

# Expungement Reform in Arizona: The Empirical Case for a Clean Slate

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## INTRODUCTION

In the past several years, dozens of states have adopted or expanded laws providing for expungement of some adult criminal convictions.<sup>1</sup> Several states have recently passed groundbreaking “Clean Slate” legislation, which makes expungement *automatic* for those who meet the legal requirements.<sup>2</sup> Arizona, currently, is one of the holdouts to this trend—it not only has no automatic expungement law but indeed does not even allow expungement by petition. Although Arizona has a procedure to “set aside” a conviction,<sup>3</sup> this procedure does not seal the record and does not give the individual the right to refuse to disclose it.<sup>4</sup> In this Article, I draw on my recent empirical research

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\* Professor of Law, University of Chicago. Thanks to J.J. Prescott, my collaborator on the underlying empirical research, and to all those who assisted with, funded, and helped us to improve that research (acknowledged in detail in *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460 (2020)). Thanks to Jason Marquez, Michael McFerran, and Claire Mena for excellent research assistance on this Article.

1. For example, in 2018, twenty states passed bills expanding access to expungement. MARGARET LOVE & DAVID SCHLUSSEL, REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 2 (2019), <https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf> [<https://perma.cc/9QA5-9PMM>]. Then, in 2019, “31 states and D.C. enacted no fewer than 67 bills creating, expanding, or streamlining record relief,” and twenty states “authoriz[ed] diversion programs that produce non-conviction dispositions newly eligible for record-clearing under existing law.” MARGARET LOVE & DAVID SCHLUSSEL, PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019, at 10 (2020) [hereinafter LOVE & SCHLUSSEL, PATHWAYS TO REINTEGRATION], [https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration\\_Criminal-Record-Reforms-in-2019.pdf](https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf) [<https://perma.cc/35MG-734Y>].

2. See CLEAN SLATE, <https://cleanslateinitiative.org> [<https://perma.cc/WQ8Q-DGN9>]; Act of June 28, 2018, No. 402, 2018 Pa. Laws No. 56 (codified in scattered sections of 18 PA. CONS. STAT. and 42 PA. CONS. STAT.) (providing a clean slate remedy for individuals with a criminal record); UTAH CODE ANN. § 77-40-102 (West 2020); CAL. PENAL CODE § 1203.425 (West 2020); N.J. STAT. ANN. § 2C:52-5.4 (2020).

3. See ARIZ. REV. STAT. ANN. § 13-905(A) (2020).

4. See *id.* § 13-905(F); see also *Parsons v. Ariz. Dep’t of Health Servs.*, 395 P.3d 709, 712 (Ariz. Ct. App. 2017) (citing *Russell v. Royal Maccabees Life Ins. Co.*, 974 P.2d 443, 449–50 (Ariz. Ct. App. 1998)) (finding that even if a conviction is set aside the individual must still disclose it when asked).

to argue that Arizona should join its sister states in offering a second chance to people with records.

Expungement laws respond to a large and growing problem. Tens of millions of Americans have conviction records,<sup>5</sup> and absent expungement, these records effectively punish them for life, long after their formal sentences are complete.<sup>6</sup> Convictions trigger hundreds of collateral legal consequences<sup>7</sup> as well as discrimination by employers,<sup>8</sup> landlords,<sup>9</sup> lenders, schools, and more.<sup>10</sup> The resulting deprivation of economic opportunity

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5. See *The Economic Impacts of the 2020 Census and Business Uses of Federal Data: Hearing Before the J. Econ. Comm.*, 116th Cong. 12 (2019) (statement of Dr. Nicholas Eberstadt, Henry Wendt Chair in Political Economy, American Enterprise Institute); Sarah K.S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948 to 2010*, 54 DEMOGRAPHY 1795, 1806 (2017) (documenting prevalence of prison and felony records). Misdemeanor convictions are harder to quantify than felony convictions because of the lack of available data, but they are surely more common because misdemeanors make up the large majority of every state's criminal caseload. See Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 n.81 (2018).

6. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790–91 (2012); JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 4 (2015).

7. See MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* §§ 1:11–1:12, 2:8, 2:44, 2:75, 6:16 (2018); Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, 272 NAT'L INST. JUST. J. 25, 25 (2013), <https://www.ncjrs.gov/pdffiles1/nij/241927.pdf> [<https://perma.cc/C2FM-8GF3>]; see also Chin, *supra* note 6, at 1811–14; Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1089–94 (2015). For a useful compilation of these legal consequences, see *National Inventory of Collateral Consequences of Conviction*, CSG JUST. CTR., <https://niccc.csgjusticecenter.org> [<https://perma.cc/G9EG-L99H>].

8. See, e.g., NAN ASTONE, MICHAEL KATZ & JULIA GELATT, *URB. INST., INNOVATIONS IN NYC HEALTH & HUMAN SERVICES POLICY: YOUNG MEN'S INITIATIVE 6* (2014), <https://www.urban.org/sites/default/files/publication/32651/413057-Innovations-in-NYC-Health-and-Human-Services-Policy-Young-s-Men-s-Initiative.PDF> [<https://perma.cc/V954-Y23W>].

9. See, e.g., ANNE MORRISON PIEHL, *THE HAMILTON PROJECT, PUTTING TIME LIMITS ON THE PUNITIVENESS OF THE CRIMINAL JUSTICE SYSTEM* 9 (2016), [https://www.hamiltonproject.org/assets/files/reducing\\_punitiveness\\_piehl\\_policymemo.pdf](https://www.hamiltonproject.org/assets/files/reducing_punitiveness_piehl_policymemo.pdf) [<https://perma.cc/XQ5P-DWKF>]; MARIE CLAIRE TRAN-LEUNG, *SARGENT SHRIVER NAT'L CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING* 1 (2015), <https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf> [<https://perma.cc/GV7K-GSEV>].

10. See, e.g., NAT'L ASS'N OF CRIM. DEF. LAWS., *COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME* 9 (2014), <https://www.nacdl.org/getattachment/4a1f16cd-ec82-44f1-a093-798ee1cd7ba3/collateral-damage-america-s-failure-to-forgive-or-forget-in-the-war-on-crime-a-roadmap-to-restore-rights-and-status-after-arrest-or-conviction.pdf> [<https://perma.cc/EL3N-LHU4>]; Beth Feldstein, *The Steep Price of a Clean Slate*, EQUAL JUST. UNDER L. (June 20, 2019),

makes it harder for people with records to rebuild their lives as productive, law-abiding members of the community.

Expungement laws are, at least potentially, a powerful tool to address these hurdles.<sup>11</sup> They seek to provide a second chance to those who have completed their sentences, preventing them from being permanently relegated to a form of second-class citizenship. Yet despite the growing momentum behind these laws, there has historically been almost no empirical evidence about their effectiveness. That's because expungement is difficult for researchers to study: expunged records are, by definition, secret.

Recently, along with my colleague J.J. Prescott, I completed a first-of-its-kind statewide study of expungements in Michigan.<sup>12</sup> We reached a data-sharing agreement with several Michigan agencies and were able to obtain access to deidentified expunged records (and comparable non-expunged records), plus complete criminal histories and wage records on the same individuals. Our study reached three key conclusions.

First, people who obtained expungements virtually all stayed crime-free thereafter.<sup>13</sup> Rearrest and reconviction rates were incredibly low: about 7% and 4%, respectively, over a five-year period, and those were almost all nonviolent misdemeanors.<sup>14</sup> Only 1% were convicted of any felony over the next five years, and only 0.6% were convicted of any violent crime (including violent misdemeanors).<sup>15</sup> Indeed, it appears that expungement recipients commit fewer crimes than the average adult in Michigan (an average that includes all those *never* convicted of a crime).<sup>16</sup> Our data can't tell us *why* these rates were so low: whether this group was very low risk to begin with or whether expungement helped them to stay crime free. Other research suggests both explanations are probably true.<sup>17</sup> But either way, the findings

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<https://equaljusticeunderlaw.org/thejusticereport/the-steep-price-of-a-clean-slate> [<https://perma.cc/9JFM-D68Y>] (“[O]ur laws perpetuate a cycle of poverty where financially [ ] struggling people with criminal records are stuck as second-class citizens.”); Eric Westervelt & Barbara Brosher, *Scrubbing the Past To Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019, 4:58 AM), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> [<https://perma.cc/68EJ-56WH>].

11. See, e.g., Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 *FORDHAM L. REV.* 2821, 2824–26 (2018); Amy Myrick, *Facing Your Criminal Record: Expungement and the Collateral Problem of Wrongfully Represented Self*, 47 *LAW & SOC'Y REV.* 73, 74 (2013).

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

13. See *id.* at 2510–23.

14. *Id.* at 2513.

15. *Id.* at 2513–14.

16. See *id.* at 2514–15.

17. *Id.* at 2518–21; see also *infra* notes 97–107 and accompanying text.

help to defuse the public safety objections sometimes leveled at expungement reforms.

Second, expungement appears to have substantially expanded recipients' job opportunities.<sup>18</sup> Within a year after expungement, average wages increased by about 23% (after controlling for the same individuals' prior wage trends). This increase was driven by unemployed or marginally employed people finding stable jobs.<sup>19</sup> One can debate whether this entire gain is a *causal* effect of the expungement, but our data provide good reason to think it is at least substantially so.<sup>20</sup> If so, expungement compares quite favorably to other common policies (like job training) that states invest in to expand job access, and it could be a tool for reducing racial disparities in employment as well.<sup>21</sup>

Third, the bad news is that all this good news affects only a small group: under petition-based systems like the one we studied, very few people actually obtain expungement.<sup>22</sup> Like most states, Michigan has long had demanding eligibility requirements for expungements, so most people with records don't qualify.<sup>23</sup> But even among those who *did* qualify under the rules that applied during our study period, we found that only 6.5% received expungements within five years of becoming eligible.<sup>24</sup> The others mainly didn't apply at all. Based on our conversations with expungement experts, we think many qualified people didn't know they were eligible, and others were daunted by the extremely burdensome process required to apply.

Together, these findings argue strongly for the expansion of expungement laws and in particular for laws that make expungement procedurally easier to obtain—especially Clean Slate laws that automate expungement. Many states are already moving in this direction—including Michigan, which just passed a Clean Slate law as well as many changes loosening restrictions on the petition-based expungement process.<sup>25</sup> Arizona can and should join this wave of reform.

