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## I Did My Time: The Transformation of Indiana's Expungement Law

Joseph C. Dugan

*Indiana University Maurer School of Law, [josdugan@indiana.edu](mailto:josdugan@indiana.edu)*

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# I Did My Time: The Transformation of Indiana's Expungement Law

JOSEPH C. DUGAN\*

*"Betrayed / I feel so enslaved / I really tried / I did my time / I did my time . . . ."*<sup>1</sup>

## INTRODUCTION

In *Parker v. Ellis*, Chief Justice Earl Warren wrote that "[c]onviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions . . . but which also seriously affects his reputation and economic opportunities."<sup>2</sup> While criminal conviction inflicts a necessary disability on the offender, expungement law presents a fitting remedy for the ex-offender: expungement ensures that employers, licensing agencies, and communities view an individual in light of her character today rather than the mistakes she made in her distant past.<sup>3</sup>

Until recently, Indiana's criminal records scheme was unforgiving. Hoosiers convicted of even minor offenses had few opportunities to wipe the proverbial slate clean.<sup>4</sup> But in 2011, the General Assembly commenced a legislative project that culminated in a comprehensive expungement statute, enacted in July 2013<sup>5</sup> and substantially amended in March 2014.<sup>6</sup> Under this new criminal records regime,

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\* J.D. candidate, 2015, Indiana University Maurer School of Law. My gratitude to Matthew Hutchens and Nick Roberts for their helpful feedback on this project; thanks also to Jamie Davis and Joe Stephens for their careful edits. I dedicate this Note to Jamie Andree and her team at the Bloomington office of Indiana Legal Services, Inc., for exemplifying wholehearted client service—and to Heidi, for sharing this frenetic but richly rewarding law school journey with me.

1. KORN, *Did My Time*, on TAKE A LOOK IN THE MIRROR (Epic/Immortal 2003).

2. 362 U.S. 574, 593–94 (1960) (Warren, C.J., dissenting) (emphasis omitted), *overruled in part* by *Carafas v. LaVallee*, 391 U.S. 234 (1968).

3. "It is a legal principle that correctional law is forgiving. Forgiveness is part and parcel of rehabilitation, whether of criminals or anyone else who has erred, or who has, in fact, what all of us have—the defects of being human." SOL RUBIN, LAW OF CRIMINAL CORRECTION 788 (2d ed. 1973), *quoted in* Luz A. Carrion, Comment, *Rethinking Expungement of Juvenile Records in Massachusetts: The Case of Commonwealth v. Gavin G.*, 38 NEW ENG. L. REV. 331, 331 (2004).

4. Indiana's former expungement scheme can be sharply contrasted with more generous schemes in other jurisdictions. Compare IND. CODE § 35-38-5-5 (2008) (providing that ex-convicts may petition the state police to limit access to their criminal histories if more than fifteen years have elapsed since they were last discharged from prison, probation, or parole), with D.C. CODE § 16-803(c) (LexisNexis Supp. 2014) (stipulating that courts will seal records of an "eligible" offense if eight years have elapsed since the completion of the sentence and the petitioner satisfies other criteria), and OR. REV. STAT. § 137.225 (2011) (specifying that courts must generally grant expungement for a lower-grade offense if the petitioner has completed her sentence and at least three years have passed since the date of her conviction).

5. Act of May 6, 2013, No. 159, 2013 Ind. Acts 1631 (codified as amended in scattered sections of IND. CODE tit. 35 (Supp. 2013)).

6. Act of Mar. 26, 2014, No. 181, 2014 Ind. Acts 2291 (codified as amended in scattered

ex-offenders may qualify for expungement of most misdemeanors and some felonies. Upon signing the statute into law, Governor Mike Pence declared, “Indiana should be the worst place in America to commit a serious crime and the best place, once you’ve done your time, to get a second chance.”<sup>7</sup>

Indiana’s new expungement law represents a laudable step toward augmenting the rights of reformed Hoosiers, and the 2014 amendments correct several deficiencies that inhered in the original statute. Nevertheless, the law remains a work in progress. Its procedures are convoluted. Its remedies are flimsy. It excludes certain classes of petitioners while setting an unreasonably high bar for others. Its “one-bite-at-the-apple” limitation and repayment prerequisites are unrealistic, particularly for low-income petitioners.

This Note evaluates the transformation of Indiana’s expungement law. Part I addresses the socioeconomic impacts of a criminal record. Part II presents normative arguments both for and against expungement, concluding that the balance tips in favor of forgiveness. Parts III–IV discuss Indiana’s original expungement provisions, the 2013 statute, and the 2014 amendments. Part V explores the reaction to the new law. Finally, Part VI offers recommendations to improve the statute so that its second-chance promise is equitable, accessible, and robust.

#### I. STIGMATIZATION AND THE RIGHTS OF THE REFORMED

Sociologists have long decried the stigma associated with a criminal record.<sup>8</sup> In a seminal 1963 exposition on stigma, Professor Erving Goffman described the Greek origins of the term: stigma referred to “signs designed to expose something unusual and bad about the moral status of the signifier . . . a blemished person, ritually polluted, to be avoided, especially in public places.”<sup>9</sup> Goffman traced the elements of stigma through the interactions of three distinct groups: the *own* (persons who

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sections of IND. CODE tit. 35 (Supp. 2014)).

7. Lesley Weidenbener, *Pence Signs Off on Rewrite of Expungement Procedure*, EVANSVILLE COURIER & PRESS, May 7, 2013, at 5A.

8. Victor Hugo eloquently captured this “rap-sheet stigma” in *Les Misérables*, where ex-convict Jean Valjean recounted the parade of horrors that met him upon his reentry into society:

I was liberated four days ago, and started for Pontarlier . . . I went to the inn, but was sent away in consequence of my yellow passport, which I had shown at the police office. . . . [N]o one would have any dealings with me. I went to the prison, but the jailer would not take me in. I got into a dog’s kennel, but the dog bit me and drove me off, as if it had been a man.

VICTOR HUGO, *LES MISÉRABLES* 72 (Lascelles Wraxall trans., Heritage Press 1938) (1862). The Indiana Supreme Court has also written about the deleterious effects of rap-sheet stigma:

[W]hen an adult is convicted of a crime, the conviction is a stigma that follows him through life, creating many roadblocks to rehabilitation. In addition to the general stigma of being an “ex-con”, or a felon, the conviction subjects him to being found a habitual criminal if he later commits additional felonies, and affects his credibility as a witness in future trials.

Jordan v. State, 512 N.E.2d 407, 409 (Ind. 1987).

9. ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 1 (Simon & Schuster Inc. 1986) (1963).

share the disfavored trait), the *wise* (persons sympathetic to the stigmatized group), and the *normals* (persons who reinforce the stigma).<sup>10</sup> The *wise* might be of some comfort to the *own*, but these sympathizers themselves hover on the margins of society: far more common are the *normals*, who perceive that stigmatized persons are “not quite human” and who “exercise varieties of discrimination” to “effectively, if often unthinkingly, reduce [their] life chances.”<sup>11</sup>

Goffman's theory applies with particular force to convicted criminals and ex-offenders. In a 2004 article, Professors Meares, Katyal, and Kahan wrote that interactions with the law-abiding world are problematic for persons convicted of crimes: the risk is high that *normals* will “define a criminal only in terms of his stigma” and avoid associating with him for fear of being contaminated.<sup>12</sup> This disassociation, characterized in this Note as “rap-sheet stigma,” prompts the ex-offender to offend once more: he may perceive that “other options are closed” to him.<sup>13</sup>

#### *A. Sentenced in Perpetuity? Economic Considerations*

Devah Pager, a sociologist from Northwestern University, explored the economics of rap-sheet stigma in a 2003 study.<sup>14</sup> Pager found that “ex-offenders are only one-half to one-third as likely as nonoffenders to be considered by employers.”<sup>15</sup> In a separate study cited by *The Economist*, sixty-five percent of employers in major cities admitted that they would not knowingly hire an ex-convict.<sup>16</sup> These numbers comport with an earlier survey of employers in Atlanta, Boston, Detroit, and Los Angeles, which found that only thirty-eight percent would likely accept an application from an ex-convict.<sup>17</sup>

10. Rachel A. Smith, *Segmenting an Audience into the Own, the Wise, and Normals: A Latent Class Analysis of Stigma-Related Categories*, 29 COMM. RES. REP. 257, 258 (2012).

11. GOFFMAN, *supra* note 9, at 28; see also Amy Myrick, *Facing Your Criminal Record: Expungement and the Collateral Problem of Wrongfully Represented Self*, 47 LAW & SOC'Y REV. 73, 77–78 (2013) (linking Goffman's theory of stigma and “spoiled identity” to the criminal records context).

12. Tracey L. Meares, Neal Katyal & Dan M. Kahan, *Updating the Study of Punishment*, 56 STAN. L. REV. 1171, 1184 (2004).

13. *Id.* As another author put it, the ex-offender may find that “the only way to live in society is as a deviant. He re-offends, and fulfills the very expectations placed upon him” by his community. Jennifer Leavitt, Comment, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1282–83 (2002).

14. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

15. *Id.* at 960.

16. *Prison and Beyond: A Stigma That Never Fades*, ECONOMIST, Aug. 10, 2002, at 25, 26.

17. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 205, 209–10 (Mary Pattillo, David Weiman & Bruce Western eds., 2004). The surveyed employers were far more willing to consider members of other stigmatized groups, including welfare recipients (92%) and high school dropouts with GEDs (96%). *Id.* at 210. Employer unease with criminal records may explain why in New York State, up to sixty percent of formerly incarcerated persons are still unemployed one year after their release. Aaron Smith, *Out of Prison, Out of a Job, Out of Luck*, CNNMONEY (Nov. 11, 2009, 6:46 AM), <http://money.cnn.com/2009/11/11/news>

The statistics are telling, but it is the stories of struggling individuals that are particularly distressing. Pager described a letter she received from an unemployed father: while the man was earnestly seeking employment, a decade-old conviction was proving an impenetrable barrier.<sup>18</sup> The man's "heart broke each morning when his six-year-old daughter would leave for school and say to him, 'Good luck in your job search, Daddy!' knowing that he would have to face her later that day with nothing more to offer."<sup>19</sup> An Indiana resident observed that his criminal record is the only thing that employers seem to care about.<sup>20</sup> "It's very difficult for a felon. . . . You realize that you've made a mistake; you've served your time for it; you've paid the consequence. So it's time to get back on track with your life."<sup>21</sup> Getting back on track is a daunting feat indeed when employers treat a rap sheet as a scarlet letter.<sup>22</sup>

### *B. Juvenile Crime and Brutal Need*

Expungement remedies the deleterious effects of rap-sheet stigma. This remedy is meaningful for anyone with a criminal past, but it is especially critical for two vulnerable classes: former juvenile delinquents and brutally impoverished ex-offenders.

#### 1. The Young

In a 1963 study on society's "sense of justice," psychiatrists Edmund Bergler and Joost Meerloo described juvenile delinquency as a "catch-all term applied to all types

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/economy/convict\_employment/.

18. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 154 (2007).

19. *Id.*

20. Vic Ryckaert, *New Law Gives Former Offenders a Second Chance*, INDIANAPOLIS STAR, Aug. 29, 2013, at B1.

21. *Id.*

22. One might argue that the perpetual punishment of a public record, evidenced by the job-related struggles of the reformed, straddles the line of unconstitutionality. *See* IND. CONST. art. I, § 16 ("Cruel and unusual punishments shall not be inflicted. All penalties shall be proportioned to the nature of the offense."); *Pritscher v. State*, 675 N.E.2d 727, 731 (Ind. Ct. App. 1996) ("A sentence, even under a valid statute, may be unconstitutional by reason of its length, if it is so severe and entirely out of proportion to the gravity of the offenses committed as 'to shock public sentiment and violate the judgment of a reasonable people.'" (quoting *Cox v. State*, 181 N.E. 469, 472 (Ind. 1932))); *see also* Erin Westbrook, Comment, *Collateral Sanctions as Punitive Sentences and the Minnesota Judiciary's Expungement Authority*, 9 U. ST. THOMAS L.J. 959, 959–60 (2012) ("When an individual commits a crime, a judge imposes a criminal sentence based upon the sentencing guidelines, which allow for consideration of a variety of factors, including criminal history and the nature of the offense. The sentencing guidelines provide safeguards to ensure that a sentence is justified and follows traditionally recognized theories and goals of punishment. Yet, once an offender has fulfilled her sentence, she faces reentry into society under the shadow of a criminal record that, among other restrictions, prevents her from securing adequate employment and housing. And whereas the offender's judicially imposed sentence is subject to judicial discretion within the limits of sentencing guidelines, the collateral 'sentence' is not subject to the same safeguards.").

of legally proscribed actions when the offender happens to be in his or her teens.”<sup>23</sup> Bergler and Meerloo observed that delinquent boys and girls are “filled with a feeling of savage indignation; life, they are convinced, has cheated them out of something.”<sup>24</sup> This indignation may be a product of the physiological effects of puberty, the sordid conditions of life in lower-class communities, or the failure of parents to meet their children’s psychological needs.<sup>25</sup> Whatever the cause, “something in [these children]—their unconscious—has stacked the cards to ensure their own disaster.”<sup>26</sup>

Much more recently, psychiatrist Andrew Solomon portrayed the untenable plight of juvenile delinquents in *Far from the Tree*.<sup>27</sup> While acknowledging that “some people seem to be born without a moral center,” Solomon argued that for most juveniles, “the criminal potential requires external stimulus to be activated; the intense, internally determined psychopath of the movies is unusual.”<sup>28</sup> Yet, Solomon continued, most of criminal law is “organized around the notion that young criminals are intractably malign.”<sup>29</sup> Courts are complicit in this convention: they waive juvenile offenders into adult court with ever-increasing frequency, particularly those juveniles who present themselves poorly or appear to lack supportive families.<sup>30</sup>

Especially troubling is the criminal law’s failure to acknowledge the psychological and physiological limitations that encumber children:

Biological evidence now demonstrates that the adolescent brain is structurally different from the adult one . . . . In the prefrontal cortex of a fifteen-year-old, the areas responsible for self-control are undeveloped; many parts of the brain do not mature until about twenty-four. . . . [H]olding children to adult standards is biologically naïve.<sup>31</sup>

No one would seriously argue, and this Note does not contend, that juveniles should be granted some kind of *carte blanche*: even young people can cause serious harm, and the criminal justice system can function to rehabilitate miscreants of all

23. EDMUND BERGLER & JOOST A. M. MEERLOO, JUSTICE AND INJUSTICE 44 (1963).

24. *Id.* at 45.

25. *Id.* at 46–49; *see also* Press Release, Univ. of Pittsburgh, Yelling Doesn’t Help, May Harm Adolescents, Pitt-Led Study Finds (Sept. 4, 2013), *available at* <http://www.news.pitt.edu/news/yelling-doesn-t-help-may-harm-adolescents-pitt-led-study-finds> (citing new research that indicates harsh verbal discipline, like physical punishment, may drive adolescents toward depressive symptoms and antisocial behaviors).

26. BERGLER & MEERLOO, *supra* note 23, at 64.

27. ANDREW SOLOMON, FAR FROM THE TREE: PARENTS, CHILDREN, AND THE SEARCH FOR IDENTITY (2012).

28. *Id.* at 544.

29. *Id.*

30. *Id.*

31. *Id.* at 546. Solomon described additional factors that weigh against too harsh a response to juvenile crime. Three out of four incarcerated children have a mental health diagnosis; between fifty and eighty percent have learning disabilities. *Id.* at 549. And while Solomon acknowledged that the “post-Freudian notion that all flaws are based in family relations is out of favor,” he recounted several observations of children whose parents “seemed unacquainted with the usual rules of love.” *Id.* at 554.

ages.<sup>32</sup> But children who fall into crime long before they have the cognitive maturity or life experience to understand the consequences of their actions—and who, as Bergler, Meerloo, and Solomon have suggested, offend within a framework of circumstances beyond their control—are especially deserving of expungement.<sup>33</sup> If these kids “do their time,” and if they change their ways, the same society that is quick to lock them up should be equally swift to extend forgiveness and a second chance.<sup>34</sup>

## 2. The Poor

Expungement provides appropriate relief not only to former juvenile offenders but also to the severely impoverished, those persons with “brutal need”<sup>35</sup> who resort to crime as a reaction or perhaps a temporal solution to their poverty.

Detroit presents a useful case study. The Motor City (“Motown”), ranked by *Forbes* as the most dangerous city in America for five years running,<sup>36</sup> is also the nation’s poorest large city.<sup>37</sup> About forty-one percent of Detroiters, and a shocking sixty percent of children, live below the federal poverty line.<sup>38</sup> With the city in bankruptcy and with many government programs in jeopardy due to statewide budget

32. Cf. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 107 (1909) (“Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is . . . and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen.”).

33. See also *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (reciting differences between juvenile and adult offenders and recognizing that juveniles have an understandable lack of maturity, a tendency to fall prey to negative influences, and transitory personality traits).

34. See RUBIN, *supra* note 3, at 788 (“Forgiveness is part and parcel of rehabilitation.”). Additional arguments cut in favor of generous expungement schemes for children adjudicated as delinquents. Justice Rehnquist wrote in *Smith v. Daily Mail Publishing Co.* that juvenile criminal records bring “undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities.” 443 U.S. 97, 108 (1979) (Rehnquist, J., concurring in the judgment). From a different angle, public records may “provide the hardcore delinquent the kind of attention he seeks, thereby encouraging him to commit further antisocial acts.” *Id.* Ultimately, criminal records may “defeat the beneficent and rehabilitative purposes” of juvenile justice: publicity may place “additional stress on [the juvenile] during a difficult period of adjustment in the community, and [may] interfere[] with his adjustment at various points when he was otherwise proceeding adequately.” *Id.* at 108 & n.1 (quoting David C. Howard, J. Thomas Grisso & Robert Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)).

35. *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

36. Daniel Fisher, *Detroit Again Tops List of Most Dangerous Cities, as Crime Rate Dips*, FORBES (Oct. 22, 2013, 7:58 AM), <http://www.forbes.com/sites/danielfisher/2013/10/22/detroit-again-tops-list-of-most-dangerous-cities-but-crime-rate-dips/>.

37. Kevin D. Williamson, *Detroit Goes Down: A Lesson for American Cities*, NAT’L REV. (July 19, 2013, 4:00 AM), <http://www.nationalreview.com/article/353862/detroit-goes-down-kevin-d-williamson>.

