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**A Clean Slate for No One: The Need for
Automatic Expungement Policies**

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ABSTRACT

In the United States, the “collateral consequences” of a criminal record extend far beyond the period of physical detention. These disadvantages fall disproportionately heavily on the shoulders of people of color, and on Black Americans in particular. Among the numerous policy mechanisms aimed at alleviating these collateral consequences, expungement – the extraction and isolation of official criminal records from public access – stands out as particularly promising in that it promises to provide criminalized individuals a “clean slate.” However, the emerging literature on the uptake rate of expungement policies in their current, petition-based state has been far from encouraging. This paper provides a critical race perspective to this emerging literature through a comparative analysis of expungement policies in New Jersey and Alabama. This analysis reveals that existing expungement policies are not simply ineffective; they are also active contributors to the racial disparities in the impacts mass incarceration. This paper concludes by suggesting that the only equitable path forward for expungement is to follow the lead of New Jersey and other states by providing expungement automatically to those who qualify.

KEYWORDS:

expungement, criminal records, racial capitalism, critical race theory, mass incarceration, racial disparities, clean slate, criminalization, labor market, employment

A Clean Slate for No One: The Need for Automatic Expungement Policies

Michael Hiestand

Introduction

In 1969, there were approximately 188,000 people incarcerated in federal and state prisons across the United States. By the end of 2019, just fifty years later, that number had ballooned to just under 2.1 million.¹ Even adjusting for population growth, this is a drastic increase in incarceration rates over a fifty-year period. And while 2.1 million is a staggering number of human lives currently living behind prison walls, it pales in comparison to the number living outside those walls burdened with the long-term social and economic impacts of criminality. These long-term impacts extend to nearly all aspects of life and have come to be known as the “collateral consequences” of criminality.²

In a nation where access to healthcare, housing, food, and (in many ways) social value is almost inextricably linked to employment, the collateral consequences of criminality on employment are perhaps the most significant of these burdens. The unemployment rate among the formerly incarcerated hovers around five times that of the national unemployment rate.³ And while barriers to employment for those with criminal records have begun to subside in recent years, the long-term burdens of criminality on employment are unlikely to entirely disappear without serious criminal justice reform.

These burdens fall disproportionately on the shoulders of people of color, and particularly on Black Americans. This is largely by design; the surge in rates of incarceration that has defined the past half-century was due in large part to the War on Drugs and “Tough on Crime” rhetoric that came along with it.⁴ These political tools, embraced by actors on both sides of the aisle, were engineered to operate as ostensibly colorblind safeguards of the American racial hierarchy.

They filled this role very effectively. People of color, particularly Black men, are incarcerated at a rate grossly disproportionate to their white peers. And Black Americans who are incarcerated experience drastically different rates of unemployment and long-term wealth.⁵ The

¹ The Sentencing Project, *Trends in U.S. Corrections* (2019) (<https://www.sentencingproject.org/wp-content/uploads/2021/07/Trends-in-US-Corrections.pdf>).

² See Margaret Colgate Love et al., *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* § 1:12 (2018).

³ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among the Formerly Incarcerated*, Prison Policy Initiative (<https://www.prisonpolicy.org/reports/outofwork.html>) (2018).

⁴ See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2d ed. 2011); Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. Gender Race & Just. 315 (2012).

⁵ Couloute & Kopf, *supra* at note 3.

combined short-term and long-term impacts of mass incarceration on people of color across the nation have worked to exacerbate the deeply rooted racial inequalities around and upon which America was built.⁶ This paper will not provide a comprehensive account of the racial origins and impacts of mass incarceration, as such accounts have already been provided eloquently and extensively by far more qualified authors.

The goal of this paper is far narrower: to contribute a critical race perspective to an emerging literature on the impacts of expungement laws on employment outcomes for those living with criminal records. The meaning of “expungement” varies by jurisdiction, but generally refers to the extraction and isolation of official criminal records from public access, either by sealing them or erasing them entirely.⁷ Though it is among the most popular, expungement is only *one* of several criminal justice reform policies that promise to reduce collateral consequences on employment. Part I will briefly address another popular policy: the so-called “Ban-the-Box” laws. Accordingly, nothing in this paper should be taken to suggest that expungement is the *only* route to addressing the consequences of mass incarceration.

Because successful expungements result in the deletion of publicly accessible criminal records, studying the effects of these policies presents built-in difficulties. Until recently, the best sources of information on the effectiveness of expungement laws were the people who had direct experience with their administration: judges, administrative agents, pro bono lawyers, and those with criminal records. That changed when, in late 2020, the *Harvard Law Review* published an in-depth statistical analysis of Michigan’s expungement laws through direct collaboration with the state police, which shined much-needed light on their effectiveness both in Michigan and across the country.⁸ The results of this analysis were far from encouraging. While employment outcomes improved for those who obtained expungements, the percentage of those who actually received one (or “uptake rate”) within five years of becoming eligible was an abysmally low 6.5%.⁹ The primary reason for this low uptake rate was that Michigan’s complicated petition-based system for obtaining an expungement was incredibly difficult to navigate.¹⁰

But while those researchers incorporated the racial demographics of expungement recipients in their statistical analysis, they stopped short of an extensive analysis of the potential

⁶ Throughout this paper, I occasionally use the phrase “people of color” as a shorthand for non-white communities of all racial and ethnic backgrounds. In doing so, I am not attempting to sidestep the reality that the impacts of mass incarceration have fallen disproportionately affected the Black, Indigenous, and Latinx communities in particular – not necessarily *all* people of color.

