Paying For a Clean Record

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CRIMINAL LAW

PAYING FOR A CLEAN RECORD

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Prosecutors and courts often charge a premium for the ability to avoid or erase a criminal conviction. Defendants with means, who tend to be predominantly White, can often pay for a clean record. But the indigent who are unable to pay, and are disproportionately Black and Brown, are saddled with the stigma of a criminal record. Diversion and expungement are two popular reforms that were promulgated as ways to reduce the scale of the criminal legal system and mitigate the impact of mass criminalization. Diversion allows a defendant to earn dismissal of a charge by satisfying conditions set by the prosecutor or court, thereby avoiding conviction. Expungement seals or erases the defendant’s record of arrest or conviction. Some diversion and expungement programs are cost-free, but most are not. Yet a criminal record carries its own costs. A criminal record can limit where an individual can live, go to school, and whether they receive public benefits. As 93% of employers conduct background checks on job applicants, the inability to avoid a criminal record can create barriers to employment and the accumulation of wealth. Costly diversion and expungement programs further calcify race and class divides, contributing to the construction of a permanent underclass.

This Article examines the promises and pitfalls of diversion and expungement as means to combat mass criminalization. These two

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mechanisms work in tandem to provide access to a “clean record,” but not enough attention has been paid to the dangers they present due to differential access to clean records based on financial means. This Article considers legal challenges to the current schemes and explains how requiring defendants to pay for a clean record enables courts and prosecutors to profit from the perpetuation of racial caste. Ultimately, this Article argues that the impacts of diversion and expungement programs are more modest than reformers claim, and that these programs need to be offered at no cost if they are to succeed in achieving the goal of reducing racial disparities in our criminal courts and in society at large.

INTRODUCTION

Every day, people pay to avoid or erase criminal records.¹ This Article details how criminal justice reforms that charge defendants for acts of mercy,

¹ See infra Part I.
epitomized by fee-based diversion and expungement, operate as regressive taxes on the poor in ways that entrench rather than ameliorate the racialized phenomenon of mass criminalization. Rather than shrinking the carceral state as reformers claim, fee-based diversion and expungement programs can both widen the net of mass criminalization while simultaneously exacerbating racial disparities in the system. Ultimately, these reforms may serve to legitimize a caste-like structure where criminal record status serves as a proxy for race and class.

We are all criminals. The primary definition of a criminal is “one who has committed a crime.” In this sense, given the expansive criminal legal net we have woven with ever-proliferating American criminal laws, it is almost impossible to function in the United States without committing a crime. Americans possess marijuana, drink alcohol underage, use their cell phones

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2 See WE ARE ALL CRIMINALS, https://weareallcriminals.org [https://perma.cc/X89T-LFQG].
6 The drinking age is twenty-one in all fifty states, see 23 U.S.C. § 158, but even by age eighteen, 58% of teens had had at least one drink. See NAT’L INST. ON ALCOHOL ABUSE & ALCOHOLISM, UNDERAGE DRINKING (2020), https://www.niaaa.nih.gov/sites/default/files/Underage_Fact.pdf [https://perma.cc/9A3E-7MRC].
while driving, speed, use hard drugs, shoplift, get into bar fights, possess illegal or unlicensed weapons, sext, urinate in public, trespass.

7 Though most states prohibit handheld cell phone use and texting, in a recent survey nearly 90% of drivers say they use their smartphones while on the road. Mark Moore, A Disturbing Number of People Still Use Cellphones While Driving, N.Y. POST (Apr. 17, 2017), https://nypost.com/2017/04/17/a-disturbing-number-of-people-still-use-cellphones-while-driving/ [https://perma.cc/GK3Z-DAXF].

8 89% of drivers say they have driven faster than the speed limit and 40% have driven more than twenty miles per hour over the limit. New Allstate Survey Shows Americans Think They Are Great Drivers – Habits Tell a Different Story, PR NEWSWIRE (Aug. 2, 2011), https://prn.to/2jkmrUq [https://perma.cc/HS3A-EYJ2].


12 See, e.g., Mary Frost, After 7-year Push, ‘Gravity Knives’ Are Decriminalized, BROOKLYN EAGLE (May 30, 2019), https://brooklyneagle.com/articles/2019/05/30/after-7-year-push-gravity-knives-are-decriminalized/ [https://perma.cc/Z57J-PP4A] (reporting at least 1,800 people a year were charged with illegal possession of gravity knives in New York City—often workers who were charged simply for possessing tools needed for work); see also CAL. PENAL CODE § 22210 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.) (criminalizing possession of billy clubs and other weapons).


14 Though public urination is illegal in most states, seventy-one percent of men reported having urinated in a bush or tree in a non-residential area. See Jack Gammon, United States of Bad Hygiene and Habits, YOUTUBE (Jul. 14, 2014), https://today.yougov.com/topics/lifestyle/articles-reports/2014/07/14/united-states-bad-hygiene [https://perma.cc/7UJS-98FK].
and fail to comply with the orders of law enforcement officers—all of which are or can be crimes under certain circumstances.

Though we are all criminals, not all of us have criminal records—but the number who do is increasing. In the past few decades, the number of adults in the United States who have criminal records has exploded. An estimated twenty million Americans, 8.6% of the U.S. adult population, have recorded felony convictions. The number of those with misdemeanor convictions is several times higher. A criminal record does not require a conviction—an arrest is enough for the taint of a “dirty” criminal record to attach. Overall, federal and state criminal records repositories have criminal records for one third of the U.S. adult population.

15 Notably, low-income people of color are often charged for trespassing in their own public housing projects. See Dorielle E. Obanor, Note, Dismantling Discrimination in the Stairways and Halls of NYCHA Using Local, State, and National Civil Rights Statutes, 6 COLUM. J. RACE & L. 169, 171 (2016).

16 In overpoliced public schools, disobeying an order is suddenly converted from a disciplinary infraction into a criminal offense. See ELORA MUKHERJEE, N.Y. CIV. LIBERTIES UNION, CRIMINALIZING THE CLASSROOM: THE OVER-POLICING OF NEW YORK CITY SCHOOLS 10 (2007), https://www.nyCLU.org/sites/default/files/publications/nyclu_pub_criminalizing_the_classroom.pdf [https://perma.cc/BQ3E-7ULK] (noting that with 4,625 officers, the School Safety Agent division of the New York Police Department would, on its own, be the tenth largest police department in the country); see also MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 56–57, 76–77 (2016).


18 Id.; ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 251–58 (2018) (collecting data documenting scope of misdemeanor criminal justice system and concluding that there were over 13 million misdemeanor filings in 2015); see also Sandra G. Mayson & Megan T. Stevenson, Misdemeanors by the Numbers, 61 B.C. L. REV. 971, 1014–15 (2020) (estimating more than 13 million misdemeanor cases filed annually or 40.4 per 1,000 people).


20 The FBI has criminal records for over 80 million individuals. See FED. BUREAU OF INVESTIGATION, FEBRUARY 2022 NEXT GENERATION IDENTIFICATION SYSTEM FACT SHEET (2022) [hereinafter FBI FACT SHEET] (noting over 80 million individuals have criminal records based on fingerprints); U.S. DEP’T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016 104, tbl.20 (2018) https://www.ncjrs.gov/pdfs/grants/251516.pdf [https://perma.cc/3BMP-J3YD] (reporting 91 million unique criminal records based on the Interstate Identification Index). In 2015, an estimated 70–100 million adults in the U.S. had a criminal record—that’s about 1 in 3 or 1 in 2 based on the current adult
At the same time, as more Americans are criminals and have criminal records, American culture increasingly relies on a person’s record to sort individuals. In the United States, criminal records—or the lack thereof—are used to allocate housing, public assistance, education, and employment. A criminal record is a major barrier to employment, and the impact of a criminal record is more profound for Black people than White people. Specifically, 93% of employers screen job applicants for criminal records at the hiring stage. One quarter of jobs require a state occupational license, population of 209 million. See REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AM. PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 1 n.1 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf [https://perma.cc/ST97-SB7U]; see also Matthew Friedman, Just Facts: As Many Americans Have Criminal Records as College Diplomas, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas [https://perma.cc/HKU9-VR9].

Importantly, many crimes are never reported to law enforcement at all. For example, in 2015, only 47% of the violent crimes and 35% of the property crimes tracked by the Bureau of Justice Statistics were reported to police. Even when violent and property crimes are reported to police, they’re often not solved—at least based on a measure known as the clearance rate. That’s the share of cases each year that are closed, or ‘cleared,’ through the arrest, charging and referral of a suspect for prosecution. In 2015, 46% of the violent crimes and 19% of the property crimes reported to police in the U.S. were cleared.


This binary is an over-simplification—criminal records result in a nuanced and complicated hierarchy based on a variety of factors including an individual’s supervision status (those who are incarcerated or under supervision like parole or probation, as opposed to those with past convictions and/or arrests) and offense of charge or conviction (sex offenders and violent offenders are thought of differently than non-violent drug offenders or white-collar offenders). See ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 8–9 (2018) (discussing different ways to conceptualize the criminal system’s relation to differentiating the labor pool).


and licensing boards routinely consider conviction and even arrest history of applicants. Many licensing laws contain blanket bans, barring those with criminal convictions from obtaining licenses, while others have good character provisions which grant licensing boards broad discretion to deny applications based on criminal history.

This has enormous economic consequences. Record-related workforce exclusions reduce the annual Gross Domestic Product by between $78 and $87 billion. Once employed, individuals with criminal records face lower wages and lower lifetime earnings—with estimated aggregate lost earnings as much as $370 billion annually. A criminal conviction is now considered disqualifying for even the most menial jobs. This remains true even though

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29 Stacy A. Hickox, A CALL TO REFORM STATE RESTRICTIONS ON HIRING OF EX-OFFENDERS, 12 STAN. J. CIV. RTS. & CIV. LIBERTIES 121, 152–53 (2016).
criminal conduct is not a very good proxy for employability or promise in the workplace.\textsuperscript{30}

The differentiation based on the “clean” or “criminal” record binary is neither benign nor neutral. As Michelle Alexander explained, the criminal legal system\textsuperscript{31} has created a racial caste system that is the direct descendant of the Jim Crow laws of the twentieth century and the enslavement of Black Americans that preceded it.\textsuperscript{32} According to Alexander, criminal laws are used to justify maintenance of the binary between White and Black Americans by replacing explicit racial terms with a more implicit binary that distinguishes “good” Americans with “clean” records from “bad” Americans with “criminal” records.\textsuperscript{33}

After decades of mass incarceration and mass criminalization, Americans from both sides of the political spectrum are beginning to express deep concern and call for reform.\textsuperscript{34} Policy makers and legislatures have started to scale back—at least superficially. Some have started to acknowledge that for certain crimes\textsuperscript{35} or defendants,\textsuperscript{36} the mark of a criminal record is too harsh. Others have conceded that, at the very least, the current system is too costly. These lawmakers have started to temper the binary of

\textsuperscript{30} See Friedman, supra note 20; see also MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 197 (2010) (noting that White professionals are the most likely of any group to have committed drug offenses).

\textsuperscript{31} There has been a shift recently from calling our system of criminal prosecution the “criminal justice system” to the “criminal legal system” because the system does not do justice. I also think that in its current iteration, the criminal system is also often not operating legally. In some ways, I prefer the term “criminal justice system” because the system we aspire to should seek to do justice, not merely to operationalize laws, but I will conform to the current convention in this Article. More recently, there has been a shift to using “criminal legal systems” in the plural because there are criminal court systems at the federal, state, and municipal levels, but for simplicity’s sake I will use the singular throughout.

\textsuperscript{32} ALEXANDER, supra note 30, at 20–58.

\textsuperscript{33} Id. at 197 (noting that the fact that Blacks are convicted and made criminals at such high rates for conduct-illegal drug activity—despite the fact that Whites participate in drug activity at roughly the same rates—has produced racial stigma and defined what it means to be Black in our era).

\textsuperscript{34} Ernest Drucker, Introduction, in DECARCERATING AMERICA: FROM MASS Punishment to Public Health 2 (Ernest Drucker ed., 2018) (“[T]he emerging consensus that we simply cannot lock up so many people in prisons and jails stands to be one of the greatest victories for justice in America in our lifetimes.”).


\textsuperscript{36} Often sympathetic defendants, like survivors of sex trafficking, young people, veterans, or individuals suffering from mental illness. For an interesting discussion of offender-based courts, see generally Erin R. Collins, Status Courts, 105 GEO. L. J. 1481 (2017).
those with clean and criminal records with release mechanisms. The most prominent—and those discussed in detail in this Article—are diversion and expungement. Diversion allows a person who is charged with a crime to avoid a conviction; typically, the defendant earns a dismissal of the charge by satisfying certain conditions. Expungement, or record sealing, allows a person with a conviction or arrest record to erase or conceal that fact. Both allow a person who committed (or allegedly committed) a crime to remain or return to the state of having a clean record.

The problem is that once a person is charged with a crime, government actors—lawmakers, prosecutors, and judges—set the price tag for a clean slate. Allowing the government to exploit profit from the criminal legal system is nothing new—convict leasing, for-profit prisons, and asset forfeiture are well-explored in legal and historical literature. But charging a premium for diversion and expungement and permitting defendants to pay to maintain or restore a clean record allows the criminal legal system to perpetuate and calcify race and class divides. Given the historically rooted socioeconomic disparities between White and Black communities, White defendants will more often be able to preserve clean records while Black defendants will be more likely to be branded criminals. Rather than mitigating the impact of the vast American criminal legal system, this dynamic reinforces the false binary of “good Whites” and “criminal Blacks.”

Like any framework, this is overly simplistic. To think of race as binary in the United States is to erase the growing number of people in this country who identify as Latinx, Asian, Indigenous, or multi-racial. It also ignores

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37 There are also diversion programs that happen before a charge is filed in court. See infra Section I.A.


39 Alexander, supra note 30, at 197 (“African Americans are not significantly more likely to use or sell prohibited drugs than whites, but they are made criminals at drastically higher rates for precisely the same conduct.”).

40 In fact, U.S. Census estimates from 2019 indicate that 18.5% of the population identifies as Hispanic or Latino while only 13.4% identify as Black or African American. Quick Facts, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/V79V-VGAU]. And some estimates are that rates of incarceration for Native
the intersection of identities. A straight Black woman may have a different experience in the criminal legal system than a gay Black man or a trans Afro-Latinx immigrant.\textsuperscript{41} Moreover, despite the racial wealth gap, the relationship between race and class is not a simple one-to-one. There are many poor Whites who are priced out of pursuing diversion and expungement. Likewise, there are wealthy and middle-class people of color who will be able to afford to pay for a clean record.\textsuperscript{42} Racial caste in America is complex,\textsuperscript{43} but any reckoning of it is incomplete without considering criminal record status.

This Article draws on several literatures including those about policing (and over-policing),\textsuperscript{44} specialty courts,\textsuperscript{45} criminal reentry,\textsuperscript{46} and criminal debt.\textsuperscript{47} Though there is a rich literature on criminal records relief and expungement, as well as scholarship discussing diversion, no article has addressed the combined impact of these two mechanisms to provide access to a “clean record” or the phenomenon of differential access to clean records based on financial means. This Article also describes how racial inequalities in the criminal legal system can fuel racial inequalities in American society at large and how the reforms of diversion and expungement can, rather than

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\textsuperscript{41} See Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. CHI. LEGAL F. 139, 140 (1989) (explaining intersectionality and how the focus on single-axis discrimination “marginalizes those who are multiply-burdened and obscures claims that cannot be understood as resulting from discrete sources of discrimination”).

\textsuperscript{42} See, e.g., James Forman, Jr., Racial Critiques of Mass Incarceration: Beyond New Jim Crow, 87 N.Y.U. L. REV. 21, 54 (2012) (“[O]ne of mass incarceration’s defining features is that, unlike Jim Crow, its reach is largely confined to the poorest, least-educated segments of the African American community.”).

\textsuperscript{43} See generally ISABEL WILKERSON, CASTE: THE ORIGINS OF OUR DISCONTENTS (2020) (describing the American racial caste system and how it operates).

\textsuperscript{44} See, e.g., ALEX S. VITALE, THE END OF POLICING (2017).


mitigating those inequalities, further enable and conceal race-based discrimination.  

This Article proceeds in four parts. Part I begins with a description of the parallel criminal justice reforms of diversion and expungement. It catalogues the variety of mechanisms for diversion and expungement, the aims and benefits of these programs, as well as the associated costs for defendants. Part II discusses the operation of monetized relief from criminal records. It begins with hypothetical models which demonstrate how fee-based diversion programs can concentrate criminal records in Black and Brown communities, and then follows with concerns about how perverse financial incentives can undermine policy goals of the criminal legal system. Part III contextualizes the environment in which paying for a clean record occurs, locating this phenomenon within in the larger American landscape of mass criminalization. A huge swath of the American population is saddled with criminal records, the collateral consequences of which make it difficult to succeed economically or acquire wealth. Compounding this is the fact that the criminal record problem in American society disproportionately affects Black and Brown Americans and perpetuates the racial wealth gap. Part IV suggest policy proposals to better realize the stated purpose of diversion and expungement and situates these reforms in the larger framework of prison abolition.

Though there are methods of diversion and expungement that hold promise, these reforms are more modest than policymakers and lawmakers claim. Preconditioning diversion and expungement on payments allows wealthy defendants to pay for a clean record, exacerbating race and class divides rather than mitigating the harms imposed by our criminal legal system. By charging a premium for diversion and expungement, criminal courthouses profit from doing the work of institutional racism rather than engaging in earnest reform.

48 See Jain, The Mark of Policing, supra note 19, at 162 (describing how “criminal records entrench racial inequality stemming from policing” and how criminal records credentialing “enables and conceals race-based discrimination”).

49 BECKY PETITT, INVISIBLE MEN: MASS INCARCERATION AND THE MYTH OF BLACK PROGRESS 3 (2012) (describing how “[t]he decades-long expansion of the criminal justice system has led to the acute and rapid disappearance of young, low-skill African American men from portraits of the American economic, political, and social condition” while at the same time “reinforc[ing] race and class inequalities in the United States”).

50 See NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA’S LARGEST CRIMINAL COURT (2016) (describing how criminal courthouses routinely operate to do the work of institutional racism).
I. THE PROBLEM OF PAYING FOR A CLEAN RECORD

Lawmakers are beginning to recognize the carnage wrought by the war on drugs and rise of mass criminalization.\textsuperscript{51} They have begun to enact criminal justice reforms—mechanisms to temper mass incarceration and “ameliorate the enduring harms of criminal convictions.”\textsuperscript{52} Diversion—which has been embraced as a means of reform—is a “popular form of leniency that permits defendants to avoid formal convictions by submitting to a period of supervision. When supervision ends, charges are dismissed.”\textsuperscript{53} Diversion is now well established in forty-eight states and the District of Columbia.\textsuperscript{54} Drug courts—many of which operate diversion programs—have expanded exponentially with more than 3,000 currently in operation nationwide.\textsuperscript{55}

In the 2020 Presidential Debates, Joe Biden advocated drug courts as a means of criminal justice reform—and the Democratic 2020 Platform endorsed diversionary drug courts as well.\textsuperscript{56} Mental health courts are also on the rise.\textsuperscript{57} Several states have created diversion programs for human trafficking survivors\textsuperscript{58} and nearly half have diversion programs for


\textsuperscript{53} \textsc{Natapoff, supra note 18, at 235.}


\textsuperscript{58} Collins, \textit{supra} note 45, at 1575; Paige Pfleger, A Pioneering Ohio Courtroom Helps Trafficking Victims Find Hope, NPR (Oct. 7, 2019), https://www.npr.org/2019/10/07/76
In 2019, eighteen states enacted twenty-six laws creating, expanding, reorganizing, or otherwise supporting diversionary programs to allow people charged with crime to avoid a criminal conviction record. For example, in just two years, California passed laws creating pre-plea diversion for drug offenses, mental health diversion, and diversion for primary caregivers of minor children. Diversion is growing.

Legislatures and policy makers are also looking to expungement as a means of criminal justice reform. In the past decade, several states have enacted laws providing for expungement or sealing remedies due to the perceived injustice of certain collateral consequences inhibiting reentry. From 2009 to 2014, thirty-one states and the District of Columbia passed laws expanding access to expungement or record sealing. In 2019 alone, thirty-one states enacted sixty-seven such laws—making criminal records relief one of the most popular criminal justice reforms. Expungement of criminal records is now available in nearly all states—with over two thirds allowing expungement or sealing of conviction records.

The move to embrace diversion and expungement seems straightforward—both are reforms that ostensibly reduce mass criminalization. One, diversion, is a front-end reform. The other, expungement, is a back-end reform. The twin reforms of diversion and expungement hold promise to assuage the ills of mass criminalization and

7850332/a-pioneering-columbus-courtroom-helps-trafficking-victims-find-hope [https://perma.cc/3BBG-5TLQ].

59 Pretrial Diversion, supra note 54.


allow more Americans access to clean records. But operationalizing these programs can be challenging. Diversion and expungement are often enacted as revenue-generating or cost-saving reforms. When diversion and expungement are fee-based or have financial barriers to entry, poor people can be locked out. Meanwhile, the wealthy and middle class can buy their way out of the harsh consequences of the criminal legal system, blunting their appetite for more meaningful reforms.

A. THE PROMISE AND COSTS OF DIVERSION

There are several types of diversion. There are pre-filing and post-filing diversion programs—meaning in some situations an individual is diverted to services before a charge is even filed, whereas in others the case is not diverted until after the court process has begun.67 Post-filing diversion can either be pre-plea or post-plea. Pre-plea diversion programs do not require a guilty plea and allow a defendant to go to trial if they fail out of the program, while post-plea diversion programs require the entry of a guilty plea68 and failure in diversion leads straight to conviction and sentencing.69 Some diversion is based in statute while other programs have developed more


68 This is particularly problematic for non-citizen defendants because a guilty plea in a diversion program would count as a conviction for immigration and deportation purposes even if the defendant successfully completes diversion and gets her case dismissed. See 8 U.S.C. § 1101(a)(48)(A). Post-plea diversion programs do not offer non-citizen defendants any refuge from immigration consequences.

69 For an in-depth discussion of post-plea diversionary schemes (also called “deferred adjudication”), see Margaret Colgate Love, Jenny Roberts & Wayne A. Logan, Collateral Consequences of Criminal Conviction: Law, Policy and Practice 563–70 (2019) (noting, at 567, that all but thirteen states allow for such programs in some circumstances and thirty states allow deferred adjudication in a “meaningful number of felony cases”).
informally as manifestations of prosecutor discretion. This results in a
patchwork of diversion programs—different jurisdictions can have very
different rules, even in nearby counties within the same state.

Either the prosecutor, judge, or both is typically the gatekeeper for
diversion programs. Prosecutors usually have power to offer diversion and
typically favor expansion of prosecutor-led diversion, rather than pre-filing,
judicial, or statutory diversion. And there is evidence that prosecutors are
more likely to grant diversion to White defendants than to their Latinx or
Black counterparts.

Entrance criteria for diversion programs differ widely in requirements,
formality, and standardization. Requirements can differ depending on the
charge and the program. Some programs are standardized, while others take
more individualized approaches. Often diversion requirements include
educational classes related to the charged offense, for example theft
prevention, drug and alcohol abuse education, domestic violence
prevention. Community service is a frequent component of diversion
programs, as is attendance at Alcoholics or Narcotics Anonymous meetings.

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70 See David Noble, Mapping the Landscape of Prosecutor-Led Pretrial Diversion, 11
Crim. L. Practitioner 8, 12–18 (2020) (describing prosecutor-led diversion programs and
explaining how they began as ad hoc exercises of discretion and have shifted to more
formalized programs).

71 Shaila Dewan & Andrew Lehren, After Crime, the Price of a Second Chance, N.Y.
[https://perma.cc/9CHE-S2Z8] (noting that in Oregon DUI diversion is common, but it is not allowed in Tennessee, and that while one county in Kansas offers drug diversion, a nearby county does not); see also Kohler-Hausmann, supra note 22, at 16
(listing factors that contribute to the unique political culture of each local criminal court and
concluding “[i]t would be foolish to assume that the host of factors that make each jurisdiction
unique would not affect, for example, how caseload pressures translate into disposition patterns”).

72 Love, Roberts & Logan, supra note 69, at 569.

73 Nataoff, supra note 18, at 235; see, e.g., S.B. 1913, 2017 Leg., 85th Sess. (Tex. 2017).

74 Traci Schlesinger, Racial Disparities in Pretrial Diversion: An Analysis of Outcomes
Among Men Charged with Felonies and Processed in State Courts, 3 Race & Just. 210, 210,
226 (2013) (finding that prosecutors were more likely to grant diversion to White defendants
than similarly situated Latinx and Black defendants, and that the disparities disadvantaged
Black defendants more frequently than Latinx defendants).

75 See, e.g., Rempel, Labriola, Hunt, Davis, Reich & Cherney, supra note 67, at 21;
see also Cal. Penal Code § 1001.36 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.)
(requiring an individualized treatment plan for the grant of mental health diversion).

