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# CRIMINOLOGY

  

## EXPUNGEMENT AND POST-EXONERATION OFFENDING

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*This is the second Article stemming from a study of the post-release behavior of wrongfully convicted individuals. Utilizing data on exonerees compiled from the Center on Wrongful Convictions at Northwestern University, the study tracks the behavior of 118 exonerees following their releases and examines the effects of more than twenty variables on their post-release criminality. We present here our findings on the ameliorative effects of expungement on post-exoneration offending. Expungement would seemingly be an obvious remedy for wrongfully convicted individuals, but in fact, almost one-third of exonerees do not have their records purged. We found that a failure to expunge was a significant predictor of post-exoneration offending.<sup>1</sup> This relationship was strongest for offenders who had not committed an offense prior to the one for which they were wrongfully convicted. The problematic impact of failing to expunge is generally consistent with labeling theory, as are the findings regarding the effects on exonerees without prior records, which are supported by*

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<sup>1</sup> Other variables that were related to post-exoneration offending, but are not the focus of this Article, include prior conviction(s) and age at release.

*research suggesting that labeling effects are strongest for first-time offenders. The universe of exonerees is small; our data is not drawn from a sample. Thus, we present our observations about the relationship of post-release offending and expungement with caution. Nevertheless, the data suggests that expunging exonerees' records is defensible, not only as a matter of fundamental fairness but also on public policy grounds.*

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#### INTRODUCTION

Although the problem of wrongful convictions has recently come into clearer focus, very little attention has been paid to the factors that allow exonerees to successfully reenter society, and almost none at all has been paid to the commonsensical measure of expunging the exonerees' records of the offense for which they were wrongfully convicted. Fundamental fairness would seem to require expungement, and yet in our study of 118 individuals who were exonerated and released between 1999 and 2009, we found that approximately one-third did not have their records expunged.

Generally speaking, expungement laws are restrictive. The federal government does not allow records to be expunged, and many states either do not allow records to be expunged or do so only under very limited circumstances. "Expungement" also means different things in different places. In some jurisdictions, expunged records do not disappear.<sup>2</sup> In three of the four states covered by our study—Florida, Illinois, and Texas—securing expungement is extremely difficult. In the fourth state, New York,

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<sup>2</sup> See generally 24 C.J.S. *Criminal Law* § 2414 (2011).

the situation is substantially better.<sup>3</sup> Perhaps not coincidentally, post-exoneration offending is dramatically lower in New York than in the other states in the study. As one might imagine, failing to expunge an exoneree's record has problematic consequences. Among exonerees who had their records expunged, 31.6% committed a post-exoneration offense (PEO) compared to 50% of those who did not have their records expunged. Of the four states in the study, New York has by far the most favorable expungement laws. There, only 8.3% of exonerees offended following their releases. This association is consistent with seminal concepts of labeling theory, which holds that status as a former criminal has a stigmatizing effect and acts as a substantial barrier to reentry. Several studies suggest that labeling effects are strongest for first-time offenders and, indeed, in our study the statistical benefits of expungement were driven principally by its ameliorative outcomes for exonerees without prior records.

On the whole, these findings suggest that exoneree expungement, which heretofore has been virtually ignored as a public policy issue, deserves far greater attention. Expungement is a nearly costless way to help ensure that exonerees make successful transitions into society following their releases. Following this Introduction, this Article offers a survey of expungement laws. Part II describes the larger project and details the methodology employed. Part III presents our results. In Part IV, we explain how labeling theory can shed light on the problematic consequences of failing to expunge and consider alternative explanations for the association we found between expungement and post-release offending. We conclude with some directions for further study and some simple suggestions for reforming the law.

## I. A SURVEY OF EXPUNGEMENT LAW

### A. OVERVIEW

Forty-five states and the District of Columbia currently have some mechanism through which an individual may expunge or limit disclosure of a criminal record.<sup>4</sup> These laws differ wildly.<sup>5</sup> The first difference is one of nomenclature: the process of limiting disclosure of criminal records to the

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<sup>3</sup> See *infra* Part I.B.

<sup>4</sup> See Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 31 (2008).

<sup>5</sup> See generally Kristin K. Henson, Comment, *Can You Make This Go Away?: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 392–412 (2005) (discussing how state approaches to expungement vary).

public may be referred to as “expungement,”<sup>6</sup> “expunction,”<sup>7</sup> “sealing,”<sup>8</sup> “setting aside,”<sup>9</sup> “destruction,”<sup>10</sup> “purging,”<sup>11</sup> or “erasure.”<sup>12</sup> States also differ substantially in their preconditions for expungement of a criminal record, and in both the manner and procedure by which they carry it out.

While almost no two statutes are the same, some commonalities regarding expungement do exist. Almost every state, for example, allows for the expungement of records related to minor offenses committed by juveniles.<sup>13</sup> Most states also allow for the expungement of arrest and court records relating to cases that did not end in convictions.<sup>14</sup> This includes

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<sup>6</sup> See, e.g., ARK. CODE ANN. § 16-90-901 (2012); DEL. CODE ANN. tit. 11, §§ 4371–4375 (2012); HAW. REV. STAT. ANN. § 831-3.2 (LexisNexis 2012); UTAH CODE ANN. § 77-40-102 (LexisNexis 2012). These differences in nomenclature sometimes connote substantive differences. Generally speaking, a “sealed” record will not be available to the public, but the court will maintain a confidential copy; an “expunged” record, in contrast, is destroyed. See Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 21–25 (1992); Henson, Comment, *supra* note 5, at 393–96. Even this rule has its exceptions, however. For example, in North Carolina “expunged” records can be searched, retrieved, and used (although this occurs only in exceptional circumstances and normally requires a court order or statutory authorization). N.C. GEN. STAT. ANN. § 15A-151 (2013).

<sup>7</sup> See, e.g., MISS. CODE ANN. § 99-19-71 (2012); N.C. GEN. STAT. ANN. §§ 15A-145 to -152 (2013).

<sup>8</sup> See, e.g., ALASKA STAT. § 12.62.180 (2013); OHIO REV. CODE ANN. §§ 2953.31–.61 (LexisNexis 2013); OKLA. STAT. tit. 22, § 19 (2012).

<sup>9</sup> See, e.g., ARIZ. REV. STAT. ANN. § 13-907 (2012); MICH. COMP. LAWS SERV. §§ 780.621–.624 (LexisNexis 2012).

<sup>10</sup> See, e.g., CAL. PENAL CODE § 851.8 (West 2013); TENN. CODE ANN. §§ 40-32-101 to -104 (2012).

<sup>11</sup> See ALA. CODE § 41-9-645 (LexisNexis 2012).

<sup>12</sup> See CONN. GEN. STAT. § 54-142A (2012).

<sup>13</sup> See, e.g., ALA. CODE § 12-15-136 (LexisNexis 2012); MASS. ANN. LAWS ch. 276, § 100B (LexisNexis 2012). Even in this context there is variation, as many states exclude certain crimes or impose other preconditions. In California, for example, five years after the termination of any punishment or when the person turns eighteen, a juvenile offender can petition the court to seal the records relating to the offense. See CAL. WELF. & INST. CODE § 781 (West 2013). The remedy is unavailable, however, for specified offenses (mostly serious, violent crimes), if the petitioner has been convicted of a felony or misdemeanor that indicates “moral turpitude” in the intervening five years, or if the petitioner has not been rehabilitated to the satisfaction of the court. See *id.* In North Carolina, expungement of a juvenile offense is possible if and only if: (1) the offender was younger than eighteen years old at the time of the offense—or twenty-one years old if the conviction was for minor consumption of alcohol; (2) he has gone at least two years without a conviction for another crime, except for minor traffic violations, and (3) he can supply affidavits from two nonrelatives attesting to his good behavior. See N.C. GEN. STAT. ANN. § 15A-145 (West 2013). See generally Snow, *supra* note 6, at 35–40 (providing an overview of juvenile expungement statutes).

<sup>14</sup> See Mouzon, *supra* note 4, at 32.

instances where the cases were dismissed or ended in *nolle prosequi*, the defendant was acquitted at trial, or the statute of limitations expired before the prosecutor pressed charges.<sup>15</sup> The District of Columbia and some other states, including Nebraska and Pennsylvania, offer expungement to those who take part in “diversion programs,” which may include treatment for problems with drugs or alcohol.<sup>16</sup> Under certain limited circumstances in a handful of states, expungement of arrest records is mandatory or construed as a right.<sup>17</sup>

Generally, however, expungement is not guaranteed. In the federal system, most offenses are not eligible for expungement.<sup>18</sup> At the state level, even where expungement is possible, it is often excluded where a charge is dismissed through plea-bargaining or in exchange for testimony regarding another crime.<sup>19</sup> Other states preclude certain charges from being expunged<sup>20</sup> or deny expungement to offenders with certain kinds of prior offense records.<sup>21</sup> Some expungement statutes require petitioners to wait a certain amount of time before they can file for expungement.<sup>22</sup> In some states, a conviction obtained during this waiting period, or a charge pending

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<sup>15</sup> See, e.g., LA. REV. STAT. ANN. § 44:9 (2012); UTAH CODE ANN. §§ 77-40-102 to -105 (LexisNexis 2012); VA. CODE ANN. §§ 19.2-392.1–4 (2012).

<sup>16</sup> NEB. REV. STAT. ANN. § 29-3523(2)(b) (LexisNexis 2012); 234 PA. CODE § 320 (2011); D.C. CODE § 24-751.10(d), *invalidated by* D.C. Bd. of Elections & Ethics v. D.C., 866 A.2d 788 (D.C. 2005).

<sup>17</sup> For example, in Georgia, “[a]n individual has the right to have his or her record of such arrest expunged” if the charges against him or her were dismissed, there are no other criminal charges pending, and he or she has never previously been convicted of the same or a similar offense. GA. CODE ANN. § 35-3-37(d)(3) (2012). For a discussion of Delaware’s statute, see *infra* notes 27–29 and accompanying text.

<sup>18</sup> See *United States v. Coloian*, 480 F.3d 47, 49 n.4 (1st Cir. 2007). Proposed federal bills have sought to allow certain offenses to be expunged in limited circumstances. See Fresh Start Act of 2013, H.R. 3014, 113th Cong. (2013); Fresh Start Act of 2011, H.R. 2449, 112th Cong. (2011); Fresh Start Act of 2010, H.R. 5492, 111th Cong. (2010). Under these bills, all introduced by Representative Steve Cohen of Tennessee, only nonviolent, first-time offenders are eligible. See H.R. 3014 (amending 18 U.S.C. § 3631 (2012) to make nonviolent, first-time offenders eligible for expungement).

<sup>19</sup> See, e.g., COLO. REV. STAT. § 24-72-308(1)(a)(II)(A)–(B) (2012).

<sup>20</sup> For example, in Utah, one is not eligible for expungement in a case of vehicular homicide or a felony DUI charge. See *Expunging Adult Criminal Records*, UTAH STATE COURTS, <http://goo.gl/WsFDhf> (last updated July 11, 2013).

<sup>21</sup> North Carolina and West Virginia, for example, preclude the expungement of arrest records for people with previous felony convictions. See N.C. GEN. STAT. § 15A-146 (2013); W. VA. CODE ANN. § 61-11-25(a) (LexisNexis 2012).