38. See *Detroit, MI*, CENSUS REPORTER, <http://censusreporter.org/profiles/16000US2622000-detroit-mi/>; Irwin Redlener, *Amid Bankruptcy, Detroit Has a Bigger Problem*, USA TODAY (July 29, 2013, 6:16 PM), <http://www.usatoday.com/story/opinion/2013/07/29/detroit-bankruptcy-child-poverty-column/2597227/>.

cuts and federal sequestration, aid resources are sparse: one social service agency reported that its 2013 budget for emergency shelters was reduced by over forty percent.<sup>39</sup> Scott Paul, President of the Alliance for American Manufacturing, observed that “[i]n Detroit, it’s come down to matters of basic survival: keeping the water turned on, providing basic public services, determining which blocks to raze and which to save.”<sup>40</sup>

The link between poverty and crime, in Detroit and in penurious communities across America, is not difficult to fathom. Hunger gives rise to theft; the fires of arson rage as property owners seek to cash out insurance policies.<sup>41</sup> Controlled substances present a tempting reprieve from bleak circumstances.<sup>42</sup> Violence, too, escalates with poverty. Analysts Ching-Chi Hsieh and M.D. Pugh concluded in a 1993 study that “resource deprivation is an underlying cause of violent crime and that poverty and income inequality are both indicators of resource deprivation.”<sup>43</sup> Economist Richard McAdams echoed these concerns, writing that “[a]n economic cost of inequality is greater street crime.”<sup>44</sup>

Understanding the link between poverty and crime helps one understand the relationship between the two classes this Note has identified as particularly deserving of expungement: juvenile offenders and the brutally poor. Children born into poverty are susceptible to delinquency. As Professor Richard Delgado observed, “It is absurdly callous to assert that poverty, lack of opportunity, a poor education, and desperate circumstances play no role in predisposing people to lives of crime, especially if they are born into those circumstances and live in them all their lives.”<sup>45</sup>

39. Bill Laitner, *As Poverty Spreads and Funding Is Cut, Charities Need Metro Detroiters' Help*, DETROIT FREE PRESS (Nov. 24, 2013), <http://www.freep.com/article/20131124/NEWS05/311240071/homeless-SNAP-Salvation-Army-Detroit>.

40. Scott Paul, *Is What I Saw in Detroit America's Future?*, HUFFINGTON POST (July 25, 2014, 3:22 PM), [http://www.huffingtonpost.com/scott-paul/is-what-i-saw-in-detroit\\_b\\_5621756.html?utm\\_hp\\_ref=detroit&i=1](http://www.huffingtonpost.com/scott-paul/is-what-i-saw-in-detroit_b_5621756.html?utm_hp_ref=detroit&i=1). Television personality and erstwhile chef Anthony Bourdain put the matter more colorfully: “The only place I’ve ever been that looks anything like Detroit does now is Chernobyl.” *Anthony Bourdain Parts Unknown: Detroit* (CNN cable transmission Nov. 10, 2013).

41. See, e.g., *State v. Enright*, 2000 MT 372, 303 Mont. 457, 16 P.3d 366; *State v. Murdock*, 500 P.2d 387 (Mont. 1972); *Phillips v. State Farm Fire & Cas. Co.*, 640 N.Y.S.2d 24 (App. Div. 1996). In some jurisdictions, merely soliciting funds may constitute a crime. See, e.g., IND. CODE § 35-45-17-1 (2008) (criminalizing begging in circumstances such as after sunset or before sunrise, at a bus stop, near a restaurant, or with a partner); cf. *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013) (ruling that Michigan’s broad antibegging statute facially violated the First Amendment of the U.S. Constitution).

42. See Sandra Langley, *The Homeless in Utah—Reflections from a New Bar Member*, UTAH B.J., Dec. 1997, at 36, 37 (“Many believe that the degrading nature of poverty itself is to blame for so many turning to some form of chemical relief. Approximately 17% of the homeless are physically disabled. The average life expectancy for homeless people is 51. Given the foregoing, is it any wonder that findings show anywhere from 48% to 80% of the homeless are seriously depressed, three to five times the national average.” (footnotes omitted)).

43. Ching-Chi Hsieh & M.D. Pugh, *Poverty, Income Inequality, and Violent Crime: A Meta-Analysis of Recent Aggregate Data Studies*, 18 CRIM. JUST. REV. 182, 198 (1993).

44. Richard H. McAdams, *Economic Costs of Inequality*, 2010 U. CHI. LEGAL F. 23, 37.

45. Richard Delgado, *The Wretched of the Earth*, 2 ALA. C.R. & C.L.L. REV. 1, 19 (2011).



Some jurists and criminologists have gone so far as to suggest that courts should recognize a kind of “poverty defense,” at least for certain economically motivated crimes.<sup>46</sup> Such a defense, however academically intriguing, seems unlikely to gain much traction given the tough-on-crime realpolitik of contemporary society.<sup>47</sup> Yet liberal expungement laws could provide a more modest and palatable mechanism for addressing the relationship between poverty and crime. Criminal records prevent members of impoverished communities from obtaining employment, but these records have other collateral consequences as well: they may lead to denial of housing, ineligibility for cash assistance, and disqualification for retirement benefits.<sup>48</sup> Unemployed and unlikely to secure gainful work with the stigma of a rap sheet, ex-offenders are left with few alternatives—and “America’s poorest communities, especially those of color, bear the brunt of the pervasive cycle of arrest, incarceration, and reentry.”<sup>49</sup> Expungement throws a wrench in the gears of that cycle, ensuring that an ex-offender, having satisfied the penalty imputed by law, can once again enjoy the rights and privileges afforded to all persons in a society of

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46. *E.g.*, *United States v. Alexander*, 471 F.2d 923, 965 (D.C. Cir. 1972) (Bazelon, C.J., dissenting) (suggesting that there may be a “significant causal relationship between violent criminal behavior and a ‘rotten social background’”); Delgado, *supra* note 45, at 14 (arguing that society’s failure to recognize a defense of “severe environmental deprivation” makes some impoverished defendants double victims).

47. *But see* *State v. Marrs*, 723 N.W.2d 499, 505 (Neb. 2006) (“When imposing a sentence, a sentencing judge should consider the defendant’s (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.”).

48. Beth Johnson, *Helping Clients with Criminal Records: It’s More Than Expungement*, CBA REC., Oct. 2013, at 32, 33. In a 2003 report, the ABA acknowledged the insipid nature of these collateral consequences: “they often take effect without judicial consideration of their appropriateness in the particular case” and without any requirement that the parties even be aware of them. ABA, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS R-1 (3d ed. 2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/101a.authcheckdam.pdf>; *see also* MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 92 (2010) (“Once a person is labeled a felon, he or she is ushered into a parallel universe in which discrimination, stigma, and exclusion are perfectly legal, and privileges of citizenship such as voting and jury service are off-limits.”); *National Inventory of the Collateral Consequences of Conviction*, ABA COLLATERAL CONSEQUENCES, <http://www.abacollateralconsequences.org> (identifying 1978 collateral consequences under federal and state law in Indiana).

49. Leavitt, *supra* note 13, at 1281; *see also* 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, 1379 (2005) (“Without access to housing and employment, [ex-offenders] face a Hobson’s choice: they can be law-abiding, but homeless and penniless, or they can recidivate and have income.”). In a situation bordering on the absurd, a homeless ex-convict was reincarcerated in 2012 after he tossed a brick through the glass doors of a federal courthouse, concluding that a warm prison bed was preferable to another night on the streets. WTVM, *Homeless Man Intentionally Commits Crime To Go Back to Prison*, WSFA.COM (Apr. 25, 2012, 12:42 PM), <http://www.wsfa.com/story/17695143/homeless-man-intentionally-commits-crime-to-go-back-to-prison>.

equals. As Professor Fruqan Mouzon observed, "Human fallibility makes forgiveness a cornerstone of civilized society."<sup>50</sup>

## II. A NORMATIVE DEBATE

The socioeconomic effects of rap-sheet stigma supply compelling justification for a robust expungement scheme. However, other arguments cut in different directions. Before evaluating Indiana's law, it is helpful to review these underlying ethical considerations. This Part will begin by presenting several arguments in favor of indelible records and public access; it will then consider additional arguments in support of erasure and confidentiality.

### A. Expungement as Unmerited Reward

Perhaps the strongest argument against what critics term "aggressive" expungement<sup>51</sup> is the need for communities to be informed about the hazards presented by their neighbors. In *United States v. Flowers*, the Seventh Circuit explained that "expungement is, in fact, an extraordinary remedy and . . . 'unwarranted adverse consequences' must be uniquely significant in order to outweigh the strong public interest in maintaining accurate and undoctored records."<sup>52</sup>

Obviously, access to such records may affect the choices that individuals make: where to move, whether to leave the kids unattended, which contractor to hire for a construction job.<sup>53</sup> But access transcends individual decision making: Professor James Diehm pointed out that in most jurisdictions, the licensing process for members of the legal, medical, pharmaceutical, and accounting professions includes a criminal background check to ensure that "the applicant is a person of integrity and deserving of the public trust."<sup>54</sup> Professor Diehm warned that "[s]erious problems

50. Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 10 (2008); cf. 111 CONG. REC. 1427 (1965) (legislative prayer of Reverend Bernard Braskamp) ("O Thou God of all grace and goodness . . . We penitently confess that our hearts are often cold and callous and we fail to have a keen sense of our social responsibility and a sincere interest in the welfare of needy humanity. Grant that in the great adventure of building a better world we may know how to coordinate practical commonsense with lofty idealism.").

51. See, e.g., T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U.J. URB. & CONTEMP. L. 161 (1997).

52. 389 F.3d 737, 739 (2004).

53. But see Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1065 ("[E]xpungement only increases the risk of danger to the public indirectly. The average citizen does not have access to criminal records. As a result, there is no increased risk to the average citizen when records are expunged. A typical citizen would not likely take additional precautions when dealing with an offender whose record is expunged because the citizen is usually not aware the criminal record ever existed.").

54. James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 76 (1992).

may arise if the applicant's criminal record has been expunged."<sup>55</sup> Professor Diehm also expressed concern that expungement may impede law enforcement officers in their review of forensic evidence and serial offenses,<sup>56</sup> although this concern may be mitigated in jurisdictions in which police investigators retain access to expunged records for official purposes.<sup>57</sup>

Another, less obvious, concern with state expungement schemes is their tendency to conflict with federal laws and regulations. Writing in 2013 shortly after the passage of Indiana's comprehensive expungement statute, attorneys for Bose McKinney & Evans LLP noted that its remedies provision conflicts with section 19 of the Federal Deposit Insurance Act, which prohibits FDIC-insured institutions from employing persons convicted of certain trust-related offenses without first securing an FDIC waiver.<sup>58</sup> Thus, a bank in Indiana is placed in the delicate position of complying with both state law—which prohibits it from discriminating on the basis of expunged records—and federal law—which compels it to inquire about the contents of such records and to take appropriate action.<sup>59</sup> Expungement statutes may conflict with other federal laws as well, such as criminal laws with elements relating to prior convictions<sup>60</sup> and laws governing the distribution of welfare benefits to former drug offenders.<sup>61</sup>

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55. *Id.*

56. *Id.* at 77.

57. *E.g.*, IND. CODE § 35-38-9-6(a)(1)–(2) (Supp. 2014) (authorizing release of expunged records to law enforcement officers, defense and prosecuting attorneys, and DHS/FBI officials acting in the course of duty).

58. *HEA 1482 Makes It Unlawful To Discriminate Based on Expunged Criminal Records*, BOSE MCKINNEY & EVANS LLP (June 6, 2013), <http://www.boselaw.com/2013/06/hea-1482-makes-unlawful-discriminate-based-expunged-criminal-records/>. The Bose attorneys noted that under FDIC policy, records that have been *completely* expunged—such that no one, including law enforcement, can access them—will not disqualify a candidate. *Id.* But most contemporary state expungement statutes, including Indiana's, allow for some official access.

59. Conflict preemption doctrine provides a solution here: where federal law directly conflicts with state law, federal law must trump: "There can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress." *Rose v. Ark. State Police*, 479 U.S. 1, 3 (1986); *see also* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Still, hiring managers and HR professionals at FDIC-insured institutions may lack expertise on the finer points of constitutional law, and state-federal conflicts burden these professionals.

60. *See United States v. Potts*, 528 F.2d 883, 887 (9th Cir. 1975) (Sneed, J., concurring in the result) ("[S]tate law must be examined to determine whether the defendant has been convicted of a felony. The relevant state law to be examined in this determination does not include expunction statutes. Such statutes do not rewrite history; they merely provide that previous history is immaterial for *certain purposes under state law*. It is not within the power of a state to make such history immaterial to the administration of the federal criminal law or the interpretation of federal criminal statutes. Only Congress can do that." (emphasis added)).

61. *Compare* § 35-38-9-10(e) (Supp. 2014) ("A person whose record is expunged shall be treated as if the person had never been convicted of the offense."), *with* DIV. OF FAMILY RES., IND. FAMILY & SOC. SERVS. ADMIN., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM

Finally, some critics oppose expungement on moral or penological grounds. In a 1970 article, practitioners Bernard Kogon and Donald Loughery, Jr., blasted what they saw as a casual and uncritical acceptance of expungement law, writing:

In trying to conceal a record we seek to falsify history—to legislate an untruth. Such suppression of truth ill befits a democratic society. Good intentions are no defense. To enable an offender to deny that he has a criminal record when in fact he has one is to help him deny a part of his identity.<sup>62</sup>

Almost three decades later, T. Markus Funk and Daniel Polsby argued that “labeling theorists,” who believe that the “perceptions of others control or influence one’s behavior,” overlook the “value of the symbolic significance that attaches to any form of punishment” and the “importance of making the person labeled aware that he has violated communal values, and that such violations carry with them certain negative consequences.”<sup>63</sup> Commentators like Kogon and Loughery, Funk and Polsby seem to view a criminal record as a suitable penalty for a person who has broken the social compact: it may be his cross to bear, but it is a cross of his own construction. One is reminded of Jacob Marley, usurer of Dickensian lore,<sup>64</sup> fettered with the chains he forged, link by link, through his avarice.<sup>65</sup>

(SNAP) FREQUENTLY ASKED QUESTIONS 2 (2012) (“There is a federal law that states anyone with a drug conviction after 8/22/1996 is ineligible to receive SNAP benefits indefinitely. It is possible for state legislatures to override this federal law. To date, Indiana has not.”); *see also* S. 286, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014) (bill that would have extended SNAP and TANF benefits to former drug offenders who secured expungement; dead in committee).

62. Bernard Kogon & Donald L. Loughery, Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 378, 385 (1970); *see also* Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 749 (1981) (“The expungement model attempts to rewrite history: it denies reality. This deliberate deception of the public violates our longstanding and generally unquestioned preference for truth over falsity.”).

63. Funk & Polsby, *supra* note 51, at 169–71; *see also* T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 289 (1998) (“[A]ggressive expungement operates to perversely penalize persons who have conformed their behavior to the dictates of the law, while providing unjustified gains to those who have not.”). Goffman’s theory offers one possible response to Professors Funk and Polsby: as long as the *normals* retain access to the ex-offender’s record, they will disassociate with him; he may fully appreciate the gravity of his past misconduct, fully rehabilitate, and yet still find himself ostracized as a common criminal. *See supra* notes 9–11 and accompanying text.

64. “‘I wear the chain I forged in life,’ replied the Ghost. ‘I made it link by link and yard by yard; I girded it on of my own free will, and of my own free will I wore it.’” CHARLES DICKENS, A CHRISTMAS CAROL 18 (Bradbury & Evans 1858) (1843).

65. The moral/penological argument may carry more normative weight for those offenses fairly characterized as *mala in se*: few commentators would seriously argue that society should quickly forgive and forget such heinous acts as murder and rape. In fact, those more serious crimes are generally excluded from state expungement schemes, while other crimes—such as burglary and assault—are subject to stiff requirements and lengthy waiting periods. For *mala prohibita* offenses, the moral argument seems less compelling: it is difficult to envision Jacob Marley forging his links by failing to file a state tax return, drinking by the roadside, or

*B. Expungement as Remedy*

Opponents of expungement—or those who favor stringent requirements and lengthy waiting periods—raise some persuasive arguments. The issue is complicated, and as a society we should be cautious and deliberate whenever we attempt to rewrite history.<sup>66</sup> On balance, however, this Note concludes that the benefits of expungement outweigh its putative costs. This Note has already addressed the principal argument in favor of a robust expungement scheme—that erasing the records of reformed ex-offenders can eliminate stigma and the austere economic consequences that accompany it.<sup>67</sup> This Note has also argued that former juvenile delinquents and brutally poor ex-offenders are particularly deserving of a second chance.<sup>68</sup> There are additional reasons, however, to view expungement not merely as a humanitarian gesture but as an essential complement to our contemporary criminal justice system.

First, expungement is a necessary corollary to a system characterized by exuberant prosecution of *mala prohibita* and noncore offenses. In a 2004 symposium article, Professor Douglas Husak of Rutgers proposed that core crimes conform to one of three patterns of liability: manifest criminality, or inherently dangerous acts; subjective criminality, or acts intended to violate a protected interest; and harmful consequences.<sup>69</sup> Conversely, noncore crimes “are best understood to be those offenses that have not been justified as legitimate exercises of state power over free and autonomous individuals.”<sup>70</sup> Husak expressed concern about the prosecution of overlapping crimes.<sup>71</sup> He likewise expressed concern about the proliferation of risk-prevention offenses, such as illicit drug possession.<sup>72</sup> Husak’s primary criticism, however, pertained to the growth of ancillary offenses—crimes to which prosecutors turn when they lack sufficient evidence to obtain conviction for the conduct they *actually* seek to penalize.<sup>73</sup>

Commentators have approached the problem of excessive criminalization from various angles,<sup>74</sup> but many concur that “[o]vercriminalization is a matter of

surreptitiously smoking a joint.

66. “In 41 states, people accused or convicted of crimes have the legal right to rewrite history.” Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), [http://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all&_r=0).

67. See *supra* Part I.A.

68. See *supra* Part I.B.

69. Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 757 (2004) (citing GREGORY P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978)).

70. *Id.* at 779.

71. These are crimes that share common elements with other crimes but also contain distinct elements such that double jeopardy doctrine is not implicated. As a result, prosecutors can stack charges and courts can assign harsher penalties. *Id.* at 770–71.

