ESSAY

PARTICIPATORY EXPUNGEMENT

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Most jurisdictions that permit expungement draw the line at certain crimes—usually those implicating one or more victims, serious risks to public safety, corruption, or breach of the public trust. This is unsurprising given how these crimes relate to the moral underpinnings of the criminal law in a democratic society. This Essay explores, given the overall direction of expungement reform, whether expungement should reach more offenses and by what procedural means.

More specifically, it suggests the community's interest in adjudicating expungement increases with the seriousness of the criminal record, whereas for lower-level criminal records, the petitioner's interest in reintegration can outweigh the preference for community involvement. As expungement reform climbs the ladder of offense seriousness, a dose of community involvement becomes more justifiable.

Given that expungement relates to the propriety of ongoing stigma and punishment, exempting the community from adjudication becomes increasingly problematic on political, ethical, and legal grounds as the severity of the criminal record increases. In a democratic legal system, the community must have the ability to express its will about the purposes and functions of the criminal law through adjudication. Second, the American constitutional tradition prefers community involvement in criminal matters. Third, communities should be involved in shaping and creating second-chance norms when they are desirable. "Participatory expungement" is warranted when the most significant normative questions relating to the criminal law are present, leaving room for development of a culture of second chances when the community thinks it is justified.

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INTRODUCTION

Less than twenty years ago, few states permitted the expungement of convictions.[1] Executive pardons were the way to erase convictions, characterized by lengthy petition-based processes that traditionally

1. See Restoration Rts. Project, 50-State Comparison: Expungement, Sealing & Other Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/ [https://perma.cc/6XZZ-92S4] [hereinafter Collateral Consequences Res. Ctr., 50-State Comparison] (last updated July 2024) (providing "state-by-state summaries of record relief laws, with links to more detailed analysis and legal citations"). I am grateful for the extensive work done by the Center that details the variation in state approaches to expungement. Much of Part II builds on the Center's exceptional work.

culminated in a judgment by a Governor or other executive official.[2] As others have highlighted, pardon processes are fraught with procedural and substantive problems, not to mention political implications.[3] And even if achieved, pardons tend to be for relatively minor crimes and, overall, barely make a dent in the quantity of conviction records in individual states and nationwide.[4] Meanwhile, criminal repositories maintain tens of thousands of conviction records in something close to perpetuity, permitting ongoing stigma and punitive effects that undercut cardinal and ordinal principles of proportionality by any measure.[5]

The punitive effects of conviction records have led to more than a decade of significant reform, with many states expanding expungement relief to convictions.[6] These legislative activities broaden the range of convictions eligible for expungement and the number of petitioners eligible for relief.[7] Automated expungement, also known as "Clean Slate" relief,[8] promises easier expungement of convictions by eliminating the manual petitions that were traditionally required and that contributed to

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2. See Rachel E. Barkow, The Politics of Forgiveness: Reconceptualizing Clemency, 21 Fed. Sent'g Rep. 153, 153–55 (2009) (referencing how the state pardon power requires gubernatorial decisionmaking); Kathleen C. Ridolfi & Seth Gordon, Gubernatorial Clemency Powers: Justice or Mercy?, 24 Crim. Just., Fall 2009, at 26, 29–30 (discussing how states historically allocated authority to executive officials to pardon).

3. See, e.g., Margaret Colgate Love, Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful, 27 Fordham Urb. L.J. 1483, 1485–87 (2000) ("[Pardons] enable [the President] to deal expeditiously with situations involving political upheavals or emergencies."); Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. L. & Criminology 1169, 1193–203 (2010) ("After 1980, presidential pardoning went into a decline . . . because the retributivist theory of 'just deserts' and the politics of the 'war on crime' together made pardon seem . . . useless and dangerous.").

4. See Off. of the Pardon Att'y, DOJ, Clemency Statistics, https://www.justice.gov/pardon/clemency-statistics [https://perma.cc/KW76-MALK] (last updated Aug. 7, 2024) (providing data on the number of pardons received, denied, and granted by U.S. Presidents since 1900).

5. See James B. Jacobs, The Eternal Criminal Record 209–19 (2015) (explaining the repercussions of a system that allows for publicly accessible criminal records and questioning its justification under theories of punishment); Sarah Esther Lageson, Digital Punishment: Privacy, Stigma, and the Harms of Data-Driven Criminal Justice 6–9 (2020) ("[D]igital punishment is an enduring form of criminal stigma that travels across mugshot websites, background check services, and Google search results."); Jenny Roberts, Expunging America's Rap Sheet in the Information Age, 2015 Wis. L. Rev. 321, 326–29 (discussing quantity of arrests and records in various databases).

6. See Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (providing lists of, and data on, states that authorize the expungement of convictions for different levels of felonies and misdemeanors).

7. See id.

8. See, e.g., Clean Slate in the States, About CSI, Clean Slate Initiative, https://www.cleanslateinitiative.org/states [https://perma.cc/HN67-6RZU] (last visited Nov. 24, 2024) ("The Clean Slate Initiative passes and implements laws that automatically clear eligible records for people who have completed their sentence and remained crime-free, and expands who is eligible for clearance." (emphasis omitted)).

what Professors J.J. Prescott and Sonja Starr referred to as the expungement "uptake gap."[9]

Yet these reforms have been accompanied by a large caveat: The remedy has been extended to a patchwork of lower-level convictions and only after extensive waiting periods. That is to say, the expanded relief has limits. Legislatures have erected procedural hurdles and shown a strong unwillingness to extend expungement beyond a subset of crimes.

This Essay explores the limits of conviction-based expungement enacted by states, the purported rationales underlying those limits, and the arguments that might support extending the remedy further. In doing so, it highlights how the move to allow expungement of convictions rests on two interwoven premises related to the maintenance of public criminal records: (1) the recognition that public criminal records stretch the boundaries of permissible state punishment and permit privately-inflicted punishment through collateral consequences;[10] and (2) the reality that existing legal structures do not adequately mitigate extra punishment stemming from public criminal records.[11]

Enabling the expungement of arrests and lower-level convictions carries less risk of undercutting moral and social norms because the extent to which those offenses implicate such norms is more attenuated.[12] Add

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9. J.J. Prescott & Sonja B. Starr, Expungement of Criminal Convictions: An Empirical Study, 133 Harv. L. Rev. 2460, 2501–07 (2020) [hereinafter Prescott & Starr, Expungement of Criminal Convictions]; see also Colleen Chien, America's Paper Prisons: The Second Chance Gap, 119 Mich. L. Rev. 519, 541–42 (2020) (noting gaps in expungement relief).

10. See Alessandro Corda, More Justice and Less Harm: Reinventing Access to Criminal History Records, 60 How. L.J. 1, 15–19 (2016) (detailing the connection between public criminal records and punishment theory and punitive consequences); Brian M. Murray, Retributive Expungement, 169 U. Pa. L. Rev. 665, 673–80 (2021) [hereinafter Murray, Retributive Expungement] (describing collateral consequences for individuals with public criminal records resulting from the decisionmaking of non-state actors); Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, *in* Invisible Punishment: The Collateral Consequences of Mass Imprisonment 15, 17–21 (Marc Mauer & Meda Chesney-Lind eds., 2002) ("In this brave new world, punishment for the original offense is no longer enough; one's debt to society is never paid."); see also Simone Ispa-Landa & Charles E. Loeffler, Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois, 54 Criminology 387, 389–91 (2016) (describing how "widely available criminal records" restrict access to a variety of privileges, including "employment opportunities, voting rights, access to public housing, student financial aid, and social service benefits").

11. See Jacobs, supra note 5, at 209–19 (describing the accessibility of criminal records); Lageson, supra note 5, at 163–82 (detailing the inadequacy of various legal structures).

12. For instance, consider that an arrest may rest solely on the judgment of one lower-level executive official without prior review by a judicial officer. See Atwater v. City of Lago Vista, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Similarly, many lower-level convictions are the product of plea deals. See Ram Subramanian, Léon Digard, Melvin Washington II & Stephanie Sorage, In the Shadows: A Review of the Research on Plea

the administrative impulses driving criminal law reform more broadly and the justification for administrative record-clearing emerges. Administrative record deletion, either manually or automatically, has become the response to administrative record creation on the front end for low-level crimes.[13]

Simultaneously, states have set up moderate conviction-based expungement regimes while remaining reluctant to include higher-level crimes.[14] This Essay suggests this hesitation has deep roots, stemming from the continued legislative acceptance of a simple, yet traditional, belief: that the criminal law—its scope and limits—involves the reaffirmation of community norms through the condemnation of moral and social wrongdoing.[15] Put simply, the most serious crimes implicate the most serious social norms and enforcement of the criminal law—and maintenance of records showing as much—has expressive value.[16]

The expungement of convictions potentially undercuts that purpose. Whereas criminal law arguably aims to "restitch" the social fabric,[17] expungement might be thought to "unstitch" it if not accomplished carefully.[18] Legislatures also might conceive ongoing stigma and associated

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Bargaining 6 (2020), https://www.vera.org/downloads/publications/in-the-shadows-plea-bargaining.pdf [https://perma.cc/KW2T-L8FD] (emphasizing the overwhelming amount of guilty pleas at the trial court level). Alternatively, higher-level convictions might involve lengthier investigations by multiple executive officials, perhaps implicating the judiciary due to the requirements of constitutional criminal procedure. See U.S. Const. amend. V (requiring grand jury indictment for capital or infamous crime); DOJ, Just. Manual § 9-11.120 (2020) (discussing the powers and limitations of grand juries).

13. See, e.g., Clean Slate Initiative, Our Strategy to Unlock Opportunity for Up to 14 Million Additional People 8 (n.d.), https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/66bb5bac1fd7ca3c98cc5da3/1723554734777/CSI+Strategic+Plan.pdf [https://perma.cc/TE4C-QCMH] (last visited Sept. 21, 2024) (outlining a strategy to implement legislation across all fifty states that would make millions of Americans eligible for automatic full or partial record clearance).

14. See infra sections II.A–.B.

15. See Joshua Kleinfeld, Reconstructivism: The Place of Criminal Law in Ethical Life, 129 Harv. L. Rev. 1485, 1513–18 (2016) [hereinafter Kleinfeld, Reconstructivism] (describing the function of punishment); Brian M. Murray, Restorative Retributivism, 75 U. Mia. L. Rev. 855, 882–87 (2021) [hereinafter Murray, Restorative Retributivism] (same).

16. Of course, whether the criminal law has expressive purposes for certain values is a separate question from whether the values it chooses to express are fully just. The moral and social underpinnings of many parts of the criminal law have changed due to increased understanding about the values the law purports to serve. Additionally, just because the criminal law aims to further certain values does not mean it accomplishes that task well.

17. Kleinfeld, Reconstructivism, supra note 15, at 1538.

18. See Brian M. Murray, Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement, 86 Fordham L. Rev. 2821, 2852–53 (2018) (explaining that prosecutors might see the expungement as an unstitching of the social fabric if there is not significant justification that aligns with their policy objectives for the expungement).

collateral consequences as deserved for higher-level offenses.[19] Further, legislative authorization is fraught with political and social difficulties given the severity of these offenses, especially if the decision is either unilateral by a judge or automatic. In other words, legislators are reluctant to let judges or automated processes unilaterally expunge higher-level convictions, in the same way that the pardon process evolved to typically involve multiple, fragmented layers of government.[20]

While nearly half of the states permit expungement of convictions, almost all restrict such relief to nonviolent offenses or crimes when social harm is less immediately visible or apparent.[21] Given this legal reality, which has stalled the extension of expungement, criminal records reformers are at a crossroads: Should they recognize the limits of expungement reform and move to other pastures for criminal records reform,[22] or should they push for expansion of expungement reform to even higher-level convictions? At the same time, expungement skeptics wonder if the past decade of reform has gone too far and requires pause.[23] Put differently, the narrow question is whether expungement should reach higher-level offenses. The broader question is, if so, *who should decide* when expungement might be appropriate given the normative fabric of the criminal law.

This Essay considers a solution that recognizes the normative components of expungement law and the moral underpinnings of the criminal law in the American democratic tradition. Building from a growing literature that reemphasizes the need to reinject the community into criminal adjudication at various phases of the criminal process,[24] it

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19. See Brian M. Murray, Are Collateral Consequences Deserved?, 95 Notre Dame L. Rev. 1031, 1068 (2020) (discussing desert and higher-level offenses); Travis, supra note 10, at 17–18 (discussing the history and context of these collateral consequences and punishment).

20. See Richard A. Bierschbach, Fragmentation and Democracy in the Constitutional Law of Punishment, 111 Nw. U. L. Rev. 1437, 1443 (2017) (describing how the "adjustment process involves a host of actors, each with its own strengths and perspectives on the demands of justice").

21. See infra sections II.A–.B.

22. There has been a movement in favor of reforming the criminal records apparatus on the front end, thereby reducing the need for expungement remedies on the back end.

23. See, e.g., Jeffrey Billman, Prosecutor Pressure Stalls Automatic Expunctions in North Carolina, Bolts Mag. (July 11, 2022), https://boltsmag.org/prosecutor-pressure-stalls-automatic-expunctions-in-north-carolina/ [https://perma.cc/GH3P-EX83] ("[T]he North Carolina Conference of District Attorneys, an influential organization that represents the state's prosecutors and pressed for the pause, argues that the court system needs time to address the law's 'unintended consequences.'").

24. See Laura I. Appleman, The Plea Jury, 85 Ind. L.J. 731, 766 (2010) [hereinafter Appleman, The Plea Jury] (proposing the incorporation of the local community into the guilty-plea procedure); Rachel A. Harmon, The Problem of Policing, 110 Mich. L. Rev. 761, 802–16 (2012) (discussing more effective police-regulation methods); Carissa Byrne Hessick & Michael Morse, Picking Prosecutors, 105 Iowa L. Rev. 1537, 1578–87 (2020) (discussing the potential for prosecutor elections as a source of criminal justice reform); Daniel S. McConkie, Jr., Plea Bargaining for the People, 104 Marq. L. Rev. 1031, 1043–45 (2021)

applies concepts relating to democratization and participatory process to the world of expungement.

Given that expungement is a judgment relating to the propriety of ongoing stigma and punishment as applied to a particular person, it is a natural forum for community involvement. In a democratic legal system, the community must have the ability to express its will about the purposes and functions of the criminal law through adjudication. The American constitutional tradition prefers community involvement in criminal matters—notions of restorative criminal justice suggest as much—and this sort of adjudication would allow communities to determine second-chance norms when they are desirable.

Put simply, as expungement reform climbs the ladder of offense seriousness, a dose of community adjudication becomes more justifiable.[25] The extraordinary nature of expungement means that the community's interest in adjudication increases with the seriousness of the criminal record at issue, whereas for lower-level criminal records, the petitioner's interest in reintegration can outweigh the preference for community involvement in adjudication. The latter justifies recent trends in expungement reform, but the former calls for coupling any additional substantive expansion with procedural incorporation of the community into expungement adjudication for serious offenses. Coupling community participation with expungement determinations would allow for threading the needle between two equally important interests: (1) reaffirmation of the utility of the criminal law and its limits more broadly, including in a democratic state, and (2) broader awareness of the effects of a conviction record in today's digital world.

In other words, this Essay makes the case for making expungement more participatory as the stakes increase. The more serious the conviction,

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(emphasizing the importance of public participation in democratic processes such as jury service and advisory boards); Jed S. Rakoff, Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It, 111 Nw. U. L. Rev. 1429, 1432 (2017) (discussing the supremacy of prosecutorial power); Jocelyn Simonson, Bail Nullification, 115 Mich. L. Rev. 585, 606–11 (2017) [hereinafter Simonson, Bail Nullification] (exploring the possibility of community bail nullification); Tom R. Tyler, From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century, 111 Nw. U. L. Rev. 1537, 1560 (2017) [hereinafter Tyler, From Harm Reduction] (describing the value of policing that promotes public trust); David Alan Sklansky, Unpacking the Relationship Between Prosecutors and Democracy in the United States 1 (Stan. Pub. L. Working Paper No. 2829251, 2016), https://ssrn.com/abstract=2829251 [https://perma.cc/EB99-PEPN] (discussing the relationship between democracy and prosecutors). See generally Tracey Meares, Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation, 111 Nw. U. L. Rev. 1525 (2017) (discussing the importance of citizen engagement in criminal law).

25. Exempting the community from adjudication becomes increasingly problematic on political, ethical, and legal grounds as the severity of the criminal record increases. See infra Part III.

the more directly involved the community should be in making the decision to expunge. Participatory expungement can involve the communal adjudication of expungement petitions involving higher-level offenses. This would obviate the need for the inefficient and flawed pardon process, align with the move to "democratize" criminal justice remedies, and empower communities to make decisions relating to records erasure and the reintegration[26] of those who have been convicted. It would inject a dose of community-centered adjudication into the criminal process, albeit on the back end. While scholars such as Judge Stephanos Bibas,[27] and Professors Akhil Reed Amar,[28] Laura Appleman,[29] Josh Bowers,[30] Tracey Meares,[31] Paul Robinson,[32] Jocelyn Simonson,[33] and

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26. See R.A. Duff, A Criminal Law to Call Our Own?, 111 Nw. U. L. Rev. 1491, 1503 (2017) [hereinafter Duff, Call Our Own?]; see also William J. Stuntz, The Collapse of American Criminal Justice 30–31 (2011) (discussing the history of progressive community involvement in the criminal justice system); Bierschbach, supra note 20, at 1437–38 (noting the balancing of bureaucratic and participatory forces to achieve democratic involvement); Alexander L. Burton, Francis T. Cullen, Justin T. Pickett, Velmer S. Burton, Jr. & Angela J. Thielo, Beyond the Eternal Criminal Record: Public Support for Expungement, 20 Criminology & Pub. Pol'y 123, 128–29 (2021) (discussing large public support of expungement in certain situations); Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, Public Opinion About Punishment and Corrections, 27 Crime & Just. 1, 41 (2000) (discussing the wide range of punitive and progressive policies favored by the public); Murray, Restorative Retributivism, supra note 15, at 891 (explaining how human decisionmaking can leave room for mercy and restoration); Ekow N. Yankah, The Right to Reintegration, 23 New Crim. L. Rev. 74, 75–81 (2020) (characterizing reintegration as a political right).

27. See Stephanos Bibas, Political Versus Administrative Justice, *in* Criminal Law Conversations 677, 677 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) [hereinafter Bibas, Political Versus Administrative] (arguing for placing criminal justice policy in the hands of laypeople given moral expertise); see also infra sections III.A–.C.

28. See infra sections III.A–.B.

29. See Laura I. Appleman, The Lost Meaning of the Jury Trial Right, 84 Ind. L.J. 397, 399 (2009) [hereinafter Appleman, Lost Meaning] (exploring the historical meaning of the jury trial right to argue against continued reliance on bench trials).

30. See Josh Bowers, Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel, 1 Va. J. Crim. L. 135, 156–64 (2012) (discussing the problems with political retributivism); Josh Bowers, Upside-Down Juries, 111 Nw. U. L. Rev. 1655, 1666–67 (2017) (arguing that laypeople are "uniquely well suited to evaluate normative principles" that are at the center of the criminal process).

31. See Meares, supra note 24, at 1533 ("[P]rocedural justice not only implicates the relationship that individuals have with legal authorities but it also implicates how we, as members of groups, relate to one another in groups.").

32. See Paul H. Robinson, The Proper Role of Community in Determining Criminal Liability and Punishment, *in* Popular Punishment: On the Normative Significance of Public Opinion 54, 73–74 (Jesper Ryberg & Julian V. Roberts eds., 2014) (arguing that community views of justice should become the basis of criminal liability and punishment).

33. See Jocelyn Simonson, The Place of "The People" in Criminal Procedure, 119 Colum. L. Rev. 249, 255–56 (2019) [hereinafter Simonson, The People] (arguing in favor of abolishing the people/defendant dichotomy and embracing popular participation in criminal procedures).

others[34] have explored the historical–legal roots of community involvement in other contexts to argue for increased participation in different phases of the criminal process, this critique applies to the field of expungement.

In conducting this novel critique and proposal, this Essay proceeds as follows. Part I explains the social and legal realities that led to extending expungement to convictions. It emphasizes the negative and lasting effects of a public conviction record, how such records implicate additional public punishment and permit privately inflicted punishment, and the shortcomings of the pardon system as the traditional vehicle for the erasure of convictions. Part II then canvasses the developing law of expunging convictions, highlighting its extensions and major limits. It suggests that while reform has been widespread across the states, it generally has not proceeded beyond a certain level of conviction. Further, ample procedural hurdles exist.

Part III articulates the rationales for increased democratic participation in expungement adjudication. This argument is made from several angles: the historical and constitutional preference for democratic involvement in criminal adjudication, democratic theory, punishment theory, empirical grounds, and the practical utility of expanding the remedy. Part IV then operationalizes these arguments to propose a roadmap for states that wish to thread the needle by broadening the remedy, enhancing participation, and serving the purposes of the criminal law at the same time. It also responds to potential and likely criticisms of the proposal, some of which are frequently leveled against any efforts to democratize criminal justice.[35] At the very least, it aims to elucidate the key questions for stakeholders moving forward.

I. WHY THE MOVE TO EXPUNGE CONVICTIONS?

Expungement promises to help someone put the past in the rearview mirror given the reality that almost all employers, landlords, governmental benefit programs, and other private actors utilize criminal background checks to screen and sort candidates.[36] Expungement for convictions implicates the proportionality of punishment exacted by the state, the

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34. See, e.g., Kyron Huigens, Virtue and Inculpation, 108 Harv. L. Rev. 1423, 1427 (1995) (referencing practical judgment and determinations of moral blameworthiness); McConkie, supra note 24, at 1034–35 (arguing for expanding popular participation in the plea bargaining system to achieve the social purposes of criminal law).

35. See, e.g., John Rappaport, Some Doubts About "Democratizing" Criminal Justice, 87 U. Chi. L. Rev. 711, 759–73 (2020) (describing the main arguments against democratizing various parts of the criminal justice system).