<sup>22</sup> For example, Utah does not allow anyone to file a petition to expunge an arrest record until at least thirty days after arrest. UTAH CODE ANN. § 77-40-104(1)(a) (LexisNexis 2012). Wyoming requires a 180-day waiting period after arrest. WYO. STAT. ANN. § 7-13-1401(a)(i) (2012).

at the time of filing, disqualifies an individual from receiving expungement.<sup>23</sup> Sometimes these wait periods can be quite long.<sup>24</sup>

The barriers to expungement can be so substantial that in some states, merely showing that a criminal proceeding did not result in charges or conviction is not enough. For example, in California exonerees may only petition for sealing and destroying of their arrest or court records in cases that ended without the filing of a plea, with the filing of a plea but without a conviction, or with acquittal only after obtaining a determination of “factual innocence” from the arresting criminal justice agency.<sup>25</sup> If the criminal justice agency does not grant the petitioner’s request, he must petition the court for such a finding by showing that “no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.”<sup>26</sup> Simply stated, in California one must be not only “not guilty” but “factually innocent” to get an arrest record expunged. In other states, petitioners are at the whim of the system. In Delaware, for example, if a misdemeanor charge or violation is “terminated in favor of the accused” and the person has no prior convictions, then the record of the arrest is subject to mandatory expungement.<sup>27</sup> Everyone else must rely upon the discretion of the Attorney General or the court.<sup>28</sup> To secure discretionary expungement, the petitioner must prove, based on a preponderance of the evidence, a failure to expunge constitutes “manifest injustice.”<sup>29</sup>

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<sup>23</sup> In Maryland, for example, one must wait three years following an acquittal, a *nolle prosequi*, or a dismissal before he or she can file for expungement. MD. CODE ANN. CRIM. PROC. § 10-105(c)(1) (LexisNexis 2012). If the petitioner has served probation before judgment or if the court has indefinitely postponed judgment in a case contingent on drug or alcohol abuse treatment, the petitioner must wait until three years after the probation or treatment was completed. *Id.* § 10-105(c)(2). If a person is convicted of a crime other than a minor traffic violation within those three years, or has charges pending against him or her, expungement will be denied. *Id.* § 10-105(c), (e)(4)(ii)(2).

<sup>24</sup> Colorado, for example, requires individuals to wait ten years after the final disposition of the case before filing for expungement, during which time the petitioner must not be found guilty of another offense. COLO. REV. STAT. ANN. § 24-72-308(1)(a)(III) (2012).

<sup>25</sup> CAL. PENAL CODE § 851.8(a) (Deering 2013). In California, expunged records are first sealed for three years before they are destroyed. *Id.*

<sup>26</sup> *Id.* § 851.8(b).

<sup>27</sup> DEL. CODE ANN. tit. 11, § 4373 (2012). In Delaware, a case is “terminated in favor of the accused” if the defendant is acquitted, a prosecutor enters a *nolle prosequi*, or the case is dismissed. *Id.* § 4372(b).

<sup>28</sup> *Id.* § 4374.

<sup>29</sup> *Id.* § 4374(c). For example, the existence of a prior conviction counts as prima facie evidence against a petitioner’s claim. *Id.* Furthermore, Title 21 offenses are not eligible for discretionary expungement. *Id.* § 4374(g). Title 21 offenses include, among others, the following: (a) driving after judgment prohibited, DEL. CODE ANN. tit. 21, § 2810 (2012); (b) reckless driving, *id.* § 4175; (c) operation of a motor vehicle causing death, *id.* § 4176A; (d)

Most states make some provision for the expungement of convictions, but the barriers remain formidable.<sup>30</sup> Statutes that provide for this possibility often apply only to those convicted of misdemeanors or minor crimes.<sup>31</sup> Where a provision is made to expunge the record of those who commit more serious crimes, a full and unconditional pardon from the Governor is sometimes required as a precondition.<sup>32</sup> In deciding a petition for expunging a conviction, a court generally weighs the interests of the petitioner against those of society,<sup>33</sup> or a court may be required to decide in favor of the “public welfare”<sup>34</sup> and may consider factors, such as the degree of rehabilitation<sup>35</sup> or “moral character” of the offender.<sup>36</sup> As with the expungement of arrest records, numerous exceptions, procedural restrictions, and long waiting periods apply.<sup>37</sup> Michigan, Utah, and Wyoming, for example, mandate that petitioners wait a certain amount of time before filing a petition, and they each exclude those with prior felony convictions, those with charges pending at the time of the hearing, and those who have already benefitted from the statute once already.<sup>38</sup> Other states have similar provisions.<sup>39</sup> While most of these expungement

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driving under the influence, *id.* § 4177; and (e) operating a commercial vehicle with a prohibited blood alcohol concentration or while impaired by drugs, *id.* § 4177M.

<sup>30</sup> In the case of felony convictions, though, one generally must go a long period of time without a subsequent conviction. See Mouzon, *supra* note 4, at 33–34 & n.144.

<sup>31</sup> See, e.g., KY. REV. STAT. ANN. §§ 431.076–.078 (LexisNexis 2012); LA. REV. STAT. ANN. § 44:9 (2012); see also Mouzon, *supra* note 4, at 32–33 & n.143.

<sup>32</sup> In Delaware, Maryland, and West Virginia, a full and unconditional pardon automatically qualifies a petitioner for a hearing but does not guarantee expungement; furthermore, even with a pardon, the West Virginia statute excludes expungement of convictions for murder, kidnapping, or treason. DEL. CODE ANN. tit. 11, § 4375 (2012); MD. CODE ANN. CRIM. PROC. § 10-105(a)(8)(ii) (LexisNexis 2012); W. VA. CODE ANN. § 5-1-16a (LexisNexis 2012).

<sup>33</sup> See, e.g., N.J. STAT. ANN. § 2C:52-14(b) (West 2013); see also Mouzon, *supra* note 4, at 40 & n.155.

<sup>34</sup> See, e.g., MICH. COMP. LAWS SERV. § 780.621(9) (LexisNexis 2012).

<sup>35</sup> See, e.g., MISS. CODE ANN. § 99-19-71(2)(c) (2012).

<sup>36</sup> See, e.g., R.I. GEN. LAWS § 12-1.3-3(b)(1) (2012).

<sup>37</sup> Usually, the wait period depends on the type of conviction. See Mouzon, *supra* note 4, at 38–39 nn.153–54.

<sup>38</sup> Michigan, Utah, and Wyoming require wait periods of five, between three and ten (depending on the type of crime), and ten years, respectively. MICH. COMP. LAWS SERV. § 780.621(3); UTAH CODE ANN. § 77-40-105(3)(C) (West 2012); WYO. STAT. ANN. § 7-13-1502 (2012). However, this rule does not seem to apply to those in Utah who benefitted from a pardon before May 14, 2013. UTAH CODE ANN. § 77-40-105(7) (West 2013).

<sup>39</sup> New Jersey, for example, does not allow a person to file a petition while charges are pending against him. N.J. STAT. ANN. § 2C:52-13 (West 2013). Pennsylvania does not allow the expungement of a conviction (assuming it was not for a summary offense) until either the individual turns seventy (after a ten-year period without a conviction) or the person has been dead for three years. 18 PA. CONS. STAT. ANN. § 9122(b) (West 2012).



proceedings rely on the discretion of the court, some statutes provide for automatic or mandatory expungement of certain convictions.<sup>40</sup> The deficiencies of expungement statutes have been widely condemned in the academic community.<sup>41</sup>

Similar statutes exist in the wrongful conviction realm. Eleven states (not including those in our study) and the District of Columbia have expungement statutes that are specifically tailored to the wrongfully convicted.<sup>42</sup> In its model legislation on compensation for the wrongfully convicted, the Innocence Project includes a drafter's note recommending that states adopt expungement procedures that complement compensation statutes.<sup>43</sup> Such statutes offer perhaps the best hope for an exoneree seeking to expunge a record of an erroneous conviction and start anew.<sup>44</sup> The most

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<sup>40</sup> For example, in Connecticut, Massachusetts, and Utah, a full and unconditional pardon guarantees the expungement of records related to the case, notwithstanding any limitations to the contrary. See CONN. GEN. STAT. ANN. § 54-142a(2) (West 2012); MASS. ANN. LAWS ch. 127, § 152, ch. 258D, § 7 (LexisNexis 2012); UTAH CODE ANN. § 77-40-105 (LexisNexis 2012). In West Virginia, a nonexcluded misdemeanor committed between the ages of eighteen and twenty-six years old is subject to automatic expungement if the petitioner waits at least a year after conviction before filing for expungement and has no prior felonies or pending charges. See W. VA. CODE ANN. § 61-11-26 (LexisNexis 2012).

<sup>41</sup> See, e.g., Henson, *supra* note 5, at 393 (arguing that most states fail to meet the elements of a well-drafted expungement statute—"clearly defined key terms, specific requirements for expungement, a delineation of the scope of courts' authority to expunge, rules for procedure, a statement of the effects of expungement, and an express or self-evident policy rationale underlying expungement"); Mouzon, *supra* note 4, at 35-45 (proposing a model federal expungement statute).

<sup>42</sup> See *infra* notes 47-56 and accompanying text. We include Connecticut, Massachusetts, and Utah because although their statutes do not specifically mention innocence, the relevant parts of their statutes would apply to every person pardoned on the basis of innocence. See CONN. GEN. STAT. ANN. § 54-142a(2); MASS. ANN. LAWS ch. 127, § 152, ch. 258D, § 7; UTAH CODE ANN. § 77-40-105.

<sup>43</sup> See INNOCENCE PROJECT, MODEL LEGISLATION: AN ACT CONCERNING CLAIMS FOR WRONGFUL CONVICTION AND IMPRISONMENT 6-7 (2010), available at <http://goo.gl/6AeVR4>.

<sup>44</sup> While typical postconviction expungement statutes provide a clean slate for those guilty ex-convicts who are supposedly most likely to take advantage of them (e.g., nonviolent, one-time offenders who have gone long periods of time without recidivating, and who have shown evidence of improvement), they may not aid the subjects of our study, few of whom were convicted of misdemeanors. Even many of the statutes that allow for expungement of felonies specifically rule out the types of crimes for which our participants were convicted. See, e.g., W. VA. CODE ANN. § 5-1-16a(e) (LexisNexis 2012). Given that most of the participants in our dataset were wrongfully convicted of serious crimes, such as murder and rape, it is equally unlikely that many would successfully have their records expunged under statutes that dictate expungement of juvenile records. Even if an exoneree was a minor when convicted, many of these statutes would still preclude the expungement of violent or sexual offenses. See, e.g., LA. CHILD CODE ANN. art. 918(C)(1) (2012); see also Snow, *supra* note 6, at 39-40. Of course, the population of exonerated individuals (the population in our study) is not necessarily representative of those wrongfully convicted in

inclusive of these statutes allow for expungement of a criminal record for anybody who receives either a pardon or a court finding of actual innocence.<sup>45</sup> Other states force exonerees to rely on either a pardon or a judicial determination alone, or include more restrictions on how they may obtain relief. For example, the District of Columbia provides a means through which a court can set aside a wrongful conviction and seal the records pertaining to it, but the statute makes no mention of executive pardons.<sup>46</sup> On the other hand, Connecticut<sup>47</sup> and Utah<sup>48</sup> guarantee expungement based on absolute pardons but make no specification for those whose convictions are vacated or set aside by a court. The same is true for those in Tennessee whose pardons, furthermore, must be based on actual innocence.<sup>49</sup> In North Carolina<sup>50</sup> and Oklahoma,<sup>51</sup> one may rely upon a pardon based on actual innocence or a court order of innocence, but the latter must be proven by DNA. Similarly, Missouri,<sup>52</sup> Ohio,<sup>53</sup> and Wyoming<sup>54</sup> only allow expungements of wrongful convictions on the basis of DNA exoneration.

