

## ARTICLES

### UNSTITCHING SCARLET LETTERS?: PROSECUTORIAL DISCRETION AND EXPUNGEMENT

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*Criminal record history information pejoratively brands those who contact the criminal justice system, whether they were guilty or not. In theory, the remedy of expungement is designed to mitigate the unanticipated, negative effects of a criminal record. But the reality is that prosecutors—driven by a set of incentives that are fundamentally antithetical to expungement—control many of the levers that determine expungement eligibility. The disjunction between the prosecutorial mindset and the “minister of justice” ideal could not be starker, nor its consequences more significant. Prosecutors, as agents of the state, can advocate forcefully for either the retention or deletion of such information, which, given the pervasive web of collateral consequences associated with a criminal record, can have a dramatic effect on the situation of an arrestee or ex-offender. This discretion, as it relates to theories of punishment, prosecutorial discretion overall, the ethical responsibilities of prosecutors to do justice, and public policy interests, has been grossly underanalyzed despite the serious implications it has for both the prosecutorial role within the criminal justice system and for reentry efforts.*

*While many scholars have paid attention to how prosecutorial incentives conflict with the theoretical responsibilities of prosecutors in charging, plea bargaining, and postconviction situations involving innocence, none have provided a theoretical framework focused on the role of the prosecutor during expungement. Many of the complicated incentives that undermine holistic prosecution during those earlier phases exist during the expungement process as well. But scholarly responses to those incentives are not adequate given the range of considerations during the expungement phase. As such, this Article argues that scholarly discussions about prosecutorial discretion need to extend their focus beyond the exercise of*

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*prosecutorial judgment pretrial or questions of factual and legal guilt. Given that the primary role of the prosecutor is to do “justice,” this Article calls for increased attention to the exercise of discretion after the guilt phase is complete, specifically in the context of expungement of nonconviction and conviction information. It offers a framework for exercising such discretion and, in doing so, hopes to initiate additional conversation about the role of prosecutors during the phases that follow arrest and prosecution.*

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## INTRODUCTION

When should a prosecutor support or oppose the unstitching of a scarlet letter?<sup>1</sup> Consider the case of Frank Jackson, a man in his seventies who applied for a customer service, telemarketing position with a large, regional insurance company.<sup>2</sup> Unable to obtain and maintain steady employment for

1. See generally NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (1850).

2. The following account is a fictional scenario based on the author’s experience as a practicing attorney in both the criminal defense and employment law contexts. The plight of the ex-offender is all too common. See, e.g., Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men out of Work*, N.Y. TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html> [<https://perma.cc/CM66-UGZE>] (noting that men with criminal backgrounds account for about 34 percent of nonworking men ages twenty-five to fifty-four in the United States and discussing challenges they face to employment); *City Employee Credits Alumnus with Ending 20-Year Nightmare*, DREXEL U. THOMAS R. KLINE SCH. L. (July

years, and unemployed for the previous nine months, Mr. Jackson applied, interviewed exceptionally well, and was told he would hear from the company about a start date in a week.

A few days later, the background check report sent to his employer arrived in his mailbox. It came with a letter from the company, which cited Mr. Jackson's nearly fifty-year-old, low-level misdemeanor assault conviction as the reason for not moving forward with his application. Mr. Jackson's conviction resulted when, as a teenager, he pushed someone during a protest of the Vietnam War; he served no jail time and his punishment was a fine. When he called the company to explain the conviction, the company's representative was sympathetic but cited company policy against hiring individuals convicted of violent crimes, no matter how old and regardless of the fact that the position involved no physical interaction with customers. That was exactly what the last potential employer had told him, and the one before that, and the one before that.

This time, Mr. Jackson sought legal assistance. The attorney he met with explained that the insurance company may have violated civil rights laws<sup>3</sup> with its decision not to hire him and that the clinic could advocate on his behalf with the potential employer, but it probably could not bring suit due to the clinic's limited resources. Although federal and state law, in theory, protected individuals like Mr. Jackson, the statutes were untested and viewed skeptically by the judiciary. Besides, a lengthy litigation would do nothing for him in the short term. But all hope was not lost; it turned out that Mr. Jackson's conviction was eligible for expungement. Rejuvenated, he had the attorney file a petition for expungement on his behalf.

Unfortunately for Mr. Jackson, despite years of personal rehabilitation, it took years before he received the expungement, which stalled his job prospects. His petition was denied multiple times, largely due to the actions of an individual prosecutor in the jurisdiction. First, the prosecutor balked at, and rejected, the petitioner's filing—something the statute allowed him to do—causing Mr. Jackson's attorney to seek judicial recourse simply to file. Second, the prosecutor objected to the petition, thereby requiring a hearing on the merits, which took three months to schedule. When the date finally came, the prosecutor objected to the merits of the petition at the hearing on the ground that the state, and particularly the prosecutor's office, needed to maintain records of past convictions for future law enforcement purposes. Even though the statute would allow the prosecutor's office to retain the record even if it was sealed from the public and background-check companies, and despite Mr. Jackson's otherwise clean record in the nearly

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22, 2014), <http://drexel.edu/law/about/news/articles/overview/2014/July/epps-expungement-project/> [<https://perma.cc/U9T5-X8X5>] (describing the story of an African American female veteran with a mutual combat conviction stemming from self-defense that prevented her from developing any type of career for twenty years).

3. See, e.g., *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL OPPORTUNITY EMP. COMMISSION, [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [<https://perma.cc/989G-9H9L>] (last visited Apr. 13, 2018).

fifty years since his arrest, the judge denied Mr. Jackson's petition for expungement. It took another year, after an appeal, for Mr. Jackson to achieve the expungement necessary to obtain employment. In the meantime, Mr. Jackson struggled to secure a job, shelter, and other basic life necessities.

Mr. Jackson's story is far too common for Americans with nonconviction and low-level conviction criminal record history information, especially younger Americans with criminal records. In an age where the number of misdemeanor arrests and convictions is astounding and where employers and other institutions rely on such information to screen applicants, expungement can hasten positive reentry and the societal benefits such reentry reaps.<sup>4</sup> Interestingly, how prosecutors may and should react to expungement, especially when afforded significant discretion to either construct or remove hurdles for those pursuing it, has never been analyzed in depth. The complicated incentives that drive prosecutors to act as staunch advocates with a conviction-first and conviction-preserved-at-all-costs mentality create a disjunction between the ideals of holistic prosecution and the reality of postconviction prosecutorial decision-making. Beyond conflicting incentives, prosecutors have also been left without guidance on expungement proceedings—processes that have significant consequences for defendants and implicate the civil policy objectives of the state.

Expungement,<sup>5</sup> a remedy afforded in most state jurisdictions as a matter of constitutional or statutory law, furthers not only rehabilitation and reentry but restoration—for both the defendant and the community. The broadening of expungement remedies provides ex-offenders hope. While expungement is a constantly developing remedy in the information age, with much legislative progress still to occur and hopefully on the horizon,<sup>6</sup> some individuals are

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4. See generally Megan Denver et al., *A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check*, 55 *CRIMINOLOGY* 174 (2017) (noting how prospective employees who receive a clear background check are less likely to be subsequently arrested). For additional real-world examples, see, e.g., Raymond Owens, *Berkeley Deputy Starts 'Expungement Team' to Help People Find a Job*, *NEWS2* (Jan. 11, 2017), <http://counton2.com/2017/01/11/berkeley-deputy-starts-expungement-team-to-help-people-find-a-job/> [<https://perma.cc/4SAN-GEN8>]. Deputy Edmund Vice stated:

We've seen several people who are trying to find jobs that cannot find jobs . . . . I had a gentleman come and tell me he had started as a business hauling materials. He had started a business hauling wood chips or something like that. He came here in a panic one day because that [an old conviction] was stopping him from getting a contract.

*Id.*

5. For purposes of this Article, expungement means the “erasure or elimination of criminal record history information by rendering the information inaccessible, either because it has been destroyed or sealed from the view of certain individuals.” Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Level*, 10 *HARV. L. & POL'Y REV.* 361, 362 (2016). *Black's Law Dictionary* defines “expungement of record” as “the removal of a conviction (esp. for a first offense) from a person's criminal record.” *Expungement of record*, *BLACK'S LAW DICTIONARY* (10th ed. 2014).

6. See *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws*, *COLLATERAL CONSEQUENCES RESOURCE CTR.* (2017), <http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf> [<https://perma.cc/X8JH-7K9M>]; see also Murray, *supra* note 5, at 362; Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 *WIS. L. REV.* 321, 322; Recent

only a hearing away from restoration in the wake of suspicion (in the case of arrest) or retribution (in the case of conviction).<sup>7</sup> This is especially true in the case of order-maintenance offenses or the prosecution of petty crimes.<sup>8</sup> Prosecuted at an alarming rate and arguably without normative justification, these are the types of contacts with the system that are not published widely, but are frequently reported by background check companies.<sup>9</sup> That widespread reporting operates as unending punishment.<sup>10</sup> And an examination of a significant number of state processes, undertaken for this Article, reveals that the prosecutor plays a significant procedural or substantive role in mitigating a criminal record's effect in many jurisdictions across the country.<sup>11</sup>

As such, expungement relates directly to the prosecutorial responsibility to pursue fair and just punishment on behalf of the community. When a criminal record—based on arrest or conviction—has the dramatic effect that it does today, ignoring the ability of prosecutors to soften its effect, or even erase its existence, lets prosecutors off the hook, shortchanges defendants, and ignores the deleterious effects on reentry efforts and the system as a whole.<sup>12</sup> Prosecutors in all jurisdictions face countless dispositions that allow for expungement, a remedy that inherently accounts for the symbiotic relationship between justice and mercy, the latter of which has not been adequately accounted for in studies of prosecutorial discretion after a

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Case, *Doe v. United States*, No. 14-MC-1412, 2015 WL 2452613 (E.D.N.Y. May 21, 2015), 129 HARV. L. REV. 582 (2015). A petition for a writ of certiorari in the U.S. Supreme Court for *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), was recently denied. *Doe v. United States*, 137 S. Ct. 2160 (2017). By the time it reached the Supreme Court, however, the case had mostly turned into a question of the reach of ancillary jurisdiction in Article III federal district courts. See *Doe v. United States*, 833 F.3d 192, 194 (2d Cir. 2016). While the jurisdictional issue at the federal level is beyond the scope of this Article, the petition for certiorari suggests that the federal law of expungement may soon see changes.

7. Of course, expungement is not a panacea; expungement as a remedy is limited—especially in the information age—and is only one aspect of the effort to further reentry. But in an age where what is attached to one's name has incredible repercussions for associations within communities and societies at large, expungement remains a crucial part of the larger puzzle.

8. See Andrew Ingram, *Breaking Laws to Fix Broken Windows: A Revisionist Take on Order Maintenance Policing*, 19 BERKELEY J. CRIM. L. 112, 113 (2014).

9. See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1656–58 (2010) [hereinafter Bowers, *Legal Guilt*]; Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 319–20 (2012); Shawn Bushway et al., *Private Providers of Criminal History Records: Do You Get What You Pay for?*, in BARRIERS TO REENTRY?: THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 174, 174 (Shawn Bushway et al. eds., 2007); Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP. L. PROJECT (2011), [http://www.nelp.org/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf) [https://perma.cc/ZA94-694L].

10. Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 26–40 (2016) (detailing the stigma associated with a criminal record).

11. See *infra* Part II.A.

12. See *infra* Part II.A.

prosecution is complete.<sup>13</sup> The expungement phase is an area where the prosecutor exercises discretion without necessarily having to make blameworthiness for a past act the primary metric of the prosecutorial response.<sup>14</sup>

A prosecutor has the ability during expungement proceedings to express the state's function as advocate of complete justice for all of the parties involved or, as others have written about with respect to other phases, to act in a quasi-judicial role.<sup>15</sup> Prosecutorial recognition of this ability only comes after the recognition that arrests alone have the potential to regulate all sorts of human behavior<sup>16</sup> and that convictions—regardless of their grade—immediately enmesh defendants in a web of collateral consequences.<sup>17</sup> Both contacts with the criminal justice system can cause nearly irreversible damage to the reputation of a defendant.

Thus, while expungement is normally classified as a judicial remedy<sup>18</sup> and, in some places, a nonadversarial process,<sup>19</sup> the discretion of both the trial judge *and* the prosecutor is often at play. In practice, judges often wait to hear whether the line prosecutor supports the defendant's motion, or at least will not oppose it.<sup>20</sup> And that is after the granting of a hearing on the merits of a petition, usually due to a prosecutorial objection.<sup>21</sup> In some jurisdictions,

13. Interestingly, the comments to Rule 3.8 of the Model Rules of Professional Conduct speak of a prosecutor's responsibility as a "minister of justice." MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N, Discussion Draft 1983). To my knowledge, no searching analysis has been conducted into whether *prosecutorial* notions of justice do, or should, include theoretical accounts of the concept of mercy. The focus on justice is the norm, despite a significant history in the western philosophical tradition that recognizes a link between justice and mercy. *See generally* David Dolinko, *Some Naïve Thoughts About Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349 (2007) (detailing how understanding the relationship between justice and mercy stretches back to Aristotle). Of course, discussions about mercy have occurred about the role of the executive when it comes to exercising the pardon power. *See, e.g.*, Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1485–86 (2000). But an in-depth discussion of the *prosecutorial role* as an advocate of mercy postconviction, within the American constitutional structure, does not exist. *See infra* Part III.A.

14. This concept has been discussed in other criminal procedure contexts. *See* Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 176 (2005).

15. *See generally infra* Part II.

16. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 820–25 (2015).

17. *See* MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013); *see also* Brian M. Murray, *Beyond the Right to Counsel: Increasing Notice of Collateral Consequences*, 49 U. RICH. L. REV. 1139, 1150 n.56 (2015); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 287 n.45 (2011).

18. MARGARET COLGATE LOVE, *RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* 113–24 (2006) (surveying judicial postconviction remedies, including expungement).

19. *See infra* Part II.A.

20. The author recalls his time as a legal aid attorney filing expungement motions to erase arrest information for charges that had been dismissed, nolle prossed, or withdrawn. On many occasions, a line prosecutor objected to expungement based on the alleged facts that had led to the prosecution. Trial judges were often inclined to consider the objection of the prosecution based on the recounted facts, even though they rarely had been formally entered into evidence.

21. *See infra* Part II.A.

expungement motions do not receive hearings until the defendant has demonstrated to the prosecutor that the petition is devoid of procedural error,<sup>22</sup> which, for the average, lay, unrepresented petitioner, is no small order. The prominent role afforded to the prosecutor during expungement likely stems from a recognition of the multifarious role of the prosecutor, which includes acting as the arbiter for the extent of punishment exacted on behalf of the community. Any understanding of the prosecutor as a “minister of justice” is incomplete if it fails to recognize the enormous responsibility that comes with exercising discretion *after* disposition.<sup>23</sup>

Contemporary examinations of the role of the prosecutor focus almost exclusively on the exercise of discretion during the charging,<sup>24</sup> bargaining,<sup>25</sup> and sentencing and conviction review phases.<sup>26</sup> This Article seeks to pivot one step further to consideration of other phases after disposition. It argues that theoretical conceptions of the prosecutorial role must account for the power wielded during a phase like expungement, regardless of whether the underlying prosecution resulted in dismissed charges or a conviction. Specifically, it claims that prosecutorial discretion relating to an application for expungement or certificate of rehabilitation<sup>27</sup> is as important as the

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22. See *infra* Part II.B.

23. Zacharias, *supra* note 14, at 174 (noting how the ABA’s *Criminal Justice Standards for the Prosecution Function* address all stages through sentencing but stop without consideration for the variety of phases after disposition). Professor Zacharias also noted how treatises tend to ignore this aspect of the prosecutorial job. *Id.* (citing BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 12:12–:32 (2d ed. 1985)).

24. See Margaret McGhee, *Preliminary Proceedings, Prosecutorial Discretion*, 88 GEO. L.J. 1057, 1058–59 (2000); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1536–39 (1981) (discussing prosecutors’ vast discretion in directing scores of law enforcement personnel and “orchestrating” grand jury proceedings); see also Lynn R. Singband, Note, *The Hyde Amendment and Prosecutorial Investigation: The Promise of Protection for Criminal Defendants*, 28 FORDHAM URB. L.J. 1967, 1967–68 (2001) (discussing federal prosecutors’ considerable involvement in the precharging investigation and virtual free rein over the charging decision).

25. Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52–53 (1968); Terance D. Miethe, *Charging and Plea Bargaining Practices Under Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion*, 78 J. CRIM. L. & CRIMINOLOGY 155, 156–57 (1987); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 504–06 (1992) (discussing the exercise of prosecutorial discretion under the federal sentencing guidelines); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1473 (1993); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87, 91–92 (2003).

26. Zacharias, *supra* note 14, at 173.

27. Certificates of rehabilitation are judicially achieved measures of relief that represent that an individual with an arrest or conviction record has been effectively rehabilitated and that the criminal record should not inhibit, by law, that person’s attempts at reentry. Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. INTER ALIA 11, 14 (2016). They aim to mitigate or prevent the collateral consequences associated with having a criminal record. *Id.* A recent study suggests that they increase the possibility of employment significantly. See *id.* at 11, 20.

discretion relating to what charges to file and how to prosecute.<sup>28</sup> This is because when prosecutors act after disposition, they have the capacity to bring the theories of punishment that underlie modern criminal justice full circle. As the Ohio Court of Appeals announced in *State v. Boddie*<sup>29</sup>:

We note further that whether to prosecute and what charges to file are decisions that generally rest in the prosecutor's discretion. A prosecutor should remain free to exercise his or her discretion to determine the extent of the societal interest in prosecution. This discretion is no less important when applied to issues such as expungement.<sup>30</sup>

In contrast to *Boddie*, the current emphasis in academic scholarship prioritizes the investigative and adjudicative aspects<sup>31</sup> of prosecutorial decision-making at the risk of leaving consequential prosecutorial activity in the shadows. The emphasis likely results from the common assumption that decisions about blameworthiness demand the most examination; hence, notions of professional responsibility remain tethered to the idea that the prosecutor's obligations primarily relate to trial, or at least the determination of guilt or innocence.<sup>32</sup> During these conversations, any attention to discretion postconviction typically focuses on the responsibility of prosecutors in situations involving factual innocence.<sup>33</sup>

Even institutional reform and regulatory proposals, like those put forth by Professors Rachel Barkow, Bruce Green, and the late Fred Zacharias, focus exclusively on the exercise of discretion in assessing the defendant's

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28. *State v. Boddie*, 868 N.E.2d 699, 701 (Ohio Ct. App. 2007); *see also* Zacharias, *supra* note 14, at 173 ("Prosecutorial discretion is at its height in the postconviction context because legislators and professional code drafters have not focused on postconviction issues.").

