

THE EXPUNGEMENT MYTH

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I. INTRODUCTION

This article stems from a study of the post-release behavior of individuals following exoneration.¹ In the course of conducting research on post-release behavior, the most comprehensive such study to date, an interesting and troubling finding emerged: expungement does not always follow exoneration.² Expungement is the “[p]rocess by which [a] record of criminal conviction is destroyed or sealed” from the state or federal repository.³ In instances where a former defendant is exonerated, expungement is sometimes part of the relief granted.⁴ In most cases, however, it must be secured in a separate civil action.⁵ Though every member of our sample has been deemed not guilty by an official body, approximately forty-two percent of these exonerees still had evidence of the wrongful conviction on their record.⁶ This disturbing statistic has significant

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¹ The term “exoneration” was used to describe “an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted.” Samuel R. Gross et al., *Exonerations in the United States, 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 524 (2005).

² See *infra* Part II.

³ BLACK’S LAW DICTIONARY 582 (6th ed. 1990).

⁴ For example, New York permits the sealing of cases where charges were dismissed, vacated, set aside, not filed, or otherwise terminated. N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2011).

⁵ 21A AM. JUR. 2D *Criminal Law* § 1219 (2012).

⁶ Data for this study is on file with the author. We do not address whether the originating arrest is expunged with the conviction. States vary in the public reporting of arrest information. For example, New York and Florida both provide arrest data, however Illinois does not and Texas only does for most, but not all counties (Harris and El Paso Counties do not provide arrest information). See *Criminal History Record Search*, NEW YORK STATE

consequences for exonerees and the criminal justice system generally.

The principal research examines post-release offending of 117 individuals who were exonerated and released between 1999 and 2009.⁷ The study explores a variety of questions: What is the risk posed by these individuals? Are they victims of prisonization? In other words, does their time in prison convert them into criminals? Do exonerees with prior offenses offend more than exonerees with no prior offenses? Do exonerees who were found guilty of certain types of crimes offend more than others?

The sample consists principally of exonerees whose cases have been documented by the Center on Wrongful Convictions (“CWC”) at the Bluhm Legal Clinic of Northwestern University Law School. These records are publicly available. To explore post-release offending, the authors ran public record searches in four states—Florida, Illinois, New York, and Texas—using the assistance of a commercial data provider.⁸ In order to obtain criminal history information, a subject’s date of birth had to be provided.⁹ If we were unable to obtain that information, that case was excluded from the study. Everyone for whom we could find the necessary identifying information was included. Gathering this data presented a unique

UNIFIED COURT SYSTEM, [hereinafter *Criminal History Record Search*, NEW YORK], <http://www.courts.state.ny.us/apps/chrs/faqs.shtml> (last updated Sept. 30, 2011); *Frequently Asked Questions*, FLORIDA DEPT OF LAW ENFORCEMENT, CRIMINAL HISTORY INFORMATION, <https://web.fdle.state.fl.us/search/app/faq> (last visited Mar. 27, 2012); *Criminal History Name Search*, TEXAS DEPARTMENT OF PUBLIC SAFETY, [hereinafter *Criminal History Name Search*, TEXAS], <https://records.txdps.state.tx.us/DpsWebsite/CriminalHistory/> (last visited Mar. 27, 2012).

⁷ The four states examined are Florida (eighteen), Illinois (thirty-one), New York (twenty-four) and Texas (forty-six). Exonerations are geographically situated, with more than forty percent occurring in four states—Illinois, New York, Texas, and California. Two-thirds of exonerations occur in ten states (those four previously mentioned plus Florida, Massachusetts, Louisiana, Pennsylvania, Oklahoma, and Missouri). *See* Gross et al., *supra* note 1, at 541. This ranking corresponds, at least in part, to the state populations. *Id.* Also, it is likely that New York and Illinois are in the top eight due to an increased media and advocacy interest in wrongful conviction cases. *Id.* Data for California is not publicly available and, thus, Florida was used in its place.