In addition, seven states include provisions that do not specifically mention innocence but could possibly be applied to the actually innocent. Oregon, for example, allows a judge to order any relief deemed to be “proper and just.”<sup>55</sup> Pennsylvania law provides a means for postconviction testing of DNA and allows a judge to order postconviction relief in the form

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general (because resources are not usually directed toward less dire cases), so many individuals who were wrongfully convicted for, or perhaps even exonerated of, minor crimes or misdemeanors could arguably benefit from a postconviction expungement statute that does not focus on innocence. However, even if it were possible for certain wrongfully convicted individuals to take advantage of postconviction expungement statutes designed for the guilty, it would still put them in the awkward position of having to implicitly admit guilt for crimes they did not commit to expunge their records of these very same crimes.

<sup>45</sup> While Massachusetts mentions only a full and unconditional pardon, Virginia specifies that a pardon be based on actual innocence. *Compare* MASS. ANN. LAWS ch. 127, § 152, ch. 258D, § 7; *with* VA. CODE ANN. § 19.2-392.2 (2012).

<sup>46</sup> D.C. CODE § 16-802 (LexisNexis 2012).

<sup>47</sup> *See* CONN. GEN. STAT. ANN. § 54-142a(2).

<sup>48</sup> *See* UTAH CODE ANN. § 77-40-105 (LexisNexis 2012).

<sup>49</sup> Tennessee law requires that the Governor first grant an “exoneration,” which is essentially an absolute pardon based on innocence. TENN. CODE ANN. § 40-27-109(a) (2012) (“The governor may grant exoneration to any person whom the governor finds did not commit the crime for which the person was convicted.”).

<sup>50</sup> *See* N.C. GEN. STAT. § 15A-148 (2013).

<sup>51</sup> OKLA. STAT. ANN. tit. 22, § 18(3)–(4) (West 2012).

<sup>52</sup> MO. ANN. STAT. § 650.058(4) (West 2012).

<sup>53</sup> OHIO REV. CODE ANN. § 2953.57(A) (LexisNexis 2013).

<sup>54</sup> *See* WYO. STAT. ANN. § 7-12-310(c)(iii), (d)(ii) (2012).

<sup>55</sup> *See* OR. REV. STAT. ANN. § 138.520 (West 2011).

of “other matters that are necessary and proper.”<sup>56</sup> Rhode Island also provides a means for postconviction testing of DNA evidence<sup>57</sup> and expungement of criminal records for persons “acquitted” or “otherwise exonerated.”<sup>58</sup> The statute does not define the term “exonerated,” but the examples it gives (“dismissal,” filing of a “no true bill,” or “no information”) seem to suggest that it refers to situations in which someone is arrested or charged, but no conviction results.<sup>59</sup> Wisconsin likewise allows a petitioner to file a motion for postconviction testing of DNA evidence;<sup>60</sup> if the testing supports a petitioner’s claim, then the court may order a hearing and thereafter “enter any order that serves the interests of justice.”<sup>61</sup> Alabama<sup>62</sup> and Georgia<sup>63</sup> allow records to be modified or expunged based on “inaccurate or incomplete” information.<sup>64</sup> Alaska allows for expungement under circumstances of “mistaken identity or false accusation.”<sup>65</sup> Illinois,<sup>66</sup> Oklahoma,<sup>67</sup> and Virginia<sup>68</sup> include provisions for those whose records mistakenly contain convictions resulting from identity theft.

#### B. STATES IN OUR STUDY

For reasons discussed *infra*, we included four states in our study: New York, Florida, Illinois, and Texas.<sup>69</sup> New York law permits sealing cases where charges have been dismissed, vacated, set aside, not filed, or otherwise terminated.<sup>70</sup> An individual convicted of a minor drug crime who has completed a prescribed treatment program may also petition to have the

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<sup>56</sup> See 42 PA. CONS. STAT. ANN. §§ 9543.1, 9546 (West 2012).

<sup>57</sup> See R.I. GEN. LAWS § 10-9.1-11 (2012).

<sup>58</sup> See *id.* § 12-1-12.

<sup>59</sup> See *id.*

<sup>60</sup> See WIS. STAT. ANN. § 974.07 (West 2012).

<sup>61</sup> *Id.* § 974.07(10)(a).

<sup>62</sup> ALA. CODE § 41-9-645 (LexisNexis 2012).

<sup>63</sup> See GA. CODE ANN. § 35-3-37 (2012).

<sup>64</sup> For a discussion of Alabama’s statute, see generally Henson, *supra* note 5.

<sup>65</sup> See, e.g., ALASKA STAT. § 12.62.180(b) (2012) (providing a remedy in the case of “mistaken identity or false accusation”).

<sup>66</sup> See 20 ILL. COMP. STAT. ANN. 2630/5.2(b)(4) (LexisNexis 2012).

<sup>67</sup> OKLA. STAT. ANN. tit. 22, § 18(12) (West 2012).

<sup>68</sup> VA. CODE ANN. § 19.2-392.2(B) (2012).

<sup>69</sup> See *infra* note 99.

<sup>70</sup> N.Y. CRIM. PROC. LAW § 160.50(1) (McKinney 2011). After such termination of the case, the individual may petition the court to seal the record, and the petition will be granted unless, within five days of the filing, the “district attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise.” *Id.* § 160.50(4).

records relating to the offense conditionally sealed.<sup>71</sup> Although the statute does not mention innocence directly, New York law provides a legal avenue for an exoneree seeking to seal records of a wrongful conviction. An exoneree may file a motion to vacate a judgment after the discovery of new evidence, which if successful, would lead to sealing of the conviction.<sup>72</sup> It is unclear if there are any sure methods for sealing a record other than vacating a sentence. A gubernatorial pardon based on actual innocence mandates “setting aside” a conviction, provided that the evidence was discovered after the time of conviction and after it is too late for the exoneree to file a motion for a new trial on the basis of new evidence.<sup>73</sup> While a pardon would only “set aside” a conviction and not vacate it, such a pardon would “place the defendant in the same position as if the indictment, information or complaint had been dismissed at the conclusion of the trial by the court because of the failure to establish the defendant’s guilt beyond a reasonable doubt.”<sup>74</sup> Following the sealing of records, New York law orders destruction of all photographs or fingerprints taken from the individual,<sup>75</sup> along with any DNA samples that were collected.<sup>76</sup> The individual also regains any legal rights or privileges he lost as a result of arrest and prosecution, is not disqualified from pursuing any profession, and need not divulge any information about the sealed arrest or conviction.<sup>77</sup>

In Florida, a releasee must first obtain a certificate of eligibility to petition the court to expunge or seal his record.<sup>78</sup> Under Florida law, an “expunction” entails physical destruction of records,<sup>79</sup> while “sealing” merely makes them confidential.<sup>80</sup> A court may order arrest or conviction records to be sealed but generally may expunge only arrest records.<sup>81</sup>

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<sup>71</sup> If after the records are sealed the individual is charged with another offense that does not terminate in his favor, the court will unseal the previously sealed records. N.Y. CRIM. PROC. LAW § 160.58(8) (McKinney 2012).

<sup>72</sup> See N.Y. CRIM. PROC. LAW § 440.10 (1)(g)–(g-1) (McKinney 2013).

<sup>73</sup> See N.Y. EXEC. LAW § 19 (McKinney 2012); see also *Lyons v. Goldstein*, 47 N.E.2d 425, 429–30 (N.Y. 1943); *People ex rel. Prisament v. Brophy*, 38 N.E.2d 468, 471 (N.Y. 1941); *Roberts v. State*, 54 N.E. 678, 679 (N.Y. 1899).

<sup>74</sup> See N.Y. EXEC. LAW § 19.

<sup>75</sup> See N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2011).

<sup>76</sup> N.Y. EXEC. LAW § 995-c(9)(a) (McKinney 2013).

<sup>77</sup> See N.Y. CRIM. PROC. LAW § 160.60 (McKinney 2013).

<sup>78</sup> See FLA. STAT. ANN. § 943.0585 (West 2013) (expungement); *id.* § 943.059 (sealing). The certificate of eligibility does not guarantee expungement or sealing; it merely qualifies one for a hearing. See *Frequently Asked Questions*, FLA. DEP’T L. ENFORCEMENT, <http://goo.gl/fcC1yd> (last visited Apr. 17, 2014).

<sup>79</sup> FLA. STAT. ANN. § 943.0585(4).

<sup>80</sup> *Id.* § 943.059(4).

<sup>81</sup> *Id.*

Specifically, the court may expunge records in cases where the charge did not end in conviction, or the arrest was mistaken or illegal.<sup>82</sup> The statutes governing both record sealing and expunging contain a list of offenses that are ineligible. Each also excludes those who have prior convictions or previously had records expunged or sealed.<sup>83</sup> Whether he is seeking expungement or sealing, the petitioner must pay a \$75 fee.<sup>84</sup> Although these statutes typically do not provide expunction to those with a conviction, a law became effective in 2008 that allows wrongfully incarcerated individuals to file a claim for compensation.<sup>85</sup> Everybody entitled to compensation under this law is also entitled to expunction of their records relating to the wrongful conviction.<sup>86</sup> This expunction is not subject to any of the limitations or fees that would otherwise normally apply.<sup>87</sup> Following expunction, all records relating to the offense are destroyed, and the individual may legally deny the existence of his criminal record, except under special circumstances such as if he applies to the Florida bar or for a position in a criminal justice agency.<sup>88</sup>

Illinois also has separate procedures for expungement and sealing. “Expungement” refers to the destruction of records, while “sealing” preserves physical and electronic copies that may be reopened at a future date.<sup>89</sup> One may petition to have an arrest record or charges expunged if he has no prior convictions, and the case against him ended in acquittal, dismissal, release with no charges being filed, or vacation or reversal of the sentence.<sup>90</sup> However, some convictions, such as those for certain sexual and violent offenses and minor traffic violations, are ineligible for expungement.<sup>91</sup> If the case against the petitioner did not end in conviction, the records may be sealed, regardless of prior offending, and certain records, even if they ended in conviction, may be sealed as well.<sup>92</sup> The petitioner is liable for any costs associated with expungement or sealing.<sup>93</sup>

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<sup>82</sup> See FLA. STAT. ANN. § 943.0581 (West 2013).

<sup>83</sup> *Id.* § 943.0585(1).

<sup>84</sup> *Id.* §§ 943.0585(2)(b), 943.059(2)(b).

<sup>85</sup> See FLA. STAT. ANN. § 961.06 (West 2013).

<sup>86</sup> *Id.* § 961.06(1)(e).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* § 943.0585(4).

<sup>89</sup> 20 ILL. COMP. STAT. ANN. 2630/5.2(a)(1)(E), (K) (West 2013).

<sup>90</sup> *Id.* § 2630/5.2(b)(1).

<sup>91</sup> *Id.* § 2630/5.2(a)(3).

<sup>92</sup> See *id.* § 2630/5.2(c). Interestingly, Illinois’s expungement statute also directed the Illinois Department of Corrections to conduct a study on the effect of sealing, especially on employment and recidivism rates, using a random sample of those who applied to have their records sealed. *Id.* § 2630/5.2(f). We found no evidence that the study has been completed.

<sup>93</sup> *Id.* § 2630/5.2(d)(10).