72. *Id.* at 771.

73. *Id.* at 771–72 (discussing derivative crimes such as money laundering and information-gathering offenses such as violations of the Bank Secrecy Act).

74. See, e.g., Kyle Graham, *Facilitating Crimes: An Inquiry into the Selective Invocation of Offenses Within the Continuum of Criminal Procedures*, 15 LEWIS & CLARK L. REV. 665 (2011) (questioning the legitimacy of three categories of crimes that implicate only portions of the arrest-arraignment-conviction-punishment continuum: detention crimes, which exist

bi-partisan concern, a proper subject for legislative reform of criminal codes, and may, in part, explain the increasing numbers in our prisons.”<sup>75</sup> Given the American embrace of comprehensive criminalization and our consequent status as home to the world’s largest prison population,<sup>76</sup> expungement—particularly for low-level or mala prohibita offenders—seems not only permissible but necessary. If rap-sheet stigma is real, and the statistics certainly suggest that it is,<sup>77</sup> then we owe it to a substantial number of our fellow Americans to give them a second lease on life after they have “done their time” for acts which, perhaps, should not have been criminalized in the first place.<sup>78</sup>

Second, expungement complements contemporary initiatives to combat recidivism. Cognizant of prison crowding and the cycle of incarceration and release, the federal government led the charge in these initiatives with the passage of the Second Chance Act of 2007.<sup>79</sup> The Act created a buffer between prison and reentry, doubling inmates’ allowable community confinement from the last six months to the last twelve months of a sentence.<sup>80</sup> It also required the Federal Bureau of Prisons to

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principally to facilitate arrests and for which conviction is an afterthought; charging crimes, which prosecutors employ as instruments to negotiate plea agreements; and pleading crimes, which rarely provide the basis for an initial arrest but to which defendants plead guilty after successful bargaining).

75. *State v. Copenhagen*, 834 N.W.2d 870, at \*7 (2013) (unpublished table decision) (Danilson, J., specially concurring); cf. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 706 (2005) (“Countless petty offenses, civil infractions, and traffic ordinances are handled by law enforcement in the same fashion as serious offenses or are bootstrapped into quasi-crimes through legal fictions. Juveniles are not only liable for violations of the relevant penal code, but also for a variety of ‘status offenses’ involving behaviors that are perfectly legal for adults—staying out late, smoking or chewing tobacco, drinking alcohol, having sexual relations, failing to attend class, and so on.”); Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1301 (1995) (“The criminalization of ostensibly innocent behavior has created situations in which people may be convicted of serious crimes without having had any idea they were doing something illegal.”).

76. Int’l Ctr. for Prison Studies, *Highest to Lowest—Prison Population Total*, PRISONSTUDIES.ORG, [http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All); cf. *15 Years in Environment of Constant Fear Somehow Fails To Rehabilitate Prisoner*, ONION (Mar. 4, 2014), <http://www.theonion.com/articles/15-years-in-environment-of-constant-fear-somehow-f,35434/> (satirizing America’s culture of incarceration) (“Reportedly left dumbfounded by the news that [a] recent parolee . . . had been reincarcerated on charges of assault and battery, officials . . . struggled Tuesday to make sense of how the prisoner had not been rehabilitated by 15 years of constant threats, physical abuse, and periodic isolation.”).

77. See *supra* Part I.A.

78. See, e.g., Kathleen Miles, *Just How Much the War on Drugs Impacts Our Overcrowded Prisons*, in *One Chart*, HUFFINGTON POST (Mar. 10, 2014, 7:30 AM), [http://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic\\_n\\_4914884.html](http://www.huffingtonpost.com/2014/03/10/war-on-drugs-prisons-infographic_n_4914884.html) (finding that 50.1% of federal inmates were convicted of drug offenses and 10.6% of immigration offenses, while only 2.8% were convicted of homicide/assault/kidnapping and a statistically irrelevant percentage were convicted of national security offenses).

79. Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.).

80. John Spyros Albanes, *Demystifying Risk Assessment: Giving Prisoners a Second*

establish benchmarks for recidivism reduction, and—most notably—it provided grants for state rehabilitative programs.<sup>81</sup> As Representative Danny K. Davis noted in a March 2013 letter to the House Subcommittee on Commerce, Justice, Science, and Related Agencies, state-level investment in reentry programs has resulted in double-digit recidivism declines in recent years.<sup>82</sup> Reentry programs often involve significant government expenditures—funding for housing, workforce development, and substance abuse treatment programs.<sup>83</sup> But the ultimate success or failure of these programs will turn on how effectively they equip ex-offenders to achieve normalcy in their communities. Federal funding alone will not offset rap-sheet stigma, but expungement can. When viewed as part of the national effort to combat recidivism, a robust expungement scheme makes sense.<sup>84</sup>

Finally, expungement serves as a kind of meager reparation for low-income defendants marginalized by an overworked and underregulated criminal justice system. This point bears emphasizing: expungement is payback for defendants abused by a broken system in which due process is too often an ideal rather than a constitutional guarantee. The case of *Wilbur v. City of Mount Vernon* illustrates the problem.<sup>85</sup> In *Wilbur*, a class of indigent criminal defendants brought an action to challenge the adequacy of the public defense systems in Mount Vernon and Burlington, Washington. The court found that indigent defendants in these cities were “systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.”<sup>86</sup> The cities’ public defense contract, according to which a private firm was paid \$17,500 per month for a caseload of approximately 1700 cases (or just over \$10 per case) rendered it “virtually impossible that the lawyer, no matter how competent or diligent, will be able to provide effective assistance.”<sup>87</sup>

The situation in Mount Vernon and Burlington was not anomalous: Professor Michelle Alexander noted that while roughly eighty percent of criminal defendants are indigent, the “quality of court-appointed counsel is poor because the miserable working conditions and low pay discourage good attorneys from participating in the system.”<sup>88</sup> Carrie Johnson of National Public Radio recited calls for a bipartisan White House commission to evaluate impediments to justice and fairness for

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*Chance at Individualized Community Confinement Under the Second Chance Act*, 64 ADMIN. L. REV. 937, 945 (2012).

81. *Id.* at 946.

82. Letter from Danny K. Davis, Member of Cong. (Mar. 20, 2013), *available at* <http://www.csh.org/wp-content/uploads/2013/04/FY14SCAAppropriationsLetter.pdf>.

83. *Id.*; *see also* Press Release, U.S. Dep’t of Justice, Justice Department Announces More Than \$62 Million To Strengthen Reentry, Probation and Parole Programs (Nov. 13, 2013), *available at* <http://www.justice.gov/opa/pr/2013/November/13-ag-1217.html>.

84. *See* BRIAN FASK, CHICAGO COAL. FOR THE HOMELESS, EXPUNGEMENT: A BEGINNING TO REDUCE RECIDIVISM (2004).

85. 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

86. *Id.* at 1124.

87. *Id.* at 1132.

88. ALEXANDER, *supra* note 48, at 84.

low-income defendants.<sup>89</sup> One hopes that increasing awareness of the plight of indigent defendants may begin to level the playing field,<sup>90</sup> but for the time being, many of our nation's poorest ex-convicts are hamstrung by records stemming from deficient process. Expungement cannot erase the trauma of negotiating the system alone, but it can shield these victims of conveyor-belt justice from stigma that might otherwise drive them back to prison.<sup>91</sup>

### III. IND. CODE § 35-38-5: INDIANA'S ORIGINAL EXPUNGEMENT STATUTE

Having concluded that the benefits of robust expungement outweigh its costs, this Note now turns to evaluate the particularities of Indiana's law. Prior to 2011, Hoosiers who wished to restrict access to their criminal records had few options. Indiana's original "Expungement of Arrest Records" statute, enacted in 1983, provided that individuals could petition for expungement if they were arrested and released without charge or if the charges filed against them were dropped due to mistaken identity, no offense in fact, or absence of probable cause.<sup>92</sup> For individuals who were actually convicted of a crime—even a low-level misdemeanor—there were no opportunities for expungement per se. If these individuals completed their sentences and waited fifteen years without incurring additional convictions, they could petition the Indiana State Police to restrict access to their records.<sup>93</sup> Even so, agencies that had previously obtained the records were under no obligation to seal or destroy them. Furthermore, while the statute provided that law enforcement officials who violated its terms could face charges, no such sanctions applied to private actors.<sup>94</sup>

Case law confirms the harsh and sometimes arbitrary limitations imposed by the original expungement statute. In *Kleiman v. State*, the petitioner sought to expunge his arrest record after he was acquitted of a Class A misdemeanor charge for public indecency.<sup>95</sup> The Court of Appeals of Indiana found that the petitioner did not qualify for expungement because the state did not drop all charges against him.<sup>96</sup> In a similar vein, the court of appeals in *Blake v. State* found that an ex-convict who served out

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89. Carrie Johnson, *Legal Advocates Want Overhaul of Public Defender System*, NPR (Oct. 2, 2013, 6:14 PM), <http://www.npr.org/blogs/thetwo-way/2013/10/02/228572418/legal-advocates-want-overhaul-of-public-defender-system> (discussing such impediments as flat-fee public defender contracts and cash bail systems).

90. *Cf. infra* notes 234–235 and accompanying text.

91. *See supra* note 49 and accompanying text.

92. IND. CODE § 35-38-5-1(a) (2008) (repealed 2014).

93. § 35-38-5-5 (2008). Even this limited remedy had its own limitations: it did not apply to petitioners who had volunteered to provide childcare in conjunction with a social service or nonprofit agency, and it did not apply to petitioners who owed child support. *See* § 10-13-3-27(a)(8), (12) (2010).

94. *See* § 35-38-5-6 (2008).

95. 590 N.E.2d 660 (Ind. Ct. App. 1992).

96. *Id.* at 663; *cf. Smith v. State*, No. 41A04-0608-CV-441, 2007 WL 1815706 (Ind. Ct. App. June 26, 2007) (unpublished) (finding that where state withdrew charges for unknown reason and petitioner could not fit his argument within the narrow provisions of chapter 5, petitioner could not qualify for expungement).



his sentence and subsequently obtained a gubernatorial pardon was not entitled to expungement of his arrest records: the statute did not reach such circumstances.<sup>97</sup>

In *State ex rel. Indiana State Police v. Arnold*, the Indiana Supreme Court carved out some additional space for would-be petitioners with multiple arrests on record.<sup>98</sup> In so doing, the court abrogated *State v. Reynolds*, an earlier decision by the court of appeals. In *Reynolds*, the court had interpreted the expungement statute to categorically exclude petitioners who had additional charges pending against them.<sup>99</sup> The *Arnold* court rejected this hardline analysis, finding that the statute's overall "animating principle" was one of trial court discretion.<sup>100</sup>

While *Arnold* seemingly broadened the pool of potential petitioners, just two years later, the court of appeals in *Zagorac v. State* reaffirmed key limitations of the expungement statute.<sup>101</sup> After the state filed a motion to dismiss on the basis of a victim's inability to testify, the petitioner sought to expunge his arrest record.<sup>102</sup> The trial court declined to grant expungement, and the petitioner appealed, arguing that the statute violated the privileges and immunities clause of Indiana's state constitution.<sup>103</sup> Expungement was available under chapter 5, section 1 if charges were never filed or if they were dropped under qualifying circumstances.<sup>104</sup> Records could be sealed under section 5 for petitioners who actually served out their sentences

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97. 860 N.E.2d 625 (Ind. Ct. App. 2007). The *Blake* court did grant the petitioner an expungement of his *conviction* records (as opposed to his *arrest* records), relying not on any statutory provision but rather on a principle from case law. *Id.* at 631. The pertinent distinction was that chapter 5 spoke explicitly to arrest records while saying nothing about conviction records, and thus the court was free to act in equity.

98. 906 N.E.2d 167 (Ind. 2009).

99. 774 N.E.2d 902, 904 (Ind. Ct. App. 2002). The *Reynolds* court based its analysis on the following statutory text:

After a hearing is held under this section, the petition shall be granted unless the court finds: (1) the conditions . . . have not been met; (2) the individual has a record of arrests other than minor traffic offenses; or (3) additional criminal charges are pending against the individual.

§ 35-38-5-1(f) (2008) (repealed 2014).

100. *Arnold*, 906 N.E.2d at 171. In reaching its determination, the *Arnold* court hypothesized that an unlucky person could be twice arrested in cases of mistaken identity. The court concluded that the legislature surely intended discretion in such a situation. *Id.* Shortly after *Arnold*, the court of appeals took up *Gerber v. State*, a case in which the petitioner sought expungement after the state elected not to file charges in connection with a domestic dispute. 912 N.E.2d 386 (Ind. Ct. App. 2009). The trial judge denied the petition, opining that a reasonable period of time had not passed since the petitioner's arrest and ruling that petitioners must wait for the statute of limitations to run before seeking expungement. *Id.* at 387–88. In another decision favorable to petitioners, the court of appeals held that in spite of his considerable discretion, the trial judge was not authorized to rewrite the statute. *Id.* at 390–91.

101. 943 N.E.2d 384 (Ind. Ct. App. 2011).

102. *Id.* at 386.

103. *Id.* at 392; *see also* IND. CONST. art. I, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.").

104. *See* § 35-38-5-1(a) (2008) (repealed 2014).

and avoided further convictions for fifteen years.<sup>105</sup> But for petitioners who fell between the statutory bookends, no relief was available.

The court of appeals agreed that it seemed counterintuitive to “provide a form of relief to convicted persons when that relief is unavailable to persons who have not been convicted.”<sup>106</sup> Unfortunately, because the petitioner had not raised his constitutional argument in the proceedings below, the court declined to decide the issue.<sup>107</sup> Taken with *Arnold*, however, *Zagorac* signaled a sea change in expungement law. It is against this backdrop of litigation that the state legislature acted, first in 2011 and then during the 118th General Assembly, crafting a statutory alternative for ex-convicts who could not satisfy the stringent requirements of chapter 5.<sup>108</sup>

#### IV. A COMPREHENSIVE OVERHAUL: PARSING IND. CODE § 35-38-9

In 2013, under the leadership of Representative Jud McMillin (R-Brookville), the General Assembly enacted a comprehensive expungement bill with wide bipartisan support.<sup>109</sup> During the 2013 legislative recess, Representative McMillin met with government officials and attorneys across the state; they discussed the strengths of the new law and areas where it might be tweaked to simplify the process.<sup>110</sup> Representative McMillin brought these recommendations back to the statehouse; the statute was amended as of March 26, 2014,<sup>111</sup> and is in effect as of this writing.

105. See § 35-38-5-5(b) (2008).

106. *Zagorac*, 943 N.E.2d at 394.

107. *Id.*

108. The General Assembly passed a stopgap “Restricted Access to Criminal Records” statute in 2011; this statute created additional opportunities for persons convicted of low-level crimes to seek expungement after an eight-year waiting period. Act of May 10, 2011, No. 194, 2011 Ind. Acts 2489 (codified as amended at IND. CODE §§ 35-38-5-5.5, -8-1 to -7 (Supp. 2011) (repealed 2013)). The 2011 statute met with mixed reviews: as Nicole Porter, state advocacy coordinator for the D.C.-based Sentencing Project, observed, “[Indiana] passed a law that only expunges very low-level offenders after eight years. . . . It’s good that [Indiana] just passed that policy, but there’s a lot of work that still needs to be done.” *New Indiana Law Lets Ex-Offenders Close Records*, HERALD BULL. (July 5, 2011), [http://www.heraldbulletin.com/archives/article\\_67baf5d0-f208-5a39-b849-77877d9c092c.html](http://www.heraldbulletin.com/archives/article_67baf5d0-f208-5a39-b849-77877d9c092c.html).

109. H.B. 1482, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013). As amended, the bill passed the Indiana Senate with a vote of 39 to 11; it passed the House with a vote of 78 to 19. *Action List: House Bill 1482*, IND. GEN. ASSEMBLY, <http://www.in.gov/apps/lisa/session/billwatch/billinfo?year=2013&request=getActions&doctype=HB&docno=1482>. Andrew Cullen of the Indiana Public Defender Council observed that expungement “brings folks who are often at different ends of the political spectrum together. . . . Legislators of a conservative nature believe in redemption while legislators of a more liberal nature believe in the concept of second chances.” Marilyn Odendahl, *Giving Felons a Chance To Wipe Their Records Clean*, IND. LAW. (Feb. 27, 2013), <http://www.theindianalawyer.com/article/print?articleId=30843>.

110. Hannah Troyer, *Bill That Tweaks Expungement Law Headed to Full House*, THESTATEHOUSEFILE.COM (Jan. 15, 2014), <http://thestatehousefile.com/bill-tweaks-expungement-law-headed-full-house/14464/>.

111. Act of Mar. 26, 2014, No. 181, 2014 Ind. Acts. 2291 (codified as amended in scattered sections of IND. CODE tit. 35 (Supp. 2014)).

Under section 1 of Indiana's amended expungement statute (chapter 9 of title 35, article 38), persons who have been arrested but not convicted or whose convictions have been vacated on appeal may petition for expungement not earlier than one year after their date of arrest or the final order vacating their conviction.<sup>112</sup> For qualifying petitioners who have no criminal charges pending, courts are required to grant expungement: as a practical matter, this means that no information concerning the expunged arrest may be retained in the Indiana Central Repository or in "any other alphabetically arranged criminal history information system" maintained by an Indiana law enforcement agency.<sup>113</sup> However, relief under section 1 is not exhaustive: law enforcement agencies and courts are not required to alter their internal records, and records pertaining to pretrial diversion or deferral programs are not affected.<sup>114</sup>

The next four sections of chapter 9 present the requirements for expungement of conviction records.<sup>115</sup> Sections 2 and 3 describe mandatory expungement, while sections 4 and 5 describe discretionary expungement.<sup>116</sup> Certain baseline requirements apply across all four sections.<sup>117</sup> Each section establishes a waiting period triggered by either the date of conviction or the completion of the sentence.<sup>118</sup> Under the 2013 version of the statute, all petitioners were required to pay a civil filing

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112. § 35-38-9-1 (Supp. 2014). The prosecuting attorney may agree in writing to an earlier petition. § 35-38-9-1(b) (Supp. 2014).