⁸ Maximum Reports, Inc., is a commercial data provider who collects information through statewide searches. In order to obtain criminal history background check, date of birth must be provided for each individual in the sample. From the data gathered from CWC, dates of birth (“DOB”) were included for about one-third of the sample. The remaining DOBs were gathered using several different methods, including sex offender registries, attorney contacts, recorded court decisions, LexisNexis and Westlaw searches for new coverage, and general Internet searches. Once DOB was obtained, identifying information was provided to Maximum Reports, Inc. Within a few days a full criminal history report was acquired. *Schedule of Services and Fees*, MAXIMUM REPORTS, INC., <http://www.maximumreports.com/index.cfm?fuseaction=Content.ServicesFees> (last visited Feb. 29, 2012).

⁹ *See id.*

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opportunity to look at the criminal history records of exonerees.¹⁰ We were immediately struck by the fact that many exonerees have evidence of the crime for which they were wrongfully convicted on their criminal record.

This article explores the relationship between exoneration and expungement. Part II presents our findings regarding expungement. We attempt to explain some of the results by offering a brief overview of current expungement laws and procedures in the four subject states. Within this section we also briefly discuss the relationship between executive pardons, exoneration, and expungement. Part III discusses the implications of having a criminal record. These include loss of privileges of citizenship, barriers to employment, loss of benefits, and access to government documents. The section notes that criminal records are increasingly accessible, which enhances the associated stigma. The article concludes with a brief review and recommendation for legal reform.

II. EXPUNGEMENT IN PRACTICE

A. *Present Data on Expungement*

We collected criminal history data in 117 cases in which a defendant was determined by an official act to be not guilty of the crime for which they were convicted and incarcerated.¹¹ Eighteen of the cases were from Florida, thirty-one from Illinois, twenty-four from New York, and forty-six from Texas.

¹⁰ The FBI requires that all public requests for national criminal check include a fingerprint for the person for whom information is sought; the U.S. Department of Justice Order 556-73 directed the FBI to establish rules and regulations for the subject of an FBI Criminal Justice Information Record to obtain a copy of his or her own record for review. 28 C.F.R. § 16 (1973); 28 C.F.R. § 16.32 (2012); *see also Identification Record Request/Criminal Background Check*, FBI, <http://www.fbi.gov/about-us/cjis/background-checks/order> (last visited Feb. 29, 2012) (Order 556-73). The FBI's Criminal Justice Information Services ("CJIS") Division processes these requests. *Criminal Justice Information Services*, FBI, <http://www.fbi.gov/about-us/cjis> (last visited Feb. 29, 2012). Without a fingerprint, a DOB is required in order to run a state specific criminal history. *Schedule of Services and Fees*, *supra* note 8. States differ by the type of information they provide publicly. And while all states require that information regarding individuals in custody be made public, some states do not publish arrest records. *See Criminal History Record Search*, NEW YORK, *supra* note 6; *Frequently Asked Questions*, *supra* note 6; *Criminal History Name Search*, TEXAS, *supra* note 6.

¹¹ These cases consisted of individuals who were exonerated between 1999 and 2009. The majority of cases had a top charge of murder (43.1%) or rape/sexual assault (29.3%). Drug crimes were the top charge in 19% of the cases and property crimes were 4.2%. The remaining cases had a top charge of assault, attempted rape, attempted murder, or kidnapping (all accounting for 1.1%).

The situation was most encouraging in New York. None of the twenty-four New York cases showed any record of the prior wrongful conviction. New York law permits the sealing of cases where charges have been dismissed, vacated, set aside, not filed, or otherwise terminated.¹² In our experience, this process was automatic.

In the three states where clearing the record is discretionary, expungement is irregular and possibly random. Among the ninety-three cases from Florida, Illinois, and Texas, thirty-nine (41.9%) had evidence of their wrongful conviction crime still present on their record.¹³ Florida had the lowest number and percentage of cases that were expunged. Only six defendants (33.3%) had no evidence of the wrongful conviction on their record. Illinois had the highest percentage of expungement. Twenty of the exonerees (67%) had no evidence of the wrongful conviction offense on their record. Twenty-eight of the Texas wrongful convictions (62%) had been successfully expunged. This data suggests that expungement after exoneration is often more myth than reality.

