
2021

Let's Move Criminal Justice Reforms Upstream: A Perspective from the Bench

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Recommended Citation

Bridget McCormack, *Let's Move Criminal Justice Reforms Upstream: A Perspective from the Bench*, 74 SMU L. REV. 575 (2021)
<https://scholar.smu.edu/smulr/vol74/iss3/9>

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LET’S MOVE CRIMINAL JUSTICE REFORMS UPSTREAM: A PERSPECTIVE FROM THE BENCH

*Bridget M. McCormack**

ABSTRACT

“[S]ometimes it feels like this. There I am standing by the shore of a swiftly flowing river and I hear the cry of a drowning man. So I jump into the river, put my arms around him, pull him to shore and apply artificial respiration. Just when he begins to breathe, there is another cry for help. So I jump into the river, reach him, pull him to shore, apply artificial respiration, and then just as he begins to breathe, another cry for help. So back in the river again, reaching, pulling, applying, breathing and then another yell. Again and again, without end, goes the sequence. You know, I am so busy jumping in, pulling them to shore, applying artificial respiration, that I have no time to see who the hell is upstream pushing them all in.”¹

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* Michigan Supreme Court, Chief Justice. I want to thank Ashley Yuill for her thoughtful contributions and excellent research assistance.

1. John B. McKinlay, *A Case for Refocusing Upstream: The Political Economy of Illness*, in *APPLYING BEHAVIORAL SCIENCE TO CARDIOVASCULAR RISK* (Allen J. Enelow & Judith B. Henderson eds. 1975), *reprinted in* INTERDISC. ASS’N FOR POPULATION HEALTH SCI. OCCASIONAL CLASSICS, Nov. 18, 2019, at 1 (quoting Irving Kenneth Zola, *Address to the United Ostomy Association: Helping: Does It Matter? The Problems and Prospects of Mutual Aid Groups* (1970)).

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I. INTRODUCTION

I agree with Professor Joe: progressive criminal justice reforms can only achieve so much when people are left to navigate a complicated post-conviction process without help.² And I support her pitch to consider broadening the scope of *Douglas v. California*;³ I encourage litigants to bring novel legal arguments in our courts because it’s the only way we can clarify or advance doctrine. But while I like the idea of expanding appellate defenders’ roles to include assisting people who can benefit from criminal justice reforms, we should work to identify and prioritize “upstream” approaches to reform whenever possible—and then we can figure out which “downstream” processes require what level of assistance and where they’re needed most.⁴

And not all downstream solutions will need lawyers; nonlawyer navigators can manage some. Others might need lawyers for limited-scope engagements (just for hearings, for example). And some will need well-resourced teams of lawyers. Like any complex problem, reforming our criminal justice system will be impossible without stakeholders surrounding the problems with upstream strategizing.⁵

Judges and lawyers are not natural upstream strategists. But if we really want to deliver on criminal justice reforms, we need to learn to be.

II. DOWNSTREAM CRIMINAL JUSTICE REFORMS ARE IMPORTANT BUT SOMETIMES INACCESSIBLE

Improving an institution as complicated and extensive as the American criminal justice system—with its lasting (and unequal) impacts on individuals, families, and communities—requires both upstream and downstream reforms. Upstream interventions target structural reform and work to address the root cause of the problems that flow downstream.⁶ But downstream reforms are critical too, especially when they can be accomplished faster than structural reforms.⁷ As we work to implement

2. See generally Irene Oritseweyinmi Joe, Shelly Richter & Dayja Tillman, *The Reform Blindspot*, 74 SMU L. REV. 555 (2021).

3. 372 U.S. 353, 357 (1963).

4. See DAN HEATH, UPSTREAM: THE QUEST TO SOLVE PROBLEMS BEFORE THEY HAPPEN 1–17 (2020).

5. *Id.*

6. *Id.*

7. *Id.*

both sets of solutions, we should continue to make downstream reforms more accessible to everyone who would benefit from them.

A concrete example helps explain what I mean. Let's use a prototypically downstream solution: expungements.⁸ They are an important piece of the reform toolkit. Setting aside convictions allows people who have served their sentences to start fresh with a clean slate, which improves (among other things) their chances of getting jobs,⁹ obtaining affordable housing,¹⁰ and securing student loans.¹¹ In some cases, the collateral consequences of a conviction may be more severe than the formal state-imposed punishment.¹² Expungements can help alleviate the burden of those consequences.¹³ In a criminal justice system where rehabilitation is a primary goal, maintaining a robust expungement system is an effective way to reform and strengthen individuals, families, and communities.

But an expungement process is only as good as it is accessible. In Michigan, for example, researchers estimate that just 10% of people eligible for expungements apply, and only 6.5% of eligible people successfully obtain them.¹⁴ There are many reasons for this disappointingly low number. For one, expungements in Michigan aren't automatic (yet),¹⁵ so successfully setting aside an eligible conviction can be done only by an application.¹⁶ And some—if not most—people are unaware that they are eligible to have their convictions set aside. Others may understandably lack trust in the system or believe that an expungement isn't worth the effort to obtain it. Others still may simply lack the time, resources, and ability to manage the complicated process they must go through to succeed. When an expungement process requires an applicant to get fingerprinted, obtain a certified copy of their conviction, file an application,

8. An expungement is the “erasure or elimination of criminal record history information by rendering the information inaccessible, either because it has been destroyed or sealed from the view of certain individuals.” Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361, 362 (2016).

9. Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 46 (2018).

10. MEYLI CHAPIN, ALON ELHANAN, MATTHEW RILLERA, AUDREY K. SOLOMON & TYLER L. WOODS, STANFORD UNIV., *A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 21–22* (2014), <http://www.secondchancegeorgia.org/wp-content/uploads/2019/08/A-Cost-Benefit-Analysis-of-Criminal-Record-Expungement-in-Santa-Clara-County.pdf> [<https://perma.cc/U2WP-5VYC>].