113. § 35-38-9-1(f) (Supp. 2014). Under the 2013 version of the statute, in which a substantially similar process was known as "sealing," a defendant who had survived two mistrials and for whom all charges were dropped filed a petition to seal her criminal history. The court confirmed that it had no discretion but was required to seal the petitioner's records based on the qualifying factors of section 1. *See* Madeline Buckley, *Prosecutors Rip Indiana's New '2nd Chance Law'*, IND. ECON. DIG. (Oct. 30, 2013, 7:28 PM), <http://www.indianaeconomicdigest.net/main.asp?SectionID=31&subsectionID=224&articleID=71892>.

114. § 35-38-9-1(f)(1)–(3) (Supp. 2014). Furthermore, as of the 2014 amendments, if a former arrestee files suit in a case in which expunged arrest records could provide a complete defense, that former arrestee has the burden to prove that the contents of her records would not exonerate the defendant under the circumstances of her case. *See* § 35-38-9-1(g) (Supp. 2014).

115. Strangely, sections 2 and 3 make no mention of juvenile delinquency adjudications. In fact, after three legislative endeavors in 2011, 2013, and 2014, juvenile record expungement remains the province of an older statute that affords unchecked discretion to trial courts. *See infra* notes 206–16 and accompanying text.

116. The mandatory expungement provisions stipulate that a court "shall" order the conviction records of a qualifying petitioner expunged. *E.g.*, § 35-38-9-2(d) (Supp. 2014). The discretionary provisions indicate that a court "may" order the records expunged. *E.g.*, § 35-38-9-4(e) (Supp. 2014). Chapter 9 addresses misdemeanor and felony convictions only: in a separate Act enacted in 2013, prior law that automatically restricted access to infraction records after five years was replaced with new statutory language requiring petitions similar to those for misdemeanor expungement. Act of Apr. 29, 2013, No. 112, § 7, 2013 Ind. Acts 811, 814–18 (codified as amended at IND. CODE § 34-28-5-15 (Supp. 2014)).

117. Qualifying petitioners must prove by preponderance of the evidence that they have no charges pending against them and they must have paid all fines, fees, court costs, and restitution obligations. *E.g.*, § 35-38-9-2(d) (Supp. 2014).

118. These waiting periods can be adjusted with the prosecutor's written consent. *E.g.*, § 35-38-9-2(b), (d)(4) (Supp. 2014).

fee.<sup>119</sup> The statute expressly denied a waiver or reduction for indigence.<sup>120</sup> The waiver proscription was among the provisions eliminated by the 2014 amendments: according to the Division of State Court Administration, low-income petitioners may now qualify for a waiver just as in other civil actions.<sup>121</sup>

Under the mandatory expungement procedures, persons convicted of misdemeanors (including Class D or Level 6 felonies reduced to Class A misdemeanors<sup>122</sup>) may petition for expungement not earlier than five years after their date of conviction, assuming they have received no additional convictions during that period.<sup>123</sup> The policy is similar for persons convicted of most nonviolent Class D or Level 6 felonies, although they have a waiting period of eight years.<sup>124</sup>

119. Indiana's civil filing fee, which includes a baseline fee increased by administrative and pro bono service fees, currently stands at \$141. *See* § 33-37-4-4 (Supp. 2014); LILIA G. JUDSON, DIV. OF STATE COURT ADMIN., IND. SUPREME COURT, INDIANA TRIAL COURT FEE MANUAL 7 (2013), available at <http://www.state.in.us/judiciary/admin/files/pubs-fee-manual.pdf>.

120. *E.g.*, § 35-38-9-2(c) (Supp. 2013) (amended 2014).

121. *See* Marcia Oddi, *Ind. Courts—The New Expungement Changes Took Effect March 26th. What Are They?*, IND. L. BLOG (Apr. 3, 2014, 10:27 AM), [http://indianalawblog.com/archives/2014/04/ind\\_courts\\_the\\_47.html](http://indianalawblog.com/archives/2014/04/ind_courts_the_47.html). Civil litigants in Indiana may ordinarily avoid court costs by declaring under oath that they are indigent. Litigants who are represented by Indiana Legal Services, a statewide legal aid program, may qualify for a waiver if their attorneys vouch for their indigency. § 33-37-3-2 (2008).

122. On May 6, 2013, Governor Pence signed H.B. 1006 into law: effective July 1, 2014, the statute overhauled Indiana's sentencing requirements. Act of May 6, 2013, No. 158, 2013 Ind. Acts 1155 (codified as amended in scattered sections of IND. CODE (Supp. 2014)). The overhaul introduced harsher punishments and fewer early-release options for violent criminals and sex offenders while reducing the penalties for nonviolent crimes and empowering judges with greater discretion to place low-level offenders into community-based correction programs or substance abuse treatment rather than the state penitentiary system. Maureen Hayden, *New Sentencing Laws Prompt Local Worries Around State*, GREENSBURG DAILY NEWS (Apr. 30, 2014), <http://www.greensburgdailynews.com/local/x2117361225/New-sentencing-laws-prompt-local-worries-around-state>.

One consequence of this overhaul was a change in the way felonies are graded: the former four-tier system (A–D) was converted to a six-tier system (1–6). IND. LAW BLOG, CRIMINAL CODE REVISION BILL SUMMARY (2013), available at [http://indianalawblog.com/documents/Criminal%20Code%20Revision%20bill\\_%20Summary%20document-1.pdf](http://indianalawblog.com/documents/Criminal%20Code%20Revision%20bill_%20Summary%20document-1.pdf). Under the new scheme, Class D felonies are classified as Level 6, Class C felonies are classified as Level 5, Class B felonies are divided between Levels 3 and 4 based on severity, and Class A felonies are divided between Levels 1 and 2 based on severity. *Id.* Misdemeanors are unaffected. *Id.* The 2014 amendments to the expungement statute accounted for this change: as a result, sections 2 through 5 reference both the old four-tier system and the new six-tier system.

123. § 35-38-9-2(b), (d)(4) (Supp. 2014). The prosecutor may consent in writing to an earlier period. The Court of Appeals of Indiana recently clarified that persons who previously obtained court-ordered dismissal of misdemeanor convictions may qualify for subsequent expungement. In *J.B. v. State*, the court noted that a judicially ordered dismissal would have been “meaningless if the records concerning that conviction were to remain accessible,” and it could not “conclude that the General Assembly would have intended such a result.” No. 53A01-1408-CR-367, 2015 WL 1035487, at \*3 (Ind. Ct. App. Mar. 10, 2015).

124. § 35-38-9-3(c), (e)(4) (Supp. 2014). Again, the prosecutor may consent to an earlier period. Although section 3 excludes from coverage those felony convictions stemming from

Under the discretionary expungement procedures of section 4, persons convicted of many nonviolent felonies may file their petitions at the later of eight years after their date of conviction or three years after completing their sentence, unless the prosecutor consents in writing to an earlier period.<sup>125</sup> Section 5 enumerates the requirements for expungement of more serious felonies, including those committed by an elected official or those resulting in “serious bodily injury.”<sup>126</sup> Petitioners must wait until the later of ten years after their date of conviction or five years after completing their sentence, unless the prosecutor consents in writing to an earlier period.<sup>127</sup> Unique to section 5, petitioners must obtain the prosecutor’s written consent to proceed with the expungement process even if they satisfy the statutory waiting period.<sup>128</sup>

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“bodily injury to another person,” § 35-38-9-3(b)(3), the Court of Appeals of Indiana held in a March 2015 opinion that “facts from the same incident that do not result in a felony conviction cannot be taken into consideration when determining whether a person is disqualified from expungement.” *Trout v. State*, No. 12A04-1409-MI-403, 2015 WL 1186077, at \*4 (Ind. Ct. App. Mar. 16, 2015). In *Trout*, the petitioner was convicted of criminal recklessness with a deadly weapon and pointing a firearm, both Class D felonies. He was acquitted of attempted murder. Although the petitioner did not dispute that he shot and injured his victim, the appellate court disagreed with the trial court’s conclusion that it could not “turn a blind eye to the facts of the entire case.” *Id.* at \*3. The language of the expungement statute is clear: “a person is ineligible for mandatory expungement if they were convicted of a felony *and that felony* resulted in bodily injury to another person.” *Id.* (emphasis added). In *Trout*’s case, whatever other misconduct he may have engaged in during the course of the crime, his only convictions fit the requirements for expungement under section 3.

125. § 35-38-9-4(c) (Supp. 2014). The statute does not identify precisely what constitutes completion of a sentence—but qualifying language in the 2013 version that required petitioners to complete any term of supervised release was eliminated by the 2014 amendments. *Compare* § 35-38-9-4(c) (Supp. 2013) (amended 2014), *with* § 35-38-9-4(c) (Supp. 2014). *See also* *Alvey v. State*, No. 20A04-1310-MI-533, 2014 WL 3857228 (Ind. Ct. App. Aug. 6, 2014) (affirming denial of expungement petition where petitioner twice violated the terms of his probation but recognizing that petitioner may seek relief under the more liberal standards of the revised statute), *aff’g* 10 N.E.3d 1031 (2014).

Under current law, petitioners must also prove that they have not been convicted of any crime within the past eight years, though the prosecutor may override this requirement. § 35-38-9-4(e)(4) (Supp. 2014).

126. § 35-38-9-5(a) (Supp. 2014). The Code defines “serious bodily injury” to include injuries that cause a substantial risk of death or impairment, disfigurement, unconsciousness, extreme pain, or miscarriage. § 35-31.5-2-292 (Supp. 2014). While such language conveys gruesome imagery, courts have construed the term broadly. *See, e.g.*, *Lipka v. State*, 479 N.E.2d 575 (Ind. 1985) (quarter-inch laceration in proximity of vital organs, without actually impacting those organs, constituted serious bodily injury); *Chidebelu-Eze v. State*, No. 49A02-1308-CR-720, 2014 WL 2192382 (Ind. Ct. App. May 27, 2014) (unpublished slip opinion) (head-butt resulting in concussion constituted serious bodily injury).

127. § 35-38-9-5(c) (Supp. 2014). Like the other sections, section 5 has a “clean hands” requirement: petitioners must prove that they have not been convicted of any crime within the past ten years, though the prosecutor may override this requirement. § 35-38-9-5(e)(4) (Supp. 2014).

128. § 35-38-9-5(e)(5) (Supp. 2014).

Under Indiana law, no relief is available for persons formerly convicted of official misconduct, kidnapping, human trafficking, homicide, or sex crimes.<sup>129</sup>

The results of a successful petition for expungement hinge on the grade of the underlying offense. For section 2 misdemeanors and section 3 Class D / Level 6 felonies, courts must order the Department of Corrections, the BMV, and other law enforcement or treatment agencies to prohibit the release of affected records except to police or persons with a court order.<sup>130</sup> Courts must also order the Indiana Central Repository to seal the records, and they must ensure that related judicial opinions are redacted.<sup>131</sup> Notably, Indiana's expungement statute—unlike statutes in some other jurisdictions<sup>132</sup>—does not mandate that expunged records be destroyed. This was not a legislative oversight: the statute provides for a number of circumstances in which expunged records may be disclosed. For instance, a prosecutor may obtain expunged records from the Central Repository if she requires them to carry out of her official duties and if she obtains a court order.<sup>133</sup> The statute provides similar access for

129. § 35-38-9-5(b) (Supp. 2014). Presumably the public would balk at expungement for persons convicted of murder or rape; hesitation might well be warranted for such serious crimes. That said, it seems less obvious to categorically withhold relief from persons convicted of official misconduct as defined under Indiana law. *See* § 35-44.1-1-1 (Supp. 2014) (defining official misconduct to include knowing commission of an offense by a public servant, acceptance of a bribe, transacting based on confidential information, or failure to deliver public records to a successor servant); *see also* *State v. Dugan*, 793 N.E.2d 1034 (Ind. 2003) (allowing charge of official misconduct for state excise officer who accepted modest kickbacks from liquor merchandiser).

130. § 35-38-9-6(a)(1) (Supp. 2014).

131. § 35-38-9-6(a)(2), (c) (Supp. 2014).

132. *See, e.g.,* LA. CHILD. CODE ANN. art. 920 (2014) (“An order for the expungement of juvenile court records must be in writing and, except as hereinafter provided, must require that the clerk of court destroy all records relating to the conduct or conditions referred to in the motion for expungement, including but not limited to pleadings, exhibits, reports, minute entries, correspondence, and all other documents.”); VT. STAT. ANN. tit. 13, § 7606(d)(3)–(4) (Supp. 2013) (“Inspection of the expungement order and the certificate may be permitted only upon petition by the person who is the subject of the case or by the court if the court finds that inspection of the documents is necessary to serve the interest of justice. . . . All other court documents in a case that are subject to an expungement order shall be destroyed.”). *But see In re Kollman*, 46 A.3d 1247, 1254 (N.J. 2012) (“When a court orders expungement, criminal records are extracted and isolated, but not destroyed . . .” (citation omitted) (citing N.J. STAT. ANN. § 2C:52-1 (2005))).

133. § 35-38-9-6(a)(2)(A) (Supp. 2014). The requirement of a court order may provide some reassurance for formerly convicted persons who might worry about the vague prosecutorial power to obtain records if “needed to carry out [their] official duties.” Yet in subsection (d), the statute provides that “[n]otwithstanding subsection (b), a prosecuting attorney may submit a written application to a court that granted an expungement petition . . . to gain access to any records that were permanently sealed . . . if the records are relevant in a new prosecution.” If the prosecutor shows that the records are “relevant,” an undefined term in the statute, the court is then required to release the records to the prosecutor, who may introduce them into evidence in the new proceeding. § 35-38-9-6(d) (Supp. 2014). As a practical matter, then, a former offender's expunged records may well come back to haunt him if he finds himself at odds with the law once more, even if he is not actually convicted of a subsequent offense.

defense attorneys, probation departments, and federal investigative agencies, and it likewise provides access for persons who require expunged records to comply with the Secure and Fair Enforcement for Mortgage Licensing Act and its companion regulations.<sup>134</sup> As of 2014, the statute also provides that expunged records may be released to the state board of law examiners or its employees for the purpose of determining whether a bar applicant possesses “good moral character” (the so-called “character-and-fitness” test).<sup>135</sup>

For section 4 and 5 felonies, arrest and conviction records remain in the public domain, but courts will order these records to be marked as expunged.<sup>136</sup> Law enforcement and other agencies must add an entry to their databases indicating that the records have been marked as expunged.<sup>137</sup>

Perhaps the most critical, yet easily overlooked, element of the statute is the “one-bite-at-the-apple” limitation of section 9(i). This provision stipulates that petitioners may generally qualify for expungement only *once in a lifetime*.<sup>138</sup> If a petitioner has convictions in multiple counties, she must file in each county within a one-year period.<sup>139</sup> If her petition is denied, she may file a subsequent petition covering those offenses she originally sought to expunge, although in cases of discretionary expungement (sections 4 and 5), the petitioner must wait three years before submitting a subsequent petition.<sup>140</sup> Under the 2013 version of the law, the one-bite-at-the-apple limitation was particularly severe for low-income, pro se petitioners: it permitted only one *petition* in a lifetime, and it made no accommodation for excusable neglect or an honest mistake (for example, failing to list an old-and-cold offense or omitting a mandatory element of the petition).<sup>141</sup> The 2014 amendments made this provision fairer for pro se petitioners: now, a court may permit a petitioner to file a subsequent petition with respect to convictions not originally included if the court finds that the petitioner intended to comply with the statute’s requirement but failed due to excusable neglect or circumstances beyond her control.<sup>142</sup> Even so, courts have discretion to permit or deny subsequent petitions based on “the best interests of justice.”<sup>143</sup> Because the amended language is quite new, no appellate courts have reviewed a denial of subsequent expungement for abuse of discretion—but it seems that results may vary across the state given the legislature’s failure to supply particular criteria and given that some judges are publicly opposed to the law.<sup>144</sup>

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134. § 35-38-9-6(a)(2)(B)–(D), (F) (Supp. 2014); *see also* 12 U.S.C. § 5104 (2012) (discussing background check and other requirements for loan origination licenses); FED. DEPOSIT INS. CORP., FDIC COMPLIANCE MANUAL, at V-14.1 (2014), *available at* <http://www.fdic.gov/regulations/compliance/manual/pdf/V-14.1.pdf>.

135. § 35-38-9-6(a)(2)(E) (Supp. 2014).

136. § 35-38-9-7(b) (Supp. 2014).

137. § 35-38-9-7(c) (Supp. 2014).

138. § 35-38-9-9(h) (Supp. 2014).

139. *Id.*

140. § 35-38-9-9(i) (Supp. 2014).

141. § 35-38-9-9(j) (Supp. 2013) (amended 2014).

142. § 35-38-9-9(j) (Supp. 2014).

143. *Id.*

144. *See Prosecutors: Expungement Law Has Good, Bad Sides*, INDIANAPOLIS BUS. J. (July

The final sections of chapter 9 represent a legislative effort to put some teeth into the new statute. Section 10 clarifies that discrimination on the basis of an expunged record is unlawful.<sup>145</sup> Now, job applications that ask about criminal histories may do so only in terms that “exclude expunged convictions or arrests.”<sup>146</sup> Persons who discriminate on the basis of an expunged record commit a Class C infraction and may be held in contempt of court.<sup>147</sup> Victims of such discrimination may sue for injunctive relief.<sup>148</sup> Section 11, the final section of the statute, was added by the 2014 amendments: it provides that a defendant may not waive the right to expungement via a plea agreement and that purported waivers are void as against public policy.<sup>149</sup>

#### V. THE AFTERMATH OF CHAPTER 9: PUBLIC PRAISE, PROSECUTORIAL PERPLEXITY

The passage of the 2013 expungement statute generated ample publicity, with small law firms in particular investing in advertisements and editorials to attract new clients.<sup>150</sup> Andre Patterson, outreach coordinator for the Office of Diversity and

20, 2014), <http://www.ibj.com/prosecutors-expungement-law-has-good-bad-sides/PARAMS/article/48674> [hereinafter *Prosecutors on Expungement*] (“Morgan Superior Court Judge G. Thomas Gray, a former prosecutor, said he dislikes the expungement process and objects to a provision that says victims can address the court, but the judge cannot consider their testimony if the expungement fits the statute.”).

145. § 35-38-9-10(b) (Supp. 2014). The statute prohibits suspension, expulsion, refusal to employ, refusal to admit, refusal to license, and any other discrimination on the basis of sealed or expunged records. *Id.*

146. § 35-38-9-10(d) (Supp. 2014).