76 Noble, supra note 70, at 14; see also Michela Lowry & Ashmini Kerodal, Ct. For
[https://perma.cc/6VVK-Y5AE].
for alcohol and drug related offenses.\textsuperscript{77} Drug treatment and testing are often required, as are other types of group or individual counseling sessions.\textsuperscript{78} Some require completion of Cognitive Behavioral Therapy or restorative justice programs.\textsuperscript{79} Many states have statutory diversion programs that allow for expungement upon successful completion.\textsuperscript{80} Diversion can also exist in “specialty” courts like drug courts,\textsuperscript{81} veterans courts, and mental health courts—though some of these courts are strictly for post-conviction matters where defendants are supervised during a probationary period after a conviction is final, and are therefore not diversion programs.

Diversion is quite common, particularly in misdemeanor cases.\textsuperscript{82} Some estimates are that as high as 33% of misdemeanors get diverted or dismissed.\textsuperscript{83} In San Antonio, 25% of cases are disposed of using diversion.\textsuperscript{84} In Cook County, Illinois 25–46% of misdemeanor cases resulted in dismissal and in Texas municipal and justice courts, the conviction rate is under 50%.\textsuperscript{85} In New York the figure is close to 50%, and in Connecticut as many as 60% are diverted.\textsuperscript{86} Sometimes, diversion focuses on specific types of crimes. For example, many places that have not decriminalized possession of marijuana offer diversion to first time marijuana offenders,\textsuperscript{87} and diversion for driving on

\textsuperscript{77} Angela J. Davis, \textit{An Introduction by Angela J. Davis}, 11 \textit{Crim. L. Practitioner} 4, 5 (2020).
\textsuperscript{78} Id.
\textsuperscript{79} \textit{See, e.g.}, LOWRY \& KERODAL, \textit{supra} note 76, at 19.
\textsuperscript{80} \textit{See, e.g.}, 35 PA. CONS. STAT. § 780-117 (Westlaw through 2021 Reg. Sess.).
\textsuperscript{81} REBECCA TIGER, \textit{JUDGING ADDICTS: DRUG COURTS AND COERCION IN THE JUSTICE SYSTEM} 21 (2013) (noting that though drug courts began with a pre-plea model, now 58% of adult drug courts are post-plea).
\textsuperscript{82} \textit{See, e.g.}, REMPEL, LABRIOLA, HUNT, DAVIS, REICH \& CHERNEY, \textit{supra} note 67, at 15–17; Mayson & Stevenson, \textit{supra} note 18, at 1005.
\textsuperscript{83} NATAPOFF, \textit{supra} note 18, at 43.
\textsuperscript{84} Mayson & Stevenson, \textit{supra} note 18, at 1032 (noting that in San Antonio approximately 25% of misdemeanor cases were channeled into diversion).
\textsuperscript{85} KOHLER-HAUSMANN, \textit{supra} note 22, at 270 n.6 (cataloging data and explaining difficulties in differentiating dismissals and diversion-based dismissals in court data).
\textsuperscript{86} NATAPOFF, \textit{supra} note 18, at 43.
\textsuperscript{87} Danny Clemens, \textit{Everything You Need to Know About Harris Co.’s New Pot Policy}, ABC 13 (Mar. 2, 2017), https://abc13.com/news/what-you-need-to-know-about-harriscos-pot-policy/1757801 [https://perma.cc/W6TV-M8NN] (reporting that the new Misdemeanor Marijuana Diversion Program “will divert all misdemeanor marijuana cases . . . instead redirecting low level drug offenders into a decision-making class”); Mayson & Stevenson, \textit{supra} note 18, at 1038 (noting that Cook County, Illinois has a diversion program for first-time possession of marijuana). This is common practice in New York. See KOHLER-HAUSMANN, \textit{supra} note 22, at 86–88 (describing frequent use of “adjournment contemplating
suspended license cases is common. Felony diversion programs are much less common, and more rigorous—particularly if the crime is characterized as a violent offense. Diversion is usually not about “weak evidence” but rather the “sentiment that it is morally unnecessary for the heavy machinery of criminal justice to come down on every defendant accused of a low-level offense if the person can prove himself to be responsible and governable.”

Diversion is not without its problems. First, as a mechanism to avoid a criminal record, diversion is not perfect—it sometimes does leave a mark on your record. For example, the arrest record and the fact that there was a grant of diversion typically remain public record. The other primary concern about diversion is that it results in a phenomenon called “net-widening.” Though the results of a diverted prosecution are less harsh, the cost of the prosecution also goes down, so it is easier to sweep people into the criminal system than it would have otherwise been. Counterintuitively, diversion reforms can “expand the scope of state control over the lives of those entangled in the justice system” and increase opportunities for government actors to intervene in the private lives of Americans. For example, drug dismissal” or ACD for marijuana cases); see also N.Y. CRIM. PROC. LAW §§ 170.55, 170.56 (McKinney, Westlaw through L.2022 Ch. 110).

88 See, e.g., NATAPOFF, supra note 18, at 235; see also Driver’s License Suspension Programs, PROSECUTOR-LED DIVERSION TOOLKIT, https://www.diversiontoolkit.org/drivers-license-suspensions/ [https://perma.cc/EXR5-6Q26] (including case studies from Marion County, Indiana and Durham, North Carolina).


90 KOHLER-HAUSMANN, supra note 22, at 74 (quoting a prosecutor explaining, “We’re evaluating the case and saying that based on the fact that maybe you have never been arrested before, or based on the fact that you are young and it’s your first offense, or based on the facts of this case—this is a case that is worth us dismissing it, if you don’t get in trouble again. That’s all we’re saying. That you are entitled to that clean slate. That we’re going to give the opportunity to have this clean slate, despite this case.”).

91 NATAPOFF, supra note 18, at 235.

92 See Ronald F. Wright & Kay L. Levine, Models of Prosecutor-Led Diversion Programs in the United States and Beyond, 4 ANN. REV. CRIMINOLOGY 331, 333 (2020).

93 NATAPOFF, supra note 18, at 219 (describing the net-widening effects of diversion and noting that “[r]eforms aimed at making the system more lenient can thus paradoxically lead to the punishment of more people.”).

arrests increased dramatically as drug courts expanded. And the sentences of those who fail in diversionary programs can sometimes be significantly longer than they would have been had the defendant simply accepted a conviction at the outset. For petty misdemeanor offenses, diversion converts the possibility of a short jail sentence into potentially months or years of supervision and court control. Though lawmakers claim diversion as a move away from mass incarceration, it is often sold to judges and lawmakers as a means of increased control and leverage over low-level offenders.

Well-run diversion programs can reduce collateral consequences for defendants, produce cost savings, and reduce recidivism—“a win, win, win.” Diversion appeals to a variety of different stakeholders because of its ability to satisfy these diverse policy goals. However, the ideological ambivalence and competing priorities of cost savings, public safety, and reducing collateral consequences can create tension. For example, when rehabilitation is promoted based on cost-effectiveness rather than adherence to egalitarian principles, stakeholders may decide some resource-needy defendants are not worth rehabilitating.

Diversion can also be expensive for the defendants who are “diverted.” Some prosecutors charge—as much as $750 per misdemeanor charge and $1,400 per felony charge—and typically much of the money must be paid up front.

95 Id. at 635. Drug arrests went from 1,008,300 in 1990 (the year after drug courts were created) to 1,375,600 in 2000 (with 665 drug courts in existence) to 1,693,100 in 2006 (with 1,756 drug courts in existence). Id.

96 Id. at 604 n.50 (“[S]entences for failing participants in New York City drug courts were typically two-to-five times longer than the sentences for conventionally adjudicated defendants”); Collins, supra note 45, at 1628 & n.307 (noting that problem-solving courts are not “get out of jail free” programs and participation in such programs does not decrease the likelihood that a defendant will be incarcerated).


99 See, e.g., id. at vi (noting in this report on prosecutor-led diversion programs, the two “most commonly endorsed goals [of diversion programs] were: (1) administrative efficiency and cost savings (by routing cases away from traditional prosecution and directing resources to other more serious cases); and (2) reducing convictions and collateral consequences for defendants”).

100 Collins, supra note 36, at 1499; see also Jessica M. Eaglin, Neorehabilitation and Indiana’s Sentencing Reform Dilemma, 47 VAL. U. L. REV. 867, 874–75 (2013).

additional charges like court costs, supervision fees, prosecution costs, drug lab fees, and public defender fees. In these courtrooms, defendants often plead guilty and accept a conviction because they cannot afford the steep costs of diversion. In Tennessee, defendants are often offered a simple form of diversion—dismissals upon payment of court costs—which can easily run as much as $500 for a simple drug possession case. If the costs are not paid quickly, the opportunity for dismissal is lost. Court costs for convictions can run even higher. Thus, defendants who can pay up front get the double benefit of the dismissal and the lower cost due to avoiding the conviction. Even in relatively progressive states like California, a premium is charged for participation in diversion. For example, under California’s diversion statute, the law authorizes an additional diversion enrollment fee of up to $300 for a misdemeanor charge and $500 for a felony charge. The statute also requires a diversion restitution fee of between $100 and $1000 dollars. Because diversion is voluntary and premised on an exercise of prosecutor discretion—not an entitlement as of right—fees are rarely waived for the poor.

Diversion entry fees and court fees are only part of the total cost. Often participants in diversion programs must pay separate costs for the programming and educational classes required. For example, the class required for “Johns” diversion programs—common diversion programs for first-time arrestees charged with solicitation of prostitution—costs $350 in Salt Lake City, $500 in North Dakota, $600 in Los Angeles County, and $750 in Minneapolis. Domestic violence cases can be dismissed for

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105 Id.

106 CAL. PENAL CODE § 1001.15(a), (c) (West, Westlaw through Ch. 10 of 2022 Reg. Sess.).

107 CAL. PENAL CODE § 1001.90(b) (West, Westlaw through Ch. 10 of 2022 Reg. Sess.).

108 Dewan & Lehren, supra note 71.


110 Id. at 79.

111 Id. at 20.

112 Id. at 62.
participation in a sixteen-week batterer’s intervention course, but the costs to participate can run $40 a session, for a total of $640.\textsuperscript{113} Drug testing typically costs $25 a test and tests can be ordered multiple times a week.\textsuperscript{114} Some courts even charge defendants a fee to perform court-mandated community service.\textsuperscript{115}

High costs certainly keep some defendants from benefitting—when the New Orleans district attorney lowered costs for diversion from $1,200 to $200, participation tripled.\textsuperscript{116} This prompts the question of how many individuals in New Orleans have criminal records simply because they could not pay the $1,200 before the fee was lowered. For those defendants who elect to participate in diversion, the costs can be unmanageable.\textsuperscript{117} Some defendants forgo college or even resort to selling plasma to make their

\textsuperscript{113} See Alicia Virani, UCLA SCH. OF L. CRIM. JUST. PROGRAM, THE FINANCIAL IMPACT OF COURT-ORDERED BATTERERS’ INTERVENTION PROGRAMS IN LOS ANGELES COUNTY 5 (2021), http://publichealth.lacounty.gov/dvcouncil/research/Docs/UCLA_Financial_Impact_BIP.pdf [https://perma.cc/N3NJ-NXC8] (noting that the median price per class in L.A. County was $25 with 24% charging $26–$40 and 4% charging over $40). In the author’s experience as a public defender in California, the cost per session was the same for the sixteen week and fifty-two week class. If the defendant fails diversion, they are ordered to complete a fifty-two week class as part of probation at triple the cost. CAL. PENAL CODE § 1203.097(a)(6) (McKinney, Westlaw through Ch. 10 of 2022 Reg. Sess.).


\textsuperscript{115} In Santa Clara County, the court required the defendant to enroll with Sentencing Alternatives Program, Inc. (SAP) to monitor and verify the defendant’s participation in community service hours. SAP charged an enrollment fee and another fee depending upon the number of community service hours assigned by the court. See Program Fees, SENT’G ALT. PROGRAM, INC., https://www.sapsj.com/our-fees/ [https://perma.cc/73XJ-HPRU]. Other courts assess the administrative fee for monitoring the community service hours themselves. See Traffic Court – Community Service Work, SUPER. CT. OF CALIF.: MARIN CNTY., https://www.marincourt.org/traffic_comm_service.htm [https://perma.cc/4BGA-VSS8]. In other counties, the volunteer center administers charge a fee to do community service hours. See UCLA LABOR CTR., WORK, PAY, OR GO TO JAIL: COURT-ORDERED COMMUNITY SERVICE IN LOS ANGELES 6 (2019), https://www.labor.ucla.edu/wp-content/uploads/2019/10/UCLA_CommunityServiceReport_Final_1016.pdf [https://perma.cc/69CC-3QY3] (noting that in 2013 to 2014, the volunteer center registration fees amounted to almost $5 million in Los Angeles County).

\textsuperscript{116} Dewan & Lehren, supra note 71.

\textsuperscript{117} For a neat interactive tool to simulate the experience of diversion, see Andrew W. Lehren, Scott Blumenthal & Shaila Dewan, The Prosecutor’s Deal, the Defendant’s Dilemma, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/interactive/2016/12/12/us/law-quiz-criminal-justice.html [https://perma.cc/5ZYN-VY66].
diversion payments. Others go without food, delay paying rent or buying prescription medication, or resort to high-interest payday loans. In one survey of 1,011 justice-involved Alabamians in 2018–2019, 42% admitted to committing additional crimes to get money to pay diversion costs. This should come as no surprise given that “[s]tudies suggest that unmanageable economic sanctions are criminogenic”—meaning they increase rather than decrease recidivism.

These additional costs might be justified if there was robust data demonstrating the efficacy of the programs being required. But often the required programing is untested or has been proven ineffective. For example, one popular domestic violence prevention program has been shown to have no impact on reoffending rates. The evidence on the effectiveness of compulsory drug treatment—like that in drug court—is mixed with studies suggesting the voluntary treatment may be preferable. This suggests that

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119 Beth A. Colgan, Beyond Graduation: Economic Sanctions and Structural Reform, 69 DUKE L.J. 1529, 1563 (2020); see, e.g., Alexes Harris, Heather Evans & Katherine Beckett, Drawing Blood from Stones: Legal Debt and Social Inequality in the Contemporary United States, 115 AM. J. SOC. 1753, 1785 (2010) (noting that several respondents in a nationally representative survey of inmates in state and federal correctional facilities indicated that criminal debt obligations encouraged them to return to crime); see also Colgan, supra note 47, at 63 (compiling studies of the effects of unmanageable economic sanctions).
119 Collins, supra note 45, at 1578 (discussing the dearth of data on the efficacy of problem-solving courts and noting that with respect to drug courts, some studies showed reduced recidivism, some no impact, and one found increased recidivism rates); see also Christine S. Scott-Hayward, Rethinking Federal Diversion: The Rise of Specialized Criminal Courts, 22 BERKELEY J. CRIM. L. 47, 84–87 (2017) (summarizing studies which found that though well-run drug courts can significantly reduce recidivism, fewer than half of drug courts tracked completion rates and recidivism, when tracked, was often only tracked for short periods; also noting that most evaluations of veterans courts were descriptive and did not include outcome evaluations).
119 Collins, supra note 45, at 1589–90 (summarizing studies); Practice Profile: Interventions for Domestic Violence Offenders: Cognitive Behavioral Therapy, Nat’l INST. JUST. (Sept. 12, 2013), https://crimesolutions.ojp.gov/ratedpractices/169#pd [https://perma.cc/97D3-WKED] (conducting meta-analyses and finding no statistically significant effect on recidivism rates or victimization rates of partners for cognitive behavioral therapy).
communities may be better off expanding access to voluntary drug treatment rather than arresting low-level drug offenders and funneling them into drug courts. Moreover, there is evidence that over-programming low-needs defendants increases rates of recidivism.125

Diversion can also keep a case pending for longer than if a defendant simply took a plea deal and conviction—particularly in misdemeanor cases. The longer the case is pending, the greater the costs to the defendant. Additional court appearances and attendance at meetings with court officers cost time and money—time off work, childcare costs, and transportation costs.126 Indigent defendants may spend more time in court than wealthier defendants because judges tend to prioritize cases in which the defendant has retained counsel—decreasing wait times for paid attorneys while relegating unrepresented defendants to the back of the line.127

Costs relating to pretrial release conditions also increase as the case takes longer to resolve due to a period of diversionary supervision by the court. For example, electronic home monitoring requires an initial “hook-up” fee, but the bulk of the costs are based on monthly maintenance fees—meaning that for each month of diversion, the defendant might have to pay simply to stay out of jail on pretrial release.128 Some defendants linger in a diversion program longer simply because they cannot make final payments, accruing more supervision and drug testing costs in the meantime.129 Many

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125 James Bonta, Suzanne Wallace-Capretta & Jennifer Rooney, A Quasi-Experimental Evaluation of an Intensive Rehabilitation Supervision Program, 27 CRIM. JUST. & BEHAV. 312, 324 (2000), (finding that nontreated low-level offenders had lower recidivism rates than treated low-level offenders). We know this intuitively. We do not send our teenaged child to in-patient drug treatment for breaking curfew and getting drunk once—such an extreme intervention would sever the teen’s positive social networks and expose her to individuals with drug problems and criminal histories. This disruption is more likely to exacerbate a drug or alcohol problem then nip a burgeoning addiction in the bud.

126 Jenny E. Carroll, Beyond Bail, 73 FLA. L. REV. 143, 185–86 (2020).


129 ALA. APPLESEED CTR. FOR LAW & JUST., supra note 119, at 8 (describing one individual whose program took three years and $8,425 to complete); see also id. at 32–33 (describing process of keeping defendants in diversion and under court supervision when they still owe diversions costs).
low-income defendants fail diversion because they cannot pay. In failure, these defendants lose both the benefit of a clean record and whatever costs they have paid for the diversion program—with some ultimately ending up in jail. Some defendants may even rationally decide at some point that going to jail or prison is “easier” than completing the program. In failing diversion, some defendants end up spending more time in jail or prison than if they had avoided diversion and accepted a conviction in the first place.

Given these financial barriers to participation and the presence of the racial wealth and income gaps—it is anticipated that people of color will have difficulty accessing diversion programs. Studies show that though Black people tend to be over-represented in the criminal legal system, they tend to benefit less than White people from diversion programs. It is also likely

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130 Eaglin, supra note 94, at 631–32 (noting that in Texas drug court programs supervision can be shortened for successful participants—but not if they have not paid for treatment).
131 Dewan & Lehren, supra note 101.
132 Cary Aspinwall, ‘We’re Going Home!: More than 500 Oklahoma Inmates Freed in Historic Release’, GUARDIAN (Nov. 5, 2019), https://www.theguardian.com/us-news/2019/nov/05/oklahoma-inmates-prison-historic-mass-release [https://perma.cc/354Z-YN6Z] (describing one woman who entered a drug court program for a marijuana possession charge who “struggled for three years to meet all the requirements of drug court, including paying hundreds of dollars for drug tests from the money she earned at an $8.10-an-hour job as a nurse’s aide. Last year, she said, she decided it was just easier to go to prison.”).
133 Tiger, supra note 81, at 25 (noting that some drug court participants spent more time in jail than their counterparts who just pled guilty and were sentenced).
134 See infra Section II.A.; see also ALA, APPLESEED CTR. FOR LAW & JUST., supra note 119, at 13 (“There is reason to be concerned that African-American Alabamians are disproportionately blocked from participating in diversion programs because they lack access to wealth.”); see infra Section IV.A.
135 Collins, supra note 36, at 1506 (explaining racial disparities in who is excluded from rehabilitative court programs and the outsized role of criminal history as a means to exclude participation); Douglas B. Marlowe, Introduction, 1 J. FOR ADVANCING JUST. 1, 1 (2018), https://advancejustice.org/wp-content/uploads/2018/06/AJ-Journal.pdf [https://perma.cc/R3DK-98FA] (“African American individuals are underrepresented in drug courts by 15 to 20 percentage points” and less likely to successfully graduate than their White male counterparts) (citations omitted); Lisa M. Shannon, Afton Jackson Jones, Shondrah Nash, Jennifer Newell & Connie M. Payne, Examining Racial Disparities in Program Completion and Post-Program Recidivism Rates: Comparing Caucasian and Non-Caucasian Treatment Court Participants, 1 J. FOR ADVANCING JUST. 63, 80 (2018) (describing a study of Kentucky drug court participants and showing that for White participants, the most common drug of choice tended to be opioids while the most common drug of choice of non-White participants was marijuana—suggesting that White defendants are referred to diversionary programs for more serious drug addiction problems than non-White defendants); Schlesinger, supra note 74, at 210; CONNOR CONCANNON, EXAMINING RACIAL AND ETHNIC DISPARITY IN PROSECUTOR’S BAIL REQUESTS AND DOWNSTREAM DECISION MAKING 51–52 (2020), https://academicworks .cuny.edu/cgi/viewcontent.cgi?article=5085&context=gc_etds [https://perma.cc/95QG-
that much of the money for diversion comes not from the poor defendants themselves, but from their poor family members.\textsuperscript{136} These costs harm not only criminal defendants but also impoverish families—particularly in low-income communities of color. Notably, there is no correlation between costs of diversion and wealth of a particular community; in fact, some poorer jurisdictions charge more for diversion due to budgetary shortfalls.\textsuperscript{137}

On the flip side, fee-based diversion is used by the wealthy and middle class to shield their children and themselves from the harsh impact of the criminal legal system.\textsuperscript{138} For example, Alabama’s current Commissioner of Pardons and Parole, Cam Ward, was able to get a 2015 DUI charge dismissed when he, a state senator at the time, participated in a pre-trial diversion program costing $2,400.\textsuperscript{139} Ward explained that he received “pretty much the same punishment as everybody who goes through that program,” failing to recognize that many would not be able to afford the program at all.\textsuperscript{140}

In some ways, it is odd to charge people for the programming required in diversion. Defendants are not thought of as having to pay the cost of their own incarceration, which is significantly more expensive than the educational and rehabilitative programs prosecutors and courts require for diversion.\textsuperscript{141} Defendants are never told they cannot be sentenced to prison because there are no beds available—but diversionary programs are frequently denied because of program or “bed space” constraints.\textsuperscript{142} Similarly, defendants can be denied diversion because programs have not worked in the past—again, prison is not shelved as an option simply because

\textsuperscript{7LKK} (finding that Black defendants were eleven percent more likely to be indicted than White defendants and that some non-indictments were due to diversion).

\textsuperscript{136} Joshua Page, Victoria Piehowski & Joe Soss, A Debt of Care: Commercial Bail and the Gendered Logic of Criminal Justice Predation, 5 RUSSELL SAGE FOUND. J. SOC. SCI. 150, 152 (2019).

\textsuperscript{137} Dewan & Lehren, supra note 101 (noting that diversion in poor Houston County, Alabama often costs $2,000 while in wealthier San Bernardino, California, diversion caps out at $400).

\textsuperscript{138} Dewan & Lehren, supra note 71 (noting that Caleb Moore, son of former Alabama Supreme Court Justice Roy Moore, paid $900 for diversion of possession of marijuana and Xanax charges).


\textsuperscript{140} Id.


\textsuperscript{142} See JAMES FORMAN JR., LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA 147, 227 (2017).
it has been proven ineffective for a particular defendant in the past. Many rehabilitative programs are cost-effective in terms of reducing crime and providing other benefits to taxpayers, but the cost is often borne by the defendant alone.

Diversion programs can be run without charging defendants. Veteran’s diversion programs are supported by VA benefits. Many drug diversion programs rely on treatment funded by Medicaid expansion. In other circumstances, the municipality absorbs the costs. For example, Cook County, Illinois has a diversion program with no financial barriers to participation and handles about 5,000 defendants a year. As one prosecutor there explained, “To tell somebody that if you can pay for this, you can get your charges dismissed, but if you are poor you are going to go through the system? That’s completely unfair.” It is unfair—but it is still pervasive within diversion programs across the United States.

B. THE PROMISE AND COSTS OF EXPUNGEMENT

The term “expungement” technically refers to record destruction and purging, but it has emerged as the umbrella term, often used to refer to statutory schemes that seal or mitigate records rather than erase them entirely. It is referred to by a variety of names: expungement, record

143 Id. at 123.
145 In fact, some have convincingly argued that when prosecutors do not bear the “full costs of their decisionmaking [this] encourages them to exceed optimal criminal enforcement.” See, e.g., Russell Gold, Paying for Pretrial Detention, 98 N.C. L. REV. 1255, 1289 (2020).
146 See, e.g., Robert T. Russell, Veterans Treatment Court: A Proactive Approach, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 368 (2009) (“Service delivery is made possible through the collaboration of numerous community partners[,]” including the VA Health Care Network and the Veterans Benefits Administration).
148 Dewan & Lehren, supra note 71.
149 Id.
151 See Bernard Kogen & Donald L. Loughey, Jr., Sealing and Expungement of Criminal Records—The Big Lie, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 378, 380 (1970); see also
sealing, record destruction, obliteration, dismissal, set aside, expunction, purging, annulment, and nullification and has varying effects depending on the statutory framework of the jurisdiction. A majority of states allow for sealing or expungement of convictions—though most only allow expungement of first-time or low-level convictions. All but three states (Arizona, Idaho, and Wisconsin) allow for sealing or expungement of non-conviction records. Fundamentally, these provisions in law “recognize that a person should not be forever judged and burdened by his or her criminal record.”