TABLE 1. PERCENT OF WRONGFUL CONVICTIONS COMPLETELY
EXPUNGED BY STATE

		STATE				
		<i>FL</i>	<i>IL</i>	<i>NY</i>	<i>TX</i>	<i>Total</i>
Yes	%	33.3	66.7	100.0	62.2	66.7
No	%	66.7	33.3	0.0	37.8	33.3
Total (N)		18	30	24	45	117

B. Current Expungement Laws and Procedures

Part of the variation is attributable to variation in the law. Federal courts have the power to expunge federal criminal offenses.¹⁴ Most federal offenses, however, are not eligible for

¹² N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2011).

¹³ Cases in which the wrongful conviction crime was listed but indicated “pardoned,” “dismissed,” or “charges dropped” were included in the “no expungement” group. This decision was made because there should be no indication of the crime left on an exonerees record in order for the crime to be considered expunged, or “erased.”

¹⁴ Statutes and the inherent authority of courts are the recognized sources of authority by which federal district courts may expunge records of criminal convictions. *See, e.g.*, 18 U.S.C. § 3607(c) (2010) (outlining expungement procedures for violators of the Controlled Substances

expungement.¹⁵ A recent proposed bill allows for the expungement of certain offenses in limited circumstances.¹⁶ Only nonviolent, first-time offenders are eligible.¹⁷

Expungement is thus typically a function of state law, specifically the law of the state with jurisdiction over the crime. Here, there is widespread variation. Some states do not allow certain records to be expunged.¹⁸ Other states allow records to be expunged only under very limited circumstances.¹⁹ Each state has its own procedure for securing expungement. Expungement may also have different meanings in different states. For example, in some jurisdictions an expunged record may not completely “disappear.”²⁰ It may be available to law enforcement, to sentencing judges on subsequent offenses, and to correctional facilities and correctional officers.²¹ The variation among Florida’s, Illinois’s, and Texas’s laws is illustrative and partially explanatory of the variation.

1. Florida

Florida does not currently have a law regarding expungement in cases of wrongful conviction. To be eligible for sealing or expungement, the defendant must not have been convicted of or have pled guilty to any criminal offense and must not have previously received an expungement or sealing.²² In other words, if

Act, 21 U.S.C. § 844 (2010)); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379–80 (1994) (recognizing the power of courts to use its powers to dispose of cases and “manage its proceedings, vindicate its authority, and effectuate its decrees” (citations omitted)).

¹⁵ See *United States v. Coloian*, 480 F.3d 47, 49 & n.4 (1st Cir. 2007).

¹⁶ See Fresh Start Act of 2010, H.R. 5492, 111th Cong. (2010) (unenacted); see also Fresh Start Act of 2011, H.R. 2449, 112th Cong. (2011) (pending).

¹⁷ See H.R. 2449 (amending U.S.C. §§ 3631, 3632 to make nonviolent, first-time offenders eligible for expungement).

¹⁸ For example, in Maryland you are not eligible for an expungement “[i]f you received a probation before judgment, a nolle prosequi, a stet, a pardon or conviction of a specified public nuisance crime, and since then you have been convicted of another crime other than a minor traffic violation or are a defendant in a pending criminal proceeding.” *Expungement: Information About Removing Criminal Records from Public Access in Maryland*, MARYLAND JUDICIARY (July 2010), <http://mdcourts.gov/courtforms/joint/ccdccb072br.pdf> at 5. In Utah, you are not eligible for an expungement in cases of vehicular homicide or felony DUI charges. See *Expunging Adult Criminal Records*, UTAH STATE COURTS, <http://www.utcourts.gov/howto/expunge/> (last updated Aug. 11, 2011).

¹⁹ See, e.g., ALASKA STAT. § 12.62.180 (2012) (providing a remedy in the case of “mistaken identity or false accusation”).