⁷ Expungements 3rd – Freedom from the Disability of a Legal Record (J.D. Eastman ed., 2005).

⁸ J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460, 2462 (2020).

⁹ *Id.* at 2465.

¹⁰ *Id.* at 2502.

impact of this uptake gap on racial inequalities. To the extent that this report and other existing literature on expungement laws have addressed race at all, they have generally only acknowledged that the collateral consequences of criminality are disproportionately felt by racial minorities and gone on to discuss the laws' effectiveness in general terms. This oversight leads to the false impression that petition-based expungement policies like the one in Michigan *should* be working to bridge the inequalities brought about by mass incarceration and are merely *ineffective* in doing so due to their low uptake rate.

This paper argues that it is crucial to go further, and to view the distributional consequences of these policies through the lens of racial capitalism: that is, to examine how expungement contributes to the process of deriving social and economic value from the racial identity of people of color, particularly Black Americans.¹¹ This process is manifested in countless institutions across America and the globe. The narrow goal of this paper is to highlight the ways that expungement—a legal mechanism ostensibly intended to counteract one manifestation of this process (mass incarceration)—might actually contribute to racial capitalism.

It will attempt to do so through a comparative analysis of recently passed expungement policies in New Jersey and Alabama. These two states were not selected at random. The researchers in the above article chose Michigan because the relatively common features of its laws and the state's demographics made it an “ideal setting” to analyze the average effectiveness of expungement laws across the nation. I focus on New Jersey and Alabama because the reverse is true: these states provide ideal settings to analyze the effectiveness of such policies at the extremes.

New Jersey has the sixth-lowest rate of incarceration in the nation, with about 341 people incarcerated per 100,000 citizens.¹² The state has a Democratic legislative “trifecta,” meaning that the Democratic party controls the house, senate, and governor's office. In 2019, that trifecta passed one of the most progressive and comprehensive expungement laws in the nation. This “Clean Slate” law added a relatively large list of felonies to those eligible for expungement and established a committee tasked with developing an automated record-clearing system in the near future.¹³ In recognition of this new law, the Collateral Consequences Resource Center (CCRC) named New Jersey the “Reintegration Champion” of 2019.¹⁴

¹¹ Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151, 2152 (2013).

¹² Emily Windra & Tiana Herring, *States of Incarceration: The Global Context 2021*, Prison Policy Initiative (<https://www.prisonpolicy.org/global/2021.html>) (2021).

¹³ NJ Rev. Stat. Ann. §§ 2C:52-1-30.

¹⁴ Kathryn Forkey & Sean Logue, *New Jersey Steps out as Reintegration Champion of 2019*, Collateral Consequences Research Center (<https://ccresourcecenter.org/2020/02/27/new-jersey-steps-out-as-reintegration-champion-of-2019/>) (2020).

By contrast, Alabama has the sixth *highest* state incarceration rate, with 938 per 100,000 citizens incarcerated, and has a Republican legislative trifecta.¹⁵ Until 2021, Alabama had no criminal conviction expungement law on the books aside from one extremely narrow law that applied solely to victims of human trafficking. Through a (somewhat forced) acronym, the recently passed REDEEMER Act promises to implement “Record Expungement Designed to Enhance Employment and Eliminate Recidivism.”¹⁶

Analyzing expungement policies at these extremes helps paint a picture of petition-based expungement laws as more than ineffective policies that leave the status quo unaffected. Section I of this paper provides a birds-eye view of expungement, some of its legislative counterparts, and its role as a labor market policy. Section II sets out the expungement processes in Alabama and New Jersey, which brings the differences in accessibility into stark relief. Section III analyzes the racial disparities in access to expungement in Alabama. By conducting such an analysis on Alabama, a state in which the manifestations of racial capitalism are particularly visible, the potential of expungement policies to function as *active* producers of racial difference becomes particularly clear. The paper concludes by pointing out the strikingly similar aspects of New Jersey’s expungement laws as they exist today, and suggesting that these unequal impacts will be felt to at least some degree in any state with a petition-based process.

Expungement and its Role in the Labor Market

Expungement is only one piece in a large reform puzzle

Although this paper will focus primarily upon the impact of expungement on access to employment, it is worth noting as an initial matter that expungement policies are not the *only* labor market policies. Much of the legislative history surrounding expungement laws (and the research on their impacts) focuses centrally on employment outcomes, but the potential benefits of expungement extend well beyond access to employment. Scholars have identified over forty-five *thousand* collateral consequences associated with criminal records.¹⁷ In addition to employment, they include negative impacts on access to housing, public benefits, education, loans, occupational licenses, and Medicare/Medicaid, to name only a few. Taken together, these consequences have come to be known by some scholars as a “new civil death.”¹⁸ By wiping away criminal records and

¹⁵ Windra & Herring, *supra* note 10.

¹⁶ AL SB117 (2021).