29. 868 N.E.2d 699 (Ohio Ct. App. 2007).

30. *Id.* at 701.

31. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009) (describing the prosecutorial role as adjudicator in the overwhelming majority of cases and arguing for institutional reforms that internally regulate prosecutorial behavior); Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 46 (2012); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1524–25 (1981); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 57 (2002); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 59–62 (1991).

32. The fact that over 90 percent of dispositions occur as a result of plea bargaining has led to calls for finding a theoretical justification for an otherwise accepted practice. *See generally* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

33. Anna Franceschelli, *Motions for Postconviction DNA Testing: Determining the Standard of Proof Necessary in Granting Requests*, 31 CAP. U. L. REV. 243, 256 (2003) (discussing a statute in Washington that gives decision-making authority for postconviction DNA testing to prosecutors and the state attorney general); Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Post-Conviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 395 (2002) (discussing the extensive discretion available to prosecutors after a conviction and proposing guidelines for ethical postconviction decision-making); Bruce A. Green & Ellen Yaroshesky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 470–71 (2009) (noting that under the ABA's model ethics rules, the prosecutor is responsible for bringing new exculpatory evidence to the attention of the court); Zacharias, *supra* note 14, at 233 (analyzing prosecutors' obligation to "do justice" postconviction).



blameworthiness throughout the investigative and adjudicative process. But those proposals, while instructive, need reorientation to the expungement phase for several reasons. First, the distinction between the investigative *and* adjudicative aspects of the criminal process is not wholly applicable to an expungement proceeding. Second, blameworthiness is not the primary concern during expungement. Third, there is additional complexity underlying the policy behind expungement since expungement statutes, unlike other criminal statutes, create a cause of action rather than prohibit conduct. And fourth, there is substantive and procedural variety across the fifty expungement regimes, not to mention the resource challenges at the state level.<sup>34</sup>

Concerns about the procedural rights of the accused relating to guilt determinations, which animate Professor Zacharias's work,<sup>35</sup> do not arise in expungement outside of the fact that many expungement petitions are filed *pro se*.<sup>36</sup> And, while informative, the structural proposals put forth by Professor Barkow to counteract biased and predisposed decision-making<sup>37</sup> do not neatly apply because expungement is not entirely adjudicative. Rather, expungement implicates both the investigative and adjudicative functions because law enforcement might find criminal record history information useful in the future, and because the merits of mitigating the arguably punitive effect of a criminal record remain an issue.

As such, while many have recognized that “charging . . . is sentencing,”<sup>38</sup> not enough attention has been paid to how opposing expungement, or responding to other restoration measures, often leads to regulation beyond payment of the defendant's debt due to the array of collateral consequences associated with arrests and convictions. And the incentives that challenge prosecutors to be fair in other contexts manifest themselves in this one as well. Prosecutorial responses to expungement intrinsically relate to the validity of punishment and to the regulation of reentry,<sup>39</sup> thereby implicating the line between doing justice and pursuing and preserving convictions. Confining analyses of prosecutorial discretion to stages, where the latter pursuit is more visible but no more significant, is short sighted. This is

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34. For example, Eric Fish has argued for prosecutorial agencies to adopt clear policies identifying when prosecutors should act as advocates versus neutral administrators. Fish concedes that adoption of his proposal is easier at the federal level given the available resources. Eric S. Fish, *Prosecutorial Constitutionalism*, 90 S. CAL. L. REV. 237, 244–67 (2017).

35. See generally Zacharias, *supra* note 14.

36. Fish, *supra* note 34, at 258 (advocating for prosecutors to act as quasi judges when defendants do not have counsel).

37. See generally Barkow, *supra* note 31.

38. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reform*, 126 HARV. L. REV. 150, 171 (2012); see also Douglas Berman, *Afternoon Keynote Address: Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & C.R.L. REV. 429, 429 (2010) (“Through their charging and bargaining decisions, prosecutors now serve as what I would call ‘first-look sentencers’ who frame and structure precisely what type and length of sentence a defendant will face.”).

39. There is reason to believe that prosecutors should be more open to expungement even if they operate from “tough on crime” and public safety assumptions. Clear background checks lessen the likelihood of recidivism. See Denver, *supra* note 4, at 196.

especially so given that a decision about the maintenance of criminal record information after adjudication can have a pervasive, pejorative effect on the livelihood of an arrestee or ex-offender.<sup>40</sup>

Put simply, there are several reasons why prosecutorial responses to expungement matter for the overall workings of the criminal justice system, especially its fidelity to the punishment norms driving it. Prosecutors can ensure or frustrate the punishment objectives associated with a criminal prosecution, further or subvert the regulatory and policy goals of the legislature and executive agencies, and act as a force for rehabilitation and restoration in the wake of retribution or suspicion that resulted in arrest. The following set of questions indicates the range of issues embedded within the exercise of discretion during expungement proceedings: When faced with an expungement petition, how should a prosecutor respond procedurally? Should the prosecutor adopt a nonadversarial position when deciding what to do? Should the prosecutor advocate *on behalf of* the defendant, especially if, in the case of a conviction, the sentence has been completed? In the case of an arrest that did not result in charges, or nonconviction information, should the prosecutor support expungement? If not, what are legitimate reasons for arguing to retain nonconviction information? How much expunged or shielded information should prosecutors be allowed to use? Is using expunged information, even if allowed by statute, unjust or unethical? Should it be? What principles, if any, should govern the prosecutor's position on the expungement? This sampling of questions—unasked to date by any ethical, scholarly, or judicial body—calls for careful analysis to decipher the blurry line between the prosecutor's quasi-judicial and adversarial role in a context that is neither wholly investigative nor adjudicative. An adequate theoretical framework for conceptualizing prosecutorial responsibility in this arena is necessary to help prosecutors pursue justice.<sup>41</sup>

The contributions of this Article are both descriptive and normative. First, this Article identifies the significant discretion afforded to prosecutors during expungement by cataloguing different expungement regimes across state jurisdictions. Second, it juxtaposes these responsibilities with the incentives normally at play in prosecutors' offices. Recognizing that current scholarly

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40. Appelbaum, *supra* note 2; Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. TIMES (May 24, 2016), <http://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> [<https://perma.cc/3C8J-QGEC>].

41. It is true that an antecedent question might exist: Why involve prosecutors at all in a decision that might be better left to neutral decision makers? Some of my colleagues have suggested making expungement proceedings analogous to parole board hearings. However, this Article's primary purpose is to identify the current landscape and identify an appropriate response that falls within the existing adversarial system of criminal adjudication where the prosecutor holds most of the cards. Given that expungement is largely a matter of statutory law grafted onto an existing adversarial system, it is highly unlikely that the prosecutor will be entirely removed from its procedural requirements. Beyond that, there may also be sound reasons for prosecutors to remain involved: they may represent constituencies that would otherwise not have a voice, such as victims, and they are, in most instances, the democratic representative for the community. Even within this existing framework, however, there is no reason why state regimes cannot tailor prosecutorial involvement to the specific concerns and values of the community that the prosecutor purports to serve.

analyses of prosecutorial discretion are useful but ultimately leave a void in this area, it builds a theoretical framework for assessing prosecutorial action related to expungement. Put simply, this Article shines a light on the existence, character, importance, and implications of the prosecutor's unexamined expungement discretion.

To accomplish this, this Article proceeds as follows. Part I describes why expungement matters by examining the effects of criminal record history information and the scope of available expungement remedies to mitigate harm from those records. In the process, it illustrates the significance of prosecutorial discretion by pointing to what is at stake for those who request expungement. Next, Part II analyzes the various responsibilities of prosecutors relating to expungement in current state statutory schemes. First, it identifies the responsibilities possessed by prosecutors in expungement regimes nationwide, focusing on the procedural and substantive implications of this previously unexamined discretion. Second, it discusses how traditional norms and incentives in prosecutors' offices suggest certain approaches to expungement. Third, it analyzes how current understandings of the prosecutor as a "minister of justice" fail to provide guidance for prosecutorial discretion in this area. Part III then proposes that many of the principles considered useful in other contexts can inform decision-making in the expungement realm to provide a deeper account of prosecutorial responsibility. But it argues that conceptualizing the prosecutor as a quasi judge is crucial for adequate decision-making in the expungement context. This is because determining blameworthiness is no longer the primary consideration driving the process, and the prosecutor should be cognizant of the policy goals underlying a statutory remedy for ex-offenders. This Article concludes with proposals for improving decision-making in this area; prosecutors can better design their offices to allow for execution of the quasi-judicial role and statutes can clarify the role of the prosecutor in light of the policy objectives behind the statute.

### I. WHY EXPUNGEMENT MATTERS

This Part begins with a discussion of the prevalence of criminal records collected in the United States and the devastating impacts such records can have on the employment opportunities and other life prospects for those who possess them. It goes on to discuss the history and merits of expunging a criminal record and surveys recent state law reforms aimed at improving access to expungement as a remedy.

#### A. *Criminal Records: Pervasive and Significant*

The overwhelmingly negative effect of a criminal record is undeniable. That effect is felt by almost one-third of Americans who possess some type of a criminal record.<sup>42</sup> Mass criminalization has resulted in a class of

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42. Rodriguez & Emsellem, *supra* note 9, at 1 (noting that over 25 percent of the adult population has a criminal record); see also Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18,

individuals that have been branded despite the commission of relatively minor crimes.<sup>43</sup> Many of these offenders have been convicted of misdemeanors and order-maintenance offenses—such as disorderly conduct—which, given the complex array of consequences that result from a conviction, render full reentry into society nearly impossible.<sup>44</sup>

Criminal records vary depending on the underlying conduct of the defendant who has been arrested, charged, and possibly convicted. The volume of these records is overwhelming: the FBI adds over ten thousand names to its database each day, with close to eighty million individuals in the FBI criminal database, which includes information related to arrests and convictions.<sup>45</sup> Additionally, states have databases that catalogue criminal record history information.<sup>46</sup> In some circumstances, states mandate dissemination of this information; in others, they distribute records freely or by sale.<sup>47</sup> Private commercial databases make a significant amount of money trafficking in this information.<sup>48</sup>

Arrest information is the most common type of criminal record and the most common form of criminal information eligible for expungement.<sup>49</sup> Sixty-five million adult Americans have an arrest record.<sup>50</sup> The numbers for men in minority groups are equally staggering as close to 50 percent of black

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2014), <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/MVU2-KL4T>] (stating that “America has a rap sheet”); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More than You Think*, WALL ST. J. (Aug. 7, 2015), <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802> [<https://perma.cc/6QML-LGQC>].

43. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090–94 (2013); see also Roberts, *supra* note 6, at 325 (“The problem is thus better characterized as one of mass criminalization.”).

44. Bowers, *Legal Guilt*, *supra* note 9, at 1721 (noting how prosecutors, on average, decline to prosecute minor charges at a lower rate than more serious offenses, and that minor convictions can have dramatic consequences).

45. Fields & Emshwiller, *supra* note 42.

46. Jain, *supra* note 16, at 824 (“Every state now either requires or permits criminal histories to be released to noncriminal justice agencies, such as those that grant licenses and provide social services.”).

47. James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST. THOMAS L.J. 387, 395 (2006) (“[T]here are laws in every state mandating or authorizing the release of individual criminal history records to certain non-criminal justice government agencies—agencies charged with granting licenses to individuals and firms in diverse businesses, ranging from liquor stores and bars to banks and private security firms as well as to agencies that provide programs and services to vulnerable populations including children, the elderly, and the handicapped.”).

48. U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006), [https://www.bjs.gov/content/pub/pdf/ag\\_bgchecks\\_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf) [<https://perma.cc/8LCF-YZBA>] (noting that most private employers conduct background searches through private enterprises or through commercial databases that aggregate criminal records).

49. See *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws*, *supra* note 6, at 6–18.

50. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL’Y 963, 964 (2013). By age twenty-three, 33 percent of “adults can expect to be arrested.” Jain, *supra* note 16, at 817. For black and Hispanic men, that statistic is closer to 50 percent. *Id.*

and Latino men will be arrested by age twenty-three.<sup>51</sup> And the FBI database mentioned above is approaching 250 million arrests.<sup>52</sup> Arrest information is held by various government agencies<sup>53</sup> and commercial databases<sup>54</sup> in the business of proliferating criminal record history information.

Misdemeanor arrests are the most common, and the number of arrest records is overwhelming.<sup>55</sup> In effect, the vast majority of new criminal cases each year are misdemeanors.<sup>56</sup> Law enforcement officers can arrest based on probable cause,<sup>57</sup> and there are few procedural checks postarrest to prevent formalization of charges.<sup>58</sup> These arrests often occur without full mindfulness of their relation to efficient and holistic policing.<sup>59</sup> Rather, the predominant interests driving an arrest, such as restraining a defendant who broke the law, interrogation, gathering evidence, and clearing administrative items—such as warrants—are not entirely consistent with “harm efficient policing.”<sup>60</sup> While these arrests are typically not publicized because they are relatively minor, they are also the type of criminal record history information that is stored and disseminated at a later time, which hurts the defendant.<sup>61</sup>

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51. Robert Brame et al., *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014). This number is greater than the records stemming from conviction because many arrests never lead to conviction.

52. Fields & Emshwiller, *supra* note 42.

53. It is not uncommon for various executive agencies, as well as the court system of a particular jurisdiction, to retain arrest information.

54. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 186 (2008) (“An internet search for ‘criminal records’ yields dozens of companies offering, for a modest fee, to carry out criminal background checks for employment, housing, and other purposes. These companies are somewhat regulated by the federal Fair Credit Reporting Act (FCRA).”).

55. R. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), [http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp\\_dec.ashx](http://www.courtstatistics.org/other-pages/~media/microsites/files/csp/data%20pdf/csp_dec.ashx) [<https://perma.cc/YM2S-H3W6>] (showing that misdemeanors significantly outnumber felonies in the criminal caseloads of seventeen selected states); R. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/Other-Pages/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/Y7AB-ZL9H>] (citing 2008 data from eleven states and describing misdemeanor cases as comprising an “overwhelming majority of criminal caseloads”).

56. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1804 n.78 (2012).

57. *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001).

58. Gary L. Anderson, *The Preliminary Hearing—Better Alternatives or More of the Same*, 35 MO. L. REV. 281, 281–83 (1970); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 468–69, 498 (1980). See generally William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (2016) (discussing ways to define probable cause).

59. Rachel A. Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776–81 (2012) (arguing that constitutional rules regarding making arrests do not account for the complex array of interests related to crime control).

60. *Id.* at 792.

61. This point cannot be emphasized enough. Some critics of expungement argue that the remedy is obsolete given the internet age and the availability of the information through news outlets or other websites and that First Amendment values cut against the remedy entirely. See, e.g., Doris DelTosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY.

Arrests have real consequences both inside and outside of the criminal justice system. Noncriminal actors use arrest information related to a particular defendant or overall as a screening mechanism<sup>62</sup> and to monitor and regulate behavior.<sup>63</sup> In the criminal arena, arrest information affects various stakeholders. First, arrestees face immediate, short-term deprivations of liberty that can instantly disrupt their lives.<sup>64</sup> An arrestee might miss a shift at work, a deadline to pay rent, or the ability to attend a funeral. Given that state prosecutions can arise through the filing of information,<sup>65</sup> prosecution is likely. And prosecution might result in a conviction that has dramatic consequences on the individual's life. The mere process associated with prosecution can sometimes be more painful than the punishment inflicted postconviction.<sup>66</sup>

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U. CHI. L.J. 1, 23 (2017). The first criticism assumes too much—that the average, low-level criminal charge makes its way into the public consciousness via the internet forever. The reality is that the order-maintenance offenses that Professor Bowers has written frequently about are not the stuff of front-page news, especially the news preserved in perpetuity; rather, they result in the charges and convictions that appear on background checks due to the relationship between the reporting agency and the state. Expungement at least prevents that appearance. The second objection—undercutting First Amendment values such as transparency and notice—seems overblown upon a close reading of many of the seminal cases. The Supreme Court has endorsed a distinction between access and publicity that often gets lost in the internet age, when access and publicity are treated as synonymous. *See* DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776–80 (1989) (holding that the release of FBI rap sheet information to third parties could constitute an unwarranted invasion of privacy and thus was exempt from Freedom of Information Act disclosure requirements); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980) (stating that absent an articulated overriding interest, criminal trials must be open to the public); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 608–10 (1978) (holding that the district court was not required to release tape recordings admitted into evidence during the Watergate investigation to the media). As these cases demonstrate, the Court has *never held* that imposing some burden on a party in order to obtain information is per se constitutionally problematic, nor has it taken issue with requiring individuals to visit the courthouse, dig through mounds of paper, and search tons of records in order to obtain criminal record history information. But *even if* the modern-day Court were to take this view, it would have to grapple with the argument that there may be a competing constitutional interest in reintegration and reentry, or even reputation, that requires careful balancing. *See, e.g.*, Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315, 1332–50 (2017) (arguing that states have a strong interest, if not an obligation, to reintegrate people with criminal convictions back into society).