Further, records can be unsealed upon a showing of good cause.<sup>94</sup> Notwithstanding these provisions, if one obtains a pardon from the Governor that specifically orders expungement, or if the conviction was set aside and the court finds by clear and convincing evidence that the defendant is factually innocent of the charge, the court will direct the arresting authority to expunge its records. Following such a pardon or reversal based on actual innocence, any DNA records maintained by the criminal justice system will also be destroyed.<sup>95</sup>

Finally, Texas law guarantees a “right” to have one’s records expunged if he is acquitted or pardoned for any reason. This right extends to a petitioner who is released from charges or otherwise not tried, but the petitioner may have to wait a predetermined amount of time, depending on the charge, before he can file a motion for expungement. However, one may not seek expungement for a charge or conviction that stemmed from an incident during which another crime occurred and for which the petitioner does not contest his guilt. In 2011, the Texas legislature amended the statute to apply to those found actually innocent through either a court order or pardon, although the latter seems redundant.<sup>96</sup> Texas law forbids the “release, maintenance, dissemination, or use of the expunged records and files for any purpose” and allows the individual to deny the existence of the arrest or conviction except when asked about it in court, at which point he may respond that it has been expunged.<sup>97</sup>

## II. METHODOLOGY

The current study is part of a larger project on post-exoneration offending, which seeks to examine the post-release offending behavior of wrongfully convicted individuals. The exonerees’ legal histories were obtained through the Center on Wrongful Convictions (CWC) at the Bluhm Legal Clinic at Northwestern University School of Law. We restricted our focus to individuals released between 1999 and 2009 because complete criminal record information is only available from 1999 onward, and with respect to the end date, to allow at least three years for adequate follow-up. The dataset was compiled from exonerations from the four leading exoneration states for which criminal history data is publicly available: Illinois, Florida, New York, and Texas. Cost limitations restricted criminal history searches to four states. The top seven exoneration states in order are: Illinois, New York, Texas, California, Louisiana, Massachusetts, and

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<sup>94</sup> See *id.* § 2630/5.2(e); 730 ILL. COMP. STAT. ANN. 5/5-5-4(b) (West 2010).

<sup>95</sup> 730 ILL. COMP. STAT. ANN. 5/5-4-3(f-1).

<sup>96</sup> See TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2012).

<sup>97</sup> *Id.* art. 55.03.

Florida.<sup>98</sup> Criminal history data from California, Louisiana, and Massachusetts are not publicly available. Florida was thus included in the study. It also so happens that Illinois, New York, Texas, and Florida have compensation statutes.<sup>99</sup>

In Florida, a wrongfully convicted individual found innocent by a prosecuting attorney or administrative court judge is entitled to \$50,000 (adjusted for cost-of-living increases) annually, up to a maximum of \$2 million, as long as he has no prior felony convictions.<sup>100</sup> He is also entitled to 120 hours of tuition at a career center, community college, or state

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<sup>98</sup> Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 541 (2005).

<sup>99</sup> As we note below in our Conclusion, discussing the limitations and directions for future research, it would be interesting to compare post-exoneration behavior between exonerees in states without any compensation statutes. That research would be challenging, though, as exonerations are heavily concentrated in states with compensation statutes. More than 40% of exonerations occur in the top four states, and the top ten states account for more than two-thirds of American exonerations. Gross et al., *supra* note 98, at 541. It is also noteworthy that the two leading exoneration states, Illinois and New York, are home to the two largest and best-established U.S. organizations that work to identify false convictions and obtain exonerations: the CWC at Northwestern University School of Law in Chicago and the Innocence Project at Benjamin N. Cardozo School of Law in New York City. While these groups do offer some services following release, they do not have any established mechanisms to assist exonerees with expungement. The Innocence Project has two social workers on staff “who help the wrongly convicted adjust to free society” and “work to offer other vital necessities” by providing direct services to clients in need of assistance after their release. *After Exoneration*, INNOCENCE PROJECT, <http://goo.gl/eXkH8K> (last visited Apr. 17, 2014). The CWC does not appear to offer after-care services at this time. *Assistance and Resources*, CENTER ON WRONGFUL CONVICTIONS, <http://goo.gl/9nkr3z> (last visited Apr. 17, 2014). Florida and Texas have innocence projects, though they are not nearly as active. The Innocence Project of Florida’s mission statement suggests that it provides transitional and after-care services to exonerees, and it has one social worker on staff; however, it does not specify if it assists with expungement. *About the Innocence Project of Florida*, INNOCENCE PROJECT FLA., <http://goo.gl/3Qk7ig> (last visited Apr. 17, 2014). The Innocence Project of Texas is dedicated to securing release for those wrongfully convicted of crimes and educating the public about the causes and effects of wrongful convictions. *Who We Are*, INNOCENCE PROJECT TEX., <http://goo.gl/JITIAB> (last visited Apr. 17, 2014). The organization’s website does not indicate that it currently offers after-care services. *Id.* In considering whether this is a limitation of the research, it is worth noting that almost all states have innocence projects (or comparable agencies). *Innocence Network Member Organizations*, INNOCENCE NETWORK, <http://goo.gl/AU1Xwt> (last visited Apr. 17, 2014) (listing states with innocence projects where only Alabama, Arkansas, Colorado, and New Jersey are not listed, South Carolina offers “no coverage,” and Oregon and Tennessee do not have active agencies). Currently, Oregon and Tennessee are the only states that do not have active agencies that focus on wrongful convictions while South Carolina offers “no coverage.” *Id.*

<sup>100</sup> FLA. STAT. ANN. § 961.06(1) (West 2012).

university and reimbursement for any fines or costs imposed at the time of his sentence.<sup>101</sup> This law was effective in 2008.<sup>102</sup>

In Illinois, exonerees who have been granted a pardon by the Governor or a certificate of innocence by a circuit court are eligible for compensation up to the following: \$85,350 for those who served up to five years, \$170,000 for those who served between five and fourteen years, and \$199,150 for those who served more than fourteen years.<sup>103</sup> The law also reimburses attorney's fees up to 25% of the compensation award, and provides job search and placement services and reentry services.<sup>104</sup>

The New York statute, which was made effective in 1984 and amended in 2007, includes several complex provisions. Under the statute, a judge reads the facts in the case and, if the lawsuit is contested by the state, determines whether the facts fit the law's criteria.<sup>105</sup> If the judge so determines, the state tends to settle the claim rather than proceed with a potentially lengthy trial.<sup>106</sup> Some other provisions include the following: If the wrongfully convicted person "did not by his own conduct cause or bring about his conviction" and files a claim within two years of his pardon of innocence, he shall receive "damages in such sum of money as the court determines will fairly and reasonably compensate him."<sup>107</sup> One unique and beneficial provision allows the Court of Claims to award any amount—there is no floor or ceiling.<sup>108</sup>

In Texas, unlike past lump-sum payments, a new law declares that compensation come through monthly payments, with an upfront lump sum and an annuity that can pass through a recipient's estate.<sup>109</sup> Additionally, the Act states that a wrongfully convicted person is entitled to \$80,000 per year of wrongful incarceration and \$25,000 per year spent on parole or as a registered sex offender.<sup>110</sup> The wrongfully convicted person is also entitled to compensation for child support payments, tuition for up to 120 hours at a

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> 705 ILL. COMP. STAT. ANN. 505/8 (West 2010).

<sup>104</sup> *Id.*; see also 20 ILL. COMP. STAT. ANN. 1015/2 (Supp. 2013).

<sup>105</sup> N.Y. CT. CL. ACT § 8-b (McKinney 2007).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> See TEX. CIV. PRAC. & REM. CODE §§ 103.001; 103.052; 103.053 (West 2012). The name of the statute was changed in 2009 from The Wrongful Imprisonment Act to the Tim Cole Act (named after Timothy Cole, the state's first posthumous pardon), and it established the Timothy Cole Advisory Panel on Wrongful Convictions. See Press Release, Sen. Rodney Ellis, Senate Passes Tim Cole Act to Improve Compensation for Wrongfully Convicted and Their Families (May 11, 2009), available at <http://goo.gl/yWpbKo>.

<sup>110</sup> See TEX. CIV. PRAC. & REM. CODE §§ 103.052(a)(1), (b); 103.053.



career center or public institution of higher learning, reentry and reintegration services, and the opportunity to buy into the state employee health plan.<sup>111</sup> This statute was amended to include a provision that does not allow payments to anyone who served time for a wrongful conviction at the same time he or she was serving out a legitimate sentence for which he or she would have been in prison anyway.<sup>112</sup>

Generally, determining innocence is an extremely lengthy process. Innocent defendants with relatively short prison sentences are released long before innocence can be determined. Thus, most exonerees in our study were subject to long prison terms prior to their determinations of innocence. Inclusion criteria for CWC exoneration cases include the following: cases in which a sentence was long enough to be reviewed on appeal, cases that have been reviewed, and cases that have available exculpatory evidence. The current study also included cases that do not involve DNA. Furthermore, seventeen of the cases from Texas derived from a single mass exoneration in Tulia, Texas.<sup>113</sup> These cases form a distinct subset, as they were not individualized exonerations.

We obtained post-exoneration offending data through background checks provided by Maximum Reports, Inc., a commercial data supplier.<sup>114</sup>

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<sup>111</sup> See *id.* §§ 103.001(d); 103.052(b); 103.054.

<sup>112</sup> See *id.* § 103.001(b).

<sup>113</sup> Dates of birth and other identifying information were not available for the other twenty-one Tulia exonerees. Inclusion of the Tulia cases does not affect our findings with respect to expungement effects. Although we chose to include the Tulia exonerees, other researchers have made a different choice. See Gross et al., *supra* note 98, at 535 (“We do not include [the Tulia exonerees] here because the processes that produced the false convictions and the mass exonerations in these singular episodes are fundamentally different from those in the individual cases on which we focus . . .”).

<sup>114</sup> Recidivism research often uses rap sheets as sources of criminal history background information, but for a variety of substantive and practical reasons, conviction records obtained by a commercial data provider were the more appropriate sources here. The principal substantive reason is that employers sometimes use commercial data providers to obtain information about prospective employees. Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders* 9 (Nat'l Poverty Ctr., Working Paper Series No. 07-08, 2007), available at <http://goo.gl/Ejfmha>. Our research thus accurately models the way that those persons and institutions that rely on criminal records may perceive them. Our research also focuses on conviction records, which can be drawn from courtroom records, rather than arrest records, which are only evident from rap sheets. The principal practical consideration is that rap sheets can only be accessed with fingerprints or a prison identification number (i.e., NYSID number in New York State). See, e.g., *Inmate Lookup Instructions*, DEP'T CORRS. & CMTY. SUPERVISION, <http://goo.gl/ts3M6y> (last visited Apr. 17, 2014). This information was not contained in the CWC data. Also, in instances where the individual had no record prior to his wrongful conviction and the wrongful conviction was expunged, no prison identifier exists. When considering the limitations of relying upon a commercial data provider as a potential limitation of the study, it is important to note research showing that courtroom data underreports offending and that

Maximum Reports, Inc., like all commercial data suppliers, requires an “identifier”—typically a date of birth or Social Security number.<sup>115</sup> CWC case histories included such an identifier in approximately one-third of its cases. In thirteen cases, an exoneree had returned to prison, and the identifier was obtainable from the state correctional department. For the remaining cases, we conducted independent searches.<sup>116</sup> We excluded all cases for which we failed to find an identifier. Thus, the number of cases included in the study was significantly smaller than the pool CWC provided.<sup>117</sup> The final set included 118 exoneration cases. These included thirty-one exoneration cases from Illinois, seventeen from Florida, twenty-four from New York, and forty-six from Texas.

Each CWC exoneration history contains specific information regarding the exoneration, including a case chronology, legal citations, and original case materials. This allows for evaluating of various aspects of the exoneration and their potential links to post-exoneration offending. All of the included cases were coded for the following independent variables:

- sex,
- age at time of arrest,
- age at time of release,
- race,
- number and nature of prior offenses (if any),
- nature of the offense that brought about the erroneous conviction,
- factors leading to the erroneous conviction (false eyewitness testimony, false confession, etc.),
- evidence (DNA or non-DNA),
- expungement status (whether there is any evidence of the wrongful conviction on record),
- procedural posture of the exoneration (for example, executive pardon), and
- compensation.

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there is no evidence of false positives using this method. *See* WILL NAGEL & CHRIS HUMBLE, ILL. INTEGRATED JUSTICE INFO. SYS., *COMPARISON OF OFFICIAL AND UNOFFICIAL SOURCES OF CRIMINAL HISTORY RECORD INFORMATION* 2–3 (2005). If anything, using courtroom data underreports the incidences of offending after release from incarceration.