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18. See Prescott & Starr, *supra* note 12, at 2523–43.

19. See *id.* at 2528.

20. See *id.* at 2533–43.

21. See *id.* at 2551–52.

22. See *id.* at 2486–510.

23. See MICH. COMP. LAWS § 780.621 (2020); Prescott & Starr, *supra* note 12, at 2481–83; *Expungement FAQs: Adult Criminal Record FAQs*, THE PAPILLON FOUND., [https://www.papillonfoundation.org/information/expungement-faqs/#Adult\\_Criminal\\_Record](https://www.papillonfoundation.org/information/expungement-faqs/#Adult_Criminal_Record) [<https://perma.cc/SA3T-GWF6>].

24. Prescott & Starr, *supra* note 12, at 2489.

25. Press Release, Gretchen Whitmer, Governor, State of Michigan, Governor Whitmer Signs Bipartisan “Clean Slate” Criminal Justice Reform Bills Expanding Opportunities for Expungement, Breaking Barriers to Employment and Housing Opportunities (Oct. 12, 2020),

Arizona would have some catching up to do even to join the mainstream of states that provide petition-based expungement processes. But here, I argue that it should simply skip this step and move directly to an automated Clean Slate approach. Other states began by adopting petition-based approaches, because in the past, technological means to automate expungement didn't exist. Now that the technology is there, there's simply no reason to put a bureaucratic, costly process in place. Automation will save implementation costs and make access to expungement meaningful for those who meet the legal requirements.

In Part I of this Article, I provide basic background on expungement laws and existing research and give an overview of the design of my research with Professor Prescott. In Part II, I summarize the findings of our Michigan study, and in Part III, I turn to the context of Arizona, reviewing relevant existing law and policy and proposing reforms. In the Conclusion, I summarize the case for reform and very briefly address some potential objections.

## I. BACKGROUND

### A. *The Expungement Policy Landscape*

Criminal convictions impose significant burdens on individuals that far outlast the completion of the sentence.<sup>26</sup> Convictions give rise to many so-called “collateral” legal consequences.<sup>27</sup> For example, hundreds of professions in many states have occupational licensing restrictions that exclude people with felonies, regardless of the felony's relevance.<sup>28</sup> Felonies

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<https://www.michigan.gov/whitmer/0,9309,7-387-90499-542110--,00.html>

[<https://perma.cc/EG34-YB4F>] (citing our research); H.B. 4980, 100th Leg., Reg. Sess. (Mich. 2020), <http://www.legislature.mi.gov/documents/2019-2020/publicact/htm/2020-PA-0193.htm> [<https://perma.cc/MSP7-JJXF>].

26. See sources cited *supra* note 6.

27. See sources cited *supra* note 7; THE PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY (2010), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs\\_assets/2010/collateralcosts1.pdf](https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1.pdf) [<https://perma.cc/736J-BNVH>]; NAT'L EMP. L. PROJECT, RESEARCH SUPPORTS FAIR-CHANCE POLICIES (2016), <https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf> [<https://perma.cc/6UVQ-33EK>].

28. See CHIDI UMEZ & REBECCA PIRIUS, NAT'L CONF. OF STATE LEGISLATURES, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS 2 (2018), [http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords\\_v06\\_web.pdf](http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf) [<https://perma.cc/6GKS-GJUF>]; Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, in *LAW AS PUNISHMENT / LAW AS REGULATION* 77, 87–88 (Austin Sarat

also trigger restrictions on voting,<sup>29</sup> access to firearms, educational loans, and many public benefits.<sup>30</sup> Beyond their legal consequences, convictions also create lasting obstacles in private markets for jobs, housing, and education.<sup>31</sup> This is confirmed by considerable existing research: for example, field experiments that find that employers are much less likely to call back otherwise identical candidates with records.<sup>32</sup>

Tens of millions of Americans have records, and there are substantial racial and socioeconomic disparities in their distribution.<sup>33</sup> So these effects reduce economic mobility for those they affect and their families and are among the drivers of race gaps in employment and other measures of well-

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et al. eds., 2011); Press Release, Kauffman Found., Policy Changes Needed To Unlock Employment and Entrepreneurial Opportunity for 100 Million Americans with Criminal Records, Kauffman Research Shows (Nov. 29, 2016), <https://www.newswire.com/news/policy-changes-needed-to-unlock-employment-and-entrepreneurial-5535013> [<https://perma.cc/FGB9-34LR>]; Shoshana Weissmann & Nila Bala, Opinion, *Criminal Justice, Occupational Licensing Reforms Can Go Hand in Hand*, HILL (Apr. 15, 2018, 4:30 PM), <https://thehill.com/opinion/civil-rights/383262-criminal-justice-occupational-licensing-reforms-can-go-hand-in-hand> [<https://perma.cc/C89U-KYXK>].

29. See CHRISTOPHER UGGEN ET AL., THE SENT'G PROJECT, 6 MILLION LOST VOTERS: STATE-LEVEL ESTIMATES OF FELONY DISENFRANCHISEMENT, 2016, at 13 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf> [<https://perma.cc/LXR6-QBXT>].

30. See NAT'L ASS'N OF CRIM. DEF. LAWS., *supra* note 10, at 19; AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 7–13 (3d ed. 2004); PAUL SAMUELS & DEBBIE MUKAMAL, LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY 12–16 (2004), <http://www.november.org/resources/LACReportCard.pdf> [<https://perma.cc/FGV5-39ZZ>]; Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 23–25 (Marc Mauer & Meda Chesney-Lind eds., 2002); Ben Geiger, Comment, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1204–06 (2006); Prescott & Starr, *supra* note 12, at 2471.

31. See Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 471 (2006); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937, 960 (2003).

32. See Pager, *supra* note 31, at 946–48, 958; Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 192–200 (2018) [hereinafter Agan & Starr, *Ban the Box*]; Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560–61 (2017).

33. See E. ANN CARSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PRISONERS IN 2016, at 10 (2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf> [<https://perma.cc/68J8-QFQT>] (comparing imprisonment rates by race); Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 476 (2014) (comparing arrest rates by race).

being.<sup>34</sup> These consequences have driven calls to adopt reforms that give people with records a “second chance.”<sup>35</sup> There are several strands of this movement: for example, “Ban-the-Box” laws delay employer access to criminal records until late in the hiring process.<sup>36</sup> But for people with records, the most significant potential for relief comes from expungement laws. Because expungement clears an individual’s record, or at least seals and negates it for most purposes, it can effectively alleviate many different hurdles at once.

Most expungement laws do not wholly eliminate a conviction from an individual’s record for all purposes. These records usually continue to exist in sealed form and can be used for certain narrow purposes such as law enforcement investigations or sentencing for future crimes. However, expungement laws typically eliminate all or almost all state-level restrictions on employment, licensing, and benefits, and give individuals the legal right to say “no” (with no risk of fraud liability) when an employer, landlord, or other entity asks if they have a conviction.<sup>37</sup> Employers, landlords, and the like are typically forbidden from considering expunged convictions even if they learn of them, and on the other hand, cannot be held liable for failing to consider them (for example, in a negligent hiring suit).<sup>38</sup>

Expungement laws typically have stringent eligibility rules, which vary across states. Almost all states impose a waiting period after completing the

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34. See THE PEW CHARITABLE TRS., *supra* note 27, at 27; Andi Mullin, *Banning the Box in Minnesota—and Across the United States!*, CMTY. CATALYST (Dec. 2, 2013), <https://www.communitycatalyst.org/blog/banning-the-box-in-minnesota-and-across-the-united-states> [<https://perma.cc/69C6-TBU2>].

35. See sources cited *supra* note 1; David Brand, *A Criminal Justice Reform Would Give Thousands a Clean Slate—if Only They Would Apply*, BROOK. DAILY EAGLE (Nov. 25, 2019), <https://brooklyneagle.com/articles/2019/11/25/a-criminal-justice-reform-would-give-thousands-a-clean-slate-if-only-they-would-apply/> [<https://perma.cc/34H3-NDKR>]; Nila Bala & Rebecca Vallas, Opinion, *State Momentum in Criminal Record Sealing Fuels Federal Clean Slate Bill*, HILL (Mar. 2, 2020, 2:00 PM), <https://thehill.com/opinion/criminal-justice/485477-state-momentum-in-criminal-record-sealing-fuels-federal-clean-slate-bill> [<https://perma.cc/W5MN-T2GB>].

36. See LINDA EVANS, ALL OF US OR NONE, BAN THE BOX IN EMPLOYMENT: A GRASSROOTS HISTORY 8 (2016), <http://criticalresistance.org/wp-content/uploads/2014/04/BTB-emp-report.pdf> [<https://perma.cc/2LAU-NPUA>]; BETH AVERY & HAN LU, NAT’L EMP. L. PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS (2020), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2020.pdf> [<https://perma.cc/E7LE-HDDP>].

37. THE PAPILLON FOUND., *supra* note 23.

38. See, e.g., CAL. LAB. CODE § 432.7(a)(1) (West 2020) (prohibiting employment discrimination); CAL. GOV’T CODE § 12952 (West 2020) (prohibiting disclosure). In Michigan, it is a misdemeanor to rely on or divulge the existence of an expunged conviction. MICH. COMP. LAWS § 780.623(5) (2020).

sentence (or sometimes after the conviction), during which the individual must stay crime-free.<sup>39</sup> States also sometimes exclude certain types of crimes,<sup>40</sup> limit expungement to comparatively minor crimes, or limit the number of convictions that the individual can have.<sup>41</sup> For example, during the time period covered by our Michigan study, state law extended expungement to first-time offenders with a single conviction only, after five clean years.<sup>42</sup> Sex offenses, traffic offenses, and the most serious class of felonies are excluded.<sup>43</sup> Many states, including Michigan, are now adopting laws making these restrictions somewhat less stringent.<sup>44</sup>

The latest wave of expungement legislation, referred to by the label “Clean Slate,” makes expungement automatic in some cases.<sup>45</sup> This is a substantial change in the typical expungement model, in which individuals who qualify must apply to a court, often by completing quite onerous petition procedures, and the court has the discretion to decline expungement.<sup>46</sup> The Clean Slate approach, in contrast, was exemplified by landmark legislation in Pennsylvania in 2018, where it was passed by a near-unanimous, Republican-dominated legislature (demonstrating a growing bipartisan consensus in favor of expungement laws).<sup>47</sup> Similar laws have recently passed in other

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39. See *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RTS. PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside> [https://perma.cc/4FTN-LP74] (Oct. 2020).