62. Jain, *supra* note 16, at 810 (“A number of actors outside the criminal justice system, such as immigration enforcement officials, public housing authorities, public benefits administrators, employers, licensing authorities, social services providers, and education officials, among others, routinely receive and review arrest information. These actors use arrest information for their own purposes and in ways that are distinct from the aims of the criminal justice system.”).

63. *Id.* at 812 (“Arrests provide a way to monitor individuals, to evaluate whether the arrested individual falls into a regulatory priority, and ultimately to determine whether to modify a preexisting social or legal arrangement.”).

64. *Id.* at 842–43 (describing how the defendant might have practical interests, such as childcare, immediately stalled due to being in custody).

65. James R. Beck, Note, *Initiation of Prosecution by Information—Leave of Court or Preliminary Examination?*, 25 MONT. L. REV. 135, 135–36 (1963).

66. MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 30–31 (1992).

Arrests also affect communities by shaping their perceptions of justice.<sup>67</sup> Statistics demonstrate that arrests might result in disproportionate harm to minorities.<sup>68</sup> Arrests also have serious financial costs for the community because they initiate a series of procedures postarrest that occur before prosecution even begins.<sup>69</sup> Those commitments cost money and take time away from other law enforcement efforts.

Arrests also implicate actors in the civil context. Sharing arrest information allows noncriminal actors to pursue alternative, noncriminal regulatory goals, especially in an area of the law such as immigration.<sup>70</sup> Immigration Customs and Enforcement (ICE) uses arrests to identify immigrants for removal proceedings.<sup>71</sup> Public housing authorities use arrest information to make eligibility determinations and identify whether leases should be renewed.<sup>72</sup> In the employment context, employers routinely use arrest information to screen applicants.<sup>73</sup> This is one reason why municipalities throughout the country have adopted “ban the box” ordinances restricting an employer’s ability to inquire into a job applicant’s criminal

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67. The lawfulness, utility, or wisdom of an arrest has the capacity to affect how individuals and communities perceive the administration of justice. *See* Jacinta M. Gau & Rod K. Brunson, *Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men’s Perceptions of Police Legitimacy*, 27 *JUST. Q.* 255, 272 (2010).

68. *See generally* Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 *STAN. L. REV.* 1271 (2004) (discussing how mass imprisonment harms African American communities).

69. Jain, *supra* note 16, at 823.

70. *Id.* at 826–29 (describing how immigration authorities and agencies use arrest information to enforce immigration norms and rules).

71. *Secure Communities: Get the Facts*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, [http://web.archive.org/web/20140910121059/http://www.ice.gov/secure\\_communities/get-the-facts.htm](http://web.archive.org/web/20140910121059/http://www.ice.gov/secure_communities/get-the-facts.htm) (“Through April 30, 2015, more than 283,000 convicted criminal aliens were removed from the United States after identification through Secure Communities.”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-708, *SECURE COMMUNITIES: CRIMINAL ALIEN REMOVALS INCREASED, BUT TECHNOLOGY PLANNING IMPROVEMENTS NEEDED* 14 (2012), <https://www.gao.gov/assets/600/592415.pdf> [<https://perma.cc/FMH2-H795>] (stating that approximately 20 percent of Immigration and Customs Enforcement (ICE) removals in 2010 and the early part of 2011 were attributed to Secure Communities). It is quite common for ICE to detain an individual upon learning of an arrest within the state system. *Immigration Detainers*, ACLU, <https://www.aclu.org/issues/immigrants-rights/ice-and-border-patrol-abuses/immigration-detainers> [<https://perma.cc/5ZYX-C27G>] (last visited Apr. 13, 2018) (“An ICE detainer is a written request that a local jail or other law enforcement agency detain an individual for an additional 48 hours (excluding weekends and holidays) after his or her release date in order to provide ICE agents extra time to decide whether to take the individual into federal custody for removal purposes.”).

72. Jain, *supra* note 16, at 835 (“[C]ontact with the criminal justice system serves as the first step in a screening process that may lead to eviction.”). Housing authorities use arrests to see whether particular tenants or those they host might be engaging in activity that would lead to ineligibility. *Id.*

73. *See Background Checking: Conducting Criminal Background Checks*, SOC’Y FOR HUM. RESOURCES MGMT. (Jan. 22, 2010), <http://www.slideshare.net/shrm/background-check-criminal> [<https://perma.cc/X6BM-BHFY>] (slide three); Memorandum from Brian P. Ritchie, Office of Inspector Gen., to Marilyn Tavenner, Ctr. For Medicaid & Medicare Servs., State Requirements for Conducting Background Checks on Home Health Agency Employees (May 29, 2014), <http://oig.hhs.gov/oei/reports/oei-07-14-00131.pdf> [<https://perma.cc/Z6MK-RBSD>].

past, although their utility has been questioned.<sup>74</sup> Employers also use arrest information to monitor the activities of employees—both on and off the job.<sup>75</sup> Locating the information allows employers to engage in investigations themselves, which at times can lead to unnecessary adverse employment actions.<sup>76</sup> Finally, many licensing agencies use arrest information to inhibit entry into a profession or trade requiring a license.<sup>77</sup> In short, arrest information allows for coordination between levels of government to enforce immigration goals and public policy measures.<sup>78</sup>

While an arrest can result in many problems, having a conviction is essentially catastrophic given the number of disadvantages that could automatically or potentially result. In 2010, about 10 percent of adult males and 25 percent of black males in the population had a felony conviction.<sup>79</sup> Immediate consequences, often deemed “collateral,” can include the loss of civil rights, such as voting; eligibility for public privileges and benefits, such as public housing; and the ability to find gainful employment given the social stigma that comes with a conviction.<sup>80</sup> In fact, many states—as well as the federal government—have enacted statutes and regulations expressly prohibiting ex-offenders from obtaining certain jobs.<sup>81</sup> Those prohibitions

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74. Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Feb. 8, 2018), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/C7RS-Y9SU>] (noting how thirty states have adopted “ban the box” laws or policies). Some have argued that ban the box measures are not necessarily the most effective in mitigating the effect of arrest records. *See, e.g.*, Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* (Univ. of Mich. Law & Econ. Research, Paper No. 16-012, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2795795](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795) [<https://perma.cc/JLJ9-HWTT>].

75. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, 915.002, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 6 (2012), [https://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [<https://perma.cc/989G-9H9L>] (“In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.” (footnotes omitted)); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003) (discussing the effect of a criminal record on barriers to employment).

76. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA'S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 36–37 (2014), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=33203&libID=33172> [<https://perma.cc/7TP3-GDZT>] (discussing the role of negligent-hiring torts in background checks).

77. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 75, at 12 (“An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.”).

78. Jain, *supra* note 16, at 830–32.

79. Appelbaum, *supra* note 2.

80. Gabriel J. Chin & Margaret Love, *Status as Punishment: A Critical Guide to Padilla v. Kentucky*, CRIM. JUST., Fall 2010, at 21, 22.

81. *See* CMTY. LEGAL SERVS. OF PHILA., LEGAL REMEDIES AND LIMITATIONS: EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS IN PENNSYLVANIA 5–11 (2016), <https://clsphila.org/sites/default/files/issues/Legal%20Remedies%20and%20Limitations%20>



typically exist in tandem with statutes that impliedly allow consideration of arrest and conviction records by employers, without much restriction.<sup>82</sup> In terms of public benefits, convictions render many individuals ineligible for welfare assistance,<sup>83</sup> medical benefits,<sup>84</sup> and unemployment benefits.<sup>85</sup> A conviction may also affect eligibility for public housing.<sup>86</sup> While more consequences of having a conviction could be mentioned, the literature describing such consequences is voluminous and need not be repeated here.<sup>87</sup>

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on%20the%20Employment%20of%20People%20with%20Criminal%20Records%20in%20Pennsylvania-%20May%202016.pdf [https://perma.cc/853L-QWAP] (noting how individuals with certain types of convictions cannot seek employment at airports, banks, insurance companies, long-term care facilities, and schools, or even at certain security positions); Roberts, *supra* note 17, at 287 n.41.

82. *See generally State Laws and Their Impact on Use of Criminal Records for Employment Purposes*, GEN. INFO. SERVICES (2007), [https://hr.4act.com/documents/State\\_Laws\\_and\\_Their\\_Impact\\_on\\_Use\\_of\\_Criminal\\_Records\\_for\\_Emplo.pdf](https://hr.4act.com/documents/State_Laws_and_Their_Impact_on_Use_of_Criminal_Records_for_Emplo.pdf) [https://perma.cc/2L7W-Z6HZ].

83. 21 U.S.C. § 862a(1)(A) (2012).

84. 42 U.S.C. § 1320a-7(a)(4), (b)(3) (2012).

85. *See, e.g.*, 43 PA. CONS. STAT. § 802(g) (2018); *see also id.* § 871(b) (noting the implications of making false representations when applying for unemployment benefits or changes in those benefits).

86. *See* 42 U.S.C. § 13662(a) (2012); 35 PA. CONS. STAT. § 780-167(b) (2018) (detailing the impact of a final criminal conviction in a drug-related offense on eviction proceedings).

87. Murray, *supra* note 17, at 1157–58 (citing a study regarding systemic literacy of collateral consequences); Roberts, *supra* note 17, at 287 nn.40–45. *See generally* LOVE ET AL., *supra* note 17; *National Inventory of the Collateral Consequences of Conviction*, COUNCIL ST. GOVERNMENTS JUST. CTR., <https://miccc.csgjusticecenter.org/> [https://perma.cc/D6P6-B3VV] (last visited Apr. 13, 2018).

When disseminated, criminal record history information has a punitive<sup>88</sup> and regulatory effect<sup>89</sup> that is extremely detrimental.<sup>90</sup> Thus, prosecutorial decisions in this context implicate the exaction of punishment and the regulation of future conduct by former defendants. As such, the treatment of criminal records after prosecution is inherently part of the prosecutorial function. But to adequately gauge the prosecutorial role in this regard, a discussion of the purpose of expungement, the current state of the law, and how these two factors relate to the underlying purposes of the criminal justice system and punishment is in order.

### B. *Expungement as a Remedy*

Expungement law has been developing for nearly eight decades.<sup>91</sup> Its primary focus is restoration; the elimination or sealing<sup>92</sup> of a criminal record removes information from the public's reach or eyesight while permitting the ex-offender to carve a new identity—or at least to cover up the branding that has occurred so that only a select few, in limited circumstances, can unveil

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88. See, e.g., Sarah B. Berson, *Beyond the Sentence—Understanding Collateral Consequences*, NAT'L INST. JUST., Sept. 2013, at 25, 26; Chin & Love, *supra* note 80, at 22; Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 153–54 (1999) (arguing that collateral consequences are “de facto punishment”); Alec Ewald & Christopher Uggen, *The Collateral Effects of Imprisonment on Prisoners, Their Families, and Communities*, in THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 83, 93–94 (Joan Petersilia & Kevin R. Reitz eds., 2012); Wayne A. Logan, *Populism and Punishment: Sex Offender Registration and Community Notification in the Courts*, CRIM. JUST., Spring 2011, at 37, 38–39 (labeling *Smith v. Doe*, in which the Supreme Court held that Alaska's sex-offender registry law was nonpunitive, a “Dubious Doctrine”); McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 479 n.2 (2005) (“[C]alling these consequences ‘collateral’ is merely a legal fiction—the person experiences the consequences as punishments regardless of the label.”); Andrea E. Yang, Comment, *Historical Criminal Punishments, Punitive Aims and Un-“Civil” Post-Custody Sanctions on Sex Offenders: Reviving the Ex Post Facto Clause as a Bulwark of Personal Security and Private Rights*, 75 U. CIN. L. REV. 1299, 1322–23 (2007).

89. In recent years, there has been a dispute about whether collateral consequences should be understood as forms of punishment or as civil effects of an arrest or conviction. While most commentators have argued forcefully for recognizing them as extensions of punishment, given their incapacitating effect, collateral consequences might be considered regulatory measures as well because they essentially restrict behavior of ex-offenders by classifying them according to risk potential. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 303 (2015) (arguing for understanding collateral consequences as regulatory measures assessing future risk rather than penal measures involving judgments of culpability). While an interesting philosophical discussion in its own right, whether either side is correct is probably immaterial for the argument in this Article given that expungement as a remedy lies at the intersection of how criminal records implicate criminal and civil policy objectives.

90. Corda, *supra* note 10, at 15–17.

91. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 482–84 (discussing juvenile expungement measures as responses to the desire to rehabilitate youth offenders).

92. Expungement, while in effect resulting in the elimination of the information from the public eye, can either mean full destruction of the record or merely hiding it from the public while still granting access to certain parties, such as law enforcement. Murray, *supra* note 5, at 362.

it.<sup>93</sup> In order to fully situate prosecutorial responsibility as it relates to expungement, the following Parts articulate the nature and purposes of expungement, the current state of the law, and the prospects for future developments.

### 1. History, Theory, and Purposes

Lord Coke said that “punishment can terminate, [but] guilt endures forever.”<sup>94</sup> The policy behind expungement is to provide offenders another chance<sup>95</sup> at building an identity by allowing them to move on from the past.<sup>96</sup> There is debate over its philosophical merits. On the one hand, the policy objectives behind the remedy are noble: ex-offenders are offered an opportunity at restoration, the first step of which is rebuilding their name.<sup>97</sup> Sympathetic policymakers probably contributed to the large-scale, relatively uncritical welcoming of expungement as a remedy.<sup>98</sup> At the same time, erasing or shielding information arguably smacks of Orwellian whitewashing and undermines the public’s capacity to know and act on the truth.<sup>99</sup> As such, expungement implicates certain constitutional norms, such as freedom of

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93. This is why some laws consider expungement to be the erasure or elimination of information whereas others define expungement as the “sealing” of information. *Id.* at 369–73.

94. Barry M. Portnoy, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 306 (1970) (quoting *Brown v. Crashaw* (1614) 80 Eng. Rep. 1028, 1028 (KB)).

95. *State v. N.W.*, 747 A.2d 819, 823 (N.J. Super. Ct. App. Div. 2000) (discussing how the purpose of the expungement statute was to provide an offender with a “second chance”).

96. *See, e.g.*, ARK. CODE ANN. § 16-90-1417 (2017) (restoring the privileges and rights of an individual and directing that the record “shall not affect any of his or her civil rights or liberties”); AARON NUSSBAUM, *FIRST OFFENDERS—A SECOND CHANCE* 24 (1956) (“A theory of law which withholds the finality of forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds.”); Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162.

97. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 113–14 (2015) (“The purpose of this policy . . . is to encourage rehabilitation and to recognize that a previously convicted offender has succeeded in turning his life around.”); Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1708 (2003) (noting how criminal offenders are subject to lifelong prejudice after formal punishment has ended).

98. *See* Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 378 (1970) (“Record sealing and expungement have been accepted casually and extended uncritically over the years, prospering in a rosy glow of good intentions and expediency, with little attention to evaluation of results.”).

99. Concern about access to public information transcends the expungement realm. *See, e.g.*, *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978); *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that there is no due process right that inhibits the government from disclosing criminal record information); *Eagle v. Morgan*, 88 F.3d 620, 626 (8th Cir. 1996); *Rogers v. Slaughter*, 469 F.2d 1084, 1085 (5th Cir. 1972) (noting that “[t]he judicial editing of history is likely to produce a greater harm than that sought to be corrected”); *see also* Michael D. Mayfield, Comment, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1066 (“For some commentators, one of the major drawbacks of expungement is that, at its roots, expungement is an institutionalized lie.”).

speech.<sup>100</sup> Technological advancements regarding big data—in terms of its dissemination and its concealment—complicate this debate.<sup>101</sup>

But how does expungement, whether pointing toward forgetting or forgiving, relate to the purposes of criminal law? In theory, an arrest results from the lawful suspicion of a crime,<sup>102</sup> conviction results from an assessment by a variety of actors (although mostly the prosecutor) of normative and legal blameworthiness,<sup>103</sup> and punishment (again in theory) results from the assent of the community.<sup>104</sup> All three of these events can lead to the branding of an individual as criminal or *a* criminal, thereby automatically drawing a line between that individual and the rest of the population.<sup>105</sup> The principle justification for expungement is that it mitigates the public ostracism that results from such branding, thereby restoring the “offender[’s] . . . status quo ante.”<sup>106</sup> In the context of an *arrest*, expungement cannot counteract the effect of the short-term restraint on liberty; however, it can counteract the long-term effects of the arrest on one’s

100. See, e.g., *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986)). But see *State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E.2d 1094, 1097–98 (Ohio 2004); *State v. D.H.W.*, 686 So. 2d 1331, 1335–36 (Fla. 1996); see also Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 735 (1981); Kogon & Loughery, *supra* note 98, at 391 (“Alteration or destruction of the record . . . only protects the body politic from confrontation regarding its own aberrant attitudes and the necessity to change. It basically corrupts the fundamental correctional objective of rehabilitating offenders.”). As such, concerns about expungement involve the premise that expungement might actually prevent full restoration of the offender because it is an easy way out and does not require the community and offender to reconcile. This seems like a charge involving two separate, but related, issues: (1) rules relating to community access to information and (2) community involvement in the administration of discretion postconviction (or postarrest). In other words, if expungement proceedings were not the creature of insiders to criminal adjudication but instead reflected community involvement with the capacity to express the normative propriety of expungement, that might cure this objection. I am in the process of working through two ideas related to just that: (1) integrating the community into the criminal justice system *after prosecution is complete* and (2) the concept of what might be called “normative brand worthiness,” which addresses the First Amendment concerns of communities regarding access to information.

101. See Pierre H. Bergeron & Kimberly A. Eberwine, *One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records*, 36 U. TOL. L. REV. 595, 609 (2005) (“[T]he individual may have to live the rest of his life with a cloud over his head and hope that his secret is never revealed.”). The fact that there is a dispute over the philosophical merits of expungement supports the thesis of this Article. An examination of prosecutorial decision-making in this context is even more important if the objectives of the state regarding expungement are less than clear.