Expungement law has been developing for eight decades and there is a “national patchwork” of approaches. In the past, expungement and sealing were typically restricted to arrest and non-conviction information—but recent laws have expanded to conviction information in most states. Sometimes expungement—of either convictions or arrests not resulting in conviction—is automatic. In other circumstances, expungement isn’t automatic even when it intuitively seems as though it should be, such as in

LOVE, ROBERTS & LOGAN, supra note 69, at 548–55 (describing the diversity of state law expungement and sealing mechanisms).


153 See LOVE, ROBERTS & LOGAN, supra note 69, at 545–46.

154 See id. at 551–52.

155 Pinard, supra note 46, at 990.


158 Brian M. Murray, A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels, 10 Harv. L. & Pol’y Rev. 361, 367 (2016); see, e.g., Ind. Code § 35-38-5-1(a) (repealed 2014); Joseph C. Dugan, I Did My Time: The Transformation of Indiana’s Expungement Law, 90 Ind. L.J. 1321, 1335 (2015) (“[I]ndividuals could petition for expungement if they were arrested and released without charge or if the charges filed against them were dropped due to mistaken identity, no offense in fact, or absence of probable cause”); see also MARGARET COLGATE LOVE, RELIEF FROM COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE BY STATE RESOURCE GUIDE 113–24 (2006) (containing a chart noting which states did not allow for expungement of conviction as well as what states generally allow it).

159 CAL. HEALTH & SAFETY CODE §§ 11361.8, 11361.9 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.) (automatic expungement of past marijuana convictions), NY CRIM. PROC. LAW § 160.59 (McKinney, Westlaw through L.2022 Ch. 110) (automatic sealing of disposition favorable to the defendant); MD. CODE ANN., CRIM. PROC., § 10-105(a)(5) (LexisNexis, Lexis through 2021 First Spec. Sess.) (allowing automatic expungement of non-conviction records).
the context of a formal exoneration. Some statutory schemes make granting expungement mandatory if eligibility criteria are met, while in other schemes, the judge retains discretion to grant or deny expungement once eligibility is established.

Most expungement schemes seal conviction or non-conviction records and prevent disclosure to private employers, though some allow disclosure to private employers in certain circumstances. Typically, information can be accessed and disclosed to state licensing bodies, a serious limitation as more and more Americans jobs require an occupational license. Criticisms of efficacy of record sealing and expungement have persisted for decades. Many laws understood to erase criminal records do a less than thorough job and can sometimes put an individual in a trap of deciding between revealing a conviction which should be expunged or risk being caught in a lie if the record comes up later. In particular, legal scholars like Jenny Roberts and James Jacobs express concern about the reliability of FBI databases and commercial background check vendors databases, and question whether it is possible to reliably expunge a criminal record in the age of big data.

In addition, access to justice barriers mean that often expungement is available to relatively few individuals with criminal records. Expungement schemes in many states are complicated and difficult for a lay person to navigate. Meanwhile, free legal services are scarce and inadequate to help

161 See, e.g., MD. CODE ANN., CRIM. PROC. § 10-303(E)(2) (LexisNexis, Lexis through 2021 First Spec. Sess.); LA. CODE CRIM. PROC. ANN. art. 977–78 (Westlaw through 2021 Sess.) (judge does not have discretion to deny expungement if defendant is statutorily eligible); MINN. STAT. ANN. § 609A.03(5)(a)(1)-(12) (Lexis through Ch. 22 of 2022 Reg. Sess.) (judge must balance public interests against petitioner’s interest in expungement if eligible and retains discretion to deny).
162 See, e.g., LA. CODE CRIM. PROC. ANN. art. 973 (Westlaw through 2021 Sess.). See Kogon & Loughery, supra note 151, at 385. But see IND. CODE ANN. § 35-38-9-10(b) (West, Westlaw through Mar. 11, 2022) (disallowing suspension, expulsion, refusal to hire, admit, or license on the basis of expunged records).
163 Kogon & Loughery, supra note 151, at 378.
164 Id. at 385.
166 See Eliza Hersh & Gabriel Chin, Building a Functioning Framework for Reentry and Restoration of Rights: Lessons from California’s “Mystery House”, 30 FED. SENT’G REP. 283,
the number of people eligible for records relief. Thus, “[f]or the vast number of ex-offenders, largely members of lower-class and minority groups, sealing and expungement are meaningless terms.” In California, less than one percent of felons eligible for records relief have applied, and even fewer have actually been granted relief.

That being said, expungement provides some relief to the harsh discrimination faced by those with criminal records in the employment context. The primary reason individuals are interested in records relief like expungement or sealing is because of its perceived impact on finding a job. Empirical studies find that obtaining an expungement increases rates of employment and wages, and that these trends are sustained over time. Moreover, recidivism rates for individuals who have obtained record expungement relief are low, assuaging fears that expunging records creates risks to public safety. Expungement holds promise for individuals marked by criminal records who want a fresh start.

Expungement also has costs, beginning with a fee for obtaining a copy of one’s own criminal record from state law enforcement agencies—the necessary first step for most sealing and expungement petitions. Costs to file expungement petitions vary—by type of petition, county, and state. Some

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283 (2018) (describing California’s expungement scheme as a “ramshackle maze of overlapping and frequently inconsistent provisions”); see also Radice, supra note 104, at 177.

169 Indigent defendants are generally not entitled to counsel to help with criminal records relief. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (no due process right to appointed counsel post-conviction aside from first appeal of right); see, e.g., Pitts v. State, 113 S.W.3d 393, 397 (Tex. App. 2003) (no right to appointed counsel for expunction proceedings).

170 See Kogon & Loughery, supra note 151, at 386.

171 Hersh & Chin, supra note 168, at 286.

172 Jeffrey Selbin, Justin McCrary & Joshua Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes, 108 Harv. L. Rev. 2460, 2500 (2020) (finding expungement or record sealing improved employment rates and wages in a sample in California’s Bay Area; average employment rates grew in the years after the intervention from roughly 75% to 80%–85%, while earnings increased by about one third in the time period after the record sealing intervention).


175 Id. at 2514 (finding that rates are even lower than the general population of the state).

176 Hersh & Chin, supra note 168, at 286 (noting that there is an indigency waiver, but even the reduced cost can be prohibitive).
fees are fairly modest—$50 in Michigan and $30 in Maryland.\textsuperscript{177} In California, filing fees charged by counties vary and can be as much as $150.\textsuperscript{178} Louisiana, with the highest cost, charges $550 per petition.\textsuperscript{179}

Some expungement statutes require a defendant to have paid off all costs—fees, fines, and restitution—associated with her original case.\textsuperscript{180} This of course presents a “Catch-22” because those in most need of record relief are those whose records obstruct them from obtaining gainful employment and who are therefore likely to have outstanding court debt.\textsuperscript{181} One study found that many individuals interested in records relief were concerned about their ability to pay off outstanding fines and fees from their original cases, with a significant fraction unable to pay these costs—some of which were more than $2,000.\textsuperscript{182}

New research explores the contours of the “second chance gap” in expungements—namely what percentage of people who are eligible for record cleaning relief do not apply. Some estimate that 30-40\% of those with criminal records—or approximately twenty to thirty million individuals—are entitled to clean their record either partially or fully.\textsuperscript{183} Nearly a third of those with clearable criminal records in one sample had clearable felonies and more than a fifth had fully clearable records.\textsuperscript{184} But many individuals with expungable records do not even apply. In California, after Proposition 47 reduced many crimes from felonies to misdemeanors and entitled defendants to retroactive records relief, only 9\% of those eligible applied for record

\begin{footnotes}
\item[178] There is some evidence that at least some courts charge more than $150. See \textit{Tansey & Carlin}, supra note 173, at 24 (noting that some courthouses in Solano County charged $240 to file an expungement petition).
\item[181] Hersh & Chin, supra note 168, at 286.
\item[182] \textit{Tansey & Carlin}, supra note 173, at 22.
\item[183] Chien, supra note 167, at 528.
\item[184] \textit{Id.} at 563.
\end{footnotes}
mitigation.\textsuperscript{185} Studies in Michigan and Washington found that only 6.5% and 3% of those eligible, respectively, had applied for records relief.\textsuperscript{186}

Even nominal filing fees can prove a barrier. In the Michigan study, the $50 application fee for an expungement—which could not be waived—was considered a major barrier and key explanation as to why only 6.5% of those eligible for expungement had filed within the first five years of eligibility.\textsuperscript{187} Along with the costs of fingerprinting, getting the application notarized, and getting a certified copy of the conviction record, the total cost was closer to $100, which was cost-prohibitive for those living in poverty or struggling with unemployment.\textsuperscript{188}

There is an alternative. Several states have expungement procedures without filing fees, or (even better) have automatic or automated expungement. In 2018, California passed a law which allowed expungement of marijuana convictions.\textsuperscript{189} Then San Francisco District Attorney George Gascon partnered with Code for America, a non-profit that helps governments utilize technology effectively, to automatically expunge 9,000 expungement-eligible convictions.\textsuperscript{190} In announcing the decision, the District Attorney explained that the convictions “excluded” people from “participating in society” and that most of those punished during the war on drugs could “ill afford to pay an attorney” to deal with the “cumbersome” expungement process.\textsuperscript{191} He noted the racial disparities in marijuana arrests and that his city was “taking the lead to undo the damage that this country’s
disastrous, failed drug war has had on our nation and on communities of color in particular."\textsuperscript{192}

San Francisco is not alone. Pennsylvania passed a law that granted broad-based automatic expungement of non-conviction records in 2018 which held the promise of sealing 30 million criminal records by June of 2020.\textsuperscript{193} In 2019, Utah, California, and New Jersey authorized automated broad-based relief for conviction and non-conviction records, while six other states made relief automatic for specific offenses or dispositions.\textsuperscript{194} In 2020, in the midst of a global pandemic, Michigan passed an expansive expungement statute that will automatically expunge misdemeanors after seven years and felonies after ten.\textsuperscript{195} In signing the bill, Governor Whitmer called the legislation a “game changer.”\textsuperscript{196} Her Lieutenant Governor explained, “This is bigger than criminal justice reform. This is about economic opportunity and full participation in our economy and our society.”\textsuperscript{197}

If expungement is to live up to its promise as a method of substantive criminal justice reform, these measures are the way it will do so. Petition-based expungement with even modest fees will only calcify racial and class disparities in criminal records by affording the wealthy an escape mechanism for which the poor cannot pay.

C. CASE STUDIES

As discussed, not all diversion and expungement programs charge fees, but many do.\textsuperscript{198} To illustrate how profit-seeking diversion and expungement schemes operate, let us zoom in and consider two drug possession cases from Alabama; one of a White college student charged in a small county on the Florida border, the other of a Black mother charged in Tuscaloosa, Alabama. Until recently, Alabama only allowed expungement of charges not resulting

\textsuperscript{192} Id.
\textsuperscript{193} COLLATERAL CONSEQUENCES RESOURCE CTR., supra note 60, at 3.
\textsuperscript{194} Id. at 3, 12–14.
\textsuperscript{196} Jackson, supra note 195.
\textsuperscript{197} Id.
\textsuperscript{198} See supra Sections I.A & II.B; see also infra Appendices A & B.
in conviction\textsuperscript{199}—so for most defendants the only way to maintain a clean record was to participate in a diversion program that would result in the charges being dismissed.

1. Drew\textsuperscript{200}

In March 2015, police stopped Drew, a wealthy White college student, for speeding as he traveled through Covington County, Alabama on his way to Florida for spring break.\textsuperscript{201} After police searched his car, Drew was charged with one felony—possession of hashish—and four misdemeanors—possession of drug paraphernalia, possession of marijuana, illegal possession of alcohol, and being a minor in possession of alcohol.\textsuperscript{202} Beating all the charges at trial was a longshot. Luckily, the prosecutor offered him diversion.\textsuperscript{203}

The diversion agreement required Drew to plead guilty to all five charges, complete twenty-four hours of community service, participate in drug treatment or education, attend alcoholics or narcotics anonymous meetings (AA or NA), pay “court costs”\textsuperscript{204} and a “deferred prosecution program administrative fee” to the district attorney’s office.\textsuperscript{205} If he failed to


\textsuperscript{200} I have chosen to use only the first name of the defendants in both case studies to avoid further publicizing their criminal court involvement. Both defendants’ full names are available in publicly available court records.


\textsuperscript{202} Id.

\textsuperscript{203} Id.

\textsuperscript{204} Court costs are costs nominally associated with the cost of filing and processing a criminal case. According to a recent empirical student, virtually all convicted misdemeanor defendants are required to pay court costs with median court costs ranging anywhere from $100 to $500 depending on the jurisdiction. Mayson & Stevenson, supra note 18, at 1014. For more information about court costs in Alabama specifically, see ALA. APPLESEED, UNDER PRESSURE: HOW FINES AND FEES HURT PEOPLE, UNDERMINE PUBLIC SAFETY, AND DRIVE ALABAMA’S RACIAL WEALTH DIVIDE 21 (2019), https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf [https://perma.cc/8G8G-EKD2].

complete the program requirements, Drew would be adjudged guilty, convicted, and sentenced to a year in jail. But if he successfully completed the program, the guilty pleas would be set aside and the charges dismissed with prejudice. Drew paid the following for his diversion program:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Court costs” for Case No. 23-DC-2015-518 (Possession of Controlled Substance)</td>
<td>$945.00</td>
</tr>
<tr>
<td>“Court Costs” for Case No. 23-DC-2015-519 (Possession of Marijuana in the Second Degree)</td>
<td>$689.50</td>
</tr>
<tr>
<td>“Court Costs” for Case No. 23-DC-2015-520 (Possession of Drug Paraphernalia)</td>
<td>$432.00</td>
</tr>
<tr>
<td>“Court Costs” for Case No. 23-DC-2015-521 (Minor in Possession of Alcohol)</td>
<td>$387.00</td>
</tr>
<tr>
<td>“Court Costs” for Case No. 23-DC-2015-522 (Illegal Possession of Alcohol)</td>
<td>$387.00</td>
</tr>
<tr>
<td>Deferred prosecution program administrative fee</td>
<td>$600.00</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>$3,440.50</strong></td>
</tr>
</tbody>
</table>

This total does not include the amount he paid for his attorney, nor does it include the costs associated with the drug treatment or education program, which runs a minimum of $295.

Drew successfully completed diversion and the charges against him were dismissed. After that, Drew filed expungement petitions for each of the five charges. At the time, expungement petitions in Alabama were $300 each case and because each charge is filed as a separate case, Drew had

(allowing a judge to dismiss a case on his or her own motion or that of the district attorney, and to condition the dismissal order upon payment of court costs).


207 Id.

208 For a point of reference, the fine for the regulatory violation of Iowa Premium Beef Plant in Iowa, the only penalty for contributing to the outbreak at their meatpacking plant which resulted in 338 of the plant’s workers testing positive, was $957. See Ryan J. Foley, *Iowa Fines Beef Plant $957 After Huge Coronavirus Outbreak*, ABC News (Sept. 24, 2020), https://abcnews.go.com/Business/wireStory/iowa-fines-beef-plant-957-huge-coronavirus-outbreak-73223319 [https://perma.cc/B56B-3L4Q].


210 *Ex parte D.S.*, 294 So. 3d at 837.

211 In Alabama, each charge is typically filed as a separate case even if it stems from the same incident.
to file five petitions, for a total of $1,500. All told, to both avoid conviction and apply for expungement cost Drew at minimum:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Court costs” and diversion fees for all cases</td>
<td>$3,440.50</td>
</tr>
<tr>
<td>Minimum drug program costs</td>
<td>$295.00</td>
</tr>
<tr>
<td>Filing Fee for 5 Expungement Petitions</td>
<td>$1,500.00</td>
</tr>
<tr>
<td><strong>Total:</strong></td>
<td><strong>$5,235.50</strong></td>
</tr>
</tbody>
</table>

This, in a state where the median per capita income is $28,934 and 14.9% of the population lives in poverty. This sum is virtually unattainable to many Alabamians and Americans.

2. **Kiasha**

In February 2014, twenty-three-year-old Kiasha and her boyfriend were arrested in a fast food parking lot in Tuscaloosa, Alabama after officers found marijuana inside their car. The marijuana was her boyfriend’s, but both were charged with felony possession of marijuana because the officers determined the marijuana was not for personal use. At the time, Kiasha was two months pregnant and working in food service, but had aspirations to become a medical assistant. Like Drew, she had no prior criminal history. Eventually, like Drew, Kiasha was offered diversion. Unlike Drew, Kiasha is Black woman who, based on her indigency, qualified for a public defender.

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212 Recent changes to the expungement law increased the filing fee to $500 a petition, but allow one expungement petition to cover all charges stemming from the same arrest of incident, which would have the effect of lowering the cost of expungement in a situation like Drew’s. See **ALA. CODE** § 15-27-4 (Westlaw through Act 2022-46 of the 2022 Reg. Sess.).


216 ALABAMA’S WAR, supra note 214, at 36–37.

217 Id.
The enrollment fee for the district attorney’s “second chance” diversion program in Tuscaloosa was $1,000.218

Kiasha could not afford her second chance. Due to the financial costs and time commitment, Kiasha declined to participate in diversion and instead pleaded guilty to two lesser offenses—both misdemeanors—possession of marijuana for personal use and possession of drug paraphernalia.219 Pursuant to the plea agreement, Kiasha was sentenced to twelve months in jail, but the imposition of the jail sentence was suspended and she was placed on two years’ probation.220 She was assessed $1,440 in court costs and was charged $40 each month in supervision fees for probation.221 Kiasha was under court supervision from her arrest in February 2014 until probation was deemed satisfied in the fall of 2020. As of October 2020, the outstanding balance on her case was still $1,849.222 The drug convictions will likely make it significantly harder for Kiasha to support her young family and to realize her dreams of becoming a medical assistant. In 2021, Alabama law changed to allow expungement of low-level convictions like Kiasha’s, but she will not be eligible until after she has paid all court-ordered costs.223

It may trouble many that Drew was able to buy his way out of a conviction224 while Kiasha was not. Drew, a White man from a wealthy mostly White town,225 was able to avoid the stigma of being branded a

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218 See Tuscaloosa County’s Second Chance Program Overview, TUSCALOOSA CNTY. DIVERSION PROGRAMS, INC., https://www.tcdpinc.org/overview [https://perma.cc/8TSK-JMY9]; see also ALABAMA’S WAR, supra note 214, at 36–37 (noting that though waivers of the $1,000 enrollment fee based on inability to pay are sometimes given—the waivers are not determined until after the defendant enters a guilty plea and registers for the program). Presumably, Kiasha would have had to plead to the felony charge to enter diversion.


220 Id.

221 ALABAMA’S WAR, supra note 214, at 38.


225 Case information in DC-2015-518 lists Drew as a White male and includes his home address in Weston, CT; see also Weston, Connecticut, CITY-DATA, http://www.city-data.com/city/Weston-Connecticut.html [https://perma.cc/F49F-RXQA] (listing median household income as over $200,000 and demographics of the town as more than 90% White). It also appears that Drew is now employed as a commercial leasing manager at a “premier vertically integrated real estate firm,” a job that would have been difficult to secure with a felony record. Drew’s employment information was obtained from his publicly available LinkedIn account.
criminal when so many others in Alabama and in the United States, including poor people and people of color like Kiasha, cannot. Though the problems of charging for diversion and expungement are illustrated in high relief in Alabama, Drew and Kiasha’s cases are not unique—so what troubles us about these cases is more than an isolated incident. Drew’s appeal was a consolidated appeal. Five other defendants—also all White—faced possession of marijuana charges stemming from traffic stops in Covington County around spring break. All five were, like Drew, charged, granted diversion, avoided conviction and then obtained expungement—all at a significant cost. Meanwhile, Black people are four times more likely than White people to be arrested for marijuana possession in Alabama and 3.64 times more likely in the United States. Many, like Kiasha, are unable to afford diversionary programs.

These cases are a Rorschach test for the criminal legal system. They demonstrate that despite widespread availability of diversion programs, financial barriers to entry make these programs differentially accessible to the poor and the well-off. Though Drew was able to avoid conviction, Kiasha was not. Moreover, because of his access to cash, Drew was under court supervision for only a fraction of the time Kiasha was, despite similar charges. Are these examples evidence of the promise of diversion and expungement, or a cautionary tale about the perils of trying to use diversion and expungement to fix what is broken in our system? This Article argues the latter and that without adequate framing, diversion and expungement can exacerbate some of the very evils they were set out to address.

II. THE OPERATION OF MONETIZED RELIEF

Diversion and expungement do not operate on a level playing field. Racial disparities operate at every discretionary decision point in the criminal

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To protect his privacy in line with supra note 200, I will not cite it here, but it has been verified by the Journal of Criminal Law and Criminology see also Company, BUILDING & LAND TECH https://www.bltoffice.com/company/ [https://perma.cc/HP9Z-YB8E].

226 Case information in DC-2016-769, CC-2018-283, CC-2018-79, CC-2018-281 lists the defendants as White males; case information for CC-2018-285 does not list the race of defendant, but it lists his address as Hartsville, SC and an individual of that same name who attended high school in Hartsville, SC appears White from his Facebook profile, see Luke Valle, FACEBOOK, https://www.facebook.com/luke.valle.7 (last visited Mar. 24, 2022). The opinion also says he was a Clemson student, and the Facebook profile has Clemson Football listed as user’s sports team.

227 ALABAMA’S WAR, supra note 214, at 7.

legal system and there are good reasons to think that even absent financial barriers, White defendants benefit more often from diversion and expungement than their Black and Brown counterparts. But because of differential access to financial resources in communities of color, fee-based diversion and expungement fuel racial disparities in the prevalence of criminal records. If that were not concerning enough, the existence of fee-based diversion and expungement programs creates perverse financial incentives. Self-interested government actors choose programs that condition criminal records relief on payment, even though these seemingly neutral programs will almost undoubtedly result in greater racial disparities.\footnote{229 See supra note 94.}

This allows courts and prosecutors to profit from the perpetuation of racial caste.

A. BY THE NUMBERS

Imagine a city, Sample City, that is evenly divided between White and Black residents and consider the impact of a marijuana possession diversion program with a cost of $400. If Sample City has arrest patterns for marijuana possession like those of the United States, Black residents will be about four times more likely to be charged with marijuana possession than White residents, despite relatively equivalent rates of drug use.\footnote{230 ACLU, supra note 228, at 5 (finding a nation-wide disparity of 1 to 3.64); see also Cassia Spohn, Race, Crime, and Punishment in the Twentieth and Twenty-First Centuries, 44 CRIME & JUST. 49, 56 (2015) (noting drug usage rates are roughly the same for White and Black individuals). There is also some evidence that when marijuana prosecution rates decline due to acts of prosecutorial discretion, racial disparities in arrest rates can actually increase. See V.M. SMIEGOCKI, P.R. METZGER & A.L.B. DAVIES, THE DALLAS PROJECT, FEWER, NOT FAIRER 3 (2021), https://www.smu.edu/~media/Site/Law/Deason-Center/Publications/Prosecution/DALLAS/Fewer_Not_Fairer.pdf?la=en [https://perma.cc/BP52-6T9J] (finding that when marijuana arrest rates declined by 31%, the racial disparity in arrest rates between non-Black and Black people rose from 1:4 to 1:4.4).} This leads to a marijuana arrest population that is 20% White and 80% Black, despite the 1:1 ratio of White and Black residents in Sample City. Assuming that 40% of those arrested can pay for diversion, then that reduces the number of people who will be convicted but does not change the racial disparities resulting from the differential arrest rates which remain 1:4. This ignores the
possibility that a prosecutor’s racial bias might also impact the availability of diversion.

But because of the racial wealth and income gaps, it is unlikely that diversion will be equally accessible to White and Black arrestees in Sample City. According to Federal Reserve data from 2019, 79% of White Americans can pay their bills even if they encounter a $400 emergency, whereas only 56% of Black Americans can.\textsuperscript{231} Let us assume that those who can handle a $400 emergency are generally able to pay for diversion and do so. If that is the case, then about 11% of those who end up with criminal records will be White, and about 89% will be Black. The fee-based diversion amplifies the racial disparity in the arrests by concentrating criminal records in the Black population.

Consider another city, Model City, with equal proportions of White, Black, and Latinx residents. Fee-based diversion will similarly exacerbate racial disparities in conviction rates. Let us assume that Black residents continue to be four times as likely to be arrested as White residents and that Latinx residents are twice as likely to be arrested as White residents, leading to a marijuana arrest population that is 14% White, 57% Black, and 29% Latinx. Using the same $400 diversion program and Federal Reserve data, which finds that 62% of Latinx people can weather a $400 emergency, the results are a marijuana conviction population that is about 8% White, 64% Black, and 28% Latinx.

In the real world, these categories are not mutually exclusive. Because Hispanic/Latinx is an ethnic rather than racial category, Latinx people can be White, Black, indigenous, mixed race, etc.

The Federal Reserve study uses the term “Hispanic” which is not entirely equivalent to Latinx—Hispanic includes people from Spain but excludes those from Brazil because it is not a former Spanish Colony, whereas Latinx excludes those from Spain because it is not part of “Latin America,” but includes those from non-Spanish speaking countries like Brazil.
This is despite there being equal numbers of White, Black, and Latinx residents in the city and roughly equivalent rates of drug use in each demographic group. Again, rather than mitigating racial disparities, diversion either preserves or amplifies the racial disparities present in the arrest population.