¹⁷ *Collateral Consequences Inventory*, Nat’l Inventory of Collateral Consequences Conviction, <https://niccc.nationalreentryresourcecenter.org/consequences> (click “Search” without applying any filters) (last visited Nov. 27, 2020).

¹⁸ Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789, 1811-1814 (2012).

providing its recipients with a clean slate, expungement promises to alleviate the impact of a broad range of these collateral consequences. In this sense, expungement is arguably the most versatile of the back-end criminal justice reform policies.

That said, expungement is neither the only one nor the one most narrowly tailored to the labor market. There have been a number of legislative efforts specifically designed to address collateral employment consequences, the most notable of which are those which limit inquiry into criminal history in the early stages of the hiring process. These so-called “ban-the-box” laws are a much more recent development than expungement laws, first introduced in California in the early 2000s.¹⁹ Since then, roughly two-thirds of states and over 100 localities have implemented some form of “ban-the-box” law. And, based on the limited amount of data available on their practical effects, they seem to be at least somewhat effective in improving job opportunities for people with criminal records.²⁰

However, “ban-the-box” laws also have some fairly noteworthy shortcomings, especially with regards to their impact on racial minorities—an impact that is particularly relevant in the context of this paper. For one thing, ban-the-box laws only impose restrictions on employers at the first stage of the hiring process by prohibiting employers from including questions about criminal history on applications. The hope is that employers will be more likely to overlook criminal records at the interview stage, once they have already determined that an applicant’s work-related credentials warrant a call-back. But the majority of employers still conduct background checks at *some* stage in the hiring process,²¹ and ban-the-box laws do not prevent them from factoring in the results of these background checks in hiring decisions. Simply prohibiting employers from asking about an applicant’s criminal history on applications does not make them any less interested in discovering it. This reality can lead to counterintuitive policy outcomes. Research has shown that ban-the-box laws lead some employers to fall back on racist stereotypes of black and brown criminality, resulting in a drastic increase in the black-white callback gap.²²

This is not to say that states should turn away from ban-the-box laws entirely. To the contrary, states should embrace this and other employment-specific reform policies *in conjunction*

¹⁹ Margaret Love & David Schlüssel, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction*, Collateral Consequences Resource Center, 79 (2020).

²⁰ See Anastasia Christman & Michelle Rodriguez, *Research Supports Fair-Chance Laws*, National Employment Law Project (2016); D.C. Council Comm. on the Judiciary and Public Safety, Report on Bill 20-642, the “Fair Criminal Records Screening Amendment Act of 2014” at 3 (2014).

²¹ Soc’y for Human Res. Mgmt., SHRM Survey Findings: Background Checking – The Use of Criminal Background Checks in Hiring Decisions (2012) (finding that 87% of randomly sampled employers conducted criminal background checks on at least some employees, and 69% performed them on *all* employees).

²² Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 *Quart. J. Econ.* 1, 4 (2018) (finding that white applicants received 45% more callback than similar black applicants after BTB was implemented, compared to 7% before).

with expungement laws. Even the most inclusive automatic expungement laws will leave some people with criminal records while they wait to become eligible, and ban-the-box laws show promise in improving their access to employment in the meantime.

Expungement's benefits and shortcomings as a labor market policy

While the mechanics of expungement processes vary by jurisdiction, the underlying policy is fairly consistent: to limit the collateral consequences of criminality for those whose records are expunged. Expungement is not a *de facto* labor market policy in that it promises to limit a broad range of collateral consequences, not all of which are strictly related to employment. But the existing research on expungement demonstrates that it has promise as a labor market policy.²³

However, expungement does have its shortcomings. Private online criminal record and mugshot databases, which often escape judicial expungement orders, present roadblocks to effectively eliminating employers' access to criminal records.²⁴ Because they are relatively new, there is also very little data on the impacts of automated expungement policies like the one recently passed in New Jersey. If automated expungement is broadly implemented, there is a chance that employers could simply fall back on the same racial biases observed with ban-the-box.²⁵ All that said, based on the currently available data, expungement presents at least a theoretically viable means of alleviating the collateral consequences of criminality on employment.

Expungement at the Extremes: Alabama and New Jersey

Alabama's REDEEMER Act

The REDEEMER Act is an encouraging step toward criminal justice reform in Alabama, which had neither a ban-the-box law nor any broadly available expungement procedure on the books before it passed. That said, it is a very small step; state law already provided a petition-based expungement process for misdemeanor charges not resulting in conviction prior to the REDEEMER Act. The biggest change in the new law is that it made eligible for expungement almost all felony non-convictions and misdemeanor convictions, as well as a very limited set of felony convictions.²⁶ If a petitioner has completed all parole and probation requirements, paid all

²³ See Prescott & Starr, *supra* note 4 at 2527 (finding that those who obtained expungement experienced significantly higher employment rates and higher wages than those who did not); Jeffrey Selbin, Justin McCrary, & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. Crim. L. & Criminology, 1, 9 (2018) (study in California finding that those who received record relief in California experienced improved employment and earnings).

²⁴ See Jennifer Doleac & Sarah Lageson, *The Problem with 'Clean Slate' policies: Could broader sealing of criminal records hurt more people than it helps?*, Niskanen Center (2020).

