



Reducing crime through expungements[☆]



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ABSTRACT

Expungement refers to the legal practice of having one's criminal record sealed. These legal devices lower the visibility of a person's criminal record, and thereby reduce the informal sanctions that may be imposed on him. This reduction is enjoyed by the ex-convict only if he does not become a repeat offender, because otherwise he re-obtains a criminal record. Thus, the value a person attaches to having his record expunged is inversely related to his criminal tendency. Therefore, by making expungements costly, the criminal justice system can sort out low criminal tendency individuals – who are unlikely to recidivate – from people who have high criminal tendencies. Moreover, the availability of expungements does not substantially affect a first time offender's incentive to commit crime, because one incurs a cost close to the reduction in informal sanctions that he enjoys by sealing his criminal record. On the other hand, expungements increase specific deterrence, because a person who has no visible record suffers informal sanctions if he is convicted a second time. Thus, perhaps counter-intuitively, allowing ex-convicts to seal their records at substantial costs reduces crime.

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1. Introduction

Expungement refers to the legal practice of having one's criminal record sealed such that it is inaccessible to the public. Although there are many variations of this practice, the commonality among them is that they make the person's criminal records less visible, and they thereby mitigate the informal costs associated with being an ex-convict. This article demonstrates that allowing expungements at a cost can counter-intuitively reduce crime.

Expungements and similar practices¹ are becoming more popular, and their functions are being debated among academics,² perhaps because they are seen as a potential remedy to the 'Mass Incarceration' problem, which is a popular term that refers to the high incarceration rates in the United States. Legal reforms and attempts at reforms parallel these debates. In 2011, two bills were proposed to enable federal expungement authority, although they did not pass.³ In Delaware, Governor Jack Markell has signed around 1600 pardons in his 6 years of service to reduce the stigmatization of

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¹ See Schlosberg et al. (2014) for a list and brief review of "mechanism[s] through which an individual may expunge or limit disclosure of a criminal record" (Schlosberg et al., 2014, p. 355).

² See, e.g., Jacobs (2015), Roberts (2015), Litwok (2014), and Schlosberg et al. (2014).

³ See, The Second Chance for Ex-Offenders Act of 2011, H.R. 2449, 112th Cong. (summary available at <https://www.govtrack.us/congress/bills/112/hr2065/summary>), and The Fresh Start Act of 2011, H.R. 2065, 112th Cong. (summary available at <https://www.congress.gov/bill/112th-congress/house-bill/2449>).

many ex-offenders.⁴ Most recently, and within the last year, a federal judge in the Eastern District of New York expunged a person's criminal record claiming that his court has ancillary jurisdiction to expunge records,⁵ whereas the New Jersey Supreme Court made it harder to obtain expungements by limiting their availability to cases where the offense occurred during a "single, uninterrupted" event.⁶ Given these recent developments, it is likely that there will be new legislation and rulings related to expungements in the near future, and it is therefore important to explore the various costs and benefits of expungements.

The existing debates among legal scholars do not directly address whether expungements are likely to increase or reduce crime. Proponents of expanding the availability of expungements often claim that a criminal record presents a barrier to re-entering society, which is a significant cost that can be mitigated (or eliminated) through the use of expungements.⁷ On the other hand, some academics note that allowing expungements violate 'the people's right to know'.⁸ Moreover, expungements reduce the expected costs associated with committing crime, and may increase first-time-offenders' incentives to commit crime.⁹ Thus, the relevant trade-off identified so far appears to be between reducing costs imposed on convicts (and their dependents) on the one hand, and costs associated with greater criminal incentives for first-time-offenders and depriving society of information regarding offenders on the other hand.