102. Ortman, *supra* note 58, at 559.

103. Bowers, *Legal Guilt*, *supra* note 9, at 1678–80.

104. STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 1–9 (2012) (contrasting community involvement in early American criminal justice with the current divide between insiders and outsiders).

105. Love, *supra* note 97, at 1716 (“Permanent changes in a criminal offender’s legal status serve[] to emphasize his ‘other-ness.’”).

106. *Doe v. Utah Dep’t of Pub. Safety*, 782 P.2d 489, 491 (Utah 1989); Mayfield, *supra* note 99, at 1057 (“In an attempt to alleviate the effects of such ostracism, and to help offenders reenter society, federal and state governments created expungement laws designed to conceal criminal records from the public.”).

name. Additionally, if the charges were without merit, expungement rectifies an error in the administration of justice.

The justification for expungement of *conviction* information is similar, but it recognizes payment of the debt by the offender and that the road to rehabilitation is either complete or the path being definitively taken by the ex-offender.<sup>107</sup> Accordingly, once the formal punishment exacted by the community has ended, the cause of the debt can be forgotten.<sup>108</sup> The act of forgetting enables the former offender to reenter society because readmission no longer comes with strings attached. In a sense, expungement might be labeled the completion of the retributive process because it *stops* the informal, and perhaps unintentional, effects of formal punishment. As such, expungement is an extension of the proportionality principle underlying retribution because it forecloses continued and unsubstantiated retribution.<sup>109</sup> Expungement operates to reintegrate after punishment, furthering what others have referred to as restorative retribution.<sup>110</sup>

Theories behind expungement also emphasize its relation to incapacitation and rehabilitation. Expungement may lead to the formal restoration of certain rights and privileges, thereby increasing the capabilities of the ex-offender upon reentry.<sup>111</sup> Additionally, expungement can both result from rehabilitation and continue to develop it.<sup>112</sup> It can allow the ex-offender to

107. This is one reason why expungement procedures are often cumbersome for petitioners. In another project, “The Process Prevents Expungement,” I will analyze how substantive reform of expungement law has not occurred in tandem with procedural reform, thereby undermining the promise of recent efforts.

108. Linda S. Bueth, Comment, *Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma*, 58 NEB. L. REV. 1087, 1089–90 (1979) (“[W]hen a conviction does occur and the individual has served time and paid a fine, then is it not true that the offender has ‘paid his debt to society?’”).

109. HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 436 (1979). Of course, this assumes that continued existence of a criminal record amounts to punishment. Given the range of automatic collateral consequences that result from a record and the proliferation of those records, that is a fair assumption. See Chin & Love, *supra* note 80, at 24; Chin, *supra* note 56, at 1830.

110. BIBAS, *supra* note 104, at 9 (noting how early American criminal justice inflicted reintegrative punishment, where “wrongdoers pa[id] their material and moral debts to victims and society, wipe[d] their slates clean, and return[ed] to the community as equals”). In documenting early American approaches to reintegration, Bibas describes how convicts in Middlesex County, Massachusetts, became politicians, constables, clerks, commissioners, and justices of the peace. *Id.* at 12.

111. Mayfield, *supra* note 99, at 1062 (“The underlying philosophy of expungement has always been to rehabilitate prisoners by providing ‘an accessible or effective means of restoring social status.’” (quoting Steven K. O’Hern, Note, *Expungement: Lies That Can Hurt You in and out of Court*, 27 WASHBURN L.J. 574, 576 (1988))). Mayfield describes how expungement arguably has roots in utilitarian punishment theory and particularly rehabilitation theory. *Id.* (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 24 (2d ed. 1986)).

112. See Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 334 (2007) (“Offenders value the good will of their fellow human beings. In addition, many offenders feel the bite of conscience for their misdeeds. . . . Forgiveness may lighten the burden of guilt from their shoulders, making it easier for them to move on with their lives.”); Gough, *supra* note 96, at 162 (noting how expungement gives youth offenders “an incentive to reform” by “removing the infamy of [their] social standing”); Love, *supra* note 97, at 1710 (“The purpose of judicial expungement or set-aside was to both encourage and reward

experience rehabilitative activities potentially not available when the ex-offender has a conviction attached to his or her name. As will be demonstrated below, courts routinely look into the condition of the offender when assessing whether expungement is appropriate.<sup>113</sup> In this regard, others have justified expungement because it simultaneously encourages and allows for rehabilitation.<sup>114</sup>

## 2. Expungement Then and Now

Although nearly every state allows for expungement, the available remedies vary greatly by jurisdiction. They are entirely the creature of state law.<sup>115</sup> Historically, expungement was only available for arrest information where the prosecution did not result in conviction.<sup>116</sup> The cause of action—or basis for an expungement petition—was usually a hodgepodge of statutory law and judicially created remedies.<sup>117</sup>

In the past, expungement remedies almost always existed when the disposition was uniquely favorable to the accused—generally acquittal or dropped charges.<sup>118</sup> Today, most state jurisdictions allow for the expungement or sealing of such nonconviction information.<sup>119</sup> Considering the breadth of arrest information collected,<sup>120</sup> the expungement remedy could

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rehabilitation, by restoring social status as well as legal rights.”); Zacharias, *supra* note 14, at 181–82; Mayfield, *supra* note 99, at 1063–64 (“Expungement, then, may be conceptualized as a natural step in rehabilitation that allows an offender to become sufficiently reformed through reintegration into society.”).

113. *See infra* Part II.B.

114. JACOBS, *supra* note 97, at 114 (“After a certain period of crime-free behavior, the ex-offender has demonstrated that he has put his past offending behind him and deserves reinstatement as a citizen in good standing.”).

115. Recently, there has been some proposed legislation at the federal level as part of the REDEEM Act. *See* Press Release, Senator Cory Booker, Paul, Booker, Cummings Introduce Bipartisan, Bicameral Bill to Fix Broken Criminal Justice System (Apr. 5, 2017), [https://www.booker.senate.gov/?p=press\\_release&id=573](https://www.booker.senate.gov/?p=press_release&id=573) [<https://perma.cc/PM7L-GBM5>].

116. *See* Joseph C. Dugan, *I Did My Time: The Transformation of Indiana’s Expungement Law*, 90 IND. L.J. 1321, 1335 (2015) (noting 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”); *see also* LOVE, *supra* note 18, at 113–24 (surveying judicial postconviction remedies, including expungement). For example, as of 2006, Wisconsin only allowed expungement of misdemeanor convictions if they occurred before the offender was twenty-one. *Id.* at 124.

117. Pennsylvania is an example of this hybrid legal regime. Pennsylvania has an expungement statute that was inspired by mid- to late twentieth century court decisions. *See, e.g.,* Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981). Minnesota’s regime was initially similar. *See generally* Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota*—State v. Schultz, 31 WM. MITCHELL L. REV. 1331, 1344 n.96 (2005) (describing the history of expungement law in Minnesota). In 1977, the Minnesota Supreme Court acknowledged that expungement was an equitable remedy under the state constitution. *In re R.L.F.*, 256 N.W.2d 803, 807–08 (Minn. 1977). Four years later, it legitimized trial court expungement. *State v. C.A.*, 304 N.W.2d 353, 357 (Minn. 1981).

118. *See, e.g.,* Commonwealth v. D.M., 695 A.2d 770, 773 (Pa. 1997) (granting automatic expungement of charges resulting in acquittal).

119. LOVE, *supra* note 18, at 43–61, app. A (cataloguing all jurisdictions that allow for expungement of nonconviction information).

120. *See, e.g., supra* note 49 and accompanying text.

become available to many people, thereby amplifying the significance of the parties who play a role in its granting or denial. Standards of review vary for dispositions in between acquittal and conviction, such as *nolle prosequi*, dismissal, or withdrawn charges.<sup>121</sup> In most instances, however, when a hearing is granted, courts are tasked with balancing state and private interests as related to the criminal record history information.<sup>122</sup> Petitioners must demonstrate that they are worthy of expungement against a presumption of retention of information,<sup>123</sup> and only after first overcoming substantial procedural hurdles.<sup>124</sup>

Over the last decade, expungement reform has occurred in various jurisdictions, which has widened the availability of relief. In the last ten years, over 80 percent of states have tried to create additional expungement remedies.<sup>125</sup> These measures include expanding the types of information, including convictions, that are eligible for expungement;<sup>126</sup> shortening waiting periods;<sup>127</sup> clarifying the legal effect of an expungement with respect to both an ex-offender's history and future activities of an ex-offender;<sup>128</sup> adding private rights of action against those who mishandle expunged information;<sup>129</sup> and lowering the burdens of proof and persuasion when

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121. See LOVE, *supra* note 18, at 43–61, app. A (noting such regimes in Arkansas, California, Colorado, Delaware, Washington, D.C., Florida, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Mississippi, Nevada, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Tennessee, Texas, Utah, Washington, and Virginia). In fact, Pennsylvania continues to have a regime that distinguishes between types of nonconviction dispositions, especially in the case of a guilty plea to a lesser charge. For example, the law treats *nolle prosequi* charges from the same case as a guilty plea differently than dismissed charges. Compare Commonwealth v. Lutz, 788 A.2d 993, 995 (Pa. Super. Ct. 2001) (holding that dismissed charges that result from a plea deal are components of a quasi contract and are not entitled to expungement), with Commonwealth v. Hanna, 964 A.2d 923, 925–29 (Pa. Super. Ct. 2009) (holding that *nolle prosequi* charges that accompany a plea deal to another charge may still be expunged).

122. See, e.g., Meinken v. Burgess, 426 S.E.2d 876, 879 (Ga. 1993); Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981).

123. See Geffen & Lentze, *supra* note 117, at 1344.

124. *Id.* (noting that statutory procedures in Minnesota were “intentionally created to be somewhat cumbersome to help protect the presumption that criminal records remain publicly available”).

125. See generally RAM SUBRAMANIAN ET AL., VERA INST. FOR JUSTICE, RELIEF IN SIGHT?: STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014 (2014), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy\\_downloads/states-rethink-collateral-consequences-report-v4.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy_downloads/states-rethink-collateral-consequences-report-v4.pdf) [<https://perma.cc/NXM7-3M7X>].

126. Since 2011, the following states have made some changes to their expungement law to allow for expungement of conviction information: California, Colorado, Idaho (juvenile offenders), Indiana, Louisiana, Maryland, Massachusetts (lowered waiting periods), Minnesota, North Dakota (changed grading), Ohio, Tennessee, Utah (lowered waiting periods), Vermont, and Wyoming. See generally *Restoration of Rights Project*, NAT'L ASS'N CRIM. DEF. LAW., <http://restoration.cresourcecenter.org> [<https://perma.cc/K85S-PGLD>] (last visited Apr. 13, 2018).

127. SUBRAMANIAN ET AL., *supra* note 125, at 14 (“Many states have recognized that overly long waiting periods place a burden on those simply trying to move on with their lives.”).

128. *Id.* at 15–16.

129. *Id.*

petitioning for expungement.<sup>130</sup> The effect of these reforms cannot be overstated, and citizens and attorneys have begun to respond by prioritizing expungement in their pro bono work.<sup>131</sup> Free clinics offering to assist with expungement petitions are now common, with hundreds of ex-offenders desiring assistance.<sup>132</sup>

Expungement reform has typically been divided into two forms of relief: (1) “forgetting” measures that aim to “expunge” data in the traditional sense of the word, meaning erasing or sealing it; and (2) “forgiving” measures, which aim to alleviate the effects of a criminal record through measures like certificates of rehabilitation.<sup>133</sup> Of course, statutes that lead to forgetting by definition imply some level of forgiving, and laws that allow for forgiveness presume some future forgetting.

There are certain trends in recent reforms. First, states are moving toward expanding the types of information eligible for expungement or sealing.<sup>134</sup> The range of criminal record history information that is considered eligible in various jurisdictions reflects the recognition that low-level misdemeanors and order-maintenance offenses are overwhelming the system with catastrophic long-term consequences on individual development and communities.<sup>135</sup> Information now eligible for expungement includes nonviolent misdemeanor offenses, particularly drug crimes, and other low-level convictions.<sup>136</sup> These expansions typically involve waiting periods linked to the perceived severity of the offense, which can range from three to ten years.<sup>137</sup>

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130. *Id.* at 17, 21 (noting how some states have decided to remove judicial discretion from the process and instead automatically provide for expungement if the petitioner meets certain criteria).

131. *See, e.g.*, Lynh Bui, *Fair Offers Free Legal Help for Those Seeking to Clear Their Records of Criminal Charges*, WASH. POST (Jan. 12, 2017), [https://www.washingtonpost.com/local/public-safety/expungement-fair-offers-free-legal-help-for-those-seeking-to-clear-their-records/2017/01/12/Of4bd84a-d8df-11e6-9a36-1d296534b31e\\_story.html? \[https://perma.cc/S4JU-DPCE\]](https://www.washingtonpost.com/local/public-safety/expungement-fair-offers-free-legal-help-for-those-seeking-to-clear-their-records/2017/01/12/Of4bd84a-d8df-11e6-9a36-1d296534b31e_story.html? [https://perma.cc/S4JU-DPCE]); Julie Shaw, *Philadelphia Bar Association to Hold Free Criminal Record Expungement Clinic*, PHILA. INQUIRER (Sept. 27, 2016), [http://www.philly.com/philly/blogs/real-time/Phila-Bar-Association-to-hold-free-expungement-clinic.html \[https://perma.cc/HG8K-PAPC\]](http://www.philly.com/philly/blogs/real-time/Phila-Bar-Association-to-hold-free-expungement-clinic.html [https://perma.cc/HG8K-PAPC]).

132. *NLG Expungement Project a Success*, TEMPLE U. BEASLEY SCH. L. (Nov. 4, 2014), [https://www.law.temple.edu/news/nlg-expungement-project-success/ \[https://perma.cc/A2SN-S7YM\]](https://www.law.temple.edu/news/nlg-expungement-project-success/ [https://perma.cc/A2SN-S7YM]).

133. *See, e.g.*, CAL. PENAL CODE § 4852.01 (West 2018).

134. *See* Andrea Papagianis, *More States Attempting to Seal Criminal Records*, REPORTERS COMMITTEE FOR FREEDOM PRESS, [https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2012/more-states-attempting-seal \[https://perma.cc/KK7L-5XV4\]](https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2012/more-states-attempting-seal [https://perma.cc/KK7L-5XV4]) (article from the spring 2012 edition of *News Media and the Law*).

135. Bui, *supra* note 131 (quoting an attorney affiliated with an expungement clinic who said, “I wonder how many people are laboring along, who are hopeless and discouraged and may have minor nuisance offenses that they can expunge and they just don’t know”).

136. *See, e.g.*, IND. CODE ANN. § 35-38-9-2(a)–(b) (West 2018); LA. CODE CRIM. PROC. ANN. art. 971 (2018) (“The inability to obtain an expungement can prevent certain individuals from obtaining gainful employment.”); Maryland Second Chance Act of 2015, MD. CODE ANN., CRIM. PROC. § 10-301(f) (West 2018); MINN. STAT. ANN. § 609A.02 (West 2018).

137. IND. CODE ANN. § 35-38-9-2(c); LA. CODE CRIM. PROC. ANN. art. 977–78 (2018); MD. CODE ANN., CRIM. PROC. § 10-303; MINN. STAT. ANN. § 609A.02(3)(a)(3).



Reforms have also attempted to restrict the usage of expunged information. In Indiana, the law determines availability of expunged records according to the seriousness of the offense.<sup>138</sup> Some more recent state laws prohibit state entities from automatically disclosing information to the general public<sup>139</sup> or using it during future law enforcement actions.<sup>140</sup> These laws also task governmental entities with sending updated information, or an order of expungement, to the private databases that hold the information, although whether private entities that continue to disclose expunged information are subject to penalties varies by jurisdiction.<sup>141</sup>

Interestingly, jurisdictions diverge regarding whether expungement should be automatic in certain situations. Some reforms have allowed for automatic expungement upon a showing by the petitioner that any procedural hurdles have been met.<sup>142</sup> Others, like Minnesota, continue to defer decision-making to a judge and call for the balancing of public interests and private interests.<sup>143</sup> In either situation, the prosecutor plays a crucial role. In the case of potential automatic expungement, prosecutors are often the gatekeepers for pointing out procedural error in petitions.<sup>144</sup> The significance of this function is remarkable considering that some state reforms, like that of Maryland, only allow petitioners one bite at the apple.<sup>145</sup> If the state allows for a hearing, prosecutors might object to expungement on either procedural or substantive grounds. In the latter situation, petitioners may have to overcome something tantamount to a clear-and-convincing-evidence standard to bypass the prosecutorial objection.<sup>146</sup>

Thus, even when the law might provide for automatic expungement, or at least express a presumption in favor of expungement, the formal and informal procedural hurdles embedded in the administration of the law provide mechanisms through which a prosecutor can stall or hasten expungement. And the prosecutor's decision-making implicates public policy, theories of punishment, state interests, and the situation of the offender. The rest of this

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138. IND. CODE ANN. §§ 35-38-9-2 to -4 (noting standards for misdemeanors and felonies); *see also* Dugan, *supra* note 116, at 1341–42 nn.129–37.

139. IND. CODE ANN. §§ 35-38-9-2 to -4. *But see* MD. CODE ANN., CRIM. PROC. § 10-302(b)(2) (allowing dissemination of the information by the state entity upon request from an employer).

140. MD. CODE ANN., CRIM. PROC. § 10-305.

141. *See, e.g.*, LA. CODE CRIM. PROC. ANN. art. 974(A) (“A private third-party entity, excluding a news-gathering organization, that compiles and disseminates criminal history information for compensation shall not disseminate any information in its possession regarding an arrest, conviction, or other disposition after it has received notice of an issuance of a court order to expunge the record of any such arrest or conviction.”).