²⁵ *Id.*

²⁶ Ala. Code §§ 15-27-1(b), 15-27-2(c).

court-ordered fines, and completed the three-year waiting period, they are *eligible* to have their records expunged.²⁷ The petition process for those who have met those baseline requirements, however, is anything but simple.

Those eligible for expungement must first obtain a certified copy of several documents, including a certified official criminal record from the Alabama Law Enforcement Administration (ALEA).²⁸ Obtaining a certified criminal record requires completing an extensive application signed by two witnesses or a notary. The application must contain a valid photo ID and FBI-fingerprinting taken by an authorized law enforcement agency along with a \$25 “administrative fee.”²⁹ After mailing all these things to the ALEA, the applicant must wait four to five weeks for approval.³⁰

This process, which is necessary to obtain just *one* of the documents required for an expungement petition, takes a minimum of five weeks and around \$50 to complete after all costs are considered. Multiplied over several different documents, these costs add up to make the process of even preparing an expungement petition very costly. In addition, the REDEEMER Act imposes a \$500 filing fee (increased arbitrarily from \$300), which is waivable only through a judicial determination that the applicant is indigent.³¹

After all of the necessary documentation is assembled, the applicant must serve the district attorney, the law enforcement agency, and the clerk of the court in the jurisdiction in which they were arrested or convicted by certified mail or personal service. Once all three parties have been served, the law imposes a mandatory 45-day waiting period in which either the district attorney or the victim may object to the expungement. If either object, the petitioner is not categorically barred from expungement, but an in-person hearing is required. If neither object, no hearing is required, and the petition is docketed for consideration by a judge. Ultimately, the judge retains full discretion to grant or deny a petition.³²

For those living with felony convictions in Alabama, who are far more likely to face serious collateral consequences, the law imposes an additional burdensome requirement. Before filing a petition for expungement, those with felony records are required to obtain a certificate of pardon with full restoration of civil and political rights from the Alabama Board of Pardons. Obtaining a pardon is an entirely separate expensive and time-consuming process. It imposes a

²⁷ *Id.*

²⁸ *Id.*

²⁹ ALEA, Application to Review Alabama Criminal History Record Information (https://www.alea.gov/sites/default/files/inline-files/SBI-ApplicationReviewALCHRI%20%281%29_0.pdf).

³⁰ *Id.*

³¹ Ala. Code § 15-27-4(a)-(c).

³² *Id.*

baseline requirement that applicants have completed their sentence or spent at least three years on parole for the sentence for which they are seeking a pardon.³³ It also requires an extensive background check, one important factor in which is employment status.

This means that anyone applying for a pardon specifically because they are unemployed and want an expungement are at a significant disadvantage at the first stage of this process. The Board has full discretion to determine the extent of this background check, which may go so far as to require the applicant to procure written references and provide extensive details regarding their living situation. Failure to fully comply with the background check results in automatic denial.³⁴

Once this background investigation is complete, the case is docketed for consideration. There is no set timetable for this consideration. The application specifically says that “no estimate will be provided” regarding how long any given applicant’s case will be pending.³⁵ Every aspect of this pardon process imposes temporal and monetary costs that make it exceedingly difficult for people with felony convictions to even get a pardon application to the hearing stage.

Fortunately, the rate at which these pardon applications are granted is generally fairly high. In 2018, for example, 80% of those who applied were granted some form of pardon.³⁶ Unfortunately for those seeking to obtain expungement thereafter, the vast majority of these tend to be *partial* pardons. Generally, this means that the grantee receives his or her voting rights, but not the right to bear arms. Since the REDEEMER Act requires a *full* pardon, those who do receive these partial pardons are ineligible for expungement unless they wait the required two years and reapply.³⁷

For people with felonies who do receive pardons, there is no guarantee that they will be able to obtain expungement. Expungements under the REDEEMER Act come with their own set of eligibility requirements, which deny expungement access to people with certain types of felonies. Those convicted of certain violent felonies or sex offenses, for instance, are categorically barred from expungement.³⁸ These particular restrictions seem fairly reasonable in the abstract; an employer might understandably want to protect their employees and clientele from a convicted murderer or rapist regardless of how much time had transpired since the date of their conviction. But the felonies ineligible for expungement under the REDEEMER Act extend well beyond these understandably proscribed crimes and include an extensive list of 50 statutorily defined crimes

³³ Ala. Code § 15-22-36(c).

³⁴ *Id.*

³⁵ Alabama Board of Pardons and Paroles, Pardon Application, 1 (<https://paroles.alabama.gov/wp-content/uploads/ABPP-3-Pardon-Application.pdf>).

³⁶ State of Alabama Board of Pardons and Paroles, FY 2018 Annual Report, 7.

³⁷ Ala. Code § 15-22-36(c).

³⁸ Ala. Code § 15-27-2(c).