<sup>115</sup> *See Pricing*, MAXIMUM REP., <http://goo.gl/MtRnuu> (last visited Apr. 14, 2014) (providing Maximum Reports, Inc. pricing requirements and state-specific information on inclusion).

<sup>116</sup> We used several different sources to obtain these records, including sex offender registries, attorney contacts, recorded court decisions, Westlaw, LexisNexis, social media websites, and general Internet search engines. Finding identifiers is the distinctive challenge of this research. For current prisoners, the identifiers are generally available from state correctional departments. For all but the thirteen individuals who had returned to prison for a new offense, this was not a viable option.

<sup>117</sup> CWC had records of 196 known exoneration cases in Florida, Illinois, New York, and Texas between 1999 and 2009. This included forty-four cases in Illinois, nineteen cases in Florida, forty-nine cases in New York, and eighty-four cases in Texas. If a case identifier was located, that case was included in the study.

The dependent variable, post-exoneration offending, was measured dichotomously (yes or no) and continuously (number of offenses). Unfortunately, some states only publicize reconviction and resentencing data, thereby omitting rearrest data, an important variable in recidivism research. Our study used only reconviction as an indicator of post-exoneration offending. In addition to the number of post-exoneration offenses, we also measured the amount of time between release and post-exoneration offending, and the type of post-exoneration offense.

In a separate article, we analyzed the effect of compensation on post-exoneration offending.<sup>118</sup> In sum, we found that substantial compensation—defined as greater than \$500,000—was associated with a significant reduction in offending.<sup>119</sup> Our focus here is the consequences of expungement.

### III. RESULTS

#### A. DESCRIPTIVE STATISTICS

Table 1 presents simple descriptive statistics. Sixty-seven (56.8%) of the exonerees in the study were African-American, thirty-four (28.8%) were white, and fourteen (11.9%) were Hispanic. The remaining two exonerees were coded as “Other.” All but five exonerees were male, and the average exoneree was approximately twenty-seven years old at arrest, with ages at arrest ranging from twelve to fifty-seven. The average age at release was thirty-nine. The youngest releasee was nineteen. The oldest was sixty-two. More than one-third of the exonerees included in the study were from Texas (n = 46), a quarter were from Illinois (n = 31), about 20% were from New York (n = 24), and the remaining 14% (n=17) were from Florida.

Sixty-seven (56.8%) exonerees were convicted of at least one crime prior to the crime for which they were wrongfully convicted. Fifty (42.4%) exonerees in the study had no prior record. The average number of prior convictions was just under two. Seventy-four (62.7%) of the exonerees were sentenced to a custodial or prison term. Twenty-two (18.6%) were sentenced to life without parole (LWOP). Seventeen (14.4%) were sentenced to death, four (3.4%) received a noncustodial sentence, and one case was missing from the analysis. Forty-five (38.1%) exonerees in our study had a post-exoneration conviction.<sup>120</sup> Consistent with prior research,

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<sup>118</sup> See Evan J. Mandery et al., *Compensation Statutes and Post-exoneration Offending*, 103 J. CRIM. L. & CRIMINOLOGY 553, 553 (2013).

<sup>119</sup> See *id.*

<sup>120</sup> Among those who had a post-exoneration offense, nineteen (42.2%) offended within the first two years of their release.

the average exoneree in the study spent more than eleven years in prison, as measured from the date of conviction to the date of release.<sup>121</sup> The maximum term of incarceration was almost twenty-seven years. Almost half of the cases in our dataset were non-DNA exoneration cases (49.2%).

The average time between release and PEO—35.1 months (SD = 31.2)—was consistent with prior recidivism research. Seventy-one exonerees (61.2%) received compensation and forty-five exonerees (38.8%) had not at the time of coding. Forty-nine exonerees (41.5%) were granted an executive pardon, a method through which an executive authority legally forgives someone for a crime and reinstates rights lost postconviction, whereas fifty-seven exonerees (48.3%) were not.<sup>122</sup> Overall, seventy-nine exonerees (66.9%) had their records expunged (wherein the wrongful conviction did not appear on the record). Thirty-eight individuals (32.2%) had not received an expungement at the time of coding. Table 2 presents the bivariate correlations among various independent variables and the sole dependent variable used in the analyses (post-exoneration offending).

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<sup>121</sup> See Gross et al., *supra* note 98, at 524 (explaining that the exonerees in that study spent an “average of more than ten years each” wrongfully incarcerated). The Innocence Project reports that among those persons who were wrongfully convicted and who are later exonerated through postconviction DNA testing, the average person spent more than thirteen years in prison. *Compensating the Wrongly Convicted*, INNOCENCE PROJECT, <http://goo.gl/ETffcc> (last visited Apr. 17, 2014).

<sup>122</sup> For this variable, data were missing for eleven cases (9.3%).

**Table 1**  
*Descriptive Statistics*

	<i>N</i>	<i>%</i>	<i>Mean</i>	<i>SD</i>
<b>Gender</b>				
Male	113	95.8		
Female	5	4.2		
<b>Race</b>				
African-American	67	56.8		
White	34	28.8		
Hispanic	14	11.9		
Other	2	1.9		
<b>State</b>				
Florida	17	14.4		
Illinois	31	26.3		
New York	24	20.3		
Texas	46	39.0		
<b>Age at Arrest</b>			26.8	7.9
<b>Age at Release</b>			39.1	9.9
<b>Prior Conviction(s)</b>				
No	50	42.4		
Yes	67	56.8		
<b>Number of Prior Convictions</b>			1.7	2.4
<b>Sentence</b>				
LWOP	22	18.6		
Death	17	14.4		
Custodial	74	62.7		
Non-custodial	4	3.4		
<b>Post-exoneration Offense</b>				
No	73	61.9		
Yes	45	38.1		
<b>Number of Post-exoneration Offense(s)</b>			.98	1.8
<b>DNA Exoneration</b>				
No	58	49.2		
Yes	60	50.8		
<b>Time Incarcerated (Years)</b>			11.2	7.1
<b>Time Between Release and PEO (Months)</b>			35.1	31.2
<b>Compensation</b>				
No	45	38.8		
Yes	71	61.2		
<b>Pardon</b>				
No	57	48.3		
Yes	49	41.5		
<b>Expungement</b>				
No	38	32.2		
Yes	79	66.9		

**Table 2**  
*Zero-Order Pearson Correlation Matrix*

	Record Expunged	Age at Exoneration	Prior Number of Convictions	Compensation (>500K)	Race (White)	Time Out (Years)
Age at Exoneration (Years)	.027					
Prior Number of Conviction	-.257**	.248**				
Compensation (>500K)	.106	.169	-.202*			
Race (White)	-.046	-.090	.125	.102		
Time Out (Years)	-.059	-.147	.151	-.154	.207*	
Post-exoneration Offending	-.177	-.193*	.287**	-.242*	.186*	.045

\*\*  $p < 0.01$  level (2-tailed).

\*  $p < 0.05$  level (2-tailed).

#### B. POST-EXONERATION OFFENDING

Table 3 presents data on post-exoneration offending. Forty-five (38.1%) exonerees in our study were convicted of at least one crime after they were released. Seventy-three (61.9%) exonerees in the cohort did not offend post-exoneration. Offending rates varied by state. Florida had the highest rate of post-exoneration offending at 58.8%. New York had the lowest rate at 8.3%. Note that New York had both the most generous compensation statute<sup>123</sup> and the most favorable expungement laws.

**Table 3**  
*Post-exoneration Offending by State*

State	%		
	Yes	No	N
Texas	45.7	54.3	46
Illinois	38.7	61.3	31
New York	8.3	91.7	24
Florida	58.8	41.2	17
<i>Total N</i>	<i>45</i>	<i>73</i>	<i>118</i>

We coded post-exoneration offenses as either violent (aggravated assault, battery, involuntary manslaughter, or child abuse), property-related

<sup>123</sup> New York's compensation statute has a provision that allows the court of claims to award any amount; there is no floor or ceiling. See 2007 N.Y. Laws 2889–90. For example, in 2011, Steven Barnes was awarded \$3.5 million for the nineteen years he spent behind bars. *Court of Claims Awards \$3.5 Million to Steven Barnes for Wrongful Conviction*, WKTV NEWS CHANNEL 2 (Jan. 7, 2011, 4:13 PM), <http://goo.gl/P6NugM>.

(burglary, theft, larceny, breaking and entering, shoplifting, or drug-related), or other (gambling, probation violation, giving false information, driving without a license, resisting arrest, interfering with an emergency call, obstruction of justice, reckless conduct, or an equipment violation). As Table 4 displays, among the forty-five exonerees who offended following their releases, twenty committed a violent offense, thirteen committed a property crime, twenty committed a drug offense, and sixteen committed an offense classified as “other.” Several of the exonerees committed multiple offenses.

**Table 4**  
*Type of Post-exoneration Offense*

<i>Offense Type</i>	<i>Yes</i>		<i>No</i>	
	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>
Violent	16.9	20	83.1	98
Property	11.0	13	88.1	104
Drug	16.8	20	82.2	97
Other	13.6	16	83.9	99

#### C. EXPUNGEMENT

Overall in the criminal history searches, seventy-nine exonerees (67.5%) had their records expunged. Thirty-eight individuals (32.5%) had not received an expungement at the time of coding.<sup>124</sup> Table 5 displays expungement by state. All individuals exonerated in New York (n = 24) had the record of their wrongful convictions expunged. Texas had the highest number (n = 17) of cases without expungements. This disparity is likely due to differences in state expungement statutes as detailed in Part I.<sup>125</sup>

<sup>124</sup> Among these thirty-eight cases, twelve exonerees (31.5%) had the wrongful conviction still on their records in their entirety. The remainder of these cases (n = 26, 68.4%) had the wrongful conviction on their records; however their records stated that the cases were either dismissed, pardoned, vacated, or charges were dropped. These cases were included in the “no expungement” group, because no indication of the crime should remain on an exoneree’s record for the crime to be considered expunged or “erased.”

<sup>125</sup> See the survey of state expungement practices *supra* in Part I.

**Table 5**  
*Expungement by State*

State	%		N
	Yes	No	
Texas	N=29 36.7	N=17 44.7	46 39.3%
Illinois	N=20 25.3	N=11 26.3	31 25.7%
New York	N=24 30.4	N=0 0.0	24 20.5%
Florida	N=6 7.6	N=11 28.7	14.5% 17
<i>Total N</i>	79 67.5%	38 32.5%	117

Table 6 displays the relationship between post-exoneration offending and expungement. Expungement is significantly associated with post-exoneration offending. Among the thirty-eight exonerees who did not have records of their wrongful convictions expunged, 50% committed PEOs. Among the seventy-nine who had their records expunged, only 31.6% offended. The difference was significant at the .05 level.

