Utah Law Review

Volume 2023 | Number 2 Article 2

2-2023

# Insider Expungement

Brian M. Murray
*Seton Hall University School of Law*, brian.murray2@shu.edu



Recommended Citation
Brian M. Murray, Insider Expungement, 2023 ULR 337 (2023). DOI: https://doi.org/10.26054/0d-7z2k-3bys

# INSIDER EXPUNGEMENT

Brian M. Murray*

*Abstract*

*Like many phases of the criminal justice system, insiders dominate the practice of expungement and there is little to no involvement of the broader community. Recently, scholars in favor of democratization in criminal justice have called for enhanced public involvement during policing, charging, bail determinations, plea-bargaining, and sentencing to improve accountability, transparency, and democratic participation. This Article is the first to extend this critique to decision-making during the expungement process. It conveys how expungement always has been the province of insiders and how recent expungement reforms, while broadening some substantive expungement remedies, double down on this paradigm. Procedures are implemented by judicial staff, prosecutors and defense attorneys filter petitions, the ultimate decision usually rests with a single judge, and bureaucrats are tasked with making expungement efficacious. The move towards tech-based, automatic expungement is merely insider expungement by another name.*

*After documenting insider expungement in its past and present forms, this Article explains why insider expungement adjudication is the norm. First, expungement processes were conceived, designed, and reformed in a system characterized by increased bureaucratization. In this sense, expungement law is a product of its environment. Second, the expungement remedy implicates the maintenance of public criminal records, which are connected to policy preferences for deterrence, incapacitation, and rehabilitation, all of which involve complicated cost-benefit analyses. In the same vein, expungement adjudication is about the assignment of risk to individuals, which traditionally has been understood as the province of criminal justice experts. Finally, insider expungement is built on the premise that the public is too punitive. In sum, insider-based expungement is a product of forces for criminal justice professionalization*

* © 2023 Brian M. Murray. Associate Professor of Law, Seton Hall Law School. Thank you to the Hon. Stephanos Bibas, for encouraging me to study expungement in all its facets, as well as the role of lay participation after criminal adjudication. Thank you to my former colleagues at Community Legal Services, who introduced me to the practice of expungement law. Thank you to Jenny Carroll, Jenny Roberts, and Brenner Fissell during CrimFest 2021, and Thea Johnson, Jessica Eaglin, and Darryl Brown during the ABA Criminal Justice Workshop Series in November 2021, for comments on this project in its early stages. I would also like to thank my wife, Katherine, for her continuous support, and my children, Elizabeth, Eleanor, George, John, and Lucy, for their inspiring curiosity, endless questions, sense of wonder, and zealous love for life.

*that are larger than the field of expungement, as well as a belief that the public cannot be trusted to address stigma-based harm or foster reentry.*

*Finally, while there is no question that the ability to obtain formal expungement relief has become easier over the past two decades, this Article notes several possible concerns with an exclusively insider-based expungement regime, including how secrecy and insider adjudication might undercut the purpose of expungement in the long run: full re-integration by the community and for more individuals. The absence of the community from expungement adjudication raises procedural justice, democratic, and legitimacy issues.*

TABLE OF CONTENTS

## INTRODUCTION

Insiders dominate expungement adjudication and implementation. Judicial staff, prosecutors, defense attorneys, judges, and administrative bureaucrats traditionally have decided the fate of expungement petitions, and now legislatures and judicial systems are enabling machines to automate expungement. Members of the community, outside of the occasional witness, are typically observers of the process rather than part of the actual adjudication. Expungement adjudication thus exemplifies the insider/outsider dynamic that pervades almost all facets of criminal justice.[1] This is the status quo despite that expungement, especially of convictions,[2] involves a determination of the merits of a petitioner's claim to reintegration, which involves a value judgment crucial to the limits of criminal justice.

This Article is the first to shed light on this phenomenon of insider expungement. It describes the insider/outsider dynamic during the expungement phase—whether petition-based or automated—before explaining *why* expungement adjudication is wholly the province of insiders, whether it is prosecutors initiating, delaying, or vetoing petitions, judges ordering them, or, more recently, machines automatically carrying out expungement. In doing so, this Article asks whether expungement adjudication's direct connection to reintegration,[3] second chances,[4]

---

[1] *See, e.g.*, Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–13 (2006) [hereinafter Bibas, *Transparency and Participation*].

[2] To date, most jurisdictions that have extended expungement to convictions have refrained from allowing it for the most well-known, *malum in se* style offenses. My contention is that the critique offered in Part III is particularly germane to the expungement of convictions, especially those that are not currently eligible for expungement, even in the jurisdictions with the broadest expungement eligibility. Based on the arguments presented in Part III, it seems plausible that an increased role for the community could allow for broader acceptance of expungement eligibility for higher-level convictions. In contrast, the expungement of non-conviction arrest information by insiders is generally less problematic given that an individual officer's decision to arrest does not carry the same normative weight as a conviction. But even that claim is subject to qualification considering the conviction may have been achieved via plea bargain instead of a finding of guilt by a jury, not to mention that arrest records have significant negative consequences themselves. That said, linking the eligibility of expungement for higher-level convictions to increased participation by the community in adjudication will be part of the discussion in another paper related to this project, which is currently titled *Participatory Expungement*.

[3] *See, e.g.*, Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1369 (2017).

[4] Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019, 4:58 AM) https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance [https://perma.cc/2682-NYVW].

stigma,[5] and punishment[6] itself warrants community perspectives. This question derives directly from the movement to "democratize" criminal justice procedure in the United States.[7] For if American criminal justice needs more democratic participation, then it is only fair to ask during which phases, and whether the expungement phase, given its connection to reentry, should permit such participation.

To be clear, insider domination of expungement processes and adjudication[8] is, at least for some, one of the remedy's chief virtues. Secret and relatively anonymized processes, coupled with broadened remedies like the reforms enacted over the past decade, can ease reentry for the successful expungement petitioner. Reformers have thus prioritized the achievement of relief for individuals, and recent changes have made it easier to achieve expungement, whether through the elimination of Byzantine procedures[9] or moving towards automated expungement.[10] But this Article asks several questions in response. First, has the allure of easing the path to an erased past come at the expense of normalizing a culture of second chances through community involvement in expungement? In other words, is bureaucratized expungement, while tantalizing in its short-term ability to erase records, undercutting attempts to foster a culture of reintegration? And is such insider adjudication, while perhaps appealing as a matter of substantive justice, problematic

---

[5] Simone Ispa Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 CRIMINOLOGY 387, 388–89 (2016).

[6] Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 46–49 (2016) (detailing connection between public criminal records and punishment theory); Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 681 (2021) (noting how expungement procedures imply rehabilitative theories of punishment) [hereinafter Murray, *Retributive Expungement*].

[7] *See generally* Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367 (2017) (introducing Issue 6, which contains several essays from legal scholars calling for the democratization of criminal justice). For example, Josh Kleinfeld notes how the problems of criminal justice reveal a "deep division between those who basically see the democratic public as the problem and those who basically see it as the solution." *Id.* at 1376.

[8] Expungement's origin is both legislative and judicial. Some early state expungement regimes located an inherent judicial power in state constitutions to remediate the stigma from a public criminal record. Other states chose to codify a remedies structure. Adjudication has primarily rested with judges, and to some extent prosecutors, and implementation responsibility rests with executive and judicial professionals.

[9] *See generally* David Schlussel & Margaret Love, *Record-Breaking Number of New Expungement Laws Enacted in 2019*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 6, 2019), https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/ [https://perma.cc/4YCR-VCD8]; *cf.* Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 541–42 (2020) (explaining the gap between eligibility and delivery of expungement relief).

[10] Clean slate laws, which enable automated expungement, have passed in states like Pennsylvania and New Jersey. *See, e.g.*, CMTY. LEG. SERVS., MY CLEAN SLATE: PA, https://mycleanslatepa.com [https://perma.cc/E2RC-VN4Y] (last visited Sept. 15, 2022).

as a matter of procedural justice, especially given original legal commitments to community involvement in criminal adjudication?[11]

These questions point to a fundamental conflict built into the aspirations for expungement policy. One argument suggests that expungement is designed to erase information, rendering it inaccessible and unable to be used.[12] Thus, keeping harmful information from potential decision-makers in the private sector protects those who have encountered the system, especially if their encounter was due to over-criminalization[13] or over-policing.[14] Professionals, experts, and bureaucrats are the privileged few who can be trusted not to misuse the information,[15] and thus secrecy is the name of the game. This critique is especially powerful in the case of arrest records, which often develop after the decision of a single police officer.

On the other hand, those who might desire to use criminal record information must appreciate the meaning of expungement for a person who happens to achieve it.[16] For if expungement is to have any value within a community, doesn't the community have to understand the potentially harmful effects of the information petitioners seek to expunge? Doesn't it need to *see* and *grapple with* the plight of the expungement petitioner rather than just hear about it in the abstract?[17] Conversely, doesn't making the community aware of such information also *undercut* any chance for expungement to have value because what could have been unknown is now *known*? This paradox lies at the promising yet stunted root of expungement reform more broadly.

Criminal justice advocates have confronted this problem by tilting policy away from knowledge, recognizing that once information is in the hands of decision-

---

[11] For instance, the U.S. Bill of Rights contemplates community involvement in criminal justice adjudication. *See generally* Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1424–26 (2017) [hereinafter Appleman, *Local Democracy*]. For a discussion of why expungement arguably involves criminal adjudication, or at least something close to its periphery, see *infra* Part II.C.

[12] Eli Hager, *Forgiving vs. Forgetting*, THE MARSHALL PROJECT (Mar. 17, 2015, 5:53 AM), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting [https://perma.cc/DR72-LYXX].

[13] *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 3–4 (2011); HARVEY A. SILVERGLATE, THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT 37 (2009).

[14] *See* Lauryn Gouldin, *Why Is There Over-Policing for Low-Level Offenses*, THE HILL (Apr. 23, 2021), https://thehill.com/opinion/criminal-justice/549902-why-is-there-over-policing-for-low-level-offenses [https://perma.cc/LU9Y-F9HR].

[15] For instance, many expungement statutes make exceptions for using such information during pre-trial phases of the criminal process or sentencing, and explicitly let prosecutors retain information otherwise ordered expunged. *See* Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2846 (2018) [hereinafter Murray, *Unstitching Scarlet Letters?*].

[16] *See generally* Brian M. Murray, *Completing Expungement*, 56 U. RICH. L. REV. 1165 (2022) [hereinafter Murray, *Completing Expungement*] (addressing issues relating to private access and use of already expunged information).

[17] *See* G.K. CHESTERTON, *The Twelve Men*, *in* TREMENDOUS TRIFLES 50, 53 (1909).

makers, and especially the public, there is very little that can be done to make sure it is not misused in a way that harms successful expungement petitioners.[18] This has had two significant effects. First, expungement is almost entirely an insider-dominated process, where criminal justice professionals determine the parameters of adjudication and implement policy.[19] Second, expungement largely has been understood as a matter of "forgetting," whereby one's past is removed from the public eye (hereinafter "the forgetting paradigm").[20] Bureaucratized expungement adjudication within this paradigm *is* the norm. Thus, expungement regimes either seal information from public access or completely erase it with only a few exceptions. Emphasizing "forgetting" *en masse* is the fuel driving recent expungement reforms, resulting in state-by-state broadening of substantive remedies over the past decade, as well as the wedding of technological advancement and expungement policy to create automatic, tech-based expungement. The only difference is that bureaucratic machines, rather than humans, are implementing the decisions.

To be fair, these developments in the world of expungement law effectuate long sought-after goals of expungement law reformers. After all, they are likely to hasten the achievement of expungement and broaden access to the remedy. In this sense, they chase the efficiency that is characteristic of modern-day discussions about criminal justice policy.[21] Enlisting technology also can mitigate long-existing problems relating to making expungement efficacious—updating databases and ensuring that background check companies have accurate information or do not have any information at all.

The problem, of course, is that an insider-dominated process that prioritizes forgetting over *everything else* undercuts the value of expungement within the broader community once formal expungement has been achieved. This is especially true given that informal records can persist in the wake of formal expungement. If few know about the *need* for expungement, then how can it have value? Many individuals within communities, especially those who have not encountered the system, do not realize why expungement is necessary. For various reasons, many

---

[18] For example, the Ban the Box movement began from this premise. *See* Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 2021), https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf [https://perma.cc/E7RZ-MHZF].

[19] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2846–50 (noting the power of prosecutors under expungement statutes to prevent relief, often without clear standards for exercising discretion).

[20] *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1707–17 (2003) (detailing a history of expungement as a method of forgetting public criminal record information).

[21] *See* Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1678 (2017) [hereinafter Bibas, *Restoring Democratic Moral Judgment*] ("Bureaucratization breeds an intense concern for efficiency, measured quantitatively as the number of arrests, charges, and convictions.").

never encounter an individual in search of an expungement, meaning the human side of the need for expungement is behind the curtain. Further, few community members are tasked with *formally* grappling with the gravity of the stigma of a criminal record, or whether it should publicly persist forever, which is the default posture of most criminal recordkeeping regimes.[22] Relatedly, while recent reforms have broadened eligibility, only certain types of convictions are eligible for expungement, meaning the community cannot do more, even if it wishes to do so. In short, communities are absent from expungement procedure in the same way that they are absent from charging, bail, bargaining, sentencing, and other phases. When the value of an expungement is contingent on the willingness of private actors to refrain from retrieving and using the information in other places after it has been officially expunged, the effect of this absence on normalizing second chances for those attempting to reenter is magnified. The lack of community involvement prevents a measure of accountability for the public criminal records apparatus in the same way that exempting public involvement from other phases fails to infuse adjudication with the sense of the public. As Laura Appleman has put it, "[b]y eliminating the role of the lay citizen, our current criminal procedure robs us of an important norm-creating opportunity in the realm of criminal justice."[23]

Scholars have been arguing for democratization in numerous phases of the criminal justice system: policing,[24] prosecutors' offices,[25] bail judgments,[26] plea

---

[22] *See* SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE 31 (2020) ("Any record ever publicly disclosed by criminal justice agencies will remain on the internet, even after an expungement.").

[23] Appleman, *Local Democracy*, *supra* note 11, at 1425.

[24] *See* Tracey Meares, *Policing and Procedural Justice: Shaping Citizens' Identities to Increase Democratic Participation*, 111 NW. U. L. REV. 1525, 1525 (2017) (suggesting that increasing procedural justice in policing encourages democracy); *see also* Tom R. Tyler, *From Harm Reduction to Community Engagement: Redefining the Goals of American Policing in the Twenty-First Century*, 111 NW. U.L. REV. 1537, 1537 (2017) (promoting policing as a means of encouraging "economic, social, and political vitality" as opposed to crime reduction); Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 761 (2012) (pondering the balance between protecting individual rights and minimizing social costs of the police).

[25] *See* Jed Rakoff, *Why Prosecutors Rule the Criminal Justice System—And What Can Be Done About It*, 111 NW. U. L. REV. 1429 (2017) (proposing prosecutors be required to spend time as defense counsel to make them more aware of injustices and their power); *see also* David Alan Sklansky, Unpacking the Relationship Between Prosecutors and Democracy in the United States (Stan. Pub. L. Working Paper No. 2829251, 2016) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2829251 [https://perma.cc/W53X-SML7] (discussing how different understandings of democracy interplay with different expectations for prosecutors); Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537 (2020) (hypothesizing that prosecutor elections may be an effective method of criminal justice reform).

[26] *See* Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

bargaining,[27] adjudication,[28] and sentencing.[29] This Article is the first to extend this paradigmatic examination to the world of expungement processes, shedding light on the insider dynamic at work in expungement as well as its causes. In doing so, it proceeds in three parts.

Part I descriptively identifies how expungement, traditionally conceived, is entirely dominated by insiders, whether they are attorneys, judges, judicial staff, or police departments. It also details how the move towards automatic expungement of certain types of public criminal records remains entirely insider-dominated, excluding the actual legislative passage of expungement reform. In other words, automatic expungement is insider expungement 2.0.

Part II explains *why* insider expungement is the norm. It argues that expungement is the product of a larger move towards bureaucratization, the connection between public criminal records and risk-based punishment theories, the understanding of expungement as primarily the adjudication of risk, and the idea that the public is too punitive to be trusted with reentry-based determinations. These forces combine to make expungement primarily about forgetting rather than forgiving, with expert insiders handling the information and mechanics.

Part III raises several implications of insider expungement for democracy and criminal justice. It notes several procedural justice, democratic, and legitimacy concerns with existing processes and describes how insider expungement undercuts the constitutional preference for public involvement in adjudication and potentially counteracts the normalization of second chances, especially for those with convictions that are not currently eligible even under the most permissive statutes. It also describes how insider expungement fails to consider whether the public is as punitive regarding public criminal records as perhaps originally thought. These concerns raise the question of whether expungement reform needs to be more community-oriented to truly pursue criminal justice.

## I. INSIDER EXPUNGEMENT AS A PHENOMENON

Insiders have dominated expungement adjudication since the creation of expungement as a remedy. Insiders dominated the creation of expungement remedies; in many states, expungement regimes were initiated by judges interpreting state constitutional requirements or the inherent powers of the judiciary to provide relief to those suffering from the adverse effect of public criminal record history

---

[27] *See* Daniel S. McConkie, Jr., *Plea Bargaining for the People*, 104 MARQ. L. REV. 1031 (2021).

[28] *See* Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731 (2010) [hereinafter Appleman, *The Plea Jury*].

