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T. Markus Funk

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A MERE YOUTHFUL INDISCRETION? REEXAMINING THE POLICY OF EXPUNGING JUVENILE DELINQUENCY RECORDS

T. Markus Funk*

Recent studies by the U.S. Department of Justice have found that, while adult violent crime rates continue to drop, today's juvenile offenders are the fastest growing segment among violent criminals. The unprecedented increase in juvenile criminality is expected to result in a dramatic increase in the overall rate of violent crime as these juveniles approach majority. Funk argues that most states have not adapted to the troubling reality that the juvenile offenders of today are not the hubcap-stealing youths of days gone by, and that chronic adult criminality is predicated on violent and repeated acts of juvenile delinquency. These jurisdictions retain statutory provisions that allow for, or mandate, the expungement of juvenile crime records once the juvenile reaches a certain age. This policy's stated goal is to allow the juvenile offender to enter adulthood with a "clean slate," thereby shielding him from the negative effects of having a criminal record. The author conducts an exhaustive analysis and critique of this policy, examining its philosophical origins, the "rehabilitative ideal" on which it is premised, and its theoretical and practical impact. He argues that even if one accepts the notion that those who have committed a juvenile indiscretion will outgrow their reckless behavior, it remains necessary to differentiate between those who in fact can be rehabilitated and those whose rehabilitative potential is negligible, a task not accomplished by most contemporary expungement statutes.

The evils of a criminal record are well known. The convicted are forever branded as untrustworthy members of society. Their job prospects are permanently compromised; they are often the subject of suspicion and mistrust [Expungement ensures that] the defendant no longer has a criminal

* A.B. 1991, B.S. 1992, University of Illinois; J.D. 1995, Northwestern University School of Law. Law clerk to a federal district court judge. The author wishes to extend special thanks to Northwestern University School of Law Professor Daniel D. Polsby for the innumerable suggestions he has made during the drafting process.

“record” and [that he]¹ can resume his life anew without the stigma of a conviction.²

When yesterday’s juvenile delinquent becomes today’s adult criminal the reasons behind society’s earlier forbearance disappear.³

INTRODUCTION

Although no universally accepted definition for the “expungement” of juvenile records exists,⁴ the term generally refers to the destruction or obliteration of an individual’s criminal file by the relevant authorities in order to prevent employers, judges, police officers, and others from learning of that person’s prior criminal activities conducted during his minority.⁵ Indeed,

1. The pronoun “he” will be used throughout this Article, given that most juveniles who commit criminal acts are male. See HOWARD N. SNYDER & MELISSA SICKMUND, NATIONAL CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: A FOCUS ON VIOLENCE 1* (1995) (estimating that 88% of juvenile crimes were committed by male offenders); BARRY KRISBERG & JAMES F. AUSTIN, *REINVENTING JUVENILE JUSTICE 134* (1993) (“Virtually all research has showed that young women are far less involved in criminal activities as compared to their male counterparts.”); Neil A. Weiner, *Violent Criminal Careers and “Violent Career Criminals,”* in *VIOLENT CRIME, VIOLENT CRIMINALS 35, 49* (Neil A. Weiner & Marvin E. Wolfgang eds., 1989) (“Cumulative violent juvenile participation of females is well below that of males, irrespective of the type of violent crime.”). It should be noted, however, that female violent crime arrests increased 125% between 1985 and 1994. See HOWARD N. SNYDER ET AL., NATIONAL CTR. FOR JUVENILE JUSTICE, *JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE 11* (1996).

2. *United States v. Hall*, 452 F. Supp. 1008, 1010–13 (S.D.N.Y. 1977) (finding that the Youth Corrections Act had as its goal “the rehabilitation of the young persons in this country who have made their first mistake, so to speak”).

3. *United States v. Johnson*, 28 F.3d 151, 155 (D.C. Cir. 1994).

4. See *Hall*, 452 F. Supp. at 1010 n.2 (“[I]t appears that the courts have given [the term ‘expungement’] varying meanings.”); Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 21–22 (1992) (“There is no uniform terminology in the world of expungement statutes. The process is variously described as expungement, erasure, destruction, sealing, setting aside, expunction, and purging.”) (footnotes omitted).

5. See *People v. Smith*, 470 N.W.2d 70, 74 (Mich. 1991) (“Rules calling for the ‘expungement’ or destruction of juvenile records have been enacted or adopted in many states.”); see also OR. REV. STAT. § 419A.260(b)(A)–(B) (1995) (defining “expunction” as the removal and destruction of a judgment or order relating to a “contact” and of all records and references); UTAH CODE ANN. § 78-3a-55 (1992 & Supp. 1995) (mandating “destruction” of expunged records); Leonard Edwards & Inger J. Sagatun, *A Study of Juvenile Record Sealing Practices in California*, 4 PEPP. L. REV. 543, 545 (1977)

the decision of whether to destroy the records completely or merely to "seal" them is in itself not uncontroversial, because anything short of complete destruction of the records leaves open the possibility of future access to the records.⁶

Numerous statutes, both federal and state, allow for—and occasionally even mandate—the expungement of juvenile convictions when the juvenile reaches a certain age. While one federal law allows, upon application of the offender, expungement for first-time drug possession by a person under the age of twenty-one who receives not more than one year of probation,⁷ another only seals the criminal records of those who have been convicted of a federal juvenile offense.⁸ Moreover, every state permits requests to expunge or destroy juvenile records, under varying conditions.⁹ It is under these state statutes that

(defining "expunge" as "to strike out, blot out, erase"); Snow, *supra* note 4, at 23 ("['E]xpungement' literally means that the record has been erased as though the event never occurred; there is no longer a record to unseal because none exists.") (footnote omitted). *But see* ARK. CODE ANN. § 16-90-901(a)–(b) (Michie Supp. 1995) (stating that "expunge" means "that the record or records in question shall be sealed, sequestered, and treated as confidential," but that "'expunge' shall *not* mean the physical destruction of any records") (emphasis added).

6. The United States Supreme Court, in *In re Gault*, 387 U.S. 1 (1967), for example, noted the failure of systemic safeguards to truly protect the confidentiality of juvenile records:

[I]t is frequently said that juveniles are protected by the process from disclosure of their deviant behavior. As the Supreme Court of Arizona phrased it in the present case, the summary procedures of Juvenile Courts are sometimes defended by a statement that it is the law's policy "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past." This claim of secrecy, however, is more rhetoric than reality. Disclosure of court records is discretionary with the judge in most jurisdictions. Statutory restrictions almost invariably apply only to the court records, and even as to those the evidence is that many courts routinely furnish information to the FBI and the military, and on request to government agencies and even to private employers.

Id. at 24. *See also* Adrienne Volenick, *Juvenile Court and Arrest Records*, 9 CLEARINGHOUSE REV. 169, 170–71 (1975) (an "effective means of protecting juvenile records from inquisitive eyes is incorporated into the statutes of many states where . . . 'destruction' of records is authorized").

7. *See* 18 U.S.C. § 3607(c) (1994).

8. *See id.* § 5038(a).

9. *See* COORDINATING COUNCIL ON JUVENILE JUSTICE & DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 25 (1996) [hereinafter COMBATING VIOLENCE]; *see also, e.g.*, ALASKA STAT. § 47.10.090(a) (Michie 1995) (sealing of records possible at age 18); ARK. CODE ANN. § 9-27-309(b) (Michie 1994) (requiring court to maintain for 10 years records of proceedings where juvenile could have been tried as an adult, but mandating expungement 10 years after the adjudication or when the individual reaches age 21 and authorizing expungement of other juvenile records at any time); CAL. WELF. & INST. CODE § 781(a) (West Supp.

the bulk of expungement actually occurs.¹⁰

Despite the differences in operation between the various state and federal statutes, one characteristic they all share is that they prevent the courts, law enforcement, and employers from gaining access to a wealth of information concerning an individual's prior juvenile arrest record and juvenile adjudications. Those championing the policy contend that expungement protects the juvenile's chances for rehabilitation and increases his likelihood of being reintegrated into mainstream society.¹¹ But the question remains whether expungement is an appropriate

1996) (allowing records to be sealed at any time after age 18, and providing that the minor can have his records sealed before age 18 under certain specific circumstances); FLA. STAT. ch. 39.045 (1995) (authorizing expungement at age 24 but listing categories of materials that may not be expunged); GA. CODE ANN. § 15-11-61(a)(1) (1994 & Supp. 1995) (allowing sealing of records upon application after two crime-free years); 705 ILL. COMP. STAT. ANN. 405/1-9 (West 1992) (allowing, upon petition, expungement of some records at age 17); KAN. STAT. ANN. § 38-1610 (1993) (allowing petition for expungement and a hearing on the petition and, after the hearing, requiring expungement either at age 21, or upon the elapsing of two years since the final discharge of the individual, so long as the court finds that the "circumstances and behavior of the petitioner warrant expungement"); LA. CHILDREN'S CODE ANN. art. 919 (West 1995) (allowing expungement at age 17 if the records concern conduct that did not result in adjudication of a felony-grade delinquent act); MINN. STAT. ANN. § 242.31(1) (West 1995 & Supp. 1996) (permitting expungement only if the individual committed a crime serious enough to allow for trial as an adult; all other records are not eligible for expungement); N.J. STAT. ANN. § 2A:4A-62 (West Supp. 1995) (allowing sealing of records two years after final discharge from custody or supervision or entry of court order, so long as the petitioner has remained crime-free for that two-year period); N.C. GEN. STAT. § 7A-676 (1994) (authorizing expungement upon petition to the court at age 16); 18 PA. CONS. STAT. ANN. § 9123 (West Supp. 1996) (allowing expungement upon motion if five years have elapsed since person's final discharge or if person is 18 years old and state attorney consents or when petitioner reaches age 21); VA. CODE ANN. § 16.1-306 (Michie 1996) (calling for destruction of records on January 2 of every year for juveniles who are 19 years old, provided the juvenile meets certain requirements); WYO. STAT. ANN. § 14-6-241 (Michie Supp. 1995) ("Any person adjudicated delinquent as a result of having committed a delinquent act other than a violent felony . . . or in need of supervision under the provisions of this act may petition the court for the expungement of his [juvenile] record . . . upon reaching the age of majority.").

10. See COMBATING VIOLENCE, *supra* note 9, at 25-26 (noting that "[r]elatively few juveniles are in the federal juvenile and criminal justice systems").

11. See, e.g., Edwards & Sagatun, *supra* note 5, at 543 ("The policy underlying the [California expungement] law is to provide young persons an opportunity to begin their adult lives without the stigma of a juvenile record."); Volenick, *supra* note 6, at 169 (arguing that although juvenile offenders are young and impressionable and thus thought of as capable of being reformed, society considers them to be ex-convicts, and they may suffer similar economic and social ostracism); see also Barry M. Portnoy, Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 314 (1970) (noting that expungement statutes "attempt to lessen the penalties that public opinion imposes on former offenders"). The proponents of expungement and the reasoning upon which they rely will be discussed in more detail. See *infra* notes 52-64 and accompanying text.

way of dealing with recidivistic juvenile delinquents who have repeatedly violated societal norms by engaging in often violent criminal conduct—a group that represents the fastest growing segment among violent offenders.¹² This Article attempts to answer this question by critically examining the major justification underlying expungement statutes—that the gains expungement brings to society by rehabilitating former juvenile offenders outweigh the harms it inflicts by preventing courts, the law enforcement community, and employers from obtaining a complete and unmodified picture of the person with whom they are dealing. Although an isolated incident of nonviolent delinquency may well be a prime candidate for expungement, it is questionable whether acts of violence or repeated nonviolent offenses should be eliminated from one's criminal history, as current expungement statutes often readily allow.

Part I begins the analysis by discussing the basic arguments advanced in support of expungement, examining its historical and philosophical origins, and considering its sociological underpinnings. Part II discusses patterns of criminality among contemporary juveniles. Part III then scrutinizes the validity of the pro-expungement arguments by discussing the extent to which juvenile offenders realistically can be expected to be rehabilitated, in light of current research. Part IV moves from the theoretical implications of expungement to the palpable negative effects that expungement has upon the sentencing judges' ability to determine appropriate sentences for adult offenders. This section contends that present expungement statutes may cause true first-time offenders to receive disproportionately harsh sentences. The section furthermore discusses the effects of expungement on law enforcement and employers. Part V discusses the potential benefits of greater reliance on the statutory alternative of restitution to avoid stigmatizing the juvenile offender. Part VI then uses the lessons learned in the previous parts to set forth the basic elements that should be part of every expungement statute. This Article concludes by calling upon legislators to abandon the present approaches of granting to the courts the virtually unlimited authority to destroy juvenile records, or of

12. See SNYDER & SICKMUND, *supra* note 1, at 8 (reporting that juveniles had the largest increase in violent crimes of all age groups from 1983 to 1992).

automatically expunging delinquency records once the individual reaches a certain age, and urges them to consider statutory alternatives, such as restitution, that are more criminologically sound and consistent with the current state of the research on recidivism and rehabilitation.

I. THE PURPOSES AND PHILOSOPHICAL PEDIGREE OF EXPUNGEMENT STATUTES

A. *The Argument for Expungement*

The primary reason for expungement statutes is an understandable concern that the juvenile offender will be forced to endure the stigma of being labeled a "juvenile delinquent"¹³ for the rest of his life as a result of mere "youthful misconduct."¹⁴ As one commentator has argued:

As long as anyone other than the child or his representative has access to court records—as long as a judge may authorize inspection without permission of the child—these records will haunt him, labeling him a criminal and adversely affecting his future both economically and socially, regardless of the noble intentions of legislators to the contrary.¹⁵

13. The term "delinquent" is derived from the Latin *delinquere* (to "commit a fault"). WEBSTER'S NEW WORLD DICTIONARY 373 (David B. Guralnik ed., 1978). In most jurisdictions, a juvenile who is prosecuted in juvenile court is not "found guilty," but rather is "adjudicated delinquent" and placed in the custody of either a state authority or agency. See Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 60 (1992).

14. See Volenick, *supra* note 6, at 169 (arguing that expungement should be automatic "[b]ecause juvenile offenders are young and impressionable" and, with proper care and guidance, are capable of learning socially acceptable behavior); see also *People v. Smith*, 470 N.W.2d 70, 74 (Mich. 1991) ("Literature describing [expungement statutes] indicates that their 'basic purpose . . . is to overcome the stigma of delinquency.'") (quoting Susan A. Sinclair, *The Use of Juvenile Adjudications for Impeachment and Sentencing*, 22 SANTA CLARA L. REV. 419, 424 (1982)); JOHN P. KENNEY ET AL., *POLICE WORK WITH JUVENILES AND THE ADMINISTRATION OF JUVENILE JUSTICE* 119 (1989) (noting the growing concern that juvenile records may be misused and may stigmatize the individual once he reaches adulthood).

15. Volenick, *supra* note 6, at 170. See also *Smith*, 470 N.W.2d at 75 ("The purpose of the court rule [dealing with expungement], and of similar rules or statutes in other

Expungement statutes, therefore, are at minimum attempts to lessen the additional penalty that public opinion places upon former offenders¹⁶ and to overcome the reality that, as Lord Coke stated, "*peona mori potest, culpa perennis erit*"¹⁷—though punishment can terminate, guilt endures forever.

But the stigma of permanently wearing the label of juvenile delinquent should be of concern to society only insofar as it leads to the *incorrect* characterization of an individual who since has reformed his life. If a former delinquent is still engaging in criminal activity in adulthood, clearly the juvenile justice system has failed to rehabilitate him, and our concern with his possible stigmatization and its effect on his potential for rehabilitation should be replaced with a concern for protecting society from a predatory recidivist.¹⁸ Even if one accepts the proposition that most juveniles with police records will outgrow their reckless behavior, that they are "capable of learning to behave in a socially acceptable manner given the proper supervision and surroundings,"¹⁹ and that this makes them more suitable for rehabilitation,²⁰ it is necessary to differentiate between the subgroup who in fact can be rehabilitated and the subgroup whose rehabilitative potential is negligible—the "career criminals."²¹

jurisdictions, is to prevent a juvenile record from becoming an obstacle to educational, social, or employment opportunities.") (footnote omitted); 47 AM. JUR. 2D *Juvenile Courts* § 114 (1995) (stating that, because a juvenile record is seen as an impediment, many states provide an expungement procedure to give reformed minors a fresh start).