36. See Eldar Haber, Digital Expungement, 77 Md. L. Rev. 337, 342–46 (2018) (describing the promise of expungement in relation to the collateral consequences of criminal punishment).

punitive capabilities of private actors, the inadequacies of existing legal structures to account for the pernicious effects of a public criminal record, and the overall desire for productive reentry.[37] These are some reasons why legislatures have expanded expungement to conviction records, which have consequences for reentry that implicate all facets of life.[38]

The numbers are staggering. Nearly 100 million Americans have criminal records,[39] and roughly eight percent of the adult population has a felony conviction.[40] The effect of these records on reentry has been well documented by scholars, litigators, policy advocates, activists, and reformers.[41] In short, conviction records lead to collateral consequences—both state and privately inflicted—after conviction. These consequences include ineligibility for public benefits and student loans,[42] occupational license denials,[43]

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37. See Brian M. Murray, Completing Expungement, 56 U. Rich. L. Rev. 1165, 1166–67 (2022) [hereinafter Murray, Completing Expungement].

38. See Peter Leasure & Tia Stevens Andersen, The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study, 35 Yale L. & Pol'y Rev. Inter Alia 11, 12 (2016), https://yalelawandpolicy.org/sites/default/files/IA/leasure.certificates_of_relief.produced.pdf [https://perma.cc/RV76-3P7W] [hereinafter Leasure & Andersen, Certificates of Relief] ("One of the most punitive collateral consequences of conviction is the impact of a criminal record on the likelihood of securing employment. Research . . . consistently demonstrates that employment is correlated with lower rates of reoffending and therefore with successful reentry." (footnote omitted)); Peter Leasure & Tia Stevens Andersen, Recognizing Redemption: Old Criminal Records and Employment Outcomes, 41 N.Y.U. Rev. L. & Soc. Change Harbinger 271, 274 (2017), https://socialchangenyu.com/wp-content/uploads/2017/03/Leasure_Recognizing-Redemption_corrected-4.25.18.pdf [https://perma.cc/6MEX-2VGT] ("[T]hose possessing various types of criminal records fared worse in employment outcomes than those without a record." (footnote omitted)).

39. The Sent'g Project, Americans With Criminal Records 1 (2014), https://www.sentencingproject.org/app/uploads/2022/08/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf [https://perma.cc/88S9-32LR].

40. Jacobs, supra note 5, at 13–69 (noting the volume of criminal records in investigative and court databases); Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010, 54 Demography 1795, 1814 (2017).

41. See, e.g., Eisha Jain, Arrests as Regulation, 67 Stan. L. Rev. 809, 826 (2015) (describing how arrests, as a specific type of criminal record, effectuate regulatory objectives); Alexandra Natapoff, Misdemeanors, 85 S. Cal. L. Rev. 1313, 1320–27 (2012) (noting how misdemeanors are the most pervasive criminal records and influence reentry more than acknowledged).

42. See Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 9 (2003); Legal Action Ctr., After Prison: A Report on State Legal Barriers Facing People With Criminal Records 8 (2004), https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/259864/doc/slspublic/LAC_PrintReport.pdf [https://perma.cc/7TXB-TBYZ].

43. See, e.g., 63 Pa. Stat. and Cons. Stat. Ann. § 3112 (2024) (covering barber licenses); Dental Law, No. 89, § 3(b)(3), 2014 Pa. Laws 828, 831 (covering dental hygienists); Social Workers, Marriage and Family Therapists and Professional Counselors Act, No. 136, § 7(a)(5), 1998 Pa. Laws 1017, 1022 (covering social workers); Real Estate Licensing and

employment restrictions,[44] and other economic and social consequences. These consequences follow conviction for all types of offenses, whether low-level or felonies.[45] The existence of this many conviction records, coupled with restrictive laws that render reentry difficult, creates a social problem of serious consideration. Some have argued for reducing the scope of the criminal law.[46] Others have called for prosecutorial discretion in charging and plea bargaining.[47] The Ban the Box Movement, popular in the early 2010s, was an early policy intervention.[48]

Although not formally classified as punishment by law, reformers argue that conviction records implicate the degree and extent of punishment exacted and permitted by the state through state and private activity.[49] It might be said that the foreseeable effects of conviction records are punitive, even if the records themselves are not punishment.[50] This is because the collateral consequences that rest on conviction records are both automatic and discretionary.[51] Some jurisdictions categorically bar consideration of those with conviction records from consideration for

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Registration Act, No. 9, § 604(a)(14), 1980 Pa. Laws 15, 35 (covering real estate brokers); 52 Pa. Code. § 30.72(f) (1997) (covering taxi drivers).

44. See Madeline Neighly, Nat'l Emp. L. Project, Workers With a Criminal Record: Employee Rights, Employer Responsibilities & Fair Hiring 4 (2011), https://www.nelp.org/app/uploads/2015/04/Madeline-Neighly.pdf [https://perma.cc/HSW6-XRBB].

45. Council of State Gov'ts Just. Ctr., After the Sentence, More Consequences: A National Snapshot of Barriers to Work 4 (2021), https://csgjusticecenter.org/publications/after-the-sentence-more-consequences/national-snapshot/ [https://perma.cc/J3NW-S3YF] (showing the percentage breakdown between types of offenses that trigger collateral consequences).

46. See, e.g., Douglas Husak, Overcriminalization: The Limits of the Criminal Law 178 (2008) ("[E]normous injustice results because we have too much punishment and criminal law." (emphasis omitted)).

47. See, e.g., Stephanos Bibas, The Need for Prosecutorial Discretion, 19 Temp. Pol. & C.R. L. Rev. 369, 373 (2010) ("[R]efining [prosecutorial] discretion can make justice more reasoned and reasonable than any set of rules alone could.").

48. Ban the Box, Nat'l Conf. State Legislatures, https://www.ncsl.org/civil-and-criminal-justice/ban-the-box [https://perma.cc/7NRL-GB5H] (last updated June 29, 2021) (describing early Ban the Box initiatives that aimed to remove the stigma associated with answers to criminal history questions).

49. See Lageson, supra note 5, at 91–112 (describing private dissemination of criminal records that causes stigma and social harm); Corda, supra note 10, at 8–14 (noting the punitive effects of criminal records in continental Europe and in early American history).

50. See Christopher Bennett, Invisible Punishment Is Wrong—But Why? The Normative Basis of Criticism of Collateral Consequences of Criminal Conviction, 56 How. J. Crime & Just. 480, 481, 484 (2017) (noting how collateral consequences from criminal records are "foreseeable effects").

51. U.S. Comm'n on C.R., Collateral Consequences: The Crossroads of Punishment, Redemption and the Effects on Communities 10 (2019), https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/ME42-YLMD].

certain privileges but not as formal "punishment" for the conviction.[52] Additionally, states permit private actors to utilize conviction records in a discretionary fashion.[53] One study suggests that more than half of the collateral consequences implicated by convictions are "subject to the discretion of decision-makers."[54] Expungement aims to mitigate these accessories to formal punishment by removing the conviction record from the equation.

Unsurprisingly, expungement reformers view the construction of conviction records and their use as problematic on several grounds. For state-sanctioned activity, including in situations involving automatic consequences that flow from a conviction, reformers argue that the conviction record is effectively extra punishment that requires a separate justification.[55] Professor Alessandro Corda has demonstrated how utilitarian punishment theories inspired the creation of public criminal records in Western Europe.[56] Policymakers sought to capitalize on public shame associated with wrongdoing to pursue deterrence and incapacitation-style punitive ends.[57] Conviction records, by inflicting shame and the expressive value of the criminal law itself, pursue punitive ends normally associated with punishment.[58] Corda and others have thus argued for their consideration as additional punishment and for the imposition of proportionality constraints on the creation of criminal records.[59]

Professor Christopher Bennett, while not going as far as Corda, has argued for considering collateral consequences as foreseeable harms associated with enforcing the criminal law.[60] This holds for collateral consequences formally sanctioned by the state—such as the ineligibility for some sort of public benefit—and the permitted activity of private actors

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52. Id. at 10–12 (detailing classification of collateral consequences as "civil" rather than punitive).

53. Rebecca Vallas & Sharon Dietrich, Ctr. for Am. Progress, One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People With Criminal Records 19 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf [https://perma.cc/L44R-99BE] (describing usage of background checks by landlords).

54. Council of State Gov'ts Just. Ctr., supra note 45, at 3.

55. See Bennett, supra note 50, at 484–85 (exploring the rationales for the harms associated with collateral consequences that are not "formal" punishment).

56. See Corda, supra note 10, at 8–14.

57. See id. at 11.

58. Id. at 46.

59. See id. at 43–44; see also Hugh LaFollette, Collateral Consequences of Punishment: Civil Penalties Accompanying Formal Punishment, 22 J. Applied Phil. 241, 246–47 (2005) (describing conventional objections to considering collateral consequences as part of the proportionality inquiry in retributive justice).

60. Bennett, supra note 50, at 484.

that results in additional harm.[61] State consequences flowing from conviction records are essentially punitive accessories to the formal punishment.[62] In the latter category, the state permits punitive activity that is not formally labeled punishment because the state is the primary actor inflicting the suffering.[63] But this private activity can be disproportionate.[64] Until recently, there was no distinction between criminal records in terms of length of availability—retail theft and homicide conviction were treated the same.[65] As mentioned elsewhere, this enables "private punitive use [to become] the real punishment after the window-dressing that is the formal system."[66]

The extrapunitive nature of conviction records makes their continued existence—especially in perpetuity, which was the default until a decade or so ago—problematic for reformers.[67] They argue that when the state uses the conviction record to bar access to a public good, the state is adding punishment.[68] And when the state permits a landlord or employer to utilize a conviction record, they are outsourcing punitive activity to private actors while hiding behind formal legal classifications and refraining from enforcing any notion of proportionality.[69] This is problematic because the state is licensing private actors to punish, contravening the state's role as the sole punisher.[70] It also is corrosive to social bonds, inhibits a culture of second chances, and undermines reentry.

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61. Id. at 483–84 (describing direct, state-sanctioned harms versus foreseeable harms, whether direct or indirect).

62. See id. (describing such consequences as supplementary harms).

63. See id. at 484; Murray, Completing Expungement, supra note 37, at 1221.

64. Murray, Completing Expungement, supra note 37, at 1226 ("[P]rivate use begins to look like unjustified double punishment that violates the core foundation of the punishment regime in a democratic society: namely that the state decides whether to punish or not in the name of the community.")

65. Murray, Retributive Expungement, supra note 10, at 680–81 (citing Corda, supra note 10, at 6) (noting how criminal histories existed long after expiration of the formal sentence).

66. Murray, Completing Expungement, supra note 37, at 1226.

67. See id. at 1219 (explaining the difficulty combatting entrenched views regarding criminal records and expungement)

68. Jamiles Lartey, How Criminal Records Hold Back Millions of People, Closing Argument, Marshall Project (Apr. 1, 2023), https://www.themarshallproject.org/2023/04/01/criminal-record-job-housing-barriers-discrimination [https://perma.cc/L22N-MRBP] (interviewing champions of TimeDone, a nonprofit, who argue that California's new record-sealing law allows for the cessation of punishment).

69. Murray, Completing Expungement, supra note 37, at 1226 (noting how private use amounts to additional and unregulated informal punishment).

70. Id. at 1222 ("For, if such harms are not punitive per se, but still the logical heirs to formalized punishment, private actors, by virtue of participation in a democratic society and in relationship to that system itself, have a responsibility not to . . . act punitively like official actors." (emphasis omitted)).

But even if the conviction records or the consequences that flow from them are not considered punitive, reformers argue that other justice-oriented considerations require extension of expungement. Economic and social concerns drive these arguments, and they transcend political lines. For example, the Vera Institute of Justice,[71] Brennan Center,[72] Marshall Project,[73] and Heritage Foundation[74] have argued for criminal records and collateral consequences reform. One think tank noted how over seventy percent of collateral consequences connect to job opportunities.[75] The Heritage Foundation highlighted how these consequences severely undercut long-term economic productivity and the ability of ex-offenders to develop and utilize marketable skills.[76] Housing concerns for people with convictions also inform policy decisions because lack of housing implicates public resources.[77] Thus, many policy arguments for expanding expungement eligibility are built from concerns relating to economic and social security, not to mention renewed participation in the broader democratic community.[78]

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71. See generally Ram Subramanian, Rebecka Moreno & Sophia Gebreselassie, Vera Inst. Just., Relief in Sight? States Rethink the Collateral Consequences of Criminal Conviction, 2009–2014, at 11 (2014), https://vera-institute.files.svdcdn.com/production/downloads/publications/states-rethink-collateral-consequences-report-v4.pdf [https://perma.cc/GKB6-T8S4] (surveying legislative activity reforming collateral consequences).

72. See Matthew Friedman, Just Facts: As Many Americans Have Criminal Records as College Diplomas, Brennan Ctr. for Just. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/2NS6-MBQ3] (describing pervasiveness of criminal records and why remedies like Ban the Box are necessary).

73. See Lartey, supra note 68 (noting effect of public criminal records on success of job seekers).

74. See John Malcolm & John-Michael Seibler, Collateral Consequences: Protecting Public Safety or Encouraging Recidivism?, Heritage Found. (Mar. 7, 2017), https://www.heritage.org/sites/default/files/2017-03/LM-200.pdf [https://perma.cc/9G5K-5XSZ] (describing economic and fiscal arguments against expansive collateral consequences laws).

75. See Council of State Gov'ts Just. Ctr., supra note 45, at 1.

76. See Malcolm & Seibler, supra note 74 ("[D]epriving broad swathes of ex-offenders of the ability to . . . obtain educational assistance to enhance their skills is hardly conducive to helping them become productive citizens.").

77. See John J. Lennon, How Do People Released From Prison Find Housing?, N.Y. Times (Mar. 20, 2023), https://www.nytimes.com/2023/03/20/realestate/prison-parole-housing-shelters.html (on file with the *Columbia Law Review*) (last updated Mar. 31, 2023) (discussing the frequency with which people released from prison in New York live in shelters, barriers to public housing and federal assistance, and state legislative efforts to expand housing access).

78. See Vallas & Dietrich, supra note 53, at 1, 13 ("[E]ven a minor criminal history now carries lifelong barriers that can block successful re-entry and participation in society. . . . Cleaning up a criminal record—often called expungement or sealing—generally addresses most of the barriers . . . though elimination of employment barriers is the most frequently cited reason for record clearing.").

II. THE LAW OF EXPUNGING CONVICTIONS

The scope of expungement has expanded during the last fifteen years. This Part catalogues the growth and limits of the law of expunging convictions. In doing so, it highlights the trend lines in the expansion of expungement and dials up the major question that this Essay responds to: whether, given these lines, expungement should be extended to more serious offenses, and if so, by what means.

A. *History of Legislative Activity*

In the late 2000s, reformers aimed to expand expungement relief to the lowest convictions, beginning with summary and traffic-style offenses.[79] These efforts followed the intermediate step in which some states permitted those with convictions that were ineligible for expungement to receive judicial or board certificates of rehabilitation.[80] Such certificates enabled individuals with convictions to obtain a court-ordered certification of rehabilitation that could be shown to employers, licensing boards, and other decisionmakers who might consider a criminal record when making a decision about interacting with the individual.[81] Commentators lauded this move as a sensible solution to help reintegrate those with convictions.[82] Early studies suggested that they also assisted individuals in obtaining employment.[83]

The certificates-of-relief movement did not catch on, however. Only a few states explicitly permitted them through legislation and a similar "uptake gap" emerged, with few individuals obtaining them.[84] By the early 2010s, states began to experiment with expunging low-level convictions,

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79. See Prescott & Starr, Expungement of Criminal Convictions, supra note 9, at 2482 ("Michigan's expungement law . . . pre-2011 . . . required five 'clean' years, excluding time behind bars. The statute covered (and still covers) almost all types of crimes, including most violent felonies. The principal exceptions are traffic offenses . . . ." (footnote omitted)).

80. See Margaret Love & April Frazier, Certificates of Rehabilitation and Other Forms of Relief From the Collateral Consequences of Conviction: A Survey of State Laws, *in* Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies 50, 50 (2006), https://www.wnyschoolofrealestate.org/certificate%20of%20relief%20facts2.pdf (on file with the *Columbia Law Review*) (explaining how six states offer administrative "certificates of rehabilitation" that may restore some or all of the legal rights and privileges lost as a result of conviction).

81. See generally id. (describing the consideration of administrative certificates of rehabilitation by licensing boards and employers in several states).

82. See, e.g., id. ("[R]elief mechanisms . . . are fairly effective in restoring criminal offenders to the legal rights and status they enjoyed prior to their conviction.").

83. See Leasure & Andersen, Certificates of Relief, supra note 38, at 19–20 & fig.1 (analyzing data from Ohio to find that a certificate increased the likelihood of a job offer or interview invitation nearly threefold for someone with a one-year-old felony drug conviction).

84. See Alec C. Ewald, Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief", 41 Law & Soc. Inquiry 5, 15 (2016) (referencing variation in awarding of certificates).

such as minor misdemeanors.[85] Felony convictions were not part of these discussions, except in a few limited instances.[86]

There were two primary arguments in support of these legislative efforts: Those seeking relief had demonstrated they were no longer recidivism risks and they also needed help in obtaining opportunities for full reintegration. Put simply, when nearly every employer conducts criminal background checks,[87] clearing convictions opened doors for the rehabilitated. For example, State Senator Stewart Greenleaf, who was instrumental in the extension of expungement in Pennsylvania, stated: "A low-level misdemeanor in one's past is often a barrier when seeking employment, long after they have completed their sentence . . . . A number of states are expanding their expungement laws to reduce the period during which a minor criminal record can punish people."[88] He introduced legislation with the desire to combat recidivism, save money, and rehabilitate "nonviolent offenders."[89] Similarly, Louisiana, when passing reforms in the mid-2010s, prefaced its law as a measure "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."[90] The argument was that expunging convictions promoted reintegration without sacrificing public safety.

Between 2014 and 2022, there has been a deluge of legislative activity extending expungement to convictions. The Collateral Consequences Resource Center (CCRC) has documented these developments in a series of reports.[91] At this time, only five jurisdictions refrain from permitting the expungement of any convictions: Alaska, Florida, Hawaii, Wisconsin, and federal law.[92] Three jurisdictions permit only misdemeanor relief.[93] Five

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85. Brian M. Murray, A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels, 10 Harv. L. & Pol'y Rev. 361, 369–73 (2016) (describing state legislative reforms in the early 2010s).

86. See id. at 371 & n.71 (citing La. Code Crim. Proc. Ann. art. 978 (2015)).

87. See Michelle Natividad Rodriguez & Maurice Emsellem, Nat'l Emp. L. Project, 65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment 1 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/5RHP-BF3W] ("In one survey, more than 90 percent of companies reported using criminal background checks for their hiring decisions.").

88. WirePOLITICS: Criminal Record Expungement Bill Passes State Senate, Lower Bucks Times (Mar. 4, 2015), https://lowerbuckstimes.com/2015/03/04/wirepolitics-criminal-record-expungement-bill-passes-state-senate-4/ [https://perma.cc/JRF5-3UZD] (internal quotation marks omitted) (quoting state Sen. Stewart J. Greenleaf).

89. Id.

90. La. Code Crim. Proc. Ann. art. 971(6) (2024).

91. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1.

92. Id.

93. Id.

allow for misdemeanor expungement and felonies that have been pardoned.[94] Twenty-one permit widespread misdemeanor relief and cover limited felonies.[95] Seventeen permit even more relief for felonies in addition to misdemeanor expungement.[96]

In short, the general story has been legislative expansion of relief for convictions, covering most misdemeanors and some felonies. But as Part I indicates, the details matter when understanding the scope of these changes. While legislatures have been open to expungement of misdemeanors, they have been much more reserved when it comes to expungement of felony convictions.

B. *Which Convictions?*

While almost all jurisdictions permit expungement of misdemeanor convictions, roughly two-thirds of jurisdictions extend relief to felonies. This section focuses on identifying the apparent line of demarcation.

The CCRC places jurisdictions into three buckets when it comes to felony-based relief.[97] First, there are jurisdictions that allow expungement for pardoned convictions.[98] Then there are jurisdictions that allow expungement for a limited subset of felonies.[99] Third, a little more than a quarter of jurisdictions contemplate some type of broader felony relief, although the scope varies state by state.[100]

The group of states that permit expungement for pardoned felonies is the smallest but also the most permissive. This is because a pardoned conviction has certain legal effects that make arguing against an expungement of the conviction more difficult. For example, Alabama permits expungement for *pardoned* felonies, but not other felonies.[101] Violent, sex-offense, and "moral turpitude" felonies are not eligible except under extremely limited circumstances.[102] South Dakota permits expungement for pardoned convictions.[103] Delaware allows the same,

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94. Id.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id.
101. Ala. Code § 15-27-2(c) (2024); see also Ashley Remkus, 'A Fresh Start': Alabama Expungement Law Will Wipe Away Some Nonviolent Convictions, AL.com (May 1, 2021), https://www.al.com/news/2021/05/a-fresh-start-alabama-expungement-law-will-wipe-away-some-nonviolent-convictions.html [https://perma.cc/F78L-K8TR] ("Under the . . . law, people convicted of some nonviolent felony crimes will also be eligible to have their convictions wiped away, but only if they first receive a pardon and wait six months.").
102. See Ala. Code § 15-27-2(c)(6) (clarifying eligibility standards for convictions relating to "moral turpitude").
103. S.D. Codified Laws § 24-14-11 (2024).

except for cases of manslaughter, murder, sexual abuse of a child, and rape.[104] Georgia permits expungement of some felony convictions after a pardon, generally excluding violent and sexual offenses.[105] Victims of human trafficking with convictions can achieve expungement in Georgia without a pardon after a long, arduous process.[106] Some nonviolent misdemeanor convictions and first-offender drug possession convictions are also eligible provided the waiting period occurs.[107]

Misdemeanor-based expungement runs the gamut from narrow possibilities to extremely permissive laws. Many states permit expungement

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104. Del. Code tit. 11, § 4375 (2024); see also Cris Barrish, 'You're Not Your Worst Mistake.' Expungement Clinic in Delaware Helps People Clear Criminal Records, WHYY (Apr. 28, 2022), https://whyy.org/articles/expungement-clinic-delaware-criminal-records/ [https://perma.cc/Y9R6-RQYY]; John Reynolds, Delaware Governor Signs Automatic Record-Clearing Law, Collateral Consequences Res. Ctr. (Nov. 10, 2021), https://ccresourcecenter.org/2021/11/10/delaware-enacts-automatic-record-clearing-law/ [https://perma.cc/UA3Y-KD9Q]; John Reynolds & Morgan R. Kelly, Mandatory Expungement Eligibility Guide, ACLU Del. (May 2, 2022), https://www.aclu-de.org/en/news/mandatory-expungement-eligibility-guide [https://perma.cc/4HF6-HHBZ]; Xerxes Wilson, Got a Record? Changes Are Coming. What Criminal Record Expungement Is, How to Get Help, Del. News J. (Jan. 5, 2024), https://www.delawareonline.com/story/news/2024/01/05/criminal-record-expungement-delaware-how-to-get-help/71966591007/ [https://perma.cc/JC23-VSM9].