[29] Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565 (2017).

information.[30] Modern-day expungement regimes are insider-centric in three ways. First, expungement procedure is extremely Byzantian, resulting in thickets that outsiders and lay people find impassable, ultimately stunting the pursuit of relief.[31] Thus, the procedure is biased towards insiders who know how to navigate the system. For petitioners, counsel is strongly recommended but never guaranteed. Second, adjudication is exclusively the province of insiders across the system; judicial clerical staff, prosecutors, defense attorneys, judges, and bureaucrats (judicial and law enforcement) decide whether expungement petitions are procedurally valid and substantively meritorious. Third, insiders within various agencies are solely responsible for the implementation of expungement. Perhaps most importantly, recent expungement reforms that harness the power of technology to hasten and broaden forms of expungement relief merely transfer insider adjudication from criminal justice system personnel to administrative experts who enlist sophisticated technology. While these reforms came into being through legislative processes, their implementation remains the work of insiders behind the curtain of the criminal records apparatuses that exist in nearly every jurisdiction in the United States.

### *A. Insider Expungement Procedure*

Expungement procedure is Kafkaesque.[32] In other words, the traditional process of petition-based expungement is, in most instances, arduous and, frankly, an ordeal for most petitioners.[33] As written elsewhere, expungement procedure was designed in accordance with the rehabilitative, theoretical roots of expungement more generally.[34] Such procedures attempt to sort out the worthiest petitioners; in effect, they stunt the promise of expungement.

The procedural complexity of expungement comes in various forms: filing hurdles, fees, waiting periods, statutory presumptions, standards of review, judicial rules, and evidentiary norms and rules for hearings. These complexities require deft navigators and essentially locate decision-making authority and expungement adjudication in a class of actors described below in Part I.B.

---

[30] *See, e.g.*, Commonwealth v. Wexler, 431 A.2d 877 (Pa. 1981). For an interesting discussion of federal courts and equitable expungement, see Steven F. Reich, *Expungement of Criminal Records in Federal Courts*, L.J. NEWSL.: BUS CRIME BULL. (Oct. 2009), https://www.manatt.com/uploadedFiles/Attorneys_and_Advisors/Reich,_Steven_F/Business%20Crimes%20Bulletin_Reich.pdf [https://perma.cc/GW43-8WWM].

[31] J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2501–06 (2020).

[32] *See, e.g.*, Franz Kafka, *Before the Law*, FRANZ KAFKA ONLINE, https://www.kafka-online.info/before-the-law.html [https://perma.cc/P4EZ-8K5A] (last visited Sept. 12, 2022 3:29 PM) (explaining how the law "sits as a gatekeeper").

[33] Chien, *supra* note 9, at 542–45; Murray, *Retributive Expungement*, *supra* note 6, at 668–69.

[34] Murray, *Retributive Expungement*, *supra* note 6, at 681.

Pursuing an expungement is a costly and time-consuming endeavor. The costs are both financial and intangible. Expungement often requires fees;[35] then there is the opportunity cost of pursuing the remedy in the first place—missed time on the job, paying for childcare, and transportation costs for tracking down the requisite paperwork needed to clear the initial hurdles. For example, most expungement processes require petitioners to gather and complete court and police agency forms, acquire identifying information, such as fingerprints, and collect judicial and police records.[36] These functions require insider knowledge of how records are kept, where information can be found, and how to best acquire it. While some states attempt to provide how-to guides for petitioners, they rarely allow for avoidance of setbacks.[37] Explaining arduous processes in detailed manuals that cannot possibly contemplate all the individual circumstances or idiosyncrasies affecting a petition renders such assistance incomplete and means petitioners must search for insider help.[38] As J.J. Prescott, Sonja Starr, and Colleen Chien have shown, requiring individuals to navigate complicated application procedures results in an uptake gap, minimizing the overall value of the remedy.[39]

Fines and fees also affect the ability to achieve expungement. To even petition for expungement often requires the payment of fees and fines, with little consideration for the unique circumstances of the petitioner. Fee requirements also expose a paradox: public criminal records are not punishment, but the achievement of erasure requires the payment of a punishment-style debt, even if it was not part of the original sentence.[40] For instance, Tennessee legislators were up front about

---

[35] *See* Chien, *supra* note 9, at 540; Murray, *Retributive Expungement*, *supra* note 6, at 693–94.

[36] *See* Murray, *Retributive Expungement*, *supra* note 6, at 686, 691–93.

[37] *See, e.g.*, *Expungement (Adult)*, MD. CTS., https://mdcourts.gov/legalhelp/expungement [https://perma.cc/2889-2Y2M] (last updated Oct. 2021); *Expunctions and Nondisclosure Orders*, TEX. ST. L. LIBR., https://guides.sll.texas.gov/expunctions-and-non-disclosure [https://perma.cc/UFX4-6QEP] (last updated Aug. 5, 2022, 5:16 PM); *How to Expunge Your Criminal and/or Juvenile Record*, N.J. CTS. (Apr. 2009), https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/10557_expunge_kit-11-2012.pdf [https://perma.cc/UQ4M-23DR].

[38] Murray, *Retributive Expungement*, *supra* note 6, at 692 (referencing how such guides "illustrate[] the types of difficulties faced by petitioners. It is a dizzying array of references and processes").

[39] *See* Prescott & Starr, *supra* note 31, at 2503–04 ("[P]eople with records are usually struggling with a variety of life challenges. Taking time away from work and childcare responsibilities to go to a police station to be fingerprinted, to make several trips to a courthouse, to find a notary, and to mail all these materials to the right addresses may be simply impossible, or at least difficult enough to be strongly discouraging."); Chien, *supra* note 9, at 541–44.

[40] *See generally* Amy F. Kimpel, *Paying for a Clean Record*, 112 J. CRIM. L. & CRIMINOLOGY 439 (2022) (exploring the pitfalls and challenges to the current schemes of diversion and expungement and explaining why a system of allowing defendants to pay for a clean record is bad policy).

how this would generate revenue.[41] At bottom, expungement costs quite a bit financially, whether the requested funds relate to the sentence, the administrative processing of the underlying case, or simply the pursuit of the expungement itself.[42] While many expungement regimes afford low-income petitioners the ability to obtain fee waivers, the ability to file a petition *in forma pauperis* often requires the pro se navigation of petitioning for that status in the first place, which requires its own sort of insider knowledge.[43]

Outside of the procedural hurdles mentioned above, most expungement statutes contain provisions that require significant legal interpretation to determine one's eligibility for expungement. The most well-known are waiting periods, meaning statutes that tether the availability of relief to the passage of time after arrest or conviction. While these waiting periods are defensible as a matter of substantive expungement law, interpreting them requires a significant understanding of how the entire law operates. Indiana's expungement regime is a good example. Waiting periods exist for all types of criminal records, and a 41-page guide to understanding the law[44] still leaves many readers with questions. This renders petitioners without counsel at a significant disadvantage, and there is no guaranteed right to counsel for expungement despite the obvious negative and punitive effects of a public criminal record.

Navigating burdens of proof also evidences the bias towards insiders. For instance, a petitioner pursuing an expungement for an arrest in Washington, D.C., is in a more favorable position than someone pursuing expungement of a conviction.[45] While that distinction is defensible, it also magnifies the latter petitioner's position as an outsider. In other words, statutes place higher burdens of proof on the outsiders most on the periphery and provide little knowledge about *how* to meet those burdens. This is the practice in several states at this point.[46]

Most importantly, while there is some appellate case law in the field of expungement, access to written trial court *decisions* or hearing records is difficult.

---

[41] Joy Radice, *Access-to-Justice Challenges for Expungement in Tennessee*, 30 FED. SENT'G REP. 277, 279 (2018) (describing access to justice barriers in Tennessee expungement process).

[42] Eliza Hersh & Gabriel J. Chin, *Building a Functioning Framework for Reentry and Restoration of Rights*, 30 FED. SENT'G REP. 283, 286 (2018) (noting costs in California, as an example).

[43] *See generally* Jenny Montoya Tansey & Katherine Carlin, *Closing the Delivery Gap*, CODE FOR AM. (May 2018), http://s3-us-west-1.amazonaws.com/codeforamerica-cms1/documents/Closing-the-Delivery-Gap.pdf [https://perma.cc/3KBV-E2BB] (explaining questions that in forma pauperis clients have).

[44] IND. OFF. OF CT. SERVS., DETAILED INFORMATION ON CRIMINAL CASE EXPUNGEMENT, IND. JUD. BRANCH, https://www.in.gov/courts/iocs/files/pubs-trial-court-courtmgmt-expungement-detailed.pdf [https://perma.cc/U57S-DMNC] (last visited Sept. 12, 2022).

[45] *Cf.* D.C. CODE § 16-803(i)(1)–(3).

[46] *See, e.g.*, ARK. CODE § 16-90-1415(a)–(e); OR REV. STAT. § 137.225(3); KY. REV. STAT. § 431.073(4)(a); MINN. STAT. § 609A.03(5); W. VA. CODE § 61-11-26(h); DEL. CODE tit. 11, § 4374(f).

In other words, to have knowledge as to what makes judicial officers tick when it comes to expungement, someone needs to be an insider or must spend quite a bit of time in a courtroom listening to expungement hearings.

Expungement procedure is difficult to navigate and favors insiders who have experience with pursuing an expungement. Procedures are costly, timely, and arduous, and insider knowledge is essential to a smooth experience. Very few expungement regimes provide this knowledge on their face, leaving expungement seekers mostly on their own.

### *B. Insider Expungement Adjudication*

Insiders dominate expungement adjudication, whether as the formal judge ruling on a petition for expungement, the clerical staff, the prosecutors who operate as gatekeepers to relief or, most recently, the machines[47] tasked by legislatures with wiping the slate clean *en masse*. This section details the various players involved in expungement adjudication.

#### *1. Traditional Insiders*

For petition-based expungement, there is a set of insiders that traditionally have been tasked with expungement adjudication, addressing either the merits of petitions or handling the procedural niceties required for a smooth expungement process. Expungement adjudicators include court clerks and staff, prosecutors, and judges. The adjudicatory power of judicial staff is largely due to their ability to serve as the gatekeepers of the process itself.[48] Depending on the jurisdiction, prosecutors can hold procedural and substantive adjudicatory power.[49] Finally, judges are tasked with ruling on petitions, usually after the presentation of very little evidence or based on the advocacy skills of attorneys representing the state or the petitioner. Community members almost *never* appear during the entire expungement adjudication, except for the rare occasion when one might be called as a witness for or against the petitioner.

##### *(a) Judicial and Executive Staff*

Judicial and executive staff maintain adjudicatory power by serving a gatekeeping function for expungement petitions. To be clear, this "gatekeeping adjudication" is altogether understandable. After all, there must be procedures

[47] As discussed below, automatic expungement is implemented by insiders tasked with operationalizing technology pursuant to the commands of the statute.

[48] The author recalls his time as an expungement attorney in a large urban area, where municipal court staff claimed to identify problems with expungement petitions that would bar filing, thereby precluding the ability of petitioners to ever set foot in court. While this rarely foreclosed the process for represented petitioners, the same could not be said for all pro se petitioners.

[49] *See, e.g.*, Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2846–59.

governing the filing of claims, required paperwork, deadlines, fees, and other procedural concerns. Personnel that maintains familiarity with these rules and guidelines allows for the administration of the judicial system on a daily basis. Judicial staff, in many ways, is the consummate insider population, as it is wholly necessary for the efficient administration of justice yet capable of constructing its own cultures and norms that undermine it. In the expungement context, executive branch personnel, such as employees at local and state police departments that maintain criminal record history information, operate in a similar fashion.[50]

That judicial staff makes initial determinations as to the viability of expungement petitions is undeniable. A quick glance inside any state courthouse that allows for the filing of expungement petitions conveys this reality. Filing desks and windows convey the basic requirements for petitions, identify reasons that documents will not be accepted, and indicate the fees that operate as barriers to filing.[51] Staff converses with prospective petitioners, redirecting them to outside organizations that may assist (such as legal aid entities), communicates basic requirements, provides skeleton or judicial forms, and, in some instances, might even provide advice to inquiring persons.

The Clerk of Courts in Chester County, Pennsylvania, is a good example of this phenomenon. The office provides potential applicants with the requisite forms, as well as a packet prepared by the office's staff to "help facilitate the filing of an expungement."[52] While the office is clear in stating that it "does not review expungement petitions for accuracy," the website also states that the "[f]ailure to submit proper paperwork may result in rejection of petition."[53] This language is, at best, ambiguous as to whether, at the moment of filing, staff members make initial determinations about a petition's compliance with procedural requirements. Lancaster County, Pennsylvania, publicizes similar information, noting that while "[t]he Clerk of Courts Office must accept whatever petition is presented . . . [f]ailure to utilize the proper petition . . . may result in a petition which is denied either by the Court of Common Pleas *or the Administrative Office of the Pennsylvania Courts*."[54] On the other side of the state, in Indiana County, Pennsylvania, a web file

---

[50] *See, e.g.*, *Criminal Expungement Process*, PA. STATE POLICE, https://www.psp.pa.gov/Pages/Criminal-Expungement-Process.aspx [https://perma.cc/AMW6-H48H] (last visited Sept. 12, 2022) (describing need to fill out forms to access criminal record information that belongs with expungement petition).

[51] *See, e.g.*, *Expungements*, CHESTER CNTY. PA., https://www.chesco.org/3405/Expungements [https://perma.cc/CNU3-DJ4X] (last visited Sept. 13, 2022). Notably, the Chester County Clerk of Courts Office "handles all expungement filings," providing forms and a "packet" created by the Office to help facilitate the process. *Id.*

[52] *Id.*

[53] *Id.*

[54] *Expungement Information Sheet*, LANCASTER CNTY. CLERK OF CTS. (emphasis added), https://lancasterpaclerkofcourts.com/129/Expungement-Information-Sheet [https://perma.cc/GGY2-M6QN] (last visited Sept. 13, 2022).

lists several obligations of a petitioner before explaining how the Clerk of Courts will receive and handle petitions.[55]

Additionally, the judicial branch in most states has several layers, usually organized geographically and hierarchically, meaning petitioners may need to encounter insiders in several places. For instance, in New Jersey, the New Jersey Courts' guide for how to pursue expungements notes locating records might entail contacting the "Superior Court Criminal Case Management Office in the county where the arrest or conviction occurred and *they will advise you how copies of those records can be obtained*."[56] This suggests that the offices have their own internal procedures and norms for addressing the requests of prospective petitioners. Similarly, in Arizona, there have been complaints by attorneys about the court system requiring multiple filings rather than one single filing, creating unintentional backlogs.[57] The official Arizona court system guidance alludes to this issue.[58] Given that the ability to comply with said procedural requirements is one way for a petitioner to impliedly convey worthiness[59] of expungement itself, these guidelines essentially have an adjudicatory *effect*, whether directly or through how they chill petitioners from filing in the first place.

In the executive branch, staff at police departments—local and state—comprise the most significant insiders that petitioners might encounter. While these officials do not maintain substantive adjudicatory authority, they can make the expungement process smooth or a headache for a prospective petitioner. Petitioners must track down several different types of records[60] to put together a complete expungement petition for submission to the court. Many of these documents exist in law enforcement agencies with their own protocols and personnel. For example, in New Jersey, the how-to guide references contacting the state police and the need to

---

[55] *Expungement Information*, IND. CNTY. CLERK OF CTS., https://www.indianacountypa.gov/wp-content/uploads/Expungement-Information.pdf [https://perma.cc/2KN5-MCRP] (last visited Sept. 12, 2022).

[56] *How to Expunge Your Criminal and/or Juvenile Record*, N.J. CTS. (June 2020) (emphasis added), https://www.njcourts.gov/forms/10557_expunge_kit.pdf [https://perma.cc/D5VT-SBZN].

[57] *See* Andrew Oxford, *After Prop. 207, Some Find Expungement Process in Pima County Slower 'Than Anyone Would Like*,*'* ARIZ. PUB. MEDIA (Nov. 23, 2021, 8:27 AM), https://news.azpm.org/s/91005-after-prop-207-some-find-expungement-process-in-pima-county-slower-than-anyone-would-like/ [https://perma.cc/F7SN-LL7S].

[58] *Instructions for Completing a Petition to Expunge Marijuana-Related Offense Records Pursuant to A.R.S. Section 36-2682*, ARIZ. CTS., https://www.azcourts.gov/Portals/0/Prop%20207/AOCCREM1I-071221.pdf?ver=2021-06-23-145149-577 [https://perma.cc/9HTV-TK5M] (last visited Sept. 12, 2022).

[59] *See* Murray, *Retributive Expungement*, *supra* note 6, at 691–700.

[60] *See, e.g.*, *Electronic Filing for Expungement Pro Se*, LEGAL SERVS. OF N.J. (2021), https://proxy.lsnj.org/rcenter/GetPublicDocument/Sites/LAW/Documents/Publications/Manuals/ElectronicFilingExpungements.pdf [https://perma.cc/5UBX-28Y9] (last visited Sept. 12, 2022).

schedule fingerprint appointments.[61] Pennsylvania has its own forms.[62] Indiana notes the significance of the state police to the expungement process but does not suggest much by way of help.[63] Maryland encourages petitioners to contact "their local . . . police barracks to request an individual review" and for fingerprinting.[64] These agencies maintain norms and processes that are separate from the judicial branch, and it is not always the case that the two branches communicate well.

Further, official criminal records repositories are known to maintain grossly inaccurate information about prospective petitioners.[65] Each state has its own set of repositories of records, and most states have laws addressing accuracy and completeness.[66] That said, processing court dispositions rarely happens quickly.[67] Rectifying records or documentation that is a prerequisite to filing with the court can require the assistance of personnel within the law enforcement agencies that operate these repositories.[68] These repositories are also enmeshed with the FBI's own database, which has its own problems with respect to accurately reporting dispositions.[69] In other words, the criminal records universe requires quite a bit of navigation. And the ability to progress through the expungement process can be contingent on efficient administration by people that the petitioner never formally encounters, in person or not.