Fee-based expungement has a similar impact. The population of individuals with criminal records contains racial disparities resulting in an over-representation of people of color amongst those with records. Again, conditioning records relief on payment of a large sum makes expungement more likely to be available to White people with records concentrating criminal records in communities of color and particularly in the Black community. This is especially pernicious because employers tend to discriminate against Black individuals with records at higher rates than Whites with criminal records. Moreover, fee-based diversion and expungement programs are more prevalent in the South—the region which over half of Black Americans call home.

234 Pager, supra note 23, at 957–58.
235 Christine Tamir, The Growing Diversity of Black America, PEW RSCH. CTR. (Mar. 21, 2021) https://www.pewresearch.org/social-trends/2021/03/25/the-growing-diversity-of-black-america/ [https://perma.cc/597F-ZA2L] (“In 2019, the South was the region with the highest share of the country’s Black population, with 56% of this population living there. The Midwest
B. PERVERSE FINANCIAL INCENTIVES

Prosecutors and judges do not merely charge for diversion and expungement to cover program costs. Diversion can be quite profitable for prosecutors, and many exploit the programs for self-interested benefits. A New York Times investigation revealed that prosecutors were routinely using diversion as a revenue stream and charging as much as $5,000 for participation for a single offense.236 One district attorney’s office, covering a population of around 120,000, was able to generate one million dollars in revenue for itself through diversion programs in just five years—sometimes offering diversion where public safety concerns counseled against doing so.237 Likewise, lawmakers pass expungement statutes with high fees anticipating that they will be “significant revenue generator[s].”238

This creates a system of perverse financial incentives. Courts and prosecutors may let financial motivations override other policy priorities. Prior to Arizona’s recent decriminalization of marijuana in the fall of 2020,239 Maricopa County raised $1.6 million annually through its marijuana diversion program—and the prospect of losing that profit served as a disincentive to decriminalize.240 The revenue function of traffic and other low-level offenses can supplant the public safety function, making safety “secondary or irrelevant to the administration of the police and . . . courts.”241 One study found that a 1% increase in the percentage of a city’s budget that was generated by economic sanctions is associated with a 6.1 percentage point decrease in the violent crime clearance rate and an 8.3 percentage point decrease in the property crime clearance rate.242 Fee-based diversion may not only further entrench the problematic aspects of our criminal legal system, but it may also result in making us less safe.

Even diversion and expungement programs created with good intentions may be implemented by actors who do not share reformist goals

and Northeast each held 17% of this population, while the West was home to one-tenth of the Black population.”); see also Appendices A and B.

236 Dewan & Lehren, supra note 71.
237 Dewan & Lehren, supra note 101.
238 Radice, supra note 104, at 279.
240 Dewan, supra note 118.
241 Ordower, Sandoval & Warren, supra note 127, at 133.
242 Colgan, supra note 121, at 1564 (citing Rebecca Goldstein, Michael W. Sances & Hye Young You, Exploitative Revenues, Law Enforcement, and the Quality of Government Services, 56 Urb. Aff. Rev. 5, 8, 17, 21–22 (2020)).
and then use the programs to leverage profit. Fee-based diversion creates perverse incentives for law enforcement and prosecutors to charge low-level offenses to generate revenue. Those cases generate a need for a greater criminal legal system administrative apparatus—more clerks, judges, and paper to process the larger caseload. And this in turn creates a greater need for revenue and reliance on fee-generating prosecutions.

Perhaps it seems strange that enlightened criminal justice reformers would use the mechanisms of diversion and expungement to generate revenue and extract money from criminal defendants and their communities, rather than simply using these programs to mitigate the impact of our overly harsh criminal legal system. But government actors have always sought to capitalize on the criminal legal system—both by extracting profit from punishment and by seeking profit in exchange for leniency. Historically, this has taken many forms. “Following the Civil War, Southern States enacted Black Codes to subjugate newly freed slaves and maintain the prewar racial hierarchy. Among these laws’ provisions were draconian fines for violating broad proscriptions on ‘vagrancy’ and other dubious offenses.” Today, fines are the most common form of punishment levied in the United States. Poverty penalties punish defendants by adding on additional late fees, payment plan fees, and interest when defendants cannot pay on time. Civil asset forfeiture is another way that governments and law enforcement can reap profits from the criminal legal system.

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244 See Colgan, supra note 121, at 1553.
245 Id. at 1550–52.
249 Alexander, supra note 30, at 155 (noting that collection fees in Alabama can be as high as 30% of the original debt and 40% of the original debt in Florida).
Relatedly, some theorists conceptualize the entire misdemeanor system as an instrument of regressive taxation resulting in massive redistribution of wealth—taking largely from those with lowest incomes. Fee-based diversion and expungement can be thought of as a part of this redistributive criminal legal system. The system is pervasive and intrusive; for example in Ferguson, Missouri the municipal court issued 9,000 arrest warrants in 2013 alone—this is a city with only 21,000 residents—mostly low-income Black people. In places like Ferguson, Missouri, law enforcement practices are “consciously revenue driven” and discriminatory to Black Americans. Ferguson is not unique; municipalities routinely exploit tickets to collect revenue. One town in northern Florida with a population of just 1,000 people issued over 11,000 traffic citations in one year, generating $500,000 in revenue for the town—half of its annual revenue. Big cities also rely on the income from fines and fees associated with criminal cases. In 2017, Atlanta projected collecting $28 million in fines and forfeitures, New Orleans $46 million, and Chicago $359 million—accounting for 4.6%, 7.5%, and 9.7% of their respective annual revenues. Empirical analysis suggests that municipalities with larger Black populations are more likely to rely heavily on fines and forfeitures to raise income. Similarly, many of the more expensive expungement and diversion programs occur in the South or in other areas with larger Black populations.

Once government actors see a way to turn a criminal justice reform into a tool to generate revenue, the tool can be perverted from its original purpose. There is good reason to think that this has happened in many diversion and expungement schemes. Though envisioned as benevolent reforms, many

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251 Natapoff, supra note 18, at 117.
253 Ordower, Sandoval & Warren, supra note 127, at 115.
254 Surprenant & Brennan, supra note 243, at 94–95 (describing how AAA wrote up Waldo for its speed traps and then went so far as to purchase billboards along U.S. Route 301 which to warn motorists about the risk).
255 Id. at 95.
256 Id. at 96 (finding that cities with one Black city council member reduce this correlation by half).
257 See generally infra Appendices A & B. Likewise, many of the cities and towns that receive significant revenue from fines and fees in criminal cases are located in the South and Midwest. See Mike McIntire & Michael H. Keller, The Demand for Money Behind Many Police Traffic Stops, N.Y. Times (Nov. 2, 2021), https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html [https://perma.cc/FW3G-X5FN] (containing a map of cities and towns that generate more than 10% of revenue from fines and fees).
governments have put a price tag on second chances—compromising the value and promise of the twin programs of diversion and expungement.

III. THE LARGER AMERICAN CRIMINAL RECORD PROBLEM

To fully understand the problem of paying for a clean record, this Article will zoom out and consider the sociohistorical context in which these fee-based diversion and expungement schemes operate. The United States’ criminal legal system is unmatched in its scope and punitiveness. The United States has the highest rates of incarceration,\(^{258}\) community supervision,\(^{259}\) and prevalence of criminal records.\(^{260}\) The system is also marked by shocking rates of racial disparities\(^{261}\) and operates to reinforce racial caste\(^{262}\) and perpetuate the racial wealth gap.\(^{263}\)

A. THE PREVALENCE OF CRIMINAL RECORDS

The expansion of criminal records in the United States is the product of two contemporaneous trends—mass criminalization and the proliferation of technologies allowing for expanded access to criminal records. Mass criminalization means that more people have contact with law enforcement and the criminal courts. “Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United States, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization.”\(^{264}\) Meanwhile, technological developments mean that data

\(^{258}\) United States Profile, Prison Pol’y Initiative, https://www.prisonpolicy.org/profiles/US.html [https://perma.cc/62R7-UW2G] (noting that the U.S. locks up 698 per 100,000 residents—the highest rate of any nation).

\(^{259}\) Alessandro Corda & Michelle S. Phelps, American Exceptionalism in Community Supervision, AM. PROBATION & PAROLE ASS’N PERSPS., Spring 2017, at 20 (noting that rates of community supervision are five times higher than the European average per capita).

\(^{260}\) See supra Section II.A.

\(^{261}\) See, e.g., Leah Sakala, United States Incarceration Rates by Race/Ethnicity, 2010, Prison Pol’y Initiative (May 2014), https://www.prisonpolicy.org/graphs/2010rates/US.html [https://perma.cc/YX2U-N7RG]; see also Paul D. Butler, Poor People Lose: Gideon and the Critique of Rights, 122 YALE L.J. 2176, 2180 (2013) (“In 1960, three years before Gideon, the [B]lack incarceration rate was approximately 660 per 100,000. By 1970, it had fallen some, to slightly under 600 per 100,000. In 2010, the rate of incarceration among [B]lack males was an astronomical 3,074 per 100,000. For men hoping to avoid prison, being both poor and [B]lack is a lethal combination. More than two-thirds of [B]lack males who do not have college degrees will be incarcerated at some point in their lives. Black male high school dropouts are more likely to be imprisoned than employed.”).

\(^{262}\) See supra Section II.B.

\(^{263}\) See supra Section II.C.

\(^{264}\) Roberts, supra note 46, at 325.
about arrests and criminal cases can be stored more efficiently and be accessed more easily. At the same time, as more people have contacts with the criminal legal system, the record-keeping capabilities of the system have expanded and the public has greater access to criminal records.\textsuperscript{265} Almost all states now have publicly available Internet databases of criminal records.\textsuperscript{266} Instead of a dusty file cabinet stored at a remote off-site location, records—and even arrest photos—can now be accessed from the comfort of home with the click of a mouse.\textsuperscript{267}

One in three adults in the United States has a criminal record.\textsuperscript{268} Approximately twenty million Americans, or about one out of every twelve adults, have felony convictions.\textsuperscript{269} This is roughly the population of New York state or Florida. The number of adults with misdemeanor convictions is several times higher.\textsuperscript{270} And millions of Americans have non-conviction records showing charges that were later dismissed or arrests that never even resulted in a criminal charge.\textsuperscript{271} The Federal Bureau of Investigations (FBI) adds over ten thousand names to its criminal records databases daily.\textsuperscript{272} It

\begin{itemize}
\item \textsuperscript{265} This is not to say that criminal record databases are complete and accurate—far from it. For example, one study found that in 2012 only eighteen states had RAP sheet databases that included disposition data for more than eighty percent of arrests. Jacobos, supra note 17, at 42.
\item \textsuperscript{266} Roberts, supra note 46, at 328.
\item \textsuperscript{267} Eumi K. Lee, Monetizing Shame: Mugshots, Privacy, and the Right to Access, 70 Rutgers U. L. Rev. 557, 566 (2018).
\item \textsuperscript{269} Jacobos, supra note 17, at 1 (emphasis omitted).
\item \textsuperscript{270} No studies document the total number of individuals with misdemeanor conviction records, but misdemeanors typically make up 70\% of a state’s criminal caseload—this suggests that there are at least twice as many people with misdemeanor convictions as felonies. See Prescott & Starr, supra note 174, at 2462 n.3 (citing Megan Stevenson & Sandra Mayson, Contributions, The Scale of Misdemeanor Justice, 98 B.U. L. Rev. 731, 746 n.81 (2018)).
\item \textsuperscript{271} Criminal records can be generated when a person is arrested (police or arrest records)—regardless of whether she is ever charged—and when a person is charged and prosecuted in court (court records)—regardless of whether she is convicted. In one dataset, 20.92\% of criminal records contained a felony conviction, 66.99\% contained a misdemeanor, and 38.72\% contained a non-conviction disposition. Chien, supra note 167, at 590 tbl.A-2.
\item \textsuperscript{272} Gary Fields & John R. Emshwiller, As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime, WALL ST. J. (Aug. 18, 2014), https://www.wsj.com/
also operates the largest biometric database in the world—containing the fingerprints of over seventy-eight million people. These records fall disproportionately on poor people and people of color. A staggering two-thirds of Black men without a college degree will be incarcerated at some point in their lives.

Alongside the newly internet-accessible courts, there is also a growing market for criminal background checks, resulting in a four billion dollar industry. In 1972 Congress passed a law allowing the FBI to do background checks for non-law enforcement purposes and to allow private entities to obtain criminal record information for a fee. Initially, the Fair Credit Reporting Act (FCRA) prohibited dissemination of criminal history information that was more than seven years old, but Congress eliminated that restriction in 1998—now FCRA only prohibits reporting arrests not resulting in conviction that are older than 7 years old. In 2005, the FBI processed 9.8 million criminal background checks for non-criminal-justice agencies and private organizations. In 2013, the number had almost doubled to seventeen million, which was slightly less than half of all FBI background checks. Today, noncriminal justice background checks eclipse background checks for criminal justice purposes. Moreover, government entities are no longer the only purveyors of criminal records information—increasingly private industry is the primary source of criminal background checks due to the commodification of criminal history information in our increasingly digital society.

Nowadays, employers, landlords, and educational institutions use criminal records more often than law enforcement agencies.

articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402 [https://perma.cc/8VZP-3PLS]; see also JACOBS, supra note 17, at 18 (describing the FBI’s National Crime Information Center (NCIC) databases, which provide support to federal, state, and local law enforcement agencies).

This database is called the Integrated Automated Fingerprint Identification System. JACOBS, supra note 17, at 35; see also FBI FACT SHEET, supra note 20.

Butler, supra note 261, at 2180.

JACOBS, supra note 17, at 71.

Id. at 45 (citing Pub. L. 92-544, 86 Stat. 1115 (1972)).

Id. at 75 (unless for a job with a salary of $75,000 or more—then older arrests can be reported); see also 15 U.S.C. § 1681c(a)(2), (b).

JACOBS, supra note 17, at 46.

Id.


and prosecutors. A criminal record (or lack thereof) matters more outside the courtroom than inside it.

B. CRIMINAL RECORDS, SOCIAL ORDERING, AND RACIAL CASTE

It should come as no surprise that more background checks are conducted for non-criminal justice purposes because Americans use criminal records to order civil society in almost every sphere. The American Bar Association database has catalogued tens of thousands of collateral consequences of criminal cases and convictions. Criminal background checks are used to decide who to employ, educate, house, give benefits to, allow to vote, and even who to date. Colleges and universities ask applicants about criminal and arrest history and use arrests and convictions to make admissions decisions. Drug convictions can disqualify students from being able to obtain federal student loans, making higher education unattainable. Landlords routinely conduct criminal background checks on prospective tenants, a practice which may perpetuate longstanding patterns.

282 Noncriminal Justice Background Checks & the NCIS, supra note 280; see also Lee, supra note 267, at 566.

283 Roberts, supra note 46, at 327; see also Nat’l Inventory of Collateral Consequences of Conviction, https://niccc.csjusticecenter.org/ [https://perma.cc/3F8D-PJVN].

284 Roughly 2.5% of the U.S. voting population is temporarily or permanently disenfranchised due to a felony conviction. Rachel Barkow, Prisoners of Politics: Breaking the Cycle of Mass Incarceration 49, 116 (2019).


287 Barkow, supra note 284, at 92.

of racial housing segregation. Of all the collateral consequences of criminal records, employment barriers are likely the most damaging. States have statutes barring those with certain convictions from being hired or licensed in certain fields. And employers discriminate, both lawfully and unlawfully, on the basis of criminal records.

The Supreme Court endorsed criminal-record-based discrimination in 1898 in *Hawker v. New York*. The Court determined it was reasonable to consider a conviction as an adjudication of the fact of the defendant’s bad moral character by the state. The Court acknowledged that the “test of character is not in all cases absolutely certain, and that sometimes it works harshly” but found that the legislature had power to make a rule of “universal application” that did not account for the possibility of later reformation of the defendant. With the approval of the Supreme Court, licensing laws proliferated in the 1920s and had two aims: to reduce minority (and in particular Black) access to certain fields and trades and to restrict competition to these jobs. These laws persist. For example, in Virginia there are 146 employment-related collateral consequences for felony convictions. A person with a felony conviction cannot own a barber shop in New York or Texas. In Iowa, a drug possession conviction disqualifies an individual from becoming a licensed electrician.

Record-based distinctions often become unmoored from the particularities of the criminal conviction or contact—simply the mark of the

290 Murray, supra note 158, at 365.
292 *Hawker v. New York*, 170 U.S. 189, 197 (1898). Hawker was a doctor with a conviction for performing an abortion. *Id.* This conviction was later used to bar him from practicing medicine. *Id.*
294 Hawker, 170 U.S. at 197.
295 SurpremANT & BRENNAN, supra note 243, at 116.
296 Barkow, supra note 284, at 94.
297 *Id.*
298 *Id.*
criminal record itself is enough for disqualification from civil life. Data suggests that employers will hire those with little or no experience over those with criminal convictions. And employment discrimination toward those with criminal records is stronger than that toward welfare recipients or undocumented immigrants. One recent study found that even minor felony records can significantly decrease the likelihood of receiving a callback for a job. Reducing prison sentences (which could reduce mass incarceration) does not remedy this second-class status—indeed, most felons are not even sent to prison.

Also, one does not need the label of “felon” to feel the sting and impact of a criminal record. Juvenile records can have serious collateral consequences in adulthood—despite the myth that these records disappear on one’s eighteenth birthday. Even an arrest record for a minor offense that is dismissed before charges are filed can have employment consequences and result in loss of a job or a job opportunity. However, studies do suggest

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300 Brewer, supra note 160, at 231; see also Bruce Western, Jeffrey R. Kling & David F. Weiman, The Labor Market Consequences of Incarceration, 47 CRIME & DELINQ. 410, 412; Amy Shlosberg, Evan J. Mandery, Valerie West & Bennett Callaghan, Expungement and Post-Exoneration Offending, 104 J. CRIM. L. & CRIMINOLOGY 353, 383 (2014).

301 Brewer, supra note 160, at 231.

302 Amanda Agan & Sonja Starr, The Effect of Criminal Records on Access to Employment, 107 AM. ECON. REV. 560, 562 (2017) (finding those without a conviction record were 63% more likely to receive a callback than those with criminal conviction records even though the records were for relatively minor drug and property felonies).

303 ALEXANDER, supra note 30, at 94.

304 Christopher Uggen, Mike Vuolo, Sarah Lageson & Ebony Ruhland, The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment, 52 CRIMINOLOGY 627, 637 (2014) (finding that a record of a misdemeanor arrest reduced the chance of a callback for White and African American males by 4 percent; surveys of job applications found that employers most often require information about “criminal convictions” and do not distinguish between misdemeanors and felonies).


306 See, e.g., FORMAN, supra note 142, at 189–93, 215 (recounting one such instance). For more information about the collateral consequences of arrests, see Adam M. Gershowitz, Prosecutorial Dismissals as Teachable Moments (and Databases) for the Police, 86 GEO. WASH. L. REV. 1525, 1530 (2018) (listing costs of an arrest: “incarceration, the need to post bail, internet-accessible arrest records, mug shots, immigration and housing consequences because agencies track arrest records, the prospect of job loss because of incarceration, and difficulty in finding new work”); Jain, Arrests as Regulation, supra note 19, at 826–44 (discussing in detail the non-criminal consequences of an arrest); Roberts, supra note 20, at 997–99.
that conviction records have more serious employment consequences than arrest and non-conviction records alone.\footnote{Peter Leasure, Misdemeanor Records and Employment Outcomes: An Experimental Study, 65 Crime & Delinq. 1850, 1851, 1853–54 (2019).}

Criminal records do not fall evenly throughout the U.S. population. Poor people of color “disproportionately bear the mark of a criminal record.”\footnote{Pinard, supra note 46, at 969.} Criminal records continue to have a disproportionate impact on Black people as compared to White people, and even as compared to other racial and ethnic minority groups.\footnote{Deval Pager, Bart Bonikowski & Bruce Western, Discrimination in a Low-Wage Labor Market: A Field Experiment, 74 Am. Soc. Rev. 777, 784 (2009).} Black communities, specifically Black men, are overburdened with criminal records. In some cities, as many as 80% of young Black men have criminal records.\footnote{Jacobs, supra note 17, at 2 (citing Alexander, supra note 30, at 7).} A recent study showed racial disparities in filing rates of misdemeanor cases in seven jurisdictions—the most striking of which was that Black people were twelve times as likely to be charged with drug and public order offenses as Whites in Chicago.\footnote{Mayson & Stevenson, supra note 18, at 1005.} In two other jurisdictions, Black people were eight times as likely to get arrested for marijuana possession than Whites.\footnote{Roberts, supra note 46, at 331.} By 2008, “a young black man without a high school diploma was more likely to be in prison or jail than to be employed in the paid labor force.”\footnote{Id.} Professor James Forman describes the “cumulative impact” of mass criminalization,\footnote{Id.} the expansion of employment-related collateral consequences, and increased access to criminal records through new technology as “devastating” to the Black community.\footnote{See Butler, supra note 261, at 2178. Admittedly, data from the most recent few years show modest reversal of this trend. See John Gramlich, Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006, Pew Rsch. Fact Tank (May 6, 2020), https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-} As he explains, “pretext policing led to more arrests, technological changes made the arrests impossible to escape, and legal changes turned a single arrest into a lifetime of exclusion and subordination.”\footnote{Id.} Rather than lessening, racial disparities in the criminal legal system have worsened in the past fifty years.\footnote{Id.}
Additionally, the presence of a criminal record exacerbates racial discrimination in hiring practices and tends to have a greater negative impact on the job prospects of Black people with criminal records than on White people with the same records. One study showed that Black men without criminal records were slightly less likely to be given a callback than White men with criminal records—showing a baseline of racial discrimination toward Black applicants even absent criminal records. The same study showed that the callback rates of Black men with criminal records were the lowest of all. The impact of criminal records can even have spillover effects into entire neighborhoods or communities, causing employers to avoid applicants from certain neighborhoods with disproportionate numbers of people who have been marked, branding the whole community. Because Black communities “disproportionately absorb” individuals with the mark of criminal arrest and conviction, these communities as a whole suffer. Generally, higher rates of criminal records create large numbers of unemployable men, and this falls primarily on poor communities of color. Efforts to mitigate criminal-records-based discrimination, like “ban the box” legislation (which prohibits employers from asking about conviction history in job applications) might cause employers to rely on race as a proxy for criminality and end up harming Blacks as a group. Due to this toxic

318 See Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 59 (2007) (detailing how Black applicants are more harmed than White applicants with the same record, even with all other qualifications remaining equal); Devah Pager, Bruce Western & Naomi Sugie, Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 199 (2009) (noting that criminal records reduced callback interviews for Black applicants as much as twice as White applicants).

319 Devah Pager, Mark of a Criminal Record 57 (2002) (noting that the White tester with no record received a callback 34% of the time, with a criminal record 17% of the time, while the Black tester with no record received a callback 14% of the time, with a criminal record 5% of the time.)

320 Id.

321 Barkow, supra note 284, at 49.


323 Butler, supra note 67, at 33.

combination of racism and criminal-records-based discrimination (in combination with other factors), historically the unemployment rate for Black people is double that of White people.\textsuperscript{325} Obviously, there are White victims of mass criminalization as well.\textsuperscript{326} And the narrative of mass incarceration is not as straightforward as Jim Crow—there were and continue to be Black proponents for the war on drugs and broken windows style policing.\textsuperscript{327} The criminal legal system “infiltrates” the lives of all poor people, but it is “singularly relentless and merciless” when it comes to Black communities.\textsuperscript{328}

C. THE RACIAL WEALTH & INCOME GAPS

The racial wealth gap is important to this Article for two reasons. First, the racial wealth gap has been perpetuated by legal regimes that intentionally or unintentionally disadvantage Blacks and other communities of color. The pervasiveness of criminal records discrimination and the concentration of criminal records in poor communities of color contribute to and perpetuate the racial wealth gap. Second, because of the racial wealth gap (which is much starker than the racial income gap), Black communities and individuals will be disproportionately excluded from fee-based diversion and expungement. Black individuals will be far less likely than their White counterparts to be able to pay for a clean record.

The racial wealth gap in the United States is profound. In 2015, Black Americans, who comprise 13% of the population, owned less than three percent of the country’s wealth.\textsuperscript{329} In 2016, the average White family’s wealth was more than ten times that of the average Black family.\textsuperscript{330} The racial wealth gap is even more stark for households with minor children, where

\textsuperscript{325} Pinard, supra note 46, at 972.
\textsuperscript{326} ALEXANDER, supra note 30, at 204–08.
\textsuperscript{327} Id. at 208–17; see generally FORMAN, supra note 142 (describing the role of the Black community in waging the war on drugs).
\textsuperscript{328} Pinard, supra note 322, at 120.
\textsuperscript{329} See WILLIAM DARITY JR., DARRICK HAMILTON, MARK PAUL, ALAN AJA, ANNE PRICE, ANTONIO MOORE & CATERINA CHIOPRIS, WHAT WE GET WRONG ABOUT CLOSING THE RACIAL WEALTH GAP 3 (2018).
Black families have one cent for every dollar of the wealth of White families. And the gap persists even amongst the poor—White households living near the poverty line have $18,000 in average wealth while similarly situated Black households typically have zero wealth. Black Americans continue to be residentially segregated and are five times as likely to live in high poverty neighborhoods as White Americans.