16. See Portnoy, *supra* note 11, at 314.

17. *Brown v. Crashaw*, 2 Bulst. 154, 80 Eng. Rep. 1028 (K.B. 1614), cited in Portnoy, *supra* note 11, at 306.

18. See *United States v. McDonald*, 991 F.2d 866, 872 (D.C. Cir. 1993) (noting that setting aside a juvenile conviction may give a youth a fresh start, but "if a juvenile offender turns into a recidivist, the case for conferring the benefit dissipates. Society's stronger interest is in punishing appropriately an unrepentant criminal.") (citation omitted).

19. Volenick, *supra* note 6, at 169.

20. See *id.*; Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) (critiquing the juvenile court system and discussing the system's underlying, and, in the author's opinion, false premise that there is something unique about childhood). Cf. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991) ("Criminology's attempt to identify the antecedent causes of criminal behavior reduced the actors' moral responsibility and focused on reforming offenders rather than punishing them for their offenses.")

21. See *McDonald*, 991 F.2d at 872 (discussing the rationale for allowing sentencing courts to consider prior, set-aside convictions). As discussed in Part III, a record of repeated acts of juvenile delinquency is in fact a reliable indicator of future adult criminality.

Unfortunately, present expungement statutes as a rule do not attempt to make such a differentiation, allowing instead for the deletion of a youth's record of contact with law enforcement and the courts, regardless of whether this contact consists of a one-time arrest for public urination or numerous arrests and convictions for assault, burglary, rape, or similarly violent transgressions. Although expungement may appear appropriate for the one-time child offender who presumably has been rehabilitated, it appears wholly inappropriate for the budding career criminal who, based on numerous incidents of recidivism, manifests no rehabilitative potential.²² As one commentator notes, "[w]hile it is commendable to forgive a youthful indiscretion and not penalize an otherwise law-abiding adult with a criminal record, that is hardly reasonable when a juvenile offender continues a life of crime into adulthood."²³

Our juvenile justice system appears to be uncomprehending of the unfortunate reality that modern society contains many delinquent minors who will be persistently deviant individuals throughout the course of their lives and who therefore require additional treatment.²⁴ To understand why the criminal justice system often fails to respond properly to this problem, it is necessary to examine how the idealized goal of "rehabilitation," as understood by today's juvenile courts, has developed.

B. The Historical and Philosophical Origins of the Rehabilitative Ideal

The contemporary rehabilitative notion, which has at its core the view that an offender can be "cured" of his criminal tenden-

22. See T. Markus Funk, *Young & Arrestless*, REASON, Feb. 1996, at 52.

23. Mary Kate Cary, *How States Can Fight Violent Crime*, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 250, 260 (Robert J. Bidinotto ed., 2d ed. 1996).

24. See COMBATING VIOLENCE, *supra* note 9, at 6 ("Today, the juvenile justice system is unable to devote sufficient resources to dealing with . . . minor delinquency because of the growing number of serious and violent offenders. These offenders require a greatly enhanced response, and greater coordination among the system's components.").

cies,²⁵ peaked in the 1960s and 1970s,²⁶ when many scholars and social science professionals sought to reform the juvenile court.²⁷ As Professor Gary Melton points out, "At its deepest

25. See Andrew von Hirsch, *Rehabilitation*, in *PRINCIPLED SENTENCING* 1 (Andrew von Hirsch & Andrew Ashworth eds., 1992). Consider:

The allusion to medical treatment suggested by the word "symptom" is not accidental; the Progressives frequently compared social deviance to physical disease. . . . Like physical pathology, social pathology could not be ignored or the "disease" might progressively worsen. With proper diagnosis and treatment, however, social pathology was considered as susceptible to cure as physical ailments. Particularly in light of the supposedly malleable nature of juveniles, the Progressives exuded confidence in their ability to cure juvenile delinquency.

Ainsworth, *supra* note 20, at 1097 (citations omitted). See also Jeffrey C. Tuomala, *Christ's Atonement as the Model for Civil Justice*, 38 AM. J. JURIS. 221, 241 (1993) ("For nearly a century (1870-1970) the rehabilitation theory held sway as the 'enlightened' rationale for corrections. Crime is viewed as pathological, requiring treatment based on a medical model of diagnosis and prescription.")

26. See EDMUND F. MCGARRELL, *JUVENILE CORRECTIONAL REFORM: TWO DECADES OF POLICY AND PROCEDURAL CHANGE* 7-14 (1988); see also Martin L. Forst & Martha-Elin Blomquist, *Punishment, Accountability, and the New Juvenile Justice*, JUV. & FAM. CT. J., Vol. 43, No. 1, 1992, at 1 (discussing the 1980 proposal of the Joint Commission on Juvenile Justice Standards of the Institute of Judicial Administration and the American Bar Association calling for replacement of the rehabilitative model of juvenile justice with the principles of criminal law and procedure applied to adults); J. ROBERT LILLY ET AL., *CRIMINOLOGICAL THEORY: CONTEXT AND CONSEQUENCES* 110-11 (2d ed. 1995) (discussing rising popularity of labeling theory during 1960s and 1970s and its "marked" influence on criminal justice policy); DAVID MUSICK, *AN INTRODUCTION TO THE SOCIOLOGY OF JUVENILE DELINQUENCY* 227 (1995) ("During the 1960s and 1970s, many legal officials throughout the United States, including juvenile court judges, emphasized rehabilitation for young offenders."); FRANKLIN E. ZIMRING & GORDON HAWKINS, *INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME* 7 (1995) ("Rehabilitation was the law's stated objective in the criminal sentencing system and remained the dominant ideology in the architecture of the model penal code reforms of the 1960s.")

27. See LILLY ET AL., *supra* note 26, at 5 (discussing rising popularity of labeling theory during the 1960s and 1970s and its "marked" influence on criminal justice policy); see also Feld, *supra* note 20, at 95 ("Because a youth's offense was only a symptom of her 'real' needs, sentences were indeterminate, nonproportional, and potentially continued for the duration of minority.") The state in effect became the child's parents and assumed parental responsibilities when the juvenile evidenced the need for such measures. Prior to the mid-nineteenth century, in contrast, children over 14 years of age were arrested, jailed, and punished as adults. See STEVEN M. COX & JOHN J. CONRAD, *JUVENILE JUSTICE: A GUIDE TO PRACTICE AND THEORY* 2 (1978). As one commentator explains:

The desirability, even necessity, for a separate court system to address the problems of young people appeared obvious [in the early part of the twentieth century], given the newly emerging view of the adolescent as an immature creature in need of adult control. When parental control failed, the benevolent, if coercive, hand of the state could provide the corrective molding needed by the errant youth. By categorizing the adolescent as a sub-class of the child rather than as a type of adult, the Progressives fashioned a discrete juvenile justice

roots, [the] paternalistic vision of the juvenile court was based on the moral premise that youth do not deserve punishment for their violations of law."²⁸

This notion of a criminal who is driven by his upbringing and experiential background rather than by his own free will is greatly removed from the classical school of criminological theory, which viewed the individual as acting in a volitional and calculating manner and saw free will as underlying all human acts.²⁹ Under the classical view, the doctrinal requirements of volition and mens rea are premised upon an underlying morality that sees individuals as "endowed with reason and able, within limits, to choose one of various possible courses of conduct."³⁰ Italian mathematician and economist Cesare Bonesana Marchese di Beccaria, who drew together ideas of eighteenth-century democratic liberalism and linked them with issues of criminal justice, is often identified as the leader of this

system premised upon the belief that, like other children, adolescents are not morally accountable for their behavior. Thus, ordinary retributive punishment for the adolescent would be inappropriate. The Progressives treated lawbreaking by juveniles as a symptom justifying, in fact humanely requiring, state intervention to save them from a life of crime that might otherwise be their fate.

Ainsworth, *supra* note 20, at 1097 (footnote omitted).

28. Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 151 (1989). See also ELLEN RYERSON, *THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 75 (1978) (quoting a participant in the 1902 National Conference on Charities and Corrections as saying that "[a] child cannot commit a crime: they are in the same class as the insane in this respect"); Ainsworth, *supra* note 20, at 1097-98 (commenting on the reform that led up to the creation of the juvenile court system and stating that the system was premised upon the belief that adolescents are not morally accountable for their behavior). Note, however, that rehabilitationists consider not only juveniles, but offenders in general, to be morally blameless for their behavior.

The rehabilitationist views man as a product of deterministic forces, or as sick rather than morally blameworthy. Treatment is then little more than behavioral conditioning designed to enforce social conformity through the instrumentality of law. The logic of both is perfectly compatible with the positivist view that law has no necessary moral content.

Tuomala, *supra* note 25, at 243.

29. See LILLY ET AL., *supra* note 26, at 15 ("The most important feature of [the classical] school of thought is its emphasis on the individual criminal as a person who is capable of calculating what he or she wants to do."); see also FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS* 53 (R.J. Hollingdale trans., Penguin Books 1968) (1889) ("[W]e immoralists . . . are trying with all our might to remove the concept of guilt and the concept of punishment from the world and to purge psychology, history, nature, the social institutions and sanctions of them . . .").

30. JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 165 (1947).

school of criminology.³¹ Beccaria's views were echoed by English jurist and philosopher Jeremy Bentham in his discussions of human actions.³² Under the classical school's criminological theory, punishment is justified only when the individual chose to engage in the proscribed conduct.³³

This stress on individual volition was first challenged by the positivist school headed by Italian doctor and "father of modern criminology," Cesare Lombroso.³⁴ The positivist school of criminology articulates a deterministic view of behavior that provides the general premise supporting rehabilitation.³⁵ One commentator describes the positivist approach to rehabilitation as follows: "Despite a deterministic view of human nature, professionals engaged in the healing process have acquired the free will necessary to remold others by means of education, counseling, psychotherapy, and vocational training."³⁶ In the second half of the twentieth century, however, correctional philosophy increasingly moved away from its previous faith in positivistic penology and its confidence in the rehabilitative potential of juvenile delinquents.³⁷ One of the main factors influencing this shift away from positivism was the failure of instituted programs to show any effect upon recidivism rates—it appeared that "nothing worked."³⁸

31. See LILLY ET AL., *supra* note 26, at 15; see also NICHOLAS N. KITTRIE, *THE RIGHT TO BE DIFFERENT: DEVIANCY AND ENFORCED THERAPY* 20 (1971) ("[I]t was Cesare di Beccaria who promulgated the first comprehensive theory of criminal justice founded upon the principles of human dignity developed by his predecessors. In 1764, his work, *On Crimes and Punishments*, became the lodestone of what is now considered the liberal or classical school of criminology.")

32. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 74–83 (J.H. Burns & H.L.A. Hart eds., 1970); see also KENNEY ET AL., *supra* note 14, at 36 ("[Beccaria's and Bentham's] principal theses were that the law and administration of justice should be based on rationality and human rights."); LILLY ET AL., *supra* note 26, at 17. ("Jeremy Bentham . . . also argued that punishment should be a deterrent, and he too explained behavior as a result of free will and 'hedonistic calculus.'")

33. See Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 1006 (1986).

34. LILLY ET AL., *supra* note 26, at 18–19.

35. See Tuomala, *supra* note 25, at 241.

36. *Id.*

37. See Ainsworth, *supra* note 20, at 1104.

38. *Id.* See also FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 28–30 (1981) (discussing the "precipitous decline" of the rehabilitative ideal); Loraine Gelsthorpe & Allison Morris, *Juvenile Justice 1945–1992*, in *THE OXFORD HANDBOOK OF CRIMINOLOGY* 949, 973 (Mike Maguire et al. eds., 1994) (discussing the "disillusionment among academics with positivist approaches to crime, beginning in the USA in the 1960s but not taking root in England and Wales until the late 1970s").

While many of the earlier theories searched for the source of criminal behavior in the soul, the body, or the mind, the social context and environment external to the individual were not considered as causes of crime until the twentieth century.³⁹ The Chicago school of criminology, a broad-based intellectual movement that started at the University of Chicago, led the way with its environmental explanation of criminality.⁴⁰ In the 1920s and 1930s, the Chicago school focused on the psychological and social disorientations caused by urban life.⁴¹ Urban life, the theory suggested, led to a disintegration of the moral order, higher rates of criminality, and loss of social cohesion.⁴² The Chicago school emphasized the transmission of a criminal culture, giving rise to the cultural deviance theory,⁴³ and theorized that the environment of the ghettos and slums taught the people who lived there how to become criminals by providing them with deviant cultural values.⁴⁴

Movements of this type, which replaced the classical view of the individual as the source of crime with the theory that society itself is criminogenic, reached their high-water mark in Robert Merton's "strain theory."⁴⁵ This theory, which emerged in the late 1930s,⁴⁶ held that America's supposed obsession with ambition and economic success—which Merton believed made America an unusual place—led to crime and deviance.⁴⁷ Not surprisingly, Merton strongly attacked the individualistic explanations of crime that existed in the 1930s.⁴⁸ "[S]train theory' explains ideology as a response to the strains that an individual's or a group's social role or position creates."⁴⁹ Put another way, the popular belief that American society allows for virtually unlimited upward mobility contrasts with the limited realistic possibility of wealth acquisition and upward mobility for certain social groups; the legitimate ends of wealth

39. See LILLY ET AL., *supra* note 26, at 37.

40. See *id.* at 38.

41. See *id.* at 38–41.

42. See Geoffrey Pearson, *Youth, Crime, and Society*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 1161, 1169 (Mike Maguire et al. eds., 1994).

43. See LILLY ET AL., *supra* note 26, at 49.

44. See *id.* at 53.

45. See *id.* at 52–59.

46. See *id.* at 52–53.

47. See ROBERT K. MERTON, *Social Structure and Anomie*, in SOCIAL THEORY AND SOCIAL STRUCTURE 185, 190–211 (1968).

48. See LILLY ET AL., *supra* note 26, at 57.

49. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 326 (1987).

and prosperity therefore do not correspond with the available means of honest work.⁵⁰ Strain theory therefore considers criminal conduct an innovative means of achieving the promised ends of the American dream that would otherwise remain unattainable.⁵¹

The historical evolution of attitudes toward criminals and criminality described above sets the ideological stage for "labeling theory." Labeling theorists assert that the delinquent child is not responsible for his actions; instead, the blame is more appropriately shouldered by society.⁵² Labeling theorists view the destruction of harmful police records as removing a major obstacle impeding the rehabilitation of the juvenile because the very act of labeling a child or young adult as a "deviant" directly increases the likelihood that this individual indeed ultimately will live a criminal life.⁵³ Those who favor this type of legislation point to its supposed effectiveness in rehabilitating juvenile delinquents and argue that expungement allows a youthful offender to enter into adulthood without the stigma of a criminal conviction which may forever blot his record simply because he committed an immature and impulsive act.⁵⁴ Most fundamentally, the philosophy driving this theory places the emphasis on the perpetrator's youth rather than on his

50. See Pearson, *supra* note 42, at 1172; see also MERTON, *supra* note 47, at 190. ("Contemporary American culture appears to approximate the polar type in which great emphasis upon certain success-goals occurs without equivalent emphasis upon institutional means.")

51. See Pearson, *supra* note 42, at 1172.

52. Labeling theory is sometimes also referred to as the "social reaction" perspective, or the "interactional theory of deviance." See CLEMENS BARTOLLAS, *JUVENILE DELINQUENCY* 190 (1990). For a thorough and illuminating discussion of the philosophy and the history of labeling theory, see LILLY ET AL., *supra* note 26, at 115-31. See also KENNEY ET AL., *supra* note 14, at 40 ("Labeling theory was developed from the more general social-psychological theory of symbolic interactionism . . ."); MCGARRELL, *supra* note 26, at 8 ("Drawing on the tenets of labelling theory, the [President's Commission on Law Enforcement and the Administration of Justice] warned that the stigmatizing effects of official processing may actually intensify delinquent behavior.") (citation omitted); MICHAEL RUTTER & HENRI GILLER, *JUVENILE DELINQUENCY: TRENDS AND PERSPECTIVES* 263 (1983) ("[I]t may be concluded that official processing may serve to increase the probability of future deviance."); John D. Wooldredge, *Age at First Court Intervention and the Likelihood of Recidivism Among Less Serious Juvenile Offenders*, 19 J. CRIM. JUST. 515, 516 (1991) (noting that one of the goals of juvenile diversion is "to avoid labelling impressionable juveniles as 'delinquent' in order to prevent increases in their recidivism likelihoods").