Gatekeeping adjudication, while not final adjudication, has the capacity to stunt the pursuit of an expungement. And this gatekeeping is governed entirely by insider personnel, whether in the judicial branch or executive agencies.

---

[61] *See How to Expunge Your Criminal and/or Juvenile Record*, *supra* note 56.

[62] *See, e.g.*, *Criminal Expungement Process*, *supra* note 50.

[63] *See Expunge Criminal History*, IND. STATE POLICE, https://www.in.gov/isp/criminal-history-services/expunge-criminal-history/ [https://perma.cc/VMR3-WP9S] (last visited Sept. 12, 2022).

[64] *Frequently Asked Questions: Other*, MD. JUDICIARY, https://mdcourts.gov/clerks/calvert/faqsother [https://perma.cc/JLJ7-AUEL] (last visited Sept. 15, 2022); *see also Information About Removing Criminal and Civil Offense or Infraction*, MD. JUDICIARY, https://mdcourts.gov/sites/default/files/court-forms/ccdccr072br.pdf. [https://perma.cc/FE22-8NEJ] (last visited Sept. 12, 2022).

[65] *See* JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 133–35 (2015).

[66] *Id.* at 134.

[67] *Id.* at 135 (referencing Bureau of Justice Statistics' survey of State Criminal History Information Report that indicated massive backlog of completing accurate records at the state level).

[68] *See, e.g.*, *Background Checks: Frequently Asked Questions – General*, STATE OF CA. DEP'T OF JUST.: OFF. OF ATT'Y GEN., https://oag.ca.gov/fingerprints/faq [https://perma.cc/3HVP-M836] (noting process for challenging accuracy of criminal record information).

[69] *See* MADELINE NEIGHLY & MAURICE EMSELLEM, NAT'L EMP. LAW PROJECT, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT (July 2013), https://s27147.pcdn.co/wp-content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf [https://perma.cc/KKJ8-C9PH].

*(b) Prosecutors*

Outside of judges, who normally possess the final adjudicatory power, prosecutors are the most significant insiders in the entire expungement process.[70] This reality simultaneously operates as a force for good and for frustration, depending on the jurisdiction and the nature of the power provided to the prosecutor by state law and the stance of the prosecutor's office towards expungement.

Prosecutors possess procedural and substantive power when it comes to the success of expungement petitions. For example, jurisdictions have allowed prosecutors to act as the first line of review.[71] Some jurisdictions require prosecutorial consent simply to file a petition.[72] Some states have let prosecutors act in a quasi-judicial fashion with respect to the merits of petitions before a judge ever enters the picture.[73] The consequences of prosecutorial action are significant; the difference between action and inaction can mean the difference between an arduous, contested process or an automatic expungement.[74]

The nature of this insider activity is not limited to acting quasi-judicially. Quite a few jurisdictions now enable prosecutors to initiate or even order expungements.[75] Some prosecutors have advocated for this authority.[76] For example, prosecutors in major urban areas around the country have initiated expungement processes, declined to contest expungement petitions, and assisted the convicted with learning how to pursue expungements.[77] Los Angeles District Attorney George Gascón has touted the mass dismissal and expungement of 60,000 cannabis cases.[78] This move has also reached the suburbs. For example, in Washtenaw County, Michigan, the

---

[70] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2846–50.

[71] *See* GA. CODE § 35-3-37(n)(2).

[72] *See, e.g.*, FLA. STAT. § 943.0585(2)(a); N.J. STAT. § 2C:52-24.

[73] *See, e.g.*, COLO. REV. STAT. § 24-72-704(2)(b)(I) (2018).

[74] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2824 (noting that prosecutorial discretion can "construct or remove hurdles for those pursuing [expungement]").

[75] *See, e.g.*, DEL. CODE tit. 11, § 4374(h); HAW. REV. STAT. § 831-3.2 (allowing state Attorney General to issue expungement orders).

[76] *See Second Chances*, CONSERVATIVES FOR CRIM. JUST. REFORM, https://www.ccjrnc.org/second-chances.html [https://perma.cc/88HZ-LT2F] (last visited Sept. 12, 2022).

[77] *See, e.g.*, Noah Goldberg, *NYC District Attorney Asks Judge to Toss More than 3,500 Marijuana Cases in Brooklyn*, N.Y. DAILY NEWS (July 27, 2021, 1:21 PM), https://www.nydailynews.com/new-york/ny-brooklyn-da-marijuana-charges-dismissed-20210727-vuwoqqti5naxnlnamfypnrg6se-story.html [https://perma.cc/5ZB5-K5PG]; *District Attorney's Office Holds Record Expungement and Vaccination Event*, ABC NEWS: WBRZ2 (Oct. 10, 2021, 6:31 PM), https://www.wbrz.com/news/district-attorney-s-office-holds-record-expungement-and-vaccination-event/ [https://perma.cc/4GYK-S65J].

[78] *District Attorney Gascón Outlines Accomplishments from First Year in Office*, L.A. CNTY. DIST. ATT'Y'S OFF. (Dec. 8, 2021), https://da.lacounty.gov/media/news/district-attorney-gascon-outlines-accomplishments-from-first-year-in-office [https://perma.cc/B6FQ-CJL3].

prosecutor's office "strongly encourages eligible people to apply to expunge their old criminal records."[79] The office's Conviction Integrity and Expungement Unit will assist prospective petitioners.[80] Following passage of the North Carolina Second Chance Act, the Durham County Prosecutor has assisted with hundreds of expungements,[81] and the Forsyth County District Attorney announced expungements for thousands.[82] In Kentucky, the Cumberland County District Attorney co-sponsors an expungement clinic.[83]

While it is becoming more popular for prosecutors to *assist* petitioners, the most significant actions of prosecutorial insiders are, by far, those that *affect* the expungement process, whether to make it easier or more difficult. Some states only permit expungement without a hearing if the prosecutor does not initially object to the petition.[84] Similarly, some states allow for mandatory expungement to occur when prosecutors do not object.[85] In some ways, these two poles represent the height

---

[79] *Expungements*, WASHTENAW CNTY., MICH. PROSECUTOR'S OFF., https://www.washtenaw.org/3364/Expungements [https://perma.cc/6LM5-PN8D] (last visited Sept. 13, 2022).

[80] *Id.*

[81] *See* Cole del Charco, *Following 'Second Chance Act,' Durham DA's Office Continues Expunging Criminal Records*, N.C. PUB. RADIO: WUNC 91.5 (Dec. 10, 2021, 3:30 PM), https://www.wunc.org/law/2021-12-09/state-law-north-carolina-da-expunging-criminal-records-second-chance [https://perma.cc/6TTP-TUZC].

[82] *See* Michael Hewlett, *Forsyth County DA Jim O'Neill Announces Expungements for 30,000 People Who Were Convicted When They Were 16 and 17*, WINSTON-SALEM J., (Dec. 3, 2021), https://journalnow.com/news/local/crime-and-courts/forsyth-county-da-jim-oneill-announces-expungements-for-30-000-people-who-were-convicted-when/article_a9010370-539b-11ec-8ec8-fbe364dabef7.html [https://perma.cc/4WK6-DJ3G].

[83] *See* Jack Boden, *Cumberland County Expungement Clinic Could Help Thousands Seal Criminal Records*, FAYETTEVILLE OBSERVER (Nov. 21, 2021), https://www.fayobserver.com/story/news/2021/11/21/cumberland-county-nc-expunge-clinic-continue-helping-those-criminal-records-return-2022/6404265001/ [https://perma.cc/ZX5A-N26J].

[84] *See, e.g.*, ARIZ. REV. STAT. § 13-909(B) ("If the prosecutor does not oppose the application, the court may grant the application and vacate the conviction without a hearing."); ARK. CODE § 16-90-1413(b)(2)(B)(i) ("If notice of opposition is not filed, the court may grant the uniform petition."); CAL. PENAL CODE § 851.8(d) ("In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading."); 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B); IND. CODE § 35-38-9-9(a); MD. CODE, CRIM. PROC. § 10-303(d)(2); N.J. STAT. § 2C:52-11; UTAH CODE §§ 77-40a-103(8) to-107; VA. CODE § 19.2-392.2(F).

[85] CAL. PENAL CODE § 851.8(a); COLO. REV. STAT. § 24-72-705; *see also* GA. CODE § 35-3-37(n)(2) (noting that for pre-2013 arrests, "if record restriction is approved by the prosecuting attorney, the arresting law enforcement agency shall restrict the criminal history record information"); 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (providing for automatic expungement if no objection); IOWA CODE § 901C.2(1) (providing for automatic expungement upon no objection or initiation by a prosecutor, which is allowed under the

of prosecutorial insider power over the process of expungement: a prosecutor's objection—or lack thereof—allows for petitioners to bypass the judiciary entirely.[86]

Prosecutor-insiders also can lengthen and make the process more arduous for already disadvantaged petitioners. Prosecutors might decide to object to expungement petitions, triggering hearings that would otherwise serve as mere formalities.[87] These hearings carry their own standards of review, which insiders are more familiar with after repeated experiences. In fact, plenty of jurisdictions allow prosecutors to advocate for their position, one way or the other, with reference to numerous statutory factors. Additionally, prosecutors know the ins and outs of expungement statutes, allowing them to manipulate the process and the ultimate availability of relief. For example, as mentioned elsewhere, in Indiana or Minnesota, "prosecutors can eliminate or elongate the waiting period by consenting to expungement or requesting more time for review."[88]

These capabilities and prosecutorial incentives combine to make prosecutors incredibly powerful insiders. With the ability to steer the petition-based expungement process, prosecutors can pursue several routes. They can default to a posture of preserving criminal records at all costs.[89] They can aim to mitigate the effects of criminal records whenever they think appropriate and in ways that eliminate the role of the judiciary.[90] Finally, they can act as insiders without clear

---

statute); KY. REV. STAT. § 431.076(3) (providing a process for expungement of records following the filing of a petition); MINN. STAT. § 609A.025(a) (providing for automatic expungement in some cases unless the court finds it contrary to the public interest); N.Y. CRIM. PROC. LAW § 160.50(1) (providing a procedure for sealing criminal records); VT. STAT. tit. 13, § 7602(a)(3) (providing for expungement upon petition to the court); WYO. STAT. §§ 7-13-1401(c), 7-13-1501(f), 7-13-1502(f) (authorizing expungement upon petition and explaining the process of expungement).

[86] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2848.

[87] *See* ARIZ. REV. STAT. § 13-909(C) ("If the prosecutor opposes the application, the court shall hold a hearing on the application."); ARK. CODE § 16-90-1413(b)(2)(B)(ii) ("If notice of opposition is filed, the court shall set the matter for a hearing if the record for which the uniform petition was filed is eligible for sealing under this subchapter unless the prosecuting attorney consents to allow the court to decide the case solely on the pleadings."); COLO. REV. STAT. § 24-72-705(1) (including misdemeanor and felony convictions and misdemeanor and felony drug convictions); 20 ILL. COMP. STAT. 2630/5.2(d)(7); IND. CODE § 35-38-9-9(c) (describing the process by which a hearing is set if the prosecuting attorney objects to a petition for expungement); LA. CODE CRIM. PROC. art. 980(D) (prescribing the hearing process); MD. CODE, CRIM. PROC. § 10-303(e)(1) ("If the State's Attorney files a timely objection to the petition, the court shall hold a hearing."); UTAH CODE § 77-40a-305(10) (describing the hearing process); WYO. STAT. §§ 7-13-1401(c), 7-13-1501(e), 7-13-1502(e) (describing, collectively, a petition and hearing process).

[88] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2849; *see, e.g.*, IND. CODE §§ 35-38-9-1(b), -9-2(c), -9-2(e)(4), -9-3(e)(4), -9-4(c), -9-4(e)(4); MINN. STAT. § 609A.025(c).

[89] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2852–55.

[90] *Id.* at 2855–57.

direction or motivations, sometimes even with indifference.[91] Regardless of the stance chosen, however, prosecutors can be forces for good or bad, and without ever encountering the community during the course of such adjudicatory decisions.

*(c) Judges*

As the most visible, formal adjudicators of expungement petitions, judges are arguably the most public insiders. This is because judicial action with respect to expungement petitions is altogether public, either via a hearing or through the public reporting of decision-making in public docket information. If judges are visible to the public, why are they expungement insiders? For the same reason they are insiders in every other criminal justice phase: they are adjudicators who develop internal habits and heuristics, and they are responsive to judicial norms *not* directly informed by the broader public.

In situations where judges have the discretion to grant or deny expungement petitions, state law usually provides ample wiggle room for judges to make decisions. While recent reforms have limited judicial discretion in some expungement contexts, such as those involving non-conviction information, conviction-based expungement petitions enable judges to draw from various sources to make determinations. While statutes or case law may prescribe certain considerations, they rarely indicate the order of preference, the relationship between the factors, or whether any weigh more than others. As such, judges are free to chart their own paths when it comes to expungement, as long as their determinations can be rationalized within the existing expungement framework. In some respects, this resembles most sentencing regimes, where judges are given certain guidelines but nevertheless remain free to act within a wide range of permissible outcomes.

Adjudicatory standards are vague and vary across jurisdictions. Conceived in a risk-based paradigm,[92] statutory standards governing expungement tend to be quite open-ended, allowing judges to make risk calculations from the bench. This makes it impossible for first-time petitioners to know what a judge is thinking or whether existing law will, *in practice*, permit expungement. The common practice across jurisdictions is to allow for judicial balancing, meaning courts assess whether the state's interest in keeping the records outweighs the petitioner's interest in having them expunged.[93] Sometimes statutes reference "the interests of justice"[94] before mentioning public safety, employer interests, rehabilitation, and community

[91] *Id.* at 2857–59.
[92] Murray, *Retributive Expungement*, *supra* note 6, at 681–87.
[93] *Id.* at 698–700.
[94] *See, e.g.*, D.C. CODE § 16-803(h)(1).

interests.[95] A petitioner's character is also on the table, usually in the context of whether the person has evidenced rehabilitation, making the person a lower risk.[96]

Recent expungement reform laws also have created a situation of legal uncertainty for judges who are tasked with interpreting statutes for the first time. For example, in Arizona, despite the passage of expungement reform through voter initiative, some judges are subjecting petitions to additional scrutiny, leading to a backlog.[97] Drug possession charges are eligible for expungement, but judges have scrutinized charges relating to the solicitation of drugs, specifically with respect to the quantity involved.[98] Similarly, an appellate court in Michigan recently reversed a lower court opinion for incorrectly interpreting how an expungement statute applied to traffic offenses that also resulted in death.[99] The Wisconsin Supreme Court recently restricted trial judge discretion for the expungement of juvenile convictions, noting how judges cannot order expungement if *any* criminal justice agency or official finds something wrong with the petitioner's compliance with prior terms of a sentence or other process.[100] Interestingly, that interpretation amounts to judicial permission for other insiders to stall the process. And the Massachusetts Supreme Court is set to review an expungement statute's failure to afford the relief initially desired.[101] Critics have noted how the law provides judicial discretion over a lengthy application process.[102] The statute permits judicial denial of expungement when the judge perceives an expungement would not be in the "best interests of justice."[103] This is emblematic of the type of discretion typically afforded to judges in expungement statutes, which has, in turn, inspired a move towards mandated expungement.

---

[95] *Id.*

[96] *See, e.g.*, ARK. CODE § 16-90-1415(b)(1)(E); MINN. STAT. § 609A.03(5)(c)(1)–(12) (referencing rehabilitation along with the petitioner's record of employment, community involvement, and the nature and circumstances of the crime); COLO. REV. STAT. § 24-72-706(1)(g); N.H. REV. STAT. § 651:5(I); 20 ILL. COMP. STAT. 2630/5.2(d)(7).

[97] *See* Oxford, *supra* note 57.

[98] *See id.*

[99] Carolyn Muyskens, *Panel: Judge Should Not Have Blocked Expungement for Manslaughter Conviction*, HOLLAND SENTINEL (Dec. 1, 2021, 6:01 AM), https://www.hollandsentinel.com/story/news/courts/2021/12/01/panel-judge-must-reconsider-expungement-petition-drunk-driving-case/8806407002/ [https://perma.cc/952U-EWMH].

[100] State v. Lickes, 960 N.W.2d 855, 863–64 (Wis. 2021).

[101] Dan Adams, *'An Utter Failure': Law Meant to Clear Old Convictions, Including for Marijuana Possession, Helps Few*, BOSTON GLOBE (Nov. 28, 2021, 4:49 PM), https://www.bostonglobe.com/2021/11/28/marijuana/an-utter-failure-law-meant-clear-old-convictions-including-marijuana-possession-helps-few/ [https://perma.cc/9VTA-LVC4].

[102] *Id*.

[103] *Id*.

*2. Legislatively Mandated, Automated Adjudication*

Automated or "clean slate" expungement results in insider expungement adjudication under the guise of popular legislation. While recent laws allowing for automated expungement have been lauded as an incredible advancement and achievement for relief,[104] bringing some state jurisdictions into the same policy arena as European countries with similar systems,[105] these laws merely outsource adjudication to a new class of insiders: executive and judicial staff who interpret and adjudicate the meaning of the statute behind a technological curtain. They are in line with the quest for "efficiency" in criminal justice.[106]

While these laws are the product of popular legislation, they remove the public from the realm of expungement adjudication entirely and relocate adjudicatory authority to an even smaller group of insiders: those responsible for running the technological machinery designed to implement the law. The public is no longer even capable of visiting the place of adjudication, such as a courtroom, because one does not exist.