The racial wealth gap originates from the legacy of slavery and the failure to provide the formerly enslaved with land grants of forty acres. American housing policy perpetuated the racial wealth gap. Federal “redlining” practices prevented Black families from accessing housing wealth and discouraged investment in neighborhoods with even small Black populations. The private market reinforced residential segregation, directing wealth to White neighborhoods and away from Black communities. In the 1970s and 80s Black inner-city communities felt the harsh impact of globalization and deindustrialization. Many individuals in inner-city Black communities lacked a college education due to longstanding segregation and racial disparities in public education and many lacked transportation to commute to the suburbs, where manufacturing jobs relocated during this era. Then, due to the war on drugs, large numbers of poor Black and Brown individuals were branded criminals. Lawful criminal-records-based discrimination compounded existing income and employment

332 DARITY, HAMILTON, PAUL, AJA, PRICE, MOORE & CHIOPRIS, supra note 329, at 2.
337 Gold, supra note 335, at 1857–58.
338 ALEXANDER, supra note 30, at 50.
339 ALEXANDER, supra note 30, at 50–51; Helen Hershkoff & Nathan Yaffe, Unequal Liberty and a Right to Education, 43 N.C.C. L. Rev. 1, 3–4 (2020).
disparities between White and Black people, exacerbating the racial wealth gap and other disparities in American society.\textsuperscript{340}

It should trouble every American that whether a person has a criminal record may have more to do with access to cash than with character or history of wrongdoing. But once understood in the context of the larger American criminal record problem and the racial wealth gap, the phenomenon of paying for a clean record is even more troubling. As demonstrated above, fee-based diversion and expungement programs serve to entrench rather than ameliorate the racialized phenomenon of mass criminalization. Monetized relief from criminal records can exacerbate racial disparities in the system by insulating wealthier White defendants from the harsh consequences of criminal cases while providing no sanctuary for poor defendants who are more likely to be Black or Brown. Moreover, criminal conviction status matters in many spaces outside of the courtroom—limiting the employment, educational, and housing opportunities of those with criminal records. Sometimes whole neighborhoods and communities are marked with this negative credential. Ultimately, reforms that allow individuals to pay for clean records may serve to legitimize a caste-like structure where criminal record status serves as a proxy for race and class.

Diversion and expungement can be used as incremental reforms to move toward a more just system, but they must be implemented in a way that allows them to be used equitably to shield both rich and poor alike. And financial incentives need to align with shrinking rather than growing the carceral state.\textsuperscript{341}

\textbf{IV. STEPS TOWARD A MORE JUST AND EQUITABLE SYSTEM}

Diversion and expungement are tools with the potential to shrink the footprint of the criminal legal system, but these tools must be used mindfully. As discussed above, Black communities and poor people have historically been targeted for criminalization and branded with criminal convictions.\textsuperscript{342} This has resulted in a criminal legal system which is both too pervasive in general (i.e., the mass criminalization problem) and which is marked by deeply embedded racial and class-based disparities (i.e. the New Jim Crow). Addressing the first of these harms without accounting for the latter could deepen disparities in the system.

\textsuperscript{340} Alexander, supra note 30, at 141; see also Craigie, Grawert & Kimble, supra note 28, at 6.

\textsuperscript{341} Gold, supra note 145, at 1284–90 (detailing prosecutor’s financial incentives in the criminal legal system and how they currently fail to provide disincentives to overincarceration).

\textsuperscript{342} Pinard, supra note 32, at 133.
As more join the fight for an end to mass incarceration and mass criminalization, it is imperative to look at the proposed alternatives critically. Many reforms that look like progress at first glance, expand the carceral state or worsen the problems we seek to remedy like the perpetuation of racial and social caste. As described above, some of the manifestations of diversion and expungement simply create a way for the wealthy to pay for a clean record rather than creating equitable access to relief from the stigma of a criminal record. With an understanding of the very real dangers of implementing diversion and expungement as superficial reforms that merely serve as window dressing for a deeply problematic criminal legal system, this section looks at ways to tailor diversion and expungement to best capitalize on their promise.

A. POLICY PROPOSALS

First, given the racial disparities in policing, charging, and prosecution rates—data about the race of beneficiaries of diversion and expungement must be tracked so that lawmakers, voters, and impacted communities know whether diversion and expungement programs are benefiting people like Kiasha and Drew equally, or whether these programs are being used to further race and class divides. Communities need the ability to ascertain whether programs are growing or shrinking the carceral state and whether they are decreasing or increasing disparities in the system. Policymakers must be attuned to the dangers of net-widening presented by diversion programs. If diversion is being used to enlarge the number of people being brought into the criminal legal system, then it is not working as intended. Numbers of cases both before and after diversion should be tracked to make sure that police and prosecutors are not using diversion to fuel cheaper prosecutions or avoid making hard decisions about who to charge in the first

343 See generally MAYA SCHENWAR & VICTORIA LAW, PRISON BY ANY OTHER NAME (2020) (documenting how many reforms, rather than shrinking the web of criminal legal systems, “weave new strands of punishment and control”); see also TIGER, supra note 81, at 41–42 (“Punishment reforms are often initiated by people interested in crafting a more humane, enlightened, and effective approach than that of the previous generation. In the course of implementation, these reforms become subject to administrative routines and efficiency leading, often, to worse consequences than the problems the reforms intended to fix. Further, reformers are often blinded to the possible deleterious effects of their reforms, seeing them only in the light of ‘benevolence’ and progress.”).

344 See, e.g., Emma Pierson, Camelia Simoiu, Jan Overgoor, Sam Corbett-Davies, Daniel Jenson, Amy Shoemaker, Vignesh Ramachandran, Phoebe Barghouty, Cheryl Phillips, Ravi Shroff & Sharad Goel, A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 NATURE HUM. BEHAV. 736, 744 (2020), https://www.nature.com/articles/s41562-020-0858-1 [https://perma.cc/Q8MW-A33X]; Mayson & Stevenson, supra note 270, at 1005 (noting racial disparities in charging rates in nearly all eight jurisdictions studied).
place. For example, if communities do not think marijuana offenders need prison or jail time, why prosecute marijuana cases at all? And why is marijuana possession a crime in the first place?

The presence of expungement can make legislatures less cautious about expanding criminal liability because of the possibility of a release mechanism later. Likewise, defense attorneys, prosecutors, and judges may think less of branding someone a criminal if they feel that the mark is reversible. Data must also track whether the presence of expungement is correlated to a rise in prosecution rates. This comprehensive data collection requires funding and funding data collection obviously involves trade-offs.345

Second, courts (particularly municipal courts) should not be evaluated as tools to generate revenue.346 Fines and fees associated with diversion and expungement frequently go toward the funding the criminal legal system—paying for the courts, prosecutors, and law enforcement. This is not a feature unique to diversion and expungement schemes—lawmakers have been using administrative fees imposed on criminal defendants to recoup system costs since at least the 1960s. The connection between the cost of funding the system and the amount an individual criminal defendant is charged for diversion or expungement must be severed. One possible solution is to have costs for entry and participation in diversion and for access to expungement be calibrated based on an individual’s ability to pay. One model, is the European “day-fine,” where fees or fines are based on percentage of defendant’s income so that rich and poor defendants are fined in proportion to their earnings.347 However, there is reason to believe that even graduated costs may undermine rather than support the possibility of broader reform.348

It is worth considering whether community members should have a say in the costs of expungement and diversion. Communities may decide that they want the ability to reintegrate individuals with criminal cases into

345 See generally Jessica M. Eaglin, Racializing Algorithms, 111 CALIF. L. REV. (forthcoming 2023) (manuscript at 32–40) (describing how data-driven technologies are often falsely viewed as costless solutions to the problems of mass incarceration).


347 NATAPOFF, supra note 18, at 236; Oklahoma has utilized the day fine model as well. See OKLA. STAT. tit. 22, § 991a(A)(1)(y) (2014).

society at no cost to the individual, and community members may be better positioned than judges or prosecutors to gauge the financial realities faced by court-involved individuals. Another solution would be for diversion and expungement to be offered cost free as a default (particularly if defendants qualify for appointed counsel or lack counsel) and allow the prosecutor to bear the burden of proving that a defendant is able to pay the fees and costs associated with these programs. More simply, the imposition of fees and costs on criminal defendants who wish to participate in diversion or access expungement could be abolished and these programs funded through other means. At the very least, unmanageable fees for diversion and expungement should be eliminated.

Individuals, particularly those who are indigent, should not be made to subsidize their own punishment and the poor should not be charged for diversion.

Third, programs required for diversion should be narrowly tailored and effective rather than seen as a replacement for carceral punishment. Individuals should not have to pay for programs that have not been proven effective; the government should be the entity funding experimental programs it believes to be beneficial. Nor should individuals be required to participate in programs that are a mismatch for their needs. For example, drug programs should not be ordered for defendants as a matter of course but should only be deployed when individuals screen as being in need of drug treatment or intervention. Obviously, it is far easier for low-income defendants and defendants of color to access treatment programs when they are provided at low cost. For example, the mental health diversion program in California relies on the County Behavioral Health system, which is resourced by Medicaid expansion dollars. Many defendants can access drug treatment through Medicaid expansion as well. Veterans treatment

350 Prescott & Starr, supra note 174, at 2554 (concluding that fees should be eliminated in the expungement context); see also Colgan, supra note 121, at 1566 (advocating for a prohibition on using economic sanctions in criminal cases to fund criminal legal system actors).
351 Natapoff, supra note 18, at 237.
353 See California Courts, supra note 147.
courts have likewise leveraged the services its participants have access to through the Veterans Administration. If a treatment or education program is promising and provides public safety and rehabilitative benefits, then communities rather than individual poor people charged with crimes should pay for it. As described above, making poor defendants pay for diversion, treatment, and expungement cuts down the promise of these programs, limits economic opportunity, and calcifies our race and class divides.

Fourth, expungement should be automated. As discussed above, several states have recently passed laws automating the expungement process. “[A]utomation has great potential to clear many records that are now subject to expensive and procedurally burdensome individualized civil sealing procedures, which can require legal sophistication, and/or substantial time and effort to navigate.”

Technologies and laws that facilitate automatic expungement and purging of arrests or convictions hold great promise. Pennsylvania recently passed a law to fully automate record sealing of non-conviction and old conviction records. Michigan did so even while a pandemic was raging.

Fifth, diversion and expungement should be expanded to address wider populations. Diversion and expungement programs often only target first-time, low-level, nonviolent offenders. Reform efforts targeting this “narrow subpopulation” will never fully address our national problem of

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355 See CAL. PENAL CODE § 1001.80 (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).
356 Supra Section I.B.
358 See CAL. HEALTH & SAFETY CODE § 11361.5 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.) (requiring automatic purging of marijuana arrests and convictions following legalization of marijuana in California).
360 Jackson, supra note 195.
mass incarceration and mass criminalization. They are too modest and only tinker around the edges. If reformers believe these programs work, then governments must expand them to more politically difficult populations—people charged or convicted of violent offenses or those with multiple convictions. Higher-risk individuals may be better served by intensive diversion programs than low-level first-time offenders who would likely self-correct without court interventions.

Finally, diversion and expungement alone cannot do it all. They are modest tools. The problems they are set out to address are bigger than they can solve. As many criminal legal experts have described, the problems with the criminal legal system are longstanding and profound. Reformers need to shrink the criminal codes, remove onerous collateral consequences of convictions (like professional licensing restrictions), provide greater access to preventative social services, fund public defenders, and drastically change the mindset of communities when it comes to policing and prosecuting crime.

B. THE DANGERS OF REFORMIST REFORMS

During the summer of 2020, after the killings of George Floyd, Breonna Taylor, Ahmaud Aubery and Rayshard Brooks (among others) sparked world-wide protests for the Black Lives Matter movement, the rhetoric of “defund the police” and prison abolition emerged in the national narrative. Abolition is best understood not as the immediate closure of prisons, but as “a gradual project of decarceration, in which radically different legal and institutional regulatory forms supplant criminal law enforcement.”

Even if one does not agree with the end goals of abolition, it is a useful exercise to

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362 Eaglin, supra note 94, at 626.


critique particular reforms through an abolitionist lens.\textsuperscript{366} To assess whether a particular policy “aids in dismantling the carceral state, abolitionists distinguish between reforms that diminish the power and function of criminal legal systems and mere technocratic reforms that may provide relief in individual cases but also entrench or legitimize such systems.”\textsuperscript{367} Using an abolitionist framework, diversion and expungement with entry costs can be thought of as “reformist reforms” rather than “abolitionist reforms.”\textsuperscript{368} As noted above, diversion often has a net-widening effect, ensnaring more people in the criminal legal system.\textsuperscript{369} The fees for diversion and expungement provide additional resources to the criminal legal system. This further entrenches the existing criminal legal system by expanding its power. Moreover, these policies and reforms reinforce the system’s centrality in meting out justice and mercy and legitimize the role of criminal records in stratifying our society and perpetuating caste.

Both expungement and diversion position the prosecutor and court as the central figures in “fixing” our mass criminalization problem. In this way, these programs seem to rehabilitate the prestige of the court and prosecutor and enhance their power.\textsuperscript{370} It is very possible that courts and prosecutors will use the tools they have—including diversion and expungement—to expand their power and social control. Indeed, judges like diversion because the problem-solving court model, where diversion is often dispensed, gives a judge discretion and authority that is waning in much of the criminal sentencing context due to the increased reliance on plea-bargaining.\textsuperscript{371} When judges and other actors are given more discretion, that increases opportunities for bias to operate.\textsuperscript{372} The presence of diversionary programs

\begin{itemize}
\item \textsuperscript{366} Amna A. Akbar, Towards a Radical Imagination of Law, 93 N.Y.U. L. REV. 405, 443 (2018) (proposing that scholars use an abolitionist framework to evaluate criminal justice policy).
\item \textsuperscript{367} See Colgan, supra note 121, at 1550.
\item \textsuperscript{368} Id. at 1550–52.
\item \textsuperscript{369} See, e.g., Maricopa County’s marijuana program, infra Part IV.C.
\item \textsuperscript{370} See TIGER, supra note 81, at 135.
\item \textsuperscript{371} Collins, supra note 45, at 16–21.
\item \textsuperscript{372} See, e.g., Crystal S. Yang, Free at Last? Judicial Discretion and Racial Disparities in Federal Sentencing, 44 J. LEGAL STUD. 75, 77 (2015) (finding greater racial disparities in federal sentencing after the Booker decision made the guidelines advisory); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, Does Unconscious Racial Bias Affect Trial Judges?, 84 NOTRE DAME L. REV. 1195, 1221 (2009) (finding evidence of implicit racial bias in favor of White defendants among White judges and some Black judges); Justin D. Levinson, Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, 57 DUKE L.J. 345, 350 (2007) (finding, through an empirical study, “that the race of a civil plaintiff or criminal defendant can act implicitly to cause people to misremember a case’s facts in racially biased ways”); Jelani Jefferson Exum, Sentencing
that are well-liked by judges and other institutional actors can also cause resistance to more meaningful change.373 For example, judges resisted proposals to lessen penalties for drug offenses because they feared doing so would undercut drug courts.374

Fee-based diversion and expungement also have the potential to legitimate criminal-records-based discrimination. By tempering the harshness of the criminal legal system, diversion and expungement may “disincentivize widespread systemic reform.”375 And if diversion and expungement opportunities are limited to those with financial means, then these practices enshrine the socio-economic biases of the criminal legal system and give them the imprimatur of legitimacy. Essentially, these reforms allow the appearance of fairness while allowing the system to remain “inherently unfair.”376 In this way, diversion and expungement might act as release mechanisms that “help the broken system continue to operate in perpetuity despite its flaws.”377 Though fewer people may have criminal records, criminal records may become even more concentrated in poor communities of color and wealthy Whites may be increasingly insulated from the effects of the harsh criminal legal system.

C. RECENT LAWSUITS AS ABOLITION CONSTITUTIONALISM

Aside from raising serious policy concerns, fee-based diversion and expungement could raise constitutional concerns as well. Two avenues for constitutional challenges present themselves. The first is a challenge under the Equal Protection Clause of the Fourteenth Amendment based on either class or race.378 The second is a challenge based in the Excessive Fines

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Disparities and the Dangerous Perpetuation of Racial Bias, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 491, 498–500 (2020) (noting that the recent trend in federal and state sentencing was increasingly longer sentences for Black men than for White men); Robert J. Smith & Justin D. Levinson, The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion, 35 SEATTLE U. L. REV. 795, 806 (2012) (arguing that implicit racial biases play a role in prosecutor’s charging decisions).

373 See TIGER, supra note 81, at 135.

374 Collins, supra note 45, at 43–51 (discussing how judges have opposed criminal justice reforms that would undercut drug courts).

375 Collins, supra note 36, at 1510.

376 Colgan, supra note 121, at 1580.

377 Collins, supra note 36, at 1508 (opining in the context of problem-solving courts).

378 But note that class distinctions are generally not subject to heightened scrutiny because the poor are not a protected class, and most schemes will survive rational basis review. See Harris v. McRae, 448 U.S. 297, 323 (1980). Likewise, facially neutral schemes will only trigger heightened scrutiny for race-based claims if they were motivated by racial animus, which is generally difficult to prove. Washington v. Davis, 426 U.S. 229, 241 (1976).
Comprehensive treatment of the application of these constitutional doctrine to the context of fee-based diversion and expungement schemes is beyond the scope of this Article. However, recently lawsuits have been utilized to put political pressure on prosecutors and legislatures with an eye toward systemic abolitionist reform.

Currently, a lawsuit is pending in Arizona against Maricopa County regarding its marijuana diversion program. The central claims are wealth-based discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Rather than challenging diversionary programs with high entry costs generally, the complaint alleges specific unsavory practices utilized by the county attorney in operationalizing the scheme. For example, the letters inviting defendants to participate in diversion threatened prison time if convicted to incentivize participation. But the defendants offered diversion were first-time offenders who were not in fact eligible for jail or prison sentences. Moreover, defendants could be terminated for failing to drug test even when they were turned away from drug testing for not being able to pay the $15–17 fee.

The complaint also paints a picture of the revenue-generating incentives of the prosecutor’s office, noting that the diversion program had generated fifteen million dollars for the Maricopa County Attorney’s Office between 2006 and 2016. The complaint details how the county attorney lobbyed against marijuana decriminalization legislation, which would have cost him the lucrative diversion program. It was also likely not lost on the attorneys pursuing the case that if the county attorney ends the program, that might end the net-widening effect of marijuana diversion and result in either a decline in the number of marijuana arrests or ultimately in the decriminalization of marijuana in Arizona. The lawsuit made the diversion scheme look more like extortion than a diversionary program. Crucially, the lawsuit challenged the social assumptions that the diversion program was a depoliticized solution or benevolent reform.

379 The Excessive Fines Clause was incorporated against the states in Timbs v. Indiana, 139 S. Ct. 682, 691 (2019), and scholar Beth Colgan posits that it supports challenges against excessive costs of diversion. See Colgan, supra note 47, at 24 n.126.
381 See Amended Complaint & Demand for Jury Trial at 12, Briggs, 2019 WL 2515950.
382 Id. at 19–21.
383 Id. at 23.
384 Id. at 10.
When a new county attorney took over, she announced sweeping changes to the program, including the elimination of the diversion case fees which had ranged from $630 to $1,200. The elimination of these fees resulted in record numbers of felony defendants participating in the diversion program and avoiding prison—participation ballooned to 1,300 participants a month from an average of around 300. Without the lucrative diversion fees, the political opposition of the county attorney to decriminalizing marijuana dampened. Indeed, after changes to the diversion program rendering it less profitable, Arizona was able to pass a proposition legalizing recreational marijuana.

Another lawsuit filed in Louisiana challenges its expungement scheme, which has the highest petition filing fee in the nation at $550 per record event. The claims in the complaint are that the expungement scheme violates both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. Like the Arizona diversion case, the lawsuit homes in on the specifics. It highlights the statutory language of Louisiana’s expungement scheme which recognizes that “the inability to obtain an expungement can prevent certain individuals from obtaining gainful employment” and that by providing increased access to employment, the expungement regime improves community reentry and serves public safety. The complaint then details the costs of expungement—for some


386 Id.


plaintiffs with multiple convictions and arrests this costs thousands—and the dire financial circumstances of the plaintiffs to make the argument that due to the exorbitant cost and lack of fee waiver for the indigent, the law does not meet even a rational basis standard. The complaint alleges that the “application of the state law is irrational because not only does it not serve a legitimate government purpose, but it actively undermines the stated purpose of the expungement laws as enacted by the legislature.”390 The plaintiffs seek not wholesale statutory reform, but simply the possibility of a fee waiver for petitioners too poor to pay.391 But the lawsuit provided leverage for a state bill that would have automated expungement in Louisiana and eradicated expungement fees.392 Though the bill did not pass, the Louisiana Senate passed a resolution to study the impact of the collateral consequences of criminal convictions and propose legislative solutions.393

Both lawsuits target decidedly flawed, superficial, or disingenuous efforts at criminal justice reform. Regardless of the rulings on the Equal Protection Clause claims, the lawsuits have publicized the shortcomings of these so-called reforms and pushed for something better—in one case facilitating the passage of a proposition to decriminalize low-level marijuana possession and in the other creating momentum for collateral consequences relief more broadly. These lawsuits advance a vision of the Constitution that can be utilized to dismantle the carceral state. They demonstrate the practice of “Abolition Constitutionalism” described by theorist Dorothy E. Roberts. As Roberts writes:

[Abolitionists acknowledge that building a prisonless society is a long-term project involving incremental achievements. . . . Abolition means developing practical strategies for taking small steps that move us toward making our dreams real and that lead us all to believe that things really could be different. Some of those steps will entail engaging with the state. In demanding state action that promotes prison abolition, abolition activists can use constitutional provisions instrumentally to assert and sometimes win their claims.394

CONCLUSION

Many Americans from both sides of the political spectrum have embraced the cause of criminal justice reform. But we are still deeply ambivalent about the reasons for reform and its end goal. Some advocate for massive structural changes based on commitment to ending the era of

390 Id. at 32.
391 Id. at 35.
criminal social control of poor people and people of color.\textsuperscript{395} While others only seek to reduce the size of the criminal justice behemoth because it has become financially unmanageable or because it has started to target people like them.\textsuperscript{396} Some government officials embrace supposed reforms only to profit financially.\textsuperscript{397} The American problem is not solely the proliferation of criminal records—it is also the societal attitude about those with criminal records which perpetuates racial caste and the creation of a permanent underclass.

This Article should not be read as a blanket argument against expungement or diversion. Well-conceived diversion systems that lack financial barriers to entry, avoid widening the net of the carceral state, and connect people to worthwhile services that keep communities safe are a good idea. Such diversion programs can be used to divert both people and funding away from jails and prisons back into communities. Similarly, expungement programs that lack financial and access to justice barriers can improve the lives of individuals with criminal records without compromising public safety. But these reforms are more modest than policymakers and politicians often claim. We cannot solve the problems of mass criminalization with expungement alone or in combination with diversion.\textsuperscript{398} As J.B. Prescott and Sonja B. Starr explain, “[o]n balance, the population of people living with criminal records is continuing to grow quickly; [diversion and expungement are] like a bucket removing water from an ever-rising ocean.”\textsuperscript{399}

As governments implement diversion and expungement programs, they must track data to ensure that these reforms are not used to grow the scope of our overly punitive and vast criminal legal system. Moreover, reformers must ensure that the pruning of convictions that results from these programs

\textsuperscript{395} ALEXANDER, \textit{supra} note 30, at 230–36.
\textsuperscript{396} For example, at the sentencing of President Trump’s former business associate Roger Stone, prosecutors asked for a below guideline sentence and noted the harshness of the U.S. Sentencing Guidelines. District Court Judge Amy Berman-Jackson responded, “For those of you new to this and who woke up last week to the fact that the . . . guidelines are harsh, I can assure you that defense attorneys and many judges have been making that point for a long time, but we don’t usually succeed in getting the government to agree.” Darren Samuelsohn & Josh Gerstein, \textit{Stone Sentenced to over 3 Years in Prison}, POLITICO (Feb. 20, 2020), https://www.politico.com/states/florida/story/2020/02/20/stone-sentenced-to-over-3-years-in-prison-1262519 [https://perma.cc/W9AH-QD2H].
\textsuperscript{397} Dewan, \textit{supra} note 119 (describing a prosecutor who has profited off diversion fees as “a prodigious user of diversion, he has shown little inclination toward its goals of mercy and rehabilitation” and noting that his county has one of the ten highest rates of death row prisoners per capita).
\textsuperscript{398} Roberts, \textit{supra} note 46, at 343.
\textsuperscript{399} Prescott & Starr, \textit{supra} note 174, at 2510 (noting that Michigan adds 300,000 new convictions a year).
does not further exacerbate the racial and class disparities in our criminal legal system and entrench racial caste. When cost-benefit analysis becomes the sole guiding principal for reform, we often lose sight of the larger social justice framework needed to achieve meaningful change.400

Remedying the harms wrought by our decades-long experiment with mass criminalization is one of the defining challenges of the current political moment. Diversion and expungement can serve as mere window dressing—superficial reforms to hide the ugliness of a deeply dysfunctional criminal legal system. Or they can be modest first steps in the direction of more a just and equitable system—one that is just out of sight, somewhere over the horizon.