**Table 6**  
*Bivariate Analysis of PEO by Expungement*

Post-exoneration Offense	Expungement				Total
	No		Yes		
	%	N	%	N	
No %	50.0	19	68.4	54	73
Yes %	50.0	19	31.6	25	44
<i>Total N</i>		38		79	117

$$\chi^2 (1) = 3.684, p < .05$$

The relationship between expungement and post-exoneration offending is complicated, however, by the fact that having a record prior to wrongful conviction is both a predictor of post-exoneration offending and a legal barrier to expungement in many states, including Florida and Illinois.<sup>126</sup> Even where it is not a legal barrier, it is a practical barrier.<sup>127</sup>

<sup>126</sup> See *supra* text accompanying notes 18–41 (general barriers), 78–88 (Florida), and 89–95 (Illinois). However, it is possible that many of the exonerees in our study did not benefit from these specifications. In Florida, the law that explicitly exempts exonerees from



Indeed, in our study, as Table 7 reflects, 78.9% of those without an expungement had a prior record.<sup>128</sup>

**Table 7**  
*Cross-tabulation of Expungement and Prior Record*

<i>Prior record</i>	<i>Expungement</i>				<i>Total</i>
	<i>No</i>		<i>Yes</i>		
	<i>%</i>	<i>N</i>	<i>%</i>	<i>N</i>	
No %	21.1	8	53.8	42	50
Yes %	78.9	30	46.2	36	66
<i>Total N</i>		38		78	116

$\chi^2(1) = 11.205$ ,  
p < .01

For this reason, we examine separately the relationship of post-exoneration offending and the expungement of wrongful convictions for exonerees with and without prior convictions. We hypothesized that the relationship would be different for the two groups of exonerees. For exonerees with histories of offending, expungement of their wrongful conviction still leaves them with a criminal history, albeit a shorter one. Failure to expunge a wrongful conviction puts an exoneree with no prior history in a categorically different position. Tables 8A and 8B support this

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the normal barriers to expungement did not become effective until 2008. See FLA. STAT. ANN. § 943.0585 (expungement) (West 2013); *id.* § 943.059 (sealing). While the relevant section of Illinois's statute has existed longer than Florida's, it is still possible that exonerees have not been benefitting from it. While there is always some degree of incongruity between the intentions of a law and its application, there is reason to believe that this incongruity is even more acute for Illinois expungement cases: Apparently, police departments across the state have been regularly ignoring court orders to seal or expunge records, substituting their own judgments for those of judges, and therefore preventing many who were legally entitled to sealing or expungement from receiving it. See Kelly Virella, *Closing Arguments: Refusal by the Illinois State Police to Enforce Court Orders Hurts Those Who Are Trying to Get Their Criminal Records Expunged or Sealed*, CHI. REP., May/June 2009, at 10. This prevented many who were legally entitled to sealing or expungement from receiving it. See *id.* ("When a judge ordered the Illinois State Police to seal or expunge the records of an offender, sometimes it happened; sometimes it didn't.").

<sup>127</sup> See SAUNDRA D. WESTERVELT & KIMBERLY J. COOK, LIFE AFTER DEATH ROW: EXONEREES' SEARCH FOR COMMUNITY AND IDENTITY 215 (2012). In their interviews with death row exonerees, Westervelt and Cook found that without expungement, exonerees had difficulty finding jobs. *Id.* at 65–66. Exonerees often need to engage legal assistance to obtain an expungement, but they generally lack the funds to do so. *Id.* at 66.

<sup>128</sup> For one case, we were unable to determine whether the subject had prior arrests or not. This explains the disparity in the numbers between Table 5 and the earlier tables.

hypothesis. Expungement decreases the likelihood of post-exoneration offending for those with no prior history of offending.<sup>129</sup>

Table 8A displays post-exoneration offending and expungement among those with no prior offending record. Among this subset, the majority of individuals (87.5%) who did not have their records expunged went on to commit at least one post-exoneration offense. As Table 8B displays, the association between post-exoneration offending and expungement is not significant among those with prior offenses.

**Table 8A**

*PEO by Expungement for Exonerees with No Prior Offending*

<i>Post-exoneration Offense</i>	<i>Expungement</i>			
	<i>%</i>	<i>No</i>	<i>Yes</i>	<i>N</i>
No %	12.5	83.3	36	
Yes %	87.5	16.7	14	
<i>Total N</i>		8	42	50

$\chi^2 (1) = 16.725, p = .000$

**Table 8B**

*Bivariate Analysis of PEO by Expungement  
for Exonerees with Prior Offending*

<i>Post-exoneration Offense</i>	<i>Expungement</i>			
	<i>%</i>	<i>No</i>	<i>Yes</i>	<i>N</i>
No %	60.0	50.0	36	
Yes %	40.0	50.0	30	
<i>Total N</i>		30	36	66

$\chi^2 (1) = .660, p > .05$

Of course, expungement is not the only factor affecting the future behavior of exonerees. Drawing on our prior research, we regressed post-exoneration offending on a vector of predictors, including compensation above a threshold amount, age, time since release, prior number of

<sup>129</sup> Among the thirty individuals who had both a prior conviction and a post-exoneration conviction, 30% (n = 9) committed crimes that were similar in nature.

convictions, race, and whether wrongful convictions were expunged.<sup>130</sup> We exploited the fact that our data includes the number of future convictions and not simply whether the exonerees offended post-release. Poisson regression fits models where rare events are counted—in other words, where there are a high proportion of zeroes and the frequency of events drops sharply thereafter.<sup>131</sup> In our study, roughly 62% of the exonerees committed no post-exoneration offenses. Of those who did, most did so one or two times. Taken together with those who never offend, approximately 87% of the exonerated offended two or fewer times. Poisson regression is thus highly appropriate.

Table 9 reports three Poisson models used to estimate the influence of expungement on the number of future convictions.<sup>132</sup> As the Table reveals, all three models are significant. Models 1 and 2 each explain approximately 19% of the variance. Model 3 explains roughly 15% of the variance. Models 1 and 3 include time since exoneration as a predictor, which fails to reach significance in both models. Model 2 excludes a predictor for time but does include a dichotomous variable for race where the value “1” equals a “white” exoneree. Time since exoneration does not appear to help in predicting post-exoneration offending—it fails to reach significance in the two models in which it is included, and it does not improve the model fit statistics or the amount of explained variance.

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<sup>130</sup> In an earlier article, the authors regressed post-exoneration offending on several predictors, including compensation, above a threshold amount, age at release, and number of prior convictions. See Mandery et al., *supra* note 118, at 568.

<sup>131</sup> See generally JAMES S. COLEMAN, INTRODUCTION TO MATHEMATICAL SOCIOLOGY (1964). Coleman developed this method of multivariate analysis. This statistical technique is analogous to regression analysis when binary variables take the value 0 or 1 to indicate the absence or presence of some categorical effect that may be expected to shift the outcome. *Id.*

<sup>132</sup> The findings we report are tentative and somewhat fragile. We report them with some degree of caution. Of particular concern is the issue of time. We use two different but related measures. Based on the literature, we use age at release to capture the age-crime relationship. We expect that older exonerees will be less likely to offend and accumulate post-exoneration convictions. In all of the models, this is so. Although highly significant, the coefficient itself is -.0001 across all three models. Time, measured as number of years since the exoneration, is more problematic. In these data, the number of years since exoneration ranges from roughly two years to eighteen years, with an average number of years of 7.7. An additional challenge is that we know how many convictions each exoneree has, but we do not know if those who were convicted were incarcerated at any given moment. For those with post-exoneration convictions, we do not have a precise measure of how long they had been out of prison and were therefore at risk to offend. It is thus somewhat of a stretch to use time as a linear predictor. Nor can we use time as an exposure against which we calculate incident rates. If we omit time, however, we are losing valuable information and risk-omitted variable bias. Because time since exoneration is an important element, we have chosen to include it in the first model, but we are cautious in the interpretation.

Unfortunately, we could only reject the influence of time if we had a better measure of the actual time each exoneree was out in the public and available to offend.<sup>133</sup>

It is no surprise that the prior number of offenses is a positive and consistent predictor of post-exoneration offending. This finding is consistent with our own prior research, as well as research on re-offending generally, which suggests that prior criminal history is predictive of post-release offending.<sup>134</sup> Compensating the wrongfully convicted appears to decrease post-exoneration offending.<sup>135</sup> Expunging wrongful convictions is, as we predicted, a significant predictive factor across all three models. Tables 8A and 8B might suggest that some other variable is interfering for those with no prior offenses and who had their wrongful convictions expunged. However, doing so would torture the data and lead to small cell values.

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<sup>133</sup> Ideally we would want to know how long each exoneree was out of prison and therefore able to offend, but due to limitations in available data, we used time from exoneration.

<sup>134</sup> Of course, all of the available research concerns recidivism as opposed to post-release offending. One of the most significant predictors of recidivism is having a prior record. See ALLEN J. BECK & BERNARD E. SHIPLEY, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1983*, at 2–3 (1989); PATRICK A. LANGAN & DAVID J. LEVIN, BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF PRISONERS RELEASED IN 1994*, at 7–10 (2002); Daniel S. Nagin et al., *Imprisonment and Reoffending*, 38 *CRIME & JUST.: ANN. REV. RES.* 115, 135 (2009); Daniel S. Nagin & Raymond Paternoster, *On the Relationship of Past to Future Participation in Delinquency*, 29 *CRIMINOLOGY* 163, 183 (1991).

<sup>135</sup> See Mandery et al., *supra* note 118, at 573.

**Table 9**

*Poisson Regression Analysis: Post-exoneration Offending by Expungement, Age at Release, Prior Number of Convictions, Compensation Amount, Race, and Years Since Release*

	Model 1	Model 2	Model 3
Constant	1.7014 (0.611)	** 2.0991 (0.446)	**** 1.442 (0.580)
Wrongful Conviction Expunged	-0.5969 (0.229)	** -0.6601 (0.213)	*** -0.5000 (0.224)
Age at Exoneration (Years)	-0.0001 (0.000)	*** -0.0001 (0.000)	**** -0.0001 (0.000)
Prior Number of Offenses	0.1399 (0.036)	**** 0.1530 (0.034)	**** 0.1522 (0.034)
Compensation at \$500,000	-0.8966 (0.369)	* -0.8167 (0.334)	* -0.5075 (0.317)
White	-0.4421 (0.288)	-0.5514 (0.279)	*
Years Since Release	0.0313 (0.028)		0.0324 (0.027)
Model Statistics			
N	104	108	105
Log Likelihood	-140.64	-145.50	-151.33
$\chi^2$	67.85	**** 71.29	**** 55.28
Pseudo R <sup>2</sup>	0.1943	0.1968	0.1544

\* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ ; \*\*\*\* $p < .0001$

Standard errors are in parentheses.

#### IV. DISCUSSION

##### A. LABELING THEORY

Our finding that failure to expunge an exoneree's record is associated with a significant increase in the risk of post-exoneration is consistent with labeling theory. Developed by sociologists in the late 1960s, labeling theory portrays criminality as a product of society's reaction to the individual.<sup>136</sup> It contends that an individual who has been labeled has a

<sup>136</sup> Howard Becker's book *Outsiders: Studies in the Sociology of Deviance* was extremely influential in the development of labeling theory and is credited with its rise to popularity. See generally HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* (1963). However, this idea began in the 1950s with the work of people like Edwin Lemert, who focused on the symbolic interactionist approach to deviance, the way in which negative labels are applied, and on the consequences of the labeling process. See generally EDWIN M. LEMERT, *SOCIAL PATHOLOGY: A SYSTEMATIC APPROACH TO THE THEORY OF SOCIOPATHIC BEHAVIOR* (1951).

transformation of identity.<sup>137</sup> Following this logic, an individual who has been convicted of a crime would acquire a criminal identity.