40. E.g., N.C. GEN. STAT. § 15A-145.5 (2020); OKLA. STAT. tit. 22, § 18(A)(11) (2020).

41. See RESTORATION OF RTS. PROJECT, *supra* note 39; *Compare States*, CLEAN SLATE CLEARINGHOUSE, <https://cleanslateclearinghouse.org/compare-states> [https://perma.cc/94VU-UPRD]; Prescott & Starr, *supra* note 12, at 2472–76 (describing this legal landscape in more detail).

42. MICH. COMP. LAWS § 780.621(3) (2011).

43. *Id.* § 780.621(2).

44. See sources cited *supra* note 25 (describing new Michigan legislation); LOVE & SCHLUSSEL, PATHWAYS TO REINTEGRATION, *supra* note 1 (reviewing new legislation passed in 2019).

45. See CLEAN SLATE, *supra* note 2.

46. See RESTORATION OF RTS. PROJECT, *supra* note 39; Simone Ispa-Landa, *Believing in a Positive Future as a Form of Stigma Resistance: Narratives of Denied Expungement-Seekers*, 40 DEVIAN'T BEHAV. 1428, 1435 (2019); LOVE & SCHLUSSEL, PATHWAYS TO REINTEGRATION, *supra* note 1, at 14.

47. See Act of June 28, 2018, No. 402, 2018 Pa. Laws No. 56 (codified in scattered sections of 18 PA. CONS. STAT. and 42 PA. CONS. STAT.); Press Release, Tom Wolf, Governor, State of Pennsylvania, Governor Wolf: “My Clean Slate” Program Introduced To Help Navigate New Law (Jan. 2, 2019), <https://www.governor.pa.gov/newsroom/governor-wolf-my-clean-slate-program-introduced-to-help-navigate-new-law> [https://perma.cc/ENF7-UDRE]; *Frequently Asked Questions About Clean Slate*, CMTY. LEGAL SERVS. OF PHILA. (June 26, 2018), <https://clsphila.org/employment/frequently-asked-questions-about-clean-slate/> [https://perma.cc/3PY5-U3CM]; J.D. Prose, *Pennsylvania Becomes First State with ‘Clean Slate’*



states, including South Dakota, Utah, California, New Jersey, and Michigan.<sup>48</sup>

Under the Clean Slate approach, computer algorithms use state criminal history databases to identify those who meet the legal requirements for expungement, and (while actual implementation procedures vary by state) there would be no petitions and no judicial discretion. All states that have followed this approach so far have left petition-based processes in place simultaneously, because automatic relief is available only to a subset of those who may petition for expungement, and/or only after a longer waiting period. For example, Pennsylvania's Clean Slate bill applies only to nonviolent misdemeanors;<sup>49</sup> California's is more ambitious but still excludes felonies resulting in jail time.<sup>50</sup> Michigan's is one of the farthest-reaching of the new Clean Slate bills, applying even to many serious felonies; however, it has a ten-year waiting period for felonies and a seven-year waiting period for misdemeanors,<sup>51</sup> while petition-based expungement will now require a three-year wait for some misdemeanors and five years for other crimes.<sup>52</sup>

### B. Our Expungement Research

The research project that I carried out with Professor Prescott sought to fill a major gap in existing knowledge about the effects of expungement laws. Despite the enormous legislative momentum surrounding such laws and their potential importance, they have been subject to troublingly little empirical analysis. Prior to our study, there was no published research on “uptake” of

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*Law for Nonviolent Criminal Records*, BEAVER CNTY. TIMES (June 28, 2018, 5:00 PM), <https://www.timesonline.com/news/20180628/pennsylvania-becomes-first-state-with-clean-slate-law-for-nonviolent-criminal-records> [https://perma.cc/BB64-H5DV].

48. See S.D. CODIFIED LAWS § 23A-3-34 (2020); Jessica Miller, *Utah Lawmakers Pass the ‘Clean Slate’ Bill To Automatically Clear the Criminal Records of People Who Earn an Expungement*, SALT LAKE TRIB. (Mar. 16, 2019), <https://www.sltrib.com/news/2019/03/14/utah-lawmakers-pass-clean> [https://perma.cc/HVV7-VFE6]; UTAH CODE ANN. § 77-40-102 (West 2020); CCRC Staff, *California Becomes Third State To Adopt “Clean Slate” Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (Oct. 10, 2019), <https://ccresourcecenter.org/2019/10/10/california-becomes-third-state-to-adopt-clean-slate-record-relief> [https://perma.cc/8U5C-XSRJ]; CAL. PENAL CODE § 1203.425 (West 2020); Press Release, Phil Murphy, Governor, State of New Jersey, Governor Murphy Signs Major Criminal Justice Reform Legislation (Dec. 18, 2019), <https://www.nj.gov/governor/news/news/562019/approved/20191218a.shtml> [https://perma.cc/V5YE-RK8F]; N.J. REV. STAT. § 2C:52-5.4 (2020); sources cited *supra* note 25 (describing new Michigan legislation).

49. 18 PA. CONS. STAT. § 9122.2 (2020).

50. CAL. PENAL CODE § 1203.425 (West 2020).

51. Press Release, Gretchen Whitmer, *supra* note 25.

52. H.B. 4983, 100th Leg., Reg. Sess. (Mich. 2020).

expungement opportunities,<sup>53</sup> nor on recidivism rates of those receiving expungements. The available work on employment outcomes was very limited, with the leading paper being a small study of 235 individuals who applied for expungements or other post-conviction relief through a particular law clinic.<sup>54</sup>

Why has there been so little work on expungement? The main challenge has been lack of access to data: obviously, expunged records are generally unavailable, and employment and wage records are also private. Luckily, we were able to overcome these problems via a data-sharing agreement with the State of Michigan, allowing a large-scale statewide study.<sup>55</sup> We received complete criminal histories from the Michigan State Police as well as Unemployment Insurance Agency wage records on hundreds of thousands of individuals. The state performed the matching of records across these agencies and then deidentified the data before turning them over to us.

Our dataset includes everyone who received an expungement in Michigan through March 2014 (close to 30,000 people), as well as a much larger group of similar individuals who did not receive expungements. Our study discusses our dataset (and some limitations, which are relatively minor) in detail.<sup>56</sup>

Note that in Michigan, expungements are called “set-asides,” a point that potentially raises confusion for an Arizona audience, given that in Arizona the same term is used to refer to a lesser form of post-conviction relief. “Set-asides” in Michigan entail the sealing of records and allow the recipient to proceed for most purposes (such as job applications) as though the record did not exist, while also eliminating most collateral legal consequences. I use the term “expungement” here to refer to this procedure, to avoid the confusion.

## II. OUR FINDINGS

Here, I briefly summarize our study’s findings on the three major empirical questions it addressed. First, Section A documents the problem of low expungement “uptake,” i.e., the low rate at which eligible people actually obtain expungements. Section B presents our findings on post-expungement

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53. *But see* Colleen V. Chien et al., *The Washington State Second Chance Expungement Gap* 1 (Feb. 28, 2020) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3529777](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529777) [<https://perma.cc/WNY4-SPNR>] (presenting brief, preliminary findings of a new study that also showed very low expungement uptake).

54. *See* Jeffrey Selbin et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 33, 38–40 (2018).

55. *See* Prescott & Starr, *supra* note 12, at 2483.

56. *Id.* at 2483–86.

crime rates, which were very low. And Section C shows that expungement recipients made impressive gains in wages and employment rates.

#### A. Low Uptake of Expungement Opportunities

The first question our study addressed was expungement “uptake.”<sup>57</sup> The uptake rate is the percentage of legally eligible individuals who receive an expungement over a given period of time. We found that this rate was low: about 6.5% of those who met the requirements actually got expungements within five years of becoming eligible.<sup>58</sup> Because expungement denials by judges are fairly rare (Michigan judges grant about 75% of applications they receive),<sup>59</sup> this implies that over 90% of eligible individuals did not even apply.<sup>60</sup>

To reach this conclusion, we first identified a sample cohort of nearly 10,000 legally eligible individuals.<sup>61</sup> All had one conviction for an expungement-eligible crime on a single criminal count, were sentenced between January 1999 and May 2001, and were not reconvicted within five years.<sup>62</sup> None were sentenced to incarceration, which would have complicated our assessment of subsequent outcomes.<sup>63</sup> These individuals first qualified for expungement between 2004 and 2006, and we tracked them for five subsequent years.<sup>64</sup>

Obtaining this number did require some judgment calls, in particular in defining the sample of those legally eligible for expungements, which constitutes the denominator in the uptake rate. So how confident can we be that the 6.5% estimate is correct? It could be slightly off because of data limitations, but we tested the effect of using a range of different assumptions about the information we were missing (for example, out-of-state and federal convictions, as well as certain date fields that some observations didn’t have).<sup>65</sup>

None of these alternative assumptions changed our result much, and therefore, we are quite confident that we are within a percentage point or two of the correct uptake rate. Also, we know from our broader dataset that most

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57. *See id.* at 2486–510.

58. *Id.* at 2489–90.

59. *Id.* at 2483.

60. *Id.* at 2489.

61. *Id.* at 2490.

62. *Id.* at 2488.

63. In incarceration cases, the eligibility clock runs from release, and we do not have the release dates.

64. *See* Prescott & Starr, *supra* note 12, at 2488 n.141.

65. *See id.* at 2488–93.

people who get expungements get them within five years; we project a lifetime expungement rate of less than 12%.<sup>66</sup> And uptake appears to be even lower for people who have been incarcerated. Among all expungement recipients, only 29% had faced any prison or jail time, and only 2% had been incarcerated for more than one year.<sup>67</sup> So, because our uptake estimate focuses only on people who were not incarcerated, it probably overstates the true overall uptake rate among all those eligible.