APPENDIX A: COSTS OF DIVERSION401

This Appendix documents the real costs of “diversion.” This appendix focuses on prosecutor-led and judicial diversion, which occur after a charge is filed with the court, rather than law enforcement assisted diversion which occurs before filing. Unlike expungement, which is typically statutory and somewhat uniform throughout the state, diversion programs vary by charge, defendant type, and jurisdictional unit.402 Some programs are statutorily defined, but more often programs are defined by local authorities, even if they are authorized by statute. As such, this table is not exhaustive and does not claim to tally the costs of all diversion programs, but merely attempts to show the real costs off a sampling of diversion programs across all states.403 This table also indicates whether the costs associated with diversion can be waived based on indigence (*). The costs included may also not be comprehensive because many costs are determined by the details of a defendant’s supervision and programming costs which vary depending on the length of time they are in the program and other factors.


401 All statutes within this appendix are current through 2021 State Legislative Sessions unless otherwise listed.

402 See supra Section I.A.

403 Many programs do not include information about costs associated in website descriptions. Where possible, the author included information about programs that specifically addressed costs or affirmatively stated that there were no costs or no additional costs.
<table>
<thead>
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<th>State</th>
<th>Sample Diversion Programs and Costs</th>
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<tr>
<td>Alabama</td>
<td>ALA. CODE § 12-17-226.1 allows district attorneys to establish pretrial diversion programs for certain offenses (§ 12-17-226.2) if the defendants meet minimum statutory criteria for admission (§ 12-17-226.3). Administration fees for pretrial diversion, up to $1,000, are to be set by the district attorney creating the program and may be reduced or waived based on a determination that the defendant will remain indigent for the foreseeable future (§ 12-17-226.8, citing § 13A-12-281(a)). The defendant is also required to pay court costs, restitution, fines, fees, and the costs of any drug testing or other services (§§ 12-17-226.6, -226.9).</td>
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<td>• In Tuscaloosa County, the “Second Chance” Diversion program, has an administration fee of $1,000 and an additional $100 a month is charged if a defendant requires more than a year to complete the program;(^{404}) court costs are also required.</td>
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<tr>
<td></td>
<td>• In Covington County, the administrative fee for diversion is $600;(^{405}) court costs are also required.</td>
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<td></td>
<td>• In Alabaster Municipal Court, diversion for a DUI charge (including court costs and other fees) is $2400.(^{406})</td>
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<td>Alaska</td>
<td>There is no state statute authorizing diversion,(^{407}) but Anchorage has a municipal code authorizing diversion in some misdemeanor offenses.(^{408}) The code authorizes community service hours of up to eighty</td>
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\(^{405}\) See supra Section I.C.1.


\(^{408}\) Anchorage, AK, Mun. Code § 08.05.060 (2016), http://anchorage-ak.elaws.us/code/coor_title8_ch8.05_sec8.05.060 [https://perma.cc/5Y4K-LFTL].
hours, and a fee of up to $500; payment of restitution is another permitted condition.\footnote{Id.}

One study conducted in 2015 found that in 93\% of cases, the diversion grantee paid a $250 fine, while 7\% of diversion grantees completed community service.\footnote{Lepage & May, supra note 407, at 18.} There is a $25 fee to complete community service.\footnote{Pre-Trial Diversion: Frequently Asked Questions, MUNICIPALITY OF ANCHORAGE, https://www.muni.org/departments/legal/criminal/pages/pretrialdiversion.aspx [https://perma.cc/B6Z8-36GV].}

\begin{tabular}{|l|l|}
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**Arizona** & ARIZ. REV. STAT. ANN. § 11-362 allows county attorneys to establish diversion programs. \\
 & - The City of Tucson has a diversion program for misdemeanors costing $275 (not inclusive of costs for restitution, monthly assessments, and “other fees related to the diversion program”).\footnote{Diversion, CITY OF TUCSON, https://www.tucsonaz.gov/prosecutor/diversion [https://perma.cc/9HH8-SNRL].}
 & - Maricopa offers a felony diversion program run by service provider SAGE Counseling. The initial assessment fee is $150, at which point the participant is placed in a treatment track based on their needs, with treatment fees as follow:\footnote{MARICOPA CNTY ATT’Y’S OFF., MCAO FELONY DIVERSION PROGRAM (Rev. Aug. 9, 2021) (on file with author).}
 & & o Track One: $400-$680
 & & o Track Two: $400-$680
 & & o Track Three: $1,200-$2,600
 & & o Track Four: $3,400-$3,900
 & & o Track Five: $480
 & & o Track Six: $1,775-$2,100
 & & o Drug Testing Fees (Frequency of testing varies by track and participant needs)
 & & & $13.90 per urinalysis test
 & & & $19.50 per oral swab/saliva test
 & & o Restitution is capped at $2,000
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**Arkansas** & ARK. CODE ANN. § 16-98-201 allows for judicial districts to establish drug court programs, including
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| California | **CAL. PENAL CODE §§ 1001–1001.97** authorize the establishment of a wide array of pretrial diversion programs (e.g. mental health diversion, veteran’s diversion, parental diversion, etc.). Sections 1001.15 and 1001.16 set maximum administrative fees for diversion at $300* for misdemeanors and $500* for felonies, and § 1001.90 sets a diversion restitution fee in all cases of between $100 and $1,000.* Generally, services are paid for by the defendant (e.g., drug diversion class can cost $395),\(^{415}\)

- Santa Cruz County’s drug diversion program fee is $705.\(^{416}\) |

| Colorado | COLO. REV. STAT. § 18-1.3-101 allows district attorneys to establish pretrial diversion programs. Diversion agreements may include requirements that defendants pay court costs, restitution, and supervision fees (of $50 a month for the up to 2-year period of diversion).

- The Fifth Judicial Circuit’s Adult Diversion program charges a $50 monthly fee, in addition to “restitution and costs of prosecution.”\(^{417}\) |

| Connecticut | • **CONN. GEN. STAT. § 46b-38c(h)** establishes a diversion program for those charged with family violence offenses. The application fee is $100* and the program fee is $300.* |

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<td>Delaware</td>
<td>DEL. CODE ANN. tit. 11, § 4218 establishes authority for the judge to grant, with the state’s consent, “probation before judgment,” which functions as post-plea diversion. Terms of the program may include payment of “a pecuniary penalty,” court costs, or restitution.</td>
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<tr>
<td>District of Columbia</td>
<td>The U.S. Attorney’s Office has several diversion programs—several of which appear to be cost-free or only require the payment of restitution (based on the website description).</td>
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<td>Florida</td>
<td>FLA. STAT. §§ 948.08, 948.16 establish pretrial intervention programs including drug, mental health, and veteran’s court diversion programs. Section 948.09 sets the cost of misdemeanor supervision at a minimum of $40 a month and also requires the defendant to pay for any electronic monitoring. DUI diversion program costs are listed at $500 and $1,000 depending on whether the program is tier I or II.</td>
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| **Georgia** | 421 Diversion Programs, State Att’y’s Off. for Orange and Osceola Cnys., https://www.sao9.net/diversion-programs.html [https://perma.cc/N5NL-VXYW].

| • The State Attorney’s Office for Orange and Osceola Counties offer several diversion programs, many of which require the participant to watch free educational videos on the State Attorney’s website.  
• The State’s Attorney for Brevard and Seminole County offers misdemeanor diversion—but the program is entirely funded at participant expense. The program fee is $360–$720 (depending on length of time); there is also a prosecution fee of $50, payment of restitution and investigation fees to law enforcement (where applicable), and the possibility of drug, alcohol, and mental health evaluation and treatment at participant expense.  

| The State's Attorney for Brevard and Seminole County offers misdemeanor diversion—but the program is entirely funded at participant expense. The program fee is $360–$720 (depending on length of time); there is also a prosecution fee of $50, payment of restitution and investigation fees to law enforcement (where applicable), and the possibility of drug, alcohol, and mental health evaluation and treatment at participant expense. |  
| Georgia | GA. CODE ANN. § 15-18-80 allows the prosecuting attorney for each judicial district to create and administer a pretrial intervention and diversion program. A program fee of up to $1,000* can be charged to the defendant, and restitution can also be ordered.  
• Cobb County’s diversion program charges an administrative fee of $200, restitution to victims, reimbursement for appointed attorney’s fees, a drug screening fee, and also indicates that the participant may be required to undergo drug and alcohol or mental health evaluations and treatment at their own expense.  
• Diversion in Cherokee County costs administrative program fee of $405*, up to $361 for drug and alcohol testing, and restitution; all these must be paid in full at the initial orientation. |  

421 Diversion Programs, State Att’y’s Off. for Orange and Osceola Cnys., https://www.sao9.net/diversion-programs.html [https://perma.cc/N5NL-VXYW].
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<td>Hawaii</td>
<td>HAW. REV. STAT. §§ 853-1, 853-4 authorize deferred acceptance of guilty and no contest pleas which functions as diversion. Hawaii law mandates a compensation fee is $35–55* for misdemeanors and $105–505* for felonies, imposition of a fine, and $75* or $150* in probation services fees (depending on whether the term of probation will be more or less than a year).</td>
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<tr>
<td>Idaho</td>
<td>IDAHO CODE § 19-3509 allows prosecuting attorneys to establish diversion programs for DUI charges in certain eligible cases. Participants are required to pay a diversion fee of $154.50*, an interlock ignition deposit of $15, as well as installation of an interlock ignition device 425 and, if the offense is drug-related, undergo twelve months of drug testing, all at participant’s expense.</td>
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<tr>
<td>Illinois</td>
<td>730 ILL. COMP. STAT. § 166/1 et seq. establishes a drug court diversion program; the “program shall include a regimen of graduated requirements [,] including but not limited to: fines, fees, costs, restitution.”426 730 ILL. COMP. STAT. § 167/1 et seq. establishes a veterans and service members treatment court, which includes diversion. 730 ILL. COMP. STAT. § 168/1 establishes a mental health court which includes diversion options. 730 ILL. COMP. STAT. § 166/25 (2017). Cook County has eight operational diversion programs—the three defined in statute above and an additional five deferred prosecution programs.427 One survey found that roughly half (26 of 54) prosecutor-led diversion programs in Illinois charged</td>
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participants program fees; program fees in one program ranged from $10 to $1,500.

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<th>Indiana</th>
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<tr>
<td>IND. CODE § 33–39–1–8 allows prosecutors to establish diversion programs for misdemeanors and low-level felons. Section 33–37–4–1 sets initial user fees for diversion at $50 (misdemeanors) or $75 (felonies) and then establishes a $20 monthly user fee and permits additional program fees and costs “reasonably related to the defendant’s rehabilitation.”</td>
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- Delaware County has a diversion program for low-level offenders; participants must pay deferred court costs of $164, a program fee of $125, a community service fee of $100, and a prosecutor’s office fee based on the grade of the charged offense $90 (class C misdemeanor), $170 (class B misdemeanor), $290 (class A misdemeanor), or $600–$1551 (level 5 & 6 felony offense).

- Johnson County has a diversion program for misdemeanors. The fee is $254 for a class C misdemeanor, $334 for a class B, and $454 for a class A. Participants may also have to pay for evaluation and treatment for “drugs, alcohol, anger control or domestic violence” and/or pay restitution.

- St. Joseph County has a diversion program for misdemeanor offenses; participants must pay a $170 “user’s fee” and $164 in court costs.

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429 Mueller v. State, 837 N.E.2d 198, 204–05 (Ind. Ct. App. 2005) (holding that prosecutor’s preclusion of defendants from participating in pretrial diversion program based solely on their asserted inability to pay the $230 in fees violated defendants’ rights to due process and equal protection under federal Constitution).


432 Pre-trial Diversion, ST. JOSEPH CNTY. PROSECUTING ATT’Y, https://www.sjciindiana.com/697/Pre-Trial-Diversion [https://perma.cc/NQ4B-LWXX].
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<tr>
<th>State</th>
<th>Description</th>
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| Iowa     | IOWA CODE § 907.3(1) allows for deferred adjudications which function as diversion, and requires imposition of a civil penalty equivalent to the fine required by §§ 903.1, 902.9, which amount to:  
- $105–$855 for simple misdemeanors,  
- $430–$2,560 for serious misdemeanors,  
- $855–$8,540 for aggravated misdemeanors,  
- $1,025–$10,245 for class D felonies, and  
- $1,370–$13,660 for class C felonies. |
| Kansas   | KAN. STAT. ANN. § 22-2907 allows for district attorneys to establish pretrial diversion programs and requires the participant pay a supervision fee of $60* (misdemeanor) or $120* (felony) and pay for any urinalysis testing. Section 22-2909 allows the diversion agreement to include payment of restitution, court costs, and diversion costs, and allows for diversion fees of up to $100. For DUI diversion, a fine between $750 and $1,000 is required, and for domestic violence diversion the participant must participate in an assessment and treatment at participant expense.  
City of Wichita has a several diversion programs including:  
- Traffic diversion with costs of $272 (low-level infractions) $322 (speeding over 15 mph);  
- First-time low-level offenses (e.g., petty theft, possession of marijuana, minor in possession) which costs $500;  
- DUI Diversion which costs $1,500. |

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433 KAN. STAT. ANN. § 21-6607(c)(3)(A) (Westlaw through 2022 Reg. Sess.).
434 KAN. STAT. ANN. § 8-1567(b)(1)(A) (Westlaw through 2022 Reg. Sess.) (outlining that community service can be substituted for the fine).
Jefferson County Attorney’s Office has a diversion program with the following costs:

- $208 for traffic cases
- $258 for class C misdemeanors
- $308 for class B misdemeanors
- $408 for class A misdemeanors, DUI first offense, and Domestic Battery
- $193 (court costs) plus $250-$1,000 (diversion fee) for felony offenses
- Additional costs may include fines, fingerprinting, urinalysis testing, lab fees, court appointed attorney’s fees, and restitution.

The Kansas Office of the Attorney General also has an established diversion program with a diversion fee of $400 due upon the filing of the agreement; court costs, fines, lab and urinalysis fees, as well as a possible $75 restitution monitoring fee may also apply.

Kentucky

KY. REV. STAT. ANN. § 533.250 allows for the establishment of pretrial diversion programs in each judicial circuit; the court “shall assess a diversion supervision fee* sufficient to defray all or part of the cost” of participation.

- Jefferson County Attorney’s Office offers DUI diversion for first time offenses. There is a $300 program fee (which must be paid in full within thirty days of entering the program) and court costs must also be paid.

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Louisiana lacks a statutorily created general pretrial diversion program, but many prosecutor-created diversion programs exist.\footnote{But see L.A. STAT. ANN. § 16:17(E) (Westlaw through 2021 Reg. Sess.), which acknowledges the existence of general pretrial diversion programs. See also LOUISIANA LEGISLATIVE AUDITOR, INFORMAL AUDIT OF DISTRICT ATTORNEY DIVERSION PROGRAMS (2020), https://app.lla.state.la.us/PublicReports.nsf/0/9C028732B72167D58625861C005FA272/$FILE/00021BED.pdf [https://perma.cc/E3E5-JE3X] (noting the existence of forty criminal, thirty-six DUI, and thirty-six traffic diversion programs).}

- The District Attorney’s Office for the 22d Judicial District offers a DUI diversion program with an enrollment fee of $1,500, a monthly supervision fee of $50, $30 fee for a victim impact panel, as well as drug/alcohol evaluation and treatment, an 8–14 week-long drug education program at participant expense, and an Alcohol Abuse Safe Driving education course, all at participant expense.\footnote{22ND JUD. DIST. DIST. ATT’Y’S OFF., APPLICATION FOR PRE-TRIAL INTERVENTION DIVERSION PROGRAM, https://damontgomery.org/wp-content/uploads/2015/04/DWIRequirements.pdf [https://perma.cc/YS8T-PELS].}

- Jefferson Parish District Attorney offers a variety of diversion programs; these require payment of an enrollment fee, and assessment fee, and “program participation fees, which exclude any fees for outside referral services.”\footnote{Adult Diversion, JEFFERSON PARISH DIST. ATT’Y’S OFF., https://www.jpda.us/departments/other/adult-diversion/ [https://perma.cc/UR7K-64UX].}

Maine

ME. STAT. tit. 17-A, § 1902 allows for deferred dispositions, which function as diversion, and allows for an administrative fee of up to $50 a month during the term of deferment.

Maryland

MD. CODE ANN., CRIM. PROC. § 6-220 allows a court to place a defendant on probation before judgement—allowing for diversion. Subsection (b)(2) of that provision permits a court to impose a fine, monetary penalty, or restitution as a condition of probation before judgement.

According to a 2016 Report about diversion in Maryland, the following courts had the following fees.
<table>
<thead>
<tr>
<th>County</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>for diversion (the report focused on drug court diversion):444</td>
</tr>
<tr>
<td></td>
<td>• Baltimore City District &amp; Circuit Courts have diversion programs without a fee,</td>
</tr>
<tr>
<td></td>
<td>• Frederick County has an alternative sentencing program with a $80 fee to participate,</td>
</tr>
<tr>
<td></td>
<td>• Harford County has a diversion program without a fee, but the participant must pay drug testing costs,</td>
</tr>
<tr>
<td></td>
<td>• Howard County has a diversion program where participants must pay $170 for a drug/alcohol education class and $15–$40 for drug testing,</td>
</tr>
<tr>
<td></td>
<td>• Montgomery County has a diversion program without a fee,</td>
</tr>
<tr>
<td></td>
<td>• Prince George’s County has a diversion program with a fee that varies depending on insurance coverage and other factors,</td>
</tr>
<tr>
<td></td>
<td>• Washington County has a program with a $15.45 insurance fee and any fees associated with the individual case programs and conditions,</td>
</tr>
<tr>
<td></td>
<td>• Worcester County has a program with no fee.</td>
</tr>
</tbody>
</table>

**Massachusetts**

<table>
<thead>
<tr>
<th>State</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>MASS. GEN. LAWS ch. 276A, §§ 1–12</td>
<td>establishes a pretrial diversion program, with § 10 establishing a diversion program for veterans and servicemembers of the military. Section 12 explicitly states that district attorneys (and police departments) have authority to establish diversion programs aside from the ones delineated by statute.</td>
</tr>
<tr>
<td>MASS. GEN. LAWS ch. 276B, §§ 1–5</td>
<td>establishes restorative justice programs that result in diversion.</td>
</tr>
<tr>
<td>Essex District Attorney’s Office</td>
<td>has a drug diversion program with no fees mentioned on the district attorney’s website description; drug treatment is provided in coordination with</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Location</th>
<th>Information</th>
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</thead>
<tbody>
<tr>
<td>Michigan</td>
<td>Mich. Comp. Laws § 333.7411 allows a court to defer judgment and place a defendant in a drug case on probation—functioning as diversion; the court “may order the individual to pay a fee” for the program and the participant “shall pay the costs of the screening, assessment, and rehabilitative services” if ordered.</td>
</tr>
<tr>
<td></td>
<td>• Kent County has a diversion program for non-violent offenses where the defendant has no previous felony conviction and no more than two misdemeanor convictions; participants must pay a $15 application fee, a $400 diversion fee, a $75 values class (if applicable), and restitution (if applicable).</td>
</tr>
<tr>
<td></td>
<td>• Wayne County has a felony diversion program for first-time offenders; beyond payment of restitution, there does not seem to be an additional fee for this program.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>State</th>
<th>Diversion Program Details</th>
</tr>
</thead>
</table>
| Minnesota   | MINN. STAT. § 401.065 directs the establishment of diversion programs by every county attorney participating in the Community Corrections Act.  
• Hennepin County has a diversion program for solicitation of prostitution diversion with a program costing $750. |
| Mississippi | MISS. CODE. ANN. § 99-15-105 authorizes district attorneys to establish pretrial intervention programs which function as diversion. Section 99-15-121 dictates that diversion requirements include full payment of restitution and expenses incurred by participation in the program.  
• The District Attorney’s Office in the 16th Circuit has a diversion program costing $1,200 (with $200 due at the time of enrollment)—if the participant fails out of the program, no fees are refunded; participants may also have to pay restitution, child support, and other court fines. |
| Missouri    | MO. REV. STAT. § 557.014 grants prosecuting attorney authority to create diversion programs.  
• Platte County has a diversion program for “first time, non-violent offenders” with a program fee of $300.  
• Jackson County has a diversion program called “NewStart 2020” that is funded by the Jackson County Legislature rather than solely by participants. |

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450 AMARA LEGAL CTR., supra note 109.  
451 But the Mississippi Supreme Court has previously held that conditioning diversion on payment can in certain circumstances violate an indigent defendant’s equal protection rights. See Moody v. State, 716 So.2d 562, 565 (Miss. 1998).  
452 DIST. ATT’Y’S OFF. FOR 16TH CIR. OF MISS., PRE-TRIAL DIVERSION 2, https://54506278-e7f9-4f1d-8967-4f7e899fe1d.filesusr.com/ugd/5e94df_6c05a3fa0b34cbda30f0c5b07af6.pdf [https://perma.cc/YKF9-YBM3].  
Montana

- Circuit Attorney’s Office of St. Louis also has a diversion program which receives federal grant funding, but also charges non-indigent participants a $30 monthly program fee.\(^{455}\)

- Missoula County has a drug court diversion program with a cost of up to $300 a month.\(^{456}\)

Nebraska

- The National Safety Council of Nebraska administers diversion programs in Douglas County (felonies) and in the City of Omaha (misdemeanors); the program cost is $250, $440, or $640 (depending on level of services and time in program) plus the cost of drug testing ($39 each test).\(^{457}\)

- Platte County has a diversion program for traffic offense and other offenses that costs $40 plus a $30 a month fee.\(^{458}\)

Nevada

- NEV. REV. STAT. §§ 174.031–.034 establishes a “preprosecution diversion program;” § 174.032(6) dictates that a defendant in the program “shall pay the cost of any program of treatment required by this section to the extent of his or her financial resources.”


\(^{458}\) Platte County Adult Diversion, PLATTE CNTY., https://plattecounty.net/webpages/adult_diversion/adult_diversion.html [https://perma.cc/RTP8-9ELM].
<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
</tr>
</thead>
</table>
| New Hampshire | The Clark County District Attorney’s Office has a Bad Check Diversion Unit; restitution and administrative costs are paid by the person accused of passing a fraudulent check.  
N.H. REV. STAT. ANN. § 490-G:2 authorizes drug courts, § 490-H:2 authorizes mental health courts, and both programs allow for diversionary dispositions.  
Merrimack County has a diversion program which has the following costs:  
- $200 (for violations),  
- $450 (misdemeanors),  
- $600 (felonies),  
- $375 FAST (First-Time Alcohol and Substance Abuse Training) |
| New Jersey   | N.J. STAT. ANN. § 2C:43-12 establishes a state-wide pretrial intervention program, primarily for first-time offenders. Section 2C:43-13.1 creates a conditional dismissal program, which functions as diversion; this program has a $75 application fee which can be waived based on indigency. |
| New Mexico  | The Pre-Prosecution Diversion Act, N. M. STAT. ANN. §§ 31-16a-1–16a-8 (2020) directs each district attorney to establish a preprosecution diversion program (PPD); restitution is required by § 31-16a-5(B).  
- The 12th Judicial District offers a PPD program which has a monthly fee of $85 for twelve months (total of $1,020), a $100 cost for a one-day course, restitution, costs for drug testing, and an eighty hour community service requirement (which can be replaced by a $580 donation). |

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<thead>
<tr>
<th>State</th>
<th>Details</th>
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<tbody>
<tr>
<td>New York</td>
<td>The 2nd Judicial District offers a program with a monthly fee of up to $85, but the fee will be waived for those with “an income at 200% or below of the federal poverty line.”[^462]</td>
</tr>
<tr>
<td></td>
<td>The 2nd Judicial District offers a program with a monthly fee of up to $85, but the fee will be waived for those with “an income at 200% or below of the federal poverty line.”[^462]</td>
</tr>
<tr>
<td>New York</td>
<td>N.Y. CRIM. PROC. LAW § 170.55 establishes a program for adjournment contemplating dismissal (ACD) and § 170.55 establishes a marijuana ACD program.</td>
</tr>
<tr>
<td></td>
<td>Chenango County has a traffic ticket diversion program which generally has a $200 application fee (some offenses like speeding twenty-one miles over the limit and cell phone use while driving have a $300 application fee).[^463]</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. GEN. STAT. § 15A-1341(a1)–(a6) establishes deferred prosecution and conditional discharge programs for certain offenses where defendants are placed on probation before judgment and the case is dismissed if the defendant complies with conditions of probation. Section 15A-1343 lays out conditions of probation, which include payment of a supervision fee of $40 a month unless exempted by the court, and to pay costs of court, fine, restitution, and the costs for appointed counsel.</td>
</tr>
<tr>
<td></td>
<td>City of Charlotte has a youth diversion program for misdemeanors which has no cost for participation.[^464]</td>
</tr>
<tr>
<td>North Dakota</td>
<td>N.D. R. CRIM. P. 32.2 allows for pretrial diversion agreements which may include a condition that a defendant make restitution, “pay to the court fees or costs allowed by law,” and “pay to others additional amounts as agreed upon by the parties.”</td>
</tr>
<tr>
<td></td>
<td>N.D. CENT. CODE. 12.1-29-07 allows sentences in purchasing prostitution cases to include an offender</td>
</tr>
</tbody>
</table>


education program and an order that the defendant pay the costs of the education program. There is a diversion program for those charged with purchasing prostitution which includes a $500 education program at participant expense.\footnote{N. D. ATT’Y GEN.’S OFF., DEMAND REDUCTION PROGRAM, https://attorneygeneral.nd.gov/sites/ag/files/documents/HTC-DemandReductionProgram.pdf [https://perma.cc/56L8-4TPA].}

| Ohio | OHIO REV. CODE ANN. § 2935.36 allows a prosecuting attorney to establish pretrial diversion programs for non-violent offenses; a condition of the diversion program is to “pay any reasonable fee for supervision services established by the prosecuting attorney.”