142. Murray, *supra* note 5, at 371 (“Like Maryland’s statute, the Louisiana statute limits judicial discretion: expungement is automatic if the eligibility requirements are met.”). Some judges have balked at the loss of discretion. *See, e.g.*, Cline v. State, 61 N.E.3d 360, 363 (Ind. Ct. App. 2016) (noting that the trial court abused its discretion when it denied an expungement petition that met all statutory requirements).

143. MINN. STAT. ANN. § 609A.03(5)(a)(1)–(12) (West 2018).

144. *See infra* Part II.A.

145. MD. CODE ANN., CRIM. PROC. § 10-303(e)(4).

146. MINN. STAT. ANN. § 609A.03(5)(c)(1)–(12).

Article examines the nature of that involvement in the context of the overall prosecutorial role.

## II. PROSECUTORIAL DISCRETION AND EXPUNGEMENT

This Part examines the role of the prosecutor in various state regimes and moves on to explore three alternative approaches to expungement that prosecutors might adopt in the expungement realm. It concludes with a discussion of existing scholarship in this area, arguing that academics have yet to comprehensively address how prosecutors should pursue justice in the expungement context.

### A. *The Power of the Prosecutor Under Current Expungement Regimes*

State legislatures allow prosecutors to wield remarkable influence over the procedural and substantive aspects of expungement law.<sup>147</sup> The authority afforded prosecutors ranges from an extension of the quasi-judicial expectations already existing at other phases, to the role of pure adversary with the power to manipulate process in addition to making substantive arguments.<sup>148</sup> Prosecutors act as the first line of review—they make determinations as to whether petitions should be heard by a judge, possess veto authority over petitions, can bargain about expungement rights, and can assent to quicker relief than otherwise provided by state law.<sup>149</sup> How a prosecutor chooses to engage with each of these responsibilities can be the difference between a smooth expungement process—and the road to full reentry—or a bureaucratic, Kafkaesque<sup>150</sup> nightmare.

In multiple jurisdictions, prosecutors are the first reviewers after a petition for expungement is filed, and they can be procedural force fields capable of blocking relief. In California, a prosecutor's rejection of an expungement petition results in its automatic denial; although that denial is appealable, the cost of the prosecutor's inaction to the lay petitioner—who has already navigated significant procedural thickets to file the petition in the first place—is immeasurable.<sup>151</sup>

California's law provides one end of a spectrum. More jurisdictions resemble that of Georgia, where the prosecutor has ninety days to determine

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147. *See infra* notes 151–66.

148. *Id.*

149. *Id.*

150. FRANZ KAFKA, *Before the Law*, in FRANZ KAFKA: THE COMPLETE STORIES 3, 3 (Nahum N. Glatzer ed., Willa & Edwin Muir trans., 1971) (“Before the law stands a doorkeeper. To this doorkeeper there comes a man from the country and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. ‘It is possible,’ says the doorkeeper, ‘but not at the moment.’”).

151. *See* CAL. PENAL CODE § 851.8(b) (West 2018). A significant number of ex-offenders are indigent, which means that petitioners are also likely to be battling other hurdles—such as filing fees and costs—at the time of their petition, making the effect of a denial even more significant. *See* Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DAEDALUS, Summer 2010, at 8, 8.

whether the petition meets the statutory criteria for expungement; if it does not, the prosecutor can return the petition to the petitioner with a notice indicating that the petition failed for procedural reasons.<sup>152</sup> The lay petitioner receiving that response from an agent of the state—who took her liberty at an earlier date—might naturally feel deterred from pushing harder. Nevertheless, the burden then shifts to the lay petitioner to demonstrate—by clear and convincing evidence—that the arrest is eligible for expungement.<sup>153</sup> In other places, prosecutorial consent is necessary simply to file a petition.<sup>154</sup>

Prosecutors also have the authority to judge the merits of petitions before they reach a judge. For example, Colorado lets prosecutors act as referees, or administrative law judges, prior to judicial involvement.<sup>155</sup> If the prosecutor does not object, expungement is automatic; after an objection, a petitioner must proceed to an in-person hearing, and it is only then that the judiciary becomes involved.<sup>156</sup>

A few states also permit prosecutors to *initiate* expungements. Delaware mandates expungement when the prosecutor files the petition.<sup>157</sup> When the prosecutor does not begin the process, the petitioner must show “manifest injustice” due to the record.<sup>158</sup> Interestingly, Hawaii raises the stakes by vesting absolute expungement authority in the office of the prosecutor: the judiciary’s reach only extends to court information.<sup>159</sup> Prosecutors can ignore judicial decisions granting expungements for functionally similar information, forcing petitioners to have to seek erasure of information in multiple venues. New York has a similar rule for information relating to arrests that did not result in charges.<sup>160</sup> Notice that the above provisions seem to presume ineligibility for expungement.

While some jurisdictions afford prosecutors the above, first-line-of-defense responsibilities, the majority of states give prosecutors the ability to affect the process by which an expungement is pursued and to advocate on behalf of the state with respect to the petition. In various places, courts can only expunge without a hearing if there is no initial objection by the

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152. GA. CODE ANN. § 35-3-37(n)(2) (West 2018).

153. *Id.* § 35-3-37(n)(3). *But see* COLO. REV. STAT. ANN. § 24-72-704(1)(b)(I) (West 2018) (allowing judges to determine whether grounds for a hearing exist).

154. *See, e.g.*, FLA. STAT. ANN. § 943.0585(2)(a) (West 2018); N.J. STAT. ANN. § 2C:52-24 (West 2018).

155. COLO. REV. STAT. ANN. § 24-72-704(1)(b)(I).

156. *Id.*

157. DEL. CODE ANN. tit. 11, § 4374(c) (West 2018).

158. *Id.*

159. HAW. REV. STAT. ANN. § 831-3.2 (West 2018).

160. N.Y. CRIM. PROC. LAW § 160.50(1), (4) (McKinney 2018).

prosecutor.<sup>161</sup> This rule applies to both criminal record information involving convictions *and* to nonconviction arrest information.<sup>162</sup>

Similarly, some jurisdictions mandate expungement when prosecutors do *not* object. In California, the “concurrence of the prosecuting attorney” requires the arresting agency to seal arrest records.<sup>163</sup> Colorado mandates expungement of various grades of misdemeanor *convictions* when the prosecutor does not object.<sup>164</sup> This is a remarkable amount of power: if a petitioner can convince the prosecutor, or the prosecutor simply *fails to respond*, the law *requires* expungement of a *conviction*, bypassing any role for the judiciary that presumably played a role in the original conviction. That is the rule in several other states as well, whether involving conviction or nonconviction information.<sup>165</sup> By locating significant authority in the prosecutor’s initial review of the petition without providing any guidance as to the metric for that review, these statutes essentially eliminate stakeholders from the process.<sup>166</sup>

Prosecutorial decision-making relating to expungement petitions has the capacity to lengthen the process and make it more difficult to obtain relief. Objections to expungement, warranted or not, often require that the matter be listed for a hearing, thereby demanding the presence of both parties and an evidentiary showing.<sup>167</sup> In most jurisdictions, courts are required to hold

161. ARIZ. REV. STAT. ANN. § 13-907.01(B) (2018) (“If the prosecutor does not oppose the application, the court may grant the application and vacate the conviction without a hearing.”); ARK. CODE ANN. § 16-90-1413(b)(2)(B)(i) (West 2018) (“If notice of opposition is not filed, the court may grant the uniform petition.”); CAL. PENAL CODE § 851.8(d) (West 2018) (“In any case where a person has been arrested and an accusatory pleading has been filed, but where no conviction has occurred, the court may, with the concurrence of the prosecuting attorney, grant the relief provided in subdivision (b) at the time of the dismissal of the accusatory pleading.”); 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (West 2018); IND. CODE ANN. § 35-38-9-9(a) (West 2018); MD. CODE ANN., CRIM. PROC. § 10-303(d)(2) (West 2018); N.J. STAT. ANN. § 2C:52-11 (West 2018); UTAH CODE ANN. §§ 77-40-103(8) to -107(7) (West 2017); VA. CODE ANN. § 19.2-392.2(F) (West 2018).

162. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-907.01(B); ARK. CODE ANN. § 16-90-1413(b)(2)(B)(i); CAL. PENAL CODE § 851.8(d).

163. CAL. PENAL CODE § 851.8(a).

164. COLO. REV. STAT. ANN. § 24-72-705(1)(d)(II), (e)(II) (West 2018).

165. *See, e.g.*, GA. CODE ANN. § 35-3-37(n)(2) (West 2018) (noting that for pre-2013 arrests, “if record restriction is approved by the prosecuting attorney, the arresting law enforcement agency shall restrict the criminal history record information”); 20 ILL. COMP. STAT. 2630/5.2(d)(6)(B) (providing for automatic expungement if no objection); IOWA CODE ANN. § 901C.1 (West 2016) (providing for automatic expungement upon no objection or initiation by a prosecutor, which is allowed under the statute); KY. REV. STAT. ANN. § 431.076(3) (West 2018); MINN. STAT. ANN. § 609A.025(a) (West 2018) (providing for automatic expungement unless the court finds it contrary to the public interest); N.Y. CRIM. PROC. LAW § 160.50(1) (McKinney 2018); VT. STAT. ANN. tit. 13, § 7602(a)(3) (West 2018); WYO. STAT. ANN. §§ 7-13-1401(c), 7-13-1501(f), 7-13-1502(f) (West 2018).

166. This arguably amounts to a separation of powers issue that might be worth exploring.

167. ARIZ. REV. STAT. ANN. § 13-907.01(C) (“If the prosecutor opposes the application, the court shall hold a hearing on the application.”); ARK. CODE ANN. § 16-90-1413(b)(2)(B)(II) (“If notice of opposition is filed, the court shall set the matter for a hearing if the record for which the uniform petition was filed is eligible for sealing under this subchapter unless the prosecuting attorney consents to allow the court to decide the case solely on the pleadings.”); COLO. REV. STAT. ANN. § 24-72-705(1)(d)(II)–(III) (misdemeanor and felony convictions); *id.* § 24-72-705(1)(e)(III) (felony drug possession convictions); 20 ILL. COMP. STAT.

hearings after prosecutors object to a petition.<sup>168</sup> The unintentional costs should not be discounted in such a situation, especially considering the presumed deleterious effects of a criminal record.

Prosecutors also wield authority to activate hidden provisions in state statutes, which broaden or narrow the relief possibilities for petitioners. Many jurisdictions require petitioners to wait a certain amount of time from the date of disposition before filing a petition.<sup>169</sup> In some jurisdictions, these waiting periods exist even for nonconviction information.<sup>170</sup> But in a state like Indiana or Minnesota, prosecutors can eliminate or elongate the waiting period by consenting to expungement or requesting more time for review.<sup>171</sup> In Minnesota, expungement following dismissal of charges can be instantaneous if the prosecutor consents.<sup>172</sup> In North Carolina, a prosecutor can delay expungement by asking for additional time to review a petition.<sup>173</sup>

Prosecutors also possess other expungement-related responsibilities. Most jurisdictions require prosecutors to comply with court orders mandating expungement, which means that offices must have internal processes for eliminating information.<sup>174</sup> Only some states maintain private rights of action for failing to comply with such orders, so improper dissemination or use by the agency remains largely unchecked.<sup>175</sup> Some jurisdictions assign notice responsibilities to prosecutors, thus requiring prosecutors to contact other agencies after an order mandates expungement or sealing.<sup>176</sup> Such provisions require disciplined internal procedures by prosecutors who might not be inclined to act, thus possibly rendering ineffective expungements ordered by a court.

In addition to their procedural powers during expungement processes, prosecutors are not limited in the factors they can consider when advocating for or against a petition. Most jurisdictions identify factors that courts should consider when determining the merits of an expungement petition<sup>177</sup> but very few provide guidance to prosecutors as to how they should approach the substantive merits of a petition.<sup>178</sup> Most often, prosecutors can pick and choose their justifications for opposing expungement without tethering them to concepts of the prosecutorial role after disposition. To name a few,

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2630/5.2(d)(7); IND. CODE ANN. § 35-38-9-9(c) (West 2018); LA. CODE CRIM. PROC. ANN. art. 980(D) (2018); MD. CODE ANN., CRIM. PROC. § 10-303(e)(1) (West 2018); UTAH CODE ANN. §§ 77-40-103(6), 77-40-107(6)(a) (West 2018); WYO. STAT. ANN. §§ 7-13-1401(c), 7-13-1501(e), 7-13-1502(e).

168. *See supra* note 167.

169. *See Murray, supra* note 5, at 369–73.

170. *Id.*

171. *See, e.g.*, IND. CODE ANN. §§ 35-38-9-1(b), -9-2(c), -9-2(e)(4), -9-3(e)(4), -9-4(c), -9-4(e)(4); MINN. STAT. ANN. § 609A.025(c) (West 2018).

172. MINN. STAT. ANN. § 609A.025(c).

173. N.C. GEN. STAT. ANN. § 15A-145.5(c) (West 2018).

174. *See, e.g.*, 18 PA. CONS. STAT. § 9122(c) (2018) (detailing prosecutorial responsibilities postexpungement, which includes retaining certain information).

175. *See, e.g.*, 18 PA. CONS. STAT. § 9183(a) (2018).

176. N.J. STAT. ANN. § 2C:52-6(a)(4) (West 2018).

177. *See, e.g.*, *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981).

178. *See, e.g.*, GA. CODE ANN. § 35-3-37(n)(2) (West 2018).

prosecutors might be mindful of the progress of the offender's rehabilitation; the effect that an expungement might have on that process; the already existing and potential harm attendant to maintenance of an arrest record; the need for the information in the future, either for usage by law enforcement or others; and the value of truth to the criminal justice system and public as a whole, as well as the individual parties involved in a case. While all of these considerations are legitimate, the state laws demonstrate that in most states, prosecutors are left with little to no guidance for thinking through them. This legislative silence is particularly troubling as it relates to the initial review phases, where the prosecutor has significant power to affect later proceedings.

Current regimes also afford prosecutors wide discretion in how they may choose to *use* information otherwise ordered sealed or expunged. The default rule in most jurisdictions is that expungement renders information mostly private, with only a select few individuals or institutions maintaining the authority to view the information.<sup>179</sup> It is usually the case that prosecutors are included in that small group, but the parameters of how prosecutors might use that information, and whether they face penalties for doing so, are typically a matter of internal policy.<sup>180</sup> Without guidance as to how to act before, during, and after an expungement, or how to prioritize the considerations mentioned above—legally or ethically—it follows logically that prosecutorial discretion at this phase can become entirely arbitrary. Decisions could turn on a variety of factors or a combination thereof, including who an offender knows, internal office dynamics, the organizational structure of an office, and prosecutorial workload. This can result in divergent and inconsistent results, not to mention costly effects for various stakeholders in expungement processes.

### B. *Prosecutorial Incentives and Expungement Regimes*

The significant leeway given to prosecutors in expungement regimes can lead to serious, rippling effects, especially if the prosecutor knows the consequences of a criminal record. These approaches can reflect the structural, personal, and psychological incentives within prosecutors' offices, such as the prioritization of law enforcement objectives, administrative efficiency, conviction integrity, notions of self-worth, public policy, and theories of punishment and proportionality.

When it comes to exercising discretion after a prosecution, there are institutional, professional, and psychological reasons why a prosecutor will default to protecting a conviction or preserving a record of an arrest even if the charges did not result in a conviction.<sup>181</sup> Put most simply, prosecutors are judged at a macro and micro level according to their ability to appear

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179. 18 PA. CONS. STAT. § 9122(c).

180. *Id.*

181. See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 38 (2009) (“[I]nstitutional, professional, and psychological incentives are normally aligned with preserving the integrity of the trial result.”).

“tough on crime.”<sup>182</sup> The efficient achievement of convictions is the fastest way to project that message.<sup>183</sup> On an individual level, a prosecutor’s win-loss record might become the measure of his self-worth.<sup>184</sup> In the expungement context, this means that a default position against expungement—especially for a legitimate conviction—is naturally attractive.

As such, conviction rates—and preserving convictions—contribute to what others have labeled a “conviction psychology,”<sup>185</sup> which the front lines of investigation, bargaining, and trial cultivate and reinforce. Winning indicates effectiveness and advances careers. This is why some offices prioritize the achievement of convictions and their longevity over other goals.<sup>186</sup> When the metric is the efficient disposition of cases with a bias toward convictions, or at least conviction-like dispositions, prosecutors default to being advocates against expungement.<sup>187</sup> In reality, the conviction-first mindset probably comes down to the nature of prosecutors’ offices and of the adversarial system, which reinforces prioritization of prosecutorial advocacy at all costs. Prosecutors’ offices are beholden to their constituents, including voters *and* partners in law enforcement.<sup>188</sup> Thus, political pressures and institutional relationships foster prioritizing the achievement and preservation of convictions.

If convictions are uprooted after the fact, the office risks looking soft and possibly disloyal to its institutional partners who are also invested in achieving convictions.<sup>189</sup> After all, the majority of prosecutors spend most of their days interacting with other parties whose aim is to achieve convictions.<sup>190</sup> The result when it comes to expungement is this: although

182. Catherine Ferguson-Gilbert, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 295 (2001) (“A prosecutor must give the people what they want—someone who is ‘tough on crime.’” (quoting Patricia Manson, *For Defense, Reform Tide Is a Buoyant Force*, CHI. DAILY L. BULL., Apr. 22, 2000, at 1)).

183. Medwed, *supra* note 181, at 45 (“[C]hief prosecutors tend to cite their offices’ overall conviction records to justify their budgets to local politicians and to demonstrate, above all, that they are ‘tough’ on crime.”).

184. *Id.*; Ferguson-Gilbert, *supra* note 182, at 292 (“Many prosecutors measure their success by the number of wins they tally.”).