Notably, the 6.5% rate is within the subset of people who legally qualify for expungement. But legal eligibility for expungement is narrow in Michigan, like in other states.<sup>68</sup> Thus, the very low uptake rate is itself just a small fraction of a small fraction.<sup>69</sup>

The uptake gap may seem surprising. After all, as discussed above, criminal records place substantial burdens on individuals. One might think that anyone who is eligible to free themselves of this burden would do so eagerly. Yet few do—why?<sup>70</sup>

Our quantitative data don't directly answer that question, so we supplemented our data with a qualitative analysis. We interviewed a number of Michigan's leading lawyers and advocates who work on expungement and reentry issues.<sup>71</sup> They gave us a consistent set of explanations, which increases our confidence that the explanations are correct.

The first problem is lack of information: many eligible individuals either do not know that the expungement law even exists or do not know that they qualify.<sup>72</sup> And few have counsel to advise them.<sup>73</sup> Beyond this problem,

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66. *Id.* at 2493.

67. *Id.* at 2494.

68. *See, e.g., id.* at 2481–83; Telephone Interview with Anonymous, Legal Aid Law. (Feb. 22, 2019); Telephone Interview with Miriam Aukerman, Senior Staff Att'y, ACLU of Mich. (Feb. 16, 2019); E-mail from Josh Hoe, Co-Chair, Pol'y & Educ. Comm., Nation Outside, to author (Feb. 13, 2019, 12:25 PM) (on file with author); *see also* sources cited *supra* note 2.

69. *See* Prescott & Starr, *supra* note 12, at 2509–10.

70. *See id.* at 2501–10.

71. *See* Telephone Interview with Anonymous, Legal Aid Law., *supra* note 68; Telephone Interview with Miriam Aukerman, *supra* note 68; Telephone Interview with Tracey Brame, Assoc. Dean, Cooley L. Sch. (Mar. 11, 2019) (on file with author); E-mail from Josh Hoe, *supra* note 68; Telephone Interview with Michael Kiehne, Att'y, Mich. Legal Help (Feb. 14, 2019); Telephone Interview with Chioke Mose-Telesford, Deputy Dir. of Workforce Dev., City of Detroit (Feb. 27, 2019); E-mail from John Shea, Att'y, Private Prac., to author (Feb. 15, 2019, 1:33 PM) (on file with author); E-mail from Kim Thomas, Clinical Professor of L., Univ. of Mich. L. Sch., to J.J. Prescott, Professor of L., Univ. of Mich. L. Sch. (Feb. 17, 2019, 9:19 PM) (on file with author).

72. *See* Prescott & Starr, *supra* note 12, at 2502.

73. *Id.* at 2505–06; *see, e.g.,* MARGARET (PEGGY) STEVENSON, EXPUNGEMENT: A GATEWAY TO WORK 1–2 (2015), <http://cucs.org/wp-content/uploads/2015/09/Stevenson-Clearinghouse-Article-April-2015.pdf> [<https://perma.cc/8EWZ-YBQD>].

though, even if one is aware of one's eligibility, it is not easy to pursue an expungement. There are a lot of bureaucratic hoops to jump through.<sup>74</sup> The State of Michigan's website includes eleven detailed steps to pursue, including at least two trips to a courthouse (including for a hearing) and one trip to a police station (to get fingerprinted).<sup>75</sup> Forms must be notarized in quadruplicate and mailed off to exactly the right address.<sup>76</sup> A certified record of conviction must be obtained.<sup>77</sup> The cost of all this totals around \$100<sup>78</sup>—quite a bit for those who are economically struggling, and that does not include the cost of transportation, childcare, and/or time off from work to get everything done.<sup>79</sup>

All this is especially daunting for people with records whose past experiences with the criminal justice system have overwhelmingly been very negative.<sup>80</sup> These individuals, now five years or more clear of those negative experiences, often have a very aversive reaction to the idea of reengaging with the system, and they also tend to have limited resources to pay expenses and overcome the administrative hurdles.<sup>81</sup>

In light of these problems, low uptake rates should not be so surprising after all. Researchers have found similarly low uptake rates in other contexts involving access to legal processes or applications for other valuable benefits.<sup>82</sup> Very low uptake rates tend to be found whenever seeking relief requires jumping through hoops—such as paying onerous application fees or navigating difficult or complex procedural requirements—or whenever awareness of the opportunity is relatively low.<sup>83</sup> As this literature suggests, a right or opportunity that is too costly to exercise is effectively worthless.<sup>84</sup>

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74. See Prescott & Starr, *supra* note 12, at 2502.

75. See MICH. CTS., MC 227: APPLICATION TO SET ASIDE CONVICTION 2, <https://courts.michigan.gov/Administration/SCAO/Forms/courtforms/mc227.pdf> [<https://perma.cc/EYV6-YJVF>].

76. See *id.*

77. *Id.*

78. Telephone Interview with Michael Kiehne, *supra* note 71.

79. See Prescott & Starr, *supra* note 12, at 2504.

80. See *id.* at 2504–05.

81. See E-mail from Josh Hoe, *supra* note 68; Telephone Interview with Michael Kiehne, *supra* note 71.

82. Colleen V. Chien, *The Second Chance Gap*, 119 MICH. L. REV. (forthcoming 2020) (manuscript at 12), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3265335](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265335) [<https://perma.cc/98T3-AJVP>]; UGGEN ET AL., *supra* note 29, at 13; Maximilian A. Bulinski & J.J. Prescott, *Online Case Resolution Systems: Enhancing Access, Fairness, Accuracy, and Efficiency*, 21 MICH. J. RACE & L. 205, 217–35 (2016); J.J. Prescott, *Assessing Access-to-Justice Outreach Strategies*, 174 J. INSTITUTIONAL & THEORETICAL ECON. 34, 38 (2018).

83. Prescott & Starr, *supra* note 12, at 2501–06; see Chien, *supra* note 82 (manuscript at 17–23).

84. See Prescott & Starr, *supra* note 12, at 2477–78.

There have been some recent efforts by nonprofits,<sup>85</sup> and even by the Detroit city government,<sup>86</sup> to try to close the uptake gap through legal services.<sup>87</sup> Although these efforts are helpful, they can't possibly close an uptake gap of the enormous size we found. The only thing that will do so is automating expungement, as several states have now done.<sup>88</sup> By eliminating bureaucracy, this process makes expungement much less resource-intensive for the individual and the state. This is a commonsense improvement: once a person has met the legal requirements for expungement, there is simply no reason to make the process an ordeal.

### B. Low Recidivism Rates for Expungement Recipients

The main objections raised by opponents of expungement reforms usually relate to public safety. Opponents suggest that members of the public, including employers, landlords, and the like, have a right to know who has a criminal record so that they can best protect themselves from those individuals' potential future crimes.<sup>89</sup>

This argument has two implicit assumptions. First, it assumes that people with expunged records pose a crime risk (beyond the small crime risk that anybody poses). Second, it implies that expungement expands that risk—or, put another way, that the public nature of criminal records promotes safety by allowing protective steps to be taken. Expungement opponents do not cite empirical support for these assumptions, and no study does support them.<sup>90</sup>

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85. See *Do-It-Yourself Expungement (Adult Conviction)*, MICH. LEGAL HELP, <https://michiganlegalthelp.org/self-help-tools/crime-traffic-and-id/do-it-yourself-expungement-adult-conviction> [<https://perma.cc/5X47-88VN>]; Telephone Interview with Michael Kiehne, *supra* note 71; see also *Have You Been Convicted of a Crime?*, MICH. WORKS! SE., <https://www.mwse.org/expungement> [<https://perma.cc/U4B7-SJCW>]; Telephone Interview with Chioke Mose-Telesford, *supra* note 71.

86. See *Project Clean Slate*, CITY OF DETROIT, <https://detroitmi.gov/departments/law-department/project-clean-slate> [<https://perma.cc/ZJQ2-E4LY>].

87. See Prescott & Starr, *supra* note 12, at 2507–09.

88. See *id.* at 2464–65.

89. See, e.g., 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, 375 (2016) (describing this argument); *Doe v. United States*, 110 F. Supp. 3d 448, 449, 499, 455 (E.D.N.Y. 2015) (stating that “employers are generally entitled to know about the past convictions of job applicants” such that expungements should only be granted in “extraordinary circumstances”); U.S. DEP'T OF JUST., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 1 (2006), [https://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) [<https://perma.cc/4BY8-WT8M>] (stating that employers do background checks “to protect employees, customers, vulnerable persons, and business assets” and avoid negligent-hiring suits).

90. See Prescott & Starr, *supra* note 12, at 2521–23.

Again, there is little existing research on expungement, but our data offer new insights.

Because we have the full criminal records of all Michigan expungement recipients, we are able to directly address the question of their subsequent crime risk.<sup>91</sup> We evaluated two- and five-year rearrest and reconviction rates for nearly 21,000 Michigan residents who received expungements (all those for whom we had enough years of post-expungement outcome data).<sup>92</sup>

We find that these rates are very low. For example, in the five years after expungement, just 4.2% were reconvicted of any crime.<sup>93</sup> Of these, the great majority were only convicted of nonviolent misdemeanors<sup>94</sup> (the most common of which were traffic misdemeanors<sup>95</sup>). Only 0.6% were convicted of a violent crime, and only 1% were convicted of any type of felony.<sup>96</sup> Rates were similarly low when we looked at different subsets of the data, such as people whose expunged conviction was a violent offense.<sup>97</sup>

These rates are not just low compared to those measured in other criminal-justice-involved populations—they are low even compared to the general population of Michigan, that is, all adults in the state, most of whom have no record.<sup>98</sup> In 2009 and 2010 combined, Michigan police made approximately 6.6 arrests per 100 adults in the population.<sup>99</sup> But among those receiving expungements in those years, we see only 4.7 arrests per 100 individuals in a two-year period.<sup>100</sup>

These findings lead to some important follow-up questions. Are these crime rates so low because expungement helps to reduce crime? Or were these individuals simply at very low risk to begin with? And what would

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91. *See id.* at 2511–17.

92. *See id.*

93. *Id.* at 2512–13.

94. *See id.* at 2512.

95. *See id.* at 2509–10.

96. *Id.* at 2512–14.

97. *See id.* at 2512.