- Stow Municipal Court has a diversion program for underage consumption of alcohol charges that costs $550.\footnote{Underage Alcohol Consumption Diversion, STOW MUN. CT., https://stowmunicourt.com/info/underage-alcohol/ [https://perma.cc/GL27-GZHV].}
- A minor marijuana offense diversion program also costs $550.\footnote{Minor Marijuana Offense Diversion, STOW MUN. CT., https://stowmunicourt.com/info/marijuana/ [https://perma.cc/4FTN-C6H5].}
- City of Columbus has a diversion program for theft with no stated costs in press coverage.\footnote{Glenn McEntyre, Columbia Launches Diversion Program for Misdemeanor Theft, Shoplifting Cases, 10TV (Sept. 6, 2019, 6:44 PM), https://www.10tv.com/article/news/local/columbus-launches-diversion-program-misdemeanor-theft-shoplifting-cases-2019-sep/530-2125b617-5f56-4e0c-981e-3fe18c4718d9 [https://perma.cc/YP85-ZQ4M].}
- Wayne County Prosecutor’s Office has a Felony Diversion Program with a $500 supervision fee (which is due within two weeks of being accepted into the program); indigent defendants can pay $300 ($150 within two weeks, and the remaining $150 within six months).\footnote{WAYNE CNTY. PROSECUTOR’S OFF., THE WAYNE COUNTY PROSECUTOR’S OFFICE FELONY DIVERSION PROGRAM 3 (2020), https://www.countyprosecutor.com/sites/default/files/April%202020%20Full%20FDP%20Packet.PDF [https://perma.cc/L87S-Y7QE].}
- Licking County has a diversion program with minimum court costs of $83 and “a diversion supervision fee of $150;” participants may also be |

<table>
<thead>
<tr>
<th>Location</th>
<th>Requirement</th>
</tr>
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</table>
| Oklahoma     | OKLA. STAT. tit. 22, §§ 471–471.11 establishes drug and DUI courts with diversion programs. Upon successful completion, the court may waive payment of court costs, fees, fines, and driver license reinstatement fees. Section 305.1 also allows for deferred prosecution programs more generally.  
- Oklahoma has a statewide diversion program for individuals driving uninsured vehicles with a $174 enrollment fee. |
| Oregon       | OR. REV. STAT. §§ 813.200–813.270 et seq. establishes a DUI diversion program which costs $490 (filing fee), $150 (assessment fee), plus the cost of treatment.  
OR. REV. STAT. § 135.925 establishes a bad check diversion program with costs of restitution, a district attorney fee (of up to $35 for each check passed), and the cost of an education program provided by the district attorney. |
| Pennsylvania | 75 PA. CONS. STAT. § 3807 directs each court to establish and implement a program for “Accelerated Rehabilitative Disposition” for DUI offenses which is a diversion program.  
- Lancaster County has a DUI diversion program with a $600 processing fee; participants will also pay “a fine, court costs, a fee for [an] alcohol safe driving class, and a probation supervision fee.” |
| Rhode Island | 8 R.I. GEN. LAWS § 8-2-39.3 establishes a superior court diversion program for certain felony and misdemeanor cases. Participants are responsible for |

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<table>
<thead>
<tr>
<th>State</th>
<th>Description</th>
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<tbody>
<tr>
<td>South Carolina</td>
<td>S.C. CODE ANN. § 17-22-30 (2018) directs county solicitors to establish pretrial intervention programs, and § 17-22-30 sets a $100 application fee and a $250 participation fee; participants may be required to pay for costs of services but fees and costs can be waived based on indigency.</td>
</tr>
<tr>
<td></td>
<td>- The 11th Judicial Circuit has a diversion program for first-time non-violent offenders which costs at least $350\textsuperscript{475} and a program for low-level traffic offenses which costs at least $280.\textsuperscript{476}</td>
</tr>
<tr>
<td></td>
<td>- The Fifth Judicial Circuit Solicitor’s Office has a pre-trial intervention program with a $100 application fee, a $250 participation fee, a $250 expungement fee, and a filing fee of $35; the participant must pay restitution if applicable.\textsuperscript{477}</td>
</tr>
<tr>
<td>South Dakota</td>
<td>S.D. CODIFIED LAWS §§ 23A-3-35, 23A-3-36 allow for the creation of diversion programs and state no required costs to defendants for participation in diversion.</td>
</tr>
<tr>
<td></td>
<td>- Pennington County has a Young Adult Diversion program with no fee to participate.\textsuperscript{478}</td>
</tr>
<tr>
<td>Tennessee</td>
<td>TENN. CODE ANN. § 40-15-105 establishes a diversion program for first-time offenders; participants must pay court costs and $10–$35 monthly fee during the period of diversion.</td>
</tr>
<tr>
<td>Texas</td>
<td>TEX. GOV’T CODE ANN. §§ 411.071–411.0775. establishes a deferred judgment program which functions as diversion.</td>
</tr>
</tbody>
</table>

\textsuperscript{474} R. I. SUPER. CT., DIVERSION PROGRAM 2 (2021), https://www.courts.ri.gov/Courts/SuperiorCourt/PDF/DiversionProgramInformation.pdf [https://perma.cc/86ZZ-MMLN].

\textsuperscript{475} Pre-Trial Intervention (PTI), SC.GOV, https://solicitor11.sc.gov/diversion-programs/PTI [https://perma.cc/2DVW-6XC6].

\textsuperscript{476} Traffic Education Program (TEP), SC.GOV, https://solicitor11.sc.gov/diversion-programs/TEP [https://perma.cc/6J3V-AXDM].

\textsuperscript{477} Pre-Trial Intervention Program, FIFTH JUD. CIR. SOLIC.’S OFF., https://www.sc.solicitor5.org/diversion-programs/pre-trial-intervention-program/ [https://perma.cc/T7D2-WA95].

\textsuperscript{478} Young Adult Diversion, PENNCO, https://www.penco.org/?SEC=A9FFB723-B72B-4B8E-8B52-9FF841E1067B [https://perma.cc/EK45-49KP].
- Comal County has a diversion program with a $60 monthly supervision fee and an initial fee of $100 (misdemeanors) or $200 (felonies).\(^\text{479}\)
- Travis County has a DUI diversion program with a $55 fee.\(^\text{480}\)
- Harrison County is planning a diversion program for first-time offenders charged with misdemeanors which will cost $250 upfront and a $60 monthly supervision fee (three months must also be paid up front).\(^\text{481}\)

<table>
<thead>
<tr>
<th>Utah</th>
<th>UTAH CODE ANN. § 77-2-5 allows for diversion programs, and allows for imposition of a diversion fee that may not exceed the suggested fine for the offense (and can be waived based on an ability to pay), and requires the imposition of restitution where applicable.</th>
</tr>
</thead>
</table>
|               | • Salt Lake City has a diversion program for solicitation of prostitution with a $350 program fee.\(^\text{482}\)  
|               | • Salt Lake County has a second chance diversion program for first-time offenders (which excludes DUIs and violent or sexual offenses) which includes six free hour-long classes.\(^\text{483}\)  
|               | • Utah County has a second chance diversion program with a $35 monthly supervision fee.\(^\text{484}\) |


\(^\text{480}\) Pre-trial Diversion, TRAVIS CNYT., https://www.traviscountytx.gov/county-attorney/criminal-trial/pre-trial-diversion [https://perma.cc/9T5R-X9S8].


\(^\text{482}\) AMARA LEGAL CTR., supra note 109. But see id. at 103 (“Judges no longer recommend/sentence individuals to the Johns Program because it’s unclear how the private counseling services really work”).


\(^\text{484}\) Id.
<table>
<thead>
<tr>
<th>State</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vermont</td>
<td>VT. STAT. ANN. tit. 3, § 164 authorizes the Attorney General to develop and administer an adult diversion program in all counties; participants are required to pay a fee not to exceed $300 (and will be adjusted based on ability to pay).</td>
</tr>
</tbody>
</table>
|            | - Lamoille County has a diversion program which has a diversion fee of $300 (felony) or $175 (misdemeanor); an additional $5 service fee is imposed for online payments.  
  |            | - Orange County’s diversion program has a program fee that ranges from $100 to $300; “[p]ayment plans, sliding scale and fee waivers are available.” |
| Virginia   | VA. CODE ANN. § 18.2-251 allows for deferred prosecution in first-time drug offenses; the defendant is required to obtain a substance abuse assessment to determine appropriate drug treatment and “pay all or part of the costs” of the program, including drug testing (unless determined to be indigent). |
| Washington | WASH. REV. CODE §§ 10.05.010–.190 allows for deferred prosecution of misdemeanors; § 10.01.160(2) sets a maximum cost administrative fee for deferred prosecution at $250.* Section 10.05.170 allows courts in granted deferred prosecution to order supervision and levy a monthly assessment fee (up to $100) upon the defendant.  
  |            | - Section 9A.88.120 allows the imposition of an additional fee for individuals charged with permitting prostitution who are given deferred prosecution; the additional fee is $1,500 for first-time offenders, $2,500 for second-time offenders, and $5,000 for those with two or more prior convictions. |

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487 See also WASH. REV. CODE ANN. § 10.64.120(1) (LexisNexis, Lexis through 2022 Reg. Sess.) (setting maximum monthly assessment fee at $100).
| Kitsap County | Kitsap County has a felony diversion program with a program fee of $850.\(^{488}\)  
| Clark County and Snohomish County both have diversion programs with an unspecified program fee.\(^{489}\) |

### West Virginia

W. VA. CODE ANN. § 61-11-22 allows prosecutors to enter into pretrial diversion agreements, while § 61-11-22a(a) allows for deferred adjudication of misdemeanor and felony charges. Deferral for DUI cases is available for first time low-level offenders pursuant to § 17C-5-2b—this DUI diversion requires payment of $100–$500 in court costs\(^{490}\) and participation in an interlock ignition program for at least 165 days (installation of $50–$200, monthly rental fee of $50–$100).\(^{491}\)

### Wisconsin

Wis. STAT. ANN. § 165.95 establishes a state-run grant program to provide funding for diversion programs for defendants who abuse alcohol or drugs.

- Washburn County has a Drug and Alcohol Court with a fee of $750; this can be reduced to $375 through performance of 37.5 hours of community service.\(^{492}\)
- Dane County has a deferred prosecution program which has no fee, but “treatment, counseling, and

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488 *Felony Diversion Eligibility Criteria, KITSAP CNTY.*, https://www.kitsapgov.com/pros/Pages/FelonyDiversion.aspx [https://perma.cc/VW8Y-F5FK].


490 See W. VA. CODE ANN. § 17C-5-2b(h) (West, Westlaw through 2022 Reg. Sess.) (citing § 17C-5-2(e)).


educational program expenses are the defendant’s responsibility.\textsuperscript{493} • St. Croix County’s pretrial diversion program has a fee of $160, and payment of restitution (where applicable).\textsuperscript{594}

\begin{table}[h]
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\begin{tabular}{|l|l|}
\hline
\textbf{Wyoming} & WYO. STAT. ANN. § 7-13-301 allows for deferred judgment of first-time offenders—functioning as a post-plea diversion program. The only financial statutory requirement is payment of restitution. \hline
 & • Albany County, which includes Laramie, offers a diversion program for “college-aged adults” charged with low-level offenses. The program requires payment of a $200 fee.\textsuperscript{495} \\
\hline
\end{tabular}
\end{table}

APPENDIX B: COSTS OF EXPUNGEMENT\textsuperscript{496}

This Appendix tabulates the real costs of “expungement” in each state based on the state’s general expungement statute and administrative requirements. For the purposes of this Appendix, “expungement” includes sealing, conviction set aside, and dismissal remedies commonly referred to as “expungements” even when they are not indeed traditional expungements. Often there are specialty expungement schemes, for example, marijuana expungement or expungement for victims of sex trafficking. Those specialty expungement schemes are not included in this appendix. If the statute contains no mention of the filing fee or other costs, that is noted with (“—”). A $0 for the costs by statute indicates an affirmative statement that there are to be no filing fees. In some cases, pricing is different for conviction and non-conviction dispositions; in those situations, the table indicates the pricing for expungement of a conviction. This table also indicates whether the statutory costs associated with an expungement can be waived based on indigence (*). This table does not include incidental costs like postage or the

\textsuperscript{493} Deferred Prosecution Program, CNTY. OF DANE, https://da.countyofdane.com/DA-Units/Deferred-Prosecution-Program [https://perma.cc/8NJP-3ZK7].

\textsuperscript{494} Pretrial Diversion: Program Tracks Offered, ST. CROIX CNTY., https://www.sccwi.gov/299/Program-Tracks-Offered [https://perma.cc/S4UC-U6XF].


\textsuperscript{496} All statutes within this appendix are current through 2021 State Legislative Sessions unless otherwise listed.
cost to get a certified check or a credit card fee to pay a filing fee. The table also includes the costs of criminal record checks even when they are not statutorily required because they are often needed in order to get case information necessary to fill out expungement paperwork or assess eligibility.

Some expungement schemes require payment of all economic sanctions included in the criminal sentence before the grant of an expungement. Other schemes require the court to consider as a factor in the exercise of its discretion whether the petitioner has paid all economic sanctions included in the criminal sentence. Further detail of these mechanisms is designated as follows:497

Π Explicit statutory mandate of payment economic sanctions in order to be eligible
ζ Requirement that all terms of sentence be “completed,” “discharged,” or “satisfied” to be eligible
Ψ Enumerated factors to be considered for the discretionary grant of expungement include whether the terms of the sentence have been “completed,” “discharged,” “satisfied,” or “complied” with
Φ Court’s authority is sufficiently expansive as to allow for the existence of ongoing criminal debt to be the determining factor for expungement
Ω Expungement only available for non-conviction records, generally rendering criminal debt moot as to the offense
Δ Affirmative statement that expungement shall not be denied based on failure to pay economic sanctions (except restitution which can still be the basis for a denial)
Ξ Sentencing conditions must be satisfied, aside from financial sanctions not paid due to indigence
€ Law or policy unclear as to whether criminal debt can be considered in determining whether to grant expungement

497 This appendix is informed in large part by that in Beth A. Colgan, Wealth-Based Penal Disenfranchisement, 72 VAND. L. REV. 55, 154 app. (2019). The author also thanks Professor Colgan for the suggestion to include an appendix to this article for a more comprehensive accounting.
<table>
<thead>
<tr>
<th>State</th>
<th>Primary Expungement Statute</th>
<th>Costs Set by Statute</th>
<th>Additional Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>ALA. CODE § 15-27-1 to 21.</td>
<td>$500, $498</td>
<td>• Fingerprinting</td>
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<tr>
<td></td>
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<td>(varies)</td>
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<td></td>
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<td></td>
<td>• Background</td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Check ($25)</td>
</tr>
<tr>
<td>Alaska</td>
<td>No general expungement law</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Arizona</td>
<td>ARIZ. REV. STAT. ANN. § 13-905</td>
<td>$0, $503</td>
<td>• Payment history</td>
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<tr>
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<td>document</td>
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<td>($30)</td>
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<tr>
<td>Arkansas</td>
<td>ARK. CODE ANN. § 16-90-1401 to 1419.</td>
<td>$0, $506 $507</td>
<td>• Fingerprinting</td>
</tr>
<tr>
<td></td>
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<td>(varies)</td>
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<td></td>
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<td>Background</td>
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<td></td>
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<td>Check ($24)</td>
</tr>
</tbody>
</table>

502 This is the provision for a conviction set aside; there is no true expungement in Arizona for general offenses. There is expungement for simple marijuana possession cases that was recently enacted. See ARIZ. REV. STAT. ANN. § 36-2862 (2020).
505 ARK. CODE ANN. § 16-90-1401 to 1419 (Lexis through 2021 Reg. Sess.).
506 ARK. CODE ANN. § 16-90-1419 (Lexis through 2021 Reg. Sess.).
507 ARK. CODE ANN. § 16-90-1405(a) (Lexis through 2021 Reg. Sess.) (describing eligibility for sealing of misdemeanor or violation records).
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| California | CAL. PENAL CODE §§ 1203.4; 1203.4a | Up to $150\textsuperscript{509} (varies by county), $ \Phi | • Fingerprinting (varies)  
• Background Check ($25)\textsuperscript{510}  
• See CAL. PENAL CODE § 1203.4(d) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.). |
| Colorado   | COLO. REV. STAT. ANN. § 24-72-701 to 720 | $65 or $224,\textsuperscript{511} \Omega | • Criminal History Search to obtain case and arrest numbers ($5 each)\textsuperscript{513}  
• Copies of Court Documents ($0.75 a page)\textsuperscript{514}  
• Certification fee ($20)\textsuperscript{515}  
| Connecticut| CONN. GEN. STAT. ANN. § 54-142a et seq. | $0,\textsuperscript{516} Ω | • Sherrif Processing ($75)\textsuperscript{517}  
• Fingerprinting ($15)\textsuperscript{518}  

\textsuperscript{509} This fee is paid upon the denial or grant of the dismissal (California’s equivalent of an expungement) rather than as an up-front cost. See CAL. PENAL CODE § 1203.4(d) (West, Westlaw through Ch. 770 of 2021 Reg. Sess.).

\textsuperscript{510} A background check is not generally required for an expungement but may be needed to determine the case number for the petition. See Clean Your Record, JUD. COUNCIL CAL., https://www.courts.ca.gov/1070.htm?rdeLocaleAttr=en [https://perma.cc/6MNU-HKED]. If required, a background check costs $25. See Criminal Records - Request Your Own, STATE OF CAL. DEP’T OF JUST., https://oag.ca.gov/fingerprints/record-review [https://perma.cc/MSG7-46XR].

\textsuperscript{511} See COLO. REV. STAT. §§ 24-72-705(f)(2)(A), 24-72-706(1)(h) (Lexis through Ch. 17 of 2022 Reg. Sess.) (indicating $65 fee). Interestingly, the instructions on filing the petition indicate a filing fee of $224. See COLO. STATE CTS., INSTRUCTIONS TO SEAL ARREST AND CRIMINAL RECORDS (2019), https://bit.ly/3Dg8FFe [https://perma.cc/Y6EE-D8H8].

\textsuperscript{512} See COLO. REV. STAT. § 24-72-706(e) (Lexis through Ch. 17 of 2022 Reg. Sess.).

\textsuperscript{513} See COLO. STATE CTS., supra note 511; see also COLO. BUREAU OF INVESTIGATION, https://www.cbirecordscheck.com/Individual_New.aspx [https://perma.cc/Y9F5-6453].

\textsuperscript{514} See COLO. STATE CTS., supra note 511.

\textsuperscript{515} Id.

\textsuperscript{516} CONN. GEN. STAT. § 54-142a(e)(2) (2017); see also 2021 Conn. Legis. Serv. P.A. 21-32 (S.B. 1019) (West) (effective 2023 and retaining $0 filing fee).


\textsuperscript{518} Id.
<table>
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<tr>
<th>State</th>
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<th>Additional Costs</th>
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<tbody>
<tr>
<td>Delaware</td>
<td>tit. § 4371 et seq.</td>
<td>$75, \textsuperscript{519} $ \textsuperscript{520}</td>
<td>Fingerprinting &amp; Background Check ($52.50)\textsuperscript{521}</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>§ 16-801 et seq.</td>
<td>$75, \textsuperscript{522} \textsuperscript{523}</td>
<td>Background Check ($7)\textsuperscript{523}</td>
</tr>
<tr>
<td>Florida</td>
<td>§§ 943.0585, 943.059</td>
<td>$75, \textsuperscript{524} \textsuperscript{525}</td>
<td>Fingerprinting (varies)\textsuperscript{525}</td>
</tr>
</tbody>
</table>


\textsuperscript{520} Del. Code Ann. tit. 11 § 4372(l) (Lexis through 83 Del. Laws, c. 280) (allowing judge to waive economic sanctions or convert to civil judgment if non-payment is due to reasons other than “willful noncompliance” if the petitioner is otherwise eligible for expungement).


\textsuperscript{522} No filing fee mentioned in statute or court website, and the author confirmed there is no filing fee in telephone call with D.C. Superior Court (202) 879-1362 on Dec. 6, 2021.


\textsuperscript{524} This is the cost of the required Certificate of Eligibility from the Department of Law Enforcement. See Fl. Stat. § 943.0585(2)(a)(4) (2019).

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<th>Law or Act</th>
<th>Disposition (varies)</th>
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<td>Georgia</td>
<td>GA. CODE ANN. § 35-3-37</td>
<td>Up to $50,(^527) ζ</td>
<td>Processing fee ($35 first time or $50 after)(^529)</td>
</tr>
<tr>
<td>Hawaii</td>
<td>HAW. REV. STAT. ANN. §§ 831-3.2, 853-1, 706-622.5</td>
<td>ζ*(^528)</td>
<td>Certified copies of dismissal record and other court documents (varies)(^530)</td>
</tr>
<tr>
<td>Idaho</td>
<td>IDAHO CODE ANN. § 19-2604(1)</td>
<td>–, Φ</td>
<td>Background Check and Fingerprinting ($20)(^531)</td>
</tr>
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\(^528\) See HAW. REV. STAT. §§ 853-1, 706-622.5 (2020) (describing requirements for deferred judgement diversion programs which allow expungement eligibility).


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<th>State</th>
<th>Fee Schedule</th>
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<td>Illinois</td>
<td>20 ILL. COMP. STAT. § 2630/5.2</td>
<td>$60, $532 Δ $533 Fee to Illinois State Police for Expungement Order ($60)</td>
</tr>
<tr>
<td>Indiana</td>
<td>IND. CODE § 35-38-9-0.5</td>
<td>$0, $535 II $536 Background Check ($17)</td>
</tr>
<tr>
<td>Iowa</td>
<td>IOWA CODE §§ 901C.3; 907.9(4)</td>
<td>$538 II $539 Background Check ($15)</td>
</tr>
</tbody>
</table>

- IND. CODE § 35-38-9-1(c) (2019).
- Statute does not list a filing fee amount. However, the author contacted clerks by telephone in both Polk and Johnson County Court clerk’s offices on Dec. 6, 2021, to confirm that applications can be filed without payment of a filing fee.
- IOWA CODE §§ 903C.3(1)(d) (for misdemeanor convictions), 907.9(4)(b) (for deferred judgment cases).
- IOWA CODE §§ 907.14, 902.9, 903.1 (Lexis through 2021 Reg. Sess.).
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<td>Kansas</td>
<td>KAN. STAT. ANN. §§ 21-6614, 22-2410</td>
<td>$176&lt;sup&gt;542&lt;/sup&gt;</td>
<td>Docket fee of up to $19 per case&lt;sup&gt;543&lt;/sup&gt;</td>
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<tr>
<td>Kentucky</td>
<td>KY. REV. STAT. §§ 431.073–.0795</td>
<td>$100 for misdemeanors,&lt;sup&gt;544&lt;/sup&gt; $300 for felonies&lt;sup&gt;545&lt;/sup&gt;</td>
<td>Fee for Certificate of Eligibility for expungement ($40)&lt;sup&gt;546&lt;/sup&gt;</td>
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<tr>
<td>Louisiana</td>
<td>LA. CODE CRIM. PROC. ANN. art. 971–996</td>
<td>Up to $550,&lt;sup&gt;547&lt;/sup&gt; Additional $50 for those convicted of driving while intoxicated&lt;sup&gt;548&lt;/sup&gt;</td>
<td>Background check ($26–$50)&lt;sup&gt;549&lt;/sup&gt;</td>
</tr>
<tr>
<td>Maine</td>
<td>No general expungement law</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>Maryland</td>
<td>MD. CODE ANN., CRIM.</td>
<td>$0&lt;sup&gt;550&lt;/sup&gt; (for non-guilty dispositions),</td>
<td>Filing Fee for expungements of eligible guilty</td>
</tr>
</tbody>
</table>

<sup>542</sup> KAN. STAT. ANN. § 22-2410(b)(3)(A) (Lexis through 2022 Reg. Sess.) (for non-conviction records), § 21-6614(g)(2) (for diversion and conviction records).  
<sup>543</sup> KAN. STAT. ANN § 21-6614(g)(2) (Lexis through Feb. 25, 2022) (for diversion and conviction cases only).  
<sup>544</sup> KY. REV. STAT. ANN. § 431.078(7) (LexisNexis, Lexis through Feb. 6, 2022).  
<sup>545</sup> KY. REV. STAT. ANN. § 431.073(10)–(11) (LexisNexis, Lexis through Feb. 6, 2022) (the filing fee is $50 but if the expungement is granted, an additional $250 shall be charged and must be paid within eighteen months).  
<sup>546</sup> KY. REV. STAT. ANN. § 431.079(1); see also Expungement Certification Process, KY. CT. OF JUST. (2021), https://kycourts.gov/AOC/Information-and-Technology/Pages/Expungement.aspx [https://perma.cc/6CR9-6NX2] (listing the fee as $40).  
<sup>547</sup> LA. CODE CRIM. PROC. ANN. art. 983(A) (Westlaw through 2021 Reg. Sess.).  
<sup>548</sup> LA. CODE CRIM. PROC. ANN. art. 984(C) (Westlaw through 2021 Reg. Sess.).  
<sup>550</sup> MD. CODE ANN., CRIM. PROC. §§ 10-103.1(f); 10-104(b) (West, Westlaw through Joint Resolution 1, 2022 Reg. Sess.).
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<tr>
<th>State</th>
<th>Law/Rule Reference</th>
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<th>Disposition Fee</th>
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<tbody>
<tr>
<td>Massachusetts</td>
<td>MASS. GEN. LAWS ch. 276, §§ 100a–100u</td>
<td>$30*</td>
<td>–</td>
<td>• Fingerprinting &amp; Background Check ($20)</td>
</tr>
<tr>
<td>Michigan</td>
<td>MICH. COMP. LAWS §§ 780.621–780.624</td>
<td>$50</td>
<td>–</td>
<td>• Background Check using ICHAT ($10) • Fingerprinting (varies) • Certified record of convictions (varies)</td>
</tr>
</tbody>
</table>


552 See Fingerprinting Services, MD. DEP’T. OF PUB. SAFETY, https://www.dpscs.state.md.us/publicservs/fingerprint.shtml [https://perma.cc/5KDL-YK7L]. A background check is not required but may be necessary to identify charges and convictions to be expunged. See Md. JUDICIARY, EXPUNGEMENT: INFORMATION ABOUT REMOVING CRIMINAL AND CIVIL OFFENSE OR INFRACTION 12 (2021), https://mdcourts.gov/sites/default/files/court-forms/ccdcr072br.pdf [https://perma.cc/T7U9-GVS7].