One aspect of the dynamic is transformational. Deviant or stigmatizing labels, such as “ex-convict,” can lead to depression,<sup>138</sup> low self-esteem,<sup>139</sup> expected devaluation, discrimination, rejection,<sup>140</sup> and delinquent behavior.<sup>141</sup>

Another aspect of this dynamic is practical. The label of “ex-convict” may contribute to people getting excluded from various activities that make access to conventional activities more difficult and criminal alternatives more attractive.<sup>142</sup> For example, in some states, “convicted felons are prohibited from obtaining student loans.”<sup>143</sup> Denials of loans for schooling, homes, and cars may further hinder exonerees’ successful reentry.<sup>144</sup> A criminal record also frustrates securing almost any service that requires an application or a background check. Although public housing is a viable

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<sup>137</sup> Many early researchers studied self-esteem or “self-typing.” See generally Suzanne S. Ageton & Delbert S. Elliott, *The Effects of Legal Processing on Delinquent Orientations*, 22 SOC. PROBS. 87 (1974); Leonard E. Gibbs, *The Effects of Juvenile Legal Procedures on Juvenile Offenders’ Self-Attitudes*, 11 J. RES. CRIME & DELINQ. 51 (1974). More recently, researchers have conducted identity-related labeling research. See, e.g., Karen Heimer & Ross L. Matsueda, *Role Taking, Role Commitment, and Delinquency: A Theory of Differential Social Control*, 59 AM. SOC. REV. 365, 366 (1994); Ross L. Matsueda, *Reflected Appraisals, Parental Labeling, and Delinquency: Specifying a Symbolic Interactionist Theory*, 97 AM. J. SOC. 1577, 1578 (1992).

<sup>138</sup> See Bruce G. Link et al., *On Stigma and Its Consequences: Evidence from a Longitudinal Study of Men with Dual Diagnoses of Mental Illness and Substance Abuse*, 38 J. HEALTH SOC. BEHAV. 177, 177 (1997); Tally Moses, *Stigma and Self-Concept Among Adolescents Receiving Mental Health Treatment*, 79 AM. J. ORTHOPSYCHIATRY 261, 262 (2009).

<sup>139</sup> Betsy L. Fife & Eric R. Wright, *The Dimensionality of Stigma: A Comparison of its Impact on the Self of Persons with HIV/AIDS and Cancer*, 41 J. HEALTH SOC. BEHAV. 50, 52–53 (2000).

<sup>140</sup> See Bruce G. Link et al., *A Modified Labeling Theory Approach to Mental Disorders: An Empirical Assessment*, 54 AM. SOC. REV. 400, 402–03 (1989).

<sup>141</sup> See generally Heimer & Matsueda, *supra* note 137, at 382; Matsueda, *supra* note 137, at 1602.

<sup>142</sup> See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 22 (Marc Mauer & Meda Chesney-Lind eds., 2002); Bruce Western & Becky Pettit, *Black-White Wage Inequality, Employment Rates, and Incarceration*, 111 AM. J. SOC. 553, 574 (2005) (discussing the broad range of consequences of imprisonment, which presumes conviction); Bruce Western, *The Impact of Incarceration on Wage Mobility and Inequality*, 67 AM. SOC. REV. 526, 528 (2002).

<sup>143</sup> Ted Chiricos et al., *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007).

<sup>144</sup> For example, arrest and incarceration can temporarily affect a person’s government benefits and eligibility for student loans in New York State. See KATE RUBIN ET AL., BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL CHARGES: A PEOPLE’S GUIDE 11 (2008), available at <http://goo.gl/HQ96EZ>.

option for individuals reentering the community, many find themselves barred as a consequence of their criminal conviction.<sup>145</sup> Obtaining private housing brings its own challenges.<sup>146</sup> Even if recent prison releasees can afford private housing, background checks and the lack of credible work histories may inhibit them.<sup>147</sup>

Ex-offenders also encounter obstacles that effectively bar them from benefits of conventional society. They lose civil liberties, including the right to vote and hold public office, and they lose access to government benefits.<sup>148</sup> They often are subject to bias from law enforcement officers.<sup>149</sup>

Moreover, a prior record sometimes acts as a barrier to securing employment,<sup>150</sup> including employment in state-licensed occupations or with

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<sup>145</sup> See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 121(2003) (“[S]ome laws now require public housing agencies and providers to deny housing to certain felons (e.g., drug and sex offenders).”). Public housing law currently requires public housing agencies and Section 8 voucher providers to deny housing to those with drug-related criminal activity and any household with a member who is subject to a lifetime registration requirement. See *Housing Laws Affecting Individuals with Criminal Convictions*, LEGAL ACTION CTR., <http://goo.gl/3T1Mkp> (last visited Apr. 17, 2014). These policies can have far-reaching effects; the public housing authority may evict all members of a household for criminal activities committed by any one member in that household. See, e.g., *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 136 (2002).

<sup>146</sup> Finding housing is one of the biggest challenges for people leaving prison. JEREMY TRAVIS ET AL., URBAN INST., FROM PRISON TO HOME: THE DIMENSION AND CONSEQUENCES OF PRISONER REENTRY 35 (2001). Some laws deny housing to certain felons, such as drug and sex offenders. See LEGAL ACTION CTR., *supra* note 145. Individuals with drug-related felony convictions are unable to receive federally funded public assistance (welfare) and food stamps. See 21 U.S.C. § 862(a) (2012).

<sup>147</sup> PETERSILIA, *supra* note 145, at 121 (“Even if the ex-prisoner can afford it, landlords conducting background checks or requiring credible work histories usually pass over an applicant with a prison record.”).

<sup>148</sup> *Id.* at 130. See generally Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 941 (1970). Every state, besides Maine and Vermont, has laws prohibiting prison inmates from voting. See CHRISTOPHER UGGEN, URBAN INST., PRISONER REENTRY AND THE INSTITUTIONS OF CIVIL SOCIETY: BRIDGES AND BARRIERS TO SUCCESSFUL REINTEGRATION—BARRIERS TO DEMOCRATIC PARTICIPATION 2 (2002). Some states permanently deny the right to vote after a felony conviction, while others prevent voting while on probation or parole. *Id.*

<sup>149</sup> See Richard C. Smith et al., *Background Information: Does It Affect the Misdemeanor Arrest?*, 4 J. POLICE SCI. & ADMIN. 111, 112–13 (1976).

<sup>150</sup> PETERSILIA, *supra* note 145, at 117. In 2001, “Western, Kling, and Weiman found that employers are less likely to hire ex-convicts [as compared to] those who provide *no* information” (those who left the question blank) on their application forms. *Id.* at 116 (internal citations omitted). Harry Holzer et al. conducted a survey of 3,000 employers from four large cities and similarly found that the majority of employers are unwilling to hire applicants with a criminal record; 60% indicated that they would “probably not” or “definitely not.” Harry J. Holzer et al., *Will Employer’s Hire Ex-offenders? Employer*

state-licensed companies.<sup>151</sup> This last consequence is arguably the most significant. Jobs are essential for exonerees who are trying to rebuild their lives. Finding and keeping work plays a crucial role in successful reentry and reintegration.<sup>152</sup> Employment also provides essential economic security, which allows former prisoners to pay their bills, support their families, obtain housing, and secure medical care. But while employment is essential to rebuilding a life, individuals with criminal records experience more difficulty obtaining employment than any other disadvantaged group, including minorities, welfare recipients, and illegal aliens.<sup>153</sup>

Study after study shows how substantial these barriers to employment are. For example, a national survey of 600 businesses showed that employers shy away from hiring ex-convicts out of fear of liability if they commit a new crime.<sup>154</sup> Other researchers have found that employers are less likely to hire an ex-convict than someone who provided *no* information on his application regarding prior employment.<sup>155</sup> A 2002 survey of 3,000 employers from four large cities similarly found that the majority of employers are unwilling to hire an applicant with a criminal record.<sup>156</sup> In addition, these researchers found that approximately 49% of employers “always” or “sometimes” checked potential employees’ criminal backgrounds.<sup>157</sup>

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*Preferences, Background Checks, and Their Determinants* 7 (Inst. Research on Poverty, Discussion Paper No. 1243-02, 2002).

<sup>151</sup> PETERSILIA, *supra* note 145, at 113–14.

<sup>152</sup> See *id.* at 112 (“Employment helps ex-prisoners be productive, take care of their families, develop valuable life skills, and strengthen their self-esteem and social connectedness.”); see also CHRISTY VISHER ET AL., URBAN INST., *EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES* 8 (2008) (“The struggle to find and keep a job after release is a crucial element of the reentry process. It is an important part of becoming a productive member of the community and assists in developing personal responsibility and gaining independence and self-reliance.”).

<sup>153</sup> See HARRY J. HOLZER ET AL., URBAN INST., *EMPLOYMENT DIMENSIONS OF REENTRY: UNDERSTANDING THE NEXUS BETWEEN PRISONER REENTRY AND WORK—EMPLOYMENT BARRIERS FACING EX-OFFENDERS* 11 (2003). Employers are much more reluctant to hire ex-offenders than any other group of disadvantaged workers. *Id.* Employers fear the legal liability that could potentially be created by hiring ex-offenders, and they view their offender status as a signal of lack of reliability and trustworthiness. *Id.* at 8.

<sup>154</sup> PETERSILIA, *supra* note 145, at 117–18. Wirthlin Worldwide surveyed businesses participating in Welfare to Work Partnership, a nonpartisan effort to assist businesses with hiring people on public assistance. *Id.* at 117. The survey reported that those with a criminal record were “hardest to serve,” and 40% of respondents reported that they would “never hire anyone with a felony drug conviction.” *Id.* (internal quotation marks omitted).

<sup>155</sup> See Bruce Western et al., *The Labor Market Consequences of Incarceration*, 47 *CRIME & DELINQ.* 410, 412 (2001).

<sup>156</sup> See Holzer et al., *supra* note 150, at 11 fig.3.

<sup>157</sup> *Id.* at 11.



While it is generally illegal for employers to ban hiring ex-offenders, certain occupations that require occupational and professional licenses mandate background checks for the safety of their clients<sup>158</sup> and create yet another barrier to successful reintegration. These barriers are common in childcare, education, security, and nursing, among other fields.<sup>159</sup> In New York and other states, some occupations—including barbers, real estate brokers, and physical therapists—require licenses that are predicated upon the applicant being “morally sound.”<sup>160</sup> Generally, evidence of a prior conviction will act as a barrier to obtaining such a license.<sup>161</sup> This effectively bars individuals with criminal records from more than 100 professions in New York.<sup>162</sup> Even outside of these occupations employers may ask about prior felony convictions, even if they are not permitted to do so.

In several respects, the barriers to employment are more difficult to overcome for exonerees than ex-convicts. Of course, the most substantial barrier to employment for ex-convicts is that they tend to lack education, job skills, and general preparedness for the workplace.<sup>163</sup> Yet—and this is particularly cruel—exonerees are sometimes ineligible for job training and vocational services that are made available to parolees.<sup>164</sup> Even if an exoneree’s record has been expunged, he generally has a long gap in his employment history, which can discourage prospective employers.<sup>165</sup> Our findings were driven by the effects that failure to expunge had on the exonerees who had no prior records. This is also consistent with research on labeling theory, which suggests that labeling effects may be strongest for first-time offenders.<sup>166</sup> One explanation for this result may be that labeling

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<sup>158</sup> See PETERSILIA, *supra* note 145, at 113.

<sup>159</sup> *Id.* These checks are especially troublesome for released offenders who previously worked in these fields. They are completely cut off from returning to their former professions.

<sup>160</sup> See ERNEST DRUCKER, *A PLAGUE OF PRISONS: THE EPIDEMIOLOGY OF MASS INCARCERATION IN AMERICA* 135 (2011).

<sup>161</sup> *See id.*

<sup>162</sup> *See id.*

<sup>163</sup> See HOLZER ET AL., *supra* note 153, at 4–5.

<sup>164</sup> See Adrian Grounds, *Psychological Consequences of Wrongful Conviction and Imprisonment*, 46 *CAN. J. CRIMINOLOGY & CRIM. JUST.* 165, 170–71 (2004); see also JIM DWYER ET AL., *ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT* 289–90 (3d ed. 2003).

<sup>165</sup> See Stephanie Armour, *Wrongly Convicted Walk Away with Scars: DNA Testing Leads to More Exonerations, but Those Freed Face Difficult Job Search and Get Little Help*, *USA TODAY*, Oct. 13, 2004, at 1A.