147. § 35-38-9-10(f) (Supp. 2014). Elsewhere in the Code, a Class C infraction is defined as a civil offense with a penalty of up to \$500. § 34-28-5-4(c) (2008). Funds collected through the administration of such a penalty are deposited into the state’s general fund. § 34-28-5-5(c) (2008). Contempt is a somewhat looser concept: “indirect contempt,” most applicable here, applies to willful disobedience of a process or order and may give rise to a fine, imprisonment, or both. §§ 34-47-3-1, -6 (2008). In *Davis v. Sponhauer*, the court of appeals held that punishment for contempt is left to the “sound discretion of the trial court.” 574 N.E.2d 292, 302 (Ind. Ct. App. 1991).

148. § 35-38-9-10(f) (Supp. 2014). Almost simultaneously with passage of the 2013 expungement statute, and as a companion provision to the section 10 remedies, the General Assembly modified title 24 trade regulations concerning the management and dissemination of criminal records. Act of Apr. 29, 2013, No. 112, §§ 1–6, 2013 Ind. Acts 811, 811–14 (codified as amended at IND. CODE §§ 24-4-18-1 to -8 (Supp. 2014)). Per the amended provisions, criminal history providers must not knowingly release information pertaining to expunged records. § 24-4-18-6(a)(1) (Supp. 2014). A knowing violation is actionable as a “deceptive act.” § 24-4-18-8(a) (Supp. 2014). Persons injured by such an act are entitled to sue for damages. § 24-5-0.5-4(a) (Supp. 2014). The Assembly’s choice to apply civil deception remedies in cases of unlawful dissemination is puzzling. It appears that a plaintiff seeking to recover damages would be required to show that she relied to her detriment on an “uncured or incurable” deceptive act. *Id.* Perhaps a plaintiff who was denied employment due to a wrongfully disseminated record would have a justiciable cause of action.

149. § 35-38-9-11 (Supp. 2014). It seems that this provision may represent a partial legislative response to arguments raised by Prosecutor Steve Sonnega in the *Combs* dispute. See *infra* note 163 and accompanying text.

150. See, e.g., *Indianapolis Expungement Law Attorneys*, WINKLERYORKLAW.COM,



Multicultural Affairs at Indiana University–Purdue University Fort Wayne, noted that more than 160 people registered for a training session on the new law, while others waited in line for hours to attend the session.<sup>151</sup> Marion County Deputy Prosecutor Andrew Fogle said that his office received between thirty and forty petitions within the first two months.<sup>152</sup>

Despite the enthusiasm of petitioners, some legal professionals raised concerns about the operation or potential consequences of the statute. In a July 2013 interview, Judge Fran Gull of the Allen Superior Court cautioned that courts did not have a sufficient framework in place to process the potential deluge of petitions.<sup>153</sup> She also warned that petitioners should seek qualified counsel before filing, given the complex eligibility requirements and the “one-bite-at-the-apple” provision.<sup>154</sup> Allen County Deputy Prosecutor Michael McAlexander echoed Judge Gull’s concerns, observing that an ex-offender in her early twenties might hesitate to petition the court if there was a chance she might encounter legal problems later in life.<sup>155</sup> Deputy Prosecutor Fogle raised a different concern: while the statute requires the prosecuting attorney to “inform the victim of the victim’s rights . . . by contacting the victim at the victim’s last known address,”<sup>156</sup> such a feat is easier said than done for decades-old convictions.<sup>157</sup>

Other prosecutors expressed concern less with the statute’s practical workings and more with its policy implications. Shelby County Prosecutor Kent Apsley remarked derisively that “[f]rom an offender’s standpoint, this law is, obviously, a huge

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<http://www.winkleryorklaw.com/expungement/>; Peterson Waggoner & Perkins, LLP, *Expungement of Criminal Records in Indiana*, YOUTUBE (Aug. 16, 2013), <http://www.youtube.com/watch?v=ld5TAN2wlaI>.

151. Frank Gray, *Thirst Acute for Info on Sealing Crime Files*, FORT WAYNE J. GAZETTE, Oct. 15, 2013, at 1C.

152. Ryckaert, *supra* note 20. In a public relations debacle, between two hundred and three hundred people crowded into the Marion County Clerk’s Office on July 1, 2013, believing that expungement was available for one day only. Dave Stafford, *Complexity of New Expungement Law Raises Questions*, IND. LAW. (July 17, 2013), <http://www.theindianalawyer.com/complexity-of-new-expungement-law-raises-questions/PARAMS/article/31913>.

153. *Law Allowing Expungement Creating Legal Confusion*, POST-TRIB., July 27, 2013, <http://posttrib.suntimes.com/news/21566608-418/law-allowing-expungement-creating-legal-confusion.html>.

154. *Id.* The statute in effect at the time of Judge Gull’s comments offered no apparent relief for pro se petitioners who filed improperly or who inadvertently omitted an offense. As amended in 2014, the statute offers higher tolerance for excusable neglect, although the general rule of once-in-a-lifetime expungement remains the law. *See supra* notes 141–43 and accompanying text.

155. *Id.* McAlexander’s concern is grounded in a practical understanding of recidivism: over one-third of Indiana’s adult inmates are reincarcerated within three years of their release. IND. DEP’T OF CORR., ADULT RECIDIVISM RATES (2012), *available at* [http://www.in.gov/idoc/files/2012\\_Adult\\_Recidivism\\_Summary.pdf](http://www.in.gov/idoc/files/2012_Adult_Recidivism_Summary.pdf). Even if a youthful ex-offender has every intention of staying on course for the duration of her life, the idea of a once-in-a-lifetime opportunity can chill young adults facing decades of experiences, surprises, and, inevitably, mistakes.

156. IND. CODE § 35-38-9-8(e) (Supp. 2014).

157. Stafford, *supra* note 152. For crimes committed long before digitized records, tracking down victims may prove impossible, especially for rural prosecutors’ offices with small staffs and limited resources.

benefit. They can essentially wipe out a whole lifetime of crime.”<sup>158</sup> Apsley described the “big losers” as employers who are prohibited, under section 10, from asking about nonexpunged crimes.<sup>159</sup> Allen County Prosecutor Karen Richards agreed that employers have a legitimate interest in making informed decisions.<sup>160</sup>

While most criticism of the expungement law has fallen along predictable policy lines, some critics have posed more nuanced legal arguments. On October 18, 2013, Morgan County Prosecutor Steve Sonnega asked Judge Matthew Hanson to declare the statute unconstitutional.<sup>161</sup> Sonnega attacked the statute on several bases: he argued, for instance, that the statute undermined judicial discretion through its mandatory expungement provisions,<sup>162</sup> and he contended that the legislature’s introduction of expungement law unconstitutionally interfered with plea bargain “contracts” established under prior law.<sup>163</sup> The crux of Sonnega’s argument, however, was that the expungement statute violates the state constitution’s requirement that victims of crimes must be treated with dignity.<sup>164</sup> While victims are

158. Paul Gable, *Apsley Uncertain of New State Law*, SHELBYVILLE NEWS, Aug. 17, 2013, available at 2013 WLNR 20466953.

159. *Id.* Jackson County Prosecutor AmyMarie Travis also expressed concern that ex-convicts might conceal past indiscretions, such as internal theft, from potential employers, though she admitted that she would urge her own family members to take advantage of the law if it would benefit them. Aubrey Woods, *Indiana Expungement Law Gives Woman a Fresh Start*, COURIER-JOURNAL (Mar. 30, 2014, 3:05 PM), <http://www.courier-journal.com/story/news/local/indiana/2014/03/30/indiana-expungement-law-gives-woman-fresh-start/7084151/>.

160. Editorial, *Expunge with Care*, FORT WAYNE J. GAZETTE, Nov. 4, 2013, at 6A. In fact, the legislature did take account of employer concerns in the new statute, providing that expunged records are inadmissible in negligent hiring suits. *See* § 35-38-9-10(g) (Supp. 2014). This safeguard may not address all employment-related issues, but it should soothe the trepidations of human resource managers fearful of lawsuits.

One might argue that the concerns voiced by Prosecutors Apsley and Richards overlook the possibility of bona fide rehabilitation. Recidivism in Indiana declined five percent from 2011 to 2012, paralleling similar and even sharper declines in other states. *Fewer Reformed Criminals Return to Prison*, WNDU.COM (Mar. 6, 2013, 7:05 AM), <http://www.wndu.com/home/headlines/Fewer-reformed-criminals-return-to-prison-195527471.html> [hereinafter *WNDU Article*]; Letter from Danny K. Davis, *supra* note 82. State-sponsored courses in substance abuse awareness, anger management, and vocational training may be partly to credit for the decline; federal investment through the Second Chance Act has undoubtedly helped as well. *WNDU Article, supra*; *see also* Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.). That said, over one-third of Indiana’s adult inmates are reincarcerated within three years of their release, so Apsley’s and Richards’s concerns are not without merit. *See supra* note 155; *but see supra* notes 49–50 (arguing that elimination of rap-sheet stigma may offset the economic desperation that often leads to recidivism). It is worth noting that if an ex-convict recidivates within a three-year period, he will probably not qualify for expungement anyway, as the statutory waiting period for the lowest-level offenses is five years. § 35-38-9-2(b), (d)(4) (Supp. 2014).

161. Tim Evans, *Law Erasing Criminal Records Faces Challenge*, INDIANAPOLIS STAR, Oct. 28, 2013, at A1.

162. *Combs v. State*, No. 55C01-1308-MI-1392, slip op. paras. 9–10 (Morgan Cnty. Cir. Ct. Oct. 28, 2013).

163. *Id.* slip. op. para. 25.

164. *Id.* slip. op. para. 51; *see also* IND. CONST. art. I, § 13(b) (“Victims of crime, as defined

invited to submit statements supporting or opposing the expungement petition, “the law does not give a judge any leeway to consider that input.”<sup>165</sup>

In an October 28 order, Judge Hanson rejected most of Sonnega’s arguments. However, he agreed that section 9’s solicitation of victim input is incompatible with the earlier provisions that “do not require a consideration of a victim’s statement before they ‘shall’ grant an expungement.”<sup>166</sup> Thus, Judge Hanson concluded, “the statute is ineffectual when it comes to victim’s [sic] rights and therefore violates the Indiana Constitution.”<sup>167</sup> In spite of his conclusion, Judge Hanson did not strike down any portion of the statute—because the case at hand concerned a DUI offense for which “there really [was] no victim.”<sup>168</sup>

Judge Hanson’s decision to forego invalidation in spite of his misgivings was an eminently reasonable expression of judicial restraint.<sup>169</sup> Moreover, it is not clear that Sonnega had standing to challenge the constitutionality of the statute in the first instance.<sup>170</sup> Citing to a recent Indiana Supreme Court case, Professor Joel Schumm of the Indiana University Robert H. McKinney School of Law observed that “the State is the State,” and the “Attorney General, the State official charged with defending the constitutionality of state statutes, cannot be too pleased that the State (through a deputy prosecutor) is alleging a statute unconstitutional.”<sup>171</sup>

by law, shall have the right to be treated with fairness, dignity, and respect throughout the criminal justice process.”).

165. Evans, *supra* note 161.

166. *Combs*, No. 55C01-1308-MI-1392, slip op. para. 47. Judge Hanson’s order came down months before the 2014 amendments were enacted. Under the version of the statute in effect at the time of Judge Hanson’s order, section 9(d) provided that “[t]he court shall consider the victims statement before making its determination.” The General Assembly eliminated this language in 2014, but the statute still welcomes victim input—and arguably, Sonnega’s complaint is stronger now that the statute does *not* require judges to consider the input they receive. As Sonnega himself observed in a July 2014 interview, “There’s not much leeway for a prosecutor or judge, and granting these [petitions] becomes perfunctory, and that bothers me.” *Prosecutors on Expungement*, *supra* note 144.

167. *Combs*, No. 55C01-1308-MI-1392, slip op. para. 53.

168. *Id.* slip op. para. 54.

169. To strike down a statute on the basis of harm to a nonexistent party would seem to violate the Indiana Supreme Court’s dictate that “[w]hen a statute can be construed to support its constitutionality, such construction must be adopted.” *Miller v. State*, 517 N.E.2d 64, 71 (Ind. 1987), *superseded on other grounds by statute*, IND. CODE § 35-37-4-6 (2008). Furthermore, while Indiana’s constitution lacks a “case or controversy” provision equivalent to the requirement of Article III, the Indiana Supreme Court has recognized that “the separation of powers language in Art. III, § 1 fulfills an analogous function” in judicial activity or inactivity. *Ind. Dep’t of Env’tl. Mgmt. v. Chem. Waste Mgmt., Inc.*, 643 N.E.2d 331, 336–37 (Ind. 1994); *see also* IND. CONST. art. III, § 1 (“The powers of the Government are divided into three separate departments . . . and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided.”).

170. *See Schloss v. City of Indianapolis*, 553 N.E.2d 1204, 1206 (Ind. 1990) (describing standing as a principle confining courts to “resolving real controversies in which the complaining party has a demonstrable injury”).

171. Joel Schumm, *State Constitutional Twilight Zone: Judges and Prosecutors Are Arguing Statutes Are Unconstitutional*, IND. L. BLOG (Sept. 25, 2013, 12:27 PM),

Beyond the procedural impropriety of Sonnega's claim, however, its merits warrant additional consideration. In concluding that "the dictates of sections 2–5 do not require a consideration of a victim's statement before they 'shall' grant an expungement,"<sup>172</sup> Judge Hanson appears to have misread the statute. While sections 2 and 3 require a judge to grant expungement for qualifying petitioners ("shall order"), sections 4 and 5 are discretionary ("may order"), and section 5 requires the petitioner to obtain the prosecuting attorney's consent.<sup>173</sup>

Furthermore, both Sonnega and Judge Hanson seem to have assumed that victims have a stake in expungement proceedings that must be weighed against the interests of petitioners. Yet the statute is structured so that expungement is available only after a petitioner has completed her sentence,<sup>174</sup> and the statute requires petitioners to have satisfied all costs, fees, and other financial obligations in connection with their conviction.<sup>175</sup> Restitution, if demanded, has been paid; time, if ordered, has been served.<sup>176</sup> The individual sentencing provisions of the Code make no mention of criminal records: as Judge Hanson himself suggested, these records are procedural ("norm[s] of doing business") rather than substantive.<sup>177</sup> Crimes and sentences are defined by the state legislature, a body democratically elected by a constituency that includes the victims of crimes. Once a convict has served out his sentence, he has done all that the law requires of him. Victims are constitutionally entitled to respect throughout prosecutions, and they are entitled to be present at public hearings<sup>178</sup>—but they are not entitled to shape the outcomes of procedures, particularly for offenders who have served their time.<sup>179</sup>

[http://indianalawblog.com/archives/2013/09/ind\\_courts\\_stat\\_61.html](http://indianalawblog.com/archives/2013/09/ind_courts_stat_61.html) (quoting *Becker v. State*, 992 N.E.2d 697, 698 (Ind. 2013)).

172. *Combs*, No. 55C01-1308-MI-1392, slip op. para. 47.

173. See §§ 35-38-9-2(d), -3(e), -4(e), -5(e) (Supp. 2014).

174. For example, section 3—expungement of Class D and Level 6 felonies—provides that eight years must have elapsed since the date of the petitioner's conviction. § 35-38-9-3(c) (Supp. 2014). Yet prison terms for Class D and Level 6 felons range from six months to three years, with the current advisory sentence being just one year. § 35-50-2-7(a)–(b) (Supp. 2014). The statute does provide that the prosecuting attorney may consent in writing to an earlier period. *E.g.*, § 35-38-9-2(b) (Supp. 2014). However, it seems inconceivable that a prosecutor would consent to expungement while the petitioner is still serving time.

175. §§ 35-38-9-2(d)(3), -3(e)(3), -4(e)(3), -5(e)(3) (Supp. 2014).

176. Victims of heinous crimes may reasonably feel that no penalty, however severe, could offset the harm that has been done to them. But expungement is not available for the most serious crimes, such as homicide or rape. Furthermore, for victims who cannot obtain sufficient relief through the operation of criminal law, tort law provides time-honored remedies. See *Allgood v. Meridian Sec. Ins. Co.*, 836 N.E.2d 243, 246 (Ind. 2005) ("Making a party 'whole' is the province of tort law . . .").

177. See *Combs*, No. 55C01-1308-MI-1392, slip op. para. 26.

178. IND. CONST. art. I, § 13(b). The constitutional provision, however, pertains specifically to prosecutions, and it refers to the adverse party as the "accused." It is not clear that this provision applies to postconviction hearings over procedural matters such as expungement. *Cf.* § 35-40-5-5 (2008) (authorizing victim input at proceedings involving sentencing and release but making no mention of expungement or criminal records).

179. In addition to the merits analysis, there are more practical considerations. As Martinsville attorney Glen Koch II observed, the legislature "wanted to make [expungement]

Although Judge Hanson left open the possibility that he would strike down the expungement statute if a future challenge involved an identifiable victim, the court of appeals likely foreclosed such a result in an April 2014 opinion.<sup>180</sup> In *Taylor v. State*, the court considered a petition filed by Jason Taylor to expunge a decade-old misdemeanor conviction. Although Taylor met the requirements of section 2, the Lake County Superior Court denied his petition after his former victim testified that she “still suffers the effects of what [Taylor] did” and “believes that the punishment should fit the crime.”<sup>181</sup> The version of the expungement statute in effect at the time of Taylor’s conviction included the language that most troubled Judge Hanson—that the court “shall consider the victim’s statement before making its determination.”<sup>182</sup> Chief Judge Vaidik, writing for the panel, agreed with Taylor that section 2 unambiguously requires expungement if the petitioner satisfies all the requirements, and she pointed out that the use of “may” in sections 4 and 5 connotes legislative line drawing between proceedings in which courts have discretion and those in which they do not.<sup>183</sup> Because Taylor satisfied the requirements of section 2, he was entitled to expungement—and the lower court erred in denying him relief.<sup>184</sup>

Although the *Taylor* court did not evaluate constitutional arguments per se, its straightforward enforcement of mandatory expungement over a former victim’s protests renders it unlikely that a lower court will dare to strike the statute down.<sup>185</sup> *Taylor* signals that Indiana’s expungement law is here to stay.

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easy and keep the costs down so these cases could be handled without getting into some big, drawn-out and expensive litigation.” Evans, *supra* note 161.

180. *Taylor v. State*, 7 N.E.3d 362 (Ind. Ct. App. 2014).