98. *See* David J. Harding et al., *Short- and Long-Term Effects of Imprisonment on Future Felony Convictions and Prison Admissions*, 114 PNAS 11103, 11106–07 (2017); Press Release, Michigan Dep't of Corr., Michigan Recidivism Rate Falls to Its Lowest Level at 28.1 Percent (Feb. 13, 2018), <https://www.michigan.gov/som/0,4669,7-192-26847-459956--,00.html> [<https://perma.cc/M9GJ-WKHH>]; Prescott & Starr, *supra* note 12, at 2514.

99. *See* MICH. STATE POLICE, 2009 STATE ARREST TOTALS (2010), [https://www.michigan.gov/documents/msp/2009Annual\\_StatewideArrests\\_332334\\_7.pdf](https://www.michigan.gov/documents/msp/2009Annual_StatewideArrests_332334_7.pdf) [<https://perma.cc/TAA9-D5XV>]; MICH. STATE POLICE, 2010 STATEWIDE ARREST TOTALS (2011), [https://www.michigan.gov/documents/msp/2010\\_Annual\\_StatewideArrests\\_358704\\_7.pdf](https://www.michigan.gov/documents/msp/2010_Annual_StatewideArrests_358704_7.pdf) [<https://perma.cc/5HDB-CWKA>]. Population figures come from the 2010 Census. *QuickFacts: Michigan*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/MI/POP010210> [<https://perma.cc/Q7KR-UZWB>].

100. *See* Prescott & Starr, *supra* note 12, at 2514.

happen to crime rates if expungement were extended to a broader and perhaps higher-risk group?

Our data can't directly answer these questions, but we can offer some informed speculation, drawing on a large body of existing criminological research on the factors influencing recidivism. The short answer is that it's likely that both explanations are true: Michigan expungement recipients were a low-risk group to begin with, and expungement (if anything) probably reduced that risk further. Moreover, if expungement were extended to a higher-risk group, it would probably reduce that group's crime rates too.

There are quite a few reasons to think that the expungement recipients in our dataset had a low baseline risk of criminal recidivism. The most important is the waiting period: all of them had gone at least five years without a subsequent conviction. Studies of criminal "desistance" and "redemption" tell us that people who go that long without offending will rarely offend again.<sup>101</sup> The highest risk period for recidivism is in the first year or two after conviction or release from incarceration.

In addition, this group consisted of first-time offenders with a single conviction, further reducing risk.<sup>102</sup> And the uptake analysis discussed above tells us that even among those meeting the waiting period and other eligibility criteria, this was a highly selected group. These were the individuals with the resources, motivation, and persistence that enabled them to navigate the onerous expungement process—assets that could well be correlated with law-abiding conduct.

But while these individuals likely started out low-risk, there's also good reason to believe that expungement made them even more so. Here again, our interpretation is guided by the broader criminological literature on the factors

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101. See, e.g., ALFRED BLUMSTEIN & KIMINORI NAKAMURA, EXTENSION OF CURRENT ESTIMATES OF REDEMPTION TIMES: ROBUSTNESS TESTING, OUT-OF-STATE ARRESTS, AND RACIAL DIFFERENCES 40–41 (2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/240100.pdf> [<https://perma.cc/BD4R-4GMV>]; Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331–39 (2009); Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 28–30 (2011); Megan C. Kurlychek et al., *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 71–78 (2007); Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 492–98 (2006).

102. See, e.g., U.S. SENT'G COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE FEDERAL SENTENCING GUIDELINES 10, 15 (2004), [https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405\\_Recidivism\\_Criminal\\_History.pdf](https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2004/200405_Recidivism_Criminal_History.pdf) [<https://perma.cc/CMJ5-DGMC>].



that predict recidivism, including unemployment,<sup>103</sup> low wages and poverty,<sup>104</sup> homelessness and housing instability,<sup>105</sup> lack of education,<sup>106</sup> and social stigma.<sup>107</sup> Expungement should be able to reduce at least some of these risk factors, perhaps all of them. Indeed, we document below that expungement opens opportunities for more stable and higher-paid work. It likely also improves access to housing, education, and other benefits. By reducing risk factors, expungement should be expected to reduce crime.

And this expectation should also hold if we expanded access to expungement, either by loosening eligibility requirements or by making the process automatic. To be sure, it wouldn't be surprising to see higher crime rates for the resulting, larger pool of recipients than we saw in the narrower, self-selected pool. The broader pool might (depending on the eligibility changes) extend to people with more recent, more serious, and more extensive records, and in general these factors are associated with a higher baseline risk of crime.<sup>108</sup>

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103. See, e.g., CHI. MAYORAL POL'Y CAUCUS ON PRISONER REENTRY, REBUILDING LIVES. RESTORING HOPE. STRENGTHENING COMMUNITIES. 15 (2006), [https://northstarnews.com/userimages/references/Mayoral%20Policy%20Caucus%20on%20Prisoner%20Reentry.2006\\_City%20of%20Chicago.pdf](https://northstarnews.com/userimages/references/Mayoral%20Policy%20Caucus%20on%20Prisoner%20Reentry.2006_City%20of%20Chicago.pdf) [<https://perma.cc/ANK5-P6AU>]; PAUL GENDREAU ET AL., CTR. FOR CRIM. JUST. STUD., CASE NEEDS REVIEW: EMPLOYMENT DOMAIN 5–7, 12 (2000), [https://www.csc-scc.gc.ca/research/092/r90\\_e.pdf](https://www.csc-scc.gc.ca/research/092/r90_e.pdf) [<https://perma.cc/P89C-L8UM>]; JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 40–41 (2003); JEREMY TRAVIS ET AL., URB. INST., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31–33 (2001), [http://research.urban.org/UploadedPDF/from\\_prison\\_to\\_home.pdf](http://research.urban.org/UploadedPDF/from_prison_to_home.pdf) [<https://perma.cc/K2Z6-RYGR>]; Nicholas Freudenberg et al., *Coming Home from Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 95 AM. J. PUB. HEALTH 1725, 1734 (2005).

104. See Samuel L. Myers, Jr., *Estimating the Economic Model of Crime: Employment Versus Punishment Effects*, 98 Q.J. ECON. 157, 163 (1983); Kristy Holtfreter et al., *Poverty, State Capital, and Recidivism Among Women Offenders*, 3 CRIMINOLOGY & PUB. POL'Y 185, 198 (2004).

105. See Stephen Metraux & Dennis P. Culhane, *Homeless Shelter Use and Reincarceration Following Prison Release*, 3 CRIMINOLOGY & PUB. POL'Y 139, 151–53 (2004).

106. See STEPHEN J. STEURER & LINDA G. SMITH, CORR. EDUC. ASS'N, EDUCATION REDUCES CRIME: THREE-STATE RECIDIVISM STUDY 20–21 (2003), <https://files.eric.ed.gov/fulltext/ED478452.pdf> [<https://perma.cc/DA7J-KHDF>]; John Nuttall et al., *The Effect of Earning a GED on Recidivism Rates*, 54 J. CORR. EDUC. 90, 92–94 (2003); Kristen M. Zgoba et al., *The Influence of GED Obtainment on Inmate Release Outcome*, 35 CRIM. JUST. & BEHAV. 375, 376–77 (2008).

107. See, e.g., Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 736–37 (1981); William D. Payne, *Negative Labels: Passageways and Prisons*, 19 CRIME & DELINQ. 33, 33–34 (1973); David R. Karp, *The New Debate About Shame in Criminal Justice: An Interactionist Account*, 21 JUST. SYS. J. 301, 305–07 (2000).

108. See Prescott & Starr, *supra* note 12, at 2522–25, 2552.

But by definition, this higher baseline risk of crime isn't caused by expungement. To the contrary, extending expungement to a higher-risk group should still be expected to reduce that group's crime rates. Indeed, if expungement reduces crime rates, there's actually more potential public safety upside in applying it to a group that has non-negligible crime rates to begin with.<sup>109</sup>

Expungement opponents have never offered any empirical evidence for the contrary theory that expungement undermines public safety, and the logic underlying this theory crumbles under even a little bit of scrutiny. The idea seems to be that knowledge provides safety: that employers and other members of the public can learn who has a criminal record and take steps to protect themselves.<sup>110</sup>

But this is illogical as a strategy for protecting the public at large. Nobody does background checks on everyone they meet, much less on every stranger who could potentially harm them. Having a criminal record that appears in public databases inflicts many disadvantages, but it in no way disables an individual from committing future crimes. A background check might allow some particular employer or landlord to avoid hiring or renting to someone with a record. But if that person poses a crime risk, not hiring them only displaces that risk to some other landlord or employer or to the general public.<sup>111</sup> And if they end up jobless or homeless, that risk will only be larger.

Finally, our data speak only to expungement recipients' subsequent crime risk. But one might imagine a concern about another crime effect: general deterrence.<sup>112</sup> Perhaps the availability of expungement could encourage potential first-time offenders to commit crime by alleviating some of the negative consequences of a conviction.<sup>113</sup>

But even if this is theoretically possible, in practice it is very unlikely. Research on general deterrence strongly indicates that potential offenders, if they are sensitive to the consequences of getting caught at all, are at best focused on consequences that are immediate and quite certain.<sup>114</sup> And the

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109. *See id.*

110. *See id.* at 2522.

111. *See id.*; cf. J.J. Prescott, *Portmanteau Ascendant: Post-Release Regulations and Sex Offender Recidivism*, 48 CONN. L. REV. 1035, 1040, 1057 (2016) (identifying a similar pattern among sex offenders subject to notification and registration requirements).

112. *See* Prescott & Starr, *supra* note 12, at 2544–48.

113. *See* Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 532–36 (1996) (suggesting that the social harms of having a conviction may contribute to deterrence).

114. *See* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 5–6, 27–28 (2017) (reviewing the literature and finding that while

possibility of eventual expungement after a waiting period is far too remote.<sup>115</sup> It is implausible that potential offenders would decide it was worth it to risk arrest, conviction, public embarrassment, serving the applicable sentence, and then years of collateral consequences, so long as they could someday get an expungement if they stay crime-free throughout those years.

If anything, the people whose incentives would more likely be impacted are those who have already served a criminal sentence but have not yet qualified for expungement.<sup>116</sup> For those individuals, the collateral consequences of the conviction are ongoing, not remote, and expungement may seem quite attractive. If potential recipients know that expungement is a possibility after they complete a given waiting period without another crime, it could provide a positive incentive to stay crime-free, especially as that date approaches.