553 MASS. GEN. LAWS ch. 276, § 100G(d)-(e) (2020).

554 A copy of one’s criminal record is recommended but not required with the expungement petition. See Request to Seal Your Criminal Record, COMMONWEALTH OF MASS., https://www.mass.gov/how-to/request-to-seal-your-criminal-record [https://perma.cc/M235-NR6K]; see also MASS. DEP’T OF CRIM. JUST. INFO. SERVS., CRIMINAL OFFENDER RECORD INFORMATION (CORI) PERSONAL REQUEST FORM, https://www.mass.gov/doc/adult-personal-request-form/download [https://perma.cc/F46A-3TWL] (noting $25 fee which can be waived for indigency).

555 MICH. COMP. LAWS § 780.621d(9) (2022) (this fee goes to the department of state police so that they can do a fingerprint-based background check).

556 MICH. COMP. LAWS ANN. § 780.621d(13) (2022).

<table>
<thead>
<tr>
<th>State</th>
<th>Statute References</th>
<th>Fee(s)</th>
<th>Additional Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minnesota</td>
<td>MINN. STAT. §§ 609a.01–609a.04</td>
<td>$285,558Ψ559</td>
<td>• Background Check ($8 for state, $33 FBI and state)560 • Fingerprinting ($10)561</td>
</tr>
<tr>
<td>Mississippi</td>
<td>MISS. CODE. ANN. §§ 99-19-71 to 72</td>
<td>$150,562Π563Φ</td>
<td></td>
</tr>
<tr>
<td>Missouri</td>
<td>MO. REV. STAT. § 610.140</td>
<td>$250,564Π565</td>
<td>• Background Check ($14-20)566</td>
</tr>
<tr>
<td>Montana</td>
<td>MONT. CODE ANN. §§ 46-18-1102 to 1111</td>
<td>–,567</td>
<td>• Fingerprinting (varies)568</td>
</tr>
</tbody>
</table>

558 MINN. STAT. § 609A.03(1) (2021); MINN. STAT. § 357.021(2)(1) (2021). There is a process through the prosecutor’s office if a person seeking expungement gets prosecutor approval that has no associated costs. See MINN. STAT. § 609A.025 (2021).

559 The court is required to consider, among other factors, “the amount, if any, of restitution outstanding, past efforts made by the petitioner toward payment, and the measures in place to help ensure completion of restitution payment after expungement of the record if granted.” MINN. STAT. § 609A.03(5)(11) (2021).


561 Id.


563 MISS. CODE. ANN. § 99-19-71(2)(a) (Lexis through Mar. 3, 2022) (for felony convictions only; no statutory requirement for misdemeanor conviction expungements).

564 Mo. Rev. Stat. § 488.650 (Lexis through 2021 1st Extraordinary Sess.).


566 Criminal history record is not required but is often needed to accurately fill out the expungement petition. See Criminal Record Check, MO. STATE HIGHWAY PATROL, https://apps.mshp.dps.mo.gov/MSHIPWeb/PatrolDivisions/CRID/crimRecChk.html [https://perma.cc/4EWV-FGJ].

567 MONT. CODE ANN. § 46-18-1107 (Lexis through 2021 Sess.) (requiring completion of sentencing terms “including payment of any financial obligations” or a collateral consequence on military service for a presumption in favor of expungement to apply).

568 MONT. CODE ANN. § 46-18-1104(3) (Lexis through 2021 Sess.) (requiring fingerprinting as part of the process of petitioning for expungement).
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<tr>
<th>State</th>
<th>Statute</th>
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<tbody>
<tr>
<td>Nebraska</td>
<td>NEB. REV. STAT. §§ 29-2264, 29-3523</td>
<td>- $15.50 Background check, Probation fees, Enrollment ($30), Monthly ($25-35), Drug testing, electronic monitoring and other service fees (varies)</td>
</tr>
<tr>
<td>Nevada</td>
<td>NEV. REV. STAT. §§ 179.2405–179.301</td>
<td>- Court filing fees (varies, e.g. $50, $100, $255, $245), State Background</td>
</tr>
</tbody>
</table>

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569 NEB. REV. STAT. § 29-2264(1)–(3) (2021).
571 Expungement in Nebraska is generally reserved for cases where defendants successfully completed probation or deferred judgement programs supervised by probation. See NEB. REV. STAT. §§ 29-2262.06(1), (3) (2005); see also NEB. REV. STAT. § 29-2293 (2019) (requiring same administrative and programming fees for deferred judgement cases).
573 There is a statutory presumption that records should be sealed if the applicant satisfies statutory requirements, unless the applicant was dishonorably discharged from probation. NEV. REV. STAT. § 179.2445 (2019); see also Matter of Tiffee, 485 P.3d 1249, 1251 (Nev. 2021) (presuming petitioner eligible based on compliance with statutory criteria).
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<th>State</th>
<th>Statute</th>
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<tr>
<td>New Hampshire</td>
<td>N.H. REV. STAT. ANN. § 651:5</td>
<td>$300, $157–158</td>
<td>• SCOPE (criminal history from law enforcement agency that arrested petitioner on charge seeking to be expunged) ($11) 576</td>
</tr>
<tr>
<td>New Jersey</td>
<td>N.J. STAT. ANN. §§ 2c:52-1 to 32.1</td>
<td>$0, $25</td>
<td>• Fingerprint Based Background</td>
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578 N.H. REV. STAT. ANN. § 651:5(III) (Westlaw through Ch. 5 of 2022 Reg. Sess.).


581 Id. § 2C:52-1(a)(2) (West, Westlaw through L.2021, c.400 & J.R. No. 9).
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*Not required but recommended by legal services providers.

**See, e.g., N.M. First Jud. Dist. Ct., General Information About Expunging Arrest Records and Court Records Conviction 4, https://realfile3016b036-bbd3-4ec4-ba17-7539841fd19.s3.amazonaws.com/c5cafd18-0d2a-4a88-840e-29f09c00ec07?AWSAccessKeyId=AKIAIMZX6TNBAOLKC6MQ&Expires=1647895279&Signature=bdYs5IG%BhkrE5oSxeCPT0NUqo%3D&response-content-disposition=inline%3B%20filename%3D%22Expungement%20Conviction.pdf%22&response-content-type=application%2Fpdf [https://perma.cc/37W5-4EPR].

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584 See, e.g., N.M. First Jud. Dist. Ct., General Information About Expunging Arrest Records and Court Records Conviction 4, https://realfile3016b036-bbd3-4ec4-ba17-7539841fd19.s3.amazonaws.com/c5cafd18-0d2a-4a88-840e-29f09c00ec07?AWSAccessKeyId=AKIAIMZX6TNBAOLKC6MQ&Expires=1647895279&Signature=bdYs5IG%BhkrE5oSxeCPT0NUqo%3D&response-content-disposition=inline%3B%20filename%3D%22Expungement%20Conviction.pdf%22&response-content-type=application%2Fpdf [https://perma.cc/37W5-4EPR].


587 See N.Y. Crim. Proc. Law § 160.59(7) (McKinney, Westlaw through 2022) (listing factors to be considered).


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<td>North Carolina</td>
<td>N.C. GEN. STAT. § 15A-145.5</td>
<td>$175,</td>
<td>• Background Check and Fingerprinting ($14)(^{591})</td>
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<tr>
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<td>(\text{\textit{\textsuperscript{b}}}^{590})\Pi(^{591})</td>
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<tr>
<td>North Dakota</td>
<td>N.D. CENT. CODE §§ 12-60.1-01 to -04</td>
<td>(\text{\textit{\textsuperscript{-}}}^{594})\Pi(^{594})</td>
<td>• Record Check ($15)(^{595})</td>
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<tr>
<td>Ohio</td>
<td>OHIO REV. CODE ANN. §§ 2953.31–.36</td>
<td>$50,</td>
<td>• Fingerprinting ($22)(^{598})</td>
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<tr>
<td></td>
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<td>(\text{\textit{\textsuperscript{c}}}^{597})\Pi(^{597})</td>
<td></td>
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<tr>
<td>Oklahoma</td>
<td>OKLA. STAT. tit. 22, § 18</td>
<td>(\text{\textit{\textsuperscript{-}}}^{599})\Pi(^{599})</td>
<td>• Background Check and Fingerprinting ($19)(^{600})</td>
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\(^{590}\) N.C. GEN. STAT. § 15A-145.5(g) (Lexis through 2021 Reg. Sess.)

\(^{591}\) Id. § 15A-145.5(c3)(5) (requiring a finding that no restitution remains outstanding before a grant can be given).

\(^{592}\) Recommended but not required. See Personal Review, N.C. STATE BUREAU INVESTIGATION, https://www.ncsbi.gov/Services/Background-Checks/Personal-Review [https://perma.cc/L7FX-HJMC].

\(^{593}\) Statute does not set a fee, and telephone call with the District Court Clerk’s office for Cass County indicated there is no filing fee for the petition to deal in that court. Telephone Interview with District Court Clerk, Cass Cnty. (Dec. 8, 2021). It was perhaps less promising that there were no court forms on the North Dakota Court’s website and that the clerk did not know offhand whether there was a filing fee indicating petitions to seal are not filed frequently.

\(^{594}\) N.D. CENT. CODE § 12-60.1-04(1)(c)–(d) (Lexis through 2021 Spec. Sess.) (requiring restitution be paid and terms of probation completed).

\(^{595}\) Not required, but recommended to locate records. See id. § 12-60-16.9 (setting fee at $15).

\(^{596}\) OHIO REV. CODE ANN. § 2953.32(C)(3) (West 2021).

\(^{597}\) Id. § 2953.32(C)(1); see also State v. Aguirre, 41 N.E.3d 1178, 1182 (Ohio 2014) (interpreting “final discharge” of sentence which triggers statutory waiting period as requiring payment of restitution—thus rendering payment of restitution an eligibility requirement for expungement).


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<th>Fee</th>
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<td>Oregon</td>
<td>• Court filing fee (apx. $175)&lt;sup&gt;601&lt;/sup&gt;</td>
<td>$281&lt;sup&gt;604&lt;/sup&gt; $5605</td>
<td>• Fingerprinting (varies)</td>
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<td>• Processing fee paid to Ohio State Bureau of Investigation ($150)&lt;sup&gt;602&lt;/sup&gt;</td>
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<td>• Fee to Department of State Police ($80)&lt;sup&gt;606&lt;/sup&gt;</td>
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<td>• Process fee paid to local law enforcement agency ($150)&lt;sup&gt;603&lt;/sup&gt;</td>
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<sup>606</sup> OR. REV. STAT. ANN. § 137.225(2)(c) (2022).
Pennsylvania

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Rhode Island

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<td>• Bureau of Criminal Identification Report ($5)614</td>
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</table>

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607 42 PA. CONS. STAT. § 1725.7(a) (2016).

608 18 PA. CONS. STAT. § 9122.1(a) (2016) (directing that a petition may not be granted “unless the person who filed the petition, upon payment of all court-ordered restitution, also paid the fee previously authorized to carry out the limited access and clean slate limited access provisions.”).

609 Recommended, not required. See PENN. STATE POLICE, REQUEST FOR CRIMINAL RECORD CHECK FORM SP4-170 (2017), https://www.psp.pa.gov/Documents/Public%20Documents/criminal_history/CRC%20Request%20SP%204-164.pdf [https://perma.cc/MGZ6-X6MF].


611 The statute does not set a fee, and telephone call with the criminal clerk of the 6th District Court Clerk in Providence, RI indicated there is no filing fee for the petition in that court. Telephone Interview with 6th District Court Clerk, Rhode Island. (Apr. 7, 2022). But see 12 R.I. GEN. LAWS § 12-1.3-3(e) (2021) (requires that expungements for decriminalized offenses be at no cost to the petitioner).

612 12 R.I. GEN. LAWS § 12-1.3-2(a) (2018); 12 R.I. GEN. LAWS § 12-1.3-3(b)(1) (2021) (both requiring that petitioner does not owe any “outstanding court-imposed or court-related fees, fines, costs, assessments, or charges,” unless such amounts are reduced or waived by order of the court).


<table>
<thead>
<tr>
<th>State</th>
<th>Code</th>
<th>Fee</th>
<th>Notes</th>
</tr>
</thead>
</table>
| South Carolina | S.C. CODE ANN. §§ 17-22-910 to -960 | $310,\(^{615}\) € | • Background Check ($26.75)\(^{618}\)  
• Fingerprinting (varies) |
| South Dakota | S.D. CODIFIED LAWS §§ 23a-3-26 to -37 | $72,\(^{616}\) \(\Phi\)\(^{617}\) | • Background Check ($29)\(^{621}\) |
| Tennessee | TENN. CODE ANN. §§ 40-32-101 to -105 | $100,\(^{619}\) \(\Pi\)\(^{620}\) | |

\(^{615}\) S.C. CODE ANN. § 17-22-940(A) (Westlaw through 2022 Act. No. 125) (listing $250 administrative fee); id. § 17-22-940(E)(1) (listing $25 fee to South Carolina Law Enforcement Division for verification of criminal record); id. § 17-22-940(F) (listing $35 filing fee as required by § 8-21-310(C)(4)—this fee is not required for expungement of non-conviction records that were not part of a guilty plea diversion agreement).

\(^{616}\) See S.D. CODIFIED LAWS § 23A-3-28 (Westlaw through Feb. 23, 2022) (requiring payment equal to the filing fee for a civil action); id. § 16-2-29(3)(a) (setting civil action filing fee at $25); id. § 16-2-39 (setting court automation surcharge at $40 for all civil filings); id. § 14-6-1 (setting law library fee at $7 for civil filings); see also S.D. UNIFIED JUD. SYS., SCHEDULE OF COURT COSTS 2 (2021), https://ujs.sd.gov/uploads/docs/ScheduleCourtCosts.pdf [https://perma.cc/4K5W-S35] (showing $70 as total filing fee for civil actions); S.D. UNIFIED JUD. SYS., MOTION FOR EXPUNGEMENT – INSTRUCTION SHEET, https://ujs.sd.gov/uploads/forms/Expungements_Instruction.pdf [https://perma.cc/8PQD-K8YB] (listing filing fee as $70).

\(^{617}\) S.D. CODIFIED LAWS § 23A-3-30 (Westlaw through Feb. 23, 2022) (giving the court discretion to grant expungement “upon a showing by the defendant or the arrested person by clear and convincing evidence that the ends of justice and the best interest of the public as well as the defendant or the arrested person will be served by the entry of the order”).


\(^{619}\) TENN. CODE ANN. § 40-32-101(a)(1)(B) (Lexis through Ch. 598 of 2022 Reg. Sess.) (citing § 8-21-401). This is a local fee and some counties have waived it to allow expunctions to be filed without a filing fee. See WREG STAFF, Shelby County to Waive $100 Expungement Fee Starting in July, WREG.COM (May 13, 2021), https://www.wreg.com/news/shelby-county-to-waive-100-expungement-fee-starting-in-july/ [https://perma.cc/N58K-GHAZ].

\(^{620}\) TENN. CODE ANN. § 40-32-101(g)(2)(C)(i) (Lexis through Ch. 598 of 2022 Reg. Sess.).

\(^{621}\) Recommended, not required. See Background Checks, TENN. BUREAU INVESTIGATION, https://www.tn.gov/tbi/divisions/cjis-division/background-checks.html [https://perma.cc/D6E8-WZKT].
<table>
<thead>
<tr>
<th>Region</th>
<th>Instructions</th>
<th>Filing Fee</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td><strong>TEX. GOV’T CODE ANN. §§ 411.071–.0775.</strong></td>
<td>$28,\textsuperscript{623}</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>TEX. CODE CRIM. PROC. ANN. art. 55.01–.06</strong> (non-conviction records)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td><strong>UTAH CODE §§ 77-40-101 to -116</strong></td>
<td>$150,\textsuperscript{627}</td>
<td></td>
</tr>
<tr>
<td>Vermont</td>
<td><strong>13 VT. STAT. ANN. §§ 7601–7610</strong></td>
<td>$90 for DUI convictions.</td>
<td></td>
</tr>
</tbody>
</table>

\textsuperscript{622} This chapter discusses Orders of Non-Disclosure (criminal record sealing) as well as the deferred judgment programs that often precede such an order. **TEX. GOV’T CODE ANN. §§ 411.071–0775** (West, Westlaw through 2021 Reg. Sess.).

\textsuperscript{623} Id. §§ 411.072(c), 411.0745(b).

\textsuperscript{624} See, e.g., id. §§ 411.0735(b); 411.0736(b).


\textsuperscript{626} See **TEX. OFF. OF CT. ADMIN., INSTRUCTIONS FOR COMPLETING THE MODEL PETITION FOR ORDER OF NONDISCLOSURE 4** (2017), https://www.txcourts.gov/media/1439446/instructions-for-completing-petition-for-nondisclosure-under-section-4110731.pdf [https://perma.cc/L56X-288R] (“The filing fee is the amount of the court’s regular civil filing fee plus an additional $28.00. Typically, the total filing fee is about $280.00. However, the amount varies from county to county.”); see also **DALLAS CTY. DIST. CLERK, ITEMS NEEDED FOR FILING EXPUNGEMENTS**, https://www.dallascounty.org/Assets/uploads/docs/district-clerk/ItemsNeededforFilingExpunctions.pdf [https://perma.cc/T647-B3SU] (listing $292 filing fee).

\textsuperscript{627} **UTAH CODE ANN. § 78A-2-301(1)(i)** (West, Westlaw through 2021 Second Spec. Sess.) (“The fee for filing a petition for expungement is $150.”); see also **EXPUNGING ADULT CRIMINAL RECORDS, UTAH CTS.**, https://www.utcourts.gov/howto/expunge/ [https://perma.cc/Z4TQ-XMRA] (indicating fee can be waived).

\textsuperscript{628} **UTAH CODE ANN. § 77-40-105(4)(a)–(b)** (West, Westlaw through 2021 Second Spec. Sess.).

### Table: Costs for Sealing a Criminal History Record

<table>
<thead>
<tr>
<th>State</th>
<th>Cost Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>Virginia</td>
<td>$0.630 otherwise $0, History Records ($30)</td>
</tr>
</tbody>
</table>

#### Notes and Details

630. **VT. STAT. ANN. tit. 32, § 1431(e) (Lexis through Act. No. 81 of 2021 Adj. Sess.)** (“The $90.00 filing fee shall apply for a motion to seal a criminal history record of a violation of 23 V.S.A. § 1201(a) [DUI convictions] pursuant to 13 V.S.A. § 7602(a)(1)(C), but shall not apply for any other motion to seal or expunge a criminal history record pursuant to 13 V.S.A. § 7602.”). **But see id. § 7282(b) (allowing the waiver of surcharges (but not restitution) “as part of an expungement or sealing proceeding where petitioner demonstrates an inability to pay.”).**

631. **Id. § 7602(b)(1)(C).**


633. **See VA. CODE ANN. § 19.2-392.2(B) (Lexis through Act 14 of 2022 Reg. Sess.) (exempting those seeking expungement based on being victims of identity theft from payment of the general filing fee, but not specifying the fee amount).**

634. **Id. § 19.2-392.2(A). Beginning in 2025 at the latest, convictions will be eligible for expungement, but at present only non-conviction records are eligible. See H.D. 2113, 2021 Leg., Spec. Sess. (Va. 2021).**

635. **See Circuit Court Civil Filing Fee Calculation, Va.’s Jud. Sys., http://webdev.courts.state.va.us/cgi-bin/DJIT/ef_djs_ccecs_calc.cgi#ID_CALC_FRM [https://perma.cc/Q9PJ-9TAT].**


637. **Required if reasonably available. VA. CODE ANN. § 19.2-392.2(C) (Lexis through Act 14 of 2022 Reg. Sess.).**

<table>
<thead>
<tr>
<th>State</th>
<th>Code Reference</th>
<th>Fee</th>
<th>Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Washington</td>
<td>WASH. REV. CODE §§ 9.94A.640, 9.96.060</td>
<td>$\text{--}^{639}$</td>
<td>Filing Fee (varies by county)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>$\text{--}^{640}$</td>
<td>Background Check and Fingerprinting ($58)^{641}$</td>
</tr>
<tr>
<td>West Virginia</td>
<td>W. VA. CODE § 61-11-26</td>
<td>$300^{642}$</td>
<td>Criminal Record Check$^{644}$</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>WIS. STAT. 973.015^{645}</td>
<td>$\text{--}^{646}$</td>
<td>Criminal Record Check ($0)^{647}$</td>
</tr>
</tbody>
</table>

639 Statute makes no mention of a filing fee and the author confirmed in telephone calls with the Kings County Superior Court Clerk’s office and cashier’s office that there was no filing fee. (Dec. 10, 2021).

640 See WASH. REV CODE § 9.94A.640(1) (2019) (requiring the sentence be “discharged” and citing § 9.94A.637, which states that for a sentence to be discharged the defendant must have “completed all requirements of the sentence, including any and all legal financial obligations.”); see also id. § 9.96.060(2)(g) (2019) (requiring three years to have passed since “the person completed the terms of the sentence including, any financial obligations”).


642 $200 filing fee and an additional $100 when the expungement is granted to the West Virginia State Police for the cost of processing the order. W. VA. CODE ANN. § 61-11-26(n) (West, Westlaw through 2021 Sess.) (citing § 59-1-11(a)(1)).

643 See id. § 61-11-26(h); see also id. § 61-11-26(d)(7) (requiring petitioner to indicate whether restitution remains outstanding and, if so, to attach a copy of that order to the petition for expungement).


645 There is no general expungement or sealing remedy in Wisconsin—this is a specialty expungement statute for only for those who were either under 25 years old at the time of their conviction or were victims of human trafficking.

646 See WIS. STAT. ANN. 973.015(1m)(a) (West, Westlaw through Nov. 12, 2021); see also WIS. CT. SYS., PETITION TO EXPunge CRIMINAL COURT RECORD OF CONVICTION, FORM CR-266 (2020), https://www.wicourts.gov/formdisplay/CR-266.pdf?formNumber=CR-266&formType=Form&formatId=2&language=en [https://perma.cc/BPD6-B3K6] (requiring petitioner to swear under oath that they “have successfully completed [their] sentence in this case, including payment of all court-ordered financial obligations”).

647 See Background Check & Criminal History Information, WIS. DEP’T OF JUST., https://www.doj.state.wi.us/dlles/cib/background-check-criminal-history-information [https://perma.cc/3YUL-CPKL] (indicating name-based criminal history checks are free).
| Wyoming | WY. STAT. ANN. §§ 7-13-1401; 7-13-1501–1502 | $300 for felonies and $100 for misdemeanors, \(^{648}\) | • Background Check ($15) \(^{650}\)  
• Fingerprinting ($5) \(^{651}\) |

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\(^{648}\) WY. STAT. ANN. §§ 7-13-1501(b) (misdemeanor convictions), 7-13-1502(b) (felony convictions) (Lexis through 2021 Sess.).

\(^{649}\) Id. § 7-13-1502(a)(i)(C) (requiring 10 years since restitution has been paid in full).


\(^{651}\) Id.