181. *Id.* at 364.

182. *Id.*

183. *Id.* at 365–66.

184. *Id.* at 367. An article in the *Indianapolis Star* published shortly after the *Taylor* decision suggested that the appellate court’s ruling will provide clarity for lower courts that may be reviewing expungement petitions filed under the 2013 version of the statute, with its conflicting “shall” (shall consider the victim’s statement, shall order the records expunged). Quoting attorney Stephen Moell of Schererville, the article noted that *Taylor* “puts those who filed for expungement under the initial version of the law on equal footing with those who file now.” Tim Evans, *Expungement Law Favors Reformed Criminals over Victims, Appeals Court Says*, INDYSTAR (Apr. 24, 2014, 5:51 PM), <http://www.indystar.com/story/news/crime/2014/04/24/expungement-law-favors-criminals-victims-appeals-court-says/8096707/>; see also *Mallory v. State*, No. 20A03-1403-MI-76, 2014 WL 4049802 (Ind. Ct. App. Aug. 15, 2014) (citing *Taylor* and holding that petitioner, who met all the requirements of section 35-38-9-3(e), was entitled to expungement of Class D felony theft conviction against victims’ wishes).

185. Cf. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *What Do Federal District Judges Want? An Analysis of Publications, Citations, and Reversals* 7 (John M. Olin Law & Econ., Working Paper No. 508, 2010) (“Except when they sit in a circuit with appellate judges who share their ideological preferences, district judges must choose between deciding cases that promote their ideological preferences and enjoying a high rate of affirmance. Since the former choice just means reversal and ultimately the failure to promote their ideological preferences, there is no choice at all. District judges will suppress their ideological leanings and decide cases so as to avoid reversal.”).

## VI. RECOMMENDED REVISIONS

Indiana's expungement law represents a significant effort to counter the deleterious effects of rap-sheet stigma and to provide relief for ex-offenders who seek to lead productive, prosocial lives. The 2013 legislation established a solid statutory foundation; the 2014 amendments made the statute fairer and more accessible.<sup>186</sup> The General Assembly should be commended for its bipartisan commitment to second chances. That said, important legislation is often a work in progress,<sup>187</sup> and the expungement statute could benefit from additional revisions and enhancements.<sup>188</sup> This final Part presents a variety of recommendations for the

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186. For instance, the 2014 amendments eliminated the compulsory filing fee, *see supra* note 121, and granted courts discretion to overlook excusable filing errors, *see supra* note 142.

187. Cf. Nicholas Bala, *A Report from Canada's 'Gender War Zone': Reforming the Child-Related Provisions of the Divorce Act*, 16 CAN. J. FAM. L. 163, 225 (1999) ("It must be recognized that the reform of child related laws will always be a 'work-in-progress,' being improved by legislators, judges and bureaucrats as more and better research becomes available."); Patrick O. Gudridge, *Complexity and Contradiction in Florida Constitutional Law*, 64 U. MIAMI L. REV. 879, 927 (2010) ("Legislative drafters can hardly be expected to monitor closely all parts of a bill and also its legislative history, at least in cases . . . in which the content of legislation is a work in progress."); Helen Elizabeth Hartnell, *Belonging: Citizenship and Migration in the European Union and in Germany*, 24 BERKELEY J. INT'L L. 330, 338 (2006) ("[T]he EU's legal framework on nationality/citizenship and on migration remains a highly contested work in progress."); Matias F. Travieso-Diaz, *Key Environmental Legislation for Cuba's Transition Period*, 21 U. PA. J. INT'L ECON. L. 331, 364 (2000) ("The transition period in Cuba will likely be characterized by frequent and perhaps dramatic changes in economic and political conditions. . . . Accordingly, the fundamental law must be considered 'work in progress' legislation, and may expressly provide that it is subject to periodic re-evaluation, at least during the first decade of the transition.").

188. Four expungement-related bills were introduced to the General Assembly during the 2015 session: as of mid-March, two of those bills were proceeding through committee and will likely merge into a uniform set of amendments to the expungement law later this spring. Compare S.B. 287, 119th Gen. Assemb., Reg. Sess. (Ind. 2015), with H.B. 1302, 119th Gen. Assemb., Reg. Sess. (Ind. 2015). Both bills would expand section 1 coverage to charges without arrest and allegations of juvenile delinquency while broadening the mandatory redaction of related judicial records. Both bills would also eliminate the requirement that petitioners submit a certified driving record along with their petitions. The senate bill would remove the filing fee altogether, while the house bill would require civil filing fees—with a caveat that courts may reduce or waive the fees for indigent petitioners. The house bill would eliminate the requirement that petitioners must have satisfied all fines, fees, costs, and restitution obligations, while the senate bill would retain that requirement. The house bill would withhold all expungement relief from persons who were convicted of two or more felony offenses involving the use of a deadly weapon where such offenses were not committed during a single crime. The house bill would also provide that prosecutors need not notify victims of their rights—per section 8—in cases of mandatory expungement, while both bills would treat a prosecutor's failure to timely reply to an expungement petition as a waiver of any objections. Both bills would add a new section 8.5 with guidance for petitioners who were convicted of offenses punishable by indeterminate sentences. Finally, both bills would clarify that an expungement case becomes confidential once the court issues an expungement order; however, the house bill further clarifies that hearings conducted prior to that order are open to the public.

General Assembly's consideration. These recommendations fall into three general categories—administrability, fairness, and effectiveness.

*A. Administrability*

Like courts across the nation, Indiana courts place a premium on judicial efficiency.<sup>189</sup> Overall, the expungement law is reasonably administrable: it provides for explicit waiting periods,<sup>190</sup> it enumerates the elements of a proper petition,<sup>191</sup> and it outlines remedies available in cases involving unlawful discrimination.<sup>192</sup> Yet two provisions of section 9 interfere with the efficient administration of the statute. Subsection (c) provides that the prosecuting attorney may object to the petition, in which case the court must set the matter for a hearing “not sooner than sixty (60) days after service of the petition on the prosecuting attorney.”<sup>193</sup> Subsection (d) invites victims of the underlying offense to submit oral or written statements in response to the petition for expungement at the time of any such hearing.<sup>194</sup> These prosecutor/victim input provisions may offer some utility in higher-grade expungement proceedings, where courts must exercise discretion to grant or deny relief,<sup>195</sup> but they simply do not comport with the language in sections 2 and 3. A petitioner seeking expungement of a misdemeanor or Class D / Level 6 felony must satisfy the waiting period and certain other requirements, but she requires the blessing of neither the prosecutor nor the victim. If she satisfies the enumerated requirements, the court *shall* grant her petition. On what basis, other than perhaps procedural deficiency, can the prosecutor object?<sup>196</sup> And what value can accrue from

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189. See, e.g., *Randolph Cnty. v. Chamness*, 879 N.E.2d 555, 557 (Ind. 2008) (“Reliable preferred venue rules increase judicial efficiency because a judge can focus on the merits of a dispute rather than its relocation to a more convenient forum.”); *Avery v. State*, 484 N.E.2d 575, 576 (Ind. 1985) (“[W]hen both the State and the appellant have asked the trial judge to certify the question and the trial judge has so certified on the basis that much time, effort and money will be saved by obtaining the interlocutory ruling and where the issue is a single issue which in reality needs no separate assignment of errors, it is in the interest of judicial efficiency to grant the joint motion and proceed with the decision of the interlocutory appeal on the merits.”); *Ross v. Bachkurinskiy*, 770 N.E.2d 389, 392 (Ind. Ct. App. 2002) (“The trial court must balance the need for an efficient judicial system with the judicial preference for deciding disputes on the merits.”).

190. See, e.g., IND. CODE § 35-38-9-2(b), (d)(4) (Supp. 2014).

191. See § 35-38-9-8 (Supp. 2014).

192. But see *infra* Part VI.C (proposing supplemental or alternative remedies to increase the statute’s effectiveness).

193. § 35-38-9-9(c) (Supp. 2014).

194. § 35-38-9-9(d) (Supp. 2014).

195. But see *supra* notes 174–179 (questioning whether victims should participate in the expungement process at all).

196. Even procedural deficiency seems unlikely to justify a full-fledged hearing: a court should be able to determine with relative ease whether the ex-offender’s verified petition complies with the enumerated requirements of section 8. Perhaps the drafters were concerned that petitioners may conceal more recent offenses in their effort to expunge older ones. Yet such dishonesty seems improbable given that false affirmations in verified pleadings subject the petitioner to the penalties for perjury. See IND. R. TRIAL P. 11(B). Furthermore, if the

welcoming the victim's input if expungement is a foregone conclusion?<sup>197</sup> To prevent a slew of unnecessary hearings<sup>198</sup> and to avoid mixed messages, the General Assembly should amend section 9 so that the prosecutorial objection and victims' input provisions apply—*if at all*<sup>199</sup>—to discretionary expungement only.

The General Assembly could also improve the statute's administrability by drafting guideposts to assist courts with discretionary expungement determinations. Currently, the statute provides that a court "may order" expungement for petitioners who satisfy the waiting period and other qualifications—yet it attaches no criteria to that "may order."<sup>200</sup> The Assembly could ensure more consistent and efficient decision making by articulating factors that courts should consider. The Supreme Court of Pennsylvania enumerated a list of such factors to reinforce its own expungement doctrine:

These (factors) include the strength of the [state's] case against the petitioner, the reasons the [state] gives for wishing to retain the records, the petitioner's age, criminal record, and employment history, the length of time that has elapsed between the arrest and the petition to expunge,

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General Assembly wishes to include an additional safeguard, it could simply require petitioners to obtain and submit a fingerprint background check as part of the expungement process. See *Inkless: Indiana's Electronic Fingerprinting Network*, IN.GOV, <http://www.in.gov/isp/2674.htm>. A background check requirement would be faster and more efficient for the petitioner and the court, and it would enable low-income petitioners to proceed pro se rather than seeking counsel for an unnecessary hearing.

197. If anything, such an invitation seems likely to stir up resent among victims, particularly if they are unfamiliar with the statute and take the time to draft a thoughtful statement. Inviting victims to opine on a process they cannot technically influence hardly seems compatible with the constitutional mandate that victims "have the right to be treated with fairness, dignity, and respect throughout the criminal justice process." IND. CONST. art. I, § 13(b).

198. For every one person convicted of a felony, ten are convicted of misdemeanors—subject to mandatory expungement in Indiana. See Alexandra Natapoff, *Why Misdemeanors Aren't So Minor*, SLATE (Apr. 27, 2012, 11:33 AM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/04/misdemeanors\\_can\\_have\\_major\\_consequences\\_for\\_the\\_people\\_charged\\_.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/04/misdemeanors_can_have_major_consequences_for_the_people_charged_.html).

199. If the General Assembly insists on victim participation with respect to higher-grade expungements, then the Assembly should consider an additional modification to section 8. As written, the statute requires prosecuting attorneys to "inform the victim of the victim's rights . . . by contacting the victim at the victim's last known address." § 35-38-9-8(e) (Supp. 2014). However, it may be impractical to contact victims of stale offenses that predated computerized records or to notify all parties in cases involving multiple victims. See *supra* note 157 and accompanying text. The General Assembly could account for such impracticability by drafting more flexibly: "If time and circumstances permit, the prosecuting attorney shall inform the victim of the victim's rights if records of the victim's last known address are reasonably accessible or the prosecuting attorney otherwise has a reasonable ability to contact the victim." At a minimum, the Assembly should add language to prevent unnecessary holdups. Kentucky's expungement statute, which similarly requires notice to victims, provides a helpful model: "Inability to locate the victim shall not delay the proceedings in the case or preclude the holding of a hearing or the issuance of an order of expungement." KY. REV. STAT. ANN. § 431.078(3) (LexisNexis 2010).

200. See § 35-38-9-4(e), -5(e) (Supp. 2014).



and the specific adverse consequences the petitioner may endure should expunction be denied.<sup>201</sup>

Finally, the General Assembly could make the statute more administrable by providing an alternative to prosecutorial consent for section 5 felony expungement. For such petitions, the Assembly reserved the most stringent prerequisites: a petitioner must wait for the later of ten years after her date of conviction or five years after completing her sentence, and she must obtain written consent from the prosecutor.<sup>202</sup> While strict requirements may seem appropriate for expungement of serious offenses, several Indiana prosecutors have sharply criticized the statute, and it is unclear whether they would consent to expungement even if the petitioner exhibits indicia of reform.<sup>203</sup> This uncertainty raises concerns of unbalanced justice: petitioners in progressive counties may find local prosecutors amenable to a second chance, while persons convicted of identical crimes in hardline counties may face strong resistance. To avoid this imbalance, the Assembly could authorize courts to consider the input of family members, employers, and religious or community leaders in lieu of prosecutorial consent.<sup>204</sup> Such input might actually shed better light on the petitioner's particular circumstances versus a stamp of approval from the prosecutor, who may have limited or no contact with the ex-offender after she reenters society.

#### *B. Fairness*

Aside from the practical considerations addressed in Part VI.A, the expungement statute raises five normative concerns<sup>205</sup>: (1) it excludes from coverage the records of children adjudicated as delinquent; (2) it limits relief and imposes an arbitrary delay for persons arrested but not convicted; (3) it bases its waiting periods on procedural circumstances beyond the petitioner's control; (4) it sets an unreasonably high bar for low-income petitioners burdened by court costs and restitution obligations; and (5) it fails to grapple with the complex nature of rehabilitation through its draconian "one-bite-at-the-apple" provision.

First, the General Assembly should amend the expungement statute to reach adjudications of juvenile delinquency. Under current law, confidential police records pertaining to delinquent children may be disclosed to a variety of officials and other

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201. *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981) (quoting *Commonwealth v. Iacino*, 411 A.2d 754, 759 (Pa. Super. Ct. 1979)).

202. § 35-38-9-5(c), (e)(5) (Supp. 2014).

203. *See supra* note 158 and accompanying text (Shelby County Prosecutor Kent Apsley); *supra* note 161 and accompanying text (Morgan County Prosecutor Steve Sonnega).

204. The Assembly could modify section 5(e)(5) to read as follows: "the prosecuting attorney has consented in writing to the expungement of the person's criminal records, or the person has submitted adequate third-party testimony demonstrating that expungement would best serve the interests of justice and equity." The definition of "adequate" testimony could be left to the discretion of the courts, or the Assembly could include a definitional provision exemplifying presumptively adequate testimony.

205. Undoubtedly, critics may argue that the real normative concerns lie with expungement itself—that the public has a right of access to criminal records and that rap-sheet stigma is simply a consequence of law breaking. *See supra* Part II for an in-depth discussion of expungement's normative implications.

parties, including “researchers”<sup>206</sup> and “interested persons.”<sup>207</sup> Similar provisions allow for the release of otherwise confidential court records,<sup>208</sup> and such records may be released without a court order to the public upon the filing of a petition alleging juvenile delinquency.<sup>209</sup> Moreover, “[r]ecords relating to the detention of any child in a secure facility shall be open to public inspection.”<sup>210</sup> The juvenile expungement provisions of title 31 offer some protection, but these provisions are entirely discretionary. The juvenile court may grant or deny a petition based on its evaluation of, inter alia, the “best interests of the child” and the “person’s current status.”<sup>211</sup> These ambiguous standards, coupled with the ease with which “interested persons” may obtain access to (and subsequently publicize) the records, create a substantial risk that the errors of youth may follow reformed offenders into adulthood.<sup>212</sup>

Unfortunately, the new expungement statute offers little added protection—by its terms, it does *not* reach final adjudications of juvenile delinquency.<sup>213</sup> Section 1

206. Upon requesting such records, a researcher must provide information about, inter alia, the purpose of his project and the safeguards he will employ to protect the identity of his subject. § 31-39-4-9 (2008).

207. This broad provision authorizes disclosure to any person having a “legitimate interest in the work of the agency or in a particular case,” and it instructs the agency head to consider that public safety is generally served if the public is informed about felonious acts or patterns of less serious offenses. § 31-39-4-8(a) (2008). Public safety is an important goal, but so is privacy—and it is difficult to grasp how this lenient statute affords any real protection to former juvenile offenders, particularly since a “person having access to [these records] is not bound by [confidentiality requirements] and may disclose the contents of the records.” § 31-39-4-8(b) (2008).

208. See §§ 31-39-2-10, -11 (2008).

209. The bar for such a petition is quite low: the court will release records if, for instance, a petitioner alleges that a child age twelve or older has committed two acts that would be misdemeanors if committed by adults. § 31-39-2-8 (2008).

210. § 31-39-3-3 (2008).

211. § 31-39-8-3 (2008). Even if a petitioner persuades the court to grant expungement, the method employed under the juvenile records statute is troubling: the records may be “destroyed or given to the person to whom the records pertain.” § 31-39-8-6 (2008). The latter approach may give ex-offenders a “false sense of security, leading [them] to believe that no trace of the record exists when, in fact, the records may continue to be available.” Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 24 (1992).

212. Concerns that youthful indiscretions may have a prolonged detrimental impact on maturing adults have motivated lawmakers in other jurisdictions to pass “second chance” laws targeted specifically at this vulnerable group. Such laws extend beyond criminal records. For instance, California recently passed an “eraser button” statute that requires social media sites with juvenile users to maintain a content deletion feature so that children can “remove information that they posted and shouldn’t have.” James Steyer, *Oops! Button Lets Kids Remove Posts They Regret*, CNN (Sept. 26, 2013, 10:44 AM), <http://www.cnn.com/2013/09/26/opinion/steyer-california-eraser-button-law/>.

213. See Kaarin M. Lueck, *Expunging a Juvenile Record*, IND. JUV. JUST. BLOG (Aug. 8, 2013, 6:25 AM), <http://indianajuvjustice.com/2013/08/08/expunging-a-juvenile-record/> (confirming that juvenile expungement procedures are “different than the law that went into effect July 1, 2013, which allows a person to expunge a criminal record under certain

provides that juveniles whose arrests did *not* result in delinquency adjudications or whose adjudications were vacated on appeal may benefit from expungement. Section 2 applies to final convictions—but of adult misdemeanors only.<sup>214</sup> At a minimum, the Assembly should amend the statute to extend equal expungement opportunities for juvenile adjudications and comparable adult offenses.<sup>215</sup> Better yet, the Assembly should extend extra lenity to persons who acted out of impulse during the period “between the idiocy of infancy and the folly of youth.”<sup>216</sup> One attractive option might be an automatic expungement scheme for lower-grade juvenile offenses, whereby arrest and conviction records are systematically sealed after reformed ex-offenders come of age.<sup>217</sup> Another possibility might be a social media tool or web app that walks users through the expungement process. Illinois has such a resource, spearheaded by the Mikva Juvenile Justice Council.<sup>218</sup>

Second, the General Assembly should restore provisions of prior law that authorized comprehensive expungement for persons arrested but not convicted. Under chapter 5, arrestees who were not charged or whose charges were dropped due to mistaken identity, no offense in fact, or lack of probable cause could petition for expungement without delay: law enforcement agencies had a brief thirty-day window to move in opposition.<sup>219</sup> Under the 2011 statute, persons who were arrested and charged with multiple offenses could qualify for restricted access to any dropped

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circumstances”).