185. Green & Yaroshefsky, *supra* note 33, at 472 n.32.

186. Medwed, *supra* note 181, at 44 (“Some prosecutorial offices unabashedly use conviction rates as a motivational device—for example, by internally distributing attorneys’ ‘batting averages,’ or listing each lawyer by name on a bulletin board with a series of stickers reflecting the conclusions of their recent cases (green for convictions and red for acquittals).”).

187. Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 207 (1987) (citing George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 SW. U. L. REV. 98, 118–19 (1975)).

188. *Id.* at 204–15 (listing the ways that and reasons why a prosecutor might be overzealous).

189. Ferguson-Gilbert, *supra* note 182, at 294 (“Prosecutors who do not want to get caught up in the scorekeeping, conviction-seeking mentality often do anyway because being the whistle blower is against the prosecutor’s own self-interest in promotions or career advancement.”).

190. Fisher, *supra* note 187, at 209 (“[T]he prosecutor, having no individual client, naturally tends to treat victims and police officers as clients or, at least, as spokespersons for the ‘public interest.’” (quoting Donald M. McIntyre, *Impediments to Effective Police-Prosecutor Relationships*, 13 AM. CRIM. L. REV. 201, 219 (1975))).

the state has offered an avenue for relief, prosecutorial incentives—at least on the surface—arguably lead to a strong presumption against acquiescing to the defendant’s petition for relief. Expungement does not naturally fit with this adversarial mentality. Consenting to expungement amounts to agreeing to undo hours of work by the prosecutor—hours by which the prosecutor measures his own worth. To the average prosecutor, unstitching a carefully achieved conviction—the proverbial “scarlet letter”—requires significant justification.

Still, prosecutors who sense the policy objectives underlying the statute, and how they might align with doing justice, might act less reflexively. Prosecutors might seek to preserve or mitigate the effects of criminal records or even remain indifferent due to a belief that they are beyond the concern of the prosecutor. This Part presents different approaches to expungement that might be adopted by prosecutors in light of their motivations and incentives, and it identifies their strengths and weaknesses in order to juxtapose them with understandings of the prosecutor as a minister of justice.

### 1. Criminal Records Preservation

As noted above, statutory regimes provide prosecutors ample ways to entrench the existence of criminal records, either in the short or long term and irrespective of the scope of the substantive remedies afforded by statute.<sup>191</sup> The natural instincts of prosecutors—cultivated by a culture that values convictions—justify viewing expungement skeptically, even if a statute suggests a policy in favor of the remedy. For example, although Indiana’s progressive expungement regime enables prosecutorial consent to override otherwise applicable waiting periods, there is no guarantee that prosecutors will do so as a matter of public (or internal-office) policy.<sup>192</sup> Rather, incentives and professional expectations might drive prosecutors to preserve the work of the office by ensuring the continued existence of a legitimate (in the eyes of the prosecutor) conviction, arrest, or set of charges.<sup>193</sup> Prioritizing the preservation of criminal records likely stems from the belief that the creation of such records is a desirable end. This position is probably most in line—and in many instances, validly so—with the default position of the average prosecutor, who has invested significant institutional and personal time and effort pursuing a legitimate conviction.<sup>194</sup> In the case of pursuing charges after an arrest, the prosecutor recognizes and validates the efforts of law enforcement.

Prosecutors seeking to preserve records can exercise their discretion during the expungement phase in two ways. First, they can utilize all procedural hurdles that are either explicitly or implicitly allowed by the

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191. *See supra* Part II.A.

192. *See supra* note 138.

193. *See* NAT’L PROSECUTION STANDARDS § 8-1.2 (NAT’L DIST. ATTORNEYS ASS’N 2009) (“[T]he prosecutor should defend a legally-obtained conviction and a properly-assessed punishment.”).

194. Zacharias, *supra* note 14, at 174 (“[P]rosecutors’ incentives at the postconviction stage militate against taking action that benefits convicted defendants.”).



statute. Prosecutors can delay the process of expungement by requesting additional time to review a petition, nitpicking procedural or minor errors in pro se petitions, and refusing to consent to otherwise meritorious petitions. By doing so, they maintain a presumption *against* expungement, and statutes that allow for this type of behavior solidify that presumption.

Second, prosecutors might make a point of opposing expungement at almost every turn out of concern for future law enforcement efforts, broader values relating to pursuing the truth at all costs, or due to belief that the offender should suffer the consequences associated with the criminal record. This approach arguably has support in existing ethical codes, which identify the primary responsibility of prosecutors as “seek[ing] justice . . . [through the] presentation of truth.”<sup>195</sup> The prosecutor views the continued existence of criminal records as crucial to safeguarding the public and prioritizing the “interests of society in a paramount position.”<sup>196</sup> The mentality is similar to a prosecutor who seeks to enforce rather than mitigate collateral consequences.<sup>197</sup> Preserving criminal records is the logical outgrowth of the metric of winning and the conviction mentality mentioned above.<sup>198</sup>

This approach has the benefit of guaranteeing a robust defense of the advocate role of the prosecutor within the criminal justice system. It holds that criminal convictions, arrests, and any contact by a defendant with the criminal justice system warrants serious attention that should not be erased regardless of the unintended, attendant consequences. Entrenching criminal records sends a message to the public that contacts with the system are real and serious and that they will not be forgotten short of significant legislative or executive action above the level of the prosecutor, such as through use of the pardon power. In this sense, preserving criminal records comports with the prosecutor’s law enforcement duties. The prosecutor justifies retention of the scarlet letter in the name of deterrence or limiting recidivism.<sup>199</sup> Further, retention allows the prosecutor to enforce collateral consequences that the prosecutor might think are useful and justified.<sup>200</sup> This also connects

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195. NAT’L PROSECUTION STANDARDS § 1-1.1.

196. *Id.* § 1-1.2.

197. Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1198, 1222 (2016) (“In taking the collateral enforcement approach, prosecutors might seek out information about the defendant’s public benefits or immigration status, and they might leverage the plea bargaining process to induce defendants to waive protections . . .”).

198. *See supra* Part II.A.

199. Interestingly, this justification was behind initial efforts to catalogue criminal record history information. *See* Corda, *supra* note 10, at 9 (discussing how the origin of maintaining criminal record history information involved concerns about punishing recidivists harshly in the name of deterrence).

200. Jain, *supra* note 197, at 1225 (“Prosecutors might view collateral consequences as a more administratively efficient substitute for serious criminal sanctions. . . . Civil penalties that attach to low-level offenses, on the other hand, impose no additional administrative burdens. This approach can also save costs for corrections as a whole. Prosecutors who take this approach may find that it allows them to take more cases overall and also avoids costs associated with incarceration.”).

to a prosecutor's sense of ensuring proportional punishment, especially if the prosecutor believes that the direct sanction was too lenient.<sup>201</sup>

Ensuring the continued existence of criminal records means that the prosecutor is guarantor of the public record and has a recordkeeping responsibility that contributes to the legal system's overall integrity, both in terms of criminal justice and broader public values, such as those relating to the free dissemination of information. The latter principles are often the basis of arguments in litigation involving the Fair Credit Reporting Act and the accurate reporting of criminal records, including those that have been expunged.<sup>202</sup> Additionally, the prosecutor pursuing preservation is probably mindful of her relationship with other well-intentioned third parties or agencies, which might have an interest in knowing about an offender's past. As such, the prosecutor views himself as partnering with other entities to protect the public. This approach responds directly to the institutional commitments described above, where the prosecutor's prioritization of relationships with partners in law enforcement drives behavior toward defendants.

Of course, responding to expungement this way is not without its costs. Part I already detailed the range of consequences for individuals with criminal records. Some of these are legitimate and some are not, but they exist, and they create a real barrier to full reentry. The immediate consequences of a denied petition can be catastrophic for the petitioner: some jurisdictions limit refiling until after a lengthy waiting period, which can range from one to five years.<sup>203</sup> Perhaps more importantly, a denied petition likely means continued incapacitation due to a criminal record and might violate principles of proportionality in punishment.<sup>204</sup> Restoration then is delayed because the retribution inherent to the criminal record never ceases, which inhibits new contributions by the ex-offender. This is justified in some situations, but in others it is not. Yet the prosecutorial incentives driving a hostile position toward expungement can allow such concerns to go unnoticed.

A second set of costs relates to procedural justice and alienation from the law. Criminal record history information operates to incapacitate individuals—both in terms of what those individuals can do and accomplish in the future and in terms of their attitudes toward the system as a whole.<sup>205</sup> Entrenching a reputation after payment of a debt arguably extends

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201. *Id.* (“[T]he prosecutor may appropriate the collateral consequence for retributive reasons.”).

202. See Sharon Dietrich, *May Background Screeners Lawfully Report Expunged Records?*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Mar. 18, 2018, 9:08 AM), <http://ccresourcecenter.org/2018/02/06/may-background-screeners-lawfully-report-expunged-records/> [https://perma.cc/VX5S-HZFY] (discussing judicial treatment of background-check screeners who report expunged criminal records as a potential violation of the Fair Credit Reporting Act).

203. See, e.g., ARK. CODE ANN. § 16-90-413(a)(2) (West 2018); VT. STAT. ANN. tit. 13, § 7605 (West 2018).

204. Corda, *supra* note 10, at 42–44 (discussing how the stigma associated with criminal record information relates to retributive principles of proportionality).

205. See *supra* Part I.A.

punishment beyond the crime and without the assent of the community. This fosters a sense of illegitimacy in the law; the idea being that the law never lets go regardless of what the offender does to repair harm that resulted from her crime. If the community desires a more liberal attitude toward expungement, this approach suffers from agency-cost problems due to a chasm between communal and legislative perspectives and the prosecutorial pursuit of those objectives, especially as the prosecutor is acting on behalf of “the people.” As will be explored in further detail below, a prosecutor at this end of the spectrum arguably fails to appreciate the quasi-judicial nature of her discretion at this phase.<sup>206</sup>

This is precisely where progressive expungement regimes might run into the cold, hard reality that some prosecutors will defend records at all costs, even when the illegitimacy of the underlying conviction or arrest is not at issue. This is arguably a third problem created by the preservation approach—undermining the separation of powers. Expungement regimes, in theory, involve all branches of government: the legislature sets policy and the scope of remedies, the judiciary determines the merits of a petition, and the prosecutor represents the executive branch and the public *and* enforces the decision of the judge. When prosecutors operate to entrench records, especially in situations where expungement would be otherwise automatic or preferred by statute, they undermine the other branches of government by disregarding legislative will and subverting the judiciary.

## 2. Criminal Records Mitigation

Whereas prosecutors seeking to maintain records in almost all situations approach expungement with a presumption against relief, those who seek to mitigate the collateral consequences of criminal records tend to emphasize forgiveness and prioritize mercy over justice in the end phases of criminal litigation. This approach tends to focus on the situation of the individual offender rather than the prosecutor’s perception of the interests of society. These prosecutors tend to consider the effects of criminal records to be disproportionate to the original reason for the creation of the criminal record. And the justification for a more open approach stems from a different metric of success—reducing recidivism.<sup>207</sup>

Mitigation has the advantage of being in line with modern-day expungement reforms because it seeks to broaden relief for a range of individuals. The mitigation approach sees the deleterious effects of a mere arrest and therefore proposes a presumption in favor of expungement. Statutes like those in Delaware, Hawaii, and Tennessee, which allow for prosecutor-initiated expungement, reflect this understanding.<sup>208</sup> Statutes that limit the arbitrary construction of procedural hurdles for petitioners reflect this as well, as do laws and that require prosecutors to provide legitimate

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206. See *infra* Part III.A.

207. See Denver et al., *supra* note 4, at 174. This study demonstrates that the erasure of criminal records can reduce recidivism. *Id.*

208. See, e.g., DEL. CODE ANN. tit. 11, § 4374(e) (West 2018).

justifications that go beyond law enforcement priorities when seeking to retain records.<sup>209</sup> Those same statutes often restrict the usage of sealed or expunged information by state actors in the future.<sup>210</sup> In short, the statutes seek to incentivize and motivate prosecutors to act in ways that go beyond the mere pursuit of convictions. This approach undeniably focuses on the effect that the criminal record has on the defendant after completion of the direct punishment. Ongoing harm to the individual is presumed, and expungement can account for that reality, even at the expense of the original investment by law enforcement in the arrest or conviction.

Prosecutors who seek to mitigate the effect of criminal records prioritize the fact that a debt has been paid by the offender (in the case of a conviction) or that an error has been made (in the case of nonconviction charges, for whatever reason) over the principle that a contact with the system occurring at a historical moment in time should be preserved. These prosecutors reject the idea that the primary responsibilities of a prosecutor are to act as a guarantor of truth and advocate on behalf of the state's penal interests at *all phases of a prosecution*. While truth might be crucial at the guilt and innocence phase, once the conviction has been obtained, the punishment been satisfied, and the offender rehabilitated, the existence of the record loses some of its justification. The prosecutor appreciates attendant circumstances that surround contacts with the system and views it as his job to control for some of them if doing so will enable full restoration. In practice, this means that prosecutors avoid delaying expungement by rarely objecting for frivolous procedural or substantive reasons, are willing to present a unified front to the judicial authority, and may even advocate for expungement. Regimes that allow for automatic expungement upon consent of the prosecutor implicitly seek to incentivize prosecutors to act as partners in rehabilitation, moving beyond the process-centric mentality of "plead 'em and forget."<sup>211</sup>

This approach, however, is not without its costs; it arguably eliminates stakeholders crucial to a well-functioning, legitimate postconviction remedy system. First, well-meaning prosecutors might not act in accordance with the wishes of interested parties in particular situations, such as adequately accounting for the interests of victims who suffered as the result of a crime. Second, prosecutors who respond favorably to expungement also might underappreciate the inherent retributive component to a scarred reputation. It is not always the case that a scarred reputation is the same as a shattered one. Some letters should remain stitched. There are some instances where

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209. See *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981).

210. See, e.g., 18 PA. CONS. STAT. § 9122(c) (2018).

211. In fairness, the origin of this phrase is "meet 'em, and plead 'em," which usually appears in critiques of overburdened public defense programs. See Cecilia Valentine, *Meet 'Em and Plead 'Em: Is This the Best Practice?*, CHAMPION, June 2013, at 18, <https://www.nacdl.org/Champion.aspx?id=28953> [<https://perma.cc/2KL9-YVXX>]. The author's conversations with local county prosecutors suggest that understanding the mechanics of the administration of justice after prosecution in a phase like expungement, and the negative effects of criminal records, is rarely an office priority, a hypothesis he is currently in the process of testing empirically.

keeping a criminal record public and accessible is wise. Third, this approach might divide prosecutors' offices internally by pitting the prosecutor who favors expungement against the institutional and personal investment of the prosecutor responsible for the otherwise legitimate conviction, or, in the case of nonconviction charges, the police. Competing incentives can breed conflicts that can fester and undermine law enforcement efforts in other contexts.

Mitigating the existence of criminal records or their effects also might not give enough deference to the information-exchange values of a free society. One of the major arguments against expungement is that it essentially perpetrates a lie on society by whitewashing the past.<sup>212</sup> Free societies should not hide their pasts, even when they are not necessarily pleasant.<sup>213</sup> And individuals who facilitate the sharing of accurate information about the criminal activities of others, according to this line of thinking, should be lauded rather than reprimanded.<sup>214</sup> Political goals incentivize prosecutors to be mindful of this when considering expungement.

That said, focusing on mitigation enables prosecutors to foster forgiveness and offer mercy when very few other institutions and actors within the system are doing so.<sup>215</sup> They can help to alleviate basic inequities within the system that breed pent-up frustration among ex-offenders and other actors. There are reasons to prioritize individualized legitimacy, including the postprosecution rights of the *accused*, over the presumed "tough on crime" interests of society. Doing so implicitly keeps the onus on the state after prosecution, which is not the norm, but could help to build trust between prosecutors and communities. It therefore accords with procedural justice concerns and seems to be consistent with the values underlying public policies in favor of expungement and other reentry projects.

### 3. Criminal Records Indifference

Another possible approach involves prosecutorial inaction or, at most, half-hearted prosecutorial advocacy. The motivation here is a belief that prosecutors are not agents of social change; they have a limited role that already demands significant resources—contributing to determinations of guilt and innocence. Thus, prosecutors are justified in their indifference to the effect of criminal record history information because their focus should be on the primary aspect of their jobs—proving guilt by the end of trial (or negotiation). Prosecutors focused exclusively on the law enforcement work of the office do not fully appreciate the effect of a criminal record after the direct punishment is complete. But they also do not appreciate the depth of their involvement postprosecution, which makes their engagement in

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212. 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 *COMMLAW CONSPECTUS* 123, 131–33 (2010).

213. *Id.*

214. *Id.*

215. Prosecutors already have incentives to do this when it will lead to the future cooperation of law enforcement.

expungement hearings an afterthought. In practice, this means prosecutors defer to the wisdom of the judge and almost always engage in actions that bring expungement matters to the hearing stage, essentially punting to the judicial authority.

Agnostic prosecutors tend to see both sides of the expungement debate but refrain from trying to preserve or mitigate the effect of criminal records. Instead, these offices adopt an ad hoc, unprepared approach to advocacy, which suggests a lack of policy commitment or resource constraints. There is no predicting how the prosecutor might approach an expungement petition in this model, which of course can lead to selective and differential treatment for similarly situated individuals. It also can undermine law enforcement objectives, fail to appreciate the procedural justice concerns of a community, and counteract the objectives of policymakers in other arenas.

At face value, this approach has several disadvantages. First, it adopts a callous attitude toward expungement remedies by automatically denying the significance of a criminal record. This manifests itself in the lack of internal office policy or preparation for expungement. Petitions may fall through the cracks and requests for consent by petitioners may fall on deaf ears or receive the polite response, “let’s see what the judge says.” That leads to a second problem: prosecutors refusing to perform part of their jobs by not contributing to the reform and redress of inequities within the system. Third, prosecutors who are agnostic about the effect of a criminal record will likely not appreciate the gravity of their decisions in other contexts, such as the screening, charging, and charge-bargaining phases. This model underappreciates the active, discretionary component inherent to the “minister of justice” label and instead has prosecutors resemble clerical actors.