53. See Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162.

54. See Volenick, *supra* note 6, at 169.

crimes.⁵⁵ One commentator, discussing the difficulty that a juvenile may encounter when trying to overcome the effects of his record of past criminality, describes the background and benefits of expungement as follows: "Recognizing the near impossibility of changing societal views toward juvenile offenders, many legislators have attempted instead to combat the harmful effects of a delinquency adjudication by providing for concealment of juvenile records, on the grounds that such concealment will aid the child's reintegration into society."⁵⁶

The labeling perspective is therefore based upon the premise that the very process of labeling as "different" those who have been apprehended creates deviants who are different only because they have been tagged with the label of delinquent.⁵⁷ "Labelling theorists suggest that some of the alleged characteristics of delinquents may be exaggerated, if not actually generated, by the processes of trial and punishment and the consequential social stigma and loss of reputation to which those who happen to be caught are inevitably exposed."⁵⁸ That is to say, labeling theory posits that the delinquency labels with which society identifies certain members are the very root causes of criminality, and that the delinquents, therefore, are mere victims of conventional labeling practices.⁵⁹

Explaining this principle, prominent labeling theorist Howard Becker writes that "deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender.' The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label."⁶⁰ Criminologist Frank

55. See von Hirsch, *supra* note 25, at 2 ("According to [the Model Penal Code] . . . the gravity of the actor's criminal conduct was relatively unimportant."); see also MCGARRELL, *supra* note 26, at 7 (discussing President Kennedy's Committee on Juvenile Delinquency and Youth Crime and the strain theory's influence on the committee, stating that "the cause of delinquency [was viewed as] a defective social structure that failed to provide youth with sufficient legitimate opportunities. The policy implications of this perspective downplayed the importance of traditional individual casework approaches and emphasized the need to reintegrate youth into the community.") (citation omitted).

56. Volenick, *supra* note 6, at 169.

57. See HOWARD S. BECKER, *OUTSIDERS* 8-9 (1963); Gary F. Jensen, *Labeling and Identity*, 18 *CRIMINOLOGY* 122 (1980).

58. D.J. WEST, *DELINQUENCY: ITS ROOTS, CAREERS AND PROSPECTS* 5 (1982).

59. See GLENN D. WALTERS, *THE CRIMINAL LIFESTYLE* 34 (1990).

60. BECKER, *supra* note 57, at 9. See also EDWIN M. SCHUR, *LABELING DEVIANT BEHAVIOR* 24 (1971) ("Human behavior is deviant to the extent that it comes to be viewed as involving a personally discreditable departure from a group's normative expectations, and it elicits interpersonal or collective reactions that serve to 'isolate,' 'treat,' 'correct,' or 'punish' individuals engaged in such behavior.") (emphasis omitted).

Tannenbaum, the first to develop the labeling perspective from the more general theory of "symbolic interactionism,"⁶¹ similarly argues in his book *Crime and the Community*⁶² that

The process of making the criminal, therefore, is a process of tagging, defining, identifying, segregating, describing, emphasizing, making conscious and self-conscious; it becomes a way of stimulating, suggesting, emphasizing, and evoking the very traits that are complained of. If the theory of relation of response to stimulus has any meaning, the entire process of dealing with the young delinquent is mischievous in so far as it identifies him to himself or to the environment as a delinquent person.⁶³

"Radical criminologists" take labeling theory's core notion of blaming society rather than the individual for the individual's criminal acts one step further by characterizing the law itself as an oppressive force used by the dominant classes to promote and to stabilize existing socioeconomic relations. The rich are viewed as protecting their property and physical safety from those who lack both power and privilege by using the legal order to impose forcefully their own interests upon society.⁶⁴ Not surprisingly, radical criminologists have sharply criticized mainstream liberals who advocate rehabilitation as betraying the lower classes. Radical criminologists see the rehabilitative system as designed to inculcate middle class values and a belief in the law's neutrality.⁶⁵ Anthony Platt, for example, tries to

61. Symbolic interactionism is a sociological theory that views society from the perspective of the individual members and focuses on how individuals utilize symbols to interact with one another. For example, the theory views reputation as arising from the interaction between an individual's personality and the perceptions of the community and its institutions. See HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 78-82 (1969). See generally JOEL M. CHARON, *SYMBOLIC INTERACTIONISM: AN INTRODUCTION, AN INTERPRETATION, AN INTEGRATION* 153-73 (2d ed. 1985) (describing symbolic interactionists' view of society); GEORGE RITZER, *SOCIOLOGICAL THEORY* 298-325 (1983) (discussing the evolution of symbolic interaction theory).

62. FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* (1938).

63. *Id.* at 19-20.

64. See William J. Chambliss, *Toward a Radical Criminology*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 230, 234 (David Kairys ed., 1982); see also MUSICK, *supra* note 26, at 117 ("[L]arge numbers of lower-class persons grow demoralized and despondent, succumbing to the temptations of crime and delinquency in order to ameliorate oppressive conditions" brought about by capitalism.).

65. See John R. Sutton, *Children in the Therapeutic State: Lessons for the Sociology of Deviance and Social Control*, in *INEQUALITY, CRIME, & SOCIAL CONTROL* 227, 227 (George S. Bridges & Martha A. Myers eds., 1994):

explain how dominant classes create definitions of crime in order to control and subordinate the lower classes:

The juvenile court system was part of a general movement directed towards developing a specialized labor market and industrial discipline under corporate capitalism by creating new programs of adjudication and control for "delinquent," "dependent" and "neglected" youth. This in turn was related to augmenting the family and enforcing compulsory education in order to guarantee the proper reproduction of the labor force.⁶⁶

The notion that the label of "juvenile delinquent" causes a person to become delinquent or to increase his level of delinquent conduct is questionable, however; put simply, the label of "juvenile delinquent" does not randomly attach itself to persons, but instead is earned by affirmative criminal conduct. Moreover, separating the underlying criminal predisposition that caused the person to be labeled delinquent from the effect, if any, that the label itself has on subsequent acts of criminality is difficult.⁶⁷ It is also interesting to note that labeling theorists generally deny the utility of engaging in any form of causation analysis.⁶⁸ Instead, they view their work as being merely

If we want seriously to address the issues of inequality, deviance, and social control in terms of children, we must choose an approach that radically problematizes not only specific taxonomies and theories of delinquency but also the very notions of childhood as a natural phenomenon and of delinquency as a distinct and scientifically accountable form of behavior.

See also Tuomala, *supra* note 25, at 243 ("Radicals believe crime is not a matter of individual pathology, but rather the ability of dominant groups to define the conduct of dominated groups as criminal. The entire social structure must be altered, replacing domination with solidarity.") (footnote omitted).

66. Anthony Platt, *The Triumph of Benevolence: The Origins of the Juvenile Justice System in the United States*, in CRIMINAL JUSTICE IN AMERICA 356, 377 (Richard Quinney ed., 1974). See also Meda Chesney-Lind, *Judicial Paternalism and the Female Status Offender: Training Women to Know Their Place*, in THE CHILDREN OF ISHMAEL 376, 377 (Barry Krisberg & James Austin eds., 1978) ("While using rhetoric about protecting children from the horrors of the adult [court] system, the [juvenile] court's founders were actually interested in a system which would shore up 'traditional' American institutions like the family.")

67. See R. BARRI FLOWERS, THE ADOLESCENT CRIMINAL: AN EXAMINATION OF TODAY'S JUVENILE OFFENDER 132 (1990) (arguing that the "most often noted" weakness of labeling theory is "the inability of labeling theory to determine the circumstances that must be present before an individual or act is labeled deviant").

68. See EDWIN M. SCHUR, RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM 154 (1973).

descriptive,⁶⁹ leaving a resultant scarcity of research regarding the question of whether having a criminal record is in itself criminogenic.⁷⁰ The research that has been conducted in this area, however, has consistently failed to prove consistently the existence of any such criminogenic influence resulting from the presence of a criminal record.⁷¹

Regardless of how one views the merits of these arguments, one must bear in mind that labeling theory and its progeny lie at the very heart of today's juvenile expungement statutes.⁷² The work of these theorists "reformed" the juvenile justice system in the 1960s and 1970s and led to the institution of contemporary expungement schemes.⁷³ Their early work shaped the present-day ideal of rehabilitation, which provides the foundation for expungement.⁷⁴ Thus, before one can reject expungement as an inappropriate legislative scheme, today's juvenile offenders must be examined in the context of the rehabilitation model, and the rehabilitation model must be examined in the context of today's juvenile offenders.

69. One author describes labeling theorists' descriptive style as follows: "Labeling theory thus explains how children who violate the law might be undergoing personality change when they get caught and, consequently, might increase delinquent activity as a result of negative feedback from family, school, and legal authorities." MUSICK, *supra* note 26, at 109.

70. One may assume that a reason for this scarcity is the methodological difficulty of conducting such a study. See Anne Rankin Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 L. & SOC'Y REV. 583, 583 (1974) (noting that labeling theory has been described as "our most widely accepted, untested formulation"); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1920 (1991) ("[N]o empirical data prove that the secondary deviance is a result of [being labeled a 'delinquent'], versus whatever conditions or instincts prompted the primary offense.").

71. See, e.g., Mahoney, *supra* note 70, at 608 (finding inconclusive the results from studies examining whether having a criminal record increases later delinquent behavior); Massaro, *supra* note 70, at 1920 (observing that "the most accurate statement" that can be made regarding the criminogenic effect of a criminal record "is that we do not know, for certain, whether labeling produces secondary deviance").

72. See Volenick, *supra* note 6, at 174.

73. See *supra* notes 25-28 and accompanying text.

74. Note, however, that the once-popular rehabilitative movement has been replaced in the 1980s by a punishment-based approach. Expungement schemes thus are not only based upon an empirically questionable foundation, but the very philosophy underlying it has been abandoned in other contexts by our legal system. See KENNEY ET AL., *supra* note 14, at 4-6; see also WILLIAM J. MACKEY ET AL., *URBANISM AS DELINQUENCY* 9 (1993) (noting that the rehabilitative ideal was "prominent in the early decades of this century . . . until the nineteen seventies").

II. A MERE YOUTHFUL INDISCRETION?

Present-day delinquents are committing very "adult" crimes which involve considerable harm to both persons and property.⁷⁵ Over the ten-year period from 1983 to 1992, juvenile arrest rates for Violent Crime Index offenses of murder, non-negligent manslaughter, forcible rape, and robbery increased 57%; the arrest rate for aggravated assault increased 95%. Notably, while the adult arrest rate for murder rose merely by 9%, the parallel juvenile arrest rate jumped 128%.⁷⁶ Furthermore, the average arrest rate for Violent Crime Index offenses is forecast to increase 101% by 2010.⁷⁷ Juvenile arrest rates for aggravated assault went up 100% between 1983 and 1992,⁷⁸ and juvenile arrests for weapons law violations more than doubled between 1983 and 1992.⁷⁹ A U.S. Department of Justice report reveals that in 1991, juveniles between the ages of twelve and eighteen were responsible for approximately 28% of all personal crimes such as rape, personal robbery, aggravated and simple assault, and theft from a person;⁸⁰ the report also discusses surveys estimating that by the year 2010, juvenile arrests for violent crime will more than double and juvenile arrests for murder will increase by 45%.⁸¹ These statistics strongly contradict the notion that juvenile criminals commit childlike crimes. In the words of one commentator, the present system is

grounded on the belief in rehabilitation and it was designed to deal with delinquents who stole hubcaps, not those who mug old ladies. It makes the courts a kind of sanctuary for the most vicious among the criminal young while paradoxically it fails at the same time to reach and effectively deal with those who might be deterred from a life of crime.⁸²

75. See KRISBERG & AUSTIN, *supra* note 1, at ix (noting a 217% increase in arrests of 15-year-olds for murder between 1985-1991). SNYDER & SICKMUND, *supra* note 1, at 117 (estimating that one in three persons arrested for a property offense between 1983 and 1992 was a juvenile).

76. See SNYDER & SICKMUND, *supra* note 1, at 10.

77. See *id.* at 7.

78. See *id.* at 8.

79. See *id.* at 21.

80. See *id.* at 1.

81. See *id.* at 7.

82. RITA KRAMER, AT A TENDER AGE: VIOLENT YOUTH AND JUVENILE JUSTICE 7 (1988). Consider also that some psychological research has shown that "even comparatively

As mentioned above, one of the underlying premises of juvenile expungement statutes is that they will help the young adult in his rehabilitation efforts.⁸³ Although this is a laudable goal, any advantages of the expungement process nevertheless must be weighed against the harm expungement causes.⁸⁴

The fear that a person with a juvenile record may become a "social leper" who, by necessity, will live at the deviant outskirts of our society is well founded.⁸⁵ But it is highly questionable that the undifferentiating destruction of virtually all records relating to juvenile delinquency is the appropriate remedy for this possibility.⁸⁶ The usefulness of a policy such as expungement must thus be measured by the ultimate protection from illegal behavior it provides to the public, as well as by its contribution to the rehabilitation of former offenders.⁸⁷ In short, the policy must be assessed by its effectiveness in reducing

young children possess[] cognitive and reasoning abilities equivalent to those of adults." Ainsworth, *supra* note 20, at 1103 (footnote omitted); see also *Wisconsin v. Yoder*, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting) (citing Piaget, Elkind, Kohlberg, Gesell, and other noted experts in child development, sociology, and psychology, and concluding that the "moral and intellectual maturity of a 14-year-old approaches that of the adult"); Jean Piaget, *THE MORAL JUDGMENT OF THE CHILD* (1965) (analyzing moral development with age); Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, *LAW & CONTEMP. PROBS.*, Summer 1975, at 38, 74 ("In the postindustrial era . . . the institutional and psychological basis for conceiving childhood and adulthood as distinct stages of life may no longer exist.").

83. See *supra* notes 11, 14-15 and accompanying text.

84. See generally *State ex rel. Mavity v. Tyndall*, 66 N.E.2d 755 (Ind. 1946) (emphasizing the need to harmonize an individual's right to privacy with community and social interests); *State v. Hakes*, No. 91-1164-CR, 1991 WL 285903, at *3 (Wis. App. Nov. 6, 1991) (discussing expungement and the "legislature's mandated objective of weighing the benefit to the offender against the harm to society"). See also *Haddock v. City of New York*, 553 N.E.2d 987, 988 (N.Y. 1990):

This appeal, centering on the rape of a nine-year-old child in a New York City playground by a Parks Department employee with a history of violent crime, poses a modern-day dilemma: assuring the public safety as well as the rehabilitation of former felons to constructive lives within society.

See also *State v. Largent*, 304 S.E.2d 868, 869 (W. Va. 1983) (discussing process in which lower court "weighed the benefit to be gained from expungement against the deterrent effect of an adult conviction"); Ainsworth, *supra* note 20, at 1118 (opining that "[p]erpetuating an anachronistic juvenile court" with a separate juvenile jurisprudence "exact[s] its own costs, both ideological and practical").

85. See Richard S. Harnsberger, *Does the Federal Youth Corrections Act Remove the "Leper's Bell" from Rehabilitated Offenders?*, 7 *FLA. ST. U. L. REV.* 395, 395-97 (1979).

86. See *infra* notes 218-19 and accompanying text.

87. Improvements in individual rehabilitation also naturally will correlate positively with improvements in public safety.

recidivism.⁸⁸ Although an evaluation of its effect on the criminal's change in attitude, personality, and skill development can be undertaken, such measures tend to correlate negatively with recidivism.⁸⁹ Because the primary purpose of instituting an expungement scheme should be society-centered (to wit, to protect the public from criminality), reduction in recidivism as measured by various contacts with law enforcement and the courts is the most appropriate measure for evaluating offender behavior and the success of the program.⁹⁰

Before discussing some specific areas in which free access to accurate and complete juvenile records is vital, the basic premise underlying the rehabilitative model—that the juveniles who engage in a pattern of criminality can, in fact, be rehabilitated—must first be examined. The focus, therefore, must be on assessing the probability of today's juvenile delinquents becoming tomorrow's adult criminals, or, more relevant to prevention, the likelihood of tomorrow's adult criminals having been today's juvenile delinquents. If a strong correlation between juvenile delinquency and adult criminality does in fact exist, then the only criminologically sound option is to document and monitor carefully those who have come into contact with the justice system in the past and who therefore are far more likely to come into contact with the justice system in the future.