105. Ga. Code Ann. § 35-3-37(j)(7) (2024); see also Can I Clean Up My Georgia Criminal History?, Ga. Just. Project, https://gjp.org/record-restriction-expungement/faq/ [https://perma.cc/SGD7-9XMB] [hereinafter Ga. Just. Project, Georgia Criminal History] (last visited Aug. 15, 2024); Madeline Thigpen, How To Get Your Felony Expunged in Georgia, Cap. B Atlanta (Dec. 21, 2022), https://atlanta.capitalbnews.org/felony-expungement-explainer/ [https://perma.cc/K875-ZHZ2].

106. Ga. Code Ann. §§ 17-10-21, 35-3-37(j); see also Criminal Record Clearing Remedies for Human Trafficking Survivors in Georgia, Ga. Just. Project, https://gjp.org/wp-content/uploads/2022/08/2022.8.4-Record-Clearing-for-Survivors-of-Human-Trafficking-2.pdf [https://perma.cc/V47T-26JZ] (last visited Aug. 15, 2024); Copelenn McMahon, The Need for an Affirmative Defense for Victims of Sex Trafficking in Georgia, Ga. L. Rev. Blog (Mar. 20, 2023), https://georgialawreview.org/post/1908-the-need-for-an-affirmative-defense-for-victims-of-sex-trafficking-in-georgia [https://perma.cc/X2G6-YF5Y]; New Georgia Law Helps Trafficking Survivors Clear Their Records, Polaris (July 13, 2020), https://polarisproject.org/blog/2020/07/new-georgia-law-helps-trafficking-survivors-clear-their-records/ [https://perma.cc/3XMF-35V7].

Texas, Idaho, and Missouri have similar exceptions for convictions relating to human trafficking. See Tex. Gov't Code Ann. § 411.0728 (West 2024); Press Release, Off. of the Tex. Governor, Governor Abbott Establishes Customized Clemency Application for Survivors of Human Trafficking and Domestic Abuse (Feb. 20, 2020), https://gov.texas.gov/news/post/governor-abbott-establishes-customized-clemency-application-for-survivors-of-human-trafficking-and-domestic-abuse [https://perma.cc/45UM-YLAR]; see also Idaho Code § 67-3014(15)(b) (2024); Miss. Code Ann. § 97-3-54.6(5) (2024).

107. See Ga. Code. Ann. §§ 35-3-37(h)(2)(B), (j)(4)(A)–(B) (excluding certain misdemeanor theft and sex offenses); see also 5 Fast Facts About Georgia's New Criminal Record Clearing Law, Ga. Just. Project (July 28, 2022), https://gjp.org/reminder-georgias-new-record-clearing-law/ [https://perma.cc/J8BC-PAMZ].

of marijuana-related convictions.[108] For example, South Dakota's law allows for expungement of minor misdemeanors and petty offenses.[109] Texas law allows for sealing of most misdemeanor convictions, with some notable exclusions, such as involvement in organized crime.[110] Mississippi authorizes misdemeanor expungement for first-time offenses.[111]

Lots of states have mixed laws, allowing for expungement of some misdemeanors but not others. For instance, Pennsylvania has a tiered approach to expunging misdemeanors. It permits expungement of first-, second-, and third-degree misdemeanors both by petition and through its clean-slate initiatives.[112] But misdemeanors are eligible only if they do not

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108. See, e.g., 12 R.I. Gen. Laws § 12-1.3-5 (2024) (providing automatic expungement for civil violations and misdemeanor and felony convictions for possession of marijuana); Marijuana Expungements, Just. Cts. Maricopa Cnty., https://justicecourts.maricopa.gov/case-types/marijuana-expungements [https://perma.cc/U8PL-QNUX] (last visited Oct. 2, 2024) ("Arizona voters passed Proposition 207 in November, 2020. Among its provisions is the ability to petition a court at no cost to expunge certain marijuana-related records." (emphasis omitted)); Tom Mooney, RI Courts Expunge More Than 23K Pot Cases Under New Legalization Law, Providence J. (June 9, 2023), https://www.providencejournal.com/story/news/courts/2023/06/09/expungements-required-under-new-law-that-legalized-recreational-pot/70303191007/ [https://perma.cc/VZ83-A85H]; see also Douglas A. Berman, Leveraging Marijuana Reform to Enhance Expungement Practices, 30 Fed. Sent'g Rep. 305, 305 (2018); Ted Oberg, Promises of Marijuana Conviction Reform Remain Unfulfilled, News4, (Apr. 20, 2023), https://www.nbcwashington.com/investigations/promises-of-marijuana-conviction-reform-remain-unfulfilled/3333412/ [https://perma.cc/LMG2-PTBV]; Virginia Marijuana Expungement Laws, Va. NORML, https://www.vanorml.org/expungement [https://perma.cc/3LSD-PLAP] (last visited Sept. 9, 2024).

109. S.D. Codified Laws § 23A-3-34 (2024).

110. See Tex. Gov't Code Ann. §§ 411.073, 411.0735(a) (West 2024) (exempting convictions under Chapter 71, relating to organized crime); see also Clare Fonstein, Here's Where Harris County Residents Can Get Help Sealing Their Criminal Records This Weekend, Hous. Chron., https://www.houstonchronicle.com/news/houston-texas/crime/article/Harris-County-sealing-criminal-records-fresh-start-17519453.php (on file with the *Columbia Law Review*) (last updated Oct. 19, 2022) ("Once one's misdemeanors are sealed they can only be viewed by criminal justice agencies and no longer have to be disclosed publicly."); Alexandra Hart, Even After Serving Out Their Sentences, Formerly Incarcerated People Often Struggle to Find Jobs, Tex. Standard (May 18, 2023), https://www.texasstandard.org/stories/formerly-incarcerated-people-often-struggle-find-jobs/ [https://perma.cc/4LFW-K6D3] (explaining that felony convictions often bar formerly incarcerated people in Texas from securing employment).

111. Miss. Code Ann. § 99-19-71(1) (2024); see also Kayode Crown, Advocates Push for Automated Criminal-Record Expungement in Mississippi, Miss. Free Press (Dec. 15, 2022), https://www.mississippifreepress.org/29722/advocates-push-for-automated-criminal-record-expungement-in-mississippi [https://perma.cc/X984-DXFE] (discussing the Mississippi Volunteer Lawyers Project's expungement clinic to help eligible Mississippians expunge misdemeanors).

112. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(a) (2024); see also Amanda Hernández, High Fees, Long Waits Cast Shadow Over New Criminal Expungement Laws, Pa. Cap.-Star (Dec. 4, 2023), https://penncapital-star.com/criminal-justice/high-fees-long-waits-cast-shadow-over-new-criminal-expungement-laws/ [https://perma.cc/8WWC-6B8F] ("Pennsylvania

carry a penalty of more than two years.[113] An ungraded offense with a penalty no longer than five years is also eligible.[114] Eligibility is contingent on seventeen-year, conviction-free waiting periods.[115] The clean-slate provisions, which provide for automatic record-clearing, have more stringent criminal history contingencies. For example, a prior felony conviction at any time bars clean-slate relief.[116] Pardoned convictions are eligible for clean-slate relief.[117]

Louisiana provides for expungement of most misdemeanors, except for sex offenses and some domestic or intimate partner offenses.[118] Maryland also permits widespread misdemeanor expungement, including for assault, drug possession, prostitution, theft, fraud, and regulatory offenses.[119] Missouri recently relaxed its expungement restrictions, now permitting expungements for nearly all misdemeanors.[120]

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passed its Clean Slate law, the first statewide automatic record-clearing bill in 2018, and has sealed 40 million cases since.").

113. See 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(b)(1); see also Nick Vadala, How to Get Your Criminal Record Sealed or Expunged in Pennsylvania, Phila. Inquirer (Dec. 22, 2020), https://www.inquirer.com/philly-tips/criminal-record-expunged-sealed-pardon-petition-pennsylvania-20201222.html [https://perma.cc/RJJ7-NG2J] (explaining that Pennsylvania's Clean Slate law automatically seals convictions for "many second- and third-degree misdemeanors after 10 years without any further convictions").

114. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.1(a); see also Clean Slate 3.0 Enacted Into Law—Allows Sealing of Some Old Felony Criminal Records, Pa. Legal Aid Network (Dec. 15, 2023), https://palegalaid.net/news/clean-slate-30-enacted-law-allows-sealing-some-felony-criminal-records [https://perma.cc/2PUN-X8TK] (discussing how under Pennsylvania's 2023 Clean Slate 3.0, drug felonies will be eligible to be sealed by automation after ten years without a subsequent misdemeanor or felony conviction unless a sentence of thirty months to sixty months' imprisonment or more was imposed).

115. See supra note 114.

116. 18 Pa. Stat. and Cons. Stat. Ann. § 9122.3(a).

117. Id. § 9122.2(a)(4).

118. La. Code Crim. Proc. Ann. art. 977 (2024); see also Louisiana Expungement—Frequently Asked Questions, La. Expungement Assistance & Advoc. Ctr., http://www.leaac.com/faq-resources/frequently-asked-questions/ (on file with the *Columbia Law Review*) (last updated Dec. 2022).

119. Md. Code Ann., Crim. Proc. § 10-110(A) (West 2024); see also Restoration Rts. Project, Maryland: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/maryland-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/H82Q-DQ5V] (last updated Oct. 10, 2024) (referencing over 100 misdemeanors as eligible for expungement); Ovetta Wiggins, Maryland Eases Path to Clear Criminal Records, Over Prosecutors' Concerns, Wash. Post (May 16, 2023), https://www.washingtonpost.com/dc-md-va/2023/05/16/maryland-expungements-wait-times/ (on file with the *Columbia Law Review*) ("Under the new law, anyone convicted of qualifying misdemeanors could apply to expunge their record five years after their sentence is completed; those convicted of specific nonviolent felonies could apply after seven years.").

120. Mo. Ann. Stat. § 610.140 (West 2024); see also Patrick Deaton, Expunging a Criminal Conviction in Missouri: Lessons Learned, 76 J. Mo. Bar 164, 164–65 (2020).

Roughly two-thirds of states permit expungement of some felonies.[121] Certain trends emerge when examining the states that permit expungement of felonies. Violent offenses are rarely eligible for expungement without a pardon.[122] Sex-based offenses are also rarely eligible.[123] Finally, legislatures have excluded certain drug-related offenses, including trafficking and distribution.[124] In short, legislatures seem to foreclose conviction-based expungement for offenses that involve the most serious harms entailing grievously harmed victims or widespread societal costs, such as drug trafficking.

Several states have moderate felony expungement regimes. For example, Connecticut allows for expungement of Class D and E felonies, excluding domestic violence crimes and those requiring sex-offender registration.[125] Delaware, when expanding its expungement law to felony convictions, included drug possession, trafficking, and certain theft crimes.[126] Kentucky permits expungement of "Class D" felony convictions, except for DUI, domestic assault, public fraud offenses, sex offenses, offenses against children, or offenses that result in serious bodily injury or death.[127] Louisiana allows felony expungement unless the offense is a "crime of violence,"[128] a sex offense,[129] involves crimes against minors, or involves certain forms of drug trafficking.[130] Maryland allows

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121. Kristine Hamann, Patricia Riley & Charlotte Bismuth, The Evolving Landscape of Sealing and Expungement Statutes, 38 Crim. Just., Winter 2024, at 36, 39.

122. Id.

123. Id.

124. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (surveying expungement policies for drug-related offenses in each state).

125. Conn. Gen. Stat. Ann. § 54-142a(e)(1)(A) (West 2024); see also Jaden Edison & Kelan Lyons, Here's What to Know About CT's 'Clean Slate' Law, Which Erases Some Criminal Records, Conn. Mirror (Mar. 27, 2023), https://ctmirror.org/2023/03/27/ct-clean-slate-bill-law-criminal-records/ [https://perma.cc/ZL5T-XX53]; Amanda Pitts, CT's Clean Slate Law to Erase Low-Level Convictions From Records of More Than 80k People, NBC Conn. (Dec. 18, 2023), https://www.nbcconnecticut.com/news/local/cts-clean-slate-law-to-erase-low-level-convictions-from-records-of-more-than-80k-people/3174769/ [https://perma.cc/B58Z-D2NX].

126. Del. Code tit. 11, § 4373(a)(2) (2024).

127. See Ky. Rev. Stat. Ann. § 431.073(1)(D) (West 2024); Ky. Dep't of Pub. Advoc., Expungement in Kentucky: A Guide for Legal Practitioners, https://dpa.ky.gov/wp-content/uploads/2022/02/Lawyers-Guide-to-Expungement-2020-update.pdf [https://perma.cc/KK34-CP6R] (last visited Aug. 16, 2024); Expungement Certification Process, Ky. Ct. Just., https://www.kycourts.gov/AOC/Information-and-Technology/Pages/Expungement.aspx [https://perma.cc/XM4K-LAHP] (last visited Aug. 16, 2024).

128. La. Code Crim. Proc. Ann. art. 978 (2024).

129. Id.

130. Id.; see also Restoration Rts. Project, Louisiana: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/louisiana-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/6FT9-N9ED] (last updated July 21, 2024). For further discussion of Louisiana's expungement provisions, see generally Margaret Love, Louisiana's New Expungement Law: How Does It

expungement for theft-based felonies, such as burglary and drug trafficking.[131] Mississippi allows for one nonviolent felony conviction to be expunged, excluding drug trafficking and sexual offenses, amongst others.[132]

Missouri, while permitting expungement for most felony convictions and *all* misdemeanors, excludes violent offenses, sex offenses, and certain alcohol-related driving offenses.[133] New Jersey allows for expungement of a single indictable offense, which includes most felonies except for serious violent offenses, drug-related crimes, and public corruption charges.[134] New York has a similar law; one felony is eligible, but it cannot be an enumerated "violent felony," a "[C]lass A" felony, or a certain type of sex offense.[135] North Carolina limits relief to one felony that is not "Class A through G," DWI, or related to certain drug offenses.[136] Ohio allows for expungement of third-, fourth-, and fifth-degree felonies, excluding crimes of violence, robbery, most sex offenses, and offenses against minors.[137]

Stack Up?, Collateral Consequences Res. Ctr. (Jan. 16, 2015), https://ccresourcecenter.org/2015/01/16/louisianas-new-expungement-law-stack/ [https://perma.cc/Q4MF-6PUZ] (comparing Louisiana's expungement law with those of other states that created expungement schemes around the same time).

131. See Md. Code Ann., Crim. Proc. § 10-110 (West 2024); Which Records Can Be Expunged?, People's L. Libr. Md., https://www.peoples-law.org/which-records-can-be-expunged [https://perma.cc/7MU2-E7KK] (last updated Aug. 1, 2024) (describing the types of criminal records that are eligible for expungement in Maryland).

132. See Miss. Code Ann. § 99-19-71(2) (2024); Economic Justice—Expungement Services, Miss. Ctr. for Just., https://mscenterforjustice.org/work/expungement/ [https://perma.cc/REP6-9LQB] (last visited Aug. 16, 2024).

133. See Mo. Ann. Stat. § 610.140(2) (2024); Missouri Expungement Law: What Does It Mean to Seal a Record, and How Do You Do It?, Mo. Bar (Apr. 6, 2021), https://news.mobar.org/missouri-expungement-law-what-does-it-mean-to-seal-a-record-and-how-do-you-do-it/ [https://perma.cc/8AMR-EDP7]; Univ. Mo. Kan. City L. Sch. Expungement Clinic, Missouri Expungement Eligibility Requirements, Clear My Rec. Mo., https://clearmyrecordmo.org/missouri-expungement-eligibility-requirements/ [https://perma.cc/CJ7S-V5ZB] (last visited Aug. 16, 2024).

134. See N.J. Stat. Ann. § 2C:52-2 (West 2024); New Changes to Expungement Statute, Legal Servs. N.J., https://www.lsnj.org/Expungement31416.aspx [https://perma.cc/SZ3J-KFWU] (last visited Aug. 16, 2024).

135. See N.Y. Crim. Proc. Law § 160.59(1)(a) (McKinney 2024); Press Release, Off. of N.Y. Governor Kathy Hochul, Governor Hochul Expands Economic Opportunity for New Yorkers, Protects Public Safety by Signing the Clean Slate Act (Nov. 16, 2023), https://www.governor.ny.gov/news/governor-hochul-expands-economic-opportunity-new-yorkers-protects-public-safety-signing-clean [https://perma.cc/QFG4-VWB6].

136. See N.C. Gen. Stat. § 15A-145.5(a) (2024); Criminal Record Expunction: FAQs, Self-Help Materials and More, Legal Aid N.C., https://legalaidnc.org/resource/criminal-record-expunction/ [https://perma.cc/D9W9-WZJK] (last visited Aug. 16, 2024).

137. See Ohio Rev. Code Ann. §§ 2953.31–.32, .36 (2024); Legal Aid Soc'y of Cleveland, Sealing an Ohio Criminal Record (2018), https://lasclev.org/wpcontent/uploads/SealedRecord_hirez.pdf [https://perma.cc/A3DH-FC5T]; Laura A. Bischoff, New Ohio Law Makes Hiding Criminal Records Easier, Quicker, Cheaper, Columbus Dispatch (May 21, 2023), https://www.dispatch.com/story/news/state/2023/05/21/ohios-new-law-

Oregon's and Tennessee's laws are similar.[138] Oklahoma limits expungement to nonviolent and nonsexual offenses.[139] Utah forecloses expungement of "capital, first degree and violent felonies, registrable sex offenses . . . vehicular homicide, or felony driving under the influence/reckless driving."[140] West Virginia has a comparable law to Utah.[141] Vermont has steadily added to its list of felonies that are eligible for expungement, including different types of theft.[142] Wyoming's limited felony expungement law excludes, like most states, crimes involving firearms, violence, sexual offenses, harm to children, significant theft, and drug trafficking or offenses involving drug-related harms.[143]

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makes-it-easier-to-seal-expunge-old-criminal-records/70180578007/ [https://perma.cc/73JK-KT33] (last updated May 22, 2023).

138. See Or. Rev. Stat. § 137.225(1)(b), (3) (2024); Tenn. Code Ann. § 40-32-101(g) (2024) (listing eligible and excluded offenses); Restoration Rts. Project, Oregon: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/oregon-restoration-of-rights-pardon-expungement-sealing-2/ [https://perma.cc/D9UM-LUH9] (last updated July 18, 2024) ("Traffic offenses, most sex offenses, most violent offenses, and most offenses against vulnerable populations are ineligible."); Yamhill Cnty. Cir. Ct., Set Aside an Arrest Record or Conviction FAQs 1 (2020), https://www.courts.oregon.gov/courts/yamhill/programs-services/Documents/SetAsideFAQYAM.pdf [https://perma.cc/FUM3-VHJS].

139. See Okla. Stat. tit. 22, § 18(A)(13) (2024); Expungements in Oklahoma, Legal Aid Servs. Okla., Inc., https://oklaw.org/resource/expungement-q-a [https://perma.cc/GTU7-HFJX] (last updated Oct. 30, 2023).

140. See Restoration Rts. Project, Utah: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/utah-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/PNL8-65ZS] (last updated July 23, 2024) (citing Utah Code § 77-40a-303(1)(a) (2024)); Expunging Adult Criminal Records, Utah State Cts., https://www.utcourts.gov/en/self-help/case-categories/criminal-justice/expunge.html [https://perma.cc/UB9B-SSWE] (last visited Aug. 16, 2024); How Do I Expunge My Record if I Don't Qualify for Clean Slate, Clean Slate Utah, https://www.cleanslateutah.org/process [https://perma.cc/7JCY-N925] (last visited Aug. 16, 2024).

141. W. Va. Code Ann. § 61-11-26(c) (2024) (excluding offenses involving violence, sexual behavior, deadly weapons, neglect of adults, cruelty to animals, harassment, and certain driving offenses); see also Expungement of Criminal Records, Legal Aid W. Va., https://legalaidwv.org/legal-information/expungement-of-criminal-records/ [https://perma.cc/C2PK-C75B] (last updated June 24, 2024).

142. Vt. Stat. Ann. tit. 13, § 7601(3)–(4) (2024); see also Seal or Expunge Your Vermont Criminal Record, Vt. Legal Aid & Legal Servs. of Vt., https://vtlawhelp.org/expungement [https://perma.cc/PR6F-4H9Z] (last updated June 26, 2024); Cam Smith, Wiping Criminal Records in Vt. Through Expungement, WCAX (Apr. 30, 2023), https://www.wcax.com/2023/04/30/wiping-criminal-records-vt-through-expungement/ [https://perma.cc/WNE4-TSF4].

143. Wyo. Stat. Ann. § 7-13-1502 (2024); see also Common Questions: Expungements, Equal Just. Wyo., https://equaljustice.wy.gov/legal-help/find-info-by-topic/expungements/expungements-common-questions/ [https://perma.cc/FHS2-6AVT] (last visited Aug. 16, 2024); Criminal History FAQs, Wyo. Div. Crim. Investigation, https://wyomingdci.wyo.gov/criminal-justice-information-services-cjis/criminal-records-unit/criminal-history-faqs [https://perma.cc/25M4-5ZFL] (last updated Aug. 20, 2021) ("Under limited circumstances, a person may petition to expunge an adult criminal arrest record.").