One might argue that an advantage of this model is that unbiased judges make decisions about expungement, thereby solidifying the judiciary as the final decision maker. An unbiased determination is surely a noble goal. However, the nature of that determination is skewed by the lack of interest on the part of the prosecutor. The prosecutor who does not actively seek to appreciate the reasons for and against expungement does not provide counsel to the judge making a particularized determination in an individual case. She also might shirk her legislatively assigned duties under the statute. Thus, the indifference model also has the potential to cause prosecutors to forget the importance of representing the interests of various stakeholders.

Before proceeding to discuss how these models, and the existing statutes, relate to prevailing norms regarding the prosecutorial mindset and behavior, a few clarifications might be in order. First, the discussion of the above approaches is by no means intended to close debate about the panoply of considerations that might drive a prosecutor’s response to the notion of expungement. Instead, it aims to identify the general frameworks that guide prosecutorial decision-making in this arena, with mentions of incentives and motivations that comport with the objectives underlying those frameworks. These frameworks exist along a spectrum, so it is possible for hybrid approaches to exist. Prosecutorial incentives are messy and expungement

regimes can help solidify some and not others, which results in mixed approaches in practice.

Additionally, this Article does not make any claim about the prevalence of any of these approaches, or the range of considerations that might permeate them. That is an empirical project for another day. Still, deciphering the boundaries between these approaches and how expungement regimes foster them is analytically useful because it allows for evaluating prosecutorial action in the expungement phase against the backdrop of existing notions of prosecutorial responsibility. Juxtaposing these approaches exposes how the current framework conceptualizing the prosecutor as “minister of justice”—focused almost entirely on adjudication and determinations of blameworthiness—fails to adequately account for the complexities endemic to prosecutorial activity after the disposition. Determining those shortcomings and proposing a response is the task of the next Part.

### C. *The Shortcomings of Existing Guidance*

Existing guidelines for prosecutorial discretion fall woefully short for phases after prosecution other than conviction-integrity review. These shortcomings are largely the product of history, conservative approaches to the rules of professional responsibility, and ad hoc rulemaking by judicial authorities. However, while those guidelines are insufficient, they also express certain normative commitments that are useful in constructing a theoretical framework for discretion in expungement.

Prosecutors are often labeled “ministers of justice,”<sup>216</sup> a phrase designed to encapsulate the double role assigned to prosecutors. They are tasked with advocating within an adversarial system while simultaneously acting in the public interest. The pursuit of justice as the primary mission dates back over 150 years.<sup>217</sup> Early courts described prosecutors as representatives of “the people” who advocate on behalf of the public interest.<sup>218</sup> The U.S. Supreme Court solidified that understanding in *Berger v. United States*,<sup>219</sup> which noted that the prosecutor is “the representative . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>220</sup> Notably, the Court’s conception of the prosecutor as an impartial “minister of justice” who pursues convictions fairly does not consider the responsibilities of a prosecutor after prosecution.

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216. See MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N, Discussion Draft 1983).

217. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 94 (5th ed. 1907) (“The office of the Attorney-General is a public trust, which involves in the discharge of it, the exertion of an almost boundless discretion, by an officer who stands as impartial as a judge.”).

218. See, e.g., *Hurd v. People*, 25 Mich. 404, 416 (1872) (“The prosecuting officer represents the public interest.”).

219. 295 U.S. 78 (1935).

220. *Id.* at 88.

Professional responsibility norms and rules have evolved over the past century to call for more oversight of prosecutorial behavior. The American Bar Association's (ABA) Model Rule 3.8 represents the latest iteration. The provisions of the rule address five different areas, including conduct relating to the exercise of procedural rights by the accused, disclosure obligations, the investigative authority of prosecutors, and public communications and statements.<sup>221</sup> The comments to Model Rule 3.8 label prosecutors "ministers of justice" with responsibilities extending beyond those "of an advocate."<sup>222</sup>

Other guidelines for prosecutorial behavior exist in the ABA's criminal justice standards and the National District Attorneys Association's (NDAA) *National Prosecution Standards*. The ABA reiterates how "[t]he duty of the prosecutor is to seek justice, not merely to convict,"<sup>223</sup> and both guidelines go one step further than Model Rule 3.8 by labeling the prosecutor "an administrator of justice, an advocate, and an officer of the court."<sup>224</sup> The NDAA guidelines remark that the "primary responsibility of prosecution is to see that justice is accomplished."<sup>225</sup> The case law across jurisdictions has tended to support the "minister of justice" approach but in specific contexts and without elaboration on application to other prosecutorial activities.<sup>226</sup> The ABA's Model Rules of Professional Conduct, association standards, and scattered cases combine to create a patchwork of guidelines that leave significant questions as to the discretion of individual prosecutors.

In short, there is a chasm between theory and practice when it comes to regulating prosecutorial discretion.<sup>227</sup> The rules are vague to begin with, and they fail to recognize the prosecutorial incentives that result from a

221. MODEL RULES OF PROF'L CONDUCT r. 3.8; Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587 ("Model Rule 3.8 is now comprised of a half dozen disciplinary provisions addressing five areas of prosecutorial conduct: the exercise of prosecutorial discretion; prosecutorial conduct affecting the waiver or exercise of procedural rights by the accused; the prosecutor's disclosure obligations; the prosecutor's exercise of investigative authority; and public communications by the prosecution team.").

222. MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1.

223. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 3-1.2(c) (AM. BAR ASS'N 1993).

224. *Id.* Standard 3-1.2(b).

225. NAT'L PROSECUTION STANDARDS § 1.1 (NAT'L DIST. ATTORNEYS ASS'N 2009).

226. *See, e.g., In re Peasley*, 90 P.3d 764, 772 (Ariz. 2004) (observing that a prosecutor's interest "is not that [he] shall win a case, but that justice shall be done"); *State v. Pabst*, 996 P.2d 321, 328 (Kan. 2000) ("A prosecutor is a servant of the law and a representative of the people . . . . We are unable to locate an excuse for a prosecutor's failure to understand the remarkable responsibility he or she undertakes when rising in a courtroom to announce an appearance for the State of Kansas."); *Hosford v. State*, 525 So. 2d 789, 792 (Miss. 1988) ("A fearless and earnest prosecuting attorney . . . is a bulwark to the peace, safety and happiness of the people. . . . [I]t is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality, and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled."). Judicial decisions have led to rules about the disclosure of exculpatory evidence, among other areas. *See, e.g., Arizona v. Youngblood*, 488 U.S. 51, 55 (1988) (noting the constitutionally guaranteed right to access exculpatory evidence).

227. Medwed, *supra* note 181, at 36 (noting the "troubling disconnect between the 'minister of justice' ideal of the American prosecutor and the on-the-streets reality of prosecutorial behavior").



prosecutor's bifurcated role. Additionally, the bases for the rules themselves do not give adequate weight to the significant discretion afforded to prosecutors in lesser-known phases of a prosecution. As one commentator puts it, "When the ABA advises prosecutors to act as 'ministers of justice' or 'administrators of justice,' it is using juris-babble that is practically meaningless to prosecutors and to the ABA itself."<sup>228</sup>

The command to do justice is too vacuous and does not appreciate the complicated nature of the prosecutorial role, which is contingent on the setting in which the prosecutor is acting.<sup>229</sup> Does "justice" mean procedural or substantive justice? Do those phrases have different meanings in different settings? Does the force of the obligation on the prosecutor depend on the viability and acceptability of other aspects of the criminal justice process? Does justice equal fairness? Is pursuing fairness an affirmative duty in all settings or only during the trial phase? In short, "doing justice" can lead a prosecutor in many directions before returning the prosecutor to where she started—her own judgment.<sup>230</sup>

The existing guidelines leave significant room for interpretation in the hands of prosecutors.<sup>231</sup> This leaves difficult questions, many not even contemplated by the terms of the rules or comments, unanswered.<sup>232</sup> As mentioned above, these guidelines fail to consider the full range of responsibilities possessed by prosecutors.<sup>233</sup> For purposes of this Article, it is worth pointing out how most, if not all, of the rules are designed to apply in situations when the prosecutor is clearly operating as an advocate and in venues designed to determine the defendant's guilt.<sup>234</sup> As a result, precise

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228. Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301 (1996).

229. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to 'Seek Justice'*, 82 NOTRE DAME L. REV. 635, 637 (2006) ("Justice" is an example of a highly generalized axiom of behavior—it does not set forth permissible and impermissible conduct, and it does not set out criteria for how prosecutors are supposed to determine what is just."); Medwed, *supra* note 181, at 42 ("Even so, the reliance on 'justice' as a governing principle of prosecutorial behavior is problematic because of the term's inherent vagueness.").

230. Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 608 FORDHAM URB. L.J. 607, 622 (1999) ("Discussions of questions such as these are not well informed by the phrase 'seek justice,' because of its vagueness. Standing alone, the injunction points in many directions. It might be taken to imply a posture of detachment characteristic of that assumed by judges, and quite apart from that ordinarily assumed by advocates, particularly in the trial context. It might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness—for example, an affirmative duty to ensure that innocent people are not convicted.").

231. See Medwed, *supra* note 181, at 45.

232. See Green, *supra* note 230, at 616 ("The disciplinary rules, however, do not fully consider how prosecutors' duty to seek justice may translate into different or more demanding professional obligations: Indeed, the rules barely scratch the surface.").

233. See *id.*

234. Green, *supra* note 221, at 1575 ("For example, specific disciplinary rules apply to lawyers in advocacy, but they generally do not recognize different responsibilities depending on whether the lawyer is advocating on behalf of a class, a corporation, or an individual, or before a court, administrative agency, or arbitrator.").

guidance does not exist for situations not involving the guilt or innocence of the defendant.

While academic literature has recognized the ambiguity in the constitutional and professional guidance, proposals in this realm have focused largely on guiding prosecutorial discretion before disposition. Scholars have sought to illuminate and justify the factors behind legitimate charging and bargaining,<sup>235</sup> and they have justified prosecutorial regulation in the trial context when adversarial safeguards are no longer present.<sup>236</sup> Additionally, scholars have focused on articulating the line between the investigative and adjudicative aspects of the position to mitigate bias in the adjudicative responsibilities of the job.<sup>237</sup> That examination led to Professor Barkow's proposal, for example, to call for a check on the adjudicatory decision-making of prosecutors through institutional design.<sup>238</sup>

In particular, Professor Barkow's proposals for institutional design focus on determining which tasks are investigative and which are adjudicative.<sup>239</sup> Investigative tasks are those that precede the initiation of charges, although they retain an adjudicative component given the effect of charges.<sup>240</sup> Adjudicative tasks "capture those decisions that effectively amount to a decision on the merits about a defendant's guilt and what punishment he or she deserves."<sup>241</sup> However, expungement relates to both sides of the line, depending on the type of criminal record history information at issue. Expungement implicates the investigative side because law enforcement might find a use for the information in the future. But it also implicates the adjudicative side because while the guilt and innocence phase has passed, the merits of mitigating the arguably punitive effect of a criminal record remain an issue. The prosecutor must ask whether the continued existence of a record, as punishment, is justified. While informative, the structural proposal that provides a clean break between the investigative and adjudicative sides does not neatly answer that question. Further, it is not entirely clear that it is viable in state prosecutors' offices—often divided politically by county—and without the resources of a large, federal bureaucracy.<sup>242</sup> Decentralization makes clarity even more difficult and the need for it that much greater.<sup>243</sup>

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235. See Wright & Miller, *supra* note 31, at 58–81. See generally Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37.

236. Zacharias, *supra* note 14, at 176.

237. Barkow, *supra* note 31, at 887–88.

238. *Id.*

239. *Id.* at 888.

240. *Id.* at 899 ("Treating the charging decision functionally, it becomes clear that it should be treated as adjudicative for purposes of separating functions in the office.")

241. *Id.* at 898.

242. Fish, *supra* note 34, at 279 ("In particular, prosecutorial self-regulation is more successful when a prosecution agency separates out the adjudicative function of enforcing defendants' rights from the line prosecutor function of obtaining convictions. This internal division of powers is easier to implement in a large, professionalized bureaucracy (such as the DOJ) than in a small, locally elected body (such as a state district attorney's office).")

243. *Id.* at 281 ("[T]here is thus reason to believe that the structure of state prosecutors' offices makes it more difficult for prosecutorial constitutionalism to flourish there.

### III. TOWARD A FRAMEWORK FOR THE PROSECUTORIAL ROLE DURING EXPUNGEMENT

After discussing the unique challenges posed by regulating the expungement process and the failure of existing academic literature to address it, this Part endeavors to propose a resolution. Part III.A begins with a discussion of the various justifications for improving regulation of the prosecutorial role in expungement proceedings. Part III.B draws on these justifications and understandings of prosecutorial incentives to offer concrete proposals for reform.

#### A. “Ministers of Justice” After Prosecution

Although existing guidelines are imperfect, scholars typically justify any call for prosecutorial justice by pointing to either the immense power afforded prosecutors or the uniqueness of their role.<sup>244</sup> These justifications offer useful parameters for considering the nature of prosecutorial responsibility in the expungement context because the aforementioned statutory regimes leave room for prosecutors to act as advocates and quasi-judicially.<sup>245</sup> Understanding the justification for pursuing justice is helpful for constructing a framework in the expungement context, where discretion must account less for individual blameworthiness and more for a balancing of broad, diffuse state objectives with the merits of the individual petition.

The “minister of justice” ideal rests on the following premises: (1) prosecutors engage in atypical legal work when they employ the *power* of law enforcement institutions; (2) prosecutors have different legal obligations than other attorneys; and (3) the historical basis for the prosecutorial office is unique.<sup>246</sup> Building from these premises, there are two justifications for asking prosecutors to pursue justice: the power afforded prosecutors and their role as the sovereign’s representative. The first justification emphasizes how the prosecutor, as a powerful agent of the state, faces generally powerless defendants in an adversarial setting. The authority possessed by prosecutors and resource advantages require prosecutors to be mindful of goals other than achieving convictions. This mindfulness should

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Nonetheless, there are a number of state district attorneys’ offices that serve as models of prosecutorial constitutionalism.”).

244. Green, *supra* note 221, at 1576.

245. See *supra* Parts II.A–B.

246. Green, *supra* note 221, at 1577 (“In the case of a criminal prosecution, in contrast, the prosecutor is not only a lawyer for the government but also a government official who makes the decisions on behalf of the government that would ordinarily be made by the client. Further, the prosecutor makes these and other decisions in light of various government objectives that derive from the law and legal traditions and that differ from the ordinary objectives of private clients. The government’s objectives might include not only convicting and punishing individuals who commit crimes, but also assuring fair and proportional punishment of the guilty, protecting the innocent from punishment, assuring fair treatment of those affected by the criminal process, and assuring compliance with constitutional and other legal provisions regulating criminal investigations and prosecutions. The prosecutor’s distinctive role, that is captured by the characterization of the prosecutor as a ‘minister of justice,’ leads to distinctive professional expectations, which are summed up by the duty to ‘seek justice.’”).

check the temptations that power might foster if left to its own devices. This justification underlies theories of prosecutorial ethics during phases involving the guilt or innocence of a defendant, especially at trial.<sup>247</sup>

The second justification stems from the prosecutor's role as the sovereign's representative.<sup>248</sup> Under this form of analysis, the prosecutor represents a sovereign who delegates authority to make decisions normally entrusted to the client. This means, in practice, that the prosecutor is tasked with deciphering the state's (client's) objectives and pursuing them. Hence, the prosecutor functions quasi-judicially by serving as both lawyer and government representative:

In many situations, a question of prosecutorial ethics will relate not to the prosecutor's duties as the government's trial lawyer, but to the prosecutor's fiduciary duties as the government's decisionmaking representative. In this role, as would be true of any individual acting as a fiduciary on behalf of a client, the prosecutor must make decisions and otherwise act in accordance with the client's interests and objectives.<sup>249</sup>

In the criminal law context, the aims of the sovereign state are threefold: (1) convicting guilty persons and avoiding prosecution of the innocent; (2) treating individuals with proportionality; and (3) treating lawbreakers equally.<sup>250</sup> The last two implicate expungement.

Both justifications can inform the construction of a theoretical framework for the exercise of discretion in the expungement context, although neither is adequate given the variation in prosecutorial involvement at the state level. The first justification corresponds to the power that prosecutors possess procedurally and substantively in the expungement context. In several jurisdictions, prosecutors have the ability to grant or deny expungement petitions in their entirety or to determine whether the process will be delayed, requires judicial intervention, or needs to be repeated at a later date.<sup>251</sup> That power, left to prosecutors without check, can be abused intentionally or due to lack of appreciation for the stigma associated with criminal records.<sup>252</sup> As such, some modicum of regulation is necessary to ensure that prosecutors use the power wisely; otherwise the imbalance of power that exists from charging to sentencing is exacerbated after prosecution, given the deleterious effect of a criminal record. However, the power justification alone does not capture the prosecutorial function during expungement because prosecutors are not asked to simply ensure fair procedure. Rather, expungement regimes tend to

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247. See Green, *supra* note 230, at 629; Zacharias, *supra* note 31, at 50–56.

248. Green, *supra* note 230, at 633 (“A lawyer serving in the role as criminal prosecutor is distinguished by the identity of the client, the amount of authority delegated to the lawyer to act on behalf of the client and the nature of the client's interests and ends in the criminal context.”).

249. *Id.* at 634.

250. *Id.*

251. See *supra* Part II.A.

252. Eric Fish makes a similar argument with respect to constitutional rights controlled by prosecutors. See Fish, *supra* note 34, at 299 (“Prosecutors should protect defendants' constitutional rights in those stages of the criminal justice process that prosecutors unilaterally control . . . [and] adopt judge-role ethics.”).

provide prosecutors with a responsibility to articulate the position of the state and, in some instances, actually enforce it.