III. DOES REHABILITATION WORK?

Juvenile records are useful only to the extent that they, based on an individual's past deviance, can aid in predicting future criminality and amenability to rehabilitation. Accordingly, these

88. See TED PALMER, A PROFILE OF CORRECTIONAL EFFECTIVENESS AND NEW DIRECTIONS FOR RESEARCH 8 (1994). He writes:

Recidivism, as measured by arrests, parole revocation, incarceration, and so on, has long been used to assess the impact of rehabilitation, punishment, and incapacitation alike. . . . [T]his index is widely accepted by researchers, practitioners, policy makers, and the public itself, and it is usually considered a key element in any outcome evaluation.

Id. at 8-9.

89. See *id.* at 9.

90. See *id.*; see also JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR 104 (1981) ("If there is one finding that overshadows all others in the area of prediction, it is that the probability of future crime increases with each prior criminal act.")

records would be virtually useless if they did not provide insight, with some degree of prognostic accuracy, into the rehabilitative potential of the individual. Therefore, the primary question that must be answered is: *To what extent are individuals with juvenile records more likely to commit future crimes than those without such a record?* The answer to that question will frame the discussion in this Part.

Although some claim that juveniles with records are no more likely to commit future crimes than those without records,⁹¹ but such claims appear to be meritless. A review of the scholarly analysis examining the relationship between early contacts with the legal system and subsequent acts of delinquency or adult criminality reveals that early court appearances are reasonably prognostic of subsequent delinquent behavior.⁹² Indeed, these studies have led some commentators to refer to young adult offenders as "juvenile delinquents grown up,"⁹³ and this reference finds backing in the empirical research conducted on the subject.⁹⁴ An uncompromising look at the available research leaves few alternatives except to conclude that rehabilitation of serious juvenile delinquents is more fiction than fact.

At bottom, unfortunately, no "cure" seems to exist for individuals who engage in repeated acts of criminal deviance. In light of the results yielded by the many programs that have been instituted to combat recidivism, it appears that, by and large, only substantial aging effectively leads to the reformation of the chronic juvenile delinquent.⁹⁵ According to one study, eighty percent of chronic juvenile offenders later will become

91. See, e.g., HOWARD B. KAPLAN, PATTERNS OF JUVENILE DELINQUENCY 124-25 (1984) (arguing that "reform is associated with . . . maturity").

92. See WEST, *supra* note 58, at 13-17; see also MONAHAN, *supra* note 90, at 92 ("Research indicates that . . . a history of early [childhood] violence relate[s] to the commission of violent behavior as an adult. Outcome studies of clinical prediction with adult populations underscore the importance of past violence as a predictor of future violence . . .").

93. WEST, *supra* note 58, at 75.

94. See Lee N. Robbins, *Sturdy Childhood Predictors of Adult Antisocial Behavior: Replications from Longitudinal Studies*, 8 J. PSYCHOL. MED. 611, 616-19 (1978) (discussing childhood antisocial behavior as predictive of adult antisocial behavior).

95. See 1 CRIMINAL CAREERS AND "CAREER CRIMINALS" 23 (Alfred Blumstein et al. eds., 1986) (finding that chronic offenders typically begin their criminal careers in their mid-teens, peak during their late teens to early twenties, and thereafter gradually decrease their criminal involvement); MICHAEL R. GOTTFREDSON & TRAVIS HIRSCH, A GENERAL THEORY OF CRIME 253 (1990) ("Composite measures of crime follow a predictable path over the life course, rising to a peak in late adolescence and declining sharply thereafter throughout life . . .").

adult offenders.⁹⁶ Moreover, research has revealed that an individual who was criminally active as a juvenile is almost four times as likely to become an adult offender than an individual without a history of such early criminality.⁹⁷ In another study, one thousand males were divided into two groups for comparison purposes—a nondelinquent control group and a delinquent group.⁹⁸ Of those in the nondelinquent control group, the majority remained law-abiding,⁹⁹ while the “great majority” of those in the delinquent group continued to commit a host of criminal acts while between the ages of seventeen and twenty-five.¹⁰⁰ The countless authoritative and exhaustive studies conducted on this issue have found that a consistent pattern of deviational behavior tends to appear early in the individual’s life and then continue throughout the life course.¹⁰¹ In addition, studies have

96. See KRAMER, *supra* note 82, at 222–23 (adding that “[t]oday we know enough about the violent few who commit the worst crimes—and commit them over and over with impunity—to see this belief in the prospects for rehabilitation of the habitually violent as misplaced optimism”); see also MARC LE BLANC & MARCEL FRECHETTE, *MALE CRIMINAL ACTIVITY FROM CHILDHOOD THROUGH YOUTH* 83–84 (1989) (estimating that as many as 60% of adolescents who were arrested or convicted will have criminal records as adults); KAPLAN, *supra* note 91, at 105 (noting that “[i]t is clear that there is a degree of stability between early delinquent behavior and later performance of illegal acts”); PALMER, *supra* note 88, at 47–48 (reluctantly concluding, after an exhaustive overview of research conducted on the effectiveness of programs designed to reduce juvenile recidivism, that there are no particular programs that can “produce” a large reduction in recidivism).

97. See MONAHAN, *supra* note 90, at 106.

98. See SHELDON GLUECK & ELEANOR GLUECK, *DELINQUENTS AND NONDELINQUENTS IN PERSPECTIVE* 3 (1968).

99. See *id.* at 170.

100. *Id.* See also SHELDON GLUECK & ELEANOR GLUECK, *OF DELINQUENCY AND CRIME* 111 (1974) (discussing an early study of juveniles in a Massachusetts Reformatory in which “almost eighty percent of the 422 whose conduct beyond the completion of [their sentences] . . . could be ascertained, committed crimes during the five-year span following expiration of the sentence which was intended to reform, or at least deter them” and finding that “[t]his dismal record contrasts sharply with the official optimistic estimates previously made”). In another study, which traced the criminal careers of 1000 juvenile boys, 73.2% of those who could be located were officially categorized as repeat offenders within 10 years of their appearance in juvenile court. See *id.* at 146.

101. See, e.g., TRAVIS HIRSCHI & MICHAEL R. GOTTFREDSON, *THE GENERALITY OF DEVIANCE* 242–48 (1994) (“Overall, we have found that delinquent behavior in childhood has significant and very substantial relationships with a wide range of adult criminal and deviant behaviors, including charges initiated by military personnel, interview-based reports of involvement in deviance and excessive drinking, and arrest by police.”); CHRISTOPHER D. WEBSTER ET AL., *THE VIOLENCE PREDICTION SCHEME: ASSESSING DANGEROUSNESS IN HIGH RISK MEN* 32, tbl. 4.2 (1994) (finding recidivists statistically more likely to have a “violent offence history” than non-recidivists); MARVIN E. WOLFGANG ET AL., *FROM BOY TO MAN, FROM DELINQUENCY TO CRIME* 196 (1987) (finding juvenile delinquency to be the strongest predictor of adult criminality); Avshalom Caspi et al., *Moving Against the World: Life-Course Patterns of Explosive Children*, 23 *DEVELOPMENTAL PSYCHOL.* 308, 313

shown that seventy-two percent of delinquents progress to higher stages of criminal activity.¹⁰² These studies therefore seem to refute the notion expressed by advocates of expungement that juvenile delinquents merely commit acts of youthful indiscretion. Instead, the studies reveal that the transition from juvenile delinquent to adult criminal is often a remarkably natural, though regrettable, progression.¹⁰³

One of the seminal works on delinquency patterns is Wolfgang, Thornberry, and Figlio's book *From Boy to Man, from*

(1987) (finding that "early personality can shape the life course" and that "long-term continuities of personality" develop early); John N. Constantino, *Early Relationships and the Development of Aggression in Children*, 2 HARV. REV. OF PSYCHIATRY 259, 260 (1995) ("[C]hildhood aggression appears to be a precursor for antisocial behavior (including violent crime) in adulthood."); David P. Farrington, *The Development of Offending and Antisocial Behavior from Childhood: Key Findings from the Cambridge Study in Delinquent Development*, 360 J. CHILD PSYCH. PSYCHIATRY 929 (1995) (finding early anti-social behavior to be a predictor of subsequent delinquency); Minna Hämäläinen & Lia Pulkkinen, *Problem Behavior as a Precursor of Male Criminality*, 8 DEV. & PSYCHOPATHOLOGY 443 (1996) (examining 196 boys and 173 girls in an ongoing longitudinal study and finding norm-breaking behavior during early adolescence to be strongly related to later criminal offenses); Rolf Loeber, *The Stability of Antisocial and Delinquent Child Behavior: A Review*, 53 CHILD DEV. 1431, 1442 (1982) ("[Y]ouths whose early antisocial behavior is extremely frequent are at highest risk for becoming chronic offenders. Moreover, there is good evidence that youngsters who turn out to become chronic offenders start their antisocial behavior at an early age."); Terrie E. Moffitt et al., *Childhood-Onset Versus Adolescent-Onset Antisocial Conduct Problems in Males: Natural History from Ages 3 to 18 Years*, 8 DEVELOPMENTAL PSYCHOPATHOLOGY 399, 399 (1996) ("[A]lmost all violent and predatory adult antisocial careers originated in juvenile conduct problems."); Julie O'Donnell et al., *Predicting Serious Delinquency and Substance Use Among Aggressive Boys*, 63 J. CONSULTING & CLINICAL PSYCH. 529, 529 (1995) ("Children who manifest . . . aggressive behavior in childhood maintain the highest risk of subsequently becoming involved in juvenile delinquency and adult criminality."); David R. Offord & Kathryn J. Bennett, *Conduct Disorder: Long-Term Outcomes and Intervention Effectiveness*, 33 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1069, 1071 (1994) ("A summary of [the literature] reveals that [early] conduct problems predict antisocial behavior in adulthood."); Dan Olweus, *Stability of Aggressive Reaction Patterns in Males: A Review*, 86 PSYCHOL. BULL. 852, 872-73 (1979) (arguing that "consistency over time in aggressive behavior" is great and that "personality concepts involving relatively stable, internal reaction tendencies or properties of individuals are useful in predicting and explaining aggressive behavior").

102. See LE BLANC & FRECHETTE, *supra* note 96, at 122-25; see also WALTERS, *supra* note 59, at 78 ("[R]esearch conducted over the past several years demonstrates that the onset of lawbreaking behavior at an early age is strongly prognostic of high-rate criminality later in life . . ."); Robert J. Sampson & John H. Laub, *Crime and Deviance in the Life Course*, 18 ANN. REV. SOC. 63, 64 (1992) (reviewing numerous studies of the link between early childhood behaviors and later adult outcomes and finding that evidence "indicates an early onset of delinquency as well as continuity of criminal behavior over the life course").

103. See MARTIN DALY & MARGO WILSON, HOMICIDE 281-88 (1988) (arguing that "present violence is [plausibly] itself a causal determinant of future violence").

Delinquency to Crime.¹⁰⁴ The authors traced the criminal careers of a sample of males born in Philadelphia in 1945 from childhood through age thirty.¹⁰⁵ The relevant finding of this study is that the frequency and seriousness of juvenile arrests, deduced by examining their juvenile records, are the most important variables in accounting for the number and seriousness of adult arrests.¹⁰⁶ This suggests a strong and consistent link between juvenile and adult deviance. Furthermore, these results have been confirmed by a host of similar studies.¹⁰⁷ Such data reveal that identifying repeat offenders, particularly violent ones, as early as possible is of particular importance. These studies regrettably point to the general futility of rehabilitative programs as they exist today in changing the deviant behaviors of youthful repeat offenders.¹⁰⁸ Indeed, the United States Supreme Court has lamented the particularly high rate of recidivism among juvenile offenders,¹⁰⁹ and studies have

104. WOLFGANG ET AL., *supra* note 101.

105. *See id.* at 195 (noting that 47% of those studied had an official arrest record by the time they turned 30).

106. *See id.* at 36 (“[S]ubjects with long and serious juvenile careers are likely to have long and serious adult careers. This finding is consistent with previous longitudinal research and suggests the continuity of offensive careers across both the juvenile and adult years.”).

107. *See, e.g.,* DONNA M. HAMPARIAN ET AL., *THE VIOLENT FEW: A STUDY OF DANGEROUS JUVENILE OFFENDERS* 128 (1978) (concluding that 7% of the chronic offenders in a two-subject cohort committed approximately 50% of the offenses); PAUL E. TRACY ET AL., *DELINQUENCY CAREERS IN TWO BIRTH COHORTS* 83 (1990) (tracing the criminal histories of 3475 delinquents and finding that 6% of the chronic offenders had 52% of all the police contacts in the cohort); WOLFGANG ET AL., *supra* note 101, at 79 (finding that, in a cohort consisting of 15% chronic offenders, these offenders were responsible for 74% of arrests); Weiner, *supra* note 1, at 124 (surveying numerous studies on criminal behavior and concluding that “[o]verall, these results indicate that among all offenders a small segment accounts for a large proportion of all offenses, including the most violent ones”).

108. *See* 1 *CRIMINAL CAREERS AND “CAREER CRIMINALS,” supra* note 95, at 86–88 (discussing continuity of criminal behavior among chronic offenders); Joanna M. Basta & William S. Davidson II, *Treatment of Juvenile Offenders: Study Outcomes Since 1980*, 6 *BEHAV. SCI. & L.* 355, 355–56 (1988) (“Past reviews of the treatment of juvenile offenders have concluded that ‘nothing works.’ . . . Several reviews of the literature called into question the efficacy of the various treatment approaches for reducing recidivism in the juvenile justice system. . . . [Other reviews have] concluded that the research of recent years is very promising.”); Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, *PUB. INTEREST*, Spring 1974, at 22, 25 (“With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.”) (emphasis omitted).

109. *See* *Schall v. Martin*, 467 U.S. 253, 264–65 (1984); *see also* Shelley Zavlek, Note, *Justice for Juveniles? The Second Circuit Declares Juvenile Preventative Detention Statute Unconstitutional*, 50 *BROOK. L. REV.* 517, 559 (1984) (discussing the *Schall* majority’s reliance on the high recidivism rates among juveniles as one of the factors justifying preventative detention).

concluded that even those juveniles placed into the best rehabilitative programs available are likely to resume their criminal careers.¹¹⁰ Moreover, these correlations are not only found in the United States. Even when one omits traditional sociological variables and expands the study to other countries, one finds a similar stability in antisocial behavior.¹¹¹ This is a generalization that cannot often be made in the social sciences.¹¹²

Findings such as these have led scholars examining the link between juvenile delinquency and adult criminal behavior to conclude that "past criminality is one of the better predictors of future criminality [and] . . . that early-onset criminality is a strong predictor of serious lawbreaking behavior later on in life."¹¹³ The fortunate converse of these findings is that those who are not delinquent as youths generally are, with few exceptions, not criminal in their adult lives.¹¹⁴

110. See Brian R. Suffredini, Note, *Juvenile Gunslingers: A Place for Punitive Philosophy in Rehabilitative Juvenile Justice*, 35 B.C. L. REV. 885, 900-01 (1994).

111. See Sampson & Laub, *supra* note 102, at 69 (citing Avshalom Caspi & Terri Moffitt, *The Continuity of Maladaptive Behavior from Description to Understanding in the Study of Antisocial Behavior*, in *MANUAL OF DEVELOPMENTAL PSYCHOPATHOLOGY 2* (D. Cicchetti & D. Cohen eds., 1991)); see also WEBSTER ET AL., *supra* note 101, at 32 (noting in a publication of the Centre of Criminology at the University of Toronto that 42% of those arrested before age 16 became violent recidivists); WEST, *supra* note 58, at 16 (examining findings of an English study which revealed that a majority of young adult offenders begin their criminal careers as juvenile delinquents and concluding that "[i]t is well known that being convicted at an early age is a bad sign"); D.J. WEST & D.P. FARRINGTON, *THE DELINQUENT WAY OF LIFE 131* (1977) (discussing their study of English juvenile delinquents and finding "a significant trend towards not merely a perpetuation of previous misconduct but towards an active increase of delinquent behavior following conviction"); Jerzy Sarnecki, *Juvenile Delinquency in Sweden*, in *YOUTH, CRIME AND JUSTICE 11, 16* (Annika Snare ed., 1991) (discussing criminality among young people in Sweden and finding that those who were more criminally active as teenagers were, as a group, also more criminally active as adults).