²⁰ See 24 C.J.S. *Criminal Law* § 2414 (2011).

²¹ For example, in Colorado the expunged records can be searched, retrieved, and used, but this occurs only in exceptional circumstances and normally requires a court order or statutory authorization. See COLO. REV. STAT. §§ 19-1-306, 24-72-308.5 (2012).

²² See *Reasons for Denial*, FLA. DEPT OF LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/getdoc/cfbb1cd3-1ca9-4a3e-a75d-01566981d6e2/Reasons-an-Application-for->

an exoneree has any prior offenses or has plead guilty to the offense for which he or she was wrongfully convicted,²³ he or she is not eligible for an expungement. A “Certificate of Eligibility” from the Florida Department of Law Enforcement is required prior to petitioning the court for an order to seal or expunge a record.²⁴ There is a \$75.00 charge required to secure this certificate.²⁵ A successful sealing will limit disclosure of the record to only the Florida Bar, the Florida Department of Children and Families, the Florida Board of Education, and law enforcement.²⁶ In a few other circumstances an expunged record will be unavailable for dissemination to any private or public entity.²⁷

2. Illinois

Illinois law allows the sealing or expungement of parts of the records of a conviction, preventing the public, including employers, from gaining access to that record.²⁸ To be eligible for sealing of a conviction record in Illinois, one must have been sentenced to supervision and must wait four years, beginning at the time of discharge from supervision.²⁹ Some misdemeanors are ineligible for sealing.³⁰ All felony convictions are ineligible for sealing except for Class 4 felony drug possession and prostitution offenses.³¹

In Illinois, expunging and sealing a criminal record are two

Certification-of-Eligib.aspx (last visited Feb. 29, 2012).

²³ See *id.* Christopher Ochoa spent twelve years in prison for a murder and rape that DNA later exonerated him for. *Know the Cases: Christopher Ochoa*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Christopher_Ochoa.php (last visited Feb. 29, 2012). This case illustrates a situation in which an innocent person pled guilty. See *id.* More information on this and similar cases can be found on the American Bar Association webpage. E.g., Ellen Yaroshesky, *Ethics and Plea Bargaining: What's Discovery Got to Do With it?*, 2008 A.B.A. SEC. CRIM. JUST. 28, 29–30, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yarosh_efskey.authcheckdam.pdf.

²⁴ See *Frequently Asked Questions*, FLA. DEP'T OF LAW ENFORCEMENT, http://www.fdle.state.fl.us/Content/Seal-and-Expunge-Process/Seal-and-Expunge-Home/Frequently-Asked-Questions.aspx#Record_Seales_or_Expunged (last visited Feb. 29, 2012).

²⁵ See *id.*

²⁶ See FLA. STAT. §§ 943.059, 943.0585 (2011).

²⁷ See *id.* §§ 943.059, 943.0585. If a record is sealed, the public (including private employers) cannot view it, but most government agencies will still have access to it. See *id.* § 943.059(4). However if a criminal record is expunged, not even a government agency can see it without a court order. See *id.* § 943.0585(4).

²⁸ *How to Clear Your Illinois Criminal Record*, OFFICE OF THE STATE APPELLATE DEFENDER, 2, 7, 9 (Jan. 2012), <http://www.state.il.us/defender/expforms/2012%20InstGuide.pdf>.

²⁹ *Id.* at 21.

³⁰ *Id.* at 15–16.

³¹ *Id.* at 2, 11.

different things.³² If an individual has never been convicted of a crime or violated a municipal ordinance, they may be eligible to have their record expunged, whereas if they have been convicted of a prior offense they may only be able to have their records sealed.³³ Expunged records are physically destroyed or returned to the individual and their name is removed from public criminal records.³⁴ In contrast, sealed records are not destroyed but are kept confidential.³⁵ The general public will not usually have access to a sealed record, but law enforcement agencies will still be able to see it.³⁶ In most cases it does not need to be disclosed to others if a record is expunged or sealed, including to potential employers.³⁷