Thus, the idea of the prosecutor as the sovereign's representative can inform behavior in the expungement context. First, the expungement context is not as adversarial as the trial phase. Second, determining the defendant's blameworthiness is no longer the fundamental objective of the process; rather, the defendant's eligibility and rehabilitation are fundamental to the determination. Third, the defendant's interests must be balanced against the range of concerns articulated in the preservation model outlined above, which means that the prosecutor is expected to account for an array of state interests. And some align with the objectives of the defendant and some do not. For example, will allowing for expungement send the wrong message to the public and other law enforcement actors, assuming the prosecutor can decipher the state's overall objectives and how they should be applied in particular cases? Alternatively, how does a prosecutor respond to the fact that background-check clearance can reduce recidivism?<sup>253</sup> Finally, the statute driving the proceeding is not a prohibition; rather, it is a cause of action providing relief. The very existence of an expungement regime suggests a conception of justice that leaves room for mercy. All of these considerations amplify the nature of the quasi-judicial role during expungement proceedings.

Because expungement proceedings are not as intrinsically adversarial as other phases, nor as focused on determining culpability, the prosecutor more often than not functions quasi-judicially. When evaluating an expungement petition, the prosecutor is essentially acting as a court of first review. Evaluation of what to do with the disposition now hinges on eligibility and the character of the ex-offender (or arrestee) rather than just the blameworthiness of the defendant, which has already been adjudicated. Notions of mercy become relevant because the prosecutor's obligation to do justice requires considering whether forgiveness is warranted.

Put simply, the theoretical framework for exercising prosecutorial discretion in the expungement context must account for the reality that existing expungement regimes situate prosecutors in a quasi-judicial role. In this role, a prosecutor's concerns relate less to individual blameworthiness and more toward a balancing of broad, diffuse state objectives with the merits of the individual petition. Those objectives are clearer in some situations than others but their spirit is undeniable—providing an avenue for relief for worthy ex-offenders that allows the prosecutor and the state to move beyond resentment and punishment.<sup>254</sup> As such, the quasi-judicial role of prosecutors during this phase arguably imports mercy into any conception of pursuing justice.

Existing expungement regimes provide prosecutors with the capacity essentially to gift warranted relief to worthy ex-offenders. It is important to distinguish this from full-fledged forgiveness, which involves more work on

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253. See generally Denver et al., *supra* note 4.

254. Bibas, *supra* note 112, at 331.

the prosecutor's end.<sup>255</sup> Rather, mercy in the expungement context involves careful consideration of the effects of expungement on the path of the ex-offender. And this is mercy that would essentially act to stop additional punishment from being exacted by the existence of a criminal record.<sup>256</sup>

It is not difficult to imagine scenarios where mercy might be warranted. There are plenty of offenses that were once considered serious that have since been decriminalized and examples of abuses in policing that have led to arrest records.<sup>257</sup> The rehabilitation of a defendant also can justify mercy. And the collateral consequences of a conviction or arrest might justify mercy as well. As such, in the expungement context, a prosecutor might be faced with a decision about whether pursuing justice actually means taking affirmative action *on behalf of* a defendant,<sup>258</sup> in conjunction with the objectives of the state, the spirit underlying the statute, and justice overall. At the same time, as quasi-judicial actors, prosecutors must remain mindful of the limitations placed upon both them and petitioners seeking relief. Mercy is not warranted in every instance because justice demands otherwise.

In sum, "doing justice" in the expungement context first means taking ownership of the prosecutorial role as quasi-judicial rather than a matter of strict advocacy. The statutory regimes provide as much, and the nature of the proceeding reinforces that role. Second, being a quasi judge in this context means that prosecutors, on a macro level, must decipher the objectives and policies of the state when it comes to expungement relief. In fairness, while the existence of expungement relief itself suggests some objectives, states could be clearer as to the priorities they envision for prosecutors. But one of those objectives is certainly reducing recidivism, which clear background checks help to do.<sup>259</sup> Third, after determining all of the objectives, prosecutors must strive to properly balance all of the competing considerations and do so in a manner that respects proportionality principles and ensures that similarly situated defendants receive the same treatment. Additionally, prosecutors need to consider thoroughly whether expungement is necessary to mitigate unintentional results from a disposition that were not part of the direct sentence, even if the results could have been justified at an earlier time in the defendant's history. Particularized determinations should be normal in this regard. Finally, prosecutors must recognize how existing expungement regimes provide the opportunity to pursue justice mindful of mercy. Recognition of that awesome capacity,

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255. *Id.* at 332 ("Unlike forgiveness, which flows from an internal emotional transformation, mercy is an external gift to a wrongdoer.").

256. The default position for prosecutors in all phases relating to guilt and innocence is "doing justice." Zacharias, *supra* note 14, at 173. For expungement proceedings related to nonconviction charges or involving a defendant who has satisfied all of the elements of his direct sentence, shouldn't the default position be justice mindful of mercy?

257. See, e.g., *The Spread of Marijuana Legalization, Explained*, VOX (Mar. 18, 2018, 9:09 AM), <https://www.vox.com/cards/marijuana-legalization/what-is-marijuana-decriminalization> [https://perma.cc/WJP5-SHA6].

258. Zacharias, *supra* note 14, at 182.

259. See generally Denver et al., *supra* note 4.

which for too long has only been understood as part of the pardon power, demands an appropriate response.

### B. Proposals

This Part offers a few concrete suggestions to help prosecutors act in a fashion that pursues justice on a macro and micro level. It begins with a discussion of institutional changes within prosecutors' offices and then moves on to suggest legislative reforms.

#### 1. The Prosecutorial Mindset and Institutional Design

Exercising discretion in the expungement context involves conflicting interests. Individual prosecutors may feel as though supporting expungement undoes significant investment by themselves or their colleagues. They may also feel the weight of expectations from other stakeholders, including victims, law enforcement personnel, defendants, and the state itself. The state can send mixed messages depending on whether the public policy underlying the expungement regime has been made clear. Finally, individual prosecutors might find themselves in an office with divergent policy goals and inattention to the importance of expungement. Thus, the first step to ensuring the fair exercise of prosecutorial discretion is to recognize these conflicts and mitigate their ability to paralyze decision-making or lead to a default position against expungement.<sup>260</sup>

One way to counter some of these conflicts is to separate the adversarial and quasi-judicial functions within a prosecutor's office. In other words, offices might clearly mandate a prosecutor, when determining the merits of an expungement petition, to be mindful of her quasi-judicial role.<sup>261</sup> For such a measure to be effective, it must occur at the policy level within the office and through educational measures that inform prosecutors about both the effects of a criminal record on reentry and the purposes of expungement relief. Others have commented on creating detailed protocols in the postconviction review context,<sup>262</sup> and there is no reason why similar internal procedures, or creation of a differential for prosecutors to think through, cannot exist with respect to expungement proceedings. This will operate to mitigate arbitrariness in decision-making.

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260. See Zacharias, *supra* note 14, at 218 ("At the postconviction stage, in contrast, prosecutors may not recognize the conflicts as readily because the various constituencies ordinarily are less active, may be unrepresented, and may not even know that an issue exists. As a procedural matter, this means that the judgment of prosecutors often will be clouded with their recognizing the possibility of a conflict of interest. This, in turn, may lead them to rely too much on the presumption of guilt as a means for justifying inaction.").

261. See H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 *FORDHAM L. REV.* 1695, 1716 (2000). While Eric Fish has proposed something similar in his article entitled "Prosecutorial Constitutionalism," his proposal is confined to the phases of prosecution before disposition. See generally Fish, *supra* note 34.

262. Zacharias, *supra* note 14, at 238 ("[P]rosecutors' offices should highlight postconviction justice issues in their manuals and administrative guidelines. At a minimum, internal guidelines can accomplish as much as new code provisions in establishing principles governing the presumption of guilt and the legitimacy of specific questionable criteria.").

Another measure that could help to ensure consistency is the development of a clear office policy on expungement. Many offices treat expungement proceedings as items on the miscellaneous docket. But given the complexity of exercising discretion in this area, prosecutors need to carefully reflect on how they want line personnel to respond to these petitions. Ad hoc decision-making cannot be the norm because it too easily incentivizes a default posture that is adversarial and forsakes the holistic responsibility at this phase.

In terms of office structure, offices should ensure that the prosecutor assessing the merits of a petition—both procedurally and substantively—is not the same prosecutor who prosecuted the case. The temptation to oppose expungement by default is too great. Prosecutors might have emotional attachments to their prior work, thereby clouding judgment. Prosecutors also might fear appearing soft to defendants, judges, victims, and their colleagues. In practice, this could involve the creation of a separate unit—similar to charging or diversion-eligibility units—that deals only with postconviction remedies, or simply expungement. Coupled with a clear office policy, prosecutors could rotate through the unit to ensure that the preferences of one prosecutor do not become de facto policy and to expose prosecutors to the arguments about the effects of a criminal record. This, in turn, would allow for careful reflection by prosecutors when they return to predisposition work about the long-term effects of a disposition.

Alternatively, prosecutors might consider hiring special expungement prosecutors with no prior experience as a prosecutor. This person also could be a senior prosecutor who no longer is involved in the adjudication of cases.<sup>263</sup> Such a position could recognize from the start the quasi-judicial nature of the task. The hired prosecutor might be required to consult with a citizen panel periodically to gauge the community's sense of when expungement is worthwhile.

Finally, offices should strive to appreciate that the expungement phase is no longer primarily about blameworthiness. The culpability of the defendant has already been adjudicated in almost all situations before a petition for expungement is filed. In the case of an arrest, prosecutors should not use expungement proceedings as an opportunity to simply restate probable cause as the justification for retaining a record. In this sense, prosecutors can recognize that their primary function—determining blameworthiness—is over and that the system has produced a disposition, however uncomfortable the prosecutor is with it. Now it is the defendant's chance to demonstrate rehabilitation and the prosecutor's opportunity to contribute to mercy on the path to restoration. Alternatively, it is a chance for the prosecutor to take seriously the expectations of other stakeholders arguing against

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263. Of course, the risks of making this individual a senior prosecutor should be apparent: experience or age is by no means a cure for the conviction mindset mentioned above. In fact, it could make biased decision-making worse because the senior prosecutor does not want to be perceived as undoing the work of her colleagues and is invested in the conviction record of the office. *See* Barkow, *supra* note 31, at 904 (“Indeed, it is possible that individuals with a great deal of experience may be biased precisely because their time in the office has colored their judgment.”).



expungement. Part of this mindset involves recognizing that contributing to restoration is not necessarily undermining retribution. Instead, expungement has the capacity to ensure proportionality—one of the main objectives of every prosecutor.

## 2. Legislative Clarity

Legislatures and policymakers, as well as the ABA—through its rules of professional responsibility—also can help prosecutors to responsibly act in this setting. First, legislative reforms aimed at clarifying the prosecutorial role and standards of review throughout the expungement process should properly situate prosecutorial decision-making within the overall expungement setting. Second, the terms of Model Rule 3.8, or at least its comments, need to consider how discretionary decisions related to reentry connect to the call for prosecutors to seek justice.

Two legislative reforms would be particularly useful. First, legislatures need to provide clarity, beyond the language of the statute, regarding the state's objectives with respect to expungement. Second, legislatures can create clearer standards of review during the prosecutorial review phase and the judicial review phase to account for natural prosecutorial incentives that might cause prosecutors to view expungement skeptically.

Statutes need to clearly articulate the grounds for prosecutorial opposition to expungement. Some statutes already provide procedural reasons for objection.<sup>264</sup> Very few reference legitimate grounds for substantive objections.<sup>265</sup> Instead, statutes reference the power to object and its effect but do not indicate to prosecutors why objection might be justified. While statutes cannot predict every circumstance or potential reason for opposition to a petition, they can at least articulate the public policy for doing so. They could also mandate that prosecutors consult with community panels within their jurisdictions in order to gauge when the community thinks expungement is appropriate. This way, prosecutors would not be acting in the dark when it comes to deciphering and representing the objectives of the state, which is necessary to properly act quasi-judicially. An expungement statute that does not provide guidance in this area essentially asks a prosecutor to represent a silent client.

Expungement regimes also need to clarify the standards of review for prosecutorial and judicial review of petitions. Procedurally meritorious expungement petitions—that is, those that involve a disposition that is definitively eligible for expungement—should be assessed within a paradigm that contemplates mercy as part of justice. Most expungement statutes involve an even balancing of interests. But the near-universal negative effect of a criminal record should tilt the ledger in favor of the ex-offender.<sup>266</sup>

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264. *See, e.g.*, GA. CODE ANN. § 35-3-37(n)(2) (West 2018).

265. *See supra* Part II.A.

266. Interestingly, Nevada recently passed legislation allowing for a presumption in favor of sealing “if all statutory eligibility criteria are satisfied” and permitting judicial grants of sealing petitions if the prosecutor agrees. *See* Mayson, *supra* note 89, at 13. Montana also

Justifying retention of the record should be a higher burden than justification for expungement, especially given that most expungement or shielding statutes allow closed-door retention for selective purposes in the future, such as law enforcement efforts.<sup>267</sup> Standards of review need to reflect the reality that, in the vast majority of cases, expungement will *not* disturb the activities of the state designed to protect individuals.

In addition to modified standards of review, legislatures would be wise to emphasize that the judiciary or an intermediate, administrative reviewing body, is, in all situations, the final decision maker when it comes to expungement.<sup>268</sup> This holds for both the procedural and substantive review of expungement petitions. Too many statutes allow prosecutorial objections to significantly stall or terminate the expungement process by acting as gatekeepers, which can chill petitioners. Alternatively, legislatures might consider enacting expiration dates for criminal records to counteract unnecessarily hostile prosecutors and judges, or inaction by both parties that effectively prevents expungement.<sup>269</sup>

In terms of professional responsibility, Model Rule 3.8, the ABA criminal justice standards, and the NDAA's *National Prosecution Standards* need to recognize that prosecutorial discretion exists in areas of the criminal justice system beyond the culpability phase. The shadows are dark in the corners of the system that are only tangentially related to determinations of guilt and innocence. Neither Model Rule 3.8 nor its comments consider the range of decisions that prosecutors make without guidance. This is likely because the drafters of these rules were focused solely on pursuing convictions at trial or during plea negotiations. Yet prosecutors make countless decisions relating to a prosecution after it is complete every day.

A modified Model Rule 3.8 would include a discussion of the various realms in which prosecutors can act simultaneously to serve the range of objectives of the state and to mitigate the long-term effect of a criminal record. Model Rule 3.8(a) currently instructs prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>270</sup> Why not consider that opposition to expungement for nonconviction charges that will not be prosecuted—either for probable cause reasons or others—violates the spirit of this provision?

Comment one to Model Rule 3.8 also mentions that “[c]ompetent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation.”<sup>271</sup> While this comment comes on the heels of a discussion of conviction review for innocent persons, the same principle arguably applies in the expungement

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seemed to enact a similar presumption unless the petitioner has other convictions. MONT. CODE ANN. § 46-18-1101(3) (West 2017).

267. *See, e.g.*, 18 PA. CONS. STAT. § 9122(c) (2018).

268. If a state assigned review to an administrative panel by way of either a parole hearing or pardon boards, the judiciary should still remain as a forum of last resort given the constitutional interests articulated above.

269. Of course, this style of regulatory solution would need to pass constitutional muster.

270. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N, Discussion Draft 1983).

271. *Id.* cmt. 1.

context given the effect of a criminal record. In order to competently advocate for the state, the prosecutor may need to undo a conviction or arrest to guarantee the remedy afforded by the state. That is a paradox that is difficult to comprehend without additional guidance.

Additionally, Model Rule 3.8 could contain language about the unique set of interests presented after prosecution. It could articulate the range of considerations surrounding a petition for relief like expungement, including the needs of the defendant, the expectations of other stakeholders, First Amendment values, the accessibility of the information, law enforcement needs, the defendant's rehabilitation, and the effect of granting an expungement for the state and the defendant. Bringing additional language into Model Rule 3.8 may be criticized as overbearing, but the current lack of guidance breeds an arbitrariness that can truly undermine broader public policy objectives designed to better the system.

#### CONCLUSION

When the judicial gavel confirms the disposition of charges, prosecutorial discretion does not cease. Given the unquestionably negative effect of a criminal record and the limited remedies afforded an arrestee or ex-offender postconviction, the exercise of prosecutorial discretion *after* completion of a prosecution is at least as significant as the exercise of judgment during other phases.

For too long, examinations of prosecutorial discretion have focused on what happens in the shadows of the law for the phases before disposition. Modern-day analyses of prosecutorial decision-making focus almost entirely on the mindset of prosecutors during the charging, bargaining, and sentencing phases. The proposals created for those phases do not fully account for the complexity of the prosecutorial response to expungement. To be fair, many of the incentives driving prosecutorial decision-making remain in the expungement realm. But the power afforded to prosecutors, the uniqueness of the remedy, the mixed messages sent by states affording the remedy, and the indirect connection between expungement and the investigative and adjudicative aspects of the criminal process combine to leave prosecutors in the dark. Neither the law nor the professional responsibility guidelines clarify what prosecutors should prioritize in this arena. And in a time when criminal record history information is widely retained and published, the decisions of prosecutors are crucial.

Responding to expungement petitions is a responsibility of the everyday prosecutor across state jurisdictions. And considering the negative effect of a criminal record, it is most definitely a "special" one. Put simply, expungement matters, and prosecutors have a significant role to play in its availability as a remedy for offenders struggling to overcome barriers after their formal punishment has long ended. Any account of prosecutorial action in this area must comprehend that expungement implicates a host of interests not fully present throughout the phases before disposition. This panoply of concerns must force prosecutors to think beyond their roles as advocates in order to fully grasp the quasi-judicial nature of the position.