112. See Sampson & Laub, *supra* note 102, at 69.

113. WALTERS, *supra* note 59, at 57 (citing C. Holden, *Growing Focus on Criminal Careers*, 223 SCIENCE 1377-78 (1986)). See also MONAHAN, *supra* note 90, at 72 (concluding that a history of past violence appears to influence the occurrence of future violence and that the age of the perpetrator is essentially irrelevant to this conclusion). As a result of the increasing disillusionment with the rehabilitative model, the juvenile justice system has moved away from rehabilitation and toward retribution.

From a world in which the child by definition was morally incapable of committing a crime, we have now passed to a world in which juveniles are to be held strictly accountable for their crimes. As a result of this shift in juvenile justice philosophy, state juvenile court hearings have come to resemble adult criminal trials. . . . The proliferation of "just desserts" juvenile sentencing laws in the 1980s represents telling evidence of the demise of the older juvenile court model.

Ainsworth, *supra* note 20, at 1105-06 (footnotes omitted).

114. See GLUECK & GLUECK, *supra* note 100, at 157 ("[T]he great majority of nondelinquents continue[] on the straight and narrow path of lawabidingness" throughout their lives).

That *chronic* offenders are responsible for the vast majority of offenses committed is also noteworthy,¹¹⁵ and this finding also holds true internationally.¹¹⁶ Research reveals that fifty to seventy-five percent of all violent offenses committed by juveniles can be traced to a group of hard-core chronic offenders that make up between two and fifteen percent of the offending population.¹¹⁷ While there is a certain understandable allure to the notion that we can “cure” a child who has decided to live outside of society’s norms, the evidence shows that, as a rule, such “cures” will fail to achieve desired results.

The presently employed system of juvenile justice inexplicably appears to ignore the wealth of evidence discussed above suggesting that the typical juvenile delinquent has adopted a deviant lifestyle that pits him against society. Juvenile delinquents learn to think like criminals in early childhood, and the studies discussed above, along with many others, reveal that patterns of chronic criminality remain stable throughout the late teens and into adulthood.¹¹⁸ “[W]hen youths continue to break the law three, four, or more times, then delinquency becomes more

115. See TRACY ET AL., *supra* note 107, at 15–16, 279–80; see also SUE T. REID, CRIME AND CRIMINOLOGY 352 (7th ed. 1994) (concluding that repeat offenders “commit the majority of serious, detected crimes, although they do not constitute a majority of criminals”); WALTERS, *supra* note 59, at 7 (“[R]esearch clearly suggests that while lifestyle criminals are small in number, they account for a decisive majority of the serious crimes committed in this country. . . .”).

116. See WALTERS, *supra* note 59, at 50; see also DORA NEVARES ET AL., DELINQUENCY IN PUERTO RICO 121 (1990) (finding that, in a cohort analysis of males and females born in 1970 who, before reaching age 18, either had at least one arrest record or were declared status offenders in the greater San Juan metropolitan area, 10% of the delinquents committed 30% of the offenses); WEST, *supra* note 58, at 16 (finding that in England a minority of the offenders were responsible for more than half of the total convicted offenses); Kauko Aromaa, *Self-Reported Delinquency in Helsinki, Finland, 1992, in DELINQUENT BEHAVIOR AMONG YOUNG PEOPLE IN THE WESTERN WORLD* 22 (Josine Junger-Tas et al. eds., 1994) (“[T]he most intensively delinquent youths are the core problem groups.”).

117. See George B. Smith & Gloria M. Dabiri, *The Judicial Role in the Treatment of Juvenile Delinquents*, 3 J.L. & POL’Y 347, 373 (1995); see also TRACY ET AL., *supra* note 107, at 83 (estimating that chronic delinquents comprised 7.5% of the 1958 cohort, yet were responsible for 61% of all offenses in the cohort); Deborah W. Denno, *Gender, Crime, and the Criminal Law Defenses*, 85 J. CRIM. L. & CRIMINOLOGY 80, 105 (1994) (“[O]ne of the most important results reported in delinquency research is the finding that chronic offenders are responsible for a highly disproportionate share of the total number of offenses.”).

118. See GOTTFREDSON & HIRSCHI, *supra* note 95, at 253 (“[C]omposite measures of crime are highly stable over time. People having a high degree of criminality at one time will tend to have a high degree of criminality later in life. . . .”); WOLFGANG ET AL., *supra* note 101, at 196 (concluding that juvenile offenders with extensive police records were significantly more likely to have extensive criminal records as adults).

significant because it then begins to represent the initiation of a pattern of deviance that can continue into adulthood."¹¹⁹ To find support for this notion, one need simply consider how rare it is to encounter an adult criminal who has not also lived on the periphery of civil society as a juvenile. "Adolescence is a developmental continuum, and young people are not irresponsible children one day and responsible adults the next."¹²⁰

Indeed it appears that on a fundamental level, criminals simply think differently than non-criminals,¹²¹ and it is this difference in thinking that leads to criminals' inability to develop the skills to cope with contemporary society.¹²² Thus, "habilitating" criminals to non-deviant thought processes, as opposed to "rehabilitating" them, may be the only way to eliminate or reduce destructive, anti-social behavior and thought patterns that ultimately lead the individual to a criminal lifestyle.¹²³ Given that adult criminality is virtually always predicated upon recidivistic juvenile delinquency,¹²⁴ it follows that delinquent youths have the most to gain, and that society has the most to lose, from expungement schemes that provide artificial "clean slates"¹²⁵ upon reaching majority.¹²⁶

Though undoubtedly there are individual deviations from this general proposition, it can be said with much confidence that these exceptions are indeed exceptional. Rehabilitation assumes a degree of determinism—that the undesirable behavior was caused by antecedent factors—and postulates that an individual's future behavior therefore can be changed by properly

119. NEVARES ET AL., *supra* note 116, at 121.

120. Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1010 (1995).

121. See Stanton E. Samenow, *The Basic Myths About Criminals*, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 56-57 (Robert J. Bidinotto ed., 2d ed. 1996); see also Robert J. Bidinotto, *Restoring Responsibility*, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 276 (Robert J. Bidinotto ed., 2d ed. 1996) ("Numerous empirical studies demonstrate that criminals simply don't think like non-criminals.") (emphasis omitted).

122. See KENNEY ET AL., *supra* note 14, at 37-39.

123. See *id.* at 11.

124. See WALTERS, *supra* note 59, at 17 (discussing research that indicates that most "career criminals" begin their criminal conduct at an early age).

125. KENNEY ET AL., *supra* note 14, at 125 ("Purging the files is also necessary to implement the philosophy of allowing young persons to begin their adult lives with a clean slate.")

126. See TRACY ET AL., *supra* note 107, at 81-82 (stating that, in light of the "apparent consistency of the findings concerning chronic offenders," some might conclude that criminal justice resources should be focused on controlling this group).

applied intervention strategies.¹²⁷ As the severity and number of delinquent acts increase, however, it becomes more apparent that intervention strategies must give way to punishment and prevention. As the U.S. Supreme Court observed in *Schall v. Martin*,¹²⁸

The "legitimate and compelling state interest" in protecting the community from crime cannot be doubted. We have stressed before that crime prevention is "a weighty social objective," and this interest persists undiluted in the juvenile context. The harm suffered by the victim of a crime is not dependent upon the age of the perpetrator. And the harm to society generally may even be greater in this context given the high rate of recidivism among juveniles.¹²⁹

Of course, one must be aware of the philosophical (and practical) problems posed when one infers characteristics about an individual based merely on his membership in a certain group; just because *most* delinquents subsequently develop into adult criminals does not mean that *every* delinquent will suffer this fate. The overall societal cost of the present system of expungement, however, substantially outweighs the potential harm that may befall an individual who is incorrectly identified as a potential criminal even though he has outgrown his delinquent tendencies.¹³⁰ Further, many of today's expungement schemes destroy a juvenile's criminal record without adequately distinguishing between the severity or the number of the crimes committed.¹³¹ Approximately one-third of male juveniles have at least one incident in their official police records;¹³² but, as noted above, chronic offenders, both violent and nonviolent, are responsible for the vast majority of serious offenses¹³³ and are the most likely to become career criminals once they reach adulthood.¹³⁴ A scheme that provides for

127. See BARRY C. FELD, JUSTICE FOR CHILDREN 262-63 (1993).

128. 467 U.S. 253 (1984).

129. *Id.* at 264-65 (citations omitted).

130. See discussion *infra* Parts IV-VI.

131. See, e.g., ALASKA STAT. § 47.10.090(a) (Michie 1995); CONN. GEN. STAT. ANN. § 466-146 (West 1996); MO. ANN. STAT. § 211.321.5 (West 1996).

132. See HOWARD N. SNYDER, NATIONAL CTR. FOR JUVENILE JUSTICE, COURT CAREERS OF JUVENILE OFFENDERS 2 (1988).

133. See *id.* at iii, 2; *supra* notes 115-17 and accompanying text.

134. See John H. Laub & Janet L. Lauritsen, *The Precursors of Criminal Offending Across the Life Course*, 58 FED. PROBATION 51, 52 (1994).

expungement of isolated nonviolent offenses would allow most of those who have been or may be rehabilitated to get a new start when they enter adulthood, yet would enable society to protect itself from the subgroup of juvenile offenders who have proved that they do not have any significant rehabilitative potential.

While the evidence of a strong link between juvenile delinquency and adult criminality probably does not surprise those who have conducted empirical research on the issue, it should indeed surprise those who advocate the destruction of all documentation related to the juvenile's prior bad acts upon his reaching majority. After all, the pro-expungement argument consistently has been that rehabilitation is to be expected from juvenile offenders because they will outgrow their criminal behavior.¹³⁵ While it appears true that juveniles who have committed isolated and minor delinquent acts likely will not become career criminals, the studies establish that most career criminals were once juvenile delinquents.¹³⁶ Identifying those juveniles who, based on the severity and pattern of their misconduct, appear most likely to reoffend consistently throughout their lives is therefore necessary.

IV. THE EFFECTS OF EXPUNGEMENT STATUTES

A. Effects on Sentencing Courts

Having concluded that records of prior criminality indeed provide a relatively accurate and easily accessible means of determining the likelihood of adult criminal acts, we can now turn to some specific areas where the accessibility of a juvenile's criminal history records becomes highly relevant: sentencing, police investigations, and employee hiring. In these areas the potential harm to society flowing from expungement becomes particularly apparent. Our legal system, for example, depends on access to accurate and complete information that reveals the nature of criminals. Such information allows sentencing judges to differentiate between the incorrigible youthful offender and

135. See, e.g., Volenick, *supra* note 6, at 169 (stating that most "juvenile offenders . . . are thought to be capable of learning to behave in a socially acceptable manner," which makes them suitable for "rehabilitation and reorientation into society").

136. See *supra* notes 92-113 and accompanying text.

the individual whose criminal behavior can best be described as aberrational, and therefore not likely to be repeated.

1. *Judges Need Juvenile Records for Accurate and Effective Sentencing*—The first, and undoubtedly most weighty, objection to expungement schemes concerns the effect of expungement on the courts. Consider a nineteen-year-old offender who appears before a sentencing judge on an assault conviction in a state that allows for the destruction of juvenile records. The judge will have difficulty rendering a decision that fully accounts for the offender's violent tendencies because the defendant's juvenile record—containing previous arrests and convictions for assault and battery and similar crimes of violence—has been expunged.¹³⁷ Some courts have attempted to ensure that “expungement does not exempt a youthful offender from responsibility for [a juvenile] offense under the habitual criminal laws.”¹³⁸ Therefore, they consider juvenile convictions for purposes of determining habitual offender status and to enhance punishment.¹³⁹ Though this practice may properly weigh the individual's recidivistic tendencies, the problem remains that juveniles who were found delinquent in jurisdictions that destroy records nevertheless may receive much lighter sentences based purely on fortuity of location during the individual's teenage years. Such an outcome is not acceptable in a system that is supposed to render fair and equal justice.

How does the harm caused by expungement statutes surface in a real case? One author describes an incident in which a fifteen-year-old was arrested and pled guilty to armed robbery.¹⁴⁰ He previously had been arrested several times for violent crimes; however, the presiding judge had no access to the prior records because they were sealed by law, so the judge released the boy after being assured that he soon would enter a residential facility.¹⁴¹ Shortly after his release, the boy shot and paralyzed a police officer who confronted him during an attempted bicycle

137. See Cary, *supra* note 23, at 260 (“Many seemingly first-time adult offenders in this country were chronic offenders as juveniles, yet evidence of their crimes may not be available . . . [to judges when sentencing] for adult crimes.”).

138. Gosnell v. State, 681 S.W.2d 385, 386 (Ark. 1984).

139. See, e.g., Rivers v. State, 616 So. 2d 1090, 1090 (Fla. Dist. Ct. App. 1993); Muir v. State, 517 A.2d 1105, 1110 (Md. 1986).

140. See KRAMER, *supra* note 82, at 22.

141. See *id.*

theft.¹⁴² Thus, the judge's inability to learn of the juvenile's criminal past arguably resulted in, or at least contributed to, the officer's debilitating injury.

Proponents of aggressive expungement seek to keep the sentencing judge ignorant of the offender's background even though "[a]n integrated and rational sentencing policy requires coordinated responses to juvenile and young adult offenders and should be based on a standardized means of identifying and subsequently sanctioning the chronic and ultimately serious young criminal."¹⁴³ Preventing sentencing judges from learning of an offender's final record becomes untenable when one considers that a 1986 Department of Justice Statistics report estimated that more than four-fifths of state prison inmates had prior records, either as juveniles or adults,¹⁴⁴ and that Department of Justice estimates show that violent crime committed by juveniles increased by forty-seven percent between 1988 and 1992 (more than double the adult rate of increase).¹⁴⁵

Contrary to the wishes of expungement advocates, courts do want access to all relevant information regarding the offender's criminal background. As the Michigan Supreme Court has observed, "almost all the courts . . . have taken the position that an accused's juvenile court record may be taken into consideration by a judge in sentencing the accused for an adult offense."¹⁴⁶ At bottom, courts take an individual's juvenile record into account when they have access to the information.¹⁴⁷ "[I]n

142. See *id.* at 21-24.

143. Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471, 500 (1987) (noting that "[t]hose individuals who are arrested as juveniles are three to four times more likely to be arrested as adults than are those who are not arrested as juveniles.") (internal quote and footnote omitted).

144. See CHRISTOPHER A. INNES, U.S. DEPT OF JUSTICE, PROFILE OF STATE PRISON INMATES 1986, 1, 3-4 (1988).

145. See SNYDER & SICKMUND, *supra* note 1, at 11.

146. *People v. Smith*, 470 N.W.2d 70, 74 (Mich. 1991) (alteration in original).

147. See *Smith*, 470 N.W.2d at 75 (holding that, although the offender's 12 prior juvenile offenses were expunged automatically, the sentencing judge properly used this information contained in a presentence investigative report because when "a juvenile offender appears in court again as an adult, his juvenile offense record may be considered in imposing sentence"); see also *United States v. Holland*, 26 F.3d 26, 28 (5th Cir. 1994) (ruling that sentencing court properly took into account defendant's juvenile record, even though juvenile adjudications were not considered convictions under Texas law); *United States v. Baker*, 961 F.2d 1390, 1392-93 (8th Cir. 1992) (holding that the sentencing court may consider prior juvenile convictions in the calculation of adult sentences); *United States v. Williams*, 891 F.2d 212, 214-15 (9th Cir. 1989) (rejecting defendant's argument that consideration of his juvenile adjudications in the calculation of his adult sentence violated the Due Process Clause); *Rivers v. State*, 616 So. 2d 1090,

fixing sentences, courts have usually considered even expunged juvenile convictions to which they have accidentally gained access."¹⁴⁸ Not surprisingly, studies reveal that as the number of juvenile offenses an individual commits goes up, juvenile court judges are increasingly unwilling to allow remedial dispositions and more likely to impose punishment.¹⁴⁹ Once the juvenile reaches majority, however, the notion of punishing the recidivist more severely than the first-time offender is jettisoned, and convicted offenders typically are treated as if they had a "clean" record.