3. Texas

Texas expungement law allows expungement of arrests which did not lead to a finding of guilt, at which point the use of expunged records by any agency is prohibited.³⁸ Unless being questioned under oath, the defendant may deny the occurrence of the arrest and expungement order.³⁹ If the defendant was found guilty, pled guilty, or pled no contest to any offense other than a Class C misdemeanor, the defendant is not eligible for expungement.⁴⁰ An individual may be eligible for expungement if they were found not guilty after a trial, they were arrested but never charged, the indictment or information was dismissed, or they were pardoned or acquitted by the appellate court.⁴¹

C. Executive Pardons and Expungement

A governor may pardon people convicted of crimes and may even specify that the pardons are based on their innocence.⁴² In most states, however, pardons are granted infrequently, at a rate of only a few per year.⁴³ The conditions for obtaining a pardon vary by

³² *Id.* at 5.

³³ *Id.* at 2.

³⁴ *Id.* at 5.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 9.

³⁸ TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(1) (West 2011); *id.* art. 55.03(1).

³⁹ *Id.* art. 55.03(2)–(3).

⁴⁰ *See id.* art. 55.01(a)(2).

⁴¹ *See id.* art. 55.01.

⁴² *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 216 (2003).

⁴³ *See id.* A notable exception to this is the recent situation in Mississippi: “Gov. Haley

state, but in most places the process is cumbersome and typically only applies to first-time offenders.⁴⁴

Expungements and pardons are distinct. When an expungement is granted, the person whose record is expunged may treat the event as if it never occurred.⁴⁵ In contrast, a pardon, sometimes referred to as an executive clemency, does not erase the event.⁴⁶ Rather, it grants forgiveness.⁴⁷ In the United States, only a judge can grant an expungement,⁴⁸ while a pardon must be granted by a governor for state law offenses or the President for federal offenses.⁴⁹ In some states a pardon leads to an automatic expunction,⁵⁰ but that is not always the case.⁵¹

In most cases, wrongfully convicted individuals need an expungement to successfully reenter society, an issue that is discussed in the following section.⁵² An expungement wipes away

Barbour granted clemency to 215 convicts in his last few days in office, among them more than two dozen who had been convicted of murder or manslaughter” Campbell Robertson, *Despite Uproar Over Clemency, Barbour Finds Lucrative Nest*, N.Y. TIMES, Jan. 14, 2012, <http://www.nytimes.com/2012/01/15/us/despite-clemency-uproar-haley-barbour-finds-lucrative-nest.html?pagewanted=all>.

⁴⁴ See SAUNDRA D. WESTERVELT & KIMBERLY J. COOK, LIFE AFTER DEATH ROW: EXONEREES’ SEARCH FOR COMMUNITY AND IDENTITY (forthcoming 2012). A pardon can be costly and requires legal expertise. *Id.* Exonerees have reported waiting a long time for their pardon to go through. *Id.* For example, one exoneree was exonerated in 1987 but did not receive a pardon until 2000. *See id.*

⁴⁵ See *Pardon and Expungement in South Carolina*, PIEDMONT TECHNICAL COLL., http://www.ptc.edu/sites/default/files/documents/hs_resources/Pardon_and_Expungement.pdf at 1 (last visited May 30, 2012).

⁴⁶ *See id.*

⁴⁷ *See id.*; see also *People v. Chiappa*, 368 N.E.2d 925, 926 (Ill. App. Ct. 1977) (“Other courts have held that a general pardon merely forgives the offender for having committed the offense.”).

⁴⁸ See *Basics on Criminal Expungement*, MINN. JUDICIAL BRANCH, <http://www.mncourts.gov/selfhelp/?page=328> (last visited Feb. 29, 2012).

⁴⁹ See *Pardon Information and Instructions*, U.S. DEP’T OF JUST., OFFICE OF THE PARDON ATTORNEY, http://www.justice.gov/pardon/pardon_instructions.htm (last visited Feb. 29, 2012).