These state laws indicate ambivalence about felony expungement. While states have been willing to extend expungement to more serious crimes, they tend to stop short when the crimes involve significant individual or societal harms. According to the CCRC report, this group represents at least two-thirds of the states that permit any type of felony expungement.[144]

In contrast to the moderate approaches just discussed, approximately one-fifth of states permit broad expungement of felonies, although even these states stop short when it comes to the most serious offenses.[145] Arizona has one of the broadest expungement statutes in the country, permitting erasure of all but one class of felonies, which includes certain violent and sexual offenses.[146] Arkansas, through about a decade of reforms, has aimed to make "sealing of certain records . . . that involve nonviolent and nonsexual offenses an automatic operation."[147] Essentially, nonviolent and major drug felonies can be expunged after completion of one's sentence.[148] Certain violent and sexual felonies, in addition to crimes carrying ten year or longer sentences, are not eligible.[149] Colorado, Indiana, Illinois, and other states have similar approaches, refraining from allowing erasing or sealing from public view violent and sex offenses, amongst others.[150] For example, in itemizing which violent crimes are

144. Collateral Consequences Res. Ctr., 50-State Comparison, supra note 1 (showing that of forty-three jurisdictions (including D.C.) that allow some form of felony expungement, twenty-three provided only "[l]imited felony & misdemeanor relief," and five provided only "misdemeanors & pardoned felonies" expungement).

145. Id. (showing that seventeen states, as well as Washington, D.C., permit broad expungement of felonies).

146. See Ariz. Rev. Stat. Ann. § 13-911(O)(1)–(4) (2024) (referencing crimes against children, violent and aggravated felonies, crimes involving the usage of weapons, and infliction of physical injuries on another person); see also Sam Ellefson, This Arizona Law Allows People to Seal Criminal Records in Court. Here's How, Azcentral (Nov. 28, 2023), https://www.azcentral.com/story/news/local/arizona/2023/11/28/seal-arizona-criminal-records/70975245007/ [https://perma.cc/QQV3-DVJ8]; What Are Arizona's New Expungement Laws?, Ariz. Defs., https://www.az-defenders.com/what-are-arizonas-new-expungement-laws/ [https://perma.cc/S69R-6ZDH] (last visited Aug. 16, 2024).

147. Restoration Rts. Project, Arkansas: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/arkansas-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/K86Y-K3RN] (last updated July 22, 2024) (internal quotation marks omitted).

148. See Ark. Code Ann. § 16-90-1406(a) (2024); Expungement, Ark. Legal Servs. P'ship (Mar. 2012), https://doc.arkansas.gov/wp-content/uploads/2020/09/FSExpungement_0.pdf [https://perma.cc/7UB8-CLEQ]; Record Sealing Clinic Planned for July 8 at St. Paul's Episcopal Church, Fayetteville Flyer (June 29, 2023), https://fayettevilleflyer.com/2023/06/29/record-sealing-clinic-planned-for-july-8-at-st-pauls-episcopal-church/ (on file with the *Columbia Law Review*).

149. See Ark. Code Ann. § 16-90-1408 .

150. See Colo. Rev. Stat. § 24-72-706(2)(a) (2024); 20 Ill. Comp. Stat. Ann. § 2630/5.2(a)(3) (West 2024); Ind. Code Ann. § 35-38-9-3(b) (West 2024); Kan. Stat. Ann. § 21-6614(a)–(d) (West 2024); Minn. Stat. § 609A.02, subdiv. 3 (2024); N.M. Stat. Ann. § 29-3A-5(G) (2024) (referencing

precluded, New Hampshire references "homicide, felony assault, kidnapping, felony arson, robbery, incest, and felony child sexual abuse offenses."[151]

There are a few states that go much further. California, in its latest reform, allows expungement in all cases except those requiring sex-offender registration.[152] Massachusetts contemplates a similar openness to expungement of most cases, except for offenses involving breaching the public trust, corruption, and certain firearms offenses.[153] Interestingly, some sexual offenses are eligible *after* a long waiting period and supervision has ended.[154] Nevada permits sealing in all cases except those involving crimes against a child, sex offenses, and certain DUI offenses.[155]

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crimes against a child, or those involving bodily harm or death, sex, embezzlement, or DUI); see also Ind. Cts., Expungements: Detailed Information on Criminal Case Expungement 3–4 (2024), https://www.in.gov/courts/iocs/files/pubs-trial-court-courtmgmt-expungement-detailed.pdf [https://perma.cc/Y5AL-GHZF]; Alec Berg, Hundreds of Coloradans Apply to Have Criminal Records Sealed, Rocky Mountain PBS (Oct. 17, 2022), https://www.rmpbs.org/blogs/news/hundreds-of-coloradans-apply-to-have-criminal-records-sealed/ [https://perma.cc/7HTT-BJTD]; Kevin Bersett, ISU Expungement Clinic Is Giving People With Criminal Records a Second Chance, Ill. St. Univ. (Oct. 14, 2021), https://news.illinoisstate.edu/2021/10/isu-expungement-clinic-is-giving-people-with-criminal-records-a-second-chance/ [https://perma.cc/4Z7L-YZYJ]; FAQ: About Expungement and Record Sealing, Expunge Colo., https://expungecolorado.org/faq [https://perma.cc/9Z8D-KETS] (last visited Aug. 16, 2024); Second Chance Law: Seal a Portion of Your Criminal Record, Indy.gov, https://www.indy.gov/activity/second-chance-law [https://perma.cc/8R9W-34XC] (last visited Aug. 16, 2024).

151. See Restoration Rts. Project, New Hampshire: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/new-hampshire-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/AA2J-33SH] (last updated Dec. 29, 2020); see also Annulment of Criminal Records, N.H. Ct. Serv. Ctr., https://www.courts.nh.gov/sites/g/files/ehbemt471/files/documents/2021-04/annulmentchecklist.pdf [https://perma.cc/ZT7V-CVEA] (last visited Nov. 14, 2024); What Is Annulment? FAQs, 603 Legal Aid, https://www.603legalaid.org/what-is-annulment-faqs [https://perma.cc/33HX-XLNT] (last visited Aug. 16, 2024).

152. Cal. Penal Code § 1203.41(a)(6) (2024); Cal. Cts., Record Cleaning: Felony Convictions and Prop 47, Jud. Branch Cal., https://www.courts.ca.gov/42537.htm [https://perma.cc/SYN7-9QU5] (last visited Aug. 16, 2024); Sydney Johnson, Millions of Criminal Records Cleared After Landmark California Law Takes Effect, KQED (July 7, 2023), https://www.kqed.org/news/11955206/millions-of-criminal-records-erased-after-landmark-california-law-takes-effect [https://perma.cc/XY3M-FC73].

153. Mass. Gen. Laws Ann. ch. 276, § 100A (West 2024); Find Out if You Can Expunge Your Criminal Record, Mass.gov, https://www.mass.gov/info-details/find-out-if-you-can-expunge-your-criminal-record#who-can-expunge-their-record [https://perma.cc/A3DU-RW3A] (last visited Aug. 17, 2024).

154. See Mass. Gen. Laws Ann. ch. 276, § 100A; Isaiah Thompson, CORI Reform Advocates Call for Changes in State Law, Bay State Banner (Apr. 26, 2023), https://www.baystatebanner.com/2023/04/26/cori-reform-advocates-call-for-changes-in-state-law/ [https://perma.cc/9E3R-4TXG].

155. See Nev. Rev. Stat. § 179.245(6) (West 2023); Criminal Record Sealing, Nev. Legal Servs., https://nevadalegalservices.org/criminal-record-sealing/ [https://perma.cc/UR22-HHWS] (last visited Aug. 17, 2024); Information on the Sealing of Nevada Criminal History Records, NV.gov https://rccd.nv.gov/FeesForms/Criminal/Sealing_NV_Criminal_History_

Washington recently expanded its law to include expungement eligibility for some violent felonies, but not those involving firearms or "sexual motivation."[156]

These examples show that while states have expanded expungement to many types of convictions, vastly different lines have been drawn in different places. The common thread has generally been that legislatures are reluctant to extend expungement to convictions involving violence, sex, firearms, public corruption, and DWIs. Unsurprisingly, these crimes tend to involve clear victims, whether individual or collective, grotesque moral wrongdoing, or the risk of serious and widespread danger.

C. *Processes and Standards*

There are certain processes and standards of review for expunging convictions. Legislatures have coupled substantive expansion of expungement with elaborate procedures. They have distinguished certain offenses for petition-based versus automatic relief and subjected eligibility to graduated waiting periods that seem to be calibrated to the seriousness of the offense or generalized beliefs about risks of reoffending. Further, for petition-based expungement, legislatures continue to require judges to assess the merits of petitions by referencing certain standards of review that involve determinations relating to risk and rehabilitation.[157]

States that have expanded expungement to higher-level convictions tend to require petition-based processes for the more serious offenses, reserving automated expungement for lower-level crimes and non-conviction records. For example, Alabama extended expungement to convictions in 2021 through a petition process.[158] Georgia, while permitting automated expungement for certain non-conviction records,[159] requires an individual with a conviction to apply after the applicable waiting period.[160] This holds for first-time drug possession offenders too.[161]

Records/ [https://perma.cc/7Z2K-SYHB] (last visited Aug. 17, 2024); Restoration Rts. Project, Nevada: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/nevada-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/Z67R-8L92] (last updated Aug. 25, 2024).

156. Wash. Rev. Code § 9.94A.640(1)–(4) (West 2024); Wash. Cts., Sealing and Destroying Court Records, Vacating Convictions, and Deleting Criminal History Records in Washington State 5 (2021), https://www.courts.wa.gov/content/publicUpload/Publications/SealingandDestroyingCourtRecords.pdf [https://perma.cc/CP2E-FCHJ].

157. See Murray, Retributive Expungement, supra note 10, at 698–702.

158. Ala. Code. § 15-27-1(b) (2024); Stephen W. Shaw, From the Alabama Lawyer: Expungement of Criminal Records, Ala. State Bar (Mar. 25, 2021), https://www.alabar.org/news/from-the-alabama-lawyer-expungement-of-criminal-records/ [https://perma.cc/PW2N-BAXT].

159. Georgia's law refers to this process as record restriction. See Ga. Just. Project, Georgia Criminal History, supra note 105; Thigpen, supra note 105.

160. Ga. Code Ann. § 35-3-37(j)(4)(A) (2024).

161. Id. § 35-3-37(h)(2)(B).

In contrast, South Dakota permits automated expungement for "petty offense[s], municipal ordinance violation[s], [and] Class 2 misdemeanor[s]."[162] Pennsylvania initially required petition-based expungement for first degree misdemeanors, but has since permitted some automated expungement.[163]

States with permissive conviction-based expungement laws almost always require petitions for higher-level convictions. Automated expungement is not the norm for higher-level convictions. Arizona, which has one of the most permissive expungement laws in the country, requires petitions.[164] Arkansas mirrors Arizona, and by statute requires a hearing in all cases except for petitions involving misdemeanors when the prosecutor does not object.[165] Delaware and Minnesota are similar.[166] California has a gradated system under its Clean Slate Act, with the most serious convictions not eligible for automated relief.[167] Colorado recently extended automated sealing to nonviolent convictions, which includes some felonies.[168] Kansas requires petitions for all types of convictions.[169] Michigan's regime is emblematic of the hybrid approach, requiring

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162. S.D. Codified Laws § 23A-3-34 (2024).

163. See Restoration Rts. Project, Pennsylvania: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/pennsylvania-restoration-of-rights-pardon-expungement-sealing-2/ [https://perma.cc/9Y2B-LMAS] (last updated Aug. 9, 2024); Get a Clean Slate, My Clean Slate PA, https://mycleanslatepa.com/ [https://perma.cc/WQM8-J753] (last visited Aug. 17, 2024).

164. Ariz. Rev. Stat. Ann. § 13-911 (2024); Sealing Criminal Case Records: Completing the Petition to Seal Criminal Case Records, Ariz. Jud. Branch, https://www.azcourts.gov/selfservicecenter/Criminal-Law/Sealing-records/Completing-the-Petition [https://perma.cc/E6FE-BMLB] (last visited Aug. 17, 2024).

165. Ark. Code Ann. § 16-90-1413 (2024); see also Expungement, Ark. Legal Servs. P'ship, supra note 148.

166. Del. Code tit. 11 § 4374(e)–(f) (2024) (requiring a hearing if the court deems it necessary); Minn. Stat. § 609A.03, subdiv. 5(a)–(b) (2024) (requiring a hearing within sixty days of petition); see also Off. of the Minn. Att'y Gen., Expungement of Criminal Records, https://www.ag.state.mn.us/Brochures/pubExpungement.pdf [https://perma.cc/H3ZY-Q3LF] (last visited Aug. 16, 2024).

167. Cal. Penal Code § 1203.4 (2024); Clearing Your Record, Super. Ct. Cal., Cnty. San Diego, https://www.sdcourt.ca.gov/sdcourt/criminal2/criminalexpungement [https://perma.cc/6G8D-XH5J] (last visited Aug. 16, 2024); see also Restoration Rts. Project, California: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/AGS5-YRCY] (last updated Mar. 6, 2023).

168. Colo. Rev. Stat. § 13-3-117 (2024).

169. Kan. Stat. Ann. § 21-6614(a)–(b) (West 2024); Kan. Bureau of Investigation, Expungement of Criminal History Records (2011), https://www.kansas.gov/kbi/info/docs/pdf/Fact%20Sheet%20-%20Expungement.pdf [https://perma.cc/6XC4-GRUR]; Expungement, Johnson Cnty. Dist. Att'y, https://da.jocogov.org/expungement [https://perma.cc/4NS6-KGFZ] (last visited Aug. 16, 2024); Facts About Expungement in Kansas, Kan. Legal Servs., https://www.kansaslegalservices.org/node/facts-about-expungement-kansas [https://perma.cc/6BXK-JTVJ] (last visited Aug. 16, 2024).

petitions for higher-level convictions while reserving automated processes for a smaller subset of convictions.[170] New Mexico requires petitions for all convictions except marijuana offenses.[171]

Legislatures also utilize waiting periods to signal which offenses are more serious than others. Waiting periods exist for expunging all types of convictions across jurisdictions, with a few exceptions that permit sealing or expungement at the time of the completion of the sentence. They tend to be calibrated to the grade of the offense. Higher-graded crimes tend to warrant longer waiting periods. That said, waiting periods for lower-level crimes can be quite long. New Jersey, which has a moderate conviction-based expungement regime, requires five years before any expungement application.[172] New York requires ten.[173] Iowa, which permits only misdemeanor expungement, requires eight years.[174] Louisiana's system illustrates the tiered approach. Misdemeanor convictions can be expunged after five years, while felony convictions are eligible after ten years.[175] North Carolina has the same waiting periods based on grading and restricts expungement for a subset of misdemeanor convictions to after seven years.[176] Ohio has the same scheme as North Carolina but with significantly shorter

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170. See Mich. Comp. Laws § 780.621 (2024); see also Expungement Assistance, Mich. Dep't Att'y Gen., https://www.michigan.gov/ag/initiatives/expungement-assistance [https://perma.cc/S34E-CD5F] (last visited Aug. 16, 2024); Restoration Rts. Project, Michigan: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/michigan-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/59AT-SVP6] (last updated Apr. 12, 2024) (referencing the distinction between automated expungement for certain convictions and petition-based expungement for more serious convictions).

171. N.M. Stat. Ann. § 29-3A-5–8 (2024); Expungement of Other Criminal Records, N.M. Cts., https://nmcourts.gov/court-administration/office-of-general-counsel/expungement/ [https://perma.cc/BGF8-MHUF] (last visited Aug. 16, 2024).

172. N.J. Stat. Ann. § 2C:52-2(a) (West 2024); Expunging Your Court Record, N.J. Cts., https://www.njcourts.gov/self-help/expunge-record [https://perma.cc/J38B-TWUQ] (last visited Nov. 14, 2024).

173. N.Y. Crim. Proc. Law § 160.59(5) (McKinney 2024); Sealed Records: After 10 Years (CPL 160.59), N.Y. State Unified Ct. Sys., https://www.nycourts.gov/courthelp/Criminal/sealedAfter10years.shtml [https://perma.cc/EJ9X-TV99] (last updated Jan. 26, 2023).

174. Iowa Code § 901C.3 (2024); Iowa Cts., Application to Expunge Misdemeanor Court Records Under Iowa Code Section 901C.3, at 2 (2024), https://www.iowacourts.gov/collections/867/files/1965/embedDocument [https://perma.cc/3UYJ-AC7W] (last visited Sept. 10, 2024); Can I Expunge My Adult Criminal Conviction in Iowa?, Iowa Legal Aid, https://www.iowalegalaid.org/resource/can-i-expunge-my-adult-criminal-conviction-in-1 [https://perma.cc/43K5-S2LP] (last updated Mar. 23, 2023).

175. La. Code Crim. Proc. Ann. art. 977, 978 (2023); La. Expungement Assistance & Advoc. Ctr., supra note 118.

176. N.C. Gen. Stat. § 15A-145.5(c) (2024); Expunctions, N.C. Jud. Branch, https://www.nccourts.gov/help-topics/court-records/expunctions [https://perma.cc/PSQ5-6YT8] (last visited Aug. 16, 2024).

waiting periods for felonies and misdemeanors, respectively.[177] Indiana has perhaps the most detailed scheme, clearly distinguishing between convictions based on seriousness and perceived harm.[178] These are some of the examples of states trying to discriminate between types of convictions through procedural requirements.[179]

Courts tasked with assessing the merits of conviction-based petitions must apply certain standards when determining whether to expunge. For example, in Kentucky, when assessing whether a Class D felony should be expunged, the court must find that the person has been rehabilitated and poses no significant threat of recidivism.[180] This standard resembles standards in other state statutes that tend to require courts to determine whether the petitioner is rehabilitated and has a need for the expungement.[181] Minnesota requires a court to find "upon clear and convincing evidence that [the expungement] would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety."[182] Arizona requires expungement if the court finds it is "in the best interests of the petitioner and the public's safety."[183] Delaware permits

177. Ohio Rev. Code Ann. § 2953.32(B)(1)(a) (2023); Bischoff, supra note 137; R. Tadd Pinkston, Expungement & Record Sealing, https://www.opd.ohio.gov/static/Law+Library/Training/OPD+Training+Materials/2019+Law+Update+And+Eyewitness+ID/Pinkston_CLE_Presentation_PPT.pdf [https://perma.cc/9SUC-XY6P] (last visited Aug. 16, 2024).

178. See Ind. Cts., supra note 150; Restoration Rts. Project, Indiana: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/indiana-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/9LYL-9E8A] (last updated Feb. 17, 2024) (identifying "five years after . . . conviction for misdemeanors or Class D felonies [r]educed to misdemeanors; eight years after conviction for Class D felonies; eight years after conviction or three years from completion of sentence for all other felonies; and, 10 years after conviction or five years after completion for . . . violent felonies").

179. See, e.g., Tenn. Code Ann. § 40-32-101(g)(2)(B) (2024); An Introduction to Expungements: Clerk of Courts Orientation 2022, Tenn. Bureau Investigation, https://www.ctas.tennessee.edu/sites/default/files/2022-08/An%20Introduction%20to%20Expungements%20-%201%20Slide.pdf [https://perma.cc/8KKY-PTSG] (last visited Aug. 17, 2024).

180. See Ky. Rev. Stat. Ann. § 431.073(4)(a) (West 2024) (requiring that expungement be "consistent with the welfare and safety of the public" and "supported by [the applicant's] behavior . . . as evidenced that [the applicant] has been active in rehabilitative activities . . . and is living a law-abiding life since release"); Commonwealth v. Hampton, 618 S.W.3d 511, 513 (Ky. Ct. App. 2021) (same).

181. See, e.g., Md. Code Ann. Crim. Proc. § 10-110(f)(2)(iii) (West 2024); N.H. Rev. Stat. Ann. § 651:5(I) (West 2024); In Re Expungement Petition of Vincent S., 278 A.3d 770, 780 (Md. Ct. Spec. App. July 5, 2022); In Re Expungement Petition of Trey H., No. 0550, 2022 WL 301294, at *4 (Md. Ct. Spec. App. Feb. 1, 2022).

182. Minn. Stat. § 609A.03, subdiv. 5(a) (2024); see also State v. T.A.W., No. A21-1125, 2022 WL 1073230, at *2 (Minn. Ct. App. April 11, 2022).

183. Ariz. Rev. Stat. Ann. § 13-911(D) (2024).

courts to grant a petition if continued existence of the public criminal record would cause "manifest injustice."[184]

Some states gradate the standard based on the type of conviction. For example, Arkansas has a stringent standard for expunging felonies, requiring "clear and convincing evidence that doing so would further the interests of justice" and allows for considerations relating to criminal history, pending charges, and victim input.[185] In contrast, the statute flips the burden to the prosecution for misdemeanor convictions, enacting a presumption for expungement unless the prosecution presents "clear and convincing evidence that a misdemeanor or violation conviction should not be sealed."[186] Indiana permits expungement of almost all felony convictions, but requires the record to remain public and "clearly and visibly marked or identified as being expunged."[187]

These variations indicate that states are attempting to balance interests when permitting the expungement of convictions. States are signaling judgments about the legitimacy of expunging convictions by distinguishing between petition and automated processes, gradating waiting periods, and altering standards of review and burdens of proof. On balance, the more serious the offense, the more hurdles or higher the standard becomes.

As such, the developing law of expunging convictions, while in overdrive the past decade, has limits. Those limits tend to emerge substantively and procedurally as the seriousness of the offense increases. Few legislatures have shown an appetite for opening expungement to violent offenses, regardless of how long ago they occurred. This judgment, in some ways, reflects broader public attitudes regarding sentencing and other postconviction remedies, in which clear lines tend to be drawn between violent and nonviolent offenses.[188] Coupled with the ongoing inadequacies of the pardon process, it also dials up an uncomfortable question: Has expungement reform reached its limit? Or is there a way to simultaneously expand expungement while recognizing the practical and social reality of the judgments made by legislatures about the palatability of extending the remedy further? Part III presents that case, suggesting that moves to expand expungement further should incorporate direct participation by the community to ensure that the remedy remains connected to the moral and social premises of the criminal law in a democratic legal system.