In this article, I highlight a feature of expungements that is ignored by many legal scholars, and has not yet been formalized in the economics literature. Ex-convicts who truly wish to refrain from committing crime in the future value expungements more than career criminals, because the latter type is more likely to be re-stigmatized as a result of his future misconduct. In more technical terms, a person's reservation price for expungements is decreasing in his criminal propensity. Thus, if the government could price expungements, it could separate generally-law-abiding-citizens, who under exceptional circumstances have failed to act in accordance with the law, from career criminals. Moreover, the possibility of purchasing expungements at a price close to one's reservation price has little effect on a person's ex-ante incentives to commit crime, because it leaves the expected costs associated with criminal actions almost unchanged. However, an ex-convict who has expunged his record is less likely to commit crime in the future compared to a similar person with an unexpunged record, because he faces greater expected informal sanctions from recidivating. Thus, expungements can be used to reduce crime by lowering recidivism rates without much affecting first-time-offenders' incentives.

Explaining the dynamics associated with pricing expungements in further detail requires a brief digression into the stigmatizing effect of criminal punishment, and how expungements reduce stigmatization costs. Many previous law and economics studies, both theoretical and empirical, focus on the extra-legal negative consequences associated with having a criminal record. A person (or a corporation) who is convicted of a crime is not only sanctioned through criminal law, but may also receive lower wages in the labor market.¹⁰ Moreover, a person with a record may suffer negative social consequences due to other people's reluctance to interact with him.¹¹ Expungements reduce these costs by making a person's criminal record unavailable to the public, and therefore harder for people to discriminate against a person based on his criminal record. Sealing one's criminal record is not very valuable, however, if the person re-offends subsequent to expunging his record, thereby suffering again the costs associated with having a criminal record.

A static model, which ignores the expected future behavior of ex-convicts, is incapable of capturing the full value of expungements to an ex-convict, because it excludes the possibility of the ex-convict re-obtaining a record. Standard multi-period law enforcement models used to study recidivism allow the incorporation of future considerations of this type.¹² In these models, various policies generate two interrelated incentive effects which are conveniently called specific deterrence effects and general deterrence effects (Funk, 2004). Specific deterrence relates to the crime rate among ex-offenders; whereas, general deterrence relates to the crime rate among people who were never convicted.

If expungements were free (or automatic) for first time offenders, one would expect them to reduce general deterrence, since they reduce the expected costs associated with committing crime.¹³ On the other hand, they are likely to increase

⁴ These pardons are not as effective as expungements, but are still meant to reduce stigma. As Barish and Starkey (2015) explain, "Pardons add a disclaimer to a criminal record saying someone is officially forgiven by the state but do not erase convictions. Rather, they restore civil liberties. . . [and] can be used to show prospective employers a person is reformed – a kind of seal of approval from the governor."

⁵ *Doe v. U.S.*, No. 14-MC1412, 2015 WL 2452613 (D.N.Y. May 21, 2015).

⁶ *In re J.S.*, 121 A.3d 322 (N.J. 2015).

⁷ See, e.g., Roberts (2015).

⁸ See, e.g., Kilcommins and O'Donnell (2003) and Dunn (1986).

⁹ That expungements may reduce general deterrence by reducing the negative consequences associated with being an offender seems to be stated rather infrequently (see, e.g., Czajkowski (1982) and Easton (1981)), although this is presumably the first effect that comes to mind in the economics of law enforcement context.

¹⁰ Many empirical studies point to this conclusion. Pager (2003) and Pager et al. (2009) are audit studies focusing on the effect of having a record; Lott (1992a) and Lott (1992b) estimate the size of informal sanctions; and Karpoff et al. (2008) estimates the penalties imposed by the market on firms due to financial misrepresentation. Legal scholars also frequently provide anecdotal evidence that support this claim (see, e.g., Murray (2016) and the references cited therein).

¹¹ The American Bar Association's Database lists more than 45,000 potential collateral consequences associated with having a conviction (National Inventory of Collateral Consequences of Conviction, <http://www.abacollateralconsequences.org/search/>). See also Demleitner (1999) where a variety of social negative consequences are discussed.

¹² Funk (2004) makes a similar observation regarding the specific deterrence reducing effect of stigma, and states that the single period models in Rasmusen (1996) are unable to generate this effect.

¹³ See, however, Litwok (2014), finding no general deterrence effects.

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