11. Ted Chiricos, Kelle Barrick, William Bales & Stephanie Bontrager, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007).

12. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) (“For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities.”).

13. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461–63 (2020).

14. *Id.* at 2466.

15. See MICH. COMP. LAWS ANN. § 780.621g (West 2021) (making expungements automatic two years from April 11, 2021).

16. See *id.* § 780.621(1).

send copies of the application to several bodies, *and* attend a hearing, it's no wonder that such a small number of eligible individuals ever apply.¹⁷

People with time and money have an advantage,¹⁸ assuming they know they are eligible. While some self-help legal websites offer online toolkits for people to proceed without counsel,¹⁹ these resources are of limited success when the process is complicated. The assistance of counsel in navigating the expungement system would help more eligible people succeed.

Despite these barriers, expanding access to expungements is worthwhile. Resources devoted to simplifying the expungement process can go far in repairing the harm done by our criminal legal system—especially the way structural racism has inflicted inequitable harms. The racial disparities in charging decisions, conviction rates, and sentencing are widely known and well documented.²⁰ In my home of Washtenaw County, Michigan, for example, a recent study of 1,000 convictions concluded that Black residents were more likely to be charged than White residents for the same offenses (for certain offenses, twenty to twenty-nine times more likely).²¹ At the federal level, research shows that Black men receive longer prison sentences than similarly situated White men arrested for the same crimes.²² Broadening the eligibility requirements for expungements and making it easier for people to achieve a clean slate—especially BIPOC community members who have suffered inequitably in the criminal legal system—can repair some of that harm.

Expungements can also alleviate the burden that people face from the collateral consequences of their criminal convictions. People with criminal records are less likely to receive interviews for jobs,²³ are more likely

17. *See id.* §§ 780.621d–780.621e; *Setting Aside an Adult Conviction in Michigan*, MICH. LEGAL HELP, <https://michiganlegalhelp.org/self-help-tools/crime-traffic-and-id/setting-aside-adult-conviction-michigan> [<https://perma.cc/4ATB-5YMM>].

18. “[A]n expungement can be between \$1,000 to \$2,500, although it can be done without an attorney.” Jameson Cook, *State Makes It Easier to Expunge Prior Convictions*, OAKLAND PRESS (Mar. 17, 2015), https://www.theoaklandpress.com/news/nation-world-news/state-makes-it-easier-to-expunge-prior-convictions/article_74afe689-de8a-554c-bc00-2dec246d40c5.html [<https://perma.cc/MEV7-L9BR>].

19. *See, e.g., Do-It-Yourself Expungement (Adult Conviction)*, MICH. LEGAL HELP, <https://michiganlegalhelp.org/self-help-tools/crime-traffic-and-id/do-it-yourself-expungement-adult-conviction> [<https://perma.cc/D8FC-BU7P>].

20. Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist. Here’s the Proof.*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [<https://perma.cc/J85G-SR6A>].

21. CITIZENS FOR RACIAL EQUITY IN WASHTENAW, *RACE TO JUSTICE: CITIZENS FOR RACIAL EQUITY IN WASHTENAW’S REPORT ON RACIAL DISPARITIES IN THE WASHTENAW COUNTY CRIMINAL LEGAL SYSTEM* 20, 50 (2020), <https://www.citizensforracialequitywashtenaw.org/crew-s-report> [<https://perma.cc/2RT7-R23B>].

22. M. Marit Rehavi & Sonja B. Starr, *Racial Disparity in Federal Criminal Sentences*, 122 J. POL. ECON. 1320, 1349 (2014).

23. 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).

to be unemployed,²⁴ and are often prevented from pursuing certain licensed occupations.²⁵ And it isn't only individuals who are held back by their criminal records—their families and communities are too.²⁶ Mass incarceration fuels generational poverty that is often concentrated in communities, which leads to educational, economic, and health disparities.²⁷ Family cohesion is also at stake; for example, if a family receives housing assistance that bars people with criminal records from living in the home, that family can't support a loved one returning from prison by taking that person in without risking their own security.²⁸ The negative effects of criminal records on workforce participation affect the national economy as well, to the tune of an estimated \$78 to \$87 billion loss in annual gross domestic product.²⁹ Given these wide-ranging impacts, we should use every tool in the reform toolkit to respond—and making expungements more accessible should be one of our top priorities.

Finally, the expungement process serves one of the main goals of the criminal justice system: rehabilitation. Research suggests that people who have their convictions expunged are unlikely to reoffend; in Michigan, only an estimated “7.1% of all expungement recipients are rearrested within five years of receiving their expungement (and only 2.6% are rearrested for violent offenses), while conviction rates are even lower: 4.2% for any crime and only 0.6% for a violent crime.”³⁰ Expungements also help boost people's economic prospects and average wages.³¹ But on a more fundamental level, an expungement allows a person to set aside their criminal conviction and move forward as more than an “ex-offender” or an “ex-felon.” Instead, they can return to their community as a full member who is no longer officially linked to their previous label of “the defendant.” Relatedly, expungements can also help remove the so-

24. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/ZM4M-NWLZ>].

25. See Joshua Kaiser, *Revealing the Hidden Sentence: How to Add Transparency, Legitimacy, and Purpose to “Collateral” Punishment Policy*, 10 HARV. L. & POL'Y REV. 123, 132–34 (2016).

26. ANNIE E. CASEY FOUND., A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES, AND COMMUNITIES 2–4 (2016), <https://www.aecf.org/m/resourcedoc/aecf-asharedsentence-2016.pdf> [<https://perma.cc/X9F2-SSJZ>].