214. Curiously, the 2011 “restricted access” statute *did* provide relief for juveniles. *See* § 35-38-8-2 (Supp. 2011) (repealed 2013) (“This section applies [to] a person . . . adjudicated a delinquent child for committing an offense that, if committed by an adult, would be a misdemeanor or Class D felony that did not result in injury to a person.”). But while the 2011 statute was abrogated in its entirety by the 2013 statute, the older juvenile expungement provisions remain good law. The absurd result of this bifurcated approach is that a teenage girl, X, who is adjudicated delinquent for engaging in disorderly conduct, must pin her hopes on the good favor of a judge wielding broad discretion. Conversely, an adult man, Y, is entitled to erase the record of such an offense after five years of good behavior.

215. Generally speaking, offenses that give rise to adjudications of juvenile delinquency would be classified as misdemeanors or Class D felonies if committed by adults, and would thus fall within the ambit of mandatory expungement. Children who commit more serious or aggravated offenses are often waived into adult criminal court. *See* §§ 31-30-3-1 to -6 (2008).

216. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 36 (Stemmer House Publishers, Inc. 1978) (1911); *see also* *State v. Guerrero*, 120 P.2d 798, 802 (Ariz. 1942) (“The policy of the juvenile law is to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.”).

217. Florida maintains such a scheme: minors not classified as serious or habitual offenders qualify for automatic expungement of many crimes five years after they turn nineteen, while those classified as serious or habitual offenders qualify five years after turning twenty-one. FLA. STAT. ANN. § 943.0515 (West 2006). Virginia has a similar scheme: the clerk of the juvenile court is required to annually destroy the records of most lower-grade delinquency adjudications for persons who have reached age nineteen if five years have elapsed since their last hearing. VA. CODE ANN. § 16.1-306(A) (2010).

218. *See* Kaarin Lueck, *Expunge.io*, IND. JUV. JUST. BLOG (Feb. 20, 2014), <http://indianajuvjustice.com/2014/02/20/expunge-io/> (discussing the app).

219. § 35-38-5-1(a), (d) (2008) (repealed 2014); *cf.* *Ind. Metropolitan Police Dep’t v. Prout*, 10 N.E.3d 560, 563 n.2 (Ind. Ct. App. 2014) (recognizing that probable cause and the other factors enumerated in chapter 5 are no longer relevant in expungement proceedings).

charges.<sup>220</sup> And under the 2013 statute, persons arrested but not convicted could qualify for the court, the BMV, the Department of Corrections, and the Indiana State Police to seal records relating to their arrest.<sup>221</sup>

Conversely, under the 2014 amendments—which subsume all of the abovementioned provisions—persons arrested but not convicted must (1) wait for one year and then (2) seek expungement of arrest records located in “alphabetically arranged criminal history information system[s].”<sup>222</sup> Section 1 excludes expungement of internal law enforcement records, court records, and records pertaining to pretrial diversion—a baffling legislative choice given the broader relief of section 6.<sup>223</sup> There is little value in delaying relief for would-be petitioners who were never convicted of the charges they seek to expunge.<sup>224</sup> And there is no conceivable justification for restricting low-grade expungement while offering ample relief to those convicted of serious offenses.<sup>225</sup> In keeping with the general spirit of the new law—more

220. § 35-38-5-5.5 (Supp. 2011) (repealed 2013). A 2013 case, *Lucas v. State*, illustrated the operation of the 2011 statute. 993 N.E.2d 1159 (Ind. Ct. App. 2013). The petitioner in *Lucas* had been charged with four crimes and one infraction stemming from a single arrest. *Id.* at 1160. The petitioner negotiated these charges down to two misdemeanors; he then sought to restrict access to records of the dropped charges. *Id.* The court of appeals found that the petitioner was entitled to relief under the 2011 statute. *Id.* at 1162; see also Dave Stafford, *Old Expungement Law Applies to Dropped Charges in Plea Deal, COA Rules*, IND. LAW. (Aug. 27, 2013), <http://www.theindianalawyer.com/old-expungement-law-applies-to-dropped-charges-in-plea-deal-coa-rules/PARAMS/article/32246>. However, the court also observed that section 1 of the new statute—which took effect shortly before the *Lucas* opinion came down—worked a “shift from focus on the disposition of individual charges to whether the arrest ultimately resulted in a conviction.” *Lucas*, 993 N.E.2d at 1162. A close reading of section 1 confirms the court’s interpretation: “This section applies only to a person who has been arrested if . . . the arrest did not result in a conviction or juvenile adjudication . . . .” § 35-38-9-1(a) (Supp. 2014). In other words, had Lucas filed his petition after July 1, 2013, he would not have qualified for relief.

221. § 35-38-9-1 (Supp. 2013) (amended 2014).

222. § 35-38-9-1(f) (Supp. 2014).

223. Compare § 35-38-9-1(f)(2) (Supp. 2014) (requiring no “change or alteration” in the records of any court in which charges were filed), with § 35-38-9-6(b) (Supp. 2014) (providing that convicted petitioners may qualify for mandatory expungement of court records). Because court records and records pertaining to pretrial diversion are published on such databases as MyCase.In.Gov and Doxpop.com, as a practical matter, the lowest-level offenders may never secure comprehensive relief under the new statute.

224. This is particularly so in cases of mistaken identity—which continue to plague the criminal justice system in spite of advances in investigative technologies. See, e.g., Leah Hope, *Chesterton Man Wrongfully Accused of Selling Heroin*, ABC7CHICAGO.COM (June 4, 2014), <http://abc7chicago.com/news/chesterton-man-wrongfully-accused-of-selling-heroin/93838/> (Northwest Indiana man spent ten days in jail and lost job after informant improperly identified him in drug sting); Steve Jefferson, *Attempted Murder Suspect Released After Mistaken Identity*, WTHR.COM (Dec. 13, 2013, 12:17 AM), <http://www.wthr.com/story/24208836/2013/12/12/assault-suspect-released-after-mistaken-identity-arrest> (Indianapolis man spent holidays in jail and lost possible job opportunity after victim improperly identified him as attacker).

225. The Board of Judges for the Monroe Circuit Court recognized the problem, writing in a May 30, 2014, memorandum that while the Board had granted comprehensive relief to qualifying petitioners under the previous version of chapter 9—expunging “all records of the

forgiveness and opportunity, fewer hurdles—the waiting period and the arbitrary limitations of section 1 should be eliminated.<sup>226</sup>

Third, the General Assembly should consider starting the “clock” for the statutory waiting periods at the date of arrest rather than the dates of conviction or sentence completion. Such an adjustment would ensure equitable treatment for petitioners whose trials are delayed due to no fault of their own. As in many states, delays are endemic in Indiana’s clogged dockets.<sup>227</sup> Starting the clock at the date of arrest would make the process more consistent and fair.<sup>228</sup>

Fourth, the General Assembly should evaluate the efficacy of an expungement process that requires full payment of all fines, fees, and court costs and satisfaction of any restitution obligations.<sup>229</sup> As discussed in Part I above, rap-sheet stigma has a ruinous impact on the ability of ex-offenders to secure gainful employment and achieve financial stability. Those fortunate reentrants who do find jobs have drastically reduced earning power compared with their peers,<sup>230</sup> and because certain

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case, both locally and in state departments and repositories”—the Board could no longer adhere to that practice given the changes in the law. HON. KENNETH G. TODD, BD. OF JUDGES, MONROE CIRCUIT COURT, 2014 EXPUNGEMENT LAW 1 (2014). Instead, the Board concluded that relief is now limited to petitioners who were *actually* arrested (versus those who were cited or summoned into court) and may extend *only* to arrest records. *Id.* at 2. “[T]he amended law now denies expungement relief to those who would rationally seem most deserving of such a remedy.” *Id.* The Board predicted a “significant decrease in the volume of Section 1 petitioners in light of the more limited provisions of relief.” *Id.* at 3.

226. As amended in 2014, section 1 does allow for prosecutors to consent in writing to an earlier petition. § 35-38-9-1(b). But rather than leaving the matter to the discretion of the adverse party (the state), the Assembly should simply revise section 1 to authorize immediate relief where charges are dropped, a defendant is found not guilty, or a conviction is overturned on appeal.

227. See *In re Brown*, 4 N.E.3d 619 (Ind. 2014) (per curiam) (removing superior court judge from office after finding that her misconduct resulted in, inter alia, delays in processing of pleadings and cases, delays in rulings, a five-month delay on a motion to dismiss, an eleven-month delay on a motion to suppress, and ten delayed jail releases); *Martin v. State*, 984 N.E.2d 1281 (Ind. Ct. App. 2013) (reversing drunk driving conviction after unreasonable 182-day delay chargeable to the state); *Indiana Man’s Triple-Murder Trial Begins After Delays*, WTHR.COM, Jan. 8, 2013, <http://www.wthr.com/story/20528674/indiana-mans-triple-murder-trial-begins-after-delays> (murder trial commenced following five years of delays). Unlike courts in most jurisdictions, Indiana courts do not permit so-called “Alford pleas” of no contest; consequently, plea bargaining is less efficient in this state. See *Carter v. State*, 739 N.E.2d 126, 128–29 (Ind. 2000) (“A valid guilty plea is a confession of guilt made directly to a judicial officer and necessarily admits the incriminating facts alleged. A defendant who says he did the crime and says he did not do the crime has in effect said nothing, at least nothing to warrant a judge in entering a conviction.” (citation omitted)).

228. Such an adjustment need not undermine legislative intent: if the Assembly fears that petitioners would qualify too soon, it can simply increase each waiting period accordingly (e.g., nine years from the date of arrest rather than eight years from the date of conviction for Class D / Level 6 felonies).

229. E.g., § 35-38-9-2(d)(3) (Supp. 2014).

230. A 2010 study by the Center for Economic and Policy Research found that in 2008, 36.6 percent of the male prison population had achieved less than a high school education. JOHN SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 6 (2010), available at <http://www.cepr.net>

classes of ex-offenders are excluded from government welfare programs, they have lower spending power as well.<sup>231</sup> With high unemployment prospects and an almost comically inadequate minimum wage of \$7.25,<sup>232</sup> it may prove impossible for ex-offenders to repay the costs they incurred through their participation in the justice system.<sup>233</sup> The problem is exacerbated by a disconcerting trend in jurisdictions across the nation whereby criminal defendants are facing unprecedented fines and fees. A 2014 exposé by National Public Radio, *Guilty and Charged*, found that “the costs of the criminal justice system in the United States are paid increasingly by the defendants,” a practice that “causes the poor to face harsher treatment than others who commit identical crimes and can afford to pay.”<sup>234</sup> In Indiana, where fees have increased since 2010, defendants may be required to pay for the costs of, *inter alia*,

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/documents/publications/ex-offenders-2010-11.pdf. Only 11.4% had completed any college. *Id.* The study recited employment statistics showing that incarceration reduces ex-offenders’ average annual weeks of work by 9.7% for young white men and as much as 15.1% for young black men. *Id.* at 9. Other statistics paint an even bleaker picture, suggesting that incarceration may reduce annual weeks of work by between 13% and 23%. *Id.*

231. See, e.g., MARC MAUER & VIRGINIA MCCALMONT, THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS 1 (2013), available at [http://sentencingproject.org/doc/publications/cc\\_A%20Lifetime%20of%20Punishment.pdf](http://sentencingproject.org/doc/publications/cc_A%20Lifetime%20of%20Punishment.pdf) (discussing statute that imposes lifetime ban on SNAP and TANF benefits for felony drug offenders unless states opt out).

232. Wage & Hour Div., U.S. Dep’t of Labor, *Minimum Wage Laws in the States*, DOL.GOV (Jan. 1, 2014), <http://www.dol.gov/whd/minwage/america.htm#Indiana>.

233. Hence a “pervasive cycle of arrest, incarceration, and reentry.” Leavitt, *supra* note 13, at 1281.

234. Joseph Shapiro, *As Court Fees Rise, the Poor Are Paying the Price*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312158516/increasing-court-fees-punish-the-poor>. NPR presented a series of anecdotes illustrating the drastic effects of fines and fees: in one case, for instance, a homeless and unemployed driver was ticketed \$165 for driving a “defective vehicle”; the fine ballooned to \$306 due to nonpayment, and the driver was arrested and jailed the day before he was scheduled to begin working at Taco Bell. *Id.* Another defendant, who was arrested in Augusta, Georgia, for stealing a can of beer, faced electronic monitoring and probation management fees of more than \$400 per month: since his only income derived from his sale of plasma at a blood bank, he fell into arrears and was sent back to jail. *Id.* One in five residents of Philadelphia had unpaid court bills in 2011, with a median debt of \$4500. *Id.* By one estimate, between eighty and eighty-five percent of ex-offenders leave prison with incarceration-related bills. *Id.*

Escalating fines and fees have given rise to a collateral problem—the reemergence of *de facto* debtors’ prisons. Although the U.S. Supreme Court ruled in *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983), that states that assess a fine or restitution as punishment for a crime “may not thereafter imprison a person solely because he lacked the resources to pay it,” the Court left open the possibility that states may imprison solvent convicts who willfully *refuse* to pay—and the ambiguity surrounding the nature of willfulness has resulted in “sweeping discrepancies across the country over how courts make those decisions.” Shapiro, *supra*. In Benton County, Washington, for instance, a quarter of misdemeanor inmates on any given day are in jail because they failed to timely pay their court costs. Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NPR (May 21, 2014, 5:01 AM), <http://www.npr.org/2014/05/21/313118629/supreme-court-ruling-not-enough-to-prevent-debtors-prisons>.

electronic monitoring, probation or supervision, public defender services, and “room and board” in prison.<sup>235</sup>

Although it is not atypical for state laws to require payment of costs and restitution as a condition for expungement, some jurisdictions take a more pragmatic approach.<sup>236</sup> The General Assembly could revise Indiana’s expungement statute to leave the question of full payment to the discretion of judges, who are in the better position to consider the individual circumstances of each petitioner and to determine whether indigence may warrant a degree of flexibility.

Finally, the Indiana General Assembly should amend the harsh “one-bite-at-the-apple” provision. Under the 2013 law, this provision was a “poison pill”: it offered no relief for pro se petitioners who made excusable errors in their pleadings.<sup>237</sup> The 2014 amendments ensure that a petitioner whose pleadings were denied for procedural reasons may seek subsequent relief, and they allow a judge to consider a second petition for expungement if the petitioner neglected to include certain convictions in his initial petition due to excusable neglect or circumstances beyond his control.<sup>238</sup> However, the general rule remains that a petitioner “may file a petition for expungement only one (1) time during the petitioner’s lifetime.”<sup>239</sup> Presumably, the legislature was seeking to avoid a revolving door of crime-and-expungement.<sup>240</sup> Yet the waiting periods built into the statute suggest that career criminals are unlikely to

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235. *State-by-State Court Fees*, NPR (May 19, 2014, 4:02 PM), <http://www.npr.org/2014/05/19/312455680/state-by-state-court-fees>.

236. In California, a guilty verdict may be set aside and all accusations dismissed in many cases in which “a defendant has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, *in its discretion and the interests of justice*, determines that a defendant should be granted [relief] . . . .” CAL. PENAL CODE § 1203.4(a)(1) (West Supp. 2014) (emphasis added). Although costs are normally assessed for such a petition, ability to pay these costs “shall be determined by the court . . . and shall not be a prerequisite to a person’s eligibility . . . .” § 1203.4(d). In Washington, D.C., expungement is available for persons convicted of “eligible” misdemeanors after an eight-year waiting period: the statute makes no reference to fines or restitution. D.C. CODE § 16-803 (LexisNexis Supp. 2014). In New Jersey, where expungement is ordinarily available ten years after the payment of a court-ordered fine, a court may grant earlier expungement if a petitioner “substantially complied with any payment plan ordered . . . or could not do so due to compelling circumstances affecting his ability to satisfy the fine.” N.J. STAT. ANN. § 2C:52-2(a)(1) (West Supp. 2014).

237. Maureen Hayden, *Bill Seeks to Ease Indiana’s ‘Second Chance’ Law*, GOSHEN NEWS (Jan. 30, 2014), <http://www.goshennews.com/local/x651203710/Bill-seeks-to-ease-Indianas-second-chance-law/print>.

238. IND. CODE § 35-38-9-9(h)–(j) (Supp. 2014).

239. § 35-38-9-9(h) (Supp. 2014).

240. The General Assembly may also have worried about the added cost of a new civil action for ex-convicts. Obviously, expungement consumes judicial resources, and it may tie up prosecutorial resources if the state challenges a petition. Some of the other recommendations presented in this Note would help to streamline the process: for instance, by eliminating prosecutorial consent and victim’s input requirements for mandatory expungement, *see supra* Part VI.A, the Assembly could foreclose the necessity of hearings in such cases. Moreover, to the extent that expungement imposes an added cost on courts, that cost is mitigated by the added benefit to society when ex-offenders can secure housing and employment without the stigma of a criminal record. *See supra* Part I.A.

qualify.<sup>241</sup> And while Indiana is not the only state with a one-time expungement policy, other jurisdictions are more forgiving.<sup>242</sup> The simplest solution would be to eliminate the provision and rely on the waiting periods to prevent abuse. As an alternative, the Assembly could draft language to require an additional waiting period—perhaps twice the ordinary length—for petitioners who previously obtained expungement.