One of the primary, but unfortunately overlooked, problems with expungement schemes is that they directly benefit the recidivist and hurt the youthful first-time offender. The celebration of one's eighteenth birthday can hardly justify such a result. To illustrate why expungement interferes with just sentencing, consider that juvenile courts operate under a rehabilitative and preventative philosophy that allows for more lenient sentencing practices.¹⁵⁰ The system is therefore constructed to defer the imposition of more severe sentencing and punishment for serious and habitual offenders until the individual has progressed into adult criminality.¹⁵¹ Because of expungement statutes, the juvenile will have a clean slate when he enters adult court and, even though he may have an extensive juvenile record, may be treated as a first-time offender.¹⁵²

1090 (Fla. Dist. Ct. App. 1993) (ruling that including defendant's prior juvenile disposition in his prior record was proper); *Muir v. State*, 517 A.2d 1105, 1110 (Md. 1986) (ruling that defendant's prior court martial convictions for robbery and attempted robbery were properly considered under state sentencing statutes); *People v. McFarlin*, 208 N.W.2d 504, 511-14 (Mich. 1973) (ruling that sentencing judge properly considered adult offender's juvenile record, even though Michigan Probate Code provided that juvenile record should not be used as evidence in subsequent proceedings for "any purpose whatever").

148. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 501.

149. See TRACY ET AL., *supra* note 107, at 260-67. Note also that a repeat offense is likely to be more severe than its predecessor. See *id.* at 285.

150. See *id.* at 294; see also Robert J. Bidinotto, *Criminal Responsibility, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY* 1, 7-8 (Robert J. Bidinotto ed., 2d ed. 1996) (describing the juvenile justice system as "far more lenient than the adult system").

151. See TRACY ET AL., *supra* note 107, at 294.

152. See *id.* at 294-95; see also Thomas B. Edsall, *Failure to Punish Misdemeanors Fuels Violence, St. Louis Officials Say*, WASH. POST, Apr. 10, 1994, at A8 ("Long before an arrest for murder or life-threatening violence . . . criminals have gone through a juvenile court system where the likelihood of punishment is small. Then they enter the adult criminal system with their juvenile records expunged to go through a series of arrests followed by various forms of probation . . .").

Given the likelihood of recidivism and the grave harm caused by chronic offenders, to impose a regime where punishment blindly fits the *crime* and not the *criminal* is inadvisable and, arguably, immoral,¹⁵³ for such a result constitutes an abdication not only of our jurisprudential heritage, but also of common sense.

[O]ur system of criminal justice is a human institution, and since biblical times we have assumed that the quintessential duty of a judge in a criminal case is to exercise judgment in sentencing, to make sure that the punishment fits the crime and also that the punishment fits the criminal.¹⁵⁴

An examination of the Federal Probation System's Worksheet for Presentence Report¹⁵⁵ reveals that the American system of jurisprudence is deeply concerned with discovering the character of the criminal by examining a variety of items, such as his familial background, education, and past history of criminal conduct. In fact, the whole "rehabilitative ideal" is based upon the notion that convicts, like medical patients, are to receive a "diagnosis" of their problem and then are to be treated appropriately.¹⁵⁶ Appropriateness of treatment necessarily must take into account recidivistic tendencies and rehabilitative potential.

153. See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 141 (Mary Gregor trans., Cambridge U. Press 1991) (1797) ("The principle of punishment is a categorical imperative, and woe to him who crawls through the windings of eudaemonism in order to discover something that releases the criminal from punishment . . .") (footnote omitted). By expunging an offender's criminal history, the legal system may be directly decreasing the punishment that the repeat offender would otherwise be forced to face, thereby "releas[ing] the criminal from punishment." Cf. George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1634 (1993) ("Punishment expresses solidarity with the victim and seeks to restore the relationship of equality that antedated the crime. This may not be so obvious in a culture that has become accustomed to thinking of punishment as a utilitarian instrument of crime control.").

154. Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y.L.J., Feb. 11, 1992, at 2; see also *People v. Jones*, 433 N.W.2d 829, 830 (Mich. Ct. App. 1988) (per curiam) (holding that sentencing judge properly considered offender's 10 juvenile adjudications for theft offenses, which defendant argued had been expunged, because "[m]odern sentencing policy attempts to tailor the sentence to the particular offender and the circumstances of the case").

155. On file with the *University of Michigan Journal of Law Reform*.

156. See Jonathan A. Willens, *Structure, Content, and the Exigencies of War: American Prison Law after Twenty-Five Years 1962-1987*, 37 AM. U. L. REV. 41, 74-75 (1987) (arguing that the human relations model of prison administration "refashioned an old legal aphorism, 'the punishment fits the crime,' to mean 'the punishment fits the criminal'").

The United States Supreme Court in *Williams v. New York*,¹⁵⁷ during a discussion of sentencing, agreed with this position when it stated:

Highly relevant—if not essential—to [a judge's] selection of an appropriate sentence is the possession of the *fullest information possible* concerning the defendant's life and characteristics. . . .

Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. . . .

To deprive sentencing judges of [probation reports that contain the best available information] would undermine modern penological procedural policies that have been cautiously adopted throughout the nation after careful consideration and experimentation.¹⁵⁸

The Supreme Court of Washington made a similar observation regarding juvenile arrest records in *Monroe v. Tielsch*,¹⁵⁹ finding that without a juvenile's arrest record

[t]he court would be unaware that one of these petitioners had been arrested in a period of 17 months for robbery, vandalism, shoplifting, rape; [sic] assault, larceny, burglary, carrying a concealed weapon and curfew violation. We have lost not only our senses, but our touch with reality if we think such a record would not have a valid bearing on the

157. 337 U.S. 241 (1949).

158. *Id.* at 247–50 (emphasis added); see also *People v. Jones*, 433 N.W.2d 829, 830 (Mich. Ct. App. 1989) (per curiam) (stating that complete information relating to the offender's juvenile criminal history is "necessary to set an individualized sentence" and finding that "rehabilitative goals would not be served by preventing a sentencing judge from considering information about a defendant's juvenile criminal history"). Kramer writes:

To fulfill his or her obligation to protect the community from crime, a judge must have full knowledge of what a defendant has done. . . . Compassion does not call for sealing records to limit a court's information, or permitting the youth to victimize others though he has himself been victimized, sometimes even before birth.

KRAMER, *supra* note 82, at 225.

159. 525 P.2d 250 (Wash. 1974) (en banc).

judge's decision as to how to treat the offender. . . . The compelling interest of the state in the availability of arrest records of juveniles is perfectly obvious.¹⁶⁰

Judge William J. Bauer of the United States Court of Appeals for the Seventh Circuit, writing for the court in *United States v. Davis*,¹⁶¹ provided perhaps the most persuasive sentencing-related argument for abandoning expungement statutes:

[I]t is imperative that the defendant's sentence account for his criminal history "from the date of birth up to and including the moment of sentencing." "[T]he consideration of the defendant's juvenile record is essential, because it is clear that the 'magic age' of eighteen, seventeen, or sixteen, whatever it may be in a specific state, cannot wipe out all previous contacts with the law." These pubescent transgressions . . . help the sentencing judge to determine whether the defendant has simply taken one wrong turn from the straight and narrow or is a criminal recidivist.¹⁶²

The lesson to be gleaned from these excerpts is that a juvenile's prior contacts with the criminal justice system are not only relevant in some abstract theoretical sense, but have practical value to the judiciary.¹⁶³ These records are often the only

160. *Id.* at 251.

161. 48 F.3d 277 (7th Cir. 1995).

162. *Id.* at 280 (citations omitted) (second alteration in original).

163. *See, e.g.*, *United States v. Sanders*, 41 F.3d 480, 486 (9th Cir. 1994) (treating declaration of defendant as "ward of the court" as proof of juvenile adjudication and allowing this proof to be used in assessing the defendant's criminal history), *cert. denied*, 115 S. Ct. 2010 (1995); *United States v. Joshua*, 40 F.3d 948, 952 (8th Cir. 1994) (allowing upward departure in sentencing guidelines because criminal history category was "inadequate" due to the absence of some juvenile court adjudications); *United States v. White*, No. CR-92-00027-WBS, 1994 WL 162068, at *3 (9th Cir. Apr. 29, 1994) ("The district court did not err in considering [defendant's] juvenile convictions at sentencing."); *United States v. Griess*, 971 F.2d 1368, 1374 (8th Cir. 1992) (holding that sentencing judge properly considered juvenile convictions excluded from defendant's criminal history); *United States v. Madison*, 689 F.2d 1300, 1312 (7th Cir. 1982) (holding that sentencing judge may consider any evidence of prior criminal history, including dismissed juvenile charges); *Moore v. State*, 597 P.2d 975, 976 (Alaska 1979) (ruling 25-year aggregate sentence for rape and armed robbery was not excessive due in part to defendant's extensive juvenile record); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 506-07 (Va. 1988) (finding that sentencing judge may rely on prior juvenile adjudications); *Thomas v. Commonwealth*, 446 S.E.2d 469, 471 (Va. Ct. App. 1994) (stating that juvenile court records are relevant in the context of a probation officer's report that will be used by the court in determining the appropriate sentence for a convicted adult offender).

way for judges to determine the rehabilitative potential of a youthful offender, and are routinely used to determine the appropriate sentence¹⁶⁴ and to set bail.¹⁶⁵

The Federal Sentencing Guidelines also emphasize the relevance of maintaining an accurate account of criminal histories. In the criminal history section of the Guidelines, the Commentary states:

A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. . . . To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.¹⁶⁶

Yet the Guidelines require that courts consider an offense committed by an individual under eighteen only when it "results in adult sentences of imprisonment exceeding one year and one month, or results in imposition of an adult or juvenile sentence or release from confinement on that sentence within five years of the defendant's commencement of the instant offense."¹⁶⁷ The express reasoning behind this provision, according to the Guidelines, is that obtaining consistent access to juvenile records is impossible, and such inconsistent access can result in disparate sentencing.¹⁶⁸ But juvenile records are not consistently available precisely *because* some states have aggressive expungement schemes, whereas other states are more reluctant to expunge juvenile crime records. Thus, the Guidelines' rationale for not

164. The records are also used by probation departments to compile case histories on the offenders:

[T]he offender's delinquency . . . record should be carefully compiled. Sometimes the offender will give little help toward this because of a natural fear that his admissions may be used against him. Police and court records, both local and out-of-town, are invaluable. . . . The primary purpose of this information is . . . to understand [the offender] in his reactions to society and his conceptions of society.

Ralph H. Ferris, *The Case History in Probation Service*, in PROBATION AND CRIMINAL JUSTICE 137, 148-49 (Sheldon Glueck ed., 1933).

165. See Robert J. Bidinotto, *Subverting Justice*, in CRIMINAL JUSTICE? THE LEGAL SYSTEM VERSUS INDIVIDUAL RESPONSIBILITY 72 (Robert J. Bidinotto ed., 2d ed. 1996).

166. U.S. SENTENCING GUIDELINES MANUAL § 4A, at 253 (1995) (emphasis removed).

167. *Id.* § 4A1.2 (emphasis removed).

168. See *id.*

considering juvenile adjudications when sentencing merely provides additional justification for modifying or, in some cases, repealing present expungement statutes.

2. *The "Lemons Problem" in Sentencing*—Another, albeit less obvious, problem caused by expungement statutes is that they lead to disproportionately harsh sentences for young adult offenders who truly have a "clean" record, while allowing recidivists of similar age to obtain relatively lenient sentences—this is what I call the lemons phenomenon in sentencing. To see why this is so, consider that the sentencing judge operating in a jurisdiction that aggressively expunges juvenile records is not able to discern, on the basis of the individuals' criminal files, who has a clean record and who has a record that has been cleaned artificially by the state. If the judge knew the two defendants' criminal histories, the first-time offender surely would receive a more lenient sentence than the recidivist. Because of the deficiency of knowledge caused by expungement, however, the judge is unable to differentiate between the true first-time offender and the recidivist, so the true first-time offender will be indirectly penalized by this informational asymmetry, because the judge likely will impose an "average" sentence in the middle of the available sentencing range on both the first-time offender and the recidivist.

Professor George Akerlof has examined this problem in the context of the market for used cars.¹⁶⁹ In the used car market there is asymmetry between the knowledge of the car salesperson, who presumably knows the "true" quality of the car, and the potential buyer of the automobile, who can only discover the true quality of the car at significant expense (such as by hiring a mechanic to inspect the car thoroughly).¹⁷⁰ Because the prudent buyer is naturally risk-averse and uncertain about

169. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970):

There are many markets in which buyers use some market statistic to judge the quality of prospective purchases. In this case there is incentive for sellers to market poor quality merchandise, since the returns for good quality accrue mainly to the entire group whose statistic is affected rather than to the individual seller.

Id. at 488.

170. See *id.* For further discussion of Professor Akerlof's theory, see Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 J. CORP. L. 301, 327 n.66 (1993) (discussing the imperfection in the market with respect to "lemons"—cars that, despite appearances, have latent problems).

the quality of the car, the buyer will substantially discount the purchase price, thereby protecting herself against the possibility of buying a "lemon."¹⁷¹ Because the salesperson will be unable to provide the potential buyer with any convincing assurance that the car is indeed a high-quality car, the high-quality car will be sold at a deeply discounted price, and the low-quality car will be sold at an artificially inflated price.¹⁷² In such a situation, one way to cure this market failure is to develop either private or governmentally sanctioned methods of establishing and communicating the "true" price of any given car.¹⁷³

Applying this intuitive logic to the courtroom, the sentencing judge is in a position similar to the used car buyer who is unable to determine accurately the correct or fair price to pay for a particular vehicle. For the sentencing judge, the only way to determine the "quality" or "value" of the convict (i.e., the proper sentence) is to have an accurate picture of his criminal background—a picture that obviously is distorted severely by the expungement of the offender's juvenile crime record. Therefore, the sentencing judge will tend to "undervalue" the truly non-recidivist youthful offender, while "overvaluing" the recidivist with an expunged record, because she will not know which is which. Because the sentencing judge lacks accurate information, an individual with no prior criminal history cannot benefit from his crime-free past by receiving a reduced sentence. Instead, the judge will impose an "average" sentence because the judge will not know what type of criminal is before her. Recidivists obviously will not object to this outcome, given that their "true" sentence is higher than average.

In discussing the phenomenon of lenient sentencing observed during the first two years of adulthood, one author has stated that "[d]espite the criminal career research findings, criminal sentencing policies tend to maximize sanctions for

171. See Akerlof, *supra* note 169, at 489–90; Ulen, *supra* note 170, at 327 n.66.

172. See Akerlof, *supra* note 169, at 489–90.

173. See Ulen, *supra* note 170, at 327 n.66 ("Some sort of governmental intervention—such as, a government-sanctioned means of determining and communicating the true quality of all cars sold—could correct this market failure."). Cf. Anjan V. Thakor, *An Exploration of Competitive Signalling Equilibria with "Third Party" Information Production: The Case of Debt Insurance*, 37 J. FIN. 717, 736 (1982) (arguing that municipal bond insurance, "in addition to serving its usual risk reduction function . . . has an informational role to play: investors can observe the insurance coverages purchased by different borrowers and learn something about the true underlying default probabilities of their debt issues").

older offenders whose criminal activity is declining, and often withhold sanctions from chronic younger offenders at the point at which their rate of activity is increasing or is at its peak."¹⁷⁴ One explanation for this phenomenon could be that the older offenders have had the opportunity to reestablish their criminal records, while the younger offenders still are experiencing the benefits from having had their records expunged. Another troubling implication flowing from a destroyed record is that the unavailability of objective information concerning an individual's criminal history may lead judges to rely (either consciously or unconsciously) on estimation techniques to convey relevant information concerning an offender's history. Inasmuch as the rate of serious criminal offending among African-American adolescents is believed to be greater than that of white adolescents,¹⁷⁵ it would not be surprising to observe that black first-time offenders were sentenced relatively more harshly in aggressive expungement jurisdictions than white first-time offenders.¹⁷⁶ Only by modifying most of the contemporary statutes will the informational asymmetry be remedied, will the race of the offenders become less of a factor, and will individuals get the sentence their crime and criminal past require.