“involving moral turpitude.”³⁹ There is some substantial overlap between this list of crimes of moral turpitude and the list of sexual and violent offenses. They include murder, kidnapping, sexual assault, and a whole host of other crimes that one might expect would be ineligible for expungement. But also included on the list are a number of non-violent offenses including theft and, most notably, drug trafficking charges.⁴⁰

After filtering out all those not granted a full pardon and all those who are categorically ineligible based on the nature of their conviction, almost no one in Alabama with a felony conviction on their record is eligible for expungement. The tiny minority who *are* eligible are not exempted from the petition process discussed above or the \$500 filing fee. In fact, the REDEEMER Act imposes an *additional* requirement that pardoned felons wait at least 180 days after receiving their pardons before filing their expungement petition.⁴¹

All of this is to say that the path to expungement in Alabama is long, confusing, and expensive, especially for convicted felons. Though there is no set timetable, the entire process is likely to take well over a year between the mandatory 180-day waiting period and the time it takes for pardon applications and expungement petitions to make their way up the docket. It is a path riddled with uncertainty and hidden costs that would be difficult to navigate even for most experienced attorneys.

New Jersey’s “Clean Slate” Law

In stark contrast to the REDEEMER Act, New Jersey’s new expungement law is among the most progressive in the nation. The law, which was passed in 2019 and went into effect in June of 2020, drastically expanded eligibility criteria, set the stage for a new “clean slate” automated expungement process, created an e-filing system for expungement petitions, and eliminated expungement filing fees.⁴² While all of these provisions are comparatively progressive, the portions of the law providing for automated expungement processes show the most promise to bridge the uptake gap observed in Michigan.

Specifically, sections 6 and 8 of the New Jersey law provide for the development of two separate automated expungement systems. The former, which is specifically for marijuana-related offenses, is already complete. In September of 2021, the New Jersey Courts announced that they had automatically expunged more than 362,000 marijuana and hashish records.⁴³ Over 1,200 of

³⁹ *Id.*

⁴⁰ Ala. Code § 17-3-30.1.

⁴¹ Ala. Code § 15-27-2©

⁴² NJ Rev. Stat. Ann. §§ 2C:52-1-30.

⁴³ New Jersey Courts, *New Jersey Judiciary Expunges More than 360,000 Marijuana Offenses* (2021).

those whose records were expunged were also released from probation.⁴⁴ None of these expungements required any action on the part of the expunged.

But while this recent marijuana expungement effort provides a glimpse at a hopeful future, these 362,000 expungements were the product of a one-time effort that accompanied the state-wide legalization of marijuana. Eventually, all other convictions (except certain ineligible crimes) will be automatically expunged after waiting *ten years* without a conviction. Those who wish to obtain one earlier will be forced to use the petition-based system. But the actual mechanism by which these expungements will be automated is still in development.

The new law established a task force to create these automated features and provided it with \$15 million to do so, but it did not provide a timetable for their implementation or even set any deadlines.⁴⁵ Almost immediately after the law was passed, the COVID-19 pandemic brought the implementation process to a grinding halt.⁴⁶ The task force did not meet for the first time until January of 2021, and is now making “slow, steady progress.”⁴⁷ By most estimates, the fully automated process that the law promises is still years away.⁴⁸

In the meantime, those hoping to obtain an expungement in New Jersey must still do so by petition. New Jersey’s petition process is almost as confusing and costly as Alabama’s and imposes many of the same procedural requirements. The state provides a thirty-four-page guide to expungement on its official website, the first page of which includes a disclaimer that it is not an adequate substitute for seeing a lawyer.⁴⁹ In the state crowned the “Reintegration Champion” of 2019, those without access to legal counsel still face a dizzying process likely to discourage even the most determined from seeing it through to the end. Though New Jersey will *eventually* be able to bridge the massive uptake gap observed in Michigan, for now it is plagued by many of the same problems as the majority of other states with petition-based systems.

Separating *Is* from *Ought*

Through distributional analysis, this section will analyze how ostensibly color-blind expungement policies like the ones in Alabama and Michigan might actually work. At the most abstract level, the goal of distributional analysis is to separate what the law “is” from what it

⁴⁴ *Id.*

⁴⁵ Amanda Hoover, *Why It’s Still So Hard to Wipe Away a Record Despite the Law That Murphy Signed*, NJ.com (April 25, 2021) <https://www.nj.com/crime/2021/04/why-its-still-so-hard-to-wipe-away-a-criminal-record-despite-promise-of-law-murphy-signed.html>.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ N.J. Cts., *How To Expunge Your Criminal and/or Juvenile Record* at 1 (2009), https://www.nj.com/corrections/pdf/OTS/FRARA/ParoleHandbook/10557_expunge_kit-11-2012.pdf.

“ought” to be. In the context of these state expungement laws, this means separating what the law ought to do in theory from what the law actually does. So what, in theory, ought expungement policies do?

Regardless of their uptake rate, the laws in New Jersey and Alabama will inevitably increase the total number of people receiving expungements. In New Jersey, it has already done so by a rather large amount. Assuming that the positive employment outcomes observed in Michigan and California noted above are generalizable to at least some extent, one would expect that these new laws will result in an overall improvement of the employment outcomes for those living with criminal records in both states. Having established that these burdens weigh disproportionately heavily on people of color, and particularly Black Americans, they ought to reap the greatest benefits from such an overall improvement.

So long as expungements are distributed somewhat equally along racial lines, the only difference between these two states’ expungement policies should be the *degree* to which they alleviate the racialized impact of mass incarceration. If this were the case, the most one could say as a critique of the REDEEMER Act is that it is a well-intentioned policy doomed to be ineffective. By applying distributional analysis to the law in Alabama, however, it becomes clear that these benefits will almost certainly *not* be distributed equally.