Pennsylvania was one of the first states to pass automated sealing legislation; its Clean Slate law went into effect on June 28, 2019.[107] The Administrative Office of Pennsylvania Courts (AOPC) notes:

> Clean Slate uses an automated computer process to identify and shield from public view (1) offenses with dispositions that are not convictions, (2) summary convictions more than 10 years old and for which payment of all court-ordered financial obligations is complete, and (3) convictions graded as a misdemeanor of the 2nd or 3rd degree, or ungraded wherein the defendant has been free from any other felony or misdemeanor conviction for 10 years and completed the financial obligations of the sentence.[108]

AOPC's description of the "Clean Slate Processing Details" reveals how this automated process is effectively statutorily prescribed insider adjudication behind

---

[104] *See, e.g.*, *Oklahoma Enacts Automatic Record Clearing Law*, COLLATERAL CONSEQUENCES RES. CTR. (May 4, 2022), https://ccresourcecenter.org/2022/05/04/oklahoma-enacts-automatic-record-clearing-law/ [https://perma.cc/93XG-5RXN].

[105] *Cf.* JACOBS, *supra* note 65, at 163–68 (noting how several European countries permit automated expungement after a period, and without proof of rehabilitation).

[106] *See* Bibas, *Restoring Democratic Moral Judgment*, *supra* note 21, at 1683–86.

[107] SHARON M. DIETRICH, PENNSYLVANIA CLEAN SLATE: DELIVERING ON ITS PROMISES, CMTY. LEGAL SERV. OF PHILA. (May 1, 2020), https://clsphila.org/wp-content/uploads/2020/05/Clean-Slate-implementation-report-final.pdf [https://perma.cc/CK28-Z5CF].

[108] THE PATH TO CLEAN SLATE, ADMIN. OFF. OF PA. CTS. (May 15, 2019), https://www.pacourts.us/Storage/media/pdfs/20210224/160611-thepathtocleanslate-007847.pdf [https://perma.cc/J6Y6-P3MR].

the technological curtain. Utah has a similar clean slate law.[109] Passed with unanimous support by the Utah legislature, it was signed into law on March 28, 2019.[110] The law requires the state judiciary to make "[r]easonable efforts" to "identify and process all clean slate eligible cases . . . ."[111] The legislature allowed several types of records to be automatically expunged, ranging from non-conviction dispositions to misdemeanor convictions.[112] Michigan and Virginia recently passed similar laws.[113]

To be clear, the states that have passed clean slate laws have done so with legislative majorities,[114] and the laws are substantively beneficial through their expansion of eligibility for relief. But that does not change the fact that such laws maintain a *practice* of insider adjudication through either statutorily prescribed operations or the designs created by personnel tasked with implementing the statute. Clean slate laws are publicly democratic in their expression of the popular will but result in the same bureaucratized operations that plague petition-based expungement statutes. Their connection to the community is the same, coming remotely through the legislators who pushed the legislation in the same way that petition-based expungement processes, at one point in time, bore the imprimatur of democracy. The main difference is that automated expungement *relief* has the potential to touch a broader class of outsiders, which is a good accomplishment. But in either instance, expungement *processes* remain the province of insiders, and perhaps even more so with the new legislation, given the complexity that comes with automation via technology, demanding a new type of expertise that few in the broader public possess. This resembles the usage of risk assessment in the bail and sentencing contexts, which have been criticized on procedural justice grounds.[115] Adjudication thus blends with technological implementation, culminating in a Weberian state of criminal justice already seen in other phases of the system.[116] Those mechanics are discussed below.

---

[109] SUDBURY CONSULTING, LLC, UTAH CLEAN SLATE IMPLEMENTATION AND EVALUATION (July 19, 2021), https://www.utcourts.gov/utc/judicial-council/wp-content/uploads/sites/48/2021/07/Final-Clean-Slate-Report-Presentation-7.19.21.pdf [https://perma.cc/9AV7-CFDH].

[110] *Id.*

[111] UTAH CODE § 77-40a-203(2)(b).

[112] SUDBURY CONSULTING, LLC, *supra* note 109.

[113] *Clean Slate for Michigan*, SAFE & JUST MICH., https://www.safeandjustmi.org/our-work/clean-slate-for-michigan/ [https://perma.cc/ERR5-2WAA] (last visited Sept. 18, 2022); *Virginia Poised to Enact "Transformative" Record Clearance Law*, COLLATERAL CONSEQUENCES RES. CTR. (March 8, 2021), https://ccresourcecenter.org/2021/03/08/virginia-poised-to-enact-transformative-record-clearance-law/[https://perma.cc/3FHF-CXSC].

[114] *See, e.g.*, COLLATERAL CONSEQUENCES RESOURCE CTR., *supra* note 113.

[115] Chris Palmer & Claudia Irizarry-Aponte, *Dozens of Speakers at Hearing Assail Pa. Plan to Use Algorithm in Sentencing*, PHI. INQ. (June 6, 2018), https://www.inquirer.com/philly/news/crime/philadelphia-pennsylvania-algorithm-sentencing-public-hearing-20180606.html [https://perma.cc/RQN7-PVWC].

[116] Kleinfeld, *supra* note 7, at 1379–89; *see infra* Part II.A.

### *C. Insider Expungement Implementation*

The implementation of an official expungement hinges on the efficient operations of insiders, whether through the manual activities of human staff in myriad criminal justice agencies or the more streamlined processes associated with clean slate expungement.

#### *1. Traditional Post-Expungement Insiders*

Insider personnel pervades expungement implementation in the context of petition-based expungement. While a court ordered expungement typically governs the judicial branch's court records, other records are held by other criminal justice agencies. Statutes prescribe processes for employees of the state to actualize the expungement. For example, in Pennsylvania, a court-ordered expungement after petition requires various agencies to expunge records relating to the arrest or conviction.[117] They include the court system itself, as well as the Pennsylvania State Police (PSP) repository.[118] Expungement of records from the PSP is crucial for petitioners because its records are what inform the FBI's criminal database, which in turn informs the content of background checks performed by background check companies.[119]

In Pennsylvania, employees of the Administrative Office of Pennsylvania Courts (AOPC) are responsible for carrying out the expungement within the judicial branch.[120] This requires the order to be communicated to the appropriate personnel between offices within the court system.[121] The same personnel are responsible for sending copies of the orders to the PSP, which has its own personnel in charge of the records that the PSP holds. That personnel then must erase or seal the expunged information and then report that it has done so to the FBI. Only after the completion of those processes is an expungement officially complete. And if any errors persist, a petitioner must contact those agencies separately to rectify them. Errors might be discovered upon the issuance of a background check report, which effectively discloses dissemination of incorrect information. As James Jacobs recounts in *The Eternal Criminal Record*, these mistakes are not easy to rectify:

> Suppose Jane Jones, having obtained a copy of her criminal record, sees a notation for an arrest that should have been sealed. Upon requesting a correction, she is told that she will have to file an application for record

---

[117] *See, e.g.*, *Blank Expungement Order 790*, ADMIN. OFF. PA. CTS. (July 21, 2021), https://www.pacourts.us/Storage/media/pdfs/20210224/222549-blankexpungementorder79000309121-000065.pdf [https://perma.cc/UE3C-4X3J].

[118] 18 PA. CONS. STAT. § 9122 (referencing central repository for expungement).

[119] *Id.* at § 9122(d) (describing how central repository must notify "all criminal justice agencies which have received the criminal history record information to be expunged").

[120] *See* PENN. R. CRIM. P. 490(c)(2) cmt.

[121] *Id.* ("The clerk of courts shall serve a certified copy of the Order to each criminal justice agency identified in the court's Order.").

> correction supported by certified copies of police and court records. This might mean traveling to the courthouse where her case was adjudicated. If the case was never brought to court, it would require correspondence, and perhaps meetings, with prosecutors and/or police officials who themselves might be unfamiliar with the disputed arrest. Other errors that infect rap sheets include multiple recordings of the same incident and recording the wrong criminal offense or wrong disposition or sentence. Such errors can be corrected if the record-subject finds out about errors and has sufficient persistence and competence to pursue the remedial process, but those are big ifs.[122]

Unfortunately, this sort of bureaucratic problem can be common.[123] The Legal Action Center estimated a near 30% error rate in rap sheets in New York City between 2008 and 2011,[124] pointing to "misinformation or lack of information sent to [the New York State's Division of Criminal Justice Services (DCJS)] by the many parties—the police, prosecutors and courts—that are required by law to send information to DCJS."[125]

Jacobs's real-world example and the above reports suggest that if insider personnel fail to carry out an expungement, a successful petitioner must convince these insiders to *actually expunge* the record, thus making implementation an extension of insider adjudication.

### *2. Implementation via Automation*

As mentioned above, clean slate expungement laws effectively outsource adjudication to insiders running technological operations within state judicial systems and executive agencies. Pennsylvania's Clean Slate operation is emblematic of this phenomenon. First, AOPC automatically identifies those offenses that it perceives to be eligible.[126] The identification process is internal to AOPC and not public. Its initial determination is then sent to the Pennsylvania State Police (PSP) for verification and potential objection.[127] This happens in monthly batches.[128] If PSP dubs an offense "non-eligible" or the data "incomplete," the record "will be removed from the batch."[129] As this process is not public, it does not appear that there is an appeal process available to the public. These validated batches are then sent to individual counties, which then are tasked with obtaining a signed judicial

---

[122] JACOBS, *supra* note 65, at 140–41.

[123] LEGAL ACTION CENTER, THE PROBLEM OF RAP SHEET ERRORS: AN ANALYSIS BY THE LEGAL ACTION CENTER 1 (2013), https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf [https://perma.cc/LGE5-JBCJ].

[124] *Id.*

[125] *Id.* at 2.

[126] THE PATH TO CLEAN SLATE, *supra* note 108.

[127] *Id.*

[128] *Id.*

[129] *Id.*

order expunging the records in the batch.[130] That process creates an "Administrative Docket" report, which can then be saved by the county.[131] If someone affiliated with the case wants information about the case or the status under this set of processes, the person must contact the "Court of Common Pleas in the county."[132] Between June 28, 2019,[133] and April 7, 2022, over 40 million cases were processed in this fashion, with no direct involvement of the community.[134]

While Michigan, Virginia, and Utah have passed similar clean slate legislation, only Utah's proposed processes for automation are public. Utah's process looks a lot like Pennsylvania's. First, the Utah Administrative Office of the Courts "entered a data sharing agreement with Code for America."[135] The goal is to use computer software to match case records to persons and "write computer code to identify" eligible cases.[136] The state enlisted a consulting company called Sudbury Consulting, LLC, to effectively audit this process as it developed.[137] Sudbury, in conjunction with volunteers in various roles in the criminal justice system, assessed whether the software that Utah and Code for America created actually complied with the statute and the extent to which it erred.[138] The software resulted in an 86% accurate identification rate, and Sudbury announced it was working with the court system and Code for America to adjust the code, promising a false positive rate of less than one percent.[139] These internal processes will ultimately be the creature of the court system. While Utah deserves credit for enlisting a consultant to check its work, it remains unclear how often that will occur and whether a public advocate will oversee the processes.

Expungement implementation—whether manually or automatically initiated—is the province of personnel within agencies that have their own norms and processes.

## II. WHY INSIDER EXPUNGEMENT IS THE NORM

Insider expungement is the norm for several theoretical and historical reasons. First, expungement regimes are emblematic of the larger criminal justice paradigm that has pervaded adjudication for nearly one hundred years: the move towards wholly professionalized adjudication.[140] Expungement regimes originated when

---

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Clean Slate Update: 40 Million Cases Sealed*, CMTY. LEG. SERVS. (Apr. 7, 2022), https://mycleanslatepa.com/clean-slate-update-apr-2022/ [https://perma.cc/WA5X-Z244].

[135] SUDBURY CONSULTING, LLC, *supra* note 109.

[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] *Id.*

[140] Kleinfeld, *supra* note 7, at 1379 (noting Weberian influence on criminal justice given the displacement of the laity by officials and experts).

bureaucratic criminal adjudication was solidifying itself as the norm. This sociological reality undergirds the link between expungement and theories of rehabilitation that traditionally require professionalized decision-making for implementation. Expungement processes thus first mirrored similar forms of adjudication in the probation and parole contexts and now, through automated expungement, resemble legislatively mandated determinations of risk.

Second, official criminal recordkeeping is connected to the functionalist beliefs that pervade administration of the system and that are prone to insider decision-making. Such recordkeeping can deter prospective wrongdoers and shame and control those who have been arrested or convicted.[141] Deterrence and incapacitation-based theories of punishment follow from utilitarian calculations by experts. Further, recordkeeping enables transparency in some matters of criminal justice,[142] allowing for conceptualizing expungement remedies as serving the opposite function. Hence, expungement was conceived as a mode of forgetting,[143] not forgiveness, preferring secrecy and anonymity rather than the restoration of relationships within the community. Secrecy and anonymity enable insider decision-making behind the curtain, giving expungement insiders control over how much transparency would or would not remain. Additionally, expungement, as a legal matter, is the adjudication of risk and, therefore, a natural place for expert insiders. In its modern-day form, this resembles adjudication of risk in the bail and sentencing contexts, where insiders have dominated.

Finally, bureaucratized expungement rests on the premise—consistent with the prevailing diagnosis regarding punitive attitudes at the time expungement regimes originated—that the public cannot be trusted to adjudicate in a just fashion. Insider-based expungement is thus a reaction to the perceived threat of community-informed adjudication in the same way that other anti-democratic forms of adjudication became prioritized in the criminal system. The nature of the remedy, plus the notion that the public is too punitive to be trusted, buttresses insider expungement.

### *A. The Current Criminal Justice Paradigm and Insider Expungement*

Insider expungement is a reality within a larger criminal justice paradigm that entrenches opaque, insider, and bureaucratic decision-making.[144] Scholars have acknowledged how this state of affairs informed the solidification of plea

---

[141] *See* Corda, *supra* note 6, at 5.

[142] The Supreme Court of the United States has held consistently that there is a right to access criminal justice proceedings and report of happenings in the criminal justice system. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 557 (1980); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 596 (1982); *see also* Press-Enterprise Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 516 (1984); Press-Enterprise Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 13 (1986); United States v. Criden, 675 F.2d 550, 557 (3d Cir. 1982); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983).

[143] *See generally* Love, *supra* note 20.

[144] Bibas, *Transparency and Participation*, *supra* note 1, at 915; STUNTZ, *supra* note 13, at 295.

bargaining,[145] the extremely low trial rate,[146] and the absolute obsession with statistics when it comes to measuring outcomes,[147] especially in the bail[148] and sentencing[149] contexts, where minimizing risk is the primary objective. Insider-driven expungement originated when the rehabilitative ideal was peaking in the probation and parole context, and the remedy expanded when incapacitation became the primary focus of criminal justice.[150] Expungement reform over the past decade has transpired against a backdrop that continues to prioritize the calculation of costs and benefits by experts making policy.[151] In short, insider expungement is the logical outgrowth of the prevailing criminal justice paradigm, which prioritizes bureaucratic, professionalized decision-making.[152]

*1. Expungement's Origin in Context: Managing Risk and Rehabilitation as the Norm*

Expungement remedies originated when rehabilitation was the fashion of the day for crafting criminal justice policy.[153] Francis Allen has noted how the rehabilitative ideal was "the dominant American theory of penal treatment" prior to the shift that occurred in the latter part of the twentieth century.[154] Like probation and parole regimes, expungement aimed to sort the rehabilitated from those who

[145] *See, e.g.*, McConkie, *supra* note 27.

[146] *See* Appleman, *The Plea Jury*, *supra* note 28.

[147] Erin Collins, *Punishing Risk*, 107 GEO. L.J. 57 (2018).

[148] Paul S. Heaton, Sandra G. Mayson & Megan T. Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 768 (2017).

[149] *See generally* Collins, *supra* note 147.

[150] Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY 100 (Charles J. Ogletreet, Jr. & Austin Sarat, eds. 2012) (noting how the carceral system is about separation through incapacitation during and after prison).

[151] One of the more prevalent arguments supporting expungement reform is how criminal records affect one's ability to be a productive member of the workforce. Love, *supra* note 20, at 1062–64.

[152] *See generally* Kleinfeld, *supra* note 7 (explaining the conflict between bureaucratic professionalization and democratization of the criminal justice system). Some scholars candidly prefer bureaucratic administration. *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2005); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS (2009). Kleinfeld notes how David Garland's two seminal works, Culture of Control and Peculiar Institution, are united in their fear of the public. *See* Kleinfeld, *supra* note 7, at 1398.

[153] Radice, *supra* note 3, at 1326 ("During the 1960s and 1970s, states endorsed a rehabilitative ideal as an integral part of the criminal justice system.").

[154] Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 149 (1978).

were too risky to allow reentry.[155] Expungement simultaneously incentivized rehabilitation and rewarded the already rehabilitated with a second chance to enter society.[156] This explains why expungement began in the juvenile field; young people, with their lives completely ahead of them and capable of additional maturity, were the population with the most potential for rehabilitation.[157]

Initial expungement regimes reflected this rehabilitative paradigm in two ways: by restricting the remedy to those who showed the most promise of rehabilitation and by placing decision-making authority with a small set of experts, namely judges who were already involved with sentencing and other criminal justice matters. First, early expungement regimes required scrutiny of a petitioner's character through consideration of various factors that were thought to shed light on the assignment of risk.[158] If the person had moved beyond what was contained on paper in the form of a criminal record, then expungement was warranted.[159] Crime-free periods, good attitudes, and the ability to complete the expungement process itself were evidence of a rehabilitated individual.[160]

---

[155] *See, e.g.*, Peter D. Pettler & Dale Hilmen, Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121, 124 (1967); Isabel Brawer Stark, Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 865 (1974) (noting the "rehabilitative ideal" as pervasive within the criminal justice system).