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184. Del. Code tit. 11, § 4374 (2024); Osgood v. State, 310 A.3d 415, 420 (Del. 2023).

185. Ark. Code Ann. § 16-90-1415(b)–(c) (2024).

186. Id. § 16-90-1415(a); Talley v. State, 610 S.W.3d 164, 167–69 (Ark. Ct. App. 2020).

187. Ind. Code Ann. § 35-38-9-7 (West 2024).

188. See infra section III.D.

III. THE CASE FOR PARTICIPATORY EXPUNGEMENT

As Part II demonstrated, there is a relatively clear line between the types of convictions that states have made eligible for expungement and those that they have not. There is an inverse relationship between perceived seriousness and eligibility; legislatures are more willing to substantively extend expungement as a remedy and procedurally make it easier, through something like an automated process, when the legislature perceives the crime as less serious. In the situations where expungement of higher-level crimes has been permitted, states tend to couple eligibility with longer waiting periods and petition-based adjudication. This Part juxtaposes these legislative realities and limits with historical and constitutional tradition as it relates to popular participation in criminal adjudication, democratic political and legal theory, punishment theory, and public attitudes relating to expungement.[189] In doing so, it suggests that extension of the substantive expungement remedy to more serious crimes should be coupled with procedural reforms that heighten public participation in the adjudication. This would help revive public adjudication of the core components of the criminal law, including proportionality in punishment, while providing the community the opportunity to determine the boundaries of justifiable second chances.

A. *The Historical and Constitutional Case*

Local communities were expected to help determine the boundaries of American criminal law through popular participation. The federalist structure of the Constitution,[190] core amendments to the Constitution,[191] and legal practices at the time of the Founding[192] and for the first century or so after the Constitution's ratification, suggest as much. Further, the Anglo-American common law tradition left great room for community involvement in criminal adjudication.[193] The Founders knew that these structural components, traditions, and practices might be inefficient; nonetheless, they remained on the chosen course.[194]

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189. This Part builds from Part III of Brian M. Murray, Insider Expungement, 2023 Utah L. Rev. 337, 380–89 [hereinafter Murray, Insider Expungement].

190. Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 83 (1998) [hereinafter Amar, The Bill of Rights] ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.").

191. See, e.g., U.S. Const. art. III, § 2; see also id. amend. V–VII.

192. Amar, The Bill of Rights, supra note 190, at 83 (noting how "the only right secured in all state constitutions penned between 1776 and 1787 was the right of jury trial in criminal cases").

193. Id. (referencing how grievances against King George III included deprivations of jury trial rights).

194. See United States v. Haymond, 139 S. Ct. 2369, 2384 (2019); see also Joshua Kleinfeld, Manifesto of Democratic Criminal Justice, 111 Nw. U. L. Rev. 1367, 1381 (2017)

Constitutional structure indicates this preference for the community's role in criminal adjudication. Amar has written extensively about how Article III's provisions relating to juries and the Fifth, Sixth, and Seventh Amendments indicate a strong preference for jury-based decisionmaking to prevent overreach by government officials.[195] Appleman has demonstrated how the enshrinement of the jury trial in the Sixth Amendment also indicates this preference.[196] While at earlier points in constitutional history the Supreme Court tended to emphasize the individual right to a jury trial under the Sixth Amendment, more recent case law has steered back on course, noting the constitutional preference for jury involvement in major areas of criminal adjudication.[197] This follows significant scholarly work arguing that the jury trial language in the Sixth Amendment amounts to a communal right, as well.[198] Amar has noted how the petit jury could "interpose itself on behalf of the people's rights."[199]

Professor Bill Stuntz demonstrated how the constitutional preference for juries aligned with American practice before plea bargaining became the norm. Juries dispensed individualized justice more frequently.[200] In effect, they served several functions. First, they could, through determinations of guilt or innocence, convey community sensibilities about the quality of the prosecution's case or even the decision to bring the case at all.[201] Second, they could communicate moral judgment about

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[hereinafter Kleinfeld, Manifesto of Democratic Criminal Justice] (referencing resistance to "total bureaucratization of legal arrangements" and a preference for a "criminal system built of ill-fitting parts" that preserves "pockets of nonbureaucratic reason and authority").

195. See Akhil Reed Amar, America's Constitution: A Biography 205–46 (2005) (discussing the presumptive role of juries in the original constitutional framework); Amar, The Bill of Rights, supra note 190, at 84 (quoting James Madison as saying "the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate" (internal quotation marks omitted)); Akhil Reed Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1169–72 (1995) (describing "the Founders' Constitution and the Bill of Rights").

196. See Appleman, Lost Meaning, supra note 29, at 399 (arguing that the Sixth Amendment enshrines a "collective right to a jury trial").

197. See Blakely v. Washington, 542 U.S. 296, 301–02 (2004) (holding that a jury must determine all facts beyond a reasonable doubt that are essential to a sentence); Apprendi v. New Jersey, 530 U.S. 466, 477–85 (2000) (holding that facts that increase the penalty beyond the statutory maximum must be submitted to a jury).

198. Appleman, Lost Meaning, supra note 29, at 399; Stephanos Bibas, Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?, 94 Geo. L.J. 183, 196–97 (2005) [hereinafter Bibas, Originalism and Formalism]; Steven A. Engel, The Public's Vicinage Right: A Constitutional Argument, 75 N.Y.U. L. Rev. 1658, 1663 (2000); see also Amar, The Bill of Rights, supra note 190, at 91–96.

199. Amar, The Bill of Rights, supra note 190, at 87.

200. See Stuntz, supra note 26, at 6, 30.

201. Id. at 30 (noting the practice of "jury nullification" to send messages to overzealous prosecutors).

the alleged wrongdoing.[202] Third, they could signal to prosecutors and state officials whether they had reached too far.[203] Finally, in limited circumstances, juries were asked to interpret the meaning of the law itself and that was considered entirely reasonable.[204] As Professor Joshua Kleinfeld has put it, juries were asked to make "prudential, equitable, and individualized moral judgment[s]."[205]

Appleman demonstrated that participation in jury trials was "the people's right."[206] Stuntz showed how community participation resulted in more moderate punishment regimes than bureaucratically administered systems.[207] Juries, through adjudication and sentencing, effectively signaled their stance on punishment.[208] In language that bears greatly on the present topic, Appleman writes: "[T]he primary role of the jury . . . was to determine the defendant's level of moral culpability," to issue a "sanction," "to restore the victim to his or her original state, and to repair the community by publicly denouncing the crime" and the perpetrator.[209] Early American juries were tasked with moderating community expressions relating to the boundaries of the criminal law.[210]

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202. Id. (describing how urban juries made moral evaluations when deciding cases).

203. Bibas, Originalism and Formalism, supra note 198, at 187.

204. Marcus Alexander Gadson, State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound, 93 St. John's L. Rev. 1, 4–9 (2019).

205. Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1383 (noting the importance of "value rationality" rather than fixating on "instrumental rationality").

206. Appleman, Lost Meaning, supra note 29, at 405. Of course, whether ideal juries are achievable is a legitimate question, and one that has particular salience given historical problems relating to jury selection, including constitutional problems relating to bias. See, e.g., Equal Just. Initiative, Race and the Jury: Illegal Discrimination in Jury Selection (2021), https://eji.org/report/race-and-the-jury/ [https://perma.cc/EU6T-XPG6]; Thomas Frampton, The First Black Jurors and the Integration of the American Jury, 99 N.Y.U. L. Rev. 515, 517–19 (2024) (describing early efforts to integrate juries); Thomas Frampton, For Cause: Rethinking Racial Exclusion and the American Jury, 118 Mich. L. Rev. 785, 792–803 (2020) (discussing how challenges for cause adversely affect jury composition).

207. See Stuntz, supra note 26, at 31–34 & tbl.3 (showing imprisonment rates were significantly lower between 1880–1972 than in 2000).

208. See Appleman, Lost Meaning, supra note 29, at 406–07 ("It was the eighteenth century, however, when some of the 'most fundamental attributes of modern Anglo-American criminal procedure' arose, including the relationship between the judge and the jury." (footnote omitted) (quoting John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources, 50 U. Chi. L. Rev. 1, 2 (1983))).

209. Id. at 407; see also Laura I. Appleman, Local Democracy, Community Adjudication, and Criminal Justice, 111 Nw. U. L. Rev. 1413, 1417 (2017) [hereinafter Appleman, Local Democracy] ("[P]unishment was not something left to the judge but rather a responsibility and right of a defendant's immediate society.").

210. See Appleman, Local Democracy, supra note 209, at 1414 (noting how community-based participation strengthens the legal system); Appleman, Lost Meaning, supra note 29, at 409 (describing early American juries in New England); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959, 990 (2009)

In short, popular involvement in determining the boundaries of the criminal law and punishment animates the American criminal law tradition. But the recordkeeping apparatus and expungement possibilities are entirely mediated by administrative institutions with no opportunity for popular participation.[211] Generally, expungement is classified as a civil remedy, and the creation of criminal records occurs through the work of various administrative officials, such as the police, through arrests, and administrative bureaucracies and judicial officials follow with more records as the process continues.[212] But the civil–criminal formal distinction ignores that the effect of expungement is to mark the acceptable limits of extrapunitive activity, whether carried out by the state or by private actors.[213] Further, by cutting out popular involvement, expungement law forecloses the usage of procedure to contribute to a culture of second chances. Thus, the absence of popular involvement is problematic on both substantive and procedural grounds. Expungement law forsakes the American legal tradition's commitment to popular adjudication of criminal matters.

Substantively, this means that the broader public has no direct means by which to express its will regarding the scope of the criminal recordkeeping apparatuses underlying the need for expungement.[214] Further, it means that the public cannot communicate, through adjudication, whether it believes the punitive effects of recordkeeping are worth responding to or not. And the public might convey two commitments at the same time, which the data on public attitudes on expungement generally support: A general openness to expungement and more demands from petitioners who claim to be rehabilitated.[215] As Bibas

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[hereinafter Bibas, Prosecutorial Regulation] ("Nevertheless, some form of consultation could inject community views into the most important prosecutorial policy decisions."). Of course, the preference for community involvement does not mean that public involvement, through juries, was always representative of the particular community at hand. There is ample history suggesting that many communities were excluded from the ability to administer justice and the rules directing composition of juries do not guarantee adequate representation. For a general critique of democratization in criminal justice, see generally Rappaport, supra note 35, at 739–809 (critiquing the democratization of criminal justice).

211. Murray, Insider Expungement, supra note 189, at 344–60.

212. See Jacobs, supra note 5, at 13–69 (noting the various ways that records are created administratively, whether through police or judicial action).

213. Murray, Insider Expungement, supra note 189, at 383 ("[E]xpungement seems akin to a matter of criminal adjudication . . . . [T]he public has no say in stopping extra, unjustified harm from being inflicted on those with criminal records or, on the other hand, demanding more from petitioners who claim rehabilitation.").

214. While the public can lobby legislatures, it does not have any direct means of communicating its stance on expungement. See supra notes 211–212.

215. See Leah C. Butler, Francis T. Cullen & Alexander L. Burton, Redemption at a Correctional Turning Point: Public Support for Rehabilitation Ceremonies, Fed. Prob., June 2020, at 38, 42–43 & tbls.1 & 2 (demonstrating conflicting, but simultaneously held, positions by the public).

has put it, participation gives the public the opportunity to carry out the complex "morality play" that constitutional commitments to popular involvement enshrined and that early American practice engaged with despite its complexity.[216]

The absence of the community from expungement determinations also forecloses community buy-in to reentry and second chances. Criminal law and punishment are about the enforcement and restoration of sociomoral norms. Popular participation forces community members to grapple with the messiness of that reality, both generally and in individual cases. Just as juries require contemplation regarding guilt and innocence, justifiable defenses, and the costs of punishment, popular participation in expungement would force the everyday community member to grapple with the effect of the maintenance of a criminal record and the utility of expungement. Community involvement thus implicates both the enforcement and restorative components of the limits of the criminal law. The absence of popular participation also undermines democratic self-determination, which is the topic of the next subsection.[217]

B. *The Democratic Self-Determination Case*

The absence of popular involvement in expungement cuts against the ability of the community to demarcate acceptable and unacceptable state action in the enforcement of the criminal law, which in turn means the community loses its ability to determine what is or is not worthy of extended punitive activity beyond the formal sentence. As Professors Paul Robinson and John Darley have noted, the utility of the criminal law is contingent on the ability of the community to adequately communicate how and where it draws the complicated lines.[218] Popular involvement in criminal adjudication allows for threading the needle when it comes to criminal law enforcement: The community mediates the simultaneously harsh, but prosocial elements of the criminal law and punishment. Existing expungement law—and its trends away from community involvement—denies the community this ability.

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216. Stephanos Bibas, The Machinery of Criminal Justice 2–5 (2012) [hereinafter Bibas, Machinery of Criminal Justice] (describing the history of popular involvement in criminal justice).

217. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1393 ("The lesson is to value both community self-determination and substantive justice, rather than to value only substantive justice and not community self-determination or to pretend that substantive justice is community self-determination." (emphasis omitted)).

218. See Paul H. Robinson & John M. Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 456–58 (1997) [hereinafter Robinson & Darley, Utility of Desert] (explaining that criminal law fluctuates in utility depending on its boundaries).

Others have written about how complete reliance on legislative representation is inadequate to the democratic task.[219] This principle is also baked into the American constitutional tradition, which supports direct popular participation through its reservation of certain determinations to members of the community.[220] Early American thinkers coupled support for popular participation in adjudication with a deferential localism that emanated from the idea of a political community's self-determination.[221] English legal authorities like Matthew Hale and William Blackstone advocated for localized criminal justice, and the Enlightenment criminal law reformer Cesare Beccaria supported public involvement in adjudication.[222] Alexis de Tocqueville lauded popular, majoritarian, and noble aspects of the jury system, noting how it "places the real direction of society in the hands of the governed."[223]

In addition to historical connections, the practical effect of omitting popular participation is generally negative. Tom Tyler's writings on procedural justice indicate that allowing voices to be heard contributes to the perception of the validity of the law.[224] Robinson and Darley have shown that the absence of community-informed sensibilities on the limits of the criminal law undercuts the overall utility of the criminal law and punishment more broadly.[225] This comports with the arguments of punishment theorist R.A. Duff, who has argued that popular participation enables communities to act as agents rather than mere subjects.[226]

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219. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1383 (noting how deliberative and participatory democracy both insist on more than representation).

220. See infra notes 222–237 and accompanying text.

221. Amar, The Bill of Rights, supra note 190, at 88–92 (noting how Madison, Hamilton, and other early constitutional interpreters understood the jury as a popular and local institution that supported the federal structure of the Constitution); see also Michael J.Z. Mannheimer, The Fourth Amendment: Original Understandings and Modern Policing 24–45 (2023) (discussing the local model of 4th Amendment adjudication).

222. Appleman, Lost Meaning, supra note 29, at 415 (noting how the Founders relied on Edward Coke, who understood the jury trial right as belonging to the community, and Matthew Hale, who emphasized the jury as a hyperlocal institution); id. at 417 (citing Cesare Bonesana Beccaria, An Essay on Crimes and Punishments 29 (Edward D. Ingraham trans., 1819) (1764)).

223. Amar, The Bill of Rights, supra note 190, at 88 (quoting 2 Alexis de Tocqueville, Democracy in America 293–94 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840)).

224. See Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 300–01 (2003) [hereinafter Tyler, Procedural Justice] (explaining that when people have the chance to participate in a procedural process and suggest how a problem should be resolved, they are more likely to view that process as fair).

225. See Robinson & Darley, Utility of Desert, supra note 218, at 456 (explaining that a criminal law system that tracks the community's morals has a higher chance of gaining compliance).

226. See Duff, Call Our Own?, supra note 26, at 1503.

There is good reason to believe that these sorts of concerns animated the original support for robust jury involvement. Amar has written about jurors as "pupils" who were expected to transmit community values and, in the process of judging, learn more about the law.[227] This participation created a feedback loop that ensured a more informed body politic capable of adjudicating questions of fact *and* law.[228] It also would, in the words of one delegate to the Constitutional Convention, "confirm the people's confidence in government."[229] Amar quotes de Tocqueville on the democratic utility of popular participation via juries:

> The jury . . . serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged and with the notion of rights. . . . It teaches men to practice *equity*; every man learns to judge his neighbor as he would himself be judged.
>
> . . . *It may be regarded as a gratuitous public school*, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws . . . .
>
> . . . I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ.[230]

For the average community member, there was little chance of being employed as a representative, senator, or other public official. Juries were a venue for self-government.[231] More pointedly, they provided an opportunity for direct representation in the judiciary, a branch of government almost always dominated by professionals.[232] Amar notes how Thomas Jefferson, amongst others, made this point, recognizing that it was more important to include popular participation in the judiciary than in the legislature.[233] The English tradition contains examples of judges doing

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227. Amar, The Bill of Rights, supra note 190, at 93.

228. Id. at 100–04 (noting how juries were judges of fact and law).

229. Id. at 96 (quoting The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution, reprinted in 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 1, 288 (Jonathan Elliot ed., Washington 1854)).

230. Id. at 93 (alterations in original) (quoting 2 Alexis de Tocqueville, Democracy in America 295–96 (Phillips Bradley ed., Henry Reeve trans., Alfred A. Knopf 1945) (1840)).

231. Id. at 94.

232. Id. (quoting Richard Henry Lee, Letters From the Federal Farmer, reprinted in The Complete Antifederalist 249–50 (Herbert J. Storing ed., 1981)) (noting that "common people should have a part and share of influence, in the judicial as well as in the legislative department").

233. Id. at 95 (quoting Letter from Thomas Jefferson to L'Abbe Arnoux (July 19, 1789), *in* 15 The Papers of Thomas Jefferson 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958)).

really bad things when no jury is present.[234] The jury *is* the democratic measure built into the judiciary.[235] In the American tradition, it bundles "populism, federalism, and civic virtue."[236]

As mentioned in *Insider Expungement*, expungement law reform is trending toward complete omission of the community's ability to self-determine the boundaries of expungement law.[237] Legislatures are essentially the only vehicle for representation. They are subject to the traditional constraints, incentives, and power structures that filter popular expression. Those realities are only sufficiently democratic if one holds that the lawful exercise of legislative power is adequate to harness popular attitudes and participation. But as Duff and Kleinfeld have suggested, filtered, remote participation is not the same as participatory criminal justice.[238] Further, the sort of fragmented democratic participation nodded to by others is grossly absent from expungement adjudication.[239]

C. *The Punishment Theory Case*

Expunging a conviction involves a judgment about the propriety of past and future punishment.[240] First, expungement operates as a judgment about the expiration of stigma once thought permissible given the existence of the public criminal record. Second, expungement communicates cessation of state-sanctioned public labeling and the complete closure of formal contact with the system related to that case.[241] Third, expungement, under most existing state statutes, signals approval of an acceptable level of individual reform on the part of the petitioner; at the very least, it represents a judgment about risk, or its irrelevance moving forward.[242] Finally, a granted expungement indicates an openness to full reintegration. As mentioned elsewhere, all these judgments implicate the

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234. Id. at 109 (highlighting the Star Chamber, the Bloody Assizes, and the case of Algernon Sidney).

235. Id. (quoting Essays by a Farmer (IV), reprinted in 5 The Complete Anti-Federalist 36, 36–38 (Herbert J. Storing ed., 1981)).

236. Id. at 97.

237. See Murray, Insider Expungement, supra note 189, at 348–56 (referencing the shortage of democratic involvement in expungement processes, whether traditional or present day).

238. See Duff, Call Our Own?, supra note 26, at 1501–04; Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1401.

239. Murray, Insider Expungement, supra note 189, at 386 (citing Bierschbach, supra note 20, at 1444 (noting the Constitution embodies the notion that "[j]ust punishment . . . is what comes out of that process; it is defined by the process that produces it")) ("But there is no such threat in the expungement context, meaning the process is not the product of even democratically designed fragmentation.").

240. Murray, Completing Expungement, supra note 37, at 1223.

241. Id. at 1223–24.

242. Murray, Retributive Expungement, supra note 10, at 711 (describing risk-based, utilitarian premises underlying expungement law).

concept of punishment and its purposes.[243] This section argues that these realities, coupled with the primary functions of criminal law and punishment—to redress and respond to sociomoral wrongdoing—warrant community involvement in expungement. Put simply, the community is who should decide.

1. *Restorative Criminal Law and Punishment.* — Recognizing that there is disagreement about the underlying purposes of American criminal law—both in theory and in practice—this section argues from prior work that acknowledges that criminal law and punishment are fundamentally related to the sociomoral underpinnings of the democratic community. This conception of criminal law supports popular participation in expungement adjudication because expungement implicates community sentiments and long-term membership in the community. Put another way, if punishment's aim is the appropriate reaction to wrongdoing *and* preparation for reintegration,[244] then community involvement in expungement—which implicates the limits of punitive effects and reentry—makes perfect sense. Expungement adjudication is the place where both aims of a restorative conception of punishment meet. The core premise of a restorative notion of criminal law and punishment is that the law must conduce to the common good and individual human flourishing. Criminal law is concerned with personal responsibility, both in an individual and social sense, given the obligations of being in a community. Punishment, by reacting to crime, should have restoration as its primary aim rather than exacting revenge, incapacitation, deterrence, or rehabilitation. Punishment aims to repair the disruption to the social order created by crime, and part of that repair makes the reintegration of an offender—to the extent possible—a priority. Punishment thus should be individually tailored and socially oriented in its restorative aims. Further, it is communicative because it aims to restore order, reaffirm which acts are wrong, promote future compliance, redress harm to victims and the broader community, and acknowledge the responsibility and value of all persons involved.[245] Thus, punishment should be "offender and order centric."[246] As Professor Peter Koritansky has stated, "[P]unishment . . . expresses and reaffirms the political community's indignation at the crime committed and solders that commitment in the

243. Murray, Completing Expungement, supra note 37, at 1223–25.

244. 2 Winston S. Churchill, Domestic Affairs (Home Office Vote), July 20, 1910, *in* His Complete Speeches: 1897–1963, at 1598 (Robert Rhodes James ed., 1974) ("The mood . . . of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. . . . [This attitude includes] unfaltering faith that there is a treasure, if you can only find it, in the heart of every man . . . .").