The “criminals” seeking expungement

The central actors in any expungement law are the “criminals.” More accurately, they are the mass of citizens who have been swept into the criminal justice system in some way or another and are now living with the collateral consequences of a criminal record. On average, these actors are far more likely to be Black or people of color. And this is particularly true in Alabama, where Black men and women represent 28% of the total state population but roughly 43% of its jail population and 54% of its prison population.⁵⁰

Much of this disparity is directly attributable to the War on Drugs. According to research by the Southern Poverty Law Center, black people in Alabama are four times as likely as white people to be arrested for marijuana possession, and five times more likely to be arrested on felony possession charges in particular.⁵¹ Thus, they are five times more likely to require a pardon to be eligible for expungement of a conviction stemming from possession of a drug legal in over half the country. These disparities are wholly attributable to unequal *enforcement* of the laws, given that

⁵⁰ *Incarceration Trends in Alabama*, Vera Institute of Justice, 1 (2021).

⁵¹ *Alabama’s War on Marijuana: Assessing the Fiscal Toll of Criminalization*, Southern Poverty Law Center, 6 (2016).

they exist despite strong evidence that white and black people use marijuana at roughly the same rate.⁵²

But the unequal impact of drug laws is not only a product of unequal enforcement—it is often a feature of drug laws themselves. For example, defendants charged with possession in Alabama may sometimes enroll in a substance abuse program as an alternative to prosecution. However, Alabama differentiates between cocaine powder and cocaine base *solely* for the purposes of determining eligibility for this program. Cocaine base is also known as “crack,” a more potent, less expensive form of cocaine that ravaged Black communities across the nation around the turn of the century. Though the compounds are identical and are treated as such for the purposes of sentencing, state law imposes a 10-to-1 drug quantity ratio for diversion program eligibility.⁵³ This means that a charge for possession of up to five grams of powder cocaine qualifies for diversion, but possession of more than one-half gram of crack does not.⁵⁴

These unequally written, unequally enforced laws play a substantial role in producing the racial disparities in criminalization in Alabama and across the nation. But even setting aside those racial disparities in criminalization and the severity of convictions, Black Americans in Alabama who decide to obtain an expungement are at an immediate disadvantage. While the REDEEMER Act’s expungement process is difficult for anyone to navigate, practically every step of Alabama’s expensive and confusing expungement process is disproportionately burdensome on Black Americans.

For anyone who can afford one, the first step of the expungement process in Alabama (and everywhere) is to hire an attorney. But private attorneys are incredibly expensive; they may charge upwards of thousands of dollars to guide an individual through the expungement process,⁵⁵ and Black Alabamians are far more likely to live below the poverty line than their white peers.⁵⁶ Though state-specific data is not available, national data indicates that this gap is even larger for those with criminal records. Thus, Black expungement-seekers will be far less likely on average to have the financial means to afford an attorney. This is especially so in light of the fact that they are more likely to require a pardon, which likely costs extra.

Constitutional law comes into play here to exacerbate the racial disparities in access to expungement. While the 6th Amendment guarantees criminal defendants a right to an attorney, that

⁵² *Id.*

⁵³ Nicole D. Porter & Valerie Wright, *Cracked Justice*, The Sentencing Project, 3 (2011).

⁵⁴ *Id.*

⁵⁵ Brian M. Murray, *Retributive Expungement*, 169 U. Pa. L. Rev. 666, 668 (2021).

⁵⁶ Pew Research Center, *Demographic Trends and Economic Well-Being* (2016) (<https://www.pewresearch.org/social-trends/2016/06/27/1-demographic-trends-and-economic-well-being/>)

right only extends to the “critical stages” relating to guilt or innocence.⁵⁷ Expungement petitions do not fall into this category, leaving those without an attorney with two alternatives: hope for help from a perpetually-overburdened legal aid clinic⁵⁸ or attempt to navigate the expungement process alone.

The first stage of the expungement process, described in detail above, involves gathering several official documents, including an official criminal record from the ALEA. Completing this step requires some form of photo ID. This may seem like a trivial requirement, but it too imposes greater average burdens on Black Americans. The recent debate surrounding voter ID laws has brought unequal access to photo identification into the national conversation. Nationally, up to 25% of voting-age Black Americans lack government-issued photo ID, compared to only 8% of whites.⁵⁹

Even those that have a photo ID must make their way to and from a number of law enforcement agencies and courthouses in order to assemble and serve all the documents necessary to file a petition. Since Alabama is a large and relatively diffusely populated state, this can require petitioners to travel fairly long distances to and from their home. And while the interstate system is relatively well-developed, the state of Alabama does not provide *any* supplement to federal and local funds allocated to public transit. This contributed to Alabama being ranked dead last among the states in public transit usage by U.S. News and World Report.⁶⁰

This leaves Alabamians heavily dependent on cars for transportation. And, in line with the emerging trend here, Black Americans are far more likely on average to lack access to a vehicle. By way of illustration, Figure 1 is a map of the percentage of households in each Alabama county with no vehicle.⁶¹ Figure 2 is a map of the percentage of the population of each county that is Black.⁶² Though the two maps do not track each other exactly, there is substantial overlap between the predominantly Black counties and those with the lowest average household access to vehicles.