At bottom, courts are concerned with accurately determining whether the person in front of them for sentencing is "a man so constituted and so habituated to war upon society that there is little or no real hope that he ever can be anything other than a menace to society—or is he obviously amenable to reformation?"¹⁷⁷ Without the full record of that individual's criminal history, such a determination will necessarily be incomplete, if not entirely impossible.

174. Feld, *supra* note 143, at 500 (discussing a study completed by Professors Abrahams, Greenwood, and Zimring).

175. The Office of Juvenile Justice and Delinquency Prevention, for example, has estimated that African-American juveniles account for 49% of all juvenile arrests for Violent Crime Index Offenses. SNYDER & SICKMUND, *supra* note 1, at 91.

176. According to some commentators, such disproportionate sentences are in fact handed down. See, e.g., Erika L. Johnson, "A Menace to Society": *The Use of Criminal Profiles and Its Effect on Black Males*, 38 HOW. L.J. 629, 645–46 (1995).

177. Thorsten Sellin, *The Trial Judge's Dilemma: A Criminologist's View*, in PROBATION AND CRIMINAL JUSTICE 99, 113 (Sheldon Glueck ed., 1933).

B. Effects on Law Enforcement

Expungement statutes not only harm the sentencing process, but they also interfere with effective law enforcement. Police officers are impeded in their efforts to uncover criminal conduct because of the expungement of arrest and conviction records and identification information.¹⁷⁸ As one commentator persuasively states:

To serve its function of preservation of life and property, the police department must have a system for the collection of information that will make it possible to anticipate some antisocial action by juveniles as well as by adults. These records are essential for preventive action as well as for effective investigation when such conduct does occur.¹⁷⁹

178. See *United States v. Hall*, 452 F. Supp. 1008, 1012 (S.D.N.Y. 1977) (stating that the criminal "records are used for numerous legitimate purposes such as investigative work by federal and state law enforcement authorities"); *Coleman v. United States Dept't of Justice*, 429 F. Supp. 411, 413 (N.D. Ind. 1977) (finding that maintenance of FBI "rap sheet" was justified by "legitimate interests of government law enforcement agencies in maintaining records of their own activities"); *United States v. Rosen*, 343 F. Supp. 804, 809 (S.D.N.Y. 1972) ("To permit law enforcement officials to retain arrest records . . . promotes more effective law enforcement. Allowing the police broad discretion in retaining arrest records enables them to utilize more efficiently their facilities for combatting crime. Moreover, arrest records may be vital in curbing the growth of crime."). Cf. *Menard v. Mitchell*, 328 F. Supp. 718, 727 (D.D.C. 1971) ("There is a compelling necessity to furnish arrest data to other law enforcing agencies for strictly law enforcement purposes."); *Kolb v. O'Connor*, 142 N.E.2d 818, 822 (Ill. App. Ct. 1957) (arguing that because "the innocent person of today . . . may be tomorrow's criminal," police should retain all records) (quoting Sidney M. De Angelis, Note, *The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs, and Other Police Records*, 27 TEMP. L.Q. 441, 452 (1954)).

179. KENNEY ET AL., *supra* note 14, at 125. As the District Court in *United States v. Dooley*, 364 F. Supp. 75 (E.D. Pa. 1973), described:

An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned or whether to exercise their discretion to bring formal charges against an individual already arrested Adverse action taken against an individual because of his arrest record is premised upon certain assumptions regarding the meaning of an arrest.

Id. at 77-78 (quoting *Kowall v. United States*, 53 F.R.D. 211, 215 (W.D. Mich. 1971)) (alteration in original). See also KRISBERG & AUSTIN, *supra* note 1, at 86 (discussing the use of records in making dispositional decisions).

A study of the Juvenile Aid Division of the Philadelphia Police Department revealed that "the juvenile's previous contacts with the police" were first in a list of six formal factors that a department officer considers in deciding whether to arrest and pursue further processing, or whether instead to use "remedial" disposition.¹⁸⁰ The Washington State Supreme Court has stated that "[l]aw enforcement agencies have a legitimate interest in juvenile arrest records. . . . [I]n dealing with juveniles who are frequently as mobile as any other part of our society, law enforcement officials should have the assistance of the past involvement of the juvenile with offenses as reflected by arrests."¹⁸¹

Criminal records thus not only inform the discretion of prosecutors in handling specific cases¹⁸² and help correctional institutions develop effective diagnostic programs,¹⁸³ but also directly assist the police in their most vital function—investigating criminals. Those jurisdictions that expunge such records, particularly when expungement occurs before majority, therefore directly interfere with these law enforcement activities.

On a related note, laws such as the Brady Handgun Violence Prevention Act¹⁸⁴ that require background checks before a firearm can be purchased depend on accurate information regarding potential purchasers or licenses. This has led some observers to call for the inclusion of juvenile violent crime records in the materials that are reviewed when conducting such background checks. Moreover, states such as Pennsylvania have already enacted laws that examine juvenile delinquency records as part

180. William F. Hohenstein, *Factors Influencing the Police Disposition of Juvenile Offenders*, in *DELINQUENCY: SELECTED STUDIES* 139 (Johan Thorstan Sellin & Marvin E. Wolfgang eds., 1969). The study further found that the best predictor of offender disposition was the number of previous contacts with the police. "When the offender had had more than one previous contact, he was arrested 91 percent of the time; when he had had one or no previous offenses, he was arrested only 53 percent of the time." *Id.* at 146; see also *JOAN PETERSILIA ET AL.*, U.S. DEP'T OF JUSTICE, *CRIMINAL CAREERS OF HABITUAL FELONS* 34 (1978) ("[T]he more contact the police have with an offender, the more likely they are to consider him a suspect . . .").

181. *Monroe v. Tielsch*, 525 P.2d 250, 251-52 (Wash. 1974).

182. See, e.g., *id.*; see also *PETERSILIA ET AL.*, *supra* note 180, at 39-40 ("Many factors—especially prior criminal record—can affect the prosecutor's treatment of the offender. . . . [T]he more serious the criminal record of the suspect, the more stringent prosecutors are in negotiating pleas of guilty.") (citing *DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 69 (1969)).

183. See, e.g., *Monroe*, 525 P.2d at 251-52; see also *PETERSILIA ET AL.*, *supra* note 180, at 49 (explaining that some correctional institutions review inmates' backgrounds when they enter the institution, and then recommend a diagnostic program on that basis).

184. 18 U.S.C. § 922 (1995).

of any background check for purposes of issuing licenses to carry firearms.¹⁸⁵ The inclusion of juvenile crime records in background checks such as these is of obvious relevance, but expungement statutes in many cases make this an impossibility.

C. Effects on Employers

Although this court rejoices along with the angels of God for every sinner that repents, to say that an applicant's honest character [as reflected in his prior criminal history] is irrelevant to an employer's hiring decision is ludicrous. In fact, it is doubtful that any one personality trait is more important to an employer than the honesty of the prospective employee.

It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness.¹⁸⁶

Expungement statutes prevent employers from taking appropriate steps to meet the security and supervision needs of their employees.¹⁸⁷ That a fundamental conflict exists "between a juvenile offender's right to obtain a job for which he or she is qualified and an employer's interest in hiring trustworthy employees" is beyond speculation.¹⁸⁸ Delinquency records typically contain information relating to the individual's arrests and convictions for delinquent acts.¹⁸⁹ And though mere arrest does not prove guilt,¹⁹⁰ it still can hinder an individual's chances of

185. See 18 PA. CONS. STAT. ANN. § 6109(d) (1996).

186. *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 752-53 (S.D. Fla. 1989).

187. See, e.g., *Snow*, *supra* note 4, at 4 ("[E]mployers need complete disclosure of the applicant's past offenses.").

188. *Id.* at 3.

189. See, e.g., ALASKA STAT. § 32-5A-91(b) (1996); MASS. GEN. LAWS ANN. ch. 6, § 172B (West 1996); N.Y. FAM. CT. ACT § 375.1.3 (McKinney 1996).

190. See *Utz v. Cullinane*, 520 F.2d 467, 478-79 (D.C. Cir. 1975). As that court explained:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released

securing employment.¹⁹¹ Moreover, an inability to find employment may in turn send previous offenders back into crime.¹⁹² Yet, an employer arguably should be allowed to draw conclusions as to what a string of arrests and/or convictions, when combined with the applicant's other background, experience, and education, evidences about the applicant. Though a criminal record does not enable an employer to predict with certainty that the applicant will commit crimes on the job, those with criminal histories have a higher rate of future criminal activity than those who have never been convicted.¹⁹³ One court has stated that it would be "reasonable for management . . . to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property-related crimes."¹⁹⁴

without trial, whatever probative force the arrest may have had is normally dissipated.

Id. at 478-79 (quoting *Schwartz v. Board of Bar Exam'rs*, 353 U.S. 232, 241 (1957)); see also *Monroe v. Tielsch*, 525 P.2d 250, 253 (Wash. 1974) (Finley, J., concurring in part and dissenting in part) ("It appears that an arrest record in the world of commerce, as a practical matter, transmutes the legal presumption of innocence into one of guilt. . . . [There is] little evidence that the arrestee is a worse risk than his non-arrested counterpart."). For a creative argument that the retention of arrest records violates the Due Process Clause of the Fourteenth Amendment and may be classified as cruel and unusual punishment under the Eighth Amendment, see *Volenick*, *supra* note 6, at 173-74.

191. See, e.g., *Utz*, 520 F.2d at 480 (commenting on the "considerable barriers that an arrest record interposes to employment, educational, and professional licensing opportunities" and stating that "so long as there exists an employable pool of persons who have not been arrested, employers will find it cheaper to make an arrest an automatic disqualification for employment") (internal quote marks and citation omitted); *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969) (stating that an arrest record may have a "disastrous effect on a person's chances for government employment, and even for getting some city licenses and permits"); *Edwards & Sagatun*, *supra* note 5, at 544 ("[T]he exposure of a juvenile record can have a detrimental effect upon a person's ability to secure employment and positions of trust . . ."); *Volenick*, *supra* note 6, at 169 ("There are many instances where a person will face discrimination because of his contact with the juvenile court system. . . . Even where no conviction has resulted, the fact of arrest may be sufficient grounds for rejection.").

192. See *Portnoy*, *supra* note 11, at 306; see also *Edwards & Sagatun*, *supra* note 5, at 544 (arguing that not expunging juvenile records may negatively affect the person's "ability to avoid a life of criminality").

193. See *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) ("[T]he evidence indicates that a group of persons who have been convicted of serious crimes will have a higher incidence of future criminal conduct than those who have never been convicted."), *aff'd*, 468 F.2d 951 (5th Cir. 1972). For a complete discussion, see *supra* Part II.

194. *Richardson*, 332 F. Supp. at 521.

Few would urge employers to reject applicants just because they have a criminal past; indeed, at least one court has held that "denying black applicants an equal opportunity for employment" based solely on an arrest record violates Title VII of the Civil Rights Act of 1964.¹⁹⁵ A number of states have enacted laws prohibiting discrimination against applicants with criminal pasts for positions with public institutions.¹⁹⁶ Nevertheless, leaving the critical hiring decisions concerning individuals with records of juvenile crime with the individual most likely to be economically impacted by them—the employers—is sensible.

An employer has a duty under the common law to provide a safe work environment.¹⁹⁷ This duty gradually has been extended to hiring safe employees, because a dangerous employee, much like a defective machine, creates a risk of harm to fellow employees and the public for which the employer may be liable.¹⁹⁸

Under the theory of vicarious liability, hiring applicants with expunged juvenile records is potentially hazardous for employers and employees alike. An employer is vicariously

195. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401, 402–03 (C.D. Cal. 1970) ("There is no evidence to support a claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees."), *aff'd as modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

196. See, e.g., CAL. LAB. CODE § 432.7(a) (West 1989 & Supp. 1996); COLO. REV. STAT. § 24-5-101 (1988 & Supp. 1995).

197. See, e.g., *International Bd. of Elec. Workers v. Hechler*, 481 U.S. 851, 860 (1987) (recognizing a Florida employer's duty to provide a safe workplace); Alfred W. Blumrosen et al., *Injunctions Against Occupational Hazards: The Right to Work Under Safe Conditions*, 64 CAL. L. REV. 702, 721 (1976) (discussing OSHA's recognition of the employer's common law duty to provide a safe and healthful work environment and finding that the Act was intended to "broaden rather than weaken the duty to provide a safe work environment").

198. See, e.g., *Allen v. Milton Martin Enter.*, 397 S.E.2d 586, 587 (Ga. Ct. App. 1990) (discussing liability for injuries caused by employee acting within scope of employment); Gary D. Miller & James W. Fenton, Jr., *Negligent Hiring and Criminal Record Information: A Muddled Area of Employment Law*, 42 LAB. L.J. 186, 191–92 (1991) (recommending that employers request criminal records from every state where a job applicant has resided in order to avoid negligent hiring suits). Note, however, that intentional torts are usually not found to be within the scope of the employer/employee relationship and therefore do not invoke vicarious liability. The modern trend, therefore, with its deliberate allocation of risk, considers only intentional torts reasonably related to employment as having occurred within the scope of employment. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 500 (5th ed. 1984); see also *LeBrane v. Lewis*, 292 So. 2d 216, 217–18 (La. 1974) (imposing vicarious liability on employer when a supervisory employee stabbed and seriously injured a former co-employee on the employment premises in an employment-related dispute).

liable for an employee's torts committed while employees are acting within the scope of their employment. . . .

. . . .

Complete knowledge about an applicant would allow an employer to take appropriate steps to decrease any liability resulting from an employee's subsequent conduct. . . .

An employer's inability to learn about a job applicant's past misdeeds prevents managers from taking precautions to minimize potential business risks.¹⁹⁹

In addition to potential legal liability due to their employees harming others, employers who hire individuals with a history of criminal behavior may also experience a more direct negative economic impact as a result of being victimized themselves. As a group, criminals do not tend toward specialization.²⁰⁰ Studies have shown that criminals may well decide to avoid certain sorts of crimes, but with regard to the crimes that they *do* decide to commit, they adopt an opportunistic attitude, choosing to act upon their criminal predisposition when the opportunity arises.²⁰¹ This trend is particularly alarming in the employment context, because individuals with prior criminal histories by necessity will often be in a position where they have access to valuable goods or large sums of money.²⁰² The impact on a business of hiring potentially unreliable employees is illustrated most graphically by a study estimating that roughly thirty

199. Snow, *supra* note 4, at 5-9 (citations omitted). See also *Morgan v. Veterans of Foreign Wars*, 565 N.E.2d 73, 77 (Ill. App. Ct. 1990) (discussing the extent to which an employer's control over and consent to the employee's behavior affects the employer's liability for the employee's acts).

200. See WALTERS, *supra* note 59, at 55; see also MONAHAN, *supra* note 90, at 105 (discussing findings that show "a significant degree of nonspecialization among offenders: 'Today's petty larceny defendant may have been involved in a past robbery case and might be the subject of a future homicide prosecution or simple assault arrest.'") (citation omitted); PETERSILIA ET AL., *supra* note 180, at 21 (discussing the "unmistakable picture of substantial crime switching by [the study's] sample of habitual offenders").

201. See Edna Erez, *Planning of Crime and the Criminal Career: Official and Hidden Offenses*, 71 J. CRIM. L. & CRIMINOLOGY 73, 73-76 (1980) (finding that approximately 80% of crimes committed by subjects of the study were committed absent any planning); PETERSILIA ET AL., *supra* note 180, at 60 (reporting that 65% of a sample's criminal offenses were "spur-of-the-moment acts").