245. Murray, Restorative Retributivism, supra note 15, at 882–88.

246. Id. at 886.

minds of potential criminals whose moral future still lay undetermined."[247] But restorative punishment, by virtue of its individual and social orientation, does not fixate on concepts like the Kantian *lex talionis* that results in harsh vengeance mistaken for retribution.[248] Instead, individuals only deserve what corresponds to their transgression of the common good and social order more broadly, mindful of individual culpability. Put another way, what is deserved is connected to both the common good and individual circumstances.[249]

In terms of human law, this theory contains a dose of humility when it comes to meting out punishment. It is synergistic with conventional notions of under-determinacy in the law that requires the appropriate use of discretion.[250] Professor James Whitman has articulated how this notion of humility found its way into procedural standards reflected in modern law.[251] In modern terms, that is close to what Professor Chad Flanders has highlighted as crucial to criminal law enforcement: ensuring that institutional identities connect to community values.[252]

Appleman has argued that something akin to this view is instantiated in the Sixth Amendment and underlies the Court's moves in cases like *Apprendi* and *Blakeley*.[253] The basic gist is that the community is the body

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247. Peter Karl Koritansky, Thomas Aquinas and the Philosophy of Punishment 162 (2012) [hereinafter Koritansky, Philosophy of Punishment].

248. Peter Koritansky, Two Theories of Punishment: Immanuel Kant and Thomas Aquinas, 22 Hist. Phil. Q. 319, 329–30 (2005) (distinguishing Kantian and Thomistic understandings of what is deserved).

249. Murray, Restorative Retributivism, supra note 15, at 882–87.

250. See Koritansky, Philosophy of Punishment, supra note 247, at 140 (noting how "prudent legislators (or judges) may presumably impose differing punishments according to the various contingencies with which they are faced").

251. James Q. Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial 87–90 (2008) (discussing medieval theology that suggested humility in adjudication and its reemergence in the late 1700s). To be fair, Whitman argues that choosing a safer path was designed to protect the souls of judges, not defendants. See id. at 92 (describing how judicial procedures arose in part to allow judges to carry out harsh sentences without fear of spiritual repercussions in the afterlife). For example, Ambrose suggested that judges should tend towards mercy in their decisionmaking in order to remain eligible for reception of communion. See id. at 38 (describing the influence of moral theology on the concept of reasonable doubt); Albert W. Alschuler, Justice, Mercy, and Equality in Discretionary Criminal Justice Decision Making, 35 J.L. & Religion 18, 22 (2020) (referencing how mercy can serve as an enhancement of "earthly justice" deemed necessary).

252. See Chad Flanders, Retribution and Reform, 70 Md. L. Rev. 87, 109, 130–31 (2010) (describing need to constrain retributive impulses within institutions in order to ensure proportionality).

253. See Laura I. Appleman, Defending the Jury: Crime, Community, and the Constitution 53 (2015) [hereinafter Appleman, Defending the Jury] (arguing that Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004), indicate how "the Court's championing of the criminal jury trial right is undergirded by a philosophy of punishment based on a type of expressive, restorative retribution").

tasked with resolving "conflicting perceptions of desert" because the community is the group that the law provides with decisionmaking authority about blameworthiness and proportionality.[254]

In a democratic legal system, popular participation provides a direct opportunity for the community to communicate the sociomoral core of criminal law and punishment.[255] Given the connection between expungement and the limits of punishment, involving the community in expungement adjudication enables the community to demarcate boundaries with respect to stigma and the incapacitating effects of public criminal records. Doing so on a case-by-case basis—especially for those offenses most closely connected with the underlying moral core of criminal law—is a unique opportunity for the community to carry out the chief function of the criminal law and punishment: restoration. Community determinations about expungement represent an opportunity to express sentiments relating to the criminal law, punishment, the common good, and individual cases with their own unique circumstances.[256] As Appleman puts it, "[W]hen the jury determines the facts leading to punishment, the wrongdoer has more difficulty avoiding the burden of criminal responsibility, because his fellow citizens, his community, and his peers have pronounced his blameworthiness . . . ."[257]

Thus, participatory expungement jives with the person- and order-centric nature of restorative notions of criminal law and punishment. Involvement of the community incorporates a relational dynamic missing from current processes.

2. *Expungement as Redemption.* — While existing expungement law was conceived with a rehabilitation-centric mindset, there is a better way to think about its meaning. As mentioned above, the state makes several judgments when it permits and grants expungement, including the notion that the petitioner is both capable and *deserving* of a second chance. This is usually due to a combination of factors, such as the petitioner's own hard work, apparent risk of reoffending, need for relief, and proportionality

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254. See id. at 57 ("[R]etributive justice principles can be found in the Court's rediscovery and reaffirmation of the right of the jury—that is, the polity—to set out all criminal punishment, no matter what form it may take.").

255. See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1659–69, 1685–86 (1992) (discussing how punishment can allow society to "vindicate the value of the victim" by expressing community disagreement with the perpetrator's actions).

256. See Murray, Restorative Retributivism, supra note 15, at 891 ("[R]estorative retributivism accounts for the reconstructive nature of punishment, nods to humility in application, and leaves room for the modern ideal of a self-governing, democratic, community." (footnote omitted)).

257. Appleman, Defending the Jury, supra note 253, at 58 (contrasting the use of juries as fact-finders with judge-based findings of fact and sentencing).

concerns.[258] Expungement's ability to alleviate the punitive effects stemming from a public criminal record make the relief—when it is achieved—redemptive. The power of redemption should not be underestimated.[259] Further, it fits neatly with early American conceptions of democratically administered criminal justice.[260]

Redemption is a complicated concept that is adjacent to many theories of punishment, although it most closely aligns with restorative theories of punishment, whether they are desert-based or from within the restorative justice movement. But it is a puzzle in current legal practice because reformers rarely associate the state with the capacity to bestow redemption.[261] This is probably because of the theological connotations of redemption, which necessarily point to a discussion of forgiveness and mercy, two concepts generally thought to be the province of religious entities rather than the state.[262] Early American practice in the colonies more easily blended these themes.[263] But as Bibas and Professor Richard Bierschbach have written, these themes have much to suggest for the existing criminal system because they encourage a more holistic outlook than abstract and impersonal approaches to criminal justice.[264]

Bibas, building from the work of Professor Jeffrie Murphy, notes how "[f]orgiving involves overcoming one's resentment of an offender for having inflicted an injury."[265] Typically, this involves a personal

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258. See Murray, Retributive Expungement, supra note 10, at 698–701 (discussing present-day processes and burdens of proof).

259. See Hannah Arendt, The Human Condition 237 (1998) ("Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover . . . .").

260. See Bibas, Machinery of Criminal Justice, supra note 216, at 1–27 (detailing localized criminal justice and communication of forgiveness and mercy).

261. Stephanos Bibas, Forgiveness in Criminal Procedure, 4 Ohio St. J. Crim. L. 329, 330–33 (2007) [hereinafter Bibas, Forgiveness in Criminal Procedure] (describing the nature of forgiveness and how it doesn't fit perfectly with state-administered criminal justice).

262. See Jeffrie G. Murphy, Forgiveness, Mercy, and the Retributive Emotions, Crim. J. Ethics, Summer/Fall 1988, at 3, 6–8 (discussing theological connotations of forgiveness and mercy and operationalizing them in certain contexts); see also Stephanos Bibas & Richard A. Bierschbach, Integrating Apology and Remorse Into Criminal Procedure, 114 Yale L.J. 85, 95–103 (2004) (discussing competing understandings of the appropriate role of apology and remorse in criminal procedure).

263. See Appleman, Defending the Jury, supra note 253, at 62 (noting the "strong strain of restorative, redemptive justice" within New England colonial criminal law philosophy); see also id. ("Unlike today, the criminal offender was not viewed as a permanent outcast from the community, but instead as a community member who had sinned—an act that could happen to anyone.").

264. See Bibas & Bierschbach, supra note 262, at 109–18 (discussing the broader value of remorse and apology as related to relational notions of criminal justice).

265. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 331 (citing Jeffrie Murphy, Forgiveness and Resentment, *in* Forgiveness and Mercy 24–26 (1988), among others).

relationship between two people, which is not how the relationship between the state, community, and offender is typically understood. But the default existence of permanent criminal records challenges that. A public criminal record acts to entrench a state of nonforgiveness on the part of the state and broader community.[266] It signals to the offender and the community that the transgression happened and will not be forgotten by the state. In other words, it forecloses complete repair of the severed relationship between offender and community. That cuts against the "reparation of harm and community empowerment [that] are . . . distinct goals of restorative justice."[267]

A default, permanent, public criminal record apparatus erected by the state deprives the community of engaging in the act of forgiveness later or, at the very least, acknowledging the offender's redemption. Expungement, by any means, reintroduces the community's ability to forgive after prior acknowledgment of the validity of the criminal law more broadly.[268] But if the state chooses to allow expungement only by nondemocratic means, it again forecloses the community from contributing to the repairing of the relationship. As Bibas states, "For forgiveness to be meaningful, the victim must also manifest it by cancelling or remitting the moral debt and repairing his breached relationship with the offender."[269]

In the expungement adjudication context, popular involvement in decisionmaking about expungement enables the community to signal its acceptance of the petitioner's path to reintegration.[270] This lends reality to the two-way relationship implicated by crime in the first place, benefitting both the community and the former offender.[271] If punishment is justified when an offender impairs that relationship, then ending its punitive effects should involve a corresponding act by the aggrieved community that has had an opportunity to confront the

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266. See Yankah, supra note 26, at 112 (describing how reintegration allows ex-offenders to regain participatory roles within their communities); see also id. at 78 nn.8–9 (referencing authors engaging concepts of retributivism and forgiveness in the modern liberal state).

267. Appleman, Defending the Jury, supra note 253, at 64 (citing Hadar Dancig-Rosenberg & Tali Gal, Restorative Criminal Justice, 34 Cardozo L. Rev. 2313, 2316 (2013)).

268. See id. at 65 ("Redemptive justice fits in well with expressive retribution in that one can agree or insist that just punishment or restitution be exacted and yet still forgive the offender working for his redemption at the end of the punishment.").

269. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 332 (citing Jean Hampton, Forgiveness, Resentment and Hatred, *in* Forgiveness and Mercy 35, 35–38 (1998)).

270. See Appleman, Defending the Jury, supra note 253, at 67 (noting the need to "add[] a redemptive view of the relationship between transgressor and society that has a strong focus on reconciliation and reintegration").

271. See Bibas, Forgiveness in Criminal Procedure, supra note 261, at 334 ("Offenders value the good will of their fellow human beings.").

offender, hear the relevant stories, and seek understanding.[272] This is a deeper understanding of the potential of expungement than existing law, which emanated from the risk-based paradigm pervading the administration of the system.[273] But it more accurately represents the effect of the remedy and provides a framework for thinking through adjudication. It also makes sense of the difference between expungement and a pardon, which loosely maps the difference between forgiveness and mercy.[274]

But even if this conception of expungement goes too far, it is still possible to conceive of expungement as a grant of mercy, albeit via a different procedure than a pardon. Mercy involves the dispensing of an unwarranted gift that does not undercut justice.[275] As one applicant for a pardon in Minnesota stated, "I want to be forgiven. I just want to be forgiven."[276] In the expungement context, who should give the gift of mercy? Should it be the individual party harmed, the broader community, or the state? Which is more in touch with, and better positioned to balance, the interests and needs of "offenders, victims, and community members"?[277] Which party is in more of a relationship with the offender?[278]

Note that conceiving expungement as redemptive by virtue of being the product of forgiveness or mercy solidifies the preeminence of the community more broadly, and in individual cases, victims. This enables expungement adjudication to properly reflect the *personal* relationships inherent to matters of criminal justice, which should be both social and individualized.[279] It requires the community to determine the price and value of expungement in a way that is more onerous than existing

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272. See id. at 336 (discussing how many crime victims want to share their stories with the offender and receive an apology for the harm caused).

273. See Murray, Retributive Expungement, supra note 10, at 681–87 (discussing risk-based premises underlying expungement remedy).

274. See Bibas, Forgiveness in Criminal Procedure, supra note 261, at 332–33 (characterizing forgiveness as involving internal emotional transformation and mercy as the result of an unwarranted gift).

275. This is a complicated concept with lots of history. As Bibas notes, "There is no tension between justice and . . . mercy; mercy becomes a way to individualize justice." Id. at 333 n.14.

276. Dan Barry, 'I Want to Be Forgiven. I Just Want to Be Forgiven.', N.Y. Times (Oct. 15, 2023), https://www.nytimes.com/2023/10/15/us/minnesota-board-of-pardons.html (on file with the *Columbia Law Review*) (last updated Oct. 17, 2023) (chronicling the stories of several pardon applicants in Minnesota).

277. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 333.

278. See Appleman, Defending the Jury, supra note 253, at 68 (referencing how community adjudication adds the relational dynamic to criminal justice that traditional notions of deontological retributivism lack).

279. See supra section III.C.1 (noting the restorative theory of punishment).

expungement law, but also likely to be more fruitful.[280] It also diverges from existing pardon practices that locate decisional authority in politically appointed boards or officials.[281]

3. *State Responsibility and Reintegration.* — Should the state facilitate reentry considering the criminal records apparatus? Bibas once wrote that "[c]ontinued [governmental] publicity is simply punishment without end,"[282] which is problematic on proportionality grounds. Similarly, Professor Ekow Yankah has asked, "What does a liberal democracy owe to even those citizens it rightfully punishes?"[283] This section argues that the state must facilitate—at least through procedural means—determinations about the persistence of public criminal records and that the best way to do that is through a body that most closely represents popular will. This corresponds to two realities: First, that what distinguishes crime from tort is its "public," intangible, and order-transgressing harm;[284] and second, that permanent, nonofficial punitive consequences that public records facilitate imply an "irrevocabl[e] breach[]" that simply is not present with most crimes and goes beyond the boundaries of proportionality.[285]

Yankah has written about a right to reintegration, arguing that the "civic equality" justifying state-inflicted punishment simultaneously demands state responsibility to aid reintegration after punishment has ended.[286] Similarly, criminologist John Braithwaite has called for incremental reintegrative systems that simultaneously exact desert and prepare offenders to return to society.[287] The argument builds from core premises relating to the justifications for punishment, merging traditional notions of retributivism with the egalitarian premises supporting liberal, democratic government.[288] But the focus is the "civic life" of all involved, including the state, offender, and broader public, all of whom were "made for citizenship."[289] In short, Yankah argues that a "republican" justification

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280. See Rachel E. Barkow, Administering Crime, 52 UCLA L. Rev. 715, 750–51 (2005) (distinguishing voter judgments about punishment at the beginning and end of criminal processes); Murray, Completing Expungement, supra note 37, at 1230–33 (emphasizing the importance of community members' participating in reintegration).

281. See infra section III.E.2.

282. Bibas, Forgiveness in Criminal Procedure, supra note 261, at 343.

283. See Yankah, supra note 26, at 76.

284. See R.A. Duff, Answering for Crime: Responsibility and Liability in the Criminal Law 141 (2007) (defining a public wrong in criminal law).

285. See Yankah, supra note 26, at 106.

286. See id. at 75.

287. See John Braithwaite, Crime, Shame and Reintegration 54 (1989).

288. See Yankah, supra note 26, at 78–80 (discussing how reintegration requires the state attempting to restore the offender to their status as a citizen in good standing).

289. Id. at 80–81.

for punishment—stemming from the inherently social affairs underlying the law—"produces a commitment to reintegration."[290]

Reciprocal responsibilities characterize punishment. While the community cedes punitive authority to the state, it remains mindful of the possibility of the offender returning to social life.[291] In turn, upon the completion of punishment, the state has the responsibility to assist the community in its determinations as to reintegration.[292] As mentioned elsewhere, this cuts against libertarian sensibilities in American culture, which do not conceive private duties to those punished upon the completion of their punishment.[293] But the effects of this logic are not only questionable philosophically—as Yankah suggests—but likely to result in permanent incapacitation that undercuts the very sociomoral underpinnings and democratic legitimacy of the law itself.[294]

But how can the state exercise this reciprocal, liberal democratic responsibility in the expungement context? Yankah suggests waiting periods and then permanent erasure as the default rule to aid reintegration.[295] But that short-circuits the popular involvement that the "civic equality" underlying his theory portends. Because conviction-based expungement lies directly at the convergence of punitive effects permitted by the state and reintegration, democratic processes for adjudicating make sense.[296] That convergence is complicated and difficult to disentangle; as such, it is precisely the type of endeavor in which community values and priorities need to be front and center, with community members engaging in the messy demands of republicanism. Foregoing popular involvement

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290. See Id. at 80 (noting an "active duty on the part of the state to return the punished to their role as a functioning citizen" (citing Antje du Bois-Pedain, Punishment as an Inclusionary Practice: Sentencing in a Liberal Constitutional State, *in* Criminal Law and the Authority of the State 199, 212 (Antje du Bois-Pedain, Magnus Ulväng, & Petter Asp eds., 2017))); see also id. at 82 ("This republican view of criminal law, however, makes clear that criminal law represents a reciprocal duty that flows between a citizen and their civic community.").

291. See id. at 83.

292. See id. at 85 ("[S]tate punishment is best justified by the need to preserve living together as civic equals. But this same justification requires recognizing the offender's right to be reintegrated into our civic society, lest she understands herself as in permanent conflict with the polity."); see also Paul H. Robinson & Muhammad Sarahne, After the Crime: Rewarding Offenders' Positive Post-Offense Conduct 24 New Crim. L. Rev. 367, 385 (2021) (referencing "giv[ing] reformed offenders the credit they deserve").

293. See Yankah, supra note 26, at 76–79 (discussing competing theories of punishment that ignore the holistic treatment of someone punished after *formal* punishment).

294. See id. at 84 ("To fail to do so is to institute a system requiring either the constant permanent removal and quarantine of those running seriously afoul of the law, or allowing them to languish as a permanent underclass among us.").

295. Id. at 107 ("A state committed to the full reintegration of citizens should have the permanent erasure of one's criminal history as its default rule.").

296. See Robinson & Sarahne, supra note 292, at 389–90 (noting how such determinations involve value judgments of the community, meaning a "jury of some sort" would be the ideal venue).

denies the democratic legitimacy that is forged when the community determines the acceptable boundaries of the effects of criminal law in this context. While this argument is at its weakest for the least serious criminal records—such as arrest records that are sometimes created by the act of a single police officer and based on a low quantum of evidence—it gains strength as the stakes of the endeavor increase.

In contrast, the current situation permits the state alone to make these complicated and nuanced choices, thereby precluding community involvement in reintegration determinations. Automatic expungement by legislative fiat and discretionary expungement excludes the community from judicial determinations. The state is therefore discharging a portion of its reciprocal duty to adjudicate reintegration but not fully honoring its inherently democratic character. As mentioned above, this is problematic on historical grounds. Put in modern terms, it undercuts the qualitative and procedural justice value of popular adjudication. As mentioned below in section III.D, it ignores empirical support for the proposition that not only should the public do this, but that it can.

D. *The Empirical Case From Public Attitudes*

A partial justification for the trend toward broader expungement is the premise that the public cannot be trusted to make decisions about criminal record history information because that same public is responsible for the era of harsh criminal justice policy in the latter half of the twentieth century.[297] A cottage industry of background check companies and online searches demonstrates there is a thirst for criminal history information[298] and private actors utilize it, regardless of whether it is legally regulated.[299] Skeptics of democratizing criminal procedures, such as Professor John Rappaport, suggest there is a "leniency myth" and that the data is less conclusive than advertised.[300] Yet there is reason to believe that the public can handle this degree of participation in expungement adjudication of the complicated and difficult cases. Expungement law, by foreclosing public adjudicating, has seemingly acted upon a false dichotomy: incorporate the public and risk few expungements versus cut out the public and maximize expungement. But is it really the case that public involvement in expungement adjudication forecloses a generally permissive expungement regime? This section, pointing to data on attitudes toward expungement, suggests that the public can handle the

297. But see Joanna Mattinson & Catriona Mirrlees-Black, Attitudes to Crime and Criminal Justice: Findings From the 1998 British Crime Survey 34–44 (2000) (noting leniency in sentences recommended by victims of crime).

298. See Lageson, supra note 5, at 91–112 (describing situations in which internet users seem to enjoy trafficking in criminal record information).

299. See Roberts, supra note 5, at 331 (describing effect of background checks on employment prospects for applicants and why expungement is necessary).

300. See Rappaport, supra note 35, at 759–74 (questioning generic and particularized leniency by lay actors).

nuanced decisionmaking expungement requires in the same way that the data indicate that the public can handle complex sentencing determinations.

Recent empirical research relating to criminal recordkeeping and expungement suggests that public attitudes toward expungement parallel public attitudes toward criminal sentencing. Generally, the public recognizes that recordkeeping, while necessary, should have a clear shelf life. Second, the public can sort the most expungement-worthy records from the least expungement-worthy, loosely paralleling the moral line indicated by the state statutes referenced in Part II. Third, in many cases, the public comes out close to where existing expungement statutes come out. Put simply, the public can handle expungement adjudication.

The work of Robinson on sentencing and Professor Francis Cullen on recordkeeping and expungement is instructive here. First, the punitive excess that characterizes the latter stages of the twentieth century was not the norm for most of the history of the American criminal justice system.[301] More pointedly, public attitudes diverge from the harsh sentencing practices of the past fifty years.[302] While the public tends to draw a line between violent and nonviolent offenses in terms of openness to reentry, there is complexity.[303] For example, Professors Kellie Hannan, Francis Cullen, and others have shown that something they dub a "Shawshank redemption effect" exists in the field of sentencing and reentry: Regardless of when the offender committed the crime and offense seriousness, the public generally supports second-look sentencing for those who commit crimes relatively early in life.[304] Robinson and his collaborators have shown that the public understands the significance of criminal law-based condemnation and the nuance within blameworthiness determinations.[305] Their findings show results that indicate a balancing approach to meting out punishment, calibrating notions of desert to offense and harm seriousness with layered understandings of the utility of

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301. See Stuntz, supra note 26, at 33–34 (showing a significant spike in incarceration rates by the year 2000 when compared to 1880–1970).