[156] *See, e.g.*, State v. N.W., 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (discussing how the purpose of the expungement statute was to provide an offender with a "second chance"); JACOBS, *supra* note 65, at 113–14 ("The purpose of this policy . . . is to encourage rehabilitation and to recognize that a previously convicted offender has succeeded in turning his life around.").

[157] *See* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 483–84 (1981); *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 (1966) (noting how "omitting [the] means of removing the infamy of [their] social standing, deprives [them] of an incentive to reform"); *see also* Love, *supra* note 20, at 1710 ("The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights."); Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1063 (1997) ("Expungement, then, may be conceptualized as a natural step in rehabilitation that allows an offender to become sufficiently reformed through reintegration into society.").

[158] *See, e.g.*, Stephens v. Toomey, 338 P.2d 182, 187–88 (Cal. 1959); People v. Johnson, 285 P.2d 74, 76 (Cal. Dist. Ct. App. 1955); People v. Mojado, 70 P.2d 1015, 1016–17 (Cal. Dist. Ct. App. 1937).

[159] *See* Pettler & Hilmen, *supra* note 155, at 124 ("This being so, it is only natural and just that he is deemed fit to return to his former role in society and assume a position of equality with its members.").

[160] Murray, *Retributive Expungement*, *supra* note 6, at 681–87; *see also* JACOBS, *supra* note 65, at 114 ("After a certain period of crime-free behavior, the ex-offender has demonstrated that he has put his past offending behind him and deserves reinstatement as a citizen in good standing.").

While initial remedies were judicially crafted in many states, legislatures ultimately codified a path to expungement once petitioners proved their rehabilitation. These statutes initially restricted the remedy to very few, treading cautiously when declaring who was truly rehabilitated.[161] Some even explicitly linked expungement to probation or parole.[162] Notably, this allowed states to thread the needle between rehabilitation and public safety concerns. Adjudication within that paradigm was entirely the province of insiders, given the unique expertise required to make that balancing.

Judges were the preeminent insiders in the world of early expungement law. Petitioners pleaded with judges who had the task of determining whether the person had been sufficiently rehabilitated.[163] Judicial balancing became the norm, whether self-directed by judges or commanded by legislatures.[164] Judges weighed the needs of the petitioner and the petitioner's rehabilitative showing against the potential threat to public safety.[165] New Jersey's first statute is a great example of this practice as it tethered expungement to the petitioner's ability to show a "degree of rehabilitation."[166]

---

[161] *See* Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L.J. 1321, 1335 (2015) ("[I]ndividuals could petition for expungement if they were arrested and released without charge or if the charges filed against them were dropped due to mistaken identity, no offense in fact, or absence of probable cause."); *see also* MARGARET C. LOVE, JENNY ROBERTS & CECELIA M. KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§ 7:1 to 7:20, Westlaw COLLATC (updated 2021) (canvassing judicial remedies available after conviction, such as expungement); *id.* at § 7:15 (noting that even in the juvenile system, "[s]ome states require a crime-free waiting period, and some require the court to make a finding of rehabilitation").

[162] *See, e.g.*, ORE. REV. STAT. § 26-1234 (1940); UTAH CODE § 77-35-17 (1953) (expungement after time since offense); WYO. STAT. § 10-1803 (1945) (same); CAL. PEN. CODE § 1203.4 (1957) (same); IDAHO CODE § 19-2604 (1965) (same); NEV. REV. STAT. § 176.340 (1963) (same); WASH. REV. CODE § 9.95.240 (1957) (same).

[163] *In re* R.L.F., 256 N.W.2d 803, 807–08 (Minn. 1977). Four years later, Minnesota legitimized trial court expungement. State v. C.A., 304 N.W.2d 353, 357 (Minn. 1981) ("The statute . . . which provides for the return of some criminal records, could be considered to be a kind of 'expungement.'"); *see also* Purdy v. Mulkey, 228 So.2d 132, 136 (Fla. Dist. Ct. App. 1969) (arguing there is no right to judicial expungement); Peabody v. Francke, 168 N.Y.S.2d 201, 202 (N.Y. App. Div. 1957) (foreclosing right to expungement after a reversed conviction and subsequent dismissal); Stark, *supra* note 155, at 870 n.28 (illustrating federal and state cases where courts were skeptical of expungement as a judicial remedy without legislative guidance).

[164] *See, e.g.*, Meinken v. Burgess, 426 S.E.2d 876, 879 (Ga. 1993) (considering various factors relevant to expungement); Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981) (same); Walter W. Steele, Jr., *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J.L. REFORM 32, 53–54 (1973).

[165] *See, e.g.*, *Wexler*, 431 A.2d at 879; *see also* Robin Pulich, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1472 (1977).

[166] N.J. STAT. §§ 2A:168A-2 to A-3 (1974).

Judicial discretion was broad and opaque in this world. There were few reported expungement decisions. Statutes that listed considerations did not weigh them or create presumptions in either direction. The Pennsylvania Supreme Court was quite candid about this when it identified the standard for trial courts as entirely a matter of balancing.[167] This allowed broad discretion, the consummate insider situation for judges, enabling rulings from the gut and divergent results.

Early expungement procedures also left room for judicially adjacent insiders, such as court staff, to implement the rehabilitative idea. Such procedures were seemingly designed to be onerous to allow for efficient sorting.[168] Petition-based expungement, with myriad obstacles confronting the prospective petitioner, was the norm.[169]

Historically, these realities resembled what was happening elsewhere in the criminal justice system. Judicial discretion was nearly unrestrained in the bail and sentencing contexts, which ultimately led to the disparate outcomes that inspired bail and sentencing reform.[170] Notably, this is now what is happening in expungement reform. Like bail and sentencing reform, expungement reform seeks greater uniformity and broadly applicable rules. These rules and procedures, however, continue to be crafted by insiders.

More specifically, the world of expungement resembled the probation and parole context, where opaque balancing frameworks ruled the day in the world of indeterminate sentencing, which operationalized the rehabilitative ideal pervading the entire system.[171] By 1950, all fifty states had probation regimes.[172] Probation was entirely based on rehabilitation as the appropriate correctional philosophy.[173] The

---

[167] *See Wexler*, 431 A.2d at 879 ("In determining whether justice requires expungement, the Court, in each particular case, must balance the individual's right to be free from the harm attendant to maintenance of the arrest record against the Commonwealth's interest in preserving such records.").

[168] *See* Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1344 (2005); Murray, *Retributive Expungement*, *supra* note 6, at 683.

[169] Murray, *Retributive Expungement*, *supra* note 6, at 684.

[170] Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 769–77 (2017); JOINT COMM. FOR REVISION OF THE PENAL CODE, HEARING ON DETERMINATE AND INDETERMINATE SENTENCING (Mar. 28, 1990), https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1069&context=caldocs_joint_committees [https://perma.cc/Z4D8-R9SC] (describing reasons for public discussion of determinate sentences).

[171] *See* Allen, *supra* note 154, at 149 (stating how "[a]lmost all of the characteristic innovations in criminal justice in the 20th century are related to the rehabilitative ideal," including "probation and parole" and "the indeterminate sentence").

[172] Joan Petersilia, *Probation in the United States*, *in* CRIME AND JUSTICE: A REVIEW OF THE RESEARCH 149, 158 (1997).

[173] RYAN M. LABRECQUE, *Probation in the United States: A Historical and Modern Perspective*, *in* HANDBOOK OF CORRECTIONS IN THE UNITED STATES 7 (2017) (citing DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980)).

emphasis was on second chances rather than a default posture of imprisonment. Rehabilitation could occur outside of prison walls, fostering reentry.[174]

The operation of these regimes was entirely the province of insiders determining the suitability of offenders to rejoin society. Criminologists focused on therapeutic interventions to reform individuals.[175] Judges issued orders of probation with requirements for offenders to comply with during the term of the sentence.[176] The ability to comply was evidence of rehabilitation, and the incentive to comply came in the form of the promise of full reentry without the watchful eye of the system.[177]

Today, probation conditions are supposed to be "tailored in response to the offender's risk to the community and his or her individual rehabilitative needs."[178] Courts maintain the ability to supervise the offender and modify the conditions as they see fit. Probation officers are tasked with preparing pre-sentence reports that either recommend or reject the possibility of probation.[179] Most significantly, officers determine whether compliance is happening and whether a case needs to be referred to the sentencing court.[180] Probation officers are thus insiders with a dual role: "helper and . . . rule enforcer."[181] As such, they are insiders with remarkable power, resembling early expungement judges who could seek to induce good behavior by dangling the carrot of expungement while retaining the ability to foreclose the possibility of relief with the stroke of a pen denying a petition.

The discretionary regimes afforded to probation officers, parole boards, and judges in early probation and parole regimes resemble those found in expungement. When making probation determinations, judges found the defendant's "educational level, average monthly salary, occupational level, residence, stability, participation in church activities, and military record" to be the most relevant factors.[182] Parole, which is an administrative process, typically involves the decision-making of parole boards, many of which were traditionally composed of executive branch appointees.[183] Opacity in decision-making was traditionally the case.[184] That said, the most significant factor has been whether the inmate was at risk of recidivating,[185]

---

[174] *Id.*

[175] *See* Allen, *supra* note 154, at 149.

[176] HARRY E. ALLEN, CHRIS W. ESKRIDGE, EDWARD J. LATESSA, GENNARO F. VITO, PROBATION AND PAROLE IN AMERICA 36 (1985); *see generally id.* at 36–56 (discussing the history of probation).

[177] LABRECQUE, *supra* note 173, at 5–6.

[178] LABRECQUE, *supra* note 173, at 5.

[179] ALLEN ET AL., *supra* note 176, at 131–32.

[180] *Id.* at 90 (referencing how probation officers manage cases and determine whether violations are occurring that warrant judicial oversight).

[181] LABRECQUE, *supra* note 173, at 6.

[182] ALLEN ET AL., *supra* note 176, at 77 (citing Robert Carter & Leslie T. Wilkins, *Some Factors in Sentencing Policy*, 58 J. CRIM. L. & CRIM. & POLICE SCI. 503 (1967)).

[183] ALLEN ET AL., *supra* note 176, at 97.

[184] *Id.* at 98.

[185] *Id.* at 101.

with lots of attention paid to devising statistically valid measures for determining this risk.[186]

*2. Expungement Reform in Context: The Continued Preference for Human and Automated Risk Assessment*

Modern-day expungement reform is consistent with the zeitgeist driving criminal justice reform in various areas: the preference for "smart on crime," "follow the data," and statistically grounded policy. There is no question that the new penology[187] observed nearly thirty years ago by criminal justice scholars has driven a generation of criminal justice policymaking, whether in the areas of policing, bail, plea bargaining, or sentencing. Data-driven criminal justice reform *is* the engine of policy changes.

Modern-day policing seeks to utilize statistical and risk-based analyses to efficiently allocate scarce resources to fight crime while remaining cognizant of constitutional rights for individuals and the need to regulate police overreach.[188] In the bail context, reformers have turned to the science of prediction to attempt to refine, with precision, judgments about who should be detained, if at all.[189] Plea bargaining is its own marketplace, with prices for certain offenses established by prosecutors, defense attorneys, and judges.[190] And in the sentencing context, actuarial style risk assessments aim to increase efficiency while reducing recidivism.[191]

Modern-day expungement reform resembles the features of the paradigm seen in bail, plea bargaining, and sentencing reform. Recently reformed expungement statutes have emphasized two reasons for broadening eligibility for expungement: the value of becoming gainfully employed and the chances that one is likely to recidivate. First, the emphasis on the economics of employment has driven criminal justice reformers to amplify how public criminal records undeniably create a group of second-class members of the community who are stuck in a web of consequences that are often irrationally related to employment. Reformers spent ample time emphasizing how employers enlist background check companies to weed out

---

[186] *Id.* at 102 (referencing scholarly literature attempting to create "methodologically sound prediction tables for potential parolees").

[187] Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 457–68 (1992).

[188] *See, e.g.*, Harmon, *supra* note 24, at 761.

[189] *See, e.g.*, Megan T. Stevenson & Sandra G. Mayson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. 709, 732–51 (2022).

[190] *See, e.g.*, Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 923–39 (2016).

[191] *See, e.g.*, Christopher Slobogin, *Principles of Risk Assessment: Sentencing and Policing*, 15 OHIO ST. J. CRIM. L. 583, 584–93 (2018).

otherwise qualified applicants.[192] The National Employment Law Project has devoted substantial attention to this phenomenon,[193] and legal aid entities like Community Legal Services of Philadelphia have made it a centerpiece of employment law practice.[194] Most visibly, advocates for criminal records reform have pushed for restrictions on the ability of employers to use criminal record information against job applicants.[195] Hence, there has been a decades-long push to Ban the Box in many localities and state jurisdictions.[196] The costs and benefits of criminal recordkeeping and record clearance dominate discussions about who should be eligible for expungement.

The second way that the paradigm has dominated modern-day expungement reform is through the construction of new statutes that reflect the latest empirical evidence on recidivism rates for those who have encountered the criminal justice system. The Bureau of Justice and Statistics has reported recidivism rates for quite some time,[197] and reformers consistently mention how individuals who remain crime-free for a stretch of time *after* release from prison or completion of their sentence are unlikely to recidivate.[198] Thus, it comes as no surprise that most new expungement statutes contain waiting periods that correspond to those findings.[199] Many statutes link eligibility for expungement to a period of crime-free behavior.[200] This is true whether the statutes allow for petition-based or automated expungement. To be clear, this is sensible given that lack of interaction with the system is evidence

---

[192] MICHELLE N. RODRIGUEZ & MAURICE EMSELLEM, 65 MILLION "NEED NOT APPLY" 2 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [https://perma.cc/LW5B-YM7Y].

[193] *Id.*

[194] CRIMINAL RECORDS, COMM. LEG. SERV. OF PA., https://clsphila.org/services/criminal-records/ [https://perma.cc/ARL8-HW2F] (last visited Sept. 13, 2022).

[195] *See* Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Oct. 1, 2021), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ [https://perma.cc/PB4M-VSKW].

[196] *See id.*

[197] *See* RECIDIVISM AND REENTRY, BUREAU OF JUST. STAT., https://bjs.ojp.gov/topics/recidivism-and-reentry [https://perma.cc/ME4Z-4ZBM] (last visited Sept. 13, 2022).

[198] *See, e.g.*, Keith Soothill & Brian Francis, *When Do Ex-Offenders Become Like Non-Offenders?*, 48 HOW. J. CRIM. JUST. 373, 385 (2009); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 80 (2007); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 499 (2006).

[199] MARGARET LOVE & DAVID SCHLUSSEL, REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, at 2 (2019), https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf [https://perma.cc/JFD8-S5D6].

[200] *See, e.g.*, IND. CODE § 35-38-9-2(d); OHIO REV. CODE § 2953.32(a)–(c); OR. REV. STAT. § 137.225(5)(a)(A)(i); MINN. STAT. § 609A.02(3)(a)(3)-(5); COLO. REV. STAT. § 24-72-706; 20 ILL. COMP. STAT. 2630/5.2(c)(3)(C); MD. CODE, CRIM. PROC. § 10-303(a); LA. CODE CRIM. PROC. Art. 977(A)(2).

of rehabilitation and the ability to reenter more successfully. At the same time, it is emblematic of the present obsession with the quantification of risk when crafting criminal justice policy rather than a more retributive, desert-based approach to policy.[201] With respect to the argument advanced here, each argument rests on the findings of experts, whether in the field of economics or criminology.

### *B. The Functional Purpose of Criminal Records, Punishment Theory, and Expertise*

Insider expungement developed within a criminal recordkeeping paradigm that conceptualized public criminal records as a means to accomplish objectives of policing and punishment while informing communities of potentially dangerous individuals. In this sense, public criminal recordkeeping jives with the culture of control that has driven criminal justice policy for decades.[202] A default baseline of publicity for criminal records, managed by police agencies, criminal justice experts, and penologists, all but guaranteed that the remedy of expungement would involve the opposite: erasure by those same insiders. After all, if publicizing criminal records could further the punitive arm of the state, whether such information would be private or not became a question of insider information control.

#### *1. Criminal Recordkeeping as Risk Management*

Criminal justice through the management of risk *is* the prevailing paradigm governing the system today, and criminal recordkeeping is another form of risk management. David Garland and others have shown how the penal system underwent a massive transformation in the second half of the twentieth century that effectively prioritized social control by any means necessary.[203] Administration of punishment shifted completely to insider operations, whether before conviction or after.[204] As Judge Stephanos Bibas has shown, criminal justice operations are the latest outgrowth of mass technocratic industrialization invading human systems.[205]

---

[201] Brian M. Murray, *Restorative Retributivism*, 75 U. MIAMI L. REV. 855, 866 (2021).

[202] Dolovich, *supra* note 150; DAVID A. GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 15–19 (2002).

[203] *See generally* GARLAND, *supra* note 202; Feeley & Simon, *supra* note 187, at 457–468; Kleinfeld, *supra* note 7, at 1372 ("At the root of all this is a view of the criminal law as a general instrument of social control coupled with the state's limitless appetite for social control.").

[204] *See* Andrew Skotnicki, O. Carm., *Foundations Once Destroyed: The Catholic Church and Criminal Justice*, 65 THEOLOGICAL STUDS. 792, 814 (2004) (citing Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449, 457, 468 (1992)); Bibas, *Transparency and Participation*, *supra* note 1, at 920–23.

[205] *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE xv–xvii (2012) [BIBAS, MACHINERY OF CRIMINAL JUSTICE].