⁵⁰ See, e.g., 20 ILL. COMP. STAT. 2630/5.2(e) (2012). In the case of an executive pardon in Illinois, “the presiding trial judge at the defendant’s trial, [may] have a court order entered expunging the record of arrest from the official records” *Id.*

⁵¹ See, e.g., N.J. STAT. ANN. § 2C:52-9 (West 2011) (setting a time frame within which a court must set a date for a hearing). One exoneree reported that upon his release from death row he was told he could request a pardon. However, he felt that he should not be the one to have to seek a pardon stating, “I think they’ve got that whole process backwards. . . . It should be him [governor] coming forward on his own free will I don’t foresee myself asking them to give that pardon.” The exoneree went on to say, “[T]he governor should expunge it on his own. It shouldn’t cost me . . . to expunge what should’ve never been there.” WESTERVELT & COOK, *supra* note 44. Half of the sample exonerees (excluding New York) used in this study were granted a pardon, however 43.6% of the exonerees were not. Six cases had missing information for this variable, accounting for 6.4%.

⁵² See WESTERVELT & COOK, *supra* note 44. In their interviews with death row exonerees,

the conviction entirely, as if it never happened.⁵³ While a pardon can explain a wrongful conviction, without an expungement that original conviction will still turn up on a criminal background check.⁵⁴ If a criminal record is expunged there is no record of the conviction and if an individual is asked if they have ever had a conviction, they can truthfully answer no, as if the conviction never happened.⁵⁵ The ability to deny the wrongful conviction ever occurred may be crucial to successful reentry for some exonerees.

III. PREJUDICE BASED ON CRIMINAL RECORD

A criminal conviction, whether the individual is in fact innocent or not, scars an individual for life. It is very difficult to move beyond the stigmatizing effects of having a criminal record. Research consistently shows that having a criminal record has negative consequences that continue long after a sentence has been served.⁵⁶ Not only does a criminal record often lead to stigmatization and community isolation, it can hinder future success.⁵⁷

Any record of criminal convictions may have a permanent effect on an individual's future, specifically in regard to their civil rights, when pursuing a job opportunity, applying for a professional license, or seeking government housing assistance and documentation. The effects may be more profound when the criminal record is for a crime the individual did not commit. When a criminal record is expunged, or erased, there will be no evidence that the crime ever occurred, which could help an exoneree make an easier transition back to society.

the authors found that without an expungement exonerees had difficulty finding a job. *Id.* Often exonerees need to engage legal assistance to obtain an expungement but lack the funds to do so. *Id.*

⁵³ *Pardon and Expungement in South Carolina*, *supra* note 45.

⁵⁴ See *Expunging Criminal Records*, SACRAMENTO CNTY. PUB. LAW LIBRARY, <http://www.saclaw.org/pages/expunging-criminal-records.aspx> (last visited Feb. 29, 2012).

⁵⁵ See *id.* No matter how an exoneree answers the question, "have you ever been convicted of a felony?" they can be criticized. See WESTERVELT & COOK, *supra* note 44. One exoneree reported that he wrote "not applicable" and was told he lied and therefore did not get the job he was applying for. See *id.*

⁵⁶ See PETERSILIA, *supra* note 42, at 105.

⁵⁷ See *id.* at 105–06; WESTERVELT & COOK, *supra* note 44. One-third of the participants in the study believed that their ex-offender status influenced their treatment by others in their home communities. *Id.*

A. *Civil Rights*

Upon release from prison, individuals experience a loss of civil liberties.⁵⁸ Convicted felons may lose many essential rights, such as the right to vote⁵⁹ and the right to hold public office.⁶⁰ A criminal record may also be a ground for a divorce, prevent jury service, and limit the ability to own a firearm.⁶¹ Individuals with certain criminal convictions may experience a loss of parental rights.⁶² They are commonly not approved as foster or adoptive parents.⁶³

B. *Employment*

Obtaining employment is critical to a successful reintegration.⁶⁴ Yet, while exonerees have been found innocent of the crime they were convicted of, they face similar challenges seeking employment as ordinary prison releasees. Regardless of an individual's innocence or guilt, incarceration still removes an individual from society and exposes them to the prison subculture. In other words, the difficulties of reentry and reintegration are found among all individuals released from prison and likely are more difficult for exonerees.⁶⁵

⁵⁸ See Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 939 (1970).