This “specific deterrence” possibility, although not tested by our data, provides in theory another reason expungement policy could reduce crime. And it’s another good reason to worry that (as we found in our uptake research) many qualified individuals don’t actually know that expungement is possible. It’s in the public’s interest to look for ways to raise their awareness.

### C. Employment Gains After Expungement

A key premise of the Clean Slate movement is the assumption that expungements improve job access for people with records. But do they? Given the existing research showing that having a record makes it harder to get a job, the answer might seem obvious. Still, some skeptics have suggested that expungement is too little, too late. Some argue that those with cleared records will nonetheless not be able to escape the digital trails of their past

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policing appears to deter crime, longer sentences do not); J.J. Prescott, *Criminal Sanctions and Deterrence*, in 1 *ENCYCLOPEDIA OF LAW AND ECONOMICS* 498, 508–09 (Alain Marciano & Giovanni Battista Ramello eds., 2019); Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 *UMKC L. REV.* 113, 123 (2018); Michael Tonry, *An Honest Politician’s Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony*, in 23 *DETERRENCE, CHOICE, AND CRIME* 365, 365 (Daniel S. Nagin et al. eds., 2018); Giovanni Mastrobuoni & David A. Rivers, *Criminal Discount Factors and Deterrence 2* (Inst. for the Study of Lab., Discussion Paper No. 9769, 2016), <http://ftp.iza.org/dp9769.pdf> [<https://perma.cc/6VXS-LL8T>].

115. See Prescott & Starr, *supra* note 12, at 2545–47.

116. See Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System: Regression Discontinuity Evidence on Court Deferrals 3–6* (Aug. 3, 2017) (unpublished manuscript), [https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2017/08/Diversion\\_in\\_the\\_Criminal\\_Justice\\_System.pdf](https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2017/08/Diversion_in_the_Criminal_Justice_System.pdf) [<https://perma.cc/F98G-SGCH>].

convictions, which survive indefinitely on the Internet.<sup>117</sup> Others note that the waiting periods are so long that expungement does not reach people during the time that they need the most help getting a job.<sup>118</sup>

My study with Professor Prescott provided the first large-scale empirical examination of this question. Fortunately, we found large wage and employment gains.<sup>119</sup> It could be true that expungement isn't as effective in improving job access as it might be if it came earlier or if the Internet did not exist. But it still seems to make a considerable difference for many job applicants.

To assess the effects of expungement, we didn't try to compare expungement recipients to non-recipients; these two groups likely differ too much in both observable and unobservable ways. Instead, we looked only at recipients (a large, thirteen-year cohort), comparing their post-expungement employment trends to their pre-expungement trends.<sup>120</sup> We estimated trend changes, effectively using each individual's past as his or her own control.<sup>121</sup> And because these trends could also be affected by underlying changes in the state's economy, we controlled for quarterly Michigan unemployment and labor force participation measures.<sup>122</sup>

After an expungement, we saw a large, statistically significant upward turn in the trajectories of recipients' wages and employment rates.<sup>123</sup> Most of the gain came in the first year, but it was sustained over time.<sup>124</sup> Within one year of the expungement, the probability that the individual was employed at all (earning anything at all in the quarter) increased by a factor of 1.13.<sup>125</sup> When we used a less minimalistic definition of employment (earning at least \$100 a week, averaged over the quarter), the probability of employment increased by even more: a factor of 1.23.<sup>126</sup> And average wages also went up by 23%.<sup>127</sup> The wage increase appeared to be driven by the employment increase—that is, by unemployed or very marginally employed people finding stable employment.<sup>128</sup>

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117. See Prescott & Starr, *supra* note 12, at 2479 nn.96–97.

118. See *id.* at 2468 n.31.

119. See *id.* at 2533.

120. *Id.* at 2523.

121. *Id.* at 2524.

122. *Id.* at 2526.

123. *Id.* at 2527–33.

124. See *id.* at 2527.

125. *Id.*

126. *Id.* at 2528.

127. *Id.*

128. *Id.*

A key question is whether the improvements we saw were a causal effect of the expungement. There are some causal inference challenges here. The basic problem is that the timing of expungement isn't random. People have to be motivated to apply.<sup>129</sup> And people are somewhat more likely to apply when they have recently lost a job or experienced a substantial wage decline.<sup>130</sup> That raises the possibility that post-expungement gains could simply represent regression to the mean (a "bounce-back" effect).<sup>131</sup> Or it could represent the effect of the individual being especially motivated to get a job: they might be applying for expungement and applying for lots of jobs at the same time. And it could be the job applications that explain their subsequent improvements.<sup>132</sup>

However, a close analysis of our data provides a couple of strong reasons to believe that at least a substantial part of the large gains that we see are, genuinely, the effect of the expungement.<sup>133</sup> The first reason is the timing of the gains. If the mean-regression or motivation stories were the main explanation, we'd expect to see the wage and employment upturns happening when people apply for expungements. Instead, we see those gains only when people receive expungements, typically one to two quarters after they apply.<sup>134</sup>

Second, there is one subgroup of applicants for whom the timing of applications isn't correlated with a prior job or wage loss and may be as good as random for our purposes. These are the people who apply right away, when they first become eligible.<sup>135</sup> There's a huge surge of applicants right after the five-year waiting period expires, and a quarter of all expungements are granted within a year of that date. This surge can only be explained by pent-up demand;<sup>136</sup> for these applicants, application timing clearly is shaped by an arbitrary legal rule, not by an employment setback or a sudden change in motivation.<sup>137</sup> But when we look only at these early applicants, we see employment and wage gains that are nearly as large as we see in the full sample.<sup>138</sup>

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129. *See id.* at 2533.

130. *Id.* at 2533–34.

131. *See id.* at 2534–35. *See generally* Adrian G. Barnett et al., *Regression to the Mean: What It Is and How To Deal with It*, 34 INT'L J. EPIDEMIOLOGY 215 (2005) (explaining this concept).

132. *See* Prescott & Starr, *supra* note 12, at 2534–35.

133. *See id.* at 2535.

134. *Id.* at 2535–36.

135. *Id.* at 2536.

136. *See id.* at 2496 nn.160–61, 2536–38.

137. *See id.* at 2539–41.

138. *See id.* at 2537 tbl.6.

And those gains are very large indeed. For example, the wage gains we attribute to expungement are five to ten times the average gains that one meta-analysis found for job training programs, a strategy that states and cities routinely pursue for improving employment in disadvantaged groups, including people with records.<sup>139</sup> Meanwhile, job training is much more expensive than expungement (which, under an automatic approach, could be essentially free).<sup>140</sup> Expungement appears to offer a promising and cost-effective way to measurably improve the employment prospects of people with records.

### III. POTENTIAL FOR EXPUNGEMENT REFORM IN ARIZONA

Arizona is one of the few states that does not have any procedure for the expungement or sealing of otherwise valid criminal convictions. In Section A, I give an overview of the issues facing people with records in Arizona specifically. In Section B, I look at the “set-aside” procedure that Arizona does have (a lesser form of relief), as well as other relevant provisions of Arizona law. And in Section C, I outline some alternative routes to reform that Arizona could take (including some reform bills that have already been introduced).

#### A. *Life with a Criminal Record in Arizona*

A 2016 study found that about 1.9 million people in Arizona had some form of criminal record.<sup>141</sup> This figure includes some nonconviction records.<sup>142</sup> However, the Sentencing Project has estimated that there are over 220,000 disenfranchised individuals with felony convictions in Arizona,<sup>143</sup> and the number with misdemeanor convictions is surely substantially larger, since misdemeanors are much more common than felonies.<sup>144</sup> The state

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139. David H. Greenberg et al., *A Meta-Analysis of Government-Sponsored Training Programs*, 57 INDUS. & LAB. RELS. REV. 31, 42 (2003) (reporting weighted means across studies).

140. *Id.* at 50 (citing an average job training cost of \$6,600 per person).

141. BECKI R. GOGGINS & DENNIS A. DEBACCO, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT tbl.1 (2018), <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf> [<https://perma.cc/D9PT-A8KJ>].

142. *Id.* at tbl.1 (explanatory notes).

143. *State-by-State Data*, THE SENT’G PROJECT, <https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR> [<https://perma.cc/N3R2-KZBQ>].

144. See MARK FLATTEN, GOLDWATER INST., CITY COURT: MISDEMEANOR CONVICTIONS LEAD TO LIFE-LONG, “BEYOND HORRIFIC” CONSEQUENCES 3 (2018), <https://goldwaterinstitute.org/wp-content/uploads/2018/04/City-court-cosequences-final.pdf> [<https://perma.cc/5JFC-FTCW>].

presently has about 62,000 people behind bars in prisons, jails, immigration detention, and juvenile facilities—a higher-than-average rate even within the United States, which leads the world in incarceration rates.<sup>145</sup>

People with records in Arizona, as in other states, face a wide array of collateral legal consequences. Convictions must be reported on occupational licensing applications and can disqualify applicants from jobs ranging from schoolteacher to pest control applicator to funeral director.<sup>146</sup> A recent statute offers some potential for relief by giving remedies to individuals unnecessarily denied licenses, although individuals must go through a petition process to seek this relief.<sup>147</sup> In addition, convictions may keep people out of public-sector jobs. Pursuant to a “Ban-the-Box” executive order, public agencies may not ask applicants about criminal records until the later stages of a job application process.<sup>148</sup> But convictions can still ultimately disqualify people from public employment as part of agencies’ “moral character” determinations.<sup>149</sup>

Beyond employment, people with certain drug-related convictions may be ineligible for public housing, welfare benefits, state-funded scholarships, and tuition waivers.<sup>150</sup> In general, local public housing authorities have discretion to use convictions to disqualify housing applicants, and major cities in Arizona do so, although they are not required to do so by law (with some crime-specific exceptions).<sup>151</sup> In Tempe, for example, all applicants must wait

145. *Arizona Profile*, PRISON POL’Y INITIATIVE, <https://www.prisonpolicy.org/profiles/AZ.html> [<https://perma.cc/ZW26-3Y42>].