⁵⁷ *Rothgery v. Gillespie County*, 554 U.S. 191, 218 (2008).

⁵⁸ Though free legal aid systems tend to be overburdened in all states, Alabama’s are particularly bad: an (admittedly old) study indicated that only 16% of the legal problems facing low-income households in 2006 were resolved with the help of legal aid. See The Alabama Access to Justice Commission, *The Legal Needs of Low-Income Alabamians: A Needs Assessment & Analysis* (2013).

⁵⁹ Brennan Center for Justice, *Citizens without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, 3.

⁶⁰ U.S. News and World Report, *Transportation Rankings* (2021) (<https://www.usnews.com/news/best-states/rankings/infrastructure/transportation>) (last accessed December 3, 2021).

⁶¹ Alabama Department of Public Health, *Access to Care*, 13 (2012).

⁶² U.S. Census Bureau, Population Estimate Program (PEP) (2021).

Figure 1:

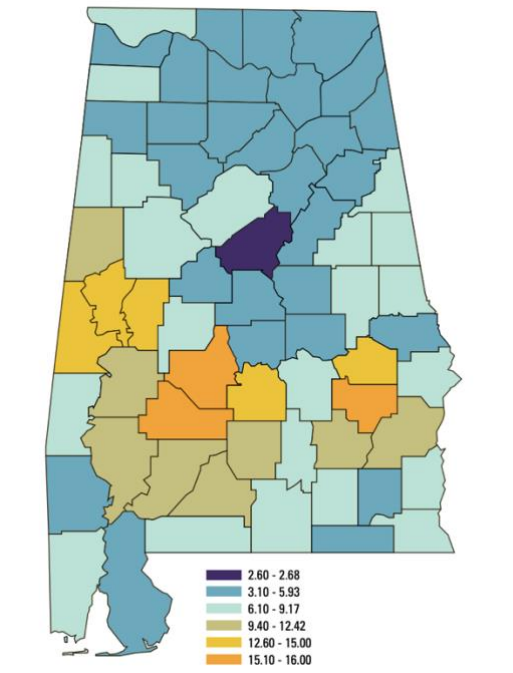
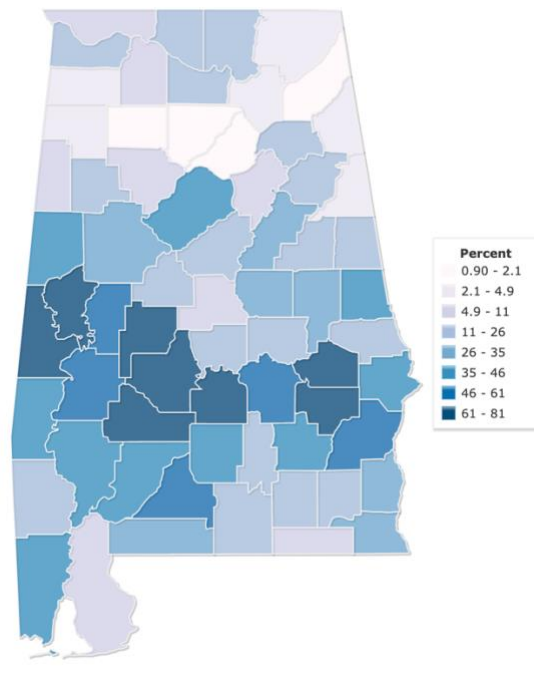


Figure 2:



On top of all of these unevenly distributed costs necessary to even *file* a petition looms the mandatory \$500 filing fee. This fee is likely to be particularly cost-prohibitive for Black Americans seeking expungement for the same reasons that obtaining legal aid will be. Granted, this fee may be waived, but a waiver requires a finding of judicial determination that the petitioner is indigent. Aside from the tangible costs of attending the hearing required by statute,⁶³ this imposes a cost to the personal dignity of the petitioner. Faced with the decision of foregoing expungement and being officially labeled “indigent,” many might understandably choose the former.

The other visible actors and their biases

All of the distributional analysis to this point has focused on the ways in which the costs of expungement in Alabama are unevenly distributed along a racial dimension. These costs are extensive and significant. Even if all of the actors and background rules involved were entirely race-neutral, they alone would very likely result in an unequal distribution of the benefits of expungement to white people with criminal records. But only the person seeking expungement is subject to these costs; they may weigh them and use their discretion to decide whether seeking an expungement is worth the effort.

⁶³ AL Code § 15-12-1.

However, those hoping for expungements are not the only actors involved in the process. Countless actors participate to some degree in the expungement process. Some participate very obviously: the judge that decides whether an expungement is granted or denied; the Board of Pardons when they preside over the hearing of a felon hoping to use his pardon to obtain an expungement; and the district attorney, in deciding whether or not to object to a petitioner receiving an expungement. Others, like the arresting officer who criminalized an applicant, or an applicant's mother who helped watch her children while she prepared her application, play a more obscured but equally important role.

Whether consciously or not, each of these actors are influenced in their exercise of discretion over the expungement process by an array of background rules and biases that combine to form their worldview. To fully explore each of these countless actors and their motivations would require more ink than this paper can accommodate. However, to illustrate how these actors might contribute to the distribution of the benefits of expungement, assessing the role of the judge provides a useful example.