<sup>166</sup> See Christina DeJong, *Survival Analysis and Specific Deterrence: Integrating Theoretical and Empirical Models of Recidivism*, 35 *CRIMINOLOGY* 561, 574 (1997); Faye S. Taxman & Alex Piquero, *On Preventing Drunk Driving Recidivism: An Examination of*

events are less consequential when they occur later in the life course of an individual.<sup>167</sup> An alternate explanation is that those without a prior record have more to lose from criminal stigma.<sup>168</sup>

#### B. ALTERNATIVE EXPLANATIONS

Expungement may be acting in whole or in part as a proxy for other factors that may reduce the risk of post-exoneration offending. Health and access to health care are obvious examples. Prisoners' health problems have been widely documented. Studies have found that 2% to 3% of inmates are HIV positive or have AIDS, a rate that is about six times higher than the rate for the general population.<sup>169</sup> Although by law inmates are entitled to health care in prison, they are often denied access to specialists, technologically advanced diagnostic techniques, and the latest medications and procedures.<sup>170</sup> These health consequences continue beyond release. Individuals released from prison have been described as "developmentally frozen."<sup>171</sup> Formerly incarcerated people may also develop mental illnesses, including post-traumatic stress disorder, depressive disorders, and panic disorders.<sup>172</sup> The prevalence of certain mental health disorders in inmate populations is significantly greater than that in the general population.<sup>173</sup> For those who receive it, treatment in prison can begin the process of recovery and return to wellness; however, continued services in the community are necessary for sustainability.<sup>174</sup> Once released, very few individuals receive assistance in reinstating their health benefits, and without coverage, their physical and mental health conditions might persist and contribute to repeated criminal justice involvement.<sup>175</sup> Since

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*Rehabilitation and Punishment Approaches*, 26 J. CRIM. JUST. 129, 140 (1998) (suggesting that there are stronger labeling effects—increased recidivism—for first-time offenders).

<sup>167</sup> See Raymond Paternoster & Leeann Iovanni, *The Labeling Perspective and Delinquency: An Elaboration of the Theory and an Assessment of the Evidence*, 6 JUST. Q. 359, 385 (1989).

<sup>168</sup> See Chiricos et al., *supra* note 143, at 571.

<sup>169</sup> See THEODORE M. HAMMETT ET AL., U.S. DEP'T OF JUSTICE, ISSUES AND PRACTICES: 1996–1997 UPDATE: HIV/AIDS, STDs, AND TB IN CORRECTIONAL FACILITIES 5 (1999).

<sup>170</sup> See PETERSILIA, *supra* note 145, at 50.

<sup>171</sup> See generally EDWARD ZAMBLE & FRANK J. PORPORINO, *COPING, BEHAVIOR, AND ADAPTATION IN PRISON INMATES* (1988).

<sup>172</sup> *Id.*

<sup>173</sup> See 1 NAT'L COMM'N ON CORR. HEALTHCARE, *THE HEALTH STATUS OF SOON-TO-BE RELEASED INMATES* 24 & tbl.3–3 (2002).

<sup>174</sup> See CHRISTY A. VISHER ET AL., *URBAN INST., IN NEED OF HELP: EXPERIENCES OF SERIOUSLY ILL PRISONERS RETURNING TO CINCINNATI* 20 (2005).

<sup>175</sup> See generally Danielle Wallace & Andrew V. Papachristos, *Recidivism and the Availability of Health Care Organizations*, 31 JUST. Q. 588 (2012). Without continuity of care and access to services in the community, individuals are likely to return to previous

employment is a pathway to health care, and expungement is a pathway to employment, the benefits of expungement may perhaps derive in whole or in part from giving exonerees access to health care.

Family may be causally knotted in a different way. Family has been consistently identified as a critical component in helping individuals transition from prison to society.<sup>176</sup> Family support can provide opportunities for housing, employment, education, and training, which releaseses would not otherwise have. Those without positive and supportive relationships are more likely to engage in criminal behavior.<sup>177</sup> It may be that people who succeed in having their records expunged disproportionately have access to resources or support mechanisms that are more broadly associated with post-release success.

Given the small size of the universe of exonerees and the difficulty in ascertaining and quantifying a variable such as family connections, disentangling these causal knots is complicated. But the complications of identifying first causes should not distract from the importance of expungement as an ameliorative measure. In *A Plague of Prisons*, Ernest Drucker characterizes prisonization as a plague, with many of the facets of an infectious disease.<sup>178</sup> He sees releaseses' inability to get jobs as a central part of this mechanism,<sup>179</sup> and the failure to expunge may be a principal cause of their inability to get work. As a public policy measure, expungement is easy and nearly costless to implement. Exonerees may succeed or fail post-release for many reasons, but expungement can only help.

In addition to noting concerns about health care and support systems, it is crucial to acknowledge the relationship between reoffending and both age and prior criminal activity. Results suggest that the older an individual is at exoneration, the less likely he is to have a post-exoneration offense. These findings are consistent with decades of research on the link between age and

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behaviors and be reincarcerated. See RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOV'TS, HOW AND WHY MEDICAID MATTERS FOR PEOPLE WITH SERIOUS MENTAL ILLNESS RELEASED FROM JAIL: RESEARCH IMPLICATIONS 1 (2009), available at <http://goo.gl/P18hHJ>.

<sup>176</sup> Family members provide both social control and social support, which can inhibit criminal activity. See ROBERT J. SAMPSON & JOHN H. LAUB, CRIME IN THE MAKING: PATHWAYS AND TURNING POINTS THROUGH LIFE 95–98 (1993); see also Francis T. Cullen et al., *Social Support and Social Reform: A Progressive Crime Control Agenda*, 45 CRIME & DELINQ. 188, 193 (1999). Family members and other supportive individuals “facilitate informal social controls—those interpersonal bonds that link ex-inmates to churches, law-abiding neighbors, families and communities.” PETERSILIA, *supra* note 145, at 19.

<sup>177</sup> See TRAVIS ET AL., *supra* note 146, at 20.

<sup>178</sup> See generally DRUCKER, *supra* note 160.

<sup>179</sup> *Id.* at 134–35.

crime.<sup>180</sup> Besides age at release, prior criminal behavior has a strong positive link to offending after release from prison. Abundant research supports the idea that prior criminal behavior affects reoffending; if an individual commits a crime once, then he will probably do it again.<sup>181</sup> Some research also suggests that it is the prison environment itself that contributes to reoffending.<sup>182</sup> Although not fully understood, wrongfully convicted individuals may experience imprisonment in a significantly different way than other inmates.<sup>183</sup> It is well-documented that these

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<sup>180</sup> Criminological research has also emphasized the strong relationship between age and crime, with involvement in most crimes peaking during adolescence and then declining. See, e.g., Travis Hirschi & Michael Gottfredson, *Age and the Explanation of Crime*, 89 AM. J. SOC. 552, 555–56 (1983). One explanation for this relationship is the strength of a person's bond to society. Social bonds in adulthood stemming from life events explain persistence in and desistance from crime, despite early childhood propensities or antisocial behavior. See John H. Laub et al., *Trajectories of Change in Criminal Offending: Good Marriages and the Desistance Process*, 63 AM. SOC. REV. 225, 236–37 (1998).

<sup>181</sup> See generally PAULA SMITH ET AL., PUB. WORKS & GOV'T SERVS. CAN., THE EFFECTS OF PRISON SENTENCES AND INTERMEDIATE SANCTIONS ON RECIDIVISM: GENERAL EFFECTS AND INDIVIDUAL DIFFERENCES (2002); Martin Killias & Patrice Villetaz, *The Effects of Custodial vs Non-custodial Sanctions on Reoffending: Lessons from a Systematic Review*, 20 PSICOTHEMA 29 (2008). Some research estimates that between 30% and 60% of juvenile delinquents go on to commit at least one adult offense. See generally David P. Farrington, *Predicting Individual Crime Rates*, 9 CRIME & JUST.: REV. RES. 53 (1987).

<sup>182</sup> The negative impact of incarceration has been observed for decades. In 1940, Donald Clemmer hypothesized that inmates learn the norms of the antisocial subculture from other prisoners during imprisonment, a process known as prisonization. See generally DONALD CLEMMER, *THE PRISON COMMUNITY* (1940). The longer an offender stays in prison, the theory states, the higher his degree of prisonization. Thus, there is a greater likelihood of reoffending. See generally *id.* A long prison sentence, in most cases, is intended to rehabilitate an individual, thus ending criminal involvement. However, prison often does the opposite, providing a criminogenic environment that exposes individuals to criminal behavior and decreases exposure to positive social behavior. See generally Nagin et al., *supra* note 134. Additionally, studies on prisons have revealed a subculture among inmates; while incarcerated, an inmate often adopts specific roles and learns criminogenic behavior from his peers. See GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* 84–108 (1958). See generally JOHN IRWIN, *THE WAREHOUSE PRISON: DISPOSAL OF THE NEW DANGEROUS CLASS* (2005).

<sup>183</sup> Kathryn Campbell and Myriam Denov conducted a qualitative review of wrongfully incarcerated individuals and found that the impact of imprisonment on these individuals is worsened by the “unjust nature of their incarceration.” Kathryn Campbell & Myriam Denov, *The Burden of Innocence: Coping with a Wrongful Imprisonment*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 139, 145 (2004). In addition, those who claim they are innocent often do not express remorse and, as a result, are considered more dangerous and more likely to reoffend. *Id.* at 152. Those who claim they are innocent are also less likely to be granted parole, are less likely to participate in programming, and often experience uncertainty about their release dates. See Richard Weisman, *Showing Remorse: Reflections on the Gap Between Expression and Attribution in Cases of Wrongful Conviction*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 121, 128–29 (2004). Making matters worse, when exonerees are released, the process is often

individuals have difficulty adapting to outside life.<sup>184</sup> Our findings suggest that expungement may help exonerees make a more productive and smooth transition back to society after incarceration.

#### CONCLUSION

Basic fairness requires expunging defendants' records when they are wrongfully convicted of an offense. Our research suggests that the evidence-based public policy argument is compelling, as well. For the roughly one-third of exonerees whose offenses continues to appear on their criminal records, the wrongful conviction serves as a permanent, undeserved stigma that impedes their successful reintegration into society. Even in the best case, it is difficult to move beyond a prison sentence. Our research suggests that for exonerees whose records have not been expunged, it is approximately twice as hard. Given the number of cases examined and other influential factors that may be at issue, these results can only be deemed to be tentative. It is beyond question, though, that this issue and the general issue of what facilitates an exoneree's successful return to society merit further study.

Going forward, it would be useful to expand this study and its background checks to other states. Qualitative research can also potentially help to understand why some exonerees offend following release and some do not. In this research, it would be useful to explore in interviews the alternative explanations and mechanisms for post-release success, including (but not limited to) family and community support, socioeconomic status, outside agency support, and mental health. For example, is failure to find employment and, generally speaking, the stigmatizing consequences of the "ex-convict" label truly the driving force? We acknowledge, too, the complex relationship between expungement and prior offending and the possibility that the latter, not the former, is more significantly affecting post-exoneration offending. Nevertheless, it is almost impossible to imagine any argument against expungement. At most, it is a nearly costless way to assist exonerees transitioning back into society. At least, it gives exonerees something they deserve.

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sudden and without preparation, support, or supervision. Jennifer L. Chunias & Yael D. Aufgang, *Beyond Monetary Compensation: The Need for Comprehensive Services for the Wrongfully Convicted*, 28 B.C. THIRD WORLD L.J. 105, 115 (2008).

<sup>184</sup> For example, some exonerees report that they were not accepted upon return to their communities and that some people continued to believe they were guilty. See WESTERVELT & COOK, *supra* note 127, at 178.