146. See FLATTEN, *supra* note 144, at 4; Penny L. Willrich, *Collateral Consequences of Criminal Convictions: Employment in Arizona* (May 1, 2012) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2478010](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2478010) [<https://perma.cc/KAR2-XSEH>].

147. UMEZ & PIRIUS, *supra* note 28, at 5–6, 7.

148. Ariz. Exec. Order No. 2017-07 (Nov. 6, 2017), [https://azgovernor.gov/sites/default/files/boxeo\\_0.pdf](https://azgovernor.gov/sites/default/files/boxeo_0.pdf) [<https://perma.cc/22MH-SQM7>]; Howard Fischer, *Ducey Announces Steps To Curb Recidivism*, ARIZ. CAPITOL TIMES (Nov. 6, 2017), <https://azcapitoltimes.com/news/2017/11/06/arizona-governor-doug-ducey-announces-steps-to-curb-recidivism/> [<https://perma.cc/WJ6X-LQZ8>].

149. ARIZ. REV. STAT. ANN. § 13-904(E) (2020) (stating that the law does require an inquiry into whether the conviction bears “a reasonable relationship to the functions of the employment”).

150. *Id.* § 13-3418.

151. *E.g.*, CITY OF PHX. HOUS. DEP’T, ADMISSIONS AND CONTINUED OCCUPANCY POLICY 28 (2020), [https://www.phoenix.gov/housingsite/Documents/2020-2021\\_ACOP\\_Draft.pdf](https://www.phoenix.gov/housingsite/Documents/2020-2021_ACOP_Draft.pdf) [<https://perma.cc/9SBP-EUW7>]; CITY OF TUCSON, ADMISSIONS AND CONTINUED OCCUPANCY POLICY FOR THE PUBLIC HOUSING PROGRAM (2019), [https://www.tucsonaz.gov/files/hcd/ACOP\\_2019\\_1.pdf](https://www.tucsonaz.gov/files/hcd/ACOP_2019_1.pdf) [<https://perma.cc/CKQ6-BNJ9>]; CITY OF TEMPE, ADMINISTRATIVE PLAN FOR THE HOUSING CHOICE VOUCHER PROGRAM 3-21 to 3-22 (2018), <https://www.tempe.gov/home/showdocument?id=64577> [<https://perma.cc/26J9-FWSW>]; 24 C.F.R. § 960.204(a)(2)–(3) (2020) (describing two specific disqualifiers for current drug use, which can be established by a recent conviction or methamphetamine production convictions).

at least three years after sentencing or (if applicable) after completing a prison term before applying; if the conviction is for a violent crime, the minimum is five years.<sup>152</sup> People with records also face restrictions on jury service,<sup>153</sup> commercial driver's licenses,<sup>154</sup> firearm possession,<sup>155</sup> and voting rights.<sup>156</sup> In child custody proceedings, there is a rebuttable presumption that a person convicted of certain offenses (including drug offenses) should not have sole or joint legal custody.<sup>157</sup>

Even if none of these legal restrictions existed, however, people with records would still face substantial hurdles in private markets for jobs, housing, education, and other services. Arizona has no private-sector “Ban-the-Box” law, so employers and landlords can ask about records at any stage of the process.<sup>158</sup> There is little research done on employment patterns for people with records in Arizona specifically. One Phoenix-based field experiment found, surprisingly, no disadvantage in online job applications for individuals with prison records, but it did find a disadvantage for in-person applications.<sup>159</sup> In addition, a much larger body of literature from around the country, including field experiments, has found strong evidence of substantial employment disadvantages for people with records even in the online setting,<sup>160</sup> and there is no particular reason to expect Arizona to be an exception to that pattern.

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152. CITY OF TEMPE, *supra* note 151, at 3-21 to 3-22.

153. ARIZ. REV. STAT. ANN. § 21-201(3) (2020) (stating that a juror must “[n]ever have been convicted of a felony, unless the juror’s civil rights have been restored”); *id.* § 13-904(A)(3) (providing that a conviction for a felony suspends the right to serve as a juror).

154. *Id.* § 28-3312(A)(1) (providing that certain convictions may result in the suspension or permanent revocation of a commercial license).

155. *Id.* § 13-3101(A)(7)(b) (stating that a prohibited firearm possessor includes individuals convicted of a felony who have not had their rights restored); *Id.* § 13-3101(A)(7)(d) (providing additional firearms restrictions); *see also id.* § 13-910(A)–(B).

156. *Id.* § 13-904(A)(1); *id.* § 13-907 (allowing an individual with only one felony conviction to have their civil rights automatically restored upon final discharge so long as victim restitution is paid); *see id.* § 13-906 (outlining the process one must undergo to have their civil rights restored if convicted of a felony and incarcerated).

157. *Id.* §§ 25-403.03 to .04.

158. Maria Polletta, *Arizona Companies Can Still Ask Job Applicants About Felonies*, AZCENTRAL (Apr. 9, 2019, 4:10 PM), <https://www.azcentral.com/story/news/politics/legislature/2019/04/04/ban-box-bill-felonies-job-applications-dies-legislature-martin-quezada/3347376002/> [<https://perma.cc/AEH5-UUEA>].

159. Scott H. Decker et al., *Criminal Stigma, Race, and Ethnicity: The Consequences of Imprisonment for Employment*, 43 J. CRIM. JUST. 108, 115 (2015).

160. For example, in a study I co-authored, we sent over 15,000 online job applications to employers in New York City and New Jersey. *See* Agan & Starr, *Ban the Box*, *supra* note 32, at 195, 200. We found that when employers asked about records on the initial application (which not all employers did), those without records received 63% more callbacks. *Id.*; *see also* Devah



In general, the landscape of restrictions and private market barriers facing people with records in Arizona is roughly similar to those that exist in other states, including Michigan, where our research took place. The case for expungement legislation in Arizona thus is essentially the same as the case in any state. Arizona is an outlier only insofar as its current law provides no procedure for expungement at all.<sup>161</sup>

*B. Existing Means of Relief for People with Records in Arizona*

Arizona's main existing remedy for those with otherwise valid criminal convictions (i.e., those not subject to vacatur due to appellate reversal or the like) is the "set-aside" procedure, which allows a court in its discretion to set aside a conviction after the completion of the sentence.<sup>162</sup> Unlike "set-asides" in Michigan, Arizona set-asides do not result in the record being sealed or removed from any databases, and they do not entitle the individual to answer "no" when asked about the record as part of an application process.<sup>163</sup> Instead, this is essentially a legal rights restoration procedure; set-asides eliminate "all penalties and disabilities resulting from the conviction."<sup>164</sup> In other words, they eliminate the *legal* consequences of the record but not the other social and economic consequences. And indeed, they do not really eliminate "all" of the legal consequences; as in other states, the record still carries some consequences, including being counted in subsequent prosecutions.<sup>165</sup> Note that Arizona has a separate provision for restoration of "civil rights," but this relief is even more limited than that offered by set-asides.<sup>166</sup>

Even the modest remedy of the set-aside is subject to limitations. Set-asides do not apply to "dangerous" offenses, for example, which are those involving dangerous weapons or instruments (anything capable of causing serious injury) or intentionally or knowingly inflicting serious injury.<sup>167</sup> Sex offenses, crimes against children, and many traffic offenses are also

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Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199–201 (2009) (finding disadvantages to people with records in an in-person field experiment).

161. See § 13-905.

162. See *id.* § 13-905(F).

163. See *id.*; *Parsons v. Ariz. Dep't of Health Servs.*, 395 P.3d 709, 712 (Ariz. Ct. App. 2017).

164. § 13-905(D).

165. *Id.* § 13-905(E).

166. "Civil rights" are defined in title 13, section 904(A) of the Arizona Revised Statutes to include voting, holding public office, jury service, firearms possession, and restriction of civil liberties as is necessary during incarceration for institutional security. Restoration of these rights other than firearms possession is automatic for first offenders but requires an application for other offenders. See *id.* §§ 13-907, -908.

167. See *id.* §§ 13-907(K), -105.

excluded.<sup>168</sup> The individual must apply to the court for the relief, victims have a right to notice and to be heard, and the court appears to have unlimited discretion to decline, although the statute spells out a non-exhaustive list of factors to consider and requires the court to state its reasons for declining.<sup>169</sup> There is no application fee.<sup>170</sup>

A number of bills have been put forth during the 2020 legislative session to expand the existing set-aside law, offer the possibility of expungement, and/or limit the effects of collateral legal consequences.<sup>171</sup> However, the progress of those bills was hampered both by procedural requirements and the COVID-19 pandemic. According to the *Arizona Capitol Times*, a “silent death” came for nearly two-thirds of the bills and legislation introduced after failing to be heard in their chambers prior to the February 21 deadline.<sup>172</sup> Additionally, on May 7, 2020, the Senate announced that it would adjourn the 2020 legislative session sine die.<sup>173</sup> So the pending reforms are now dead, at least until and unless they are reintroduced in the future.<sup>174</sup>

### C. Possible Reforms for Expungement in Arizona

The policy case for expungement is strong. Arizona could adopt several different strategies that would move it in line with most of its sister states in offering petition-based expungement, or (better) into the vanguard of states offering automatic expungement. Here, I outline two possibilities: an automated expungement reform or a petition-based procedure, which could build on the existing set-aside procedure. These could readily be combined: automatic expungement could be available for some class of cases meeting certain eligibility requirements and a waiting period, while expungement could be petition-based for a broader class over which it is thought to be important to maintain judicial discretion.

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168. *Id.* § 13-905(K).

169. *See id.* § 13-905.

170. *See id.* § 13-905(B).

171. *See* H.R. 2178, 54th Leg., 2d Reg. Sess. (Ariz. 2020); H.R. 2708, 54th Leg., 2d Reg. Sess. (Ariz. 2020); S.B. 1619, 54th Leg., 2d Reg. Sess. (Ariz. 2020); S.B. 1620, 54th Leg., 2d Reg. Sess. (Ariz. 2020); S.B. 1621, 54th Leg., 2d Reg. Sess. (Ariz. 2020).

172. Ariz. Capitol Times Staff, *Fate of Most 2020 Bills Met at Legislature’s Deadline*, ARIZ. CAPITOL TIMES (Feb. 28, 2020), <https://azcapitoltimes.com/news/2020/02/28/fate-of-most-2020-bills-met-at-legislatures-deadline/> [https://perma.cc/CFN9-GA5K].