202. Some have found that "[w]hen working, most lifestyle criminals will take advantage of their employer's generosity or good nature." WALTERS, *supra* note 59, at 73.

percent of all business failures are attributable to employee theft.²⁰³ The study concluded that "preemployment screening is a crucial first step to combating theft in the workplace. The challenge for the employer is . . . to choose those employees who have the least propensity to steal. . . . [S]hrinkage resulting from internal theft will almost certainly be curtailed when companies pay more attention to screening job applicants."²⁰⁴ Expungement of juvenile records causes employers to make hiring decisions absent the full knowledge of economic risk. As Judge Posner states, the argument that expungement statutes are useful because they prevent potentially strong reactions to disclosure is "particularly weak in the context of employment, where competition exacts a heavy penalty from any firm that makes irrational employment decisions."²⁰⁵ Hiring the wrong person can result in high rates of attrition, theft, and low productivity, each of which can seriously affect the productivity of a company.²⁰⁶

Indeed, the whole notion of expunging criminal records to prevent employers from "unjustly" discriminating against former criminals appears to be based on the perception that legislators are somehow better positioned than employers regarding the hiring of former criminals. Taking an unadorned look at expungement statutes, it becomes clear that legislators impose their own notions of "fairness" by preventing private employers from having access to a potential employee's criminal record for fear that they may irrationally discriminate against them. This presumption arguably is fallacious and unfairly shifts the burden of having to risk incurring the costs of a potentially criminal employee to the employers.

203. See Peter D. Bullard & Alan J. Resnick, *SMR Forum: Too Many Hands in the Corporate Cookie Jar*, 25 SLOAN MGMT. REV. 51, 51 (1983).

204. *Id.* at 54-55.

205. Richard A. Posner, *Privacy, Secrecy & Reputation*, 28 BUFF. L. REV. 1, 43 (1979).

206. See Snow, *supra* note 4, at 9. Consider also the argument that, if applicants' criminal records were openly available, and if these applicants indeed were not sub-par workers,

employers who do know [that this set of employees is not sub-par] will be able to hire them at a below-average wage because of their depressed job opportunities and will thereby obtain a competitive advantage over the bigots. In a diverse, decentralized, and competitive society such as ours, one can expect irrational shunning to be weeded out over time.

That employers know the truth about people with whom they are dealing is vital.²⁰⁷ In making hiring decisions, employers should be guided by the good on-the-job performance of their employees with histories of juvenile crime, not by a statute that prevents employers from knowing whom they are hiring. An employer may well have personal biases or prejudices against a potential employee on the basis of his prior history of criminality, but—as University of Chicago Nobel Laureate Gary Becker has demonstrated, those employers who do not harbor irrational biases will gain a competitive advantage over their biased competitors as a result of the reduced labor cost that the former will enjoy.²⁰⁸ In the long term, the monetary incentive to maximize profits will force biased employers to change their views if in fact their views are as incorrect and misguided as is presumed by the legislators.²⁰⁹ In a 1922 discussion of the inevitable economic pressures that will confront an employer who is driven by his own irrational whims and predilections, prominent Austrian economist Ludwig von Mises stated:

207. See Portnoy, *supra* note 11, at 316 n.85 (“In some cases, e.g., the securities industry, violating [the right of people to know the background of persons with whom they deal] with an expungement law may do more harm than good to society as a whole.”); Snow, *supra* note 4, at 4 (“The requirement of complete disclosure flows from an employment relationship based on trust rather than faith. . . . An employer has a common sense need for job applicant information because the employer bears the ultimate risk of an employee’s damage.”); see also *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519, 521 (E.D. La. 1971) (holding that requiring a clean record and refusing to hire an individual with convictions of theft and receiving stolen goods is justified by business necessity when the potential employee is in a “security sensitive” position), *aff’d*, 468 F.2d 951 (5th Cir. 1972); Posner, *supra* note 205, at 14 (“[I]f economic analysis would classify refusal to disclose a particular type of fact as fraudulent in the market for goods, such refusal should equally be classified as fraudulent when made by someone seeking a job . . .”).

208. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* 39–41 (2d ed. 1971). Cf. Richard A. Posner, *The Efficiency and the Efficacy of Title VII*, 136 U. PA. L. REV. 513, 514 (1987) (“White employers who are not averse to [associating with African-Americans] will have lower labor costs and will therefore tend to gain a competitive advantage over their bigoted competitors.”); see also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 27.1 (3d ed. 1986) (discussing the impact of various levels of discrimination within a competitive market); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1640–43 (1991) (arguing that, as information about productivity becomes more accurate, employers will be less likely to use irrational criteria for hiring).

209. See BECKER, *supra* note 208, at 59 n.6. See also Kenneth J. Arrow, *The Theory of Discrimination*, in *DISCRIMINATION IN LABOR MARKETS* 3, 3–10 (Orley Ashenfelter and Albert Rees eds., 1973) (arguing that discriminatory components are not maximizing profits and therefore eventually will be driven out of the market).

True, the entrepreneur is free to give full rein to his whims, to dismiss workers off hand, to cling stubbornly to antiquated processes, deliberately to choose unsuitable methods of production and to allow himself to be guided by motives which conflict with the demands of consumers. But when and in so far as he does this he must pay for it, and if he does not restrain himself in time he will be driven, by the loss of his property, into a position where he can inflict no further damage. Special means of controlling his behaviour are unnecessary. The market controls him more strictly and exactly than could any government or other organ of society.²¹⁰

The reliance on the free market to drive out irrationally biased actors may be best illustrated by way of example. If a group called the "Misunderstood" is perceived as having a penchant for stealing at work, one would expect that the labor costs/wages for members of the Misunderstoods would go down relative to the costs/wages of other groups as a result of the perceived productivity losses that would follow from employing them. If, however, it turns out that the Misunderstoods do not steal at work, then the employer who hires from this undervalued labor pool will be minimizing his labor costs. On the other hand, if the Misunderstoods *are* in fact thieves—therefore proving the employers' bias to be accurate—then the employer who hires them will lose money, causing him and other potential employers to desist from hiring the Misunderstoods. In the words of Gary Becker, if two groups "are imperfect substitutes, they may receive different wage rates even in the absence of discrimination."²¹¹ The only possible solution for the Misunderstoods in such a situation would be simply to stop stealing if they ever wanted to lower their unemployment rate.

A bias against employees with prior criminal histories may in fact be irrational, as is confidently asserted by those advocating expungement. But, if this is so, unbiased employers will be able to capitalize on an immensely undervalued labor pool and accordingly will be able to maximize labor cost savings. The long-term results of this course of conduct would lead those employers whose biases have been disproved either to change

210. LUDWIG VON MISES, SOCIALISM 401 (J. Kahane trans., Liberty Classics 1981) (1932).

211. BECKER, *supra* note 208, at 17.

their views or to suffer the consequences of continuing their inefficient hiring practices. Unfortunately, the present system of expungement ignores this basic economic reality, instead forcing private employers into hiring from a labor pool that cannot be accurately assessed because of an absence of reliable information concerning the criminal histories of prospective employees.

V. RESTITUTION: A STATUTORY ALTERNATIVE FOR REDUCING STIGMATIZATION

As the previous discussion has revealed, a strong argument can be made that aggressive expungement statutes harm the judicial process, employers, law enforcement, and therefore society in general. Because expungement's asserted goal is to eliminate the stigmatization of juvenile offenders, it is worthwhile to discuss some alternative methods of minimizing stigma without the attendant social and economic costs of expungement. One approach may be to use the alternative disposition of restitution as a sanction for juvenile offenders convicted of lesser crimes, rather than incarceration or complete inaction. A restitution program reduces the financial burdens upon society because the convicted juvenile is forced to compensate his victim, perhaps a more desirable result than forcing society to cover the costs of his detention. More importantly, however, a restitution program also would reduce sharply the stigmatization of juvenile offenders. Because the oft-cited argument for broad expungement is that it helps avoid stigmatizing individuals as criminals, restitution, which is a less stigmatic form of punishment, limits the need to expunge incidents of juvenile delinquency.

Restitution in the form of fines does not deplete social resources to the extent that guards, probation officers, and supervisory personnel do;²¹² the only cost of a fine is the cost of collecting it and ensuring that the juvenile is actually working off his debt to the victim. More importantly, however, fines force the offender to work off his debt to the individuals that he has victimized, which may be more sensible and morally sound

212. Gary S. Becker, *Criminal Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 193 & n.41 (1968) (noting that transfer payments in the form of clothing, shelter, and food need not be expended).

than paying off some noneconomic debt to "society."²¹³ The most common objection to such a fine system is that it is unfair to the poor. Yet the object of this system is to compensate the victims of the crimes, and so long as the victims are compensated appropriately, the primary objective is met. Because these fines must be worked off as opposed to merely paid off, both the rich and the poor will be required to earn the money necessary for compensating their victims if they want to avoid incarceration.²¹⁴ The present system of punishment can hardly be said to provide compensation—either economic or psychological—to victims of crime.

Such a system of fining also is superior to the alternative of allowing a juvenile to remain incarcerated in an environment where he learns to become a more effective criminal from his peers and where rehabilitation is a highly atypical outcome. A report by the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention examined juvenile restitution and the criticisms levelled against it in great depth and found:

Historically, restitution has a fundamentally different philosophical tradition than the rehabilitation-oriented, *parens patriae* perspective that has served as the foundation of the juvenile court during most of its history. Restitution, when approached with the intention of holding juveniles accountable for their crimes, brings something unique to the juvenile justice system. It reflects a shift in thinking about

213. But there are also other arguments for why this scheme is not "unfair." As Becker explains:

Since imprisonment is a more costly punishment to society than fines, the loss from offenses would be reduced by a policy of leniency toward persons who are imprisoned because they cannot pay fines. Consequently, optimal prison terms for "debtors" would not be "unfair" to them in the sense that the monetary equivalent to them of the prison terms would be less than the value of optimal fines, which in turn would equal the harm caused

Becker, *supra* note 212, at 197. For a more complete discussion of the fairness of the fine scheme, see *id.* at 196-98.

214. Although a strictly victim oriented program may not be concerned with who pays the restitution the argument that the desired goal of holding the perpetrator accountable counsels in favor of compelling the youth to earn the money himself. See DEPT OF JUSTICE, GUIDE TO JUVENILE RESTITUTION 10-11 (1985) [hereinafter RESTITUTION GUIDE].

youth; one that emphasizes juveniles' individual responsibility and, therefore, accountability for their actions.²¹⁵

Present punishment and "rehabilitation" schemes, in contrast, not only fail to compensate the victim, but also fail to change the behavior of the perpetrator. More central to our discussion, however, they perversely require the "victims," who do not feel that the perpetrator has in actuality "paid [his] debt to society," to expend additional resources on formal and informal punishments.²¹⁶ Such added punishments occur in the form of formal legal restrictions upon the perpetrator's economic and political opportunities and, of particular relevance to this discussion, in the form of informal restrictions on the former offender's social acceptance.²¹⁷ The informal punishment promoted under the current scheme thus actually fosters the very stigmatization it claims to be fighting. To understand why this is so, one must consider that few citizens accept the fiction of the ex-delinquent who has "paid his debt to society;" the reality is that most people believe that criminals "get off much too easy."²¹⁸ The result is that society continues to punish the ex-offender both formally and informally.²¹⁹ Imposition of a fine scheme, in contrast, may lower the level of informal stigmatization a convicted juvenile is forced to face. A fine scheme helps compensate

215. *Id.* at 7.

216. See Becker, *supra* note 212, at 194. The U.S. Department of Justice states:

The primary responsibility of a victim-oriented program is to obtain repayment for the victim. Other desired consequences may occur as by-products of victim reparations, such as holding the youth accountable. . . . [M]any victims like the idea of the child being responsible for "righting the wrong." They feel that such actions mean that justice has been truly served.

RESTITUTION GUIDE, *supra* note 214, at 10-11.

217. See Becker, *supra* note 212, at 194 ("Since fines do compensate and do not create much additional cost, anger toward and fear of appropriately fined persons do not easily develop. As a result, additional punishments are not usually levied against 'ex-finees,' nor are strong efforts made to 'rehabilitate' them.")

218. Cf. Kenneth Cole, *Lansing Split Over Juvenile Justice*, DET. NEWS, Nov. 8, 1995, at D1 (quoting Michigan Senate Majority Leader Dick Posthumus saying that juvenile delinquents are "street-wise criminals, who know that because they're under age they can commit . . . violent crimes and get off easy").

219. See Massaro, *supra* note 70, at 1910 (describing shame as a form of punishment and elaborating on the Japanese system of formal shaming, followed with "ceremonies of repentance and reacceptance," and arguing that such a system allows an offender to "humble himself and thereby be reintegrated into the social fabric" because the community feels he has understood his crime).

those individuals actually hurt by the juvenile, forces the juvenile to earn money to pay off the fine himself, and therefore assists the juvenile's reintegration into a society more likely to believe that he has earned the right to be reintegrated.

VI. THE BASIC ELEMENTS EVERY EXPUNGEMENT STATUTE SHOULD CONTAIN

The preceding discussion has revealed certain basic aspects of juvenile criminality. Legislation that strives to allow individuals to remove from their records isolated nonviolent juvenile "mistakes," while maintaining the state's ability to identify and respond to violent and chronic offenders, must account for these factors.

While not attempting to draft a "model" expungement statute because such an undertaking is best left in the hands of lawmakers who understand the particular needs of their respective communities, I will emphasize certain universal elements that every statute should incorporate if it is to effectively deal with the problems created by contemporary juvenile delinquency. Most importantly, "expunge" should never be defined as destroying or erasing the record entirely, but instead should be limited to "sealing" the record from employers and other members of the public in appropriate situations. One of the primary reasons for this is that courts should always have access to an individual's entire unaltered record so as to be able to tailor a sentence based on the former juvenile's full criminal history and demonstrated rehabilitative potential. Law enforcement officials, academic researchers,²²⁰ and employers seeking employees for positions of national security should in most circumstances likewise have access to the entire juvenile record.

Turning to those events in an individual's past that may appropriately be sealed from members of the public such as employers, the research discussed above demonstrates that the seriousness of the juvenile offense is predictive of continuing criminal involvement and that recidivism as a juvenile is

220. All research must be conducted in strict confidence, the names of the delinquents should remain anonymous, and the researchers should have to sign a contract indicating their willingness to abide by these criteria (a fairly common practice in many contemporary juvenile courts that allow for the inspection of juvenile crime records for research purposes).

strongly correlated to adult chronic criminality. In short, criminal propensities rarely emerge de novo in adulthood. For this reason, expungement statutes should require records to be maintained where the juvenile has committed three or more unrelated delinquent acts. In any event, no juvenile conviction should be expunged if the individual has not remained crime free for at least five years, thereby ensuring that the individual who has been found guilty of one or two nonviolent delinquent acts has demonstrated his rehabilitative potential. Furthermore, given the high stability of aggression over time, expungement statutes should not expunge delinquent acts of violence unless special circumstances indicate to the court that expungement is appropriate. Finally, expungement of the remaining juvenile records, including all arrests that did not result in formal actions, should occur automatically and without the need to petition the court²²¹ once the juvenile reaches his eighteenth birthday or has remained crime free for five years, whichever is later.

CONCLUSION

The typical expungement statute must be reexamined and redrafted in a way that takes into account contemporary patterns of juvenile delinquency. While there is support for the proposition that a juvenile who has committed an isolated act of nonviolent delinquency should have his record wiped clean of artifacts of youthful recklessness, the reality is that many juvenile delinquents evidence a pattern of repeated and often serious deviant behavior which remains consistent throughout their adult lives. By expunging the records of this predatory subset of individuals, we prevent sentencing judges from determining the appropriate punishment for offenders who have their first adult conviction because they appear to be first-time criminals. On the other hand, we also prevent the judges from showing leniency toward the convict who has never before set foot in a courtroom or a juvenile hall, and therefore is presumably more amenable to rehabilitation. Casting even more doubt upon

221. This is necessary to prevent financial wherewithal or legal sophistication from artificially skewing expungement practices.

expungement schemes, expungement prevents the police from effectively combating crime. Equally clear is that employers are directly burdened with the risk of hiring employees who may abuse their positions by victimizing their employers or the public.

The evidence of the negative effects resulting from contemporary aggressive expungement statutes is overwhelming. Justifications advanced in favor of expungement were not only highly speculative at the time of their initial conception in the early 1960s; they subsequently have been disproved by volumes of research conducted on the issue of recidivism and rehabilitation. The notion of expunging a juvenile's criminal record may seem appealing upon first inspection, but a more serious analysis leads to the conclusion that a long overdue reconsideration of the nation's expungement statutes is in order.