⁵⁹ See PETERSILIA, *supra* note 42, at 130. Every state, besides Maine and Vermont, has laws prohibiting prison inmates from voting. See Christopher Uggen, *Barriers to Democratic Participation* 2, Paper Presented at The Urban Institute's Reentry Roundtable: Prisoner Reentry and the Institutions of Civil Society: Bridges and Barriers to Successful Reintegration (Mar. 2002), available at <http://www.urban.org/publications/410801.html>. Some states permanently deny the right to vote after a felony conviction, while others prevent voting while on probation or parole. See *id.*

⁶⁰ See PETERSILIA, *supra* note 42, at 105.

⁶¹ See *id.*

⁶² See *id.* at 106.

⁶³ See *id.* at 127. In cases where parents have been convicted of murder, voluntary manslaughter, or acts of serious violence against children, they have been stripped of parental rights. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 211 (1997) (codified in scattered sections of 2, 42 U.S.C.).

⁶⁴ Research has established a strong positive link between job stability and reduced offending. See Mark W. Lipsey, *What Do We Learn from 400 Research Studies on the Effectiveness of Treatment with Juvenile Delinquents?*, in WHAT WORKS: REDUCING REOFFENDING: GUIDELINES FROM RESEARCH AND PRACTICE 71 (James McGuire ed., 1995); Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 AM. SOC. REV. 529, 529-30 (2000).

⁶⁵ WESTERVELT & COOK, *supra* note 44. The authors explain the trauma experienced by exonerees and how it affects their identity. *Id.* "Exonerees . . . endure a double dose of attacks on the self. . . [T]hey experience the devaluation and disorientation common to those released from prison. . . [T]he assault on identity is compounded by the wrongful conviction experience itself." *Id.*

Although it is generally illegal for employers to ban hiring ex-offenders,⁶⁶ certain occupations mandate a background check for the safety of their clients.⁶⁷ “The most common . . . jobs with [this requirement are] childcare, education, security, nursing, and home health care”⁶⁸ This can be especially troublesome for released offenders who once worked in the aforementioned occupations. Employers outside of these occupations often ask about prior felony convictions, even if they are not permitted to do so.

Individuals with a prior criminal record are less likely to be hired for a position,⁶⁹ and are also often restricted in their ability to obtain occupational and professional licenses.⁷⁰ This creates a barrier for individuals who are trying to successfully reintegrate into society, independent of their actual innocence.

C. Obtaining Government Benefits and Documentation

Having a criminal record also hinders an individual’s ability to obtain government benefits such as housing,⁷¹ welfare,⁷² food stamps,⁷³ and financial assistance.⁷⁴ In addition, formerly incarcerated individuals have difficulty obtaining drivers’ licenses, social security cards, and birth certificates—documents that are often necessary for employment.⁷⁵

⁶⁶ See PETERSILIA, *supra* note 42, at 113.

⁶⁷ *See id.*

⁶⁸ *Id.*

⁶⁹ *See id.* at 116–17. A national survey of 600 businesses revealed that employers are reluctant to hire ex-convicts, reporting they fear liability if a new crime is committed. *See id.* at 117. Additionally, in 2001 “Western, Kling, and Weiman . . . found that employers are less likely to hire ex-convicts [as compared to] those who provide *no* information” (left question blank) on their application form. *Id.* at 116. Holzer et al. conducted a survey of 3,000 employers from four large cities and similarly found that the majority of employers are unwilling to hire an applicant with a criminal record; sixty percent indicated that they would “probably not” or “definitely not.” HARRY J. HOLZER, WILL EMPLOYER’S HIRE EX-OFFENDERS? EMPLOYER PREFERENCES, BACKGROUND CHECKS, AND THEIR DETERMINANTS 10 (2002). In addition, these researchers found that over sixty percent of employers “always” or “sometimes” checked the criminal backgrounds of potential employees, as compared to under fifty percent in 1994. *Id.*

⁷⁰ *See* PETERSILIA, *supra* note 42, at 114.