302. See Burton et al., supra note 26, at 123–32 (noting public support for moderate, "intermediate" sanctions and rehabilitative efforts rather than pure incarceration).

303. Cullen et al., supra note 26, at 8 (observing that "[e]ven when expressing punitive opinions, people tend to be flexible enough to consider a range of sentencing options").

304. See Kellie R. Hannan, Francis T. Cullen, Amanda Graham, Cheryl Lero Jonson, Justin T. Pickett, Murat Haner & Melissa M. Sloan, Public Support for Second Look Sentencing: Is There a Shawshank Redemption Effect?, 22 Criminology & Pub. Pol'y 263, 280 (2023) (studying "global and specific support" for second-look sentencing after it was implemented in Washington, D.C., and finding that the majority of the public supported the policy).

305. See Paul H. Robinson & John M. Darley, Justice, Liability, and Blame: Community Views and the Criminal Law 210 (1995) ("One explanation is that the subjects want to express their disapproval of the person's conduct but feel that the person is not sufficiently blameworthy to be punished for the conduct.").

punishment. In short, the public is cognizant of desert and risk.[306] Robinson and his colleagues have used their findings to support the notion that public involvement in adjudication contributes to legitimacy and stability for the criminal law and its limits.[307] By contrast, most expungement regimes operate exclusively from risk-based premises to inform the merits of adjudication and leave those determinations entirely to insiders.

In another study, Professors Cullen, Alexander Burton, and Leah Butler tested public attitudes toward rehabilitation and redemption rituals as a matter of corrections policy.[308] The project was designed to determine whether there was public support for Professor Shadd Maruna's theory that such rituals have a positive effect on lowering recidivism rates by allowing the ex-offender to forge a new identity and have the public, through a public ceremony, validate it.[309] That theory helped spawn the thousands of "problem-solving" courts in the United States, which typically respond to particular subsets of persons contacting the system, such as through substance abuse or due to mental illness.[310] Those programs, administered by courts or correctional systems, culminate in formal ceremonies marking completion.[311]

Butler, Cullen, and Burton argue that the data "reveal substantial belief in offender redeemability and support for rehabilitation ceremonies and certificates."[312] Roughly fifty percent of respondents strongly agreed that "*[a]fter time served*, an offender should have a clean slate and be able

306. See id. ("[I]f one sees the criminal law as having dual roles (of both announcing rules of proper conduct and adjudicating violations of those rules) and, further, sees desert as the primary guide for assessing punishment, then this sort of judgment of 'improper conduct, no punishment' makes more sense.").

307. See Kleinfeld, Manifesto of Democratic Criminal Justice, supra note 194, at 1409 (referencing how "[t]he costs and benefits of crime and punishment must fall together into the hands of those with control over the criminal system"); Robinson, supra note 32, at 55–56 (discussing how criminal justice systems that enjoy public support tend to foster greater public trust); Paul H. Robinson & John M. Darley, Intuitions of Justice: Implications for Criminal Law and Justice Policy, 81 S. Cal. L. Rev. 1, 38–48 (2007) (describing how upholding the criminal justice system's credibility depends in large part on adhering to public opinion); Robinson & Darley, Utility of Desert, supra note 218, at 456–58 ("[T]he criminal law's moral credibility . . . is enhanced . . . if it assigns liability and punishment in ways that the community perceives as consistent with the community's principles of appropriate liability and punishment.").

308. Butler et al., supra note 215, at 39 ("[T]he current project explores the extent to which the American public would support the implementation of rehabilitation ceremonies, including certificates.").

309. See Shadd Maruna, Making Good: How Ex-Convicts Reform and Rebuild Their Lives 12 (2001).

310. See Butler et al., supra note 215, at 40.

311. See id. (describing how drug courts throughout the United States carry out the kinds of ceremonies Maruna proposed as part of their graduation ceremonies).

312. Id. at 39.

to move on with their life."[313] Nearly eighty percent agreed that ex-offenders can change and rejoin the community.[314] At the same time, the authors were quick to note that the respondents did not seem to adopt a "[p]ollyannaish view of offenders."[315] Instead, they "seem[] to have a generally realistic picture of the challenges of inmate reform."[316] Most importantly, for the purposes of this section, nearly eighty percent supported ceremonial validation of reentry with community involvement.[317] Furthermore, the respondents with demographic attributes most traditionally associated with more punitive approaches to criminal justice issues did not differ significantly from these findings.[318] As the authors put it, "[t]hese results indicate that there is a widespread consensus among the American public supportive of providing a *formal* means of offender redemption."[319]

Cullen and his collaborators have made similar findings in the field of expungement. Cullen, Burton, and others have shown through their research that public attitudes generally support expungement for almost all nonviolent crimes, especially when the petitioner has demonstrated rehabilitation—either affirmatively or through the passage of time without recidivating.[320] The results also indicate that public safety concerns dominate the thought processes of the participants, who simultaneously support the concept of public criminal records (so long as they are accurate) and expungement.[321] Put differently, the public can understand the stakes—the government and petitioners' interests—and balance them accordingly.[322]

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313. Id. at 42 (emphasis added).

314. Id.

315. Id. at 43.

316. Id.

317. Id. (referencing "widespread support . . . for both rehabilitation ceremonies (81.9 percent agree) and certificates of rehabilitation (79.4 percent agree)" in which "the public is willing to grant them the possibility of being declared rehabilitated and of recapturing all rights and privileges attached to full-fledged citizenship").

318. See id. at 43–44 (noting that nearly seventy-five percent of "conservative" respondents supported these measures).

319. Id. at 44–45 (emphasis added) ("[N]ational-level opinion data show[] that the public supports the reforms of rehabilitation ceremonies and certificates that restore offenders officially to full citizenship. In short, for those who are meritorious, Americans are willing to offer them *true redemption*. The generosity is widespread and cuts across political lines . . . .").

320. See Burton et al., supra note 26, at 126 (measuring the increase in public support for expanded expungement practices in terms of the number of states who have extended expungement eligibility in recent years).

321. See id. at 144.

322. See id. at 135–36 (noting that seventy-five percent of respondents agreed with restricted criminal records access for nonviolent crimes and ninety-two percent of respondents desired accurate recordkeeping by government agencies).

A deeper dive into this data indicates general support for the expungement of convictions, especially after certain periods of time. But the public also differs on that length of time, usually according to the seriousness of the offense. Respondents identified several factors that might suggest worthiness for expungement, indicating the ability to engage in case-by-case judgment. Like Robinson, Cullen and his collaborators did not find variations in approach or key findings according to demographic differences, including "based on political values or sociodemographic factors."[323] The community seems completely capable of making the macro, risk-based determinations currently made by legislatures or discretionary actors case-by-case.[324]

These data suggest that at the very least attitudes toward expungement come close to existing legislative approaches to expungement, meaning little would be lost by deferring decisionmaking to the community. Of course, there may be transaction costs that lower the expungement rate in situations in which legislatures have decided it should be automatic. But there is nothing to suggest that community members cannot engage in the sort of balancing that justifies community involvement in other settings.[325] Cullen and Burton put it this way: "Americans believe in second chances, especially for those whose past offenses and sustained good behavior signal that they no longer pose a threat to public safety."[326]

E. *The Practical and Political Case*

In addition to the reasons above, there are two practical reasons for incorporating the public into expungement determinations. First, doing so fits with broader calls for restoring popular participation in criminal adjudication. Second, and more practically, it responds to the enduring challenges of the pardon process, which provides little relief for those who have paid their debt.

1. *Participatory Criminal Law.* — Another component underlying the palatability of increasing participation in the expungement process relates to the current criminal justice moment more broadly. Conferences and

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323. Id. at 138.

324. See id. at 139 (outlining the predicted levels of support for policies expunging criminal records).

325. See Bibas, Political Versus Administrative, supra note 27, at 677 (arguing for placing criminal justice policy in the hands of laypeople given their moral expertise); Bowers, supra note 30, at 1666 (citing Josh Bowers, Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel, 1 Va. J. Crim. L. 135, 136 (2012) (noting how intuition and practical reason are essential to judgment); Huigens, supra note 34, at 1438–40 (1995) (referencing practical judgment and determinations of moral blameworthiness).

326. Burton et al., supra note 26, at 144.

symposia have been devoted to the topic.[327] This has led to calls to democratize criminal justice at various stages of the process. Over the past two decades, and given concerns that policymakers and officials are not fully responsive to the desires of the community, scholars have advanced arguments for more public involvement in investigations, charging decisions, the exercise of prosecutorial discretion at various stages, bail determinations, plea bargaining, defense activity, and sentencing.[328] Further, Tyler's work indicates that the overall legitimacy of the criminal legal system corresponds greatly to the degree of stakeholder buy-in and trust.[329]

On the political side, in addition to bipartisan efforts to expand expungement reform, there has been coordination between various constituencies to engage in criminal justice reform. The First Step Act represents one example at the federal level.[330] At the state level, coalitions have joined forces to decriminalize certain types of activities.[331] The Sentencing Commission also has revised the Sentencing Guidelines and sought to clarify issues bubbling in the circuits. Think tanks and policy organizations have critiqued the expansion of the criminal law,[332]

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327. See, e.g., Symposium, Democratizing Criminal Law, Nw. U. L. Rev. (2016); Symposium, Relief in the Making: The Policy, Implementation, and Impact of Rights Restoration Laws, Drug Enf't & Pol'y Ctr. Ohio St. Moritz Coll. of L. (2024).

328. See, e.g., Meares, supra note 24, at 1532–34 (arguing for improved procedural justice in policing to enhance democratic participation); see also Appleman, The Plea Jury, supra note 24, at 741–50 (arguing for plea juries); Harmon, supra note 24, at 768–80 (critiquing reliance on courts and calling for utilization of other institutional actors to hold police accountable); Hessick & Morse, supra note 24, at 1570–79 (questioning viability of electoral strategies for prosecutorial reform); McConkie, supra note 24, at 1065–86 (proposing various jury-like bodies to supervise plea bargaining); Rakoff, supra note 24, at 1435 (suggesting prosecutors should occasionally serve as defense counsel to communicate the scope of prosecutorial power); Simonson, Bail Nullification, supra note 24, at 599–611 (suggesting "community bail funds" to hold judicial actors accountable); Tyler, From Harm Reduction, supra note 24, at 1555–60 (arguing for policing initiatives that promote public trust).

329. See Tyler, Procedural Justice, supra note 224, at 286 (explaining how people are more likely to adhere to the rules when they accept the legal authorities).

330. Ames Grawert & Tim Lau, How the FIRST STEP Act Became Law—And What Happens Next, Brennan Ctr. for Just. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/8RNL-5K2W] (explaining how compromises and effort from various groups was vital to bringing the FIRST STEP Act into being).

331. Most of this activity has involved decriminalizing activities relating to controlled substances. See State Drug Law Reform, Nat'l Ass'n Crim. Def. Laws., https://www.nacdl.org/Landing/DrugLaw#State%20Reform [https://perma.cc/R6W8-GDDD] (last visited Aug. 17, 2024) ("As of October 2023, thirty-one states and Washington D.C. have decriminalized simple possession of marijuana.").

332. See Timothy Lynch, Overcriminalization, *in* Cato Handbook for Policy Makers 193, 193–99 (8th ed. 2017) ("Policymakers at all levels of government have criminalized so many activities that it should come as no surprise that our courthouses are clogged with cases and our prisons are overflowing with inmates."); Heritage Explains Overcriminalization,

prosecutorial power,[333] indigent defense resources,[334] and disproportionate sentencing regimes.[335]

With respect to criminal records policy, scholars, policymakers, legal aid organizations, and others have combined to increase awareness of the deleterious effects of a public criminal record. Organizations like the Vera Institute of Justice,[336] Cato Institute,[337] and Heritage Foundation[338] have

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Heritage Found., https://www.heritage.org/crime-and-justice/heritage-explains/overcriminalization [https://perma.cc/6N7S-RY8T] (last visited Aug. 17, 2024) ("'Overcriminalization'—the overuse and abuse of criminal law to address every societal problem and punish every mistake—is an unfortunate trend."); Overcriminalization, Nat'l Ass'n of Crim. Def. Laws., https://www.nacdl.org/Landing/Overcriminalization [https://perma.cc/FBJ9-2J9L] (last visited Aug. 17, 2024) ("[O]ur nation's addiction to criminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk.").

333. See Prosecutorial Reform, ACLU Pa., https://www.aclupa.org/en/issues/criminal-justice-reform/prosecutorial-reform [https://perma.cc/395Y-2TDQ] (last visited Aug. 17, 2024) ("Prosecutors have used their power to pack jails and prisons. And it has taken decades, billions of dollars, and thousands of laws to turn the United States into the largest incarcerator in the world."); Prosecutorial Reform, Brennan Ctr. for Just., https://www.brennancenter.org/issues/end-mass-incarceration/changing-incentives/prosecutorial-reform [https://perma.cc/4VFS-YNBZ] (last visited Aug. 17, 2024) ("In many cases, spurred by punitive policies that create incentives to put people behind bars, [prosecutors] have fed the epidemic of mass incarceration plaguing the United States.").

334. See, e.g., Norman Lefstein, A Broken Indigent Defense System: Observations and Recommendations of a New National Report (Apr. 1, 2009), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol36_2009/spring2009/a_broken_indigent_system_observations_and_recommendations_of_a_new_national_report/ (on file with the *Columbia Law Review*) (detailing how the failings of indigent defense systems are denying justice to the poor and adding to the just of the judicial system).

335. See Federal Sentencing Reform, ABA, https://www.americanbar.org/advocacy/governmental_legislative_work/priorities_policy/criminal_justice_system_improvements/federalsentencingreform/ (on file with the *Columbia Law Review*) (last visited Aug. 17, 2024) (describing the "[o]ver-reliance on prison" that characterizes the federal prison sentencing regime); Sent'g Project, https://www.sentencingproject.org/ [https://perma.cc/EGG7-MQAM] (last visited Aug. 17, 2024) (describing participation in the Second Look Network which "provid[es] direct legal representation to incarcerated individuals seeking relief from lengthy or unfair sentences").

336. See Jacqueline Altamirano Marin, Erica Crew & Margaret diZerega, Looking Beyond Conviction History: Recommendations for Public Housing Authority Admissions Policies, Vera Inst. Just. 1–2 (Apr. 2021), https://www.vera.org/publications/looking-beyond-conviction-history (on file with the *Columbia Law Review*) ("Federal policymakers have encouraged [public housing authorities] to rethink limits on public housing for people with criminal conviction histories and to actively address barriers to housing that can reinforce discrimination.").

337. J.J. Prescott & Sonja B. Starr, The Power of a Clean Slate, Regulation, Summer 2020, at 28, 28, https://www.cato.org/regulation/summer-2020/power-clean-slate [https://perma.cc/64VM-PVU5] (researching the effects of expunging criminal records in an effort to facilitate the policy push for expanded expungement laws).

338. Malcolm & Seibler, supra note 74, at 1 (describing the "tenuous relationship" between many collateral consequences and the conviction that prompted them).

joined in calls for thinking more critically about collateral consequences resulting from contact with the criminal system. This follows developing Supreme Court case law relating to collateral consequences, plea bargaining, and the right to counsel.[339] In short, the time is ripe for additional discussion about community involvement in expungement adjudication.

2. *Shortcomings of Boards of Pardons.* — Existing pardon practices are varied and haphazard and do not make a dent in the pervasiveness of public criminal records. There are fifty-one pardon processes in the United States.[340] Some states have organized, regular processes whereas the majority have "uneven" and "irregular" practices.[341] In the jurisdictions where processes are regular, the CCRC considers a thirty percent success rate to be significant. Only seventeen states qualify for this category.[342] Overall, the states with regular processes tend to grant more applications. The CCRC reports that seventeen states, including Alabama, Connecticut, Georgia, and South Carolina report high pardon rates compared to other jurisdictions.[343] These states have recurring and streamlined processes.[344]

Pardon administration varies in terms of structure as well. They involve little direct public involvement. A handful of states opt for an independent board with terms of service for those appointed to the board. For example, in Alabama, an independent board is appointed by the Governor.[345] Connecticut has a similar arrangement.[346] Board composition

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339. See Lafler v. Cooper, 566 U.S. 156, 169–70 (2012) ("[H]ere the question is . . . the fairness and regularity of the processes that preceded [the trial], which caused the defendant to lose benefits he would have received in the ordinary course but for counsel's ineffective assistance."); Missouri v. Frye, 566 U.S. 134, 144 (2012) ("In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations."); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) ("We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.").

340. Restoration Rts. Project, 50-State Comparison: Pardon Policy & Practice, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ [https://perma.cc/9WXM-YWWH] (last updated July 2024).

341. Id. (noting twenty-eight jurisdictions with "uneven/irregular" or "rare" pardon practices).

342. Id.

343. Id. (noting "significant % of applications granted" in seventeen jurisdictions).

344. See id. (explaining that these states with high grant rates have efficient processes like "[p]ublic hearings at regular intervals").

345. Restoration Rts. Project, Alabama: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restorationprofiles/alabama-restoration-rights-expungement-sealing/ [https://perma.cc/FTL5-GTQY] (last updated Oct. 10, 2024).

346. Restoration Rts. Project, Connecticut: Restoration of Rights & Record Relief, Collateral Consequences Res. Ctr., https://ccresourcecenter.org/state-restoration-

usually consists of other public officials rather than members of the community. For example, Minnesota, which recently underwent pardon reform, has a three-person board consisting of the Attorney General, Governor, and Chief Justice.[347] Applicants are permitted to present their case to the Board who then votes in real time.

Further, most states involve the Governor in some capacity—in either a shared-power arrangement or through some form of consultation.[348] Sometimes the level of gubernatorial involvement hinges on the underlying crime.[349] This form of administration seems based on the idea that political representation is the equivalent of direct participation and that the representatives of the state, rather than the community itself, grant mercy.

IV. PARTICIPATORY EXPUNGEMENT IN PRACTICE

The above arguments support infusing popular participation into some expungement processes. But questions remain. What form would popular participation take? If there is popular involvement in adjudication, what would adjudicatory processes look like? Should involvement in adjudication be coupled with some sort of rulemaking authority? Which convictions, should a petitioner seek expungement, warrant this sort of process? Aside from public processes, how should the private sector, if at all, work to support such processes, whether the results are favorable or not to petitioners? Finally, what might be the major criticisms of such a proposal? This Part explores these questions.

A. *Participatory Expungement Possibilities*

What would participatory expungement adjudication look like in practice? Currently, expungement statutes allocate decisionmaking authority in three ways: (1) to judges; (2) through deference to legislative mandates (for automatic expungement); and (3) to prosecutors (in limited situations involving prosecutor vetoes). While all three actors represent the community, none of them are a complete reflection of it. Participatory expungement would add a fourth decisionmaker: the local community.

This section identifies two possible routes for participatory expungement: popular adjudication and popular rulemaking. Each has advantages and disadvantages. For example, while participatory expungement adjudication allocates decisionmaking authority about

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profiles/connecticut-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/A3JN-V3AZ] (last updated Oct. 14, 2024).

347. Barry, supra note 276.

348. See supra note 340 (noting that in thirty-one states, the governor "shares power" or "may consult" with the pardon board).

349. See supra note 340 (referencing processes in Alabama, South Carolina, Rhode Island, and California).

individual petitions with community members in a very direct way, it risks different results from similarly situated petitioners, raising equality concerns. The seriousness of that concern likely rests on one's faith in public decisionmakers to distinguish between cases properly and consistently. Participatory expungement rulemaking, in contrast, contemplates authorizing community members to make rules for the extraordinary cases currently untouched by legislatures. This could alleviate concerns that like cases will not be treated alike; however, it does not cultivate a similar, direct connection between petitioners seeking reintegration and the community. It is less relational in practice and begs questions relating to power dynamics, composition, and transparency.

To be clear, legislatures will need to decide which route, or combination, best works in their jurisdiction. This section merely lays out the basic contours and considerations relating to both, while raising possible advantages and disadvantages.

1. *Participatory Expungement Adjudication.* — Appleman's work on the viability of plea juries is helpful to conceptualize what this might look like. Appleman advocated for plea juries given that plea bargaining can result in what Langbein referred to as "condemnation without adjudication."[350] Similarly, expungement can result in either continued condemnation without adjudication or insufficiently democratic reintegration. Foregoing public involvement in any expungement adjudication improperly removes the community from a role that the Supreme Court has intimated is crucial to the determination of punishment.[351]

Participatory expungement could take the form of panels drawn from those already called for jury service. These panels would not need to be the size of regular juries, although a large enough number—perhaps seven to nine—would be preferable. Majority votes could determine the outcome.[352] However, unlike regular juries, they would need to serve for an extended period, although periodically. An extended length of service

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350. Appleman, Defending the Jury, supra note 253, at 129 (internal quotation marks omitted) (quoting John Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 204 (1978)).

351. Id. at 130–31 (noting communal right that cannot be waived by defendant).

352. As expungement petitions do not adjudicate guilt or innocence, the lack of unanimity likely does not present constitutional concerns. See Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020) (noting that the Sixth Amendment requires unanimity in order to convict). There might be good reasons, however, to require unanimity. Unanimity would be a clear statement by the community that reintegration is warranted, whereas majority support might unintentionally convey that the community lacks total confidence in the restoration. On the other hand, requiring unanimity might forestall reintegration due to the inclinations of a small minority, thereby letting a small minority determine normative questions for the entire community. These concerns plague plenty of other democratic arrangements and are not unique to this context. I am grateful to Marah Stith McLeod for raising this point.

would be useful for allowing the panel to adjudicate a range of petitions and communicate the sense of the community during a particular time.

In terms of procedure, petitioners would present their petition to the expungement panel. As these types of petitions would involve criminal records normally beyond the reach of existing expungement statutes, it is important that the presentation be made to the panel as the decider rather than as a bystander. This has important symbolic value: It reduces the space between the party seeking reintegration and the community determining its parameters.[353] Further, it fosters something akin to a relationship, which underlies reintegration. The panel could ask questions about the petitioner's cause and argument for expungement, and dialogue can ensue. This sort of procedure gives petitioners a real opportunity to be heard by their peers rather than the insiders traditionally occupying courts.