Judges, like all actors, arrive at any given expungement hearing armed with a preconceived notion of the significance of race. By virtue of their post-graduate education, they may be less likely to carry racial prejudices.⁶⁴ On the other hand, by virtue of presiding over criminal trials in which the majority of the defendants are Black, they may be particularly prone to preconceived notions of Black criminality. In any case, it is very likely that they will be influenced to at least some degree by the employment status of the individual in question.

Whatever their preconceived notions may be, they are brought to bear on each expungement decision and affect the outcome of each applicant's life in the long-term. To be sure, judges are limited in their exercise of discretion by certain standards. In most jurisdictions, including Alabama, these standards resemble some form of "balancing approach," which calls on the court to weigh the interests of the person seeking expungement against the good of the community.⁶⁵ But ultimately, this balancing test calls for a value judgement.

To say that these kinds of discretionary actors might contribute to racial inequality in expungement outcomes is not to say that judges are "racists," or even that any of these actors harbor explicit racial prejudices. It is only to suggest that these discretionary judgements, multiplied over countless actors and constricted by a broad range of background rules, are likely to produce a racially disparate effect in the aggregate. Though this is *particularly* true of Alabama, it

⁶⁴ Geoffrey T. Wodtke, *Are Smart People Less Racist? Verbal Ability, Anti-black Prejudice, and the Principle-Policy Paradox*, *Social Problems* Vol. 63 Iss. 1, 26 (2016).

⁶⁵ Murray, *supra* note 54 at 698.

is arguably bound to be true anywhere that actors involved in expungement processes retain discretion over their outcome against the background systems of racial inequality upon and around which America was built.

The hidden beneficiaries

Though there is no publicly available data that provides demographic information on expungement recipients in Alabama, the various actors and the background rules just described combine to suggest that the vast majority are white. This only serves to deepen the racial inequalities in Alabama by expanding the existing racial disparities in criminality and access to employment. But the actors just discussed are not the only ones who will be impacted by such a policy. There are also the hidden actors who benefit, either monetarily or otherwise, from this reproduction of racial difference in criminal records. It is in this stage of the analysis that racial capitalism appears most clearly.

The most obvious of these hidden beneficiaries are the employers who benefit from their access to cheap and expendable labor in the form of workers with criminal backgrounds. Two of Alabama's largest industries—agriculture and manufacturing—are built around this extraction of value from low-wage minority workers. Barred from many of the best-paying jobs that require criminal background checks at some stage of the hiring process, these industries offer chances at employment by providing low-paying jobs that do not require a background check.

Alabama's poultry industry, for example, generates \$15 billion of the state's GDP and represents one-eighth of the state's economy.⁶⁶ As Carrie Freshour observed in Georgia, this industry's processing plants tend to be staffed almost entirely by people of color, and in particular Black women.⁶⁷ These plants are maintained by, and contribute to the maintenance of, the so-called "carceral geographies" that encompass "the sites and relationships of power that enable and incentivize the systematic capture, control, and confinement of human beings through structures of immobility and dispossession."⁶⁸

The racial disparity in criminal records that petition-based expungement policies reproduce through the unequal distribution of their benefits is crucial in maintaining these relationships of power. But the benefits of these carceral geographies are not limited to those who employ people of color with criminal records. Perhaps most maliciously, these carceral geographies work to create

⁶⁶ Alabama Poultry and Egg Association, *About the Alabama Poultry and Egg Association* (<https://www.alabamapoultry.org/about>) (last accessed November 29, 2021).

⁶⁷ Brian Williams and Carrie Freshour, *Cotton Chemicals and Poultry Speedups: Carceral Geographies of Agricultural Productivity*, 20 (2021) (abstract).

⁶⁸ *Id.* at 4, 5.

a vicious feedback loop of unemployment, poverty, and criminal recidivism among Black communities that generates surplus value by funneling public resources to those who profit directly from the prison industry.

In the 2016-2017 fiscal year, the state of Alabama spent a total of \$178,367,621 on law enforcement, a disproportionate amount of which went to arresting and incarcerating young Black men.⁶⁹ The total budget spent on mass incarceration is much higher, but that money does not disappear into thin air. It is distributed to various actors working behind the scenes to maintain mass incarceration, such as those who work in police departments and run private prisons.

Conclusions

Under an automated expungement scheme like the one currently under development in New Jersey, many of these background rules and actors would fade from view. The law would apply uniformly to all those eligible, with no need to consider the compounded biases of various judicial actors or the unequal distribution of burdens on people of color. Although there will inevitably still be unequal distribution along certain racial dimensions, such as laws that apply unequally to people of color by language rather than enforcement, this paper has shown that automatic expungement policies are the only path forward if record clearing is to bridge the racial gap in collateral consequences on employment.

That said, it would be a mistake to take comfort in New Jersey's new law. Its mandatory 10-year waiting period will leave people unwilling to engage with the petition process in the years immediately following release, in which they are likely to be in the greatest need of relief. In the meantime, it is important to keep in mind that many of the features of New Jersey's policy that will remain in place until the automatic process is complete are substantially similar to Alabama's. And while it would be tempting to believe that the analysis would look different in New Jersey, capitalism is not only racial in the South.

⁶⁹ Southern Poverty Law Center, *supra* note 23 at 53.