27. *Id.* at 3–4; U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 35–87 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf?eType=EMailBlast-Content&eId=D37030a2-bfe6-4784-866a-7db61d64f357> [<https://perma.cc/AS7V-M7X4>].

28. ANNIE E. CASEY FOUND., *supra* note 26, at 4; JOCELYN FONTAINE & JENNIFER BIESS, URBAN INST., HOUSING AS A PLATFORM FOR FORMERLY INCARCERATED PERSONS 6 (2012), <https://www.urban.org/research/publication/housing-platform-formerly-incarcerated-persons> [<https://perma.cc/SJD9-E8KD>].

29. Cherrie Bucknor & Alan Barber, CTR. FOR ECON. & POL'Y RSCH., THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 1 (2016), <https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf> [<https://perma.cc/ZR89-4BFG>].

30. Prescott & Starr, *supra* note 13, at 2466.

31. See *id.* at 2528 (finding that successful expungement applicants, on average, saw a 23% increase in their wages within one year of clearing their record); see also Selbin et al., *supra* note 9.

cial stigma associated with having a criminal conviction; indeed, stigma is often a motivator for seeking an expungement.³² This closure is a significant benefit to individuals, families, and communities.

I agree with Bryan Stevenson: “Each of us is more than the worst thing we’ve ever done.”³³ Expungements breathe life into that principle. America is (supposed to be) the land of second chances and new beginnings, after all. Allowing people with criminal records to take accountability for the harms they caused, serve their punishments, and then live their lives without being chained to the past is key to maintaining a justice system that focuses on more than vengeance.

III. GIVING LITIGANTS COUNSEL IMPROVES OUTCOMES GENERALLY—AND WOULD DO SO HERE

Whether or not there is a constitutional basis for appointing counsel to navigate the expungement process—an issue that has never been decided by my Court or the U.S. Supreme Court—the assistance of counsel plainly would mean more people would succeed in their expungement processes. And that, to me, means that it is a good idea. As the U.S. Supreme Court has said, “there can be no equal justice where the kind of an appeal a man enjoys ‘depends on the amount of money he has.’”³⁴ The lack of equal access is rotten here too; those who can afford a lawyer to guide them through the expungement process have a greater shot at success than those whose limited means require them to go it alone (if they go at all).

We know that providing lawyers to litigants leads to more justice and better outcomes in many contexts. Take evictions, for example. In the United States, an estimated 90% of landlords are represented by counsel in eviction proceedings, compared to just 10% of tenants.³⁵ In jurisdictions where tenants facing eviction have the right to appointed counsel, research shows that they are much less likely to be evicted.³⁶ In 2017, New York City became the first city in the United States to establish the right to counsel for low-income tenants facing eviction proceedings.³⁷ By 2019, evictions in New York City had declined by over 40% compared to 2013 (including a 15% drop in 2019 alone), and 84% of households repre-

32. Simone Ispa-Landa & Charles E. Loeffler, *Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement-Seekers in Illinois*, 54 *CRIMINOLOGY* 387, 397, 406–407 (2016).

33. BRYAN STEVENSON, *JUST MERCY: A STORY OF JUSTICE AND REDEMPTION* 17–18 (2015).

34. *Douglas v. California*, 372 U.S. 353, 355 (1963) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

35. Matthew Desmond, *Unaffordable America: Poverty, Housing, and Eviction* 22 *FAST FOCUS* 1, 5 (2015), <https://www.irp.wisc.edu/publications/fastfocus/pdfs/FF22-2015.pdf> [<https://perma.cc/57J3-UFUL>].

36. *See, e.g.*, N.Y.C. OFF. OF CIV. JUST., 2019 ANNUAL REPORT 8–9 (2020), https://www1.nyc.gov/assets/hra/downloads/pdf/services/civiljustice/OCJ_Annual_Report_2019.pdf [<https://perma.cc/X5EU-BP9A>].

37. *Id.* at 6.

sented in court by lawyers were not evicted.³⁸ Providing counsel in this context not only serves low-income families but also stabilizes entire neighborhoods and saves the government significant resources. One cost-benefit analysis found, for instance, that providing counsel to tenants in Philadelphia who otherwise couldn't afford a lawyer would save the city \$45.2 million in costs each year, dwarfing the \$3.5 million it would take to provide appointed counsel.³⁹

And in the criminal justice context, we know that defendants who are represented by counsel at their first appearance in court—which the Sixth Amendment might not require—have better outcomes than those who don't. One study showed that after appointed counsel was guaranteed for misdemeanor defendants, these cases were more likely to result in release on recognizance (as opposed to bail) and were less likely to lead to jail booking on charges.⁴⁰ Providing counsel was also linked to a higher likelihood of having the charge reduced from a misdemeanor to a noncriminal offense.⁴¹ This is an effective upstream solution.

The State of Michigan conducted its own experiment into the effectiveness of providing counsel at a defendant's first appearance and saw the same results.⁴² Between 2014 and 2016, pilot programs in three counties produced striking outcomes.⁴³ One county saw an average 20% reduction in the time it took to resolve a case and a 28% decrease in jail time served between a defendant's arraignment and release.⁴⁴ In another, the number of hearings necessary to resolve a case plummeted—ultimately leading to 20% fewer hearings.⁴⁵ The third county also observed positive improvement for defendants with bond set; there, “the court set bond at the level recommended by defense counsel in 30% of cases and at a level lower than the interim bond in 59% of cases.”⁴⁶ And the number of defendants who had their cases resolved at their first appearance in the this county increased by 8%.⁴⁷

Similarly, providing counsel to people navigating the expungement process would likely lead to better outcomes. There is no data to show it

38. *Id.* at 8–9.

39. STOUT, ECONOMIC RETURN ON INVESTMENT OF PROVIDING COUNSEL IN PHILADELPHIA EVICTION CASES FOR LOW-INCOME TENANTS 6 (2018), <https://legalaidresearch-nlada.files.wordpress.com/2020/01/philadelphia-evictions-report.pdf> [<https://perma.cc/U7KS-X7MC>].

40. ALISSA POLLITZ WORDEN, ANDREW L.B. DAVIES, REVEKA V. SHTEYNBERG & KIRSTIN A. MORGAN, EARLY INTERVENTION BY COUNSEL: A MULTI-SITE EVALUATION OF THE PRESENCE OF COUNSEL AT DEFENDANTS' FIRST APPEARANCES IN COURT 20 (2020), <https://www.ojp.gov/pdffiles1/nij/grants/254620.pdf> [<https://perma.cc/R4BA-FRJG>].

41. *Id.* at 25.

42. NAT'L LEGAL AID & DEF. ASS'N., ACCESS TO COUNSEL AT FIRST APPEARANCE: A KEY COMPONENT OF PRETRIAL JUSTICE 3 (2020), <http://www.nlada.org/node/34531> [<https://perma.cc/M3XB-TSG8>].

43. *Id.* at 19.

44. *Id.*

45. *Id.*

46. *Id.* at 20.

47. *Id.*

(yet), but given the positive results of providing counsel in other contexts, it is a safe assumption.

Here's what we do know. Successfully expunging a conviction *in pro per* is no easy task in most jurisdictions.⁴⁸ In Michigan, only around 2,500 expungement applications are granted each year.⁴⁹ While Michigan Legal Help, an online self-help website, offers a “DIY Expungement tool,” the organization's internal data reveals that most people who access this tool don't ultimately use it to complete an application.⁵⁰ In 2020, 7,380 people started filling out the DIY Expungement tool, but only 1,605 finished it: a 21.75% completion rate.⁵¹ Though we don't have data to explain why people exit the DIY Expungement tool without completing it—perhaps they were ineligible or decided it wasn't worth pursuing—we know that other Michigan Legal Help online tools have an average completion rate of roughly 60%.⁵² Having a trained advocate to guide eligible applicants through this process would boost the number of people who successfully expunge their prior convictions.

IV. BUT LAWYERS AREN'T ENOUGH

As much as we might wish otherwise, lawyers are not a panacea for this problem. A natural solution for expanding access to expungements would be to appoint public defenders to represent applicants through the process. But to say that our existing public defender systems are overloaded and underfunded is an understatement.⁵³ The same goes for our civil legal aid system.⁵⁴ In an ideal world, an army of public service lawyers would be available to assist anyone interested in expunging their conviction. We should work to achieve that world. But in this one, while we can't practically provide a competent lawyer for every person navigating the expungement process, we should advocate for additional upstream and downstream solutions to dismantle the barriers to expungements. Here are a few examples to consider.

48. “Clearing a record without an attorney is frequently difficult. The absence of sufficient free legal help and the inability to pay for private attorneys mean that many low-income people unnecessarily carry the burden of an expungeable conviction for years.” Margaret “Peggy” Stevenson, *Expungement: A Gateway to Work*, CLEARINGHOUSE REV., Mar. 2015, at 1–2, <http://cucs.org/wp-content/uploads/2015/09/Stevenson-Clearinghouse-Article-April-2015.pdf> [<https://perma.cc/3D5B-9MVP>].

49. J.J. Prescott & Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [<https://perma.cc/GL39-WKFFV>].

50. E-mail from Angela Tripp, Exec. Dir., Michigan Legal Help, to Ashley Yuill, Jud. Law Clerk to the Hon. Bridget M. McCormack (Mar. 25, 2021) (on file with author).

51. *Id.*

52. *Id.*

53. See Eve Brensike Primus, *Defense Counsel and Public Defense*, in 3 REFORMING CRIMINAL JUSTICE: PRETRIAL AND TRIAL PROCESSES 121, 123–26 (Erik Luna ed., 2017).

54. See LEGAL SERVS. CORP., *THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 6–8* (2017), <https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf> [<https://perma.cc/69GV-59ZZ>].

A. EXPUNGEMENTS SHOULD BE AUTOMATIC

For a range of misdemeanors and low-level felony convictions, relief can and should be automatic. This means that people with certain convictions don't have to apply to set them aside or attend a hearing to complete the process. Instead, an eligible conviction will simply be cleared, under a standard operating procedure after a waiting period.⁵⁵ Here are a few examples of offenses that are automatically expunged in some jurisdictions:

- Minor marijuana possession offenses (California, Illinois, New Jersey, New York, Vermont, and Virginia);⁵⁶
- Felonies punishable by less than 10 years' imprisonment that are neither assaultive crimes nor crimes of dishonesty, don't relate to human trafficking, and don't involve a minor, a vulnerable adult, injury or serious impairment, or death (Michigan);⁵⁷
- Misdemeanors punishable by imprisonment of less than two years (Pennsylvania);⁵⁸
- Petty offenses or municipal ordinance violations (South Dakota);⁵⁹
- Felonies that don't require registration under the Sex Offender Registration Act (California);⁶⁰
- Convictions that were pardoned by the Governor and approved by a majority of the Board of Pardons (Pennsylvania);⁶¹ and
- Offenses for which probation was successfully completed (Vermont).⁶²

55. ALL. FOR SAFETY & JUST., CREATING MODEL LEGISLATIVE RELIEF FOR PEOPLE WITH PAST CONVICTIONS 3 (2019), <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/09/Model-Policies-Brief.pdf> [<https://perma.cc/6P6X-ZMA3>].

56. Margaret Colgate Love, *Automatic Conviction Relief*, Subheading to *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RTS. PROJECT (June 2021), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside> [<https://perma.cc/H8TQ-DB8B>].

57. See MICH. COMP. LAWS ANN. § 780.621g(10) (West 2021).

58. Margaret Colgate Love, *Expungement, Sealing & Other Record Relief*, Subheading to *Pennsylvania: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (May 2021), https://ccresourcecenter.org/state-restoration-profiles/pennsylvania-restoration-of-rights-pardon-expungement-sealing-2/#III_Expungement_sealing_other_record_relief [<https://perma.cc/MJH2-657E>].

59. Margaret Colgate Love, *Expungement, Sealing & Other Record Relief*, Subheading to *South Dakota: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Mar. 2021), <https://ccresourcecenter.org/state-restoration-profiles/south-dakota-restoration-of-rights-pardon-expungement-sealing> [<https://perma.cc/LSR8-DBQP>].

60. Margaret Colgate Love, *Expungement, Sealing & Other Record Relief*, Subheading to *California: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (Feb. 2021), <https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing> [<https://perma.cc/TWF6-FE3N>].

61. Love, *supra* note 58.

62. Margaret Colgate Love, *Expungement, Sealing & Other Record Relief*, Subheading to *Vermont: Restoration of Rights & Record Relief*, RESTORATION OF RTS. PROJECT (June 2021), https://ccresourcecenter.org/state-restoration-profiles/vermont-restoration-of-rights-pardon-expungement-sealing/#III_Expungement_sealing_other_record_relief [<https://perma.cc/W6M9-RB25>].

The benefits of this model, especially for low-level offenses, are many and obvious. If the government doesn't place the burden of proving eligibility and obtaining relief on the person with the conviction, it eliminates the barriers to expungement posed by the application process. For example, a candidate doesn't even have to know that their conviction is eligible for expungement when the process is automated. This approach is more fair, efficient, and cost-effective. Only twelve states provide automatic expungement or sealing of some convictions.⁶³ Every jurisdiction should adopt this system.

The Michigan Legislature recently passed a bipartisan bill providing for automatic expungements, which was signed into law by Governor Gretchen Whitmer in the fall of 2020.⁶⁴ Before the new statute passed, Michiganders with one felony conviction or two or fewer misdemeanors for certain offenses could apply to have some or all of their convictions set aside, so long as they hadn't offended within the last five years.⁶⁵ But the newly enacted law creates an automatic process for expunging all eligible misdemeanors after seven years of nonoffending and certain felonies after ten years.⁶⁶ This will impact the lives of hundreds of thousands of Michiganders for the better.⁶⁷

B. WE SHOULD TRAIN NONLAWYERS TO ASSIST PEOPLE ELIGIBLE FOR EXPUNGEMENT BY APPLICATION

For nonautomatic expungements that require an application, we should train nonlawyer navigators to help candidates through the process and, when needed, change our rules to permit them to assist eligible applicants.

Regulatory reform is an important tool in meeting access-to-justice needs generally. Almost every state prohibits people from practicing law without a license.⁶⁸ The monopoly that attorneys have on the practice of law makes accessing justice in the United States more expensive and, therefore, more difficult for people who can't afford a lawyer.⁶⁹ To close

63. Love, *supra* note 56.

64. Angie Jackson, *Gov. Whitmer Signs Bills Expanding Criminal Record Expungement in Michigan*, DETROIT FREE PRESS (Jan. 29, 2021, 9:21 AM), <https://www.freep.com/story/news/local/michigan/2020/10/12/michigan-expungement-bills-law-governor-whitmer/3532215001> [<https://perma.cc/FP7S-TL6N>].

65. MICH. COMP. LAWS ANN. § 780.621d(2), (7)(c) (West 2021).

66. *Clean Slate, Criminal Record Set Asides*, MICH. CTS., <https://courts.michigan.gov/News-Events/Pages/CleanSlate.aspx> [<https://perma.cc/3SW5-SBHB>].

67. See Angie Jackson, *Here's How Michigan's Expungement Laws Will Change This Spring*, DETROIT FREE PRESS (Jan. 30, 2021, 8:53 PM), <https://www.freep.com/story/news/local/michigan/2021/01/29/michigan-expungement-laws-criminal-records/6669129002> [<https://perma.cc/T7X8-X4LS>].

68. See Jessica K. Steinberg, Anna E. Carpenter, Colleen F. Shanahan & Alyx Mark, *Judges and the Deregulation of the Lawyer's Monopoly*, 89 FORDHAM L. REV. 1315, 1318 (2021).

69. See *id.* at 1319–21. The World Justice Project, for example, ranks the United States 109 out of 128 countries in access to justice and affordability of legal services. *Civil Justice Sub-factor 7.1 for United States, 2020*, Subheading to *WJP Rule of Law Index Country*

the gap between rich and poor litigants, some states are experimenting with changing the rules governing the practice of law. In 2019, Utah became the second state to allow licensed paralegals to “engage in the limited practice of law” in specific practice areas, including family law, debt collection matters, and evictions.⁷⁰ Utah’s rule allows licensed practitioners to (among other things) establish contractual relationships with unrepresented clients, help them complete and file their court forms, and communicate with other parties on their behalf.⁷¹ Adding expungements to the list of areas nonlawyers can assist with would immediately make this process more accessible.

One doesn’t need to pass the bar in order to advise and assist expungement candidates. Law students and paralegals are already well suited for this task; for example, the Los Angeles County Public Defender’s Office files roughly 4,500 expungement applications each year, most of which paralegals complete.⁷² Law students and paralegals can help tackle barriers to filing the application by advising candidates on whether they satisfy the eligibility requirements and helping them apply. And trained professionals, it seems to me, could also appear in court hearings.

Technology can make this task even easier. Community Legal Services in Philadelphia has proven this; one of its attorneys developed “Expungement Generator” software that automatically references the court’s criminal record database, retrieves the client’s information, and plugs it into the expungement petition form.⁷³ This innovation can make the expungement system more efficient and accessible both to candidates seeking to benefit from it and organizations seeking to serve them.

C. STAKEHOLDERS SHOULD CREATE AND DEPLOY EXPUNGEMENT CLINICS, INCLUDING MOBILE CLINICS TO REACH RURAL COMMUNITIES

Michigan has modeled clinics too. In 2019, fifteen students from Detroit Mercy Law traveled to nine counties around Michigan and connected with volunteer attorneys, court officials, judges, and sheriffs to host expungement clinics through the Access to Justice Mid-Northern Michigan Expungement Project.⁷⁴ From July to October 2019, these volunteers worked mostly in rural counties to serve nearly 350 prospective expungement candidates.⁷⁵ We also hosted a clinic at the Hall of Justice,

Insights: United States, WORLD JUST. PROJECT, <https://worldjusticeproject.org/rule-of-law-index/country/2020/United%20States/Civil%20Justice> [https://perma.cc/4KUP-2WWS].

70. UTAH SUP. CT. PRO. PRAC. R. 14-802(c).

71. *Id.*

72. Stevenson, *supra* note 48, at 5.

73. *Id.* at 5 & n.47.

74. *Detroit Mercy Law Traveling Expungement Clinic Receives 2020 Kimberly M. Cahill Leadership Award*, UNIV. OF DETROIT MERCY L. SCH. (Oct. 5, 2020), <https://law-school.udmercy.edu/news/2020/ATJ-SBM-Kimberly-Cahill-Award.php> [https://perma.cc/S9MF-R73V].

75. *Id.*; *Detroit Mercy School of Law “Project Access,”* STATE BAR OF MICH., <https://www.michbar.org/alawyerhelps/storydetail/StoryID=210> [https://perma.cc/6UN5-FJXS].

where the Supreme Court sits, at which volunteers guided over 100 people through the steps to set aside their convictions.⁷⁶ Besides traveling clinics, law school clinical programs are well suited to host one-off expungement fairs. For example, Western Michigan University Law School's Access to Justice Clinic consistently hosts expungement clinics where student attorneys help prospective expungement candidates.⁷⁷ The more communities can be proactive about assisting people with the expungement process, the better.

D. PROSECUTORS SHOULD USE THEIR OFFICES TO MAKE IT EASIER FOR PEOPLE TO EXPUNGE THEIR RECORDS

A prosecutor's job isn't just to obtain a conviction—it's to seek and secure justice for everyone. Having prosecutors play an active role in helping people expunge the convictions they secured promotes that purpose.⁷⁸ This requires at the very least that prosecutors refrain from conditioning a plea bargain on a defendant's promise to never seek expungement of the conviction; in some states, like Indiana, this type of coercive bargaining is prohibited by law.⁷⁹ Prosecutors shouldn't get an automatic veto over an expungement application either. In California, for example, a petition to expunge an arrest record "shall be deemed to be denied" if the prosecutor doesn't respond to it within sixty days.⁸⁰ To obtain the required certificate of eligibility for an expungement in Florida, an applicant must include a statement from the prosecutor confirming their eligibility.⁸¹ And in Hawaii, the attorney general is the entity that has the power to grant or deny an expungement—not the courts.⁸² Prosecutors are already the most powerful actors in our criminal legal system;⁸³ they shouldn't have the final say over what happens once someone has served their punishment and reformed themselves too.

Beyond this floor, prosecutors should use the resources of their offices to inform the public about the expungement process and to make it more accessible to people with criminal records. The newly elected prosecutor

76. Sarah Lehr, *Michiganders Could Have Criminal Records Erased, but Few Are Applying. Clinics Aim to Help.*, LANSING ST. J. (Oct. 23, 2019, 12:18 PM), <https://www.lansingstatejournal.com/story/news/2019/10/23/few-eligible-michiganders-try-expunge-convictions-clinic-aims-help/4063290002> [<https://perma.cc/6Z6V-JSV5>].

77. *WMU-Cooley Access to Justice Clinic Hosts Expungement Clinic*, W. MICH. UNIV. COOLEY L. SCH. (Mar. 4, 2020), <https://www.cooley.edu/news/wmu-cooley-access-justice-clinic-hosts-expungement-clinic> [<https://perma.cc/D7CB-SFVY>].

78. See Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 *FORDHAM L. REV.* 2821, 2825 (2018) ("[E]xpungement relates directly to the prosecutorial responsibility to pursue fair and just punishment on behalf of the community.").

79. *IND. CODE* § 35-38-9-11 (2020) ("A person may not waive the right to expungement under this chapter as part of a plea agreement. Any purported waiver of the right to expungement in a plea agreement is invalid and unenforceable as against public policy.").

80. *CAL. PENAL CODE* § 851.8(b) (Deering 2021).

81. *FLA. STAT.* § 943.0585(2)(a)(2) (2020).

82. *HAW. REV. STAT.* § 831-3.2(a) (2021).

83. See Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 *WASH. & LEE L. REV.* 1413, 1414 (2010).

in my home county, Eli Savit, is already showing us how this can be done. He immediately rolled out plans to create a Conviction Integrity and Expungement Unit within the Washtenaw County Prosecutor's office⁸⁴ and hired a former Innocence Project attorney to lead it.⁸⁵ The Expungement Coordinator walks people through the application process, helps them get their fingerprints and certified court records, and can quickly clear up any questions with their records since the prosecutor's office has easy access to law enforcement information.⁸⁶ For example, when one applicant couldn't figure out what had happened with a "floating arrest" on her record, the Expungement Coordinator resolved the problem—which might have taken weeks for the applicant to fix on her own—within ten minutes.⁸⁷ This type of assistance is one of the biggest contributions prosecutors can offer to make expungements more accessible. Savit's office is also considering working with the courts to host "Expungement Days," where judges would clear specific days for holding expungement hearings; there, a single pro bono attorney could supervise several law students at once, so more applicants (who would not be represented otherwise) can have advocates at their hearings.⁸⁸ And holding these hearings on remote platforms would also break down the barriers posed by in-person court attendance while accomplishing just as much.⁸⁹

Ultimately, prosecutors might be the stakeholders who can do the most good for improving access to expungements. And expanding this access is in line with their job to ensure public safety and promote rehabilitation. Because an expungement is key to both ends, it's something that Savit views "as being part and parcel of our office's focus on rehabilitation."⁹⁰ "If you're eligible for expungement, you have really done everything that we've asked you to do," he explained, and "just keeping a criminal record on for the sake of keeping a criminal record isn't meaningfully keeping us any safer."⁹¹ In the end, Savit believes that

what leaning in on expungement does for prosecutors is build community trust. We're saying, look: we actually care about your rehabilitation. If you've done everything we asked you to do, the very prosecutor's office that got that conviction on your record in the first place is going to do everything possible to help you take it off. I think

84. Eli Savit (@EliNSavit), TWITTER (Dec. 28, 2020, 7:53 AM), <https://twitter.com/EliNSavit/status/1343585824437379074> [<https://perma.cc/ZF9F-TTCA>].

85. Zoom Interview with Eli Savit, Washtenaw County Prosecutor, and Frances Walters, Washtenaw County Prosecutor's Office Conviction Integrity and Expungement Coordinator (Mar. 29, 2021) [hereinafter Interview with Savit & Walters].

86. *Id.*

87. *Id.*

88. *Id.*

89. See Justin P. Hicks, *Technology Brought 'Much-Needed Change' to Judicial System, Michigan Supreme Court Chief Justice Tells Congress*, MLIVE (June 25, 2020), <https://www.mlive.com/public-interest/2020/06/technology-brought-much-needed-change-to-judicial-system-michigan-supreme-court-chief-justice-tells-congress.html> [<https://perma.cc/R37N-U5TA>].

90. Interview with Savit & Walters, *supra* note 85.

91. *Id.*

that demonstrates an investment in the community that builds trust in the prosecutor's office.⁹²

I agree.

V. RESTORATIVE JUSTICE IS THE MOST UPSTREAM SOLUTION OF ALL

Of course, none of these suggestions are needed when we can prevent convictions at the front end of the process. Addressing the root causes of crime—poverty, behavioral health problems, and unequal education opportunities, just to name a few—is the most upstream solution to criminal justice reform. But there are additional upstream opportunities too, such as deflection and diversion to restorative justice processes.

Restorative justice practices focus on healing the harm that an offense has caused to the victim, the community, and the offender.⁹³ As Howard Zehr, the architect of this model, explained, our traditional criminal justice system asks: (1) “What laws have been broken?”; (2) “Who did it?”; and (3) “What do they deserve?”⁹⁴ But we ask a different set of questions when we take a restorative justice approach: (1) “Who has been hurt?”; (2) “What are their needs?”; and (3) “Whose obligations are these?”⁹⁵ Common restorative justice programs include engaging in dialogue and mediation between the victim and the offender, family group conferencing, peacemaking circles, and community service.⁹⁶

Employing these practices to identify and remedy the harm done diverts cases away from the traditional prosecution model. For example, Philadelphia District Attorney Larry Krasner is offering a restorative justice program to resolve 80% of the cases against about five hundred people accused of committing nonviolent offenses during the historic protest that followed the police killing of George Floyd.⁹⁷ After successfully completing the program, these defendants will have their charges dismissed and their record expunged.⁹⁸ A restorative justice approach in this context makes sense. Here, the victims (small and large businesses) sustained millions of dollars in damages, but the accused were poor enough to qualify for public defenders, so they're unlikely to be in a position to

92. *Id.*

93. *See generally* HOWARD ZEHR, *CHANGING LENSES: A NEW FOCUS FOR CRIME AND JUSTICE* (3d ed. 2005).

94. HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 21 (2002).

95. *Id.*

96. Mark S. Umbreit & Marilyn Peterson Armour, *Restorative Justice and Dialogue: Impact, Opportunities, and Challenges in the Global Community*, 36 WASH. U. J.L. & POL'Y 65, 71 (2011); *What is Restorative Justice?*, INSIGHT PRISON PROJECT, <http://www.insightprisonproject.org/a-restorative-justice-agency.html> [https://perma.cc/UMG4-3VES].

97. Samantha Melamed, *Hundreds Arrested in Philly Uprisings May Avoid Prosecution Through Restorative Justice*, PHILA. INQUIRER (Mar. 26, 2021), <https://www.inquirer.com/news/philadelphia-unrest-restorative-justice-george-floyd-larry-krasner-20210326.html> [https://perma.cc/2H4E-PSQG].

98. *Id.*

compensate for the damage inflicted.⁹⁹ Rather than send all of these people to jail and prison in retribution—which would subject them to the collateral consequences of a conviction and likely continue the cycle of poverty and crime—the goal “is to have accountability without the necessity for convictions,” as Krasner explained.¹⁰⁰ “The plan is to make sure that as best we can the defendants and the defense satisfy their obligations to the people they harmed The plan is also not to repeat the mistakes of the past.”¹⁰¹

In Michigan, many diversion programs are available for first-time offenders. In Wayne County, for example, defendants with no prior record who are charged with certain felonies are offered a chance to resolve the case without a conviction.¹⁰² Participants pay restitution, complete community service, and report regularly to ensure their compliance with the program.¹⁰³ They might also receive a combination of anger management counseling, substance abuse treatment, or GED classes or vocational training.¹⁰⁴ At the end of the program, their case is dismissed without a record.¹⁰⁵ This approach promotes genuine rehabilitation and avoids the serious consequences of a criminal conviction. But as our Joint Task Force on Jail and Pretrial Incarceration observed, diversion programs aren't available across the state, and there is no statute offering guidance on when these diversion programs should be used.¹⁰⁶ Jurisdictions should authorize, expand, and fund a variety of diversion options for defendants. Doing so would likely lead to fewer prosecutions in the future; one study of the Suffolk County District Attorney's decision not to prosecute lower-level misdemeanors found that non-prosecuted misdemeanor defendants were 58% less likely to be charged with a new offense within two years compared to defendants who weren't diverted.¹⁰⁷

While restorative justice programs are often uncontroversial for nonviolent and first-time offenders, they have also been successfully used to resolve cases involving a violent harm.¹⁰⁸ The one-size-fits-all incarceration punishment isn't always the best solution. For instance, after a young man in Philadelphia hit his friend in the head with a gun, they agreed to

99. *Id.*

100. *Id.*

101. *Id.*

102. *Diversion Section*, WAYNE CNTY. PROSECUTOR, <https://www.waynecounty.com/elected/prosecutor/diversion-section.aspx> [<https://perma.cc/MM6H-UQJS>].

103. *Id.*

104. *Id.*

105. *Id.*

106. MICH. JOINT TASK FORCE ON JAIL & PRETRIAL INCARCERATION, *REPORT AND RECOMMENDATIONS 21* (2020), <https://courts.michigan.gov/News-Events/Documents/final/Jails%20Task%20Force%20Final%20Report%20and%20Recommendations.pdf> [<https://perma.cc/R8KM-6LF9>].

107. Michael Jonas, *Study Finds Not Prosecuting Misdemeanors Reduces Defendants' Subsequent Arrests*, COMMONWEALTH MAG. (Mar. 29, 2021), <https://commonwealthmagazine.org/criminal-justice/study-finds-not-prosecuting-misdemeanors-reduces-defendants-subsequent-arrests> [<https://perma.cc/88VJ-KWGT>].

108. See DANIELLE SERED, *UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 6*, 133 (2019) (ebook).

participate in mediation through the Restorative Cities Initiative.¹⁰⁹ What did the victim want? A new pair of sneakers to replace the ones he bled on during the assault, and \$50.¹¹⁰ The offender, the victim, and community members signed a contract that would require the offender's arrest if it was broken.¹¹¹ But it wasn't, "[a]nd no one needed to go to jail."¹¹² This approach can, even for serious offenses, lead to positive outcomes for victims and offenders alike.¹¹³ Without addressing endemic violence and violent crimes, we will have a hard time significantly changing our incarceration rates.

And diversion and deflection can take place outside court too, eliminating the need for the criminal process all together. As our Task Force on Jail and Pretrial Incarceration recommended, we should authorize, incentivize, and train law enforcement agencies to deflect people with behavioral health needs away from the justice system and into treatment.¹¹⁴ When the police are called to respond to someone experiencing a crisis, there should be somewhere to take them for help besides jail. Robust mental health, substance abuse treatment, and emergency crisis systems in a community can avert the need for criminal justice system options in many cases.¹¹⁵ We should expand these programs as much as possible.

Rethinking what conduct needs prosecution and broadening restorative justice options are the most upstream solutions for the expungement-access problem. Every would-be defendant diverted away from the traditional prosecutorial system (and, where needed, toward services to address needs) is one less person who will have to seek expungement. This conserves public resources, avoids the collateral consequences of a conviction, addresses the causes of the behavior that brought the person to the attention of law enforcement, and therefore, builds safer and healthier communities.

VI. CONCLUSION

If our criminal justice system is a raging river, expungements are about as far downstream as you can get. That doesn't mean they're not important or that we shouldn't try to make them more accessible to everyone who is eligible. Appointing lawyers to help people navigate the process is

109. Melamed, *supra* note 97.

110. *Id.*

111. *Id.*

112. *Id.*

113. TANYA RUGGE, JAMES BONTA & SUZANNE WALLACE-CAPRETTA, PUB. SAFETY & EMERGENCY PREPAREDNESS CAN., EVALUATION OF THE COLLABORATIVE JUSTICE PROJECT: A RESTORATIVE JUSTICE PROGRAM FOR SERIOUS CRIME 42 (2005), <https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cllbrtv-jstc-prjct/cllbrtv-jstc-prjct-eng.pdf> [https://perma.cc/5NYN-DEKT].

114. MICH. JOINT TASK FORCE ON JAIL & PRETRIAL INCARCERATION, *supra* note 106, at 22.

115. Editorial Board, Opinion, *Reimagine Safety* (pt. 2), WASH. POST (Mar. 16, 2021), <https://www.washingtonpost.com/opinions/interactive/2021/reimagine-safety/incident-response-police-public-safety> [https://perma.cc/8SXZ-ZJ7A].

a good idea. But law is a downstream business, and the courts are the most downstream. In my view, we should move solutions upstream wherever we can because they're almost always more effective.

Allowing nonlawyer navigators to provide limited representation to expungement candidates is a slightly upstream solution, as is expanding the role that prosecutors play in removing barriers. The same is true for expungement clinics. But making expungements as automatic as possible is significantly more upstream and would prevent downstream time and resource obstacles. And we can head even further up the river by expanding restorative justice, deflection, and diversion opportunities to reduce criminal convictions at the front end.

Solving problems upstream is always more likely to produce greater impact. From my perspective on the bench, all the way down river, I am convinced that we should move as much reform upstream as possible if we want to achieve significant reform. Around-the-edges reform is fine in the meantime. But disruptive change is what we need.