⁷¹ *See Housing Laws Affecting Individuals with Criminal Convictions*, LEGAL ACTION CTR., http://lac.org/doc_library/lac/publications/housing_laws.pdf (last visited Feb. 29, 2012). Finding housing is one of the biggest challenges for people leaving prison. Some laws deny housing to certain felons, such as drug and sex offenders. *See id.*

⁷² *See* 21 U.S.C. § 862a (2010). Individuals with drug-related felony convictions are unable to receive federally funded public assistance (welfare) and food stamps. *See id.*

⁷³ *See id.*

⁷⁴ *See* PETERSILIA, *supra* note 42, at 124

⁷⁵ *See id.* at 115.

D. Law Enforcement Bias

Offenders with a criminal record are also more likely to be subject to bias of law enforcement.⁷⁶ Many officers use records to influence their decision on whether or not to make an arrest.⁷⁷ Having a criminal record could also affect the plea bargaining process and other decisions in the court process.

E. Greater Accessibility to Records

The growing use of computer-based record keeping makes criminal history information more readily available and easier to share. Between 1995 and 2005, the Department of Justice gave the states \$465 million toward improving the accessibility and quality of their criminal history record keeping.⁷⁸ It is important to note that this information is not only available to law enforcement and courts; the general public can access criminal histories as well, although the degree of accessibility varies state by state.⁷⁹ In addition to technological advances, there are several private companies that will provide these services for a nominal fee.⁸⁰

Although being able to access criminal history information is a necessary tool for law enforcement and public safety, it can have detrimental effects on individuals reentering society. These negative effects are intensified for those individuals who were exonerated but still have a publicly available record of their conviction.

F. Conclusion and Implications

When an individual is wrongfully convicted they are deprived of freedom and liberty. After their release they then need to rebuild their life, a process made more difficult if court records related to

⁷⁶ See Richard C. Smith et al., *Background Information: Does It Affect the Misdemeanor Arrest?*, 4 J. POLICE SCI. & ADMIN. 111, 113 (1976).

⁷⁷ *Id.*

⁷⁸ See OFFICE OF THE ATTORNEY GEN., U.S. DEPT OF JUST., THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 17 (2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf (last visited Feb. 29, 2012).

⁷⁹ See PETERSILIA, *supra* note 42, at 109. Criminal records are widely available via the Internet. In twenty-five states the public can access criminal records for individuals in prison; however, in nineteen of these states information on formerly imprisoned and paroled offenders can also be accessed. See *id.*

⁸⁰ A Google search (Jan. 5, 2012) revealed hundreds of private companies that offer background check services ranging in price and scope of information.

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the wrongful conviction are publicly available. Having a criminal history record has far-reaching consequences. When returning to the community, individuals leaving prison are often stigmatized and isolated. In addition, these individuals experience a loss of civil liberties, including the right to vote or hold public office. Other obstacles include obtaining employment, access to government benefits, and law enforcement bias. This situation is worse for an individual who was wrongfully convicted; they should have never had the criminal record to begin with.

Post-exoneration expungement is a complex problem that deserves the attention of lawmakers and government officials. There should be immediate automatic expungement for all cases of wrongful conviction, whether “innocence” was based on an acquittal, dismissal, pardon, or actual innocence.⁸¹

⁸¹ In law, a wrongful conviction is often considered “legal innocence” and frequently results from an appellate court reversal based on procedural error. Keith A. Findley, *Defining Innocence*, 74 ALB. L. REV. 1157, 1185–86 (2010/2011). However, many researchers focus on the idea of “actual” innocence, a situation in which an individual “did not commit the acts underlying the conviction . . .” Marvin Zalman et al., *Officials’ Estimates of the Incidence of “Actual Innocence” Convictions*, 25 JUST. Q. 72, 75 (2008).