Importantly, legislatures that create this sort of adjudicatory process for higher-level offenses would need to contemplate the role of courts in relationship to the expungement panels. For example, when describing the "watchful eye of the court" for plea juries, Appleman notes how courts could reverse decisions that were substantively unreasonable.[354] Legislatures could determine the standard that must be met before a court can intervene to counteract the decision of a panel. Although data suggests decisionmaking by diverse bodies in a group can be superior to other forms of decisionmaking,[355] this sort of backstop seems warranted given concerns relating to bias or inadequate democratic representation on a particular panel.

Legislatures also would need to determine whether they would license such panels to craft their own internal standards for adjudication or not. For instance, a jurisdiction might decide that for a set of crimes beyond the reach of traditional expungement law, the community panel can determine, by its own standards, which petitions are eligible for expungement. Alternatively, a legislature might decide to impart a standard of review to the panel but leave a court with some measure of review authority.

The primary advantage to this approach is that it assigns decisionmaking authority to the community for the most serious expungement matters. Such panels could have final say on the merits of

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353. Appleman makes a similar point when describing the values served by plea juries: "Meaningful lay participation, in the form of a plea jury, would shrink the current distance between the criminal law's 'legitimizing promise and [the] systemic reality' of guilty pleas." Appleman, Defending the Jury, supra note 253, at 137 (alteration in original) (footnote omitted) (quoting Markus Dirk Dubber, American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure, 49 Stan. L. Rev. 547, 551 (1997)).

354. Id. at 135.

355. See, e.g., Cass R. Sunstein, Deliberative Trouble? Why Groups Go to Extremes, 110 Yale L.J. 71, 109 (2000) (explaining how diverse groups bond through pursuit of a common objective rather than other affinities).

expungement petitions for a class of criminal records. Considering the significance of an expungement, that is an empowering possibility. It involves a heavy dose of direct participation in adjudication.

The primary disadvantage is probably the potential for disparate results that do not accord with the desire for equal treatment under the law, which, to be fair, automated expungement does fairly well. What if a panel's decisions in similarly situated cases diverge without apparent justification? Will that undercut the procedural justice gains obtained by installing the process in the first place? Or is that a potential cost worth the risk? Conversely, many expungement processes still require petition-based expungement, permitting judges to render decisions on petitions that might not withstand similar scrutiny. So perhaps the risk of some head scratching results is not all that different than the status quo.

2. *Participatory Expungement Rulemaking*. — While some legislatures may choose to provide community members with the ability to adjudicate petitions directly, an alternative to enhancing popular participation in expungement decisions could involve tasking a large group of community members with rulemaking authority for the most extraordinary cases. Whereas the previous section articulated aspects of participatory expungement *adjudication*, this section describes a different form of popular involvement: participatory expungement *rulemaking*.

Of course, adjudication by an expungement panel seated for an extended period would have some rulemaking effect, at least by publicly signaling which types of petitions it finds acceptable. But a formal rulemaking authority—delegated to a group by the legislature—would have a different effect. Such a body would be tasked with determining how courts, or another decisionmaker, should adjudicate the more complicated expungement matters currently avoided by expungement statutes. In other words, the legislature assigns a commission-style entity with the responsibility to determine which principles, considerations, and standards should govern expungement petitions for the types of cases not currently contemplated by statute.

This panel would have quasi-legislative authority for criminal records the legislature determines it will not authorize expungement for via statute. In other words, legislatures might permit such panels to determine whether the remedy is available to a class of criminal records, but not mandate it. Basically, the legislature delegates expungement rulemaking authority for a subset of criminal records given their connection to the sociomoral underpinnings of the community.

One advantage of this approach is it might be more likely to result in similar treatment for similarly situated cases. The body could determine which types of records are eligible for expungement or not, full stop. This might result in some hardship for some potential petitioners, but that is no different than the results of legislative action with any piece of legislation relating to expungement. There are some winners and some

losers. A secondary advantage, however, is that decisionmaking authority about eligibility is less removed from the broader community than the legislature.

Of course, a disadvantage is that this might result in cookie cutter approaches that do not account for the unique circumstances presented by petitioners. In this sense, equal treatment and individualized treatment might be in conflict. Another potential disadvantage involves determining the personnel tasked with this rulemaking. This sort of body is likely to exist for a longer term, thereby meaning a more static decisionmaking apparatus. The stakes of membership in the rulemaking entity thereby go up considerably, whereas there could be a higher rate of turnover in the panels tasked with participatory expungement adjudication.

B. *Which Convictions?*

Part II identifies the relatively bright line located by legislatures with respect to which convictions have been made eligible for expungement. Essentially, legislatures—while increasing eligibility overall and broadening the number of criminal records that are eligible for automated expungement—have not opened the door to serious, nonviolent felonies, violent felonies, and crimes relating to breach of the public trust. This is fully defensible and understandable for several reasons.[356]

Legislatures have shown little appetite for extending expungement to this class of crimes. One motivation is likely sociomoral: These crimes are the easiest to point to as causing the most public and private harm. Additionally, these happen to be the crimes—or related to those crimes—whose adjudication traditionally was reserved to public juries as part of enforcement of the criminal law.[357] Third, there is potentially serious political risk with going down this road.[358]

The degree of public involvement in expungement adjudication should correlate with the degree of sociopublic harm associated with the criminal record itself. For criminal records that are generated mostly via administrative measures, like an arrest record, then primarily administrative solutions make sense. Professor James Jacobs, in *The Eternal Criminal Record*, suggests how singular police interactions that result in an arrest can create an *eternal* record.[359] Doing so would permit administrative

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356. See supra sections II.A–.B.

357. See United States v. Gaudin, 515 U.S. 506, 510 (1995) (discussing the prominence of public adjudication through the jury trial).

358. See Paul Demko, Jeremy B. White & Jason Beeferman, Big Blue Cities Are Embracing Conservative Anti-Crime Measures. Here's Why., Politico (Mar. 7, 2024), https://www.politico.com/news/2024/03/07/liberal-cities-crime-policies-00145532 [https://perma.cc/3VWC-4L62] (describing the political fallout for legislators showing mercy in criminal policy).

359. See Jacobs, supra note 5, at 13–16.

abuse in some cases without democratic accountability, running afoul of the sensibilities underlying the Fourth Amendment, due process, and fairness overall.

For criminal records that are generated with a mix of administrative and popular activities, including public representatives like prosecutors and judges, then hybrid processes make sense. Prosecutorial, defense, and victim involvement are warranted because they were part of the initial adjudication, even if it occurred through the existing plea bargaining reality. Finally, for criminal records that relate to the most serious crimes, typically involving the sociomoral fabric of the community, then the degree of community involvement in determinations should increase. The latter holds even though most of those cases, in the modern system, are resolved by plea deal. Because even in those cases, the prosecutor has assumed the adjudicatory role traditionally reserved and originally intended for the community.

Moving forward, legislatures should take these principles into mind when thinking about *how* the remedy might be expanded. As mentioned above, expungement reformers are at a crossroads. If they plan to push for extension of the remedy to even more serious crimes, they should take seriously the arguments for public involvement. How expungement comes about matters.

Further, and in addition to the adding process, there is the more urgent question of *when* someone with a serious conviction might be eligible. Here, legislatures can draw from what they are already doing, particularly with waiting periods. But when crafting waiting periods, legislatures should do more than simply defer to the risk-based paradigm that pervades the construction of waiting periods currently. Instead, legislatures need to consider the competing rationales for punishment—including the limiting features of retribution—when determining waiting periods.[360] Injecting a retributive lens into expungement waiting periods might produce more nuanced results that are also more procedurally just because they accord with public attitudes toward reentry and redemption more broadly.[361]

C. *Private Sector Implementation and Support*

Participatory expungement can entail more than the official acts of government. Because expungement involves a determination by the state about the path to reintegration, there is a realm of private responsibility post-expungement. This is not contingent on whether the maintenance of

360. See Murray, Retributive Expungement, supra note 10, at 709.

361. Id.

public criminal records amounts to punishment or not.[362] Instead, this sphere of responsibility corresponds to a mix of the stigma-based harm of eternal criminal records and responsibilities of individuals in a democratic, criminal legal system.

Here is one way to think about this: As each participant in the community has ceded punitive authority to the state, each participant thereby must be cognizant of the punitive limits of the state, as well as the state's decisions to *permit* reintegration. As written in *Completing Expungement*, "when private actors continue the stigma after the formal limits of the criminal law have been utilized, they are dangerously close to usurping public authority to impose punishment."[363] But even if such private behavior is *not* punishment, membership in a shared, democratic enterprise warrants consideration by private actors of their responsibilities when handling information after an official act of expungement. Moreover, participatory expungement can occur on the front end. In fact, it already is, to some degree, with pop-up clinics, information sessions, and grassroots efforts by communities that seek to alleviate the burdens felt by their members.[364]

These ideas accord with a relational understanding of the underpinnings of the criminal law and punishment. Scholars such as Mary Sigler,[365] R.A. Duff,[366] and others[367] have written extensively about the web of relationships underlying political communities that also implicate the limits of the criminal law. Professor Christopher Bennett has referred to these associations as a "special kind of relationship."[368] Participatory

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362. See Murray, Completing Expungement, supra note 37, at 1223 ("[W]hether we classify private holding and usage of already expunged information as formally punitive or not *only* informs the *nature of* the responsibility for handling the information, not whether any responsibility exists at all.").

363. Id.

364. See, e.g., Press Release, Del. Cnty. Pa., Delaware County Office of the Public Defender Hosting Free Expungement Clinic (May 24, 2024), https://www.delcopa.gov/publicrelations/releases/2024/expungementclinic.html [https://perma.cc/7RJ4-VB6A]; PA Law Help, https://www.palawhelp.org/resource/clean-slate-and-expungement-clinics [https://perma.cc/A4HQ-DVKM] (last visited Aug. 17, 2024); Reentry Clinic, Univ. Akron Sch. L., https://www.uakron.edu/law/curriculum/clinical-programs/reentry.dot [https://perma.cc/ZK9Q-XJX8] (last visited Aug. 17, 2024); Set Aside and Expungement Clinic, Cmty. Legal Servs., https://clsaz.org/event/set-aside-and-expungement-clinic-20/ [https://perma.cc/MJ5P-CJPW] (last visited Aug. 17, 2024).

365. See Mary Sigler, Humility, Not Doubt: A Reply to Adam Kolber, 2018 U. Ill. L. Rev. 158, 159–62 (discussing role of humility in punishment).

366. See R.A. Duff, Relational Reasons and the Criminal Law 3 (Univ. of Minn. Legal Stud. Rsch. Paper No. 12-30, 2012).

367. Bennett, supra note 50, at 482; Stephen P. Garvey, Restorative Justice, Punishment, and Atonement, 2003 Utah L. Rev. 303, 304–11 (comparing restorative and retributive theories of punishment); Yankah, supra note 26, at 75–82 (noting social bonds underlying criminal law and punishment).

368. Bennett, supra note 50, at 482.

expungement is thus open to private efforts to alleviate the barriers to expungement that contribute to the uptake gap and efforts that accentuate the effects of expungements once they are achieved.

Participatory expungement also contemplates room for private support for expungement petitioners in a way that resembles participatory methods in other phases. The reality is that in any expungement action, to follow Simonson's point, "the people" can be on both sides.[369] Participation from the public can occur in decisionmaking, supportive, and adversarial contexts. Put simply, participatory expungement posits opening the door to actors currently left out. Alternatively, it involves harnessing the resources and creative thinking of actors who might support or oppose expungement in concrete cases.[370]

D. *Potential Issues*

Participatory methods do not come without costs or criticism. Injecting popular participation likely creates resource questions in an already overstressed system. Further, there is the lingering question of whether the community involved in such activity can adequately express the values held by a community given heterogeneity and sub-communities that might be left out on any given occasion.[371] Finally, incorporating the community might result in risky tradeoffs that short circuits the capacity for individual relief that already is achievable under existing expungement law. In short, even if ideal involvement cannot be achieved, is it *worth* it?

The form participatory expungement takes likely determines the degree of resource challenges faced by jurisdictions. Participatory expungement rulemaking requires creating new quasi-judicial legal apparatuses that must be staffed and guided by internal norms and rules. In contrast, participatory adjudication models could take advantage of existing structures relating to constructing juries. Although lots of community members decline or avoid jury service,[372] there are still a lot of potential jurors floating around courthouses. Why not take advantage of them?

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369. Simonson, The People, supra note 33, at 286–94.

370. The literature on participatory defense is expansive and extensive. See generally Russell M. Gold & Kay L. Levine, The Public Voice of the Defender, 75 Ala. L. Rev. 157 (2023) (arguing for public defense lawyers to utilize social media technology to counteract popular narratives about crime); Janet Moore, Marla Sandys & Raj Jayadev, Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform, 78 Alb. L. Rev. 1281 (2015) (identifying core principles of participatory defense and connecting them to constitutional concepts relating to the right to counsel, due process, and equality); Simonson, The People, supra note 33, at 286–94 (recognizing the role that community members play on both sides of a criminal prosecution).

371. Rappaport, supra note 35, at 739–56.

372. Id. at 754 (noting lower than appreciated yield for mandatory jury service).

The more difficult objection to participatory expungement involves an issue that plagues any democratization argument: how can this proposal account for diverse communities that have lots of different value systems? Further, can the form the participatory model takes adequately account for those values? Finally, will negative externalities result?

Rappaport, in *Some Doubts About "Democratizing" Criminal Justice*, makes a forceful case against the prevailing democratization thesis by questioning whether community expressions of sociomoral values are practically achievable and, if so, desirable given the data on lay attitudes toward punishment.[373] Rappaport sees a few problems with deference to the community. First, communities are not homogeneous and consist of lots of different groups with lots of different values.[374] Although there may be agreement on big picture principles, like Robinson's work suggests, differences likely exist for nuanced applications of those principles. After all, "laboratory vignettes differ meaningfully from actual jury service."[375] Social mobility, whether horizontal or vertical, contributes to heterogeneity and is unlikely to go away.[376] Additionally, whether the public is informed or not about the decisions it makes suggests the results might not be fully deliberative.[377] And moral panics might lead to huge swings in preferences at different times, affecting the justice of individual case determinations.[378] Put simply, the consensus that democratizers laud and revere is unlikely to be found.[379]

A related, but distinct problem, is that deference to community decisionmaking may elevate "dominant voices while muffling others."[380] For example, idealized deliberative decisionmaking might just provide an outlet for the loudest voices to capture the democratic institution, thereby stifling participation by the broader community. This reality contrasts with the ideal notion of deliberative decisionmaking where participants are guided by the common good.[381] As Rappaport puts it, "the 'community values' that appear to emerge from community meetings and the like disproportionately reflect relatively powerful factions of the community."[382]

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373. Id. at 739–56.

374. See id. at 739–45 (arguing that even small, localized communities are not and have never been ideologically homogenous groups able to dole out justice in a fair manner).

375. Id. at 771.

376. Id. at 745–46.

377. Id. at 761 (suggesting the notion of an "informed public" is a myth).

378. Id. at 766.

379. Id. at 744 (questioning whether the data shows consensus on granular issues).

380. Id. at 749.

381. Id. at 748 (referencing philosopher Jürgen Habermas's "ideal speech situation" problem).

382. Id. at 749 & n. 231 (referencing literature discussing louder voices capturing popular institutions).

A third problem involves negative externalities. For example, communities might begin to compete with one another, moving policy to the poles rather than moderating it, like Stuntz, Appleman, and Bibas suggest. Rappaport refers to this as "jurisdictional competition." Some communities, recognizing that the one next door is tougher on crime, might move in that direction, creating an unintentional arms race.[383] In the process, this competition leaves individuals behind.

A few thoughts come to mind with respect to how the styles of participatory expungement contemplated by this paper might respond. First, the form it takes likely determines whether it can persuasively account for these concerns. But more foundationally, it is important to focus on the key argument in this paper: *Expansion* of expungement as a remedy *beyond its current level* should involve popular participation. In other words, some of the concerns articulated above have more force against proposals that seek to replace existing institutional decisionmaking with popular participation to replace bureaucratic harshness with purported lay leniency. But that is not the argument here. The baseline is different; legislatures have drawn a line of demarcation, limiting the remedy of expungement. For example, replacing sentencing judges with sentencing juries or bail judges with bail panels might mean the unintentionally harsh public undercuts the substantive justice aims of reformers. But the proposal contemplates a way to expand the remedy by popular means, not simply replace the means used for an existing process. This is a class of convictions where *no relief is currently available*. The risks are not the same.

Rappaport's concern about institutional capture by the loudest voices seems more present if participatory expungement takes the form of rulemaking. Legislatures might be tempted by the traditional forces that affect politics generally. Power dynamics, interest groups, money, and other factors might affect the composition of the decisionmaking body. Pardon and parole board composition has been criticized on these grounds.[384] To be clear, traditional institutional, singular decisionmakers already face these pressures as well. Prosecutors and judges might feel the heat when adopting positions toward expungement, and legislatures certainly do when deciding how to restrict the remedy. Existing expungement statutes are the products of compromise; some make sense and others do not. So existing expungement structures are not *more* democratic by the critique's own criteria.

On the other hand, participatory expungement adjudication through jury-style panels that utilize existing processes might be less likely to suffer from these problems. Of course, the loudest voices on the panel might dominate the conversation once it begins. To be sure, any given panel

383. Id. at 758.

384. Beth Schwartzapfel, Parole Boards: Problems and Promise, 28 Fed. Sent'g Rep. 79, 80–84 (2015) (detailing shortcomings of parole boards, including political sensitivity).

might not be perfectly representative of the broader composition of the community. But getting divergent views into the room at the start is probably easier. And the entry process, like random selection of jury pools, would ameliorate some concerns about gatekeeping. Moreover, are prosecutors' offices and judicial institutions perfectly representative such that the unilateral authority to propose or veto expungement is warranted? There is an extensive literature on prosecutorial insulation from community views, and office cultures, both for good and for bad.[385]

Further, participatory expungement does not contemplate complete deference to expressions of uninformed will by decisionmakers. Instead, it leaves room for careful crafting of standards of review and judicial backstops given broader concerns about democratic values. In short, and to use Rappaport's language, it can remain open to evidence-based reform and democratic values at the same time.[386] For example, participatory expungement adjudication or rulemaking leaves room for informing the lay participants about the risks of recidivism for someone with a petitioner's profile, but it does not mandate that they dictate a particular result.[387] Legislatures do not have to simply punt to community decisionmaking and walk away. Instead, they can partner with them, recognizing room for expertise and lay perspectives and how each brings something to the table.[388]

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385. See Jeffrey Bellin, The Power of Prosecutors, 94 N.Y.U. L. Rev. 171, 178 (2019) (examining inconsistencies in how prosecutorial authority is discussed and perceived); Bibas, Prosecutorial Regulation, supra note 210, at 963 ("Simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency."). See generally Bruce Green, Access to Criminal Justice: Where Are the Prosecutors?, 3 Tex. A&M. L. Rev. 515 (2016) (arguing for enhanced prosecutorial duties in securing just results for defendants in criminal trials); Bruce Green, Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers, 62 Hastings L.J. 1093 (2011) (discussing potential solutions to the lack of clear prosecutorial professional standards); Bruce Green & Alafair S. Burke, The Community Prosecutor: Questions of Professional Discretion, 47 Wake Forest L. Rev. 285, 295 (2012) ("Community prosecution strategies may be inconsistent with ordinary principles regarding how prosecutors should employ their discretion, and the departures may not be sufficiently justified by the social utility of these strategies."); Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0, 92 Notre Dame L. Rev. 51 (2016) (discussing the emergence of criticism directed at the prosecutorial system and expanding the definition of misconduct beyond standard legal obligations).

386. Rappaport, supra note 35, at 810 (referencing the 1967 President's Commission on Law Enforcement and Administration of Justice to argue for an evidence-based approach to criminal law questions that also is mindful of broader democratic values).

387. See, e.g., Rachel Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 167 (2019) (noting how empirically valuable information can lead to informed decisions); see also Daniel Epps & William Ortman, The Informed Jury, 75 Vand. L. Rev. 823, 856–59 (2022) (arguing for informing juries about sentencing ranges prior to adjudication).

388. Rappaport, supra note 35, at 812 (suggesting conversations between experts and individuals can sharpen regulation).

Whether participatory expungement can adequately capture the values in a heterogeneous community is a significant question. Throw in the fact that the community is likely to have changed since the petitioner committed the offense and the issue is even more complicated. The community might have cared a lot about the marijuana possession conviction in 1989 but not so much in 2024. But that issue exists whether the community is tasked with the decision *or* experts *or* judges. Pretending otherwise is odd. Disenchantment with the experts' ability to capture community values is just as real. While critics of democratization are skeptical of the ability to achieve consensus in such settings, they gloss over whether experts can achieve consensus either or whether they adequately represent the values of communities. Communities go back and forth on their preferences, electing tougher and lenient public officials in the same decade. Allowing the practice of expungement adjudication may have an unanticipated effect that forges consensus over time. Perhaps the thirst for consensus presupposes participation, rather than making participation contingent on the existence of consensus. Building a culture of second chances takes time, hard work, and patience—not shortcuts.

Put another way, some prosecutors initiate expungement; others oppose it. Some judges default to expungement; others search for reasons to preserve the records. But for the subset of criminal records that are the subject of this discussion, neither actor has to make a choice because existing law does not ask them to. Letting the community have it first does not entail all the risks that the skeptics of democratization are concerned about in other phases.

CONCLUSION

In some ways, this Essay aims to thread a needle about the future of expungement by connecting the nature of the remedy to how the criminal law does and should reflect the sensibilities of the community. It describes the limits of expungement reform to date and entertains whether the remedy should expand further and, if so, how. The gist is this: If reformers wish to expand the remedy, they should do so mindful of first principles relating to democratic self-determination in the legal tradition and with respect to the criminal law and punishment. That means when offense seriousness increases, popular participation should increase as well. Will this popular participation result in idealized, substantive justice outcomes for the most fervent expungement and criminal justice reformers? Probably not, although that does not exist now either. Could it open one more door to the construction of a culture of second chances? Not entirely, but somewhat. Let the people decide how much and determine the complicated questions in between.