Public criminal recordkeeping is primarily related to risk management, sometimes by design and almost always in effect. As Alessandro Corda has documented, public criminal records have always implicated theories of punishment.[206] The earliest recordkeeping systems in Europe were created to identify persons who reoffended or might recidivate.[207] This identification function was fundamentally utilitarian and in the name of public safety; public criminal records enabled the state to track the dangerous and alert the public to the same. Such registries effectively created a culture of stigma, extending the formal arm of criminal law and punishment into the informal realm of punitive effects that rarely were recognized as formal punishment.[208]

In other words, public criminal recordkeeping allows for formal and informal incapacitation based on risk,[209] with the hoped-for added benefit of deterrence.[210] Corda has shown how these systems have roots in the European penological movements that emphasized the utilitarian calculations of criminal justice experts.[211] For example, Corda has shown how a major French penal reformer thought public records would allow for increased surveillance and stigma, fostering widespread deterrence.[212]

Regardless of whether American jurisdictions explicitly adopted this European conceptualization of public criminal records, the reality is that most jurisdictions have operationalized it, at least in effect. Every state has a criminal records statute.[213] Almost every state has carveouts within its statute for the continued usage of information that might be helpful to law enforcement, such as prosecutors or police departments.[214] Further, the norm in American law has been to allow private actors to access this information almost without restraint, effectively outsourcing control

---

[206] *See generally* Corda, *supra* note 6, at 8 ("The origins and maintenance of criminal conviction record systems are closely connected to development of modern theories of recidivism.").

[207] JOHN PRATT, GOVERNING THE DANGEROUS: DANGEROUSNESS, LAW AND SOCIAL CHANGE 30–34 (1997).

[208] Corda, *supra* note 6, at 10–11 (describing French adoption of penal registers in 1850).

[209] *See* PRATT, *supra* note 207, at 33–34; *see also* 5 LEON RADZINOWICZ & ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 261–62 (1986) ("The only tangible success to emerge from the legislation on habitual criminals was the system of registration and identification.").

[210] Corda, *supra* note 6, at 11 (stating that criminal records "amplify the imposed punishment and make future offending less likely").

[211] *Id.*

[212] *Id.*

[213] *See* JACOBS, *supra* note 65, at 134.

[214] Murray, *Retributive Expungement*, *supra* note 6, at 680 ("Further, even where expungement regimes exist, they can maintain exceptions for usage by law enforcement, thereby reaffirming that a primary purpose of criminal recordkeeping is to further assist law enforcement in its public safety objectives.").

to private actors who choose to *use* the information to the detriment of individuals with criminal records.[215]

*2. The Forgetting Paradigm and Insider Entrenchment*

In the history of crafting expungement policy, reformers have entertained an internal debate for nearly fifty years: whether the remedy should be about forgetting or forgiveness.[216] Whereas forgiveness portends beneficent reintegration permitted by the community, forgetting is premised on the assumption that only erasure would allow for full reentry. This debate stems from several social realities: American discomfort with whitewashing the past, a thirst for governmental accountability, and the recognition that private decision-making based on past criminal behavior is fundamentally reasonable in many instances and, therefore, should be presumptively legal. As such, the Supreme Court has consistently recognized a right to access public criminal proceedings and records,[217] and jurisdictions have adopted a default posture of publicity.[218]

While recordkeeping is a means of transparency for criminal justice, expungement poses a threat to it. But the threat also is the basis of the promise for the petitioner, assuming access to criminal records always bars full reentry. Ultimately, the forgetting paradigm won out, with jurisdictions prioritizing sealing or erasure rather than remedies like certificates of rehabilitation or other public recognition of rehabilitation.[219]

This development makes sense if one considers the role of insiders in the handling of criminal recordkeeping from the start, its connection to punishment objectives like deterrence and the furthering of stigma, and the overwhelming paradigm of risk. It is emblematic of the mentality of professionalized criminal justice, favoring "technical expertise over prudential, individualized moral judgment

---

[215] *Id.* ("It also allows private actors to cooperate in pursuing the same objectives, a result that employment law and other private law supports."); *see* Murray, *Completing Expungement*, *supra* note 16, at 1219–36.

[216] *See* LOVE ET AL., *supra* note 161, § 7:13.

[217] *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 594 (1980) ("Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence.") (Brennan, J., concurring).

[218] *See generally* Sarah Esther Lageson, *There's No Such Thing as Expunging a Criminal Record Anymore*, NEW AMERICA (Jan. 10, 2019), https://www.newamerica.org/weekly/theres-no-such-thing-expunging-criminal-record-anymore/ [https://perma.cc/7XBQ-UHAV].

[219] There was a short period of time in the early 2000s where certificates of rehabilitation were achievable in a few jurisdictions. Others have written about this phenomenon, both as a practical matter, and theoretically. *See generally Certificates of Rehabilitation and Limited Relief*, NAT'L CONF. OF STATE LEG. (June 30, 2022), https://www.ncsl.org/research/civil-and-criminal-justice/certificates-of-rehabilitation-and-limited-relief.aspx [https://perma.cc/P9DU-N3ZP].

. . . regard[ing] criminal law and administration as properly a tool of instrumentally rational social management rather than cultural self-expression."[220] By making expungement about forgetting rather than forgiveness, insiders maintain control over the legal efficacy of expungement through the implementation of expungement rules both external and internal to the expungement process. Degrees of forgetting thus became the terrain for expungement reform rather than the harder work of reintegration. Expungement's connection to "forgetting" rather than "forgiving" enables insiders to manage the degree of transparency.

Expungement premised on forgetting requires the assistance of already existing insiders who handle the recordkeeping apparatus. Expungement as forgetting requires secrecy and anonymity, in opposition to full-blown transparency, rather than the restoration of relationships within the community. Insiders thrive on secrecy and anonymity; the forgetting paradigm solidifies the ability of expungement insiders to *control how much* transparency would or would not remain. By making expungement about the operationalization of forgetting, insiders, through their decision-making operations, control the *efficacy* of expungement. The forgetting paradigm is, therefore, both a cause of insider expungement and helpful to its continued entrenchment.

The latest iteration of the forgetting paradigm entrenching insider expungement is the reliance of modern-day expungement reformers on the technical expertise of computer scientists and other bureaucratic officials tasked with implementing clean slate expungement. Mass erasure requires mass technological expertise to operationalize. Incorporating the public, or even its representatives, who are the traditional insiders, like judges and prosecutors, is now an *obstacle* to forgetting. Too many actors make expungement too slow or ineffective for the short-term, instrumental objective of erasure.

In short, the forgetting paradigm all but guarantees insider adjudication and implementation of expungement, given the connection of criminal recordkeeping to functional punitive goals and the technical requirements of maintaining the recordkeeping systems themselves.

### *C. Expungement as Legal Adjudication of Risk*

The substantive rules for assessing expungement, especially for convictions, remain based on a finding of riskiness (or lack thereof), whether the law requires petition-based expungement or permits automated expungement. While a few jurisdictions have officially sanctioned automated expungement, many expungement statutes still require petitioners to ask a court to order an expungement. Petition-based expungement thus remains the norm, at least for now. And while expungement reforms have broadened the number of individuals eligible for relief, the standards by which petitions are judged remain tethered to understandings of risk. This paradigm manifests in the procedural requirements that are effectively substantive determinations of risk, such as waiting periods, and the standards of

[220] Kleinfeld, *supra* note 7, at 1399.

review used by judges when ruling on petitions. Thus, expungement is, as a formal matter, the legal adjudication of risk, with insider legislators and judges dominating the scene as always.

*1. Statutory Reflection of the Risk Paradigm*

Legislatures have entrenched the risk paradigm that guarantees insider decision-making about the risky and non-risky for expungement. Legislators thus play the role of insiders and empower others, which is a bit of a paradox, considering they are the representatives of communities. Legislated statutory requirements, such as waiting periods, or other prerequisites to expungement, correlate with findings relating to recidivism and reentry. As mentioned earlier, they also permit prosecutors to gum up the process of expungement or affirmatively initiate it, licensing insider adjudication in either a positive or negative direction for petitioners.

Waiting periods appear in expungement statutes that have been reformed. While states have *decreased* waiting periods in many instances, they almost always require "crime-free" terms, suggesting the absence of run-ins with the law (for whatever reason, and irrespective of whether law enforcement was justified in its intervention in the first place) determines eligibility. Waiting periods vary, ranging from a few years to a decade or more. For example, Illinois and Maryland have three-year waiting periods for lots of offenses.[221] Kansas has a three-to-five-year period,[222] Louisiana has a five-year period,[223] and Missouri has three- and seven-year periods for misdemeanors and felony convictions,[224] respectively. Minnesota and Colorado have graduated schemes, presumably based on the seriousness of the offense.[225] Interestingly, waiting periods tend to resemble the most up-to-date research on the long-term risk of recidivism for those who are "crime-free" for a period.[226] They also look a lot like the terms that determine probation requirements or eligibility for parole.

In addition to waiting periods, legislatures inject risk-based adjudication into expungement by restricting eligibility to situations where other criminal records do not convey too much risk. For example, while states have extended expungement to convictions, multiple states restrict the expungement of convictions to situations where the petitioner did not have records that the state considered too serious to permit expungement of less-serious records for the same petitioner. New York, while allowing expungement for tons of felony convictions, tethers such expungement to the legislatively assigned severity of the offense, which in turn

---

[221] 20 ILL. COMP. STAT. 2630/5.2(c)(3)(C); MD. CODE, CRIM. PROC. § 10-303(a).

[222] KAN. STAT. § 21-6614(2)(c).

[223] LA. CODE CRIM. PROC. art. 977(A)(2).

[224] MO. REV. STAT. §610.140(5)(1).

[225] MINN. STAT. § 609A.02(3)(a)(3)–(5); COLO. REV. STAT. § 24-72-706(b).

[226] Bill Keller, *Seven Things to Know About Repeat Offenders*, MARSHALL PROJECT (Mar. 9, 2016, 11:00 PM), https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders [https://perma.cc/C47E-CK55] (noting that almost half of federal inmates are arrested again within five years of release).

corresponds to recidivism risk based on the seriousness of the offense.[227] Similarly, North Carolina and Kentucky permit conviction expungement, but only if the petitioner has no prior felony records.[228]

The insider-dominated risk paradigm manifests in the continued ability of prosecutors to steer expungement in one direction or another. These powers are legislatively assigned and assumed by prosecutors[229] as a matter of prosecutorial discretion when statutes are silent. Statutes assign prosecutors the authority to resist expungement on both substantive and technical grounds.[230] While discussed at length elsewhere,[231] prosecutorial practices relating to expungement indicate the risk paradigm and its bias towards insider adjudication. Statutes permit prosecutors to effectively force hearings on the record.[232] They also allow prosecutors to prescreen the merits of petitions, which can be favorable or unfavorable for petitioners.[233] In some states, non-objections by prosecutors allow the court to easily grant expungement.[234] In others, objections create time-consuming procedural thickets

---

[227] N.Y. CRIM. PROC. LAW § 160.59.

[228] N.C. GEN. STAT. § 15A-145.5; KY. REV. STAT. § 431.078; OHIO REV. CODE § 2953.31(A)(1)(a)−(b) (restricting expungement to certain types or number of felonies); MICH. COMP. LAWS § 780.621(1)−(3) (limiting expungement availability based on criminal convictions); 12 R.I. GEN. LAWS § 12-1.3-1(2) to -1(3)(requiring longer period before expungement for felons); TENN. CODE § 40-32-101(g), (k) (restricting expungement for certain drug crimes and crimes involving minor victims).

[229] *Sealing a Criminal Conviction*, MANHATTAN DIST. ATT'YS OFF., https://www.manhattanda.org/sealing/ [https://perma.cc/ZW2L-TZNL] (last visited Sept. 13, 2022); Press Release, N. Y. Cnty. Def. Servs., Through Groundbreaking Class Action, Hundreds of New Yorkers Have Old Marijuana Convictions Sealed (Aug. 9, 2019), https://nycds.org/through-groundbreaking-class-action-hundreds-of-new-yorkers-have-old-marijuana-convictions-sealed/ [https://perma.cc/UZK2-TATB].

[230] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2846–59.

[231] *Id.*

[232] *See, e.g.*, GA. CODE § 35-3-37(n)(3) (allowing prosecutors to decline an individual's request to their criminal history record information, which leads to a civil action to remedy the prosecutorial discretion); *but see* COLO. REV. STAT. § 24-72-704(1)(c)(I)−(II) (allowing judges to determine whether grounds for a hearing exist).

[233] COLO. REV. STAT. § 24-72-704(1)(d); VT. STAT. tit. 13, § 7602(a)(3).

[234] *See* ARIZ. REV. STAT. § 13-909(B) ("If the prosecutor does not oppose the application, the court may grant the application and vacate the conviction without a hearing."); ARK. CODE § 16-90-1413(b)(2)(B)(i) ("If notice of opposition is not filed, the court may grant the uniform petition."); CAL. PENAL CODE § 851.8(d) ("In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading."); *see also* 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (requiring the court to grant or deny a petition if no objection); IND. CODE § 35-38-9-9(a) (allowing a court to grant a petition for expungement without a hearing if prosecutor refrains from objecting); MD. CODE, CRIM. PROC. § 10-303(d)(2) granting of a petition for shielding criminal records contingent on the State's

dominated by insiders.[235] Regimes like these persist even in places that have attempted to automate relief.[236] While these prosecutorial interventions could be interpreted as democratic in the sense that the prosecutor and judge are potentially democratic agents, prosecutorial objections merely steer decision-making from one insider to a committee of insiders operating within their own sets of norms without accountability to the community.

Of course, prosecutorial adjudication can be a favorable force for prospective petitioners. Prosecutors, such as the Manhattan District Attorney, have initiated expungement or affirmatively advertised the remedy to prospective petitioners.[237] Some statutes provide prosecutors with formal authority to waive barriers to expungement,[238] and others make prosecutor-initiated expungement automatically effective.[239]

### *2. Adjudication Within the Risk Paradigm*

How expungement petitions are judged in courtrooms indicates the prevalence of the risk paradigm and its bias towards insider adjudication. Expungement standards of review are emblematic of cost-benefit analyses and, as a matter of practice, are usually conducted without the benefit of empirical data. Overall, the common theme in adjudication is balancing: "courts assess whether the potential harm to the petitioner caused by a public criminal record outweighs the state's interest in keeping the record in place."[240] This is, effectively, a determination of risk, and statutes locate decision-making authority with courts.

As mentioned earlier, the D.C. Code provides an example of this phenomenon. Judges are tasked with discerning and balancing three interests: (1) the petitioner's; (2) community interest in access due to concerns about public safety; and (3) community interest in furthering rehabilitation and employability.[241] Although the statute references the community, it is *judges*, without the input of the community in any formal way, who decide the balancing of the interests.

---

Attorney not filing an objection); N.J. STAT. § 2C:52-11; UTAH CODE § 77-40a-305(11) (allowing a court to grant a petition for expungement without a hearing if no objection); VA. CODE § 19.2-392.2(F) (allowing a court to enter an order of expungement without conducting a hearing if the prosecutor gives written notice that the prosecutor does not object and existence of the record would be unjust to the petitioner).

[235] *See* Murray, *Unstitching Scarlet Letters?*, *supra* note 15, at 2846–59.

[236] Murray, *Retributive Expungement*, *supra* note 6, at 697 (noting that after California passed expungement reform, the California Attorney General determined eligibility in localities).

[237] *See* sources cited *supra* note 229.

[238] TEX. CODE CRIM. PROC. art. 55.01(a)−(b).

[239] *See* DEL. CODE tit. 11, § 4374(h).

[240] Murray, *Retributive Expungement*, *supra* note 6, at 698.

[241] D.C. CODE § 16-803(h)(1)(A)–(C).

The D.C. Code is not alone in this regard. New Mexico's statute overtly references judicial findings relating to risk.[242] Arkansas's relatively new statute instructs judges to consider information "that would cause a reasonable person to consider the person a further threat to society."[243] Colorado's and Illinois's new statutes call on judges to consider similar factors to those mentioned above.[244] Vermont's statute, like the others mentioned, contains language that vaguely references "the interests of justice."[245] Such an open-ended factor resembles how parole regimes allow parole boards to consider anything else that might be relevant. In the final analysis, countless statutes, whether recently reformed or not, permit judges to draw on numerous factors when making decisions.[246] And standards based on court decisions resemble the statutory frameworks.[247] Judges, as the consummate insiders, are wholly in control of petition-based expungement without any direct connection to the community.

### *D. The Punitive Public*

The development of insider expungement as a historical matter makes sense given the widespread assumption that the public is too punitive and that public attitudes, and the response to them by policymakers, are responsible for the massive

---

[242] N.M. STAT. § 29-3A-5(C) ("[I]f the court finds that . . . .").

[243] ARK. CODE § 16-90-1415(b)(1)(E).

[244] COLO. REV. STAT. § 24-72-706(1)(g); 20 ILL. COMP. STAT. 2630/5.2(d)(7).

[245] VT. STAT. tit. 13, § 7602(b)(1)(A)–(D).

[246] *See* KAN. STAT. § 21-6614(h)(1)–(3) (referencing nonrecidivism, "the circumstances and behavior of the petitioner," and the "public welfare"); KY. REV. STAT. § 431.073(4)(a)(1)–(4) (requiring erasure of felony convictions to be consistent with "welfare and safety of the public," and supported by the petitioner's "behavior since the conviction"); MICH. COMP. LAWS § 780.621d(134) (referencing "circumstances and behavior of an applicant" and the "public welfare"); MINN. STAT. § 609A.03(5)(a) (requiring that the "benefit to the petitioner" be "commensurate with the disadvantages to the public and public safety"); MISS. CODE § 99-19-71(2)(b) (looking for proof of rehabilitation for the convicted offense); MO. REV. STAT. § 610.140(5)(1)–(6) (referencing nonrecidivism and that the "petitioner's habits and conduct" indicate that he is "not a threat to the public safety" and "public welfare"); N.Y. CRIM. PRO. LAW § 160.59(7)(d), (f)–(g) (noting the "character of the defendant, including any measures that the defendant has taken toward rehabilitation," the "impact of sealing . . . upon . . . rehabilitation and upon his or her successful and productive reentry and reintegration into society," and "the impact of sealing . . . on public safety"); OR. REV. STAT. § 137.225(3)(a) (referencing "the circumstances and behavior of the applicant"); 12 R.I. STAT. § 12-1.3-3 (noting discretion of court to determine whether petitioner has "exhibited good moral character" and "rehabilitation has been attained to the court's satisfaction"); TENN. CODE § 40-32-101(g)(5)(b) (referencing "interest of justice and public safety"); UTAH CODE § 77-40a-305(11) (implying rehabilitation for drug offenses); W. VA. CODE § 61-11-26(d)(10) (requiring petitioner to aver in petition the "steps . . . taken . . . toward personal rehabilitation"); WYO. STAT. § 7-13-1501(g) (focusing on whether petitioner is a "substantial danger").

[247] *See, e.g.*, Commonwealth v. Wexler, 431 A.2d 877 (Pa. 1981).

carceral state that exists today.[248] Translated to the world of expungement, such a premise effectively holds that the public cannot be trusted with handling criminal records, whether due to its interest in perpetuating stigma or because the public cannot resist the desire for access to salacious or scandalizing information.[249]

The premise of the punitive public informed entrenchment of insider expungement at three key moments. First, the rehabilitative norm at the time expungement remedies were created was itself a bureaucratic reaction to distrust of the public and sentencing judges shooting from the hip. Second, the development of expungement law and procedure occurred during the time when conventional wisdom held that a vengeful public desired retribution in the wake of crime waves in the 1960s.[250] Third, expungement reform over the past decade has occurred during a period where mass incarceration, resulting in extreme deviations in imprisonment, probation, and parole from prior periods in American history,[251] is understood to be the rotten fruit of the expressed will of the vengeful public.[252]

As mentioned above, the earliest expungement regimes came onto the scene in the early 1950s, when the rehabilitative mindset was dominant in the criminal justice system.[253] Historically speaking, punishment was not more punitive than it is today. But as prosecutors, attorneys, judges, and the process of criminal justice became more professionalized, a corresponding move towards expert adjudication in sentencing became the norm.[254] Expertly administered sentencing also was the outgrowth of the idea that crime should be treated rather than punished. This was a period of renewed hope in the promise of individual reform, in which criminal behavior was understood as something to be treated rather than reacted to in terms of vengeance or desert. In short, expungement was conceived in an era where the rehabilitative ideal was dominant and a reaction to the perception that prior models of punishment were too vengeful.

The second significant moment that entrenched insider expungement occurred during the first wave of expungement reform, which coincided with the rise of public

---

[248] James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/history-mass-incarceration [https://perma.cc/NG6R-2YB2].

[249] *See* LAGESON, *supra* note 22, at 91–112 (detailing how members of the public use criminal record information on the Internet to gain attention).

[250] LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 305–306 (1993).

[251] Heather C. West & William J. Sabol, *Prisoners in 2007*, Table 8, BUREAU OF JUST. STAT., https://bjs.ojp.gov/content/pub/pdf/p07.pdf [https://perma.cc/N665-WBXD] (last visited Sept. 18, 2022); Lauren E. Glaze & Thomas P. Bonczar, *Probation and Parole in the United* States*, 2007 – Statistical Tables*, U.S. DEP'T OF JUST.: BUREAU OF JUST. STAT. (2009), https://bjs.ojp.gov/library/publications/probation-and-parole-united-states-2007-statistical-tables [https://perma.cc/QJ5W-ZMKW].

[252] Kleinfeld, *supra* note 7, at 1378–96 (discussing conventional wisdom that the public cannot be trusted).

[253] *See* Allen, *supra* note 154, at 149–50.

[254] ALLEN ET AL., *supra* note 176, at 146–47.

calls for harsh responses to crime waves in the 1960s and 1970s.[255] Public criminal records were nationalized in the 1970s through the construction of the FBI criminal database and the linkage of state repositories to federal records.[256] At the same time, federal and state courts began to solidify the right of public access to such records.[257] The legislation supporting criminal records apparatuses, as well as the judicial decisions sanctioning public access to criminal records, occurred during the era when politicians perceived the public's desire for tough-on-crime policies and access to records.

The first wave of expungement reform during this time—which advanced the remedy for arrest records but not much else—reserved the practice of criminal recordkeeping, even after successful expungement, to the administration of insiders. Many of the hoops and obstacles that characterize the process of expungement enabled insiders to remain the dominant figures in adjudication. Judges and prosecutors thus became the primary adjudicators, remotely representing the public who wished for policy that was cautious on issues of public safety.[258] And these expungement regimes attempted to straddle the reformers' desire for reentry avenues with the public concern for public safety, ultimately resulting in the arduous processes that characterized petition-based expungement.[259]

The current wave of expungement reform—in favor of automated expungement—has occurred during a time when the ills of mass incarceration are blamed on the public thirst for tough-on-crime policies in the 1980s and 1990s, as well as the belief that private actors cannot be trusted to give arrestees and ex-offenders a second chance. While the causes of mass incarceration are beyond the scope of this Article, at least one recurring premise in the current criminal justice moment is that mass incarceration is the result of vengeful policies enacted by legislatures and pushed by opportunistic politicians playing on public fears of career criminals.[260] Automated expungement represents an attempt to counteract the punitive excesses of that earlier time when public criminal records became even more entrenched.

More pointedly, automated expungement is a way to broadly undercut the ability of private actors to *use* criminal records in an unreasonable fashion that harms those trying to reintegrate. Sean Bushway and others have shown how employers, landlords, and other private actors use public criminal records to foreclose reentry.[261] This premise underscores the move towards reforms like Ban the Box, which remove the ability of private actors to even consider criminal records at the early stages of

---

[255] *See* Cullen, *supra* note 248 (noting calls by major politicians to punish harshly).

[256] *See* JACOBS, *supra* note 65, at 13–53 (summarizing American criminal records databases).

[257] *See* Murray, *Completing Expungement*, *supra* note 16, at 1195–1200.

[258] *See supra* Part I.B.

[259] *See supra* Part I.B.

[260] For instance, federal laws that resulted in determinate, harsh sentencing for all sorts of crimes, such as drug offenses, that are now viewed less seriously.

[261] Shawn D. Bushway & Nidhi Kalra, *A Policy Review of Employers' Open Access to Conviction Records*, 4 ANN. REV. CRIM. 165, 165 (2021).

the employment process. Thus, the premise of the punitive public continues to inform policy shifts, just as it did during the conception of expungement as well as the initial phase of reform.

## III. REASONS FOR CONCERN

This Part evaluates insider expungement through several lenses consistent with the democratization of criminal justice. It suggests there are at least three reasons to be concerned about insider expungement despite its known short-term advantages to petitioners. First, American constitutional commitments favor public involvement in criminal adjudication, and expungement is, especially for convictions, adjudication of ongoing punitive stigma. Second, theories of democratic participation and their relation to the legitimacy of the criminal law underscore the value of community involvement in adjudication. Third, public attitudes relating to punishment generally—and expungement specifically—indicate that fears regarding community adjudication are insufficient alone to justify insider-based expungement. In fact, recent data suggests community-informed expungement regimes might even be more forgiving to petitioners than existing expungement regimes—whether they are administered by human beings or automatically via technology. This suggests the tradeoff is one involving efficiency and democratic procedural justice.

### *A. The American Design for Public Involvement*

The first reason for concern with the current situation is its disjunction with the original American design in favor of public involvement in criminal adjudication. The preference for community involvement was instantiated into federal constitutional amendments and conventional legal practice and was inherited from the Anglo-American common law tradition.[262] The American constitutional framework[263] and historical legal practice were biased in favor of allocation of authority to the public when it came to matters of criminal adjudication, even if it meant the construction of an inefficient legal system or process of adjudication, something the Supreme Court continues to recognize to this day.[264] Kleinfeld has described this preference for public involvement as resistance to the "*total* bureaucratization of legal arrangements," with a desire for a "criminal system built of ill-fitting parts," preserving "pockets of nonbureaucratic reason and authority."[265]

The most obvious manifestation of the American preference for lay involvement in criminal adjudication is the constitutional preference for the jury trial in the Sixth Amendment.[266] While the Sixth Amendment has been interpreted as a

---

[262] *See* 2 MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 758-63 (Guenther Roth & Claus Wittich, Univ. Cal. Press 1978) (1968).

[263] *See, e.g.*, U.S. CONST. art. III, § 2; *see also* U.S. CONST. amend. VI.

[264] United States v. Haymond, 139 S. Ct. 2369 (2018).

[265] Kleinfeld, *supra* note 7, at 1381.

[266] U.S. CONST. amend VI.

right primarily held by the defendant, modern Supreme Court doctrine[267] and scholars[268] have demonstrated that the preference for jury involvement is a community interest, if not a separate right altogether. Perhaps more importantly, it was American *practice* for nearly a century and a half to involve juries to judge defendants and *check* professionalized criminal justice.[269] Juries helped criminal justice adjudication remain with the community, determining whether prosecutors were overzealous or overreaching and whether the law itself needed to be altered.[270] Juries were tasked with making "prudential, equitable, and individualized moral judgment[s]."[271]

Laura Appleman has forcefully demonstrated this historical-legal proposition and its significance not only for constitutional law but criminal adjudication. More specifically, Appleman has shown how the right to a jury trial was the people's right in the criminal context, greatly affecting the distribution of punishment[272] and usually moderating it when compared to modern-day levels of punishment.[273] Its English origins were absorbed by early Americans; interestingly, juries were tasked with adjudicating guilt, and they maintained the *power* to dole out punishment.[274] Jurors were moral arbiters in public; as Appleman puts it, "the primary role of the jury . . . was to determine the defendant's level of moral culpability, to sanction the offender, to restore the victim to his or her original state, and to repair the community by publicly denouncing the crime and the criminal."[275] Juries controlled the professionals—judges and court personnel, not to mention the attorneys advocating before the court.[276] "[P]unishment was not something left to the judge but rather a responsibility and right of a defendant's immediate society."[277] Further, these juries

---

[267] Apprendi v. New Jersey, 530 U.S. 466, 477–85 (2000); Blakely v. Washington, 542 U.S. 296, 301–02 (2004).

[268] Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 399 (2009) [hereinafter Appleman, *The Lost Meaning*]; Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 196–97 (2005); Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 91–96 (1998).

[269] STUNTZ, *supra* note 13, at 6, 30.

[270] BIBAS, MACHINERY OF CRIMINAL JUSTICE, *supra* note 205, at 5–6; *see also* Marcus Alexander Gadson, *State Constitutional Provisions Allowing Juries to Interpret the Law Are Not as Crazy as They Sound*, 93 ST. JOHN'S L. REV. 1, 1–2 (2019).

[271] Kleinfeld, *supra* note 7, at 1383.

[272] Appleman, *The Lost Meaning*, *supra* note 268, at 407.

[273] *See* STUNTZ, *supra* note 13, at 31–34.

[274] Appleman, *The Lost Meaning*, *supra* note 268, at 407 (citing John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41 (1983)).

[275] Appleman, *The Lost Meaning*, *supra* note 268, at 407.

[276] *See id.* at 408 (citing WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, at 20 (1975)).

[277] Appleman, *Local Democracy*, *supra* note 11, at 1417.

were fiercely localized in early American practice, representing the community's voice.[278] They moderated community interests, informed the law, and expressed the law, all at once.[279] They informed substantive justice *and* process.[280]

Part I detailed the on-the-ground situation of insider expungement, which is a *total* bureaucratization of adjudication. Part II situated this phenomenon contextually, indicating how it aligns with the broader professionalization of criminal justice adjudication. The result is an opaque adjudicatory apparatus that leaves no room for direct democratic involvement by community members. To borrow a phrase from Judge Stephanos Bibas, there is a "machinery" of expungement that operates, at best, with a remote connection to communities.[281] Although legislatures have engaged in expungement reform over the past decade, resulting statutes still leave little room for communities in adjudication, and the implementation and operationalization of expungement reform remains the province of insiders.

Of course, the text of the Sixth Amendment has been interpreted to require a jury right for adjudication of guilt or innocence.[282] The goal here is not to shoehorn a community right to adjudication into the Sixth Amendment. Rather, it is to point out that the principle underlying the collective jury right—popular involvement *because of the significance of criminal adjudication and punishment*—is absent in the existing system of expungement despite that recordkeeping relates directly to ongoing stigma and the potentially unjustified, punitive effect of a criminal record.

More specifically, the outsider-insider dynamic in expungement is a serious problem given this historical-legal reality for two reasons: first, it departs from historical legal commitments for public involvement in adjudication; second, it potentially short-circuits the normalization of second chances and reentry by not allowing the broader public to understand and grapple with the significance of expungement or express its desire to go beyond recent reforms. The outsider-insider

---

[278] Appleman, *The Lost Meaning, supra* note 268, at 408; Kevin K. Washburn, *Restoring the Grand Jury*, 76 FORDHAM L. REV. 2333, 2385–87 (2008) (discussing the neighborhood grand jury model); *see also* SIR JOHN HAWLES, THE ENGLISHMAN'S RIGHT: A DIALOGUE BETWEEN A BARRISTER AT LAW AND A JURYMAN (1771). Matthew Hale, cited by Appleman in her article, articulated how the jury was to come from local neighborhoods. *See* MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 160 (Charles M. Gray & John Clive eds., 1971).

[279] BIBAS, MACHINERY OF CRIMINAL JUSTICE, *supra* note 205, at 2–5; Appleman, *The Lost Meaning*, *supra* note 268, at 409.

[280] Appleman, *Local Democracy*, *supra* note 11, at 1414. Of course, the preference for community involvement does not mean that this ideal was achieved, and that the public involvement, through juries, was always representative of the particular community at hand. There is ample history suggesting that many communities were excluded from the ability to administer justice and the rules directing composition of juries do not guarantee adequate representation. For a general critique of democratization in criminal justice, see, e.g., John Rappaport, *Some Doubts About 'Democratizing' Criminal Justice*, 87 U. CHI. L. REV. 711 (2020).

[281] *Cf.* BIBAS, MACHINERY OF CRIMINAL JUSTICE, *supra* note 205.

[282] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 155–56 (1968).

dynamic removes the community from both adjudication and restoration in the same vein that plea bargaining shuts out the public from learning about charging, adjudication, and sentencing inequities. The public does not have a chance to expunge in the same way that juries rarely have the opportunity to express dismay.

As to the first concern, as Part II demonstrates, expungement seems akin to a matter of criminal adjudication given the purposes behind criminal recordkeeping, as well as the ongoing stigmatic and punitive effect of public criminal records long after any proportionate measure of desert has been achieved by the formal sentence and its effects. This means that the public has no say in stopping extra, unjustified harm from being inflicted on those with criminal records or, on the other hand, demanding more from petitioners who claim rehabilitation. This is particularly egregious in the case of those who have only arrest records and even more so for those with low-level convictions who unfortunately suffer from the arbitrary choice of insiders to default to a posture of eternal criminal recordkeeping. The opportunity for the morality play, originally conceived and *practiced* in early American adjudication, is foreclosed.

Regarding the second concern, the absence of the community, just like the absence of juries from traditional adjudication, prevents communities from communicating to officials and the government writ large what its understanding of the value of expungement *is* and *should be*.[283] It also prevents the community from playing a formal role in restoration, marking the clear end of punishment sanctioned by the community. An opportunity to communicate whether criminal recordkeeping, in its current form, is publicly sanctioned is lost, just like the practice of jury nullification has been lost. Most significantly, community members never have the formal opportunity to contemplate the gravity of the effect of the maintenance of a criminal record. All of this combines to prevent further public normalization of second chances because it short circuits ongoing public involvement in the process of criminal justice.[284] It also prevents the public from communicating with policymakers about the normative acceptability of existing law, its desire for broader relief, or its sentiment about insider practices within the law. And it prevents the public from validating the subjectively longed-for return of the individual seeking expungement.

A potential counterpoint to this understanding of the role of the community in criminal adjudication is that sometimes public involvement might cut against substantive justice. In fact, this is one reason to be skeptical of something other than insider expungement. After all, the trend line seems to be in favor of petitioners, even with insider adjudication. This is certainly true for arrest records and some lower-level convictions. But criminal justice in a democratic legal system should

---

[283] Kleinfeld notes how Alexis de Tocqueville understood American juries as a "governmental actor on a constitutional scale, almost a fourth branch." Kleinfeld, *supra* note 7, at 1392.

[284] *See* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1149–50 (2014).

take seriously the claim of self-determination made by communities.[285] Official, professionalized control is not the be-all and end-all, *even if* community involvement does not result in perfect substantive justice. As Appleman suggests, community involvement means punishment gains the mark of legitimacy through democratic process and conveys normative judgment.[286] Further, as will be mentioned below, existing empirical research suggests that the public would be, at the very least, as lenient as the most recent expungement reforms enacted by statutes.[287]

### *B. Democracy and Criminal Law*

The purpose of criminal law is to demarcate unacceptable moral and social wrongdoing that is worthy of punishment. In a democratic system, the criminal law retains its validity and utility if the community can adequately voice the line of demarcation.[288] The purpose of punishment in a democratic system is to do justice in a fashion that restores moral and social bonds.[289] In this sense, democratically ordained punishment is supposed to be paradoxically pro-social.

Exclusively relying on representation, and nothing else, is insufficiently democratic.[290] Early Americans knew this, as did the Founders, who built from legal and political thinkers sharing the same premises.[291] Matthew Hale and Blackstone emphasized the significance of localized criminal justice,[292] and Cesare Beccaria argued forcefully for public involvement in adjudication.[293] Political communities need to let "free and equal citizens within the community deliberat[e] on matters of shared political concern, including questions of value."[294] Without direct involvement, there is a risk that a community cannot construct a political culture or "project [it] into the realm of government."[295] Self-government is deeply undermined.[296] Paul Robinson and John Darley have shown how when the criminal system deviates from democratic sensibilities in terms of appropriate punishment,

---

[285] Kleinfeld, *supra* note 7, at 1393 ("The lesson is to value both community self-determination and substantive justice, rather than to value only substantive justice and not community self-determination or to pretend that substantive justice is community self-determination.").

[286] Appleman, *Local Democracy*, *supra* note 11, at 1416.

[287] *See infra* Part III.C.

[288] Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 456–58 (1997).

[289] Murray, *supra* note 201, at 882–88.

[290] Kleinfeld, *supra* note 7, at 1383 (noting how deliberative and participatory democracy both insist on more than representation).

[291] Appleman, *The Lost Meaning*, *supra* note 268, at 415 (noting how the Founders relied on Coke, who understood the jury trial right as belonging to the community, and Hale, who emphasized the jury as a hyperlocal institution).

[292] *Id.* at 415–18.

[293] *Id.* at 417.

[294] Kleinfeld, *supra* note 7, at 1385.

[295] *Id.* at 1386.

[296] *Id.* at 1390.

*the* utility of the criminal law and punishment suffers.[297] R.A. Duff has written about how incorporating the community allows its members to be "agents, not merely . . . obedient subjects, of the criminal law."[298]

That being so, modern-day criminal justice democratizers emphasize a few points when it comes to democracy and criminal law. As stated by Kleinfeld:

> "Democracy" as we use that term in the movement to democratize criminal justice refers to a form of criminal law and procedure that is responsive to the laity rather than solely to officials and experts; that cares about prudential, equitable, and individualized moral judgment rather than merely formal rule compliance and technical expertise; that is more value rational than instrumentally rational; that submits the law and administration of criminal justice to public deliberation and to the values embedded in the way we live together as a culture, rather than treating it mainly as a tool of social management under the control of our institutional bureaucracies; that is substantially given into the hands of local communities as an instrument of collective self-determination and cultural self-creation; but that channels popular rule into constitutional forms meant to resist domination, disperse power, and permit contestation by a restless and animated citizenry. Our conception of democracy is thus anti-bureaucratic, deliberative, and participatory under a constitutional structure.[299]

If this charter is applied to the world of expungement, a couple of observations are in order. First, expungement adjudication rarely involves the community and is only responsive to it to the extent that legislatures rewrite expungement statutes. Second, existing expungement regimes—through their deference to judges with amorphous standards—potentially allow for equitable and prudential judgment. However, they do so in a bureaucratized paradigm that prioritizes risk management over all else. Thus, the equitable judgment afforded to judges is effectively constrained by utility. Third, expungement adjudication in its current form does not generally permit the public to express how it constructs and wishes to construct relationships with those who have encountered the system. While hearings occur in open courtrooms, and evidence may be presented, there are no formal vessels of public deliberation about the nature of these relationships through adjudication.[300] Fourth, the absence of communities means the absence of localized involvement in criminal justice, widening the chasm between administration of criminal justice and

---

[297] *See generally* Robinson & Darley, *supra* note 288.

[298] R.A. Duff, *A Criminal Law We Can Call Our Own?*, 111 NW. U. L. REV. 1491, 1503 (2017).

[299] Kleinfeld, *supra* note 7, at 1397.

[300] *See* Duff, *supra* note 298, at 1501–04.

communities. This disrupts self-determination in criminal justice, particularly for matters relating to reentry.[301]

The fact that recent expungement statutes in many jurisdictions are the product of the regular lawmaking process does not fully address these concerns unless one's conception of democracy is solely about the lawful exercise of power.[302] Remote representation is not the same as participatory criminal justice.[303] Nor is there a distribution or sharing of power between professionals and the public in the expungement context. Richard Bierschbach has argued how this is a design feature of the American system, namely the division "between actors and governments."[304] Of course, professionalized fragmentation—meaning multiple insiders with different constituencies—can be helpful for democracy in criminal justice.[305] But there is no expungement regime in the United States that injects popular participation on par with professional activity. And there is no insider whose constituency is exclusively the local community given that expungement is a state law issue.[306] Insiders represent stakeholders in different ways in other phases of the system, and the possibility of the jury is at least lurking during the adjudication of guilt or innocence.[307] But there is no such threat in the expungement context, meaning the process is not the product of even democratically designed fragmentation.[308] In short, the normalization of second chances through expungement adjudication is foreclosed, as is the potential expansion of expungement for convictions not currently included in statutes that have been reformed.

### *C. Public Attitudes Toward Criminal Recordkeeping*

As mentioned in Part II, a cardinal premise of insider expungement is that the public cannot be trusted with criminal record information because public attitudes are too punitive. Incorporating the public risks bringing the harsh and vengeful criminal justice that spawned the era of mass incarceration to expungement proceedings. Importantly, it must be noted that this premise is not without some support, given contemporary practices by employers, landlords, and other private actors.[309] Scholars like Shawn Bushway have shown that employers use criminal

---

[301] *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 312–16 (2003).

[302] Kleinfeld, *supra* note 7, at 1401.

[303] Duff, *supra* note 298, at 1501–04.

[304] Richard A. Bierschbach, *Fragmentation and Democracy in the Constitutional Law of Punishment*, 111 NW. U. L. REV. 1437, 1438 (2017).

[305] *Id.* at 1443.

[306] This is similar to critiques of democracy and prosecutorial elections. *Id.* at 1447.

[307] *Id.* at 1443 (describing how "actors represent[] stakeholders in different ways").

[308] *Id.* at 1444 (noting how the Constitution embodies the notion that "[j]ust punishment . . . is what comes out of that process; it is defined by the process that produces it").

[309] *See generally* RODRIGUEZ & EMSELLEM, *supra* note 192 (discussing how companies have imposed overbroad background check requirements).

records to the detriment of even successful expungement petitioners.[310] Further, any quick Google search reveals the ongoing thirst for criminal record information and that plenty of community members have no problem with the ongoing shaming.[311] That said, a distinction must be made between the public's perception of reasonable use of a criminal record and whether expungement might be appropriate at a certain moment in time. Put differently, public involvement in adjudication can coexist with reasonable access and use for private actors.[312]

Nonetheless, this section suggests that this premise does not paint the full picture and potentially shortchanges the long-term normalization of second chances by stunting public deliberation about criminal justice in the context of expungement. First, empirical research has shown that public attitudes towards punishment and sentencing more generally are quite consistent[313] and, in many instances, more lenient than existing sentencing regimes.[314] Here the work of scholars like Paul Robinson is instrumental. Second, recent empirical research on the specific question of criminal recordkeeping and expungement suggests that the public would be at least as forgiving as recent expungement reform statutes, if not even more so.[315] These findings suggest that involving the public in expungement adjudication is unlikely to disturb the current trend line in favor of expungement. While it might result in some inefficiencies and divergent results on the margins, substantive justice outcomes probably will resemble the status quo. But, more importantly, communities would directly determine such justice rather than being displaced by officials in all instances.

Paul Robinson, Francis Cullen, and other scholars have demonstrated that the public is not nearly as punitive as conventionally understood. While American policymaking has undergone fluctuations over the past half century or so, recent research suggests that the legislation that characterizes the punitive, "get tough" era from the 1970s to the early 2000s does not accurately represent the public will when it comes to matters of criminal justice.[316] William Stuntz showed that prior to that era, American punishment regimes were more lenient, recognizing that the practice of punishment was necessary but should be utilized with humility and as something like a last resort.[317] Public views of punishment are messy; they are both punitive

---

[310] Bushway & Kalra, *supra* note 261.

[311] *See* LAGESON, *supra* note 22, at 91–112 (describing situations where Internet users seem to enjoy trafficking in criminal record information).

[312] *See* Murray, *Completing Expungement*, *supra* note 16, at 1219–36.

[313] Paul H. Robinson & Robert Kurzban, *Concordance and Conflicts in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1892 (2007) (identifying how public attitudes about punishment are mostly fixed in certain contexts).

[314] *Id.*

[315] Alexander L. Burton, Francis T. Cullen, Justin T. Pickett, Velmer S. Burton Jr. & Angela J. Thielo, *Beyond the Eternal Criminal Record: Public Support for Expungement*, 20 CRIM. & PUB. POL'Y 123, 123–27 (2021).

[316] Francis T. Cullen, Bonnie S. Fisher & Brandon K. Applegate, *Public Opinion About Punishment and Corrections*, 27 CRIME & JUSTICE 1, 1–10 (2000).

[317] STUNTZ, *supra* note 13, at 31–34.

and progressive, with an important dividing line being violent versus nonviolent crime.[318] In other words, the era of mass incarceration with fixed, determinate, and harsh sentencing was not always the case.

More pointedly, Robinson has shown that the lay attitudes towards criminal liability and sentencing are open to much more complex regimes than have been authorized by statute.[319] He and his co-author also have demonstrated how existing doctrines conflict with community views, whether relating to substantive criminal law, defenses, or other doctrines.[320] For instance, study subjects frequently found responsibility but then decided against punishment.[321] This suggests the public might conceive violations of the criminal law as worthy of condemnation while remaining concerned about the degrees of blameworthiness when it comes to certain offenses.[322] This concern results in hesitation to punish harshly, balancing the utility of enforcing the criminal law with humility when imposing desert. Interestingly, Robinson and his co-authors hypothesize that this suggests the public views punishment primarily as a matter of *desert*,[323] which is in direct contrast to existing expungement regimes and their focus on *risk*. The focus is on the transgression, not railroading the offender.[324] Importantly, following public intuitions with respect to punishment maps the utilitarian and desert-based functions of the criminal law overall, underwriting legitimacy and credibility for the entire system.[325]

In addition to the research suggesting that public intuitions diverge from existing criminal law doctrines and punishment, there is reason to believe that public attitudes towards expungement are no worse than the status quo and potentially more

---

[318] Cullen et al., *supra* note 316, at 6–8.

[319] PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 199, 203–06 (1995); *see also* Robinson, *supra* note 29, at 1570–74 (discussing human predispositions on views towards punishment).

[320] Paul H. Robinson & Johnathan C. Wilt, *Undemocratic Crimes*, 2022 UNIV. ILL. L. REV. 485, 485 (2022).

[321] ROBINSON & DARLEY, *supra* note 319, at 210 ("In many of our studies, the subjects impose criminal liability on a person but then impose little or no punishment.").

[322] *Id.* ("One explanation is that the subjects want to express their disapproval of the person's conduct but feel that the person is not sufficiently blameworthy to be punished for the conduct.").

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

[324] *Id.* (noting how the public views "the person's *conduct* . . . [as] inappropriate although the *actor* is not held to be terribly blameworthy").

[325] *See* Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 U.S.C. L. REV. 1, 38–48 (2007); Robinson & Darley, *supra* note 288, at 456–58; Paul H. Robinson, *The Proper Role of Community in Determining Criminal Liability and Punishment*, *in* POPULAR PUNISHMENT: ON THE NORMATIVE SIGNIFICANCE OF PUBLIC OPINION (Jesper Ryberg & Julian A. Roberts eds., 2014); Kleinfeld, *supra* note 7, at 1409 (referencing how "[t]he costs and benefits of crime and punishment must fall together into the hands of those with control over the criminal system").

forgiving of ex-offenders. A recent study by Alexander Burton and Francis Cullen, with others, suggests that public support for expungement is high for those who have committed nonviolent crimes and who, after a sufficient period of time, signal individual reform.[326] As with other surveys of public attitudes and matters of criminal justice, public safety permeates the public mind when it comes to expungement,[327] showing just how far the risk and crime control paradigm trickles into the public consciousness. This is reflected in the desire for the availability of the remedy *and* for accurate criminal records if they are made public.[328] Seventy-five percent of respondents "totally agreed" with the statement that "only law enforcement agencies and some potential employers should be able to see adults' record for nonviolent crimes."[329] At the same time, 92% expressed "total support" for federal government efforts to ensure accuracy in the FBI criminal database.[330]

Nonetheless, there appears to be support for expungement for lower-level convictions, especially for nonviolent offenses.[331] The public also views waiting periods as reasonable, tethering them to the perceived seriousness of the offense.[332] In terms of factors to consider, survey respondents pointed to employment, evidence of rehabilitation, and other positive relations with the community.[333] This conveys community interest in individual reform prior to expungement. It also suggests that the public shares an interest in the discretionary factors authorized by existing statutes for insider discretion and adjudication. Importantly, the Burton and Cullen study did not find demographic disparities among respondents when it came to views on expungement policy, noting how there was "little evidence of division over expungement among the public based on political values or sociodemographic factors."[334]

These findings call into question the premise that the public cannot be trusted to adjudicate criminal records policy. Burton and Cullen note how public support maps a "risk principle"; he writes that "[a]s the public's assessment of an offender's risk of recidivating decreases, their support for record closure increases."[335] More specifically, evidence of employment and rehabilitation were crucial factors for respondents.[336]

This suggests that incorporating the community would, at worst, mirror existing expungement regimes for convictions, whether they are petition-based or

---

[326] Burton et al., *supra* note 315, at 123.

[327] *Id.* at 129.

[328] *Id.*

[329] *Id.* at 135.

[330] *Id.* at 136.

[331] *Id.* at 123.

[332] *Id.* at 133–34 (contrasting views on expungement eligibility for shoplifting, burglary, sex offenses involving children, domestic battery, white-collar crimes, DUIs, and drug possession).

[333] *Id.* at 134.

[334] *Id.* at 138.

[335] *Id.* at 139.

[336] *Id.* at 140.

automatic.[337] Equitable and nuanced discretion is something the community can handle.[338] As Josh Bowers has written, "[l]aypeople are uniquely well suited to evaluate normative principles, like fairness, dignity, autonomy, mercy, forgiveness, coercion, and even equality."[339]

This begs the question: what are the reasons for incorporating the community in criminal adjudication? As mentioned above, insider-based adjudication undercuts principles of democratic criminal justice and diverges from the American commitment to public checks on the administration of criminal justice. As Burton and Cullen also recognize, the data suggests that "Americans believe in second chances, especially for those whose past offenses and sustained good behavior signal that they no longer pose a threat to public safety."[340] In other words, building expungement adjudication on the premise that the public does *not* support second chances contributes to a hollow foundation for the remedy, undercutting its legitimacy long term. Insider expungement is the product of historical circumstances, but it does not have to be the sole characteristic of expungement adjudication or characterize all reform efforts moving forward.

## CONCLUSION

Insider expungement adjudication and implementation is the norm. To many expungement reformers, this is a primary feature of the expungement process itself, as anonymization and secrecy enable efficient erasure, easing reentry for those who need it. This Article, in considering the principles that underlie the movement to democratize criminal justice, calls this conventional wisdom into question. It suggests that insider expungement, while beneficial in the short term in its ability to efficiently expunge and seal records, is troubling on historical, constitutional, and procedural justice grounds. Further, it potentially stunts the normalization of second chances in the broader culture by insulating the community from grappling with the seriousness of criminal records stigma.

---

[337] The findings in this survey also suggest that expungement reform may be reflective of the public will, suggesting expungement law is perhaps more democratic than other criminal law doctrines. While that may be true, it does not change the fact that the absence of the community from adjudication has serious ripple effects on the overall legitimacy of the criminal law, punishment, and reentry.

[338] Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1666 (2017).

[339] *Id.* at 1666 (citing Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 136 (2012)) (noting how intuition and practical reason are essential to judgment); Stephanos Bibas, *Political Versus Administrative Justice*, *in* CRIMINAL LAW CONVERSATIONS 677 (Paul H. Robinson, Stephen Garvey & Kimberly Kessler Ferzan eds., 2009) (arguing for placing criminal justice policy in the hands of laypeople given moral expertise); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423 (1995) (referencing practical judgment and determinations of moral blameworthiness).

[340] Burton et al., *supra* note 315, at 144.

This situation has persisted for nearly three-quarters of a century and is emblematic of the current criminal justice paradigm, which prioritizes the professionalized adjudication of risk in almost every phase of the existing system. Its latest iteration is the outsourcing of expungement implementation to professionally designed tech-based solutions that result in automatic expungement. This is another step removed from traditional petition-based expungement, which at least located authority with insiders who maintained remote democratic connections to the community.

Given that the purpose of expungement is full reintegration into the community, expungement reformers need to ask whether the existing status quo—as well as the trend in favor of automated expungement—unduly prioritizes short-term gains over the long-term normalization of second chances in communities. Considering that the broader public appears to be no more punitive than reformed expungement regimes, injecting the community into expungement adjudication could help reintegration long term by allowing communities to more clearly communicate how they view criminal records stigma, as well as inequities and injustices in the larger criminal records apparatus. The democratization of expungement should not be pushed to the margins due to past substantive reform, although the precise contours and form of enhanced democratic participation in the expungement phase requires careful attention and deliberation.[341]

[341] As mentioned previously, I am working on a forthcoming paper titled *Participatory Expungement* that will explore more deeply the arguments for community participation in adjudication. To the extent they are persuasive, they will be balanced against the interests of the petitioner given the stakes involved. Part of this discussion will include whether reformers should consider conceding more community involvement to obtain increased eligibility for higher-level convictions.