### *C. Effectiveness*

#### 1. Remedies

In its current form, the expungement statute makes bold assertions. It provides that persons who suspend, expel, or refuse to employ anyone on the basis of an expunged or sealed record commit “unlawful discrimination.”<sup>243</sup> It requires employers to ask about criminal records only in terms that exclude expunged offenses.<sup>244</sup> It also provides that persons who engage in discriminatory conduct commit infractions and may be held in contempt.<sup>245</sup>

These penalties may have a deterrent effect, yet they are insufficient to restore the rights of injured parties—and while the statute provides that a target of discrimination is entitled to “injunctive relief,”<sup>246</sup> such relief seems inadequate. Injunctions do not foster collegial work relations; an applicant formerly targeted by a prejudiced manager will not be too eager to join her team.<sup>247</sup> There is an evidentiary problem as well: given

241. For example, a person convicted of a nonviolent Class C felony must generally wait eight years from the completion of her sentence, and she must maintain a clean record throughout those eight years. § 35-38-9-4(c), (e)(5) (Supp. 2014). Career criminals are unlikely to satisfy this lengthy waiting period: they may never qualify for a single expungement, let alone a series of expungements. But consider a Hoosier who commits a minor indiscretion in his early twenties—such as vandalism or visiting a common nuisance—and subsequently obtains expungement. If, in his forties, the Hoosier is charged with a DUI, he will be precluded from expunging this offense even though he has lived an otherwise decent life and even though there is no link between this offense and his earlier indiscretion. Arguably, the “one-bite-at-the-apple” provision serves only to dissuade young people from wiping the slate clean early in life—out of fear that they may run askance of the law decades later. *See supra* note 155 and accompanying text.

242. *See, e.g.*, LA. REV. STAT. ANN. § 44:9(A)(5)(a) (Supp. 2014) (specifying that expungement of a violation or misdemeanor offense other than OWI “shall occur only once with respect to any person during a five-year period”); UTAH CODE ANN. § 77-40-105(4)–(6) (LexisNexis 2012) (establishing a criminal history grid to determine whether a petitioner may qualify for subsequent expungement).

243. § 35-38-9-10(b) (Supp. 2014).

244. § 35-38-9-10(d) (Supp. 2014).

245. § 35-38-9-10(f) (Supp. 2014).

246. *See id.*

247. On an analogous note, retaliation against workplace whistleblowers rose from twelve percent in 2007 to twenty-two percent in 2011. Janice Harper, *Hear the Lonesome Whistle Blow: Workplace Retaliation*, HUFFINGTON POST (Jan. 8, 2012, 7:24 PM), [http://www.huffingtonpost.com/janice-harper/whistleblower-employers\\_b\\_1191737.html](http://www.huffingtonpost.com/janice-harper/whistleblower-employers_b_1191737.html). Such retaliation is difficult to prove, but it is deeply felt and may include such conduct as “receiving the cold-shoulder from co-workers, being verbally abused by supervisors, and being relocated or demoted.” *Id.*



stubborn jobless rates,<sup>248</sup> employers are reviewing many applications and may reject a candidate for any number of reasons. The candidate may suspect she has been targeted, yet her suspicions alone will gain little traction in court.

Simple revisions to section 10 would render the statute more enforceable and thus more effective. First, violations of subsection (d)—the requirement that employers ask about criminal records only in terms that exclude expunged offenses—should create a rebuttable presumption of discrimination under subsection (f).<sup>249</sup> Then, if an employer were to violate subsection (d), she would bear the burden to prove that her violation was inadvertent or otherwise nondiscriminatory. This burden shift would have a likely trickle-down effect: eager to avoid litigation, employers would exercise greater care in evaluating and interviewing applicants.

Second, the General Assembly should amend subsection (f) to provide that victims of discrimination are entitled to injunctive relief or, in the alternative, money damages.<sup>250</sup> A damages remedy would extend relief for persons who seek to vindicate their rights but who no longer desire to work for prejudiced employers. Compensatory damages might include job search expenses as well as court costs and legal fees. Punitive damages would be appropriate if the discrimination was malicious or if compensatory damages seemed unlikely to deter future discrimination.<sup>251</sup>

Third, the General Assembly should consider amending the civil rights enforcement statute to cover discrimination on the basis of an expunged record.<sup>252</sup> Such an amendment would bring rap-sheet discrimination within the jurisdiction of the Indiana Civil Rights Commission, a body charged with investigating discriminatory practices, taking action against employers who engage in such practices, and restoring to the extent feasible the losses incurred by victims.<sup>253</sup>

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248. Indiana's unemployment rate in January 2015 reached six percent, an eleven-month high—although as Department of Workforce Development Commissioner Steven Braun noted, the higher numbers may indicate that more Hoosiers are reentering the workforce and seeking employment. Brandon Smith, *Indiana Unemployment Rises to Highest Level in 11 Months*, IND. PUB. MEDIA (Mar. 17, 2015), <http://indianapublicmedia.org/news/indiana-unemployment-rises-highest-level-11-months-79493/>.

249. Indiana's Rules of Evidence stipulate that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption." IND. R. EVID. 301. The remedy this Note is proposing is similar to the burden shift that occurs when a litigant makes out a prima facie case of discrimination in the Title VII context. *See Filter Specialists, Inc. v. Brooks*, 906 N.E.2d 835, 839 (Ind. 2009).

250. A damages remedy was actually proposed in one of the bills introduced but not enacted in the 117th General Assembly. *See* S.B. 407, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

251. *See Stroud v. Lints*, 790 N.E.2d 440, 447 (Ind. 2003) (finding that "punitive damages are intended both to deter others and to punish the wrongdoer"). In Indiana, punitive damages must not exceed the greater of treble damages or \$50,000, IND. CODE § 34-51-3-4 (2008), and must be apportioned between the injured party (twenty-five percent) and the state's violent crime victims compensation fund (seventy-five percent), § 34-51-3-6 (2008).

252. The statute presently defines discriminatory conduct as an exclusion from equal opportunity on the basis of "race, religion, color, sex, disability, national origin, or ancestry." § 22-9-1-3(l)(1) (2007).

253. § 22-9-1-6(d), (j) (2007).

Finally, the General Assembly should consider earmarking the funds generated from Class C infractions under subsection (f) for initiatives to combat discrimination and to promote the rights of the reformed. Presently, these fines—up to \$500 per violation<sup>254</sup>—are simply deposited into the state's general fund.<sup>255</sup> This is a missed opportunity.<sup>256</sup> Fines could instead be deposited into a slush fund to cover the cost of educational campaigns, public awareness broadcasts, training sessions for attorneys, or reentry/antirecidivism programs aimed at helping ex-offenders make the most out of their "second chance." Funds could also be reserved to offset the cost of indigency waivers available as of 2014 under section 33-37-3-2, or they could be deposited into a dedicated account to provide free or subsidized counsel for low-income petitioners.<sup>257</sup>

## 2. Reach

Expungement is only meaningful if it actually relieves the ex-offender of rap-sheet stigma. For expungement of most felonies, records remain public but are marked to identify their status.<sup>258</sup> Yet at this early stage, it is unclear to what extent, if any, petitioners benefit from records "clearly and visibly marked or identified as being expunged."<sup>259</sup> Theoretically, this compromise serves the delicate dual purposes of (1) maintaining public safety while (2) extending relief to qualified petitioners who appear to have rehabilitated. But will employers and others in receipt of such records *actually* treat the ex-offender "as if the person had never been convicted of the offense?"<sup>260</sup> Rap-sheet stigma is powerful.<sup>261</sup> Even if an employer knows the law and recognizes that she may not discriminate on the basis of an expunged record, she may be subconsciously wary of an ex-offender. If many employers behave in kind, the statute's primary purpose will be thwarted. The General Assembly could explore this problem by commissioning an interim study committee: such a committee could conduct surveys, contact human resource

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254. § 34-28-5-4(c) (2008).

255. § 34-28-5-5(c) (2008).

256. While general fundraising is an important governmental activity, Indiana's budgetary situation is enviably stable: the state ended its 2013 fiscal year with a \$1.94 billion cash reserve, and the General Assembly revoked certain "add-backs" that previously required Hoosiers to increase their state taxable income (thereby paying more income tax). See Eric Bradner, *Indiana Wraps Up 2013 Fiscal Year with \$1.94B Surplus*, THEINDYCHANNEL.COM (July 11, 2013, 10:37 PM), <http://www.theindychannel.com/news/politics/indiana-wraps-up-2013-fiscal-year-with-194b-surplus>; *Indiana Add-Backs*, IND. DEP'T REVENUE, <http://www.in.gov/dor/4853.htm>.

257. These recommendations are not too farfetched: in fact, there is precedent for earmarking infraction fines under specific circumstances. See § 9-21-5-11(e) (2010) (allocating funds from the violation of worksite speed limits to cover the costs of hiring off-duty patrol officers); § 34-28-5-5(e) (2010) (allocating funds from traffic infractions in Marion County for compensation of county commissioners and for funding the county's guardian ad litem program).

258. § 35-38-9-7(b) (Supp. 2014).

259. *Id.*

260. § 35-38-9-10(e) (Supp. 2014); cf. Graham Polando, *Are Indiana's Newly Expunged Convictions Still Available for Impeachment?*, 90 IND. L.J. SUPP. 30 (2014) (exploring whether expunged convictions could be used in impeachment proceedings).

261. See *supra* Part I.

professionals, and poll courts to gather data on (1) which petitioners have sought expungement, (2) whether they have qualified, and (3) how their circumstances have changed subsequent to their petitions.<sup>262</sup>

The General Assembly should also explore mechanisms to combat the private publication of expunged records. In a 2008 special concurrence, Judge Gordon Shumaker of the Minnesota Court of Appeals wrote that to offer “eligible persons the remedy of record expungement but then to limit the reach of that expungement so that the record remains accessible to the public is to effectively deny that remedy. This contradiction surely violates the principle of fundamental fairness on which our laws are premised.”<sup>263</sup> Shelby County Prosecutor Kent Apsley echoed these concerns in an August 2013 interview: “Once a person has been charged, convicted and that information hits the World Wide Web, there is no way to cover up those facts.”<sup>264</sup>

Granted, no effort to preserve privacy will be absolutely effective, but one need not resort to such defeatism. Indeed, the 2014 amendments introduced an important change: the contents of a petition for expungement and an order granting expungement are now confidential.<sup>265</sup> But as Jeffrey Weise at the Division of State Court Administration pointed out, the amendment does not make the entire civil case

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262. The added cost and administrative burden of convening interim study committees must, of course, be taken into account. *See* § 2-5-1.2-11 (Supp. 2014) (establishing a right to compensation for service on committees); § 2-5-1.2-14 (Supp. 2014) (designating funds for committee expenses). Even so, each summer and fall, the General Assembly convenes a variety of these committees to evaluate important issues in preparation for the next legislative session. *See, e.g., 2013 Interim Study Committees*, IND. GEN. ASSEMBLY, <http://www.in.gov/legislative/interim/committee/>. During the last recess, committees met to discuss, *inter alia*, child care, driver education, compensation of public officers, and the state fair. *Id.* The impacts of a key criminal records statute seem to warrant at least as much scrutiny as these other matters.

263. *State v. V.A.J.*, 744 N.W.2d 674, 678 (Minn. Ct. App. 2008) (Shumaker, J., concurring specially), *abrogated by* *State v. S.L.H.*, 755 N.W.2d 271 (Minn. 2008).

264. Gable, *supra* note 158; *cf. Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 107–08 (1979) (Rehnquist, J., concurring in the judgment) (“Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths’ prospects for adjustment in society and acceptance by the public. This exposure brings undue embarrassment to the families of youthful offenders and may cause the juvenile to lose employment opportunities . . . . Such publicity also renders nugatory States’ expungement laws, for a potential employer or any other person can retrieve the information the States seek to ‘bury’ simply by visiting the morgue of the local newspaper.” (citations omitted)); Adam Liptak, *Criminal Records Erased by Courts Live To Tell Tales*, N.Y. TIMES, Oct. 17, 2006, at A1 (“[E]normous commercial databases are fast undoing the societal bargain of expungement, one that used to give people who had committed minor crimes a clean slate and a fresh start.”).

265. § 35-38-9-10(i) (Supp. 2014). In August 2014, Indiana’s public access counselor, Luke Britt, opined that expungement petitions are not governed by the state’s Open Door Law. As a result, journalists can be lawfully denied access to courtrooms while expungement proceedings are underway. *See* Brian Culp, *Public Access Counselor OKs Closed Hearings on Expungement*, HERALDTIMESONLINE.COM (Aug. 24, 2014, 11:10 PM), [http://www.heraldtimesonline.com/public-access-counselor-oks-closed-hearings-on-expungement/article\\_8808fd5b-dabe-5cc3-ad3d-12054ba288d7.html](http://www.heraldtimesonline.com/public-access-counselor-oks-closed-hearings-on-expungement/article_8808fd5b-dabe-5cc3-ad3d-12054ba288d7.html).

confidential,<sup>266</sup> and it does not affect the status of records previously published on the Internet. An addendum to section 6(a)(2) could require the Central Repository to notify prior recipients that an expunged record has been withdrawn from the public domain. The Assembly could also contemplate liability for publishers who knowingly report on an expunged offense without indicating in some way the fact of expungement. Obviously, such a rule would require narrow tailoring to avoid a First Amendment violation;<sup>267</sup> the precise composition of any such rule is beyond the scope of this Note.<sup>268</sup>

Finally, the General Assembly should consider how it might harness expungement to accomplish other legislative priorities. For instance, the Assembly should consider an accelerated expungement scheme for petitioners who demonstrate an exceptional dedication to volunteerism. The Assembly could add a caveat to the waiting periods, allowing judges to override them for such petitioners. Alternatively, the Assembly could create a new service-and-mentorship program, enabling ex-offenders to earn "credits" toward the waiting periods akin to "early release"

266. See Oddi, *supra* note 121.

267. Content-based restrictions on speech are subject to strict scrutiny: they must be "(1) necessary to serve a (2) compelling state interest and (3) narrowly drawn." *LaRose v. State*, 820 N.E.2d 727, 730 (Ind. Ct. App. 2005). Yet strict scrutiny is not "fatal in fact," and it may be possible for the General Assembly to craft legislation in such a narrow manner that it can prevent discrimination against reformed ex-offenders—surely an important governmental interest and arguably a compelling one—while preserving the First Amendment rights of Internet publishers.

268. Although this Note does not purport to predict whether such a rule could withstand constitutional scrutiny, it is worth noting that courts have long recognized tort liability for certain disclosures of private facts. See RESTATEMENT (SECOND) OF TORTS § 652D (1977). Moreover, the General Assembly has restricted publication of confidential information in a variety of circumstances. *E.g.*, § 5-14-3-4 (2010) (protection of private information held by administrative agencies); § 6-1.1-35-9 (2010) (protection of certain financial information in the context of property assessments); § 16-39-2-3 (2008) (protection of mental health records).

While rejecting the argument that publishers must *erase* content about expunged arrest records, Professor Eugene Volokh entertained the notion that publications should be *updated* if charges are dropped. For entities that refuse to update their publications, liability might attach on a theory of "libel by omission." Eugene Volokh, *Is It Libel To Say Someone Was Arrested When the Arrest Record Has Been Erased?*, VOLOKH CONSPIRACY (Aug. 8, 2012, 5:45 PM), <http://www.volokh.com/2012/08/08/is-it-libel-to-say-someone-was-arrested-when-the-arrest-record-has-been-erased/>. Indiana does not generally recognize such a theory, but recovery may lie if "what has been omitted has made a material assertion of fact untrue." *Heeb v. Smith*, 613 N.E.2d 416, 422–23 (Ind. Ct. App. 1993). One could argue that reporting on an offense without noting the fact of expungement is materially deceptive: in fact, concern about such deception underlies the updated trade regulations discussed in note 148, *supra*.

In a 2010 article, communications expert Clay Calvert offered an interesting (though perhaps unrealistic) alternative to legislative resolution of the expungement / First Amendment conflict: an *ethical standard* requiring journalists who report on arrests and convictions to report on subsequent expungements and to explain their legal significance. Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMM.LAW CONSPECTUS 123, 143–44 (2010). Calvert's recommendation would not eliminate discrimination, but it might offer a modest safeguard.

procedures.<sup>269</sup> Not only would a service program encourage prosocial behavior, it would also meet an important need<sup>270</sup> while expediting relief for persons who seem particularly deserving.

#### CONCLUSION

Indiana's expungement law has transformed during the space of three short years from a stingy scheme into a generous one. This transformation is changing lives. In December 2013, for instance, a Gary woman learned that her son would qualify for expungement under the new statute. "Hallelujah!" she declared. "This shows there's always another chance for a new beginning."<sup>271</sup>

The project is not complete. Important work lies ahead for the General Assembly and the courts as they seek to fashion a law that is just and fair. Its contours must be shaped; its implications must be evaluated and litigated. This process will take time.

But if expungement continues to enjoy bipartisan support, and if the legal community continues to participate in this endeavor, the Hoosier state may realize the vision that Governor Pence declared, becoming "the best place, once you've done your time, to get a second chance."<sup>272</sup>

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269. See, e.g., § 35-50-6-3.3 (2008) (providing credit time for completion of educational coursework, vocational training, and substance abuse recovery programming).

270. Private organizations have long acknowledged the unique perspective that ex-offenders can offer and the compelling manner in which they can connect with urban youth and other at-risk groups that may be distrustful of conventional authority figures. See, e.g., Patrick Boyle, *Ex-Convicts Connect with Kids*, YOUTHTODAY (Mar. 1, 2001), <http://youthtoday.org/2001/03/ex-convicts-connect-with-kids/>; Beth Warren, *Former Chicago Gang Supervisor with Violent History Now Mentors Memphis Youths*, COM. APPEAL (MEMPHIS) (Mar. 14, 2013, 11:54 PM), <http://www.commercialappeal.com/news/local-news/former-chicago-gang-supervisor-with-violent-now>. The U.K. Ministry of Justice has implemented a more universal approach, recruiting ex-offenders to be "'wise friends' to newly-freed prisoners." James Slack, *Ex-Criminals Will Become Mentors to Newly-Freed Prisoners and Offer Tips on How to Go Straight*, DAILY MAIL (Nov. 19, 2012, 7:03 PM), <http://www.dailymail.co.uk/news/article-2235508/Ex-criminals-mentors-newly-freed-prisoners-offer-tips-straight.html>.

271. Michael Gonzalez, *Second Chance Law Offers a Fresh Start*, POST-TRIB. (Dec. 21, 2013, 12:44 AM), <http://posttrib.suntimes.com/news/lake/24501799-418/second-chance-law-offers-a-fresh-start.html>.

272. Weidenbener, *supra* note 7.