173. Jeremy Duda, *UPDATED: Senate Plans To End 2020 Legislative Session Friday, House Will Not*, AZMIRROR (May 7, 2020, 9:39 PM), <https://www.azmirror.com/2020/05/07/senate-will-end-2020-legislative-session-friday-house-plans-unknown/> [https://perma.cc/NDS8-M3H8].

174. *Id.*

### 1. “Clean Slate” Approach (Automatic Expungement)

The best approach for Arizona to take would be to adopt an automatic expungement policy, analogous to those that several states have adopted recently. Our research on uptake rates, as well as other research on uptake in other postconviction contexts, has a clear implication: petition-based procedures will dramatically reduce access to expungement. Moreover, petition-based procedures are more resource-intensive for the state and for applicants.

Petition-based procedures are a relic of an era in which criminal records predominantly existed in paper form, or at least could not be readily analyzed by computer algorithm. But today it is technologically possible to automate the expungement process.<sup>175</sup> Doing so may require an initial investment to develop the algorithm to identify eligible cases and clear records, especially if it requires coordination across multiple different databases. But once the system is in place, the marginal cost of expungements should fall to essentially nothing.

An automatic expungement procedure can have any set of substantive eligibility requirements and waiting periods, and the states at the forefront of the Clean Slate movement have modeled a variety of approaches. The first two states, Pennsylvania and Utah, were quite conservative, automatically clearing only nonviolent misdemeanors, after waiting periods ranging up to ten years.<sup>176</sup> California, on the other hand, extends Clean Slate relief to felonies so long as they did not result in a prison sentence and has only a one-year waiting period.<sup>177</sup> Michigan’s new law extends automatic expungement to felonies with up to a ten-year maximum sentence, but as noted above, it does so only after ten years,<sup>178</sup> while the wait for misdemeanors is seven years.

In my view, while understandable for the states first experimenting with the Clean Slate approach, it is a mistake to be overly conservative in defining eligibility requirements and waiting periods. California and Michigan, with more ambitious approaches, offer better models than the very cautious

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175. See Angie Jackson, *It May Become Easier To Clear Criminal History in Michigan*, DETROIT FREE PRESS (Sept. 20, 2019, 7:30 PM), <https://www.freep.com/story/news/local/michigan/2019/09/20/michigan-automatic-expungement-laws-record-sealed/2266703001/> [<https://perma.cc/3B5T-G3G6>].

176. See 18 PA. CONS. STAT. § 9122 (2020); see also RESTORATION OF RTS. PROJECT, PENNSYLVANIA RESTORATION OF RIGHTS & RECORD RELIEF (2020), [https://ccresourcecenter.org/state-restoration-profiles/pennsylvania-restoration-of-rights-pardon-expungement-sealing-2/#III\\_Expungement\\_sealing\\_other\\_record\\_relief](https://ccresourcecenter.org/state-restoration-profiles/pennsylvania-restoration-of-rights-pardon-expungement-sealing-2/#III_Expungement_sealing_other_record_relief) [<https://perma.cc/T37P-LK5B>]; UTAH CODE ANN. §§ 77-40-102, -114 (West 2020).

177. CAL. PENAL CODE § 1203.425 (West 2020).

178. Jackson, *supra* note 175.

Pennsylvania and Utah bills (even though those states deserve credit for being Clean Slate's pioneers), and future states could readily go farther. After all, as discussed above, there is every reason to believe that expanding expungement will *help* public safety by giving people access to jobs and housing.<sup>179</sup> The goal shouldn't be to limit expungement only to people who are *already* at very low risk of recidivism; rather, policymakers should seek to improve outcomes for those who *do* pose some risk.

Long waiting periods, like most of those described above, reduce these potential benefits because individuals won't get relief until long after the period when they typically need it the most in order to successfully reintegrate into society.<sup>180</sup> Limiting expungement to misdemeanors also has disadvantages; most employers only ask applicants about felony convictions, and felonies are the trigger for most collateral consequences.<sup>181</sup> So individuals with felony convictions stand to gain much more from expungement—which, again, can benefit society as well.

Still, suppose policymakers are committed to the idea that those receiving expungement need to have already proven themselves low risk with a period of good behavior. Having *some* waiting period does have advantages, including creating an incentive for good behavior during that period. But how long should the wait be? Our research in Michigan makes it clear that five years is enough.<sup>182</sup> (We couldn't evaluate periods *less* than five years, since that was the waiting period under Michigan law during our study period.<sup>183</sup>) In every subsample within our data—including individuals with felonies and individuals with violent-offense convictions—recidivism rates were lower than average crime rates in the general adult population of Michigan.<sup>184</sup> And recidivism rates for those who received expungements after five years (that is, shortly after becoming eligible) were not substantially lower than the rates for those who received expungements after ten or more years.<sup>185</sup> Waiting longer than five years does not do much to affect recidivism rates; it merely imposes a gratuitous cost on those awaiting relief.

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179. See Prescott & Starr, *supra* note 12, at 2523–43.

180. See JACOBS, *supra* note 6, at 131; Franklin & Johnsen, *supra* note 107, at 739; Selbin et al., *supra* note 54, at 52.

181. See UMEZ & PIRIUS, *supra* note 28, at 3.

182. See Prescott & Starr, *supra* note 12, at 2494.

183. *Id.* at 2515.

184. *Id.* at 2514.

185. *Id.* at 2512.

## 2. Adding Record-Sealing to the Existing Set-Aside Procedure

Short of adopting a Clean Slate law, or perhaps in addition, an easy change Arizona could make would be to amend its current set-aside law such that set-aside records would be sealed and removed from all searchable databases. The law should also specify that set-aside records cannot be used in employment, housing, and educational access decisions and that an applicant can treat a set-aside record as though it does not exist for those purposes. And the law should require that all commercial vendors of criminal background information remove set-aside convictions, and continued access of those vendors to state records should be conditioned on their compliance. (All these provisions should be included in any automated expungement law as well.)

These amendments would effectively transform the set-aside procedure into something close to expungement (analogous to the procedure labeled “set-aside” in Michigan), instead of simply a restoration of legal rights. With these reforms, set-asides might be able to offer recipients improved access to private employment and other markets, analogous to the large employment gains we saw in Michigan.

If Arizona were to take this approach, it could adopt some new set of eligibility constraints. Analogously, some reform bills introduced during the 2020 legislative session would have created new expungement procedures with their own sets of rules.<sup>186</sup> In my view, though, the simpler and better approach would be to maintain the current procedures and substantive eligibility requirements that presently apply to set-asides. Those eligibility requirements are not especially demanding, and there is no fixed waiting period. But while formal eligibility hurdles are necessary for a Clean Slate automated approach, they are really not necessary for a petition-based procedure. Judges have, and would retain, the discretion to reject set-aside applications that in their view come too soon, or that otherwise do not appear to be in the public interest. And certain offense classes that might be deemed inappropriate for sealing (like sex offenses subject to registration) are already excluded from set-asides.<sup>187</sup>

Our Michigan study strongly suggests that even if record-clearing were added to the set-aside law, applications would probably not be very common.<sup>188</sup> This is why the Clean Slate approach is more likely to be effective. That said, if Arizona does stick to a petition-based procedure, it

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186. See H.R. 2893, 54th Leg., 2d Reg. Sess. (Ariz. 2020) (proposing to create a new record-sealing procedure with varying waiting periods depending on the type and extent of the criminal record); H.R. 2882, 54th Leg., 2d Reg. Sess. (Ariz. 2020) (proposing a new procedure for the complete destruction of records, with various constraints based on crime type).

187. ARIZ. REV. STAT. ANN. § 13-905(K) (2020).

188. See Prescott & Starr, *supra* note 12, at 2492–93.

could help to reduce the uptake gap by offering funding for public defenders and other court-appointed counsel to assist with petitions, and by training defense counsel to treat pursuing these petitions as a core part of indigent defense work. It should also seek to streamline procedures as much as possible. For example, petitions should regularly be able to be granted without hearings on the basis of online applications, especially where there is no objection from the prosecutor or victims. Arizona should certainly maintain one positive feature of its current system: a lack of an application fee, since even small fees are highly burdensome to those in poverty.

#### CONCLUSION

Providing a second chance to people with records isn't just in their interest. It is in society's interest to encourage successful reintegration into society, to discourage recidivism, to get more people working and paying taxes, and to help the families of those affected. Michigan's experience provides empirical evidence that policymakers in Arizona and elsewhere can draw on. It shows that crime and employment outcomes for those with expungements are very positive. And it makes the case for removing the bureaucratic barriers that otherwise impede access to expungement and using the approach that technology now makes possible: automating relief for those who meet the legal requirements.

Although this short piece does not afford space to discuss every detail related to expungement policy, I will briefly touch on a couple of potential objections not already addressed above. First, the Clean Slate movement is not calling for eliminating responsibility or justice for crimes. In states that offer expungement, it's only available to people who have served their sentences—and often to people who have gone well beyond that, also demonstrating rehabilitation through years of further law-abiding conduct. For the penalty for every crime to last forever is inconsistent with theories of moral desert and, indeed, with *all* major theories of punishment.

Second, some might object that expungement conceals information that the public has a right to know. But this begs the question: what information about individuals should we consider public? The answer can't be *everything* that employers or other members of the public might be interested in. After all, we treat a great deal of individual information (even information about the individual's interaction with the state and others) as private: tax records, unemployment insurance records, health records, education records, and the like. We certainly don't have the state maintain such records in publicly searchable databases or allow the state to sell it to commercial databases—effectively extending the state's punishment of the individual. Perhaps it is

time to start thinking of an old, fully discharged criminal record as the kind of information for which, eventually, an individual's interest in privacy begins to outweigh the public's interest in information—especially given that the stakes for that individual are high.

Arizona is, today, an outlier state in its lack of any expungement policy. For the hundreds of thousands of Arizonans with convictions, it is hard, regardless of years or decades of effort, to move beyond the shadow of their past mistakes. The Clean Slate idea offers the possibility of redemption and serves society's interests as well, including making the public safer. With reforms, Arizona can move from the back of the pack to the front, offering moral leadership that is backed up by hard data.