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Note

Moving Forward: Proposals for Expanding and Simplifying Expunction in Texas

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Abstract

Hundreds of thousands of criminal cases are dismissed each year in Texas, yet those cases remain on individuals' criminal records, accessible to almost anyone using the Internet. In theory, dismissed charges should not prevent individuals from accessing housing, employment, and professional licenses. However, the stigma associated with certain offenses, difficult-to-decipher criminal records reporting, and the lack of transparency in selection processes make discrimination against those with dismissed criminal charges a common phenomenon.

Expunction (the destruction of arrest records) remains the only route to permanently removing charges from one's criminal record. However, narrow expunction eligibility criteria prevent many Texans from obtaining this form of relief. Many who are eligible are unable to obtain expunctions due to the costly and onerous procedural requirements. By broadening expunction eligibility and simplifying expunction procedure, those who would most benefit from expunction will be able to access it more easily. This Note puts forward three proposals for expanding and simplifying expunction in Texas. First, this Note argues that all dismissed offenses should be eligible for expunction. This would require an expansion of the current statute, which allows only dismissed offenses that are not linked to convictions to be expunged. Second, this Note argues that offenses resulting in a dismissal from deferred adjudication should be eligible for

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expunction. These offenses are currently only eligible to be sealed using an order of nondisclosure. Finally, this Note proposes several procedural reforms to make expunctions more widely accessible, including waiving expunction filing fees and eliminating the hearing requirement. In writing this Note, I hope to generate discussion about the purposes of expunction and whether they are being fulfilled by Texas's statutes.

Introduction

In 2013, Shannon¹ was pulled over late at night for driving 15 miles per hour over the speed limit—what many would consider a minor traffic offense. Shannon, who volunteered to be the designated driver that night, had just dropped off the last of her friends at their home. When the police officer approached Shannon's car, he stated that he could smell marijuana and asked if he could search the vehicle. Shannon consented to the search, since she knew she did not smoke marijuana and would not have any in her car. The officer found a gram of marijuana in the glove compartment, which Shannon's friend had discreetly placed there earlier in the evening, thinking that she would retrieve it later. Nevertheless, Shannon was arrested for possession of less than two ounces of marijuana, a Class B Misdemeanor. Hysterical, Shannon screamed and cried that the marijuana was not hers and she did not realize it was in the car. Shannon was ultimately charged with resisting arrest, possession of marijuana, and speeding. A compassionate prosecutor, realizing that Shannon was a first-time offender, placed Shannon on deferred adjudication for the resisting arrest charge and dismissed the possession of marijuana and speeding charges.

Four years later, Shannon realized that the possession of marijuana and resisting arrest charges appeared on her criminal record, despite them being dismissed. She learned about the process of expunction and became hopeful that she could clean up her criminal record so that she could fulfill her dream of becoming a nurse. After speaking with a local criminal defense attorney, Shannon was devastated to learn that none of her charges could be expunged. Her charges could be sealed, but they would still be visible to the Texas Board of Nursing.

It is hard to dispute that an individual like Shannon is deserving of a second chance, an opportunity to live without the stigma of a criminal record for the rest of her life. However, Texas law denies Shannon and many others the opportunity to have their arrests expunged. As a result, Shannon is at risk of being denied professional licenses, loans, jobs, and housing because of her criminal record.

This Note proposes changes to Texas's expunction statutes to allow individuals like Shannon the ability to clean up their criminal records. The

1. Name has been changed for confidentiality.

proposals also seek to make expunctions more accessible to indigent individuals, who are generally most in need of this form of relief. Part I of this Note discusses arrest rates in Texas and the collateral consequences of arrests. Part I also explains the extent to which criminal records are publicly accessible in Texas. Part II of this Note describes expunction eligibility in Texas and the procedure for obtaining an expunction order. And finally, Part III presents several proposals for expanding expunction eligibility and simplifying the process for obtaining an expunction in Texas.

I. The Problem

Discussions about criminal justice reform and re-entry today focus mainly on rates of incarceration and conviction, rather than on rates of arrest. However, the sheer number of Americans with arrest records shows that the problem does not start and end with convictions. In 2017 alone, more than 800,000 Texans were arrested.² It is estimated that about one third of Americans have arrest records by the time they are twenty-three years old.³ But the impacts of these arrests are not evenly distributed: Black Americans are arrested at 2.5 times the rate of white Americans.⁴ Native Americans and Hispanics are arrested at higher rates as well.⁵

What happens with these arrests? In 2017, about 33% of all class A and B misdemeanor cases disposed of in Texas were dismissed.⁶ Around 42% of misdemeanor defendants were convicted,⁷ and 97% of those convicted pled guilty without a trial.⁸ That same year, Texas felony cases had a lower rate of dismissal, about 17%, but only about 36% of cases disposed of resulted in a

2. *Texas Arrest Records and Crime Rates*, TEX. ST. RECS., <https://texas.staterecords.org/arrests.php> [<https://perma.cc/8K3C-HHA9>].

3. THE SENTENCING PROJECT ET AL., AMERICANS WITH CRIMINAL RECORDS 1 (2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf> [<https://perma.cc/YFD3-NYXJ>]. About as many Americans have criminal records as have four-year degrees. *Fair Chance Hiring Fact Sheet*, NAACP, <https://www.naacp.org/fairchancehiring/> [<https://perma.cc/WZH6-95YH>].

4. *Racial Justice: Presumption of Guilt*, EQUAL JUSTICE INITIATIVE, <https://eji.org/racial-justice/presumption-guilt> [<https://perma.cc/6M5C-AE6J>].

5. CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME & DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf [<https://perma.cc/2ZNV-6MNE>].

6. *County-Level Courts, Misdemeanor Case Activity Detail: January 1, 2017 to December 31, 2017*, TEX. OFF. CT. ADMIN., [hereinafter *County Case Activity*] <https://card.txcourts.gov/ReportSelection.aspx> [<https://perma.cc/D4YG-BBPR>] (select "County-Level Courts" on the "Report Type" drop-down menu; select "Misdemeanor Activity Detail" from the "Report" drop-down menu; select "Continue" button; under the "From" heading, select "2017" from the year drop-down menu and select "January" from the "month" drop-down menu; under the "To" heading, select "2017" from the year drop-down menu and select "December" from the "month" drop-down menu; click "Run Report").

7. *Id.*

8. *Id.*

conviction.⁹ Still, 93% of convicted felony defendants pled guilty without a trial.¹⁰ There are no statistics reporting the number of Texans who pled guilty to a lesser charge in exchange for a dismissal of the original charge, though it is likely that a large number of guilty pleas were the result of so called “plea bargains,” in which a defendant pleads guilty in exchange for a conviction on a lesser charge, a lesser sentence, or some other benefit.¹¹

Plea bargains resulting in dropped or dismissed charges provide defendants with lower punishments in the short term but do not always lead to more equitable outcomes in the long term due to the pervasiveness of criminal history reporting. In Texas, criminal records are widely available to the public. Many counties have online portals where criminal histories can be found in a matter of minutes.¹² These portals generally list all arrests for which charges were filed, even if the charges are ultimately dismissed or deferred. County criminal history portals all have slightly different ways of reporting criminal records and can be difficult to read and understand. Many use criminal justice lingo to describe the events of a case, which can be confusing to the general public and those who are not familiar with Texas criminal law. Additionally, the databases can sometimes contain inaccurate or missing information. Criminal histories are also disseminated through the Federal Bureau of Investigation. Millions of employers around the country rely on FBI background checks, which can be difficult to read and sometimes miss important information, such as a criminal case’s final disposition or outcome.¹³ Because arrest information is so widely accessible, it is easy for those with criminal records to be discriminated against in various facets of life.

9. *District and Statutory County Courts, Felony Case Activity Detail: January 1, 2017 to December 31, 2017*, TEX. OFF. CT. ADMIN., [hereinafter *District Case Activity*] <https://card.txcourts.gov/ReportSelection.aspx> [<https://perma.cc/KK6X-46JH>] (select “District and Statutory County Court” on the “Report Type” drop-down menu; select “Felony Activity Detail” from the “Report” drop-down menu; select “Continue” button; under the “From” heading, select “2017” from the year drop-down menu and select “January” from the “month” drop-down menu; under the “To” heading, select “2017” from the year drop-down menu and select “December” from the “month” drop-down menu; click “Run Report”).

10. *Id.*

11. *See, e.g.*, Emily Yoffe, *Innocence Is Irrelevant*, THE ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/> [<https://perma.cc/AFP8-H3MN>].

12. *See, e.g.*, *Online Case Information*, TRAVISCOUNTYTX.GOV, <https://www.traviscountytx.gov/district-clerk/online-case-information> [<https://perma.cc/QT6T-PEDG>] (providing searchable felony records for Travis County); *Search Our Records and Documents*, HARRIS COUNTY DISTRICT COURT, <https://www.hcdistrictclerk.com/Edocs/Public/search.aspx> [<https://perma.cc/833F-DU3D>] (allowing creation of a free account to search court records).

13. REBECCA VALLAS & SHARON DIETRICH, CTR. FOR AMERICAN PROGRESS, ONE STRIKE AND YOU’RE OUT: HOW WE CAN ELIMINATE BARRIERS TO ECONOMIC SECURITY AND MOBILITY FOR PEOPLE WITH CRIMINAL RECORDS 14 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf> [<https://perma.cc/6GJP-Y8E4>].

Though much research has focused on the collateral consequences of criminal convictions, having an arrest record—even if the arrest did not result in a conviction—can be a debilitating barrier to finding employment and housing, accessing public benefits and loans, and receiving professional licenses. Unlike race, religion, or gender, “individuals with criminal records” is not a protected class recognized by antidiscrimination laws.¹⁴ So while courts and state and federal agencies may advise employers¹⁵ and housing providers¹⁶ that arrest records should not be considered as part of their selection criteria, this guidance seems to have little impact on everyday practices.¹⁷ Given the widespread availability of criminal records online, the lack of transparency (or honesty) in selection criteria, and the various barriers to enforcement, discrimination on the basis of an individual’s arrest record is still commonplace.

II. The Current State of Expunction in Texas

In the 1970s, Texas lawmakers acknowledged that certain Texans with criminal histories deserve a fresh start and established a process for expungement in the state. Expungement, called “expunction” in Texas, is the process through which individuals can clear arrests off of their criminal records.¹⁸ A person who has received an expunction can legally deny that the arrest ever took place in applications for employment, housing, and

14. See Elizabeth Westrope, *Employment Discrimination on the Basis of Criminal History: Why an Anti-Discrimination Statute is a Necessary Remedy*, 108 J. CRIM. L. & CRIMINOLOGY 367, 381 (2018) (“Courts have consistently held that . . . criminal history cannot form the basis of a Title VII claim.”); Camila Domonoske, *Denying Housing Over Criminal Record May Be Discrimination, Feds Say*, NPR (Apr. 4, 2016, 1:14 AM), <https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say> [<https://perma.cc/QU7W-Z6KH>] (noting that “people with criminal records aren’t a protected class under the Fair Housing Act”).

15. The Texas Workforce Commission advises employers not to ask job applicants about arrests, “since the [Equal Employment Opportunity Commission] and the courts consider [such questions] to have a disparate impact on minorities.” *References and Background Checks*, TEX. WORKFORCE COMM’N, https://twc.texas.gov/news/eft/references_background_checks.html [<https://perma.cc/8LU9-RLQR>].

16. The United States Department of Housing and Urban Development advises housing providers that denying housing on the basis of arrests that did not result in convictions will expose them to “discriminatory effects liability” under the Fair Housing Act. U.S. DEP’T OF HOUS. & URBAN DEV., OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT, STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 5 (2016), https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF [<https://perma.cc/K28X-8XED>].

17. See, e.g., Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> [<https://perma.cc/5UTD-8BT5>] (describing the effects of an arrest record, even with no convictions, on employment opportunities, salary, and wealth).

18. Fred Dahr, *Clearing Criminal Records in Texas*, 69 TEX. B.J. 258, 260 (2006).

professional licenses¹⁹ and may state only that the arrest has been expunged if questioned about it under oath during a legal proceeding.²⁰ After an expunction is granted by the court, all records relating to the arrest are physically destroyed²¹ and “the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited.”²²

The right to expunge certain criminal records is predicated on a belief that certain offenders are entitled to a second chance. Texas’s expunction statute aims to balance “the competing interests of a wrongly arrested person wanting to get a fresh start without the stigma of a criminal history, the State’s need to preserve records for future use, and the public’s right to information.”²³ While there is little else to indicate the intentions of the expunction statute’s original drafters, one can presume that they put a significant amount of stock in the idea that one is innocent until proven guilty or convicted. More recently, certain Texas lawmakers have acknowledged some of the collateral consequences associated with having a criminal history, which, in their view, may be mitigated with expunction.²⁴ As lawmakers have become more mindful of these collateral consequences, they have sought to expand the state’s expunction statutes, but only some of these attempts have been successful.

To obtain an expunction, one must file a petition with the district court in the county where the arrest or offense was alleged to have occurred.²⁵ Since the petition is a legal document that requires a certain degree of legal knowledge to draft, many petitioners for expunction hire an attorney or utilize a pro bono program to assist them with the process of drafting the petition. The petition must contain a significant amount of identifying information for the arrest, including the name of the offense charged, the date of the charge and arrest, the arresting agency, the case number and court of the offense, and a list of all public and private agencies that would have a record of the arrest.²⁶

19. TEX. CODE CRIM. PROC. ANN. art. 55.03 (West 2019).

20. *Id.*

21. TEX. CODE CRIM. PROC. ANN. art. 55.02 § 5(d) (West 2019).

22. TEX. CODE CRIM. PROC. ANN. art. 55.03 (West 2019).

23. Andrea L. Westerfield, *Advanced Expunction Law*, TEX. DISTRICT & COUNTY ATT’YS ASS’N, <https://www.tdcaa.com/journal/advanced-expunction-law/> [https://perma.cc/JY6H-E5S2].

24. See House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 64, 86th Leg., R.S. (2019), <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB00064H.pdf#navpanes=0> [https://perma.cc/N7ES-KR53] (“[t]here have been calls to remove the stigma associated with . . . misdemeanor arrests and allow these individuals to leave that past behind them.”); Senate Comm. on Criminal Justice, Bill Analysis, Tex. H.B. 351, 82nd Leg., C.S. (2011), <https://capitol.texas.gov/tlodocs/82R/analysis/pdf/HB00351S.pdf#navpanes=0> [https://perma.cc/T4SV-5R9W] (“The ramifications of [the narrow expunction statute] have negative consequences for persons seeking employment when confronted with employers who now routinely conduct background checks.”).

25. TEX. CODE CRIM. PROC. ANN. art. 55.02 (West 2019).

26. *Id.*

Counties generally charge several hundred dollars in fees for the filing of an expunction,²⁷ but they can be waived for indigent applicants who fill out a Statement of Inability to Pay Court Costs. Once the petition is filed, the petitioner must appear in court to have the order of expunction signed.²⁸ As long as the petitioner meets the legal criteria for expunction eligibility, the expunction must be granted; it is not discretionary.²⁹

In Texas, expunction eligibility is governed by Article 55.01 of the Texas Code of Criminal Procedure. A person is entitled to expunge any arrest that resulted in all charges being acquitted or pardoned.³⁰ Arrests that resulted in no charges or charges that were dismissed are also eligible for expunction.³¹ However, expunction based on dismissed or rejected charges generally may not be granted until the statute of limitations for the offense has expired, unless the petitioner completed a pretrial diversion program or the charge was brought by mistake, using false information, or without probable cause.³²

A major limitation on Texans' eligibility for expunction is the statutory requirement that all offenses arising out of an arrest be eligible for expunction. Article 55.01(a)(2)(A) requires that any misdemeanor or felony charges "arising out of the same transaction for which the person was arrested" be rejected or dismissed in order for the arrest to be eligible for expunction.³³ In other words, where any arrest results in more than one charge, all charges need to be dropped, dismissed, or result in an acquittal for the arrest to be eligible for expunction. This is an "arrest-based" approach to expunctions, rather than an "offense-based" approach.³⁴ While there is no data available, the pervasiveness of plea bargaining means that millions of Texans may be affected by this limitation.

27. See, e.g., *Filing a Pro Se Expunction*, HARRIS CTY. DIST. CLERK (last updated Jan. 8, 2019), https://www.hcdistrictclerk.com/Common/Civil/pdf/Expunction_Filing_ProSe.pdf [<https://perma.cc/MET7-FM4R>] (base filing fee of \$267 plus \$3–\$14 per agency to be served); *Filing Fees/Court Costs*, DENTON CTY. DIST. CLERK, <https://dentoncounty.com/Departments/District-Clerk/Filing-Fees> [<https://perma.cc/8XEF-L8QR>] (base filing fee of \$277 plus \$11 per agency to be served).

28. *Id.*

29. See *supra* note 23 (noting that judges must grant expunctions to those who fulfill the eligibility requirements of the expunction statute but may also grant discretionary expunctions after a prosecutor recommendation).

30. TEX. CODE CRIM. PROC. ANN. art. 55.01 (West 2019).

31. *Id.*

32. *Id.*

33. *Id.*

34. See *In re Expunction*, 465 S.W.3d 283, 289–90 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (agreeing with another court's characterization of Article 55.01 as requiring an "arrest-based" approach to expunctions); see also *State v. T.S.N.*, 547 S.W.3d 617, 618–19 (Tex. 2018) (summarizing arguments interpreting Article 55.01 as requiring an "offense-based" versus an "arrest-based" approach to expunctions).

Another limitation placed on expunction eligibility is the rule that cases that resulted in a deferred adjudication may not be expunged. Deferred adjudication is a form of community supervision that is granted at the judge's discretion after a criminal defendant pleads guilty or *nolo contendere*. If a judge feels it is in "the best interest of society and the defendant," he or she may "defer further proceedings without entering an adjudication of guilt and place the defendant on deferred adjudication community supervision."³⁵ Once the defendant's period of community supervision has expired, the case is dismissed. Despite the case resulting in a dismissal, it is treated more similarly to a conviction in that it is not eligible for expunction. Instead, certain cases that result in deferred adjudication are eligible for orders of nondisclosure, or what others refer to as "seal[ing]."³⁶ An order of nondisclosure hides an arrest from the general public, but it does not limit law enforcement or certain other agencies and institutions from seeing the arrest.³⁷ Even if an order of nondisclosure is granted, a criminal justice agency may disclose the sealed arrest information to over 30 entities or classes of entities, including the Texas Medical Board, the Texas Board of Nursing, the State Board for Educator Certification, and banks and credit unions.³⁸

III. Expanding & Simplifying Expunction

Texas's expunction statutes place an undue burden on indigent petitioners and provide limited relief because of strict eligibility requirements. While there are many ways in which the expunction statutes could be amended or rewritten, the proposals below represent a few minor ways that expunction in Texas can be expanded and simplified so as to provide relief to more individuals and to make the process for petitioning the court more efficient and straightforward. These proposals seem more attainable than those calling for a complete overhaul of the expunction scheme, and some have garnered political support in the past. Subpart A of this Part proposes that the expunction eligibility guidelines shift to an "offense-based" rather than an "arrest-based" model of expunction. Subpart B of this Part proposes expanding expunction eligibility to cases resulting in dismissal from deferred adjudication, and Subpart C proposes some changes to expunction procedure to ease the burden currently placed on petitioners.

A. *Moving to an "Offense-Based" Model of Expunction*

In order for the intent of the expunction statute to be fully realized, the statute must be revised to become "offense-based" rather than "arrest-based."

35. TEX. CODE CRIM. PROC. ANN. art. 42A.101 (West 2017).

36. Dahr, *supra* note 18.

37. Dahr, *supra* note 18.

38. TEX. GOV'T CODE ANN. § 411.0765 (West 2019).

In other words, a person's eligibility for expunction should not turn on whether each charge arising out of an arrest is eligible. Instead, each charge's eligibility should be reviewed individually. By passing a (later vetoed) bill that would allow petitioners to expunge individual charges that meet the requirements of Article 55.01,³⁹ the Texas Legislature signaled its disagreement with the current construction of the statute. The current statute is a poor fit for the way today's criminal justice system functions. Ultimately, for the maxim "innocent until proven guilty" to truly apply to Texas residents, all charges that did not result in a conviction should be able to be expunged so that the records may not be used to the detriment of those affected.

There are several different scenarios in which the expunction statute's "arrest-based" approach prevents an individual from getting an expunction. If an individual is arrested and charged with a felony but through a plea agreement later pleads guilty to a misdemeanor in exchange for a dismissal of the felony, then the dismissed felony charge may not be expunged. If an individual is arrested and immediately charged with multiple offenses arising out of the same arrest, and one or more charges resulted in a conviction or a deferred adjudication, any dismissed charges arising out of that arrest may not be expunged. This is essentially Shannon's scenario, where a deferred adjudication for resisting arrest prevented her dismissed possession-of-marijuana charge from being eligible for expunction. Finally, picture this scenario: an individual is arrested based on a warrant for an offense, such as armed robbery, but is then charged with an additional offense as a result of the arrest, such as a class B misdemeanor of driving while his or her license is suspended. Police later realize that this individual could not have committed the armed robbery, so the prosecutor dismisses that charge. However, the individual pleads guilty to the class B misdemeanor of driving with a suspended license. Because of this guilty plea, the individual is no longer able to expunge the armed robbery charge from his record, so it will stay there indefinitely.

In each of these scenarios, the individual was charged with two offenses but was ultimately convicted of the more "minor" charge. A prospective landlord or employer who sees a marijuana-possession or driving-on-a-suspended-license conviction may not see that as a barrier to leasing to or hiring that individual. However, seeing an assaultive misdemeanor or felony on a person's criminal record, even if it was ultimately dismissed or dropped, will almost certainly factor into the prospective landlord's or employer's decision.

39. Veto Message of Gov. Abbott, Tex. H.B. 3579, H.J. of Tex., 84th Leg., R.S. 6050 (2015), <https://journals.house.texas.gov/hjrn/84r/pdf/84RDAY85FINAL.PDF#page=24> [<https://perma.cc/G5MK-BCK2>].

The First District Court of Appeals in Houston long held that an “expunction order may carve individual offenses out of an arrest and expunge only the ones that meet the expunction requirements[.]”⁴⁰ In *Ex Parte E.E.H.*, the court held that this more expansive construction of the expunction statute better serves the public interest, as it saw “no public policy reason to limit the right of expunction to an ‘all or nothing’ proposition.”⁴¹ However, a 2011 legislative amendment to the expunction law emphasized the need for all charges in an arrest to meet the expunction eligibility requirements, requiring the court to reverse its holding in *E.E.H.*⁴²

In 2015, both the Texas Senate and House of Representatives passed House Bill 3579 (HB 3579),⁴³ which would have allowed for expunction eligibility to be evaluated using offenses instead of arrests.⁴⁴ That the bill made it to the Governor’s desk showed the bipartisan support for an expansion of expunction eligibility. However, Governor Abbott vetoed this bill, releasing the following statement:

“House Bill 3579 . . . goes too far by allowing courts to expunge dismissed criminal charges — including serious felony charges — even when the defendant was convicted of other, related charges. This would be problematic for two reasons. First, dismissal of a criminal charge is not necessarily an indicator of the defendant’s innocence of that crime, particularly when a multi-charge arrest results in a plea agreement. Second, unlike orders of non-disclosure, which seal records from public view, expunction seals the records even from law enforcement. Under House Bill 3579, even those convicted of serious felonies could have parts of their criminal record expunged. This would deprive law enforcement of information about the offense history of habitual criminals, which may be useful in the investigation of future crimes.”⁴⁵

Governor Abbott’s criticisms of HB 3579 have several logical flaws. First, Governor Abbott states that the “dismissal of a criminal charge is not necessarily an indicator of the defendant’s innocence[.]”⁴⁶ This is true, but it is beside the point when it comes to expunction eligibility. The current

40. Westerfield, *supra* note 23.

41. *Ex Parte E.E.H.*, 869 S.W.2d 496, 498 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

42. *In re Expunction*, 465 S.W.3d 283, 289 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (overruling *Ex Parte E.E.H.*, 869 S.W.2d 496 (Tex. App.—Houston [1st Dist.] 1993, writ denied)).

43. *History, Tex. H.B. 3579, 84th Leg., R.S. (2015)*, TEXAS LEGISLATURE ONLINE, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=84R&Bill=HB3579> [<https://perma.cc/8QY6-W8NY>].

44. *Tex. H.B. 3579, 84th Leg., R.S. (2015)*.

45. HOUSE RESEARCH ORGANIZATION, TEXAS HOUSE OF REPRESENTATIVES, VETOES OF LEGISLATION 84TH LEGISLATURE 54 (July 16, 2015), <https://hro.house.texas.gov/pdf/focus/veto84.pdf> [<https://perma.cc/G7U6-C8ZM>].

46. *Id.*

expunction statute does not consider innocence in the determination of eligibility—it considers culpability.⁴⁷ A dismissed or dropped charge is the clearest indication that society does not find a defendant culpable of the offense for which he was arrested. Just as a guilty plea is not always indicative of a defendant’s guilt, a dismissed charge is not always indicative of a defendant’s factual innocence. However, this matters little in the context of expunction.

Next, Governor Abbott expresses concern that those convicted of serious felonies would have parts of their records expunged under the proposed law.⁴⁸ While this is true, it remains the case that the records associated with the conviction would not be expunged. Governor Abbott also provides little reasoning behind this concern, other than to say that law enforcement could be “deprive[d] . . . of information about the offense history of habitual criminals[.]”⁴⁹ Even assuming that someone eligible under the proposed statute is a “habitual criminal,” a prosecutor always has the discretion to choose not to dismiss an offense in exchange for a plea. If a prosecutor anticipates that the individual he is dealing with is in fact a “habitual criminal” who is culpable of a serious offense, he will presumably dispose of the case in a way that will not prevent him from accessing records he may need in the future.

Just as Governor Abbott recognized in his statement of veto, allowing for the expunction of criminal records based on offenses instead of arrests would allow those who entered into certain types of plea deals to have their initial, more serious charges expunged. Though there is no local data on the incidence of plea deals involving an agreement to plead guilty to a lesser charge, it can be assumed that these arrangements are quite common given the number of guilty pleas overall. The purpose of these plea deals is intuitive—an individual accepts a conviction on a lesser charge, presumably in exchange for a lesser sentence and to avoid the stigma of a conviction on the higher charge. In return, taxpayers are saved the cost of a trial, individuals are punished more promptly, and prosecutors can devote their time to other, more resource-intensive cases. A problem with Governor Abbott’s statement is that he assumes the original, more serious charge represents the offense for which the defendant is actually culpable. This assumption is flawed. Rather, prosecutors have vast discretion in making charging decisions and can initially charge defendants with more serious offenses in order to encourage plea bargaining.⁵⁰ For that reason, it is unfair for an offense of which an

47. See TEX. CODE CRIM. PROC. ANN. art. 55.01(a)(2)(A) (West 2019).

48. HOUSE RESEARCH ORGANIZATION, *supra* note 45.

49. HOUSE RESEARCH ORGANIZATION, *supra* note 45.

50. See Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187 (2007) (“Using leverage gained through overcharging and from determinate sentencing laws, prosecutors can extract guilty pleas in weak cases.”). Prosecutors can

individual was never found culpable to remain on his record indefinitely. It is harmful for individuals to be continually stigmatized and penalized, via collateral consequences, for crimes for which our criminal justice system decided they should not be convicted.

In 2017 alone, approximately 200,000 criminal cases were dismissed in Texas.⁵¹ Though the data is not reported, it is likely that thousands more arrests resulted in no charges at all. While many of these events are eligible to be expunged from criminal records, many others are not, simply because they are linked to cases that resulted in a conviction or a deferred adjudication. There are few public policy reasons to support the maintenance of criminal records for offenses that were dismissed or never charged. If we as a society truly believe that criminal defendants are innocent until proven guilty, then Texas must stop maintaining and disseminating information on charges that did not lead to a conviction.

B. Allowing Expunction of Deferred Adjudications

As momentum for expanding expunction eligibility in Texas continues to grow, a future focus of reform should be allowing the expunction of deferred adjudication cases. Often, defendants are told that deferred adjudication is a better alternative to a guilty conviction because, after they complete their community supervision, their cases will be dismissed. However, defendants contemplating this choice may not understand that their dismissal from deferred adjudication will be treated differently than a traditional dismissal. It will not be eligible for expunction, but only for an order of nondisclosure, which provides limited relief against the collateral consequences of having a criminal record.⁵²

Deferred adjudication requires defendants to submit to extensive supervision by the state and to fulfill requirements similar to those of probation. These requirements typically include “monthly visit[s] to a probation officer, minimum community service hours, urinalysis for drugs and alcohol, fines, court costs and monthly probation fees.”⁵³ Once an individual successfully completes these requirements and the period of his supervision has expired, he is released from deferred adjudication.

also engage in a practice called “charge stacking,” where they charge defendants with multiple offenses to increase the defendant’s potential prison time, leading to increased pressure to plead guilty. See Radley Balko, *The Power of the Prosecutor*, HUFFINGTON POST (Jan. 16, 2013), https://www.huffpost.com/entry/the-power-of-the-prosecut_n_2488653 [<https://perma.cc/3A55-QLXG>].

51. See *County Case Activity*, *supra* note 6 (case dispositions for class A and B misdemeanors in 2017); *District Case Activity*, *supra* note 9 (case dispositions for felony cases in 2017).

52. See generally *supra* notes 35–38 and accompanying text.

53. *Deferred Adjudication v. Regular Probation (Community Supervision)*, CARL DAVID CEDER, ATTORNEY AT LAW, <http://www.carlcederlaw.com/deferred-adjudication-vs-probation-in-texas> [<https://perma.cc/S6X2-X5CL>].

The decision regarding whether or not to impose deferred adjudication community supervision on a defendant is seemingly very arbitrary. The judge must decide whether imposing deferred adjudication is in “the best interest of society and the defendant,”⁵⁴ but it is not clear how this calculus works. Some believe that deferred adjudication is used primarily for first-time offenders.⁵⁵ However, there is no data to support this claim. It is also unclear why deferred adjudication is more likely to be used for some offenses than others. Based on Texas court statistics from the years 2017 and 2018, some of the offenses for which deferred adjudications are most commonly imposed include drug offenses like possession of marijuana or felony drug possession, theft, and traffic offenses.⁵⁶ However, deferred adjudication is sometimes also imposed for a range of offenses considered more serious, including aggravated assault and family violence assault.⁵⁷

While Texas does provide a path to relief for those who have been dismissed from deferred adjudication—an order of nondisclosure or “sealing”—this remedy only goes so far. As stated above, over 30 entities or classes of entities, including the Texas Medical Board, the Texas Board of Nursing, the State Board for Educator Certification, banks, and credit unions have access to records that are subject to an order of nondisclosure.⁵⁸ This means that many important professional licensing boards, banks, and classes of employers may still view the sealed arrests and use them to deny individuals licenses, loans, or employment.

Given that a judge must find that it is in “the best interest of society and the defendant”⁵⁹ to place an individual on deferred adjudication community supervision, it is likely that the judge views such a defendant as being capable of reform and deserving of a second chance. Additionally, an individual’s successful completion of the terms of community supervision signals his commitment to positive growth. It makes little sense for the state of Texas to create a program to shield individuals from the direct consequences of a conviction, yet still subject them to collateral consequences by allowing these offenses to be accessible to many agencies and institutions indefinitely.

Texas legislators are beginning to recognize the problems with the way deferred adjudication cases are treated in the state, and they recently introduced a bill that would have allowed for the limited expunction of cases that have been dismissed from deferred adjudication. House Bill 64 (HB 64) was filed in November of 2018 and would have allowed for the expunction of certain nonassaultive misdemeanor offenses that were dismissed after

54. TEX. CODE CRIM. PROC. ANN. art. 42A.101 (West 2017).

55. See Dahr, *supra* note 18.

56. *County Case Activity*, *supra* note 6; *District Case Activity*, *supra* note 9.

57. *County Case Activity*, *supra* note 6; *District Case Activity*, *supra* note 9.

58. TEX. GOV’T CODE ANN. § 411.0765 (West 2019).

59. TEX. CODE CRIM. PROC. ANN. art. 42A.101 (West 2017).

deferred adjudication, excluding disorderly conduct, public indecency, possession of prohibited weapons, and certain drug crimes.⁶⁰ However, in order to be eligible, the individual must not have been “convicted of or placed on deferred adjudication community supervision under Subchapter C, Chapter 42A, for an offense, other than a traffic offense punishable by fine only, committed after the date of the misdemeanor offense for which the person was placed on deferred adjudication community supervision[.]”⁶¹ Additionally the individual is not eligible for expunction until five years after date of dismissal from deferred adjudication.⁶² This bill did not proceed to a vote by the Texas House of Representatives before the end of the 2019 legislative session.

While HB 64 appeared to be a step in the right direction, it did not go nearly far enough to provide relief for those who have successfully completed deferred adjudication. The drafters of the bill decided that the “fresh start” associated with an expunction should not be attainable for those who have committed a large range of offenses or for those who have committed offenses since being released from deferred adjudication. A more lenient bill that balances the idea of providing certain individuals with a “fresh start” with the interests of the state in retaining criminal records might allow for the expunction of all misdemeanor and non-assaultive felony deferred adjudications after a specific waiting period. Instead of requiring that an individual have a clean record since his dismissal from deferred adjudication to be eligible for expunction, a more lenient bill might require the passage of a certain length of time since an individual’s last conviction, to be more confident that the individual is not at a high risk of re-offending. Such an approach is consistent with research that most individuals tend to “age out” of crime.⁶³

Even if a bill similar to HB 64 were to pass, many individuals who have been released from a deferred adjudication will still not be eligible for expunction of their offenses, meaning their deferred adjudications will prevent them from getting professional licenses, housing, jobs, and loans. This is not an equitable outcome for defendants who were persuaded to submit to the terms of a deferred adjudication, thinking that they would fare better with it on their record than with a conviction. Ultimately, the Texas

60. House Comm. on Criminal Jurisprudence, Bill Analysis, Tex. H.B. 64, 86th Leg., R.S. (2019), <https://capitol.texas.gov/tlodocs/86R/analysis/pdf/HB00064H.pdf#navpanes=0> [<https://perma.cc/N7ES-KR53>]; *History, Tex. H.B. 64, 86th Leg., R.S. (2019)*, TEXAS LEGISLATURE ONLINE, <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=HB64> [<https://perma.cc/6WUV-MNKD>].

61. Tex. H.B. 64, 86th Leg., R.S. (2019); *History, Tex. H.B. 64, supra* note 60.

62. *Bill Analysis, Tex. H.B. 64, supra* note 60.

63. *See generally* Dana Goldstein, *Too Old to Commit Crime?*, N.Y. TIMES (Mar. 20, 2015), <https://www.nytimes.com/2015/03/22/sunday-review/too-old-to-commit-crime.html> [<https://perma.cc/6JJJ-NSJN>] (explaining that “all but the most exceptional criminals, even violent ones, mature out of lawbreaking before middle age . . .”).

Legislature needs to find a way to better balance the needs of prosecutors and law enforcement with the needs of those who have successfully completed deferred adjudication and wish to move forward with their lives without the stigma of a criminal record.

C. *Making Expunction Accessible*

Because expunctions can only be granted after filing a petition with the court and because drafting the petition typically requires the assistance of an attorney, the cost of an expunction can total between \$500 and \$2,500, not including filing fees.⁶⁴ Filing fees typically total between \$200 and \$400,⁶⁵ but can be waived for indigency. These amounts also do not include any costs incurred travelling to one's expunction hearing, which can accumulate quickly if the person has moved to another county or state. These costs have a disproportionately harmful effect on indigent individuals, who are already more likely to have criminal records⁶⁶ and less likely to have the resources and connections to navigate the many collateral consequences associated with having a criminal record.⁶⁷ Certain changes should be made to the procedures for seeking an expunction that can ease the burden on those who need the expunctions the most. These changes include transitioning from a petition-driven process to a simpler, form-driven process, waiving the cost of expunctions for all Texans, and eliminating the hearing requirement.

A legal petition is a complicated piece of writing that can be unintuitive to many lawyers, let alone laypeople. Because expunctions are not given at the judge's discretion, petitions need not include any language advocating for the grant of an expunction. They are only required to include identifying

64. See *How to Get Your Criminal Record Expunged in Texas*, LAW OFFICES OF SETH KRETZER: BLOG (Sept. 11, 2018, 7:00 AM), <https://kretzerfirm.com/how-to-get-your-criminal-record-expunged-in-texas/> [<https://perma.cc/GFU4-JE5L>] (“The expenses vary depending on the lawyer, but in general, [one’s] Texas expungement cost should be between \$1000 and \$2500.”). A recent Texas startup claims to provide lower cost expunctions by generating petitions using automation. Madison Iszler, *A San Antonio Startup That Uses Technology to Scrub Criminal Records Is Expanding*, SAN ANTONIO EXPRESS-NEWS (Mar. 22, 2019, 10:02 AM), <https://www.expressnews.com/business/technology/article/A-San-Antonio-startup-that-uses-technology-to-13708679.php> [<https://perma.cc/U3AM-BQM9>]. However, the startup does not provide clients with the advice of an attorney. *Id.*

65. See DENTON COUNTY DISTRICT CLERK, *supra* note 27; HARRIS COUNTY DISTRICT CLERK, *supra* note 27.

66. See Daniel Kopf & Bernadette Rabuy, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (Jul. 9, 2015), <https://www.prisonpolicy.org/reports/income.html> [<https://perma.cc/D8GA-BBGV>] (finding that, in 2014, “incarcerated people had a median annual income of \$19,185 prior to their incarceration, which is 41% less than non-incarcerated people of similar ages.”).

67. See Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html> [<https://perma.cc/B9P2-J4ZH>] (“Roughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers.”); see also Kopf & Rabuy, *supra* note 66.

information for the petitioner and for the arrest(s) the petitioner seeks to expunge as well as a list of agencies that should be sent notice of the grant of an expunction.⁶⁸ If the statute were amended so that all that is needed to request an expunction is a simple form, individuals would save a significant amount of money on legal fees. Additionally, a form-based system would allow expunction requests to be filed and processed much more quickly. The form should require less information than the petition, since the information currently required is more easily found by county staff than by the average person. The document would utilize a straightforward “fill-in-the-blank” format that any individual could complete.

Currently, many legal-aid providers and pro bono clinics will determine individuals’ eligibility for expunction and draft petitions free of charge for indigent individuals. However, the demand for pro bono legal services is so high that these programs and providers are unable to serve every person who seeks their assistance. By amending the procedure for seeking an expunction to make the process more accessible to non-lawyers, the state would make it easier for individuals to file the paperwork themselves. Criminal justice advocates would still be able to step in to help individuals needing additional assistance. Pro bono clinics and legal-aid providers would be able to focus their efforts on counseling individuals regarding those individuals’ eligibility for expunction, a less time-intensive task that would allow the clinics and providers to serve more individuals in need.

Removing the requirement that a petition be filed each time an expunction is sought is a fair middle ground between the current system, which places a significant burden on those seeking expunctions, and an “automatic expunction” system, which some states have embraced and for which expunction advocates have increasingly begun calling.⁶⁹ An “automatic expunction” system might be particularly complicated in Texas, where expunctions cannot be granted until the statute of limitations has passed. Statutes of limitation vary by crime and class of crime, and keeping track of their expiration would put a significant burden on counties, which would most likely be responsible for processing the automatic expunctions. Additionally, assuming an “automatic expunction” bill is retroactive, it would be extremely time-consuming for counties to look back into their old records, determine what can be expunged, and go through the expunction process. Ultimately, in a state as large as Texas, it might not be financially

68. TEX. CODE CRIM. PROC. ANN. art. 55.02 (West 2019).

69. See HELEN GAEBLER, WILLIAM WAYNE JUSTICE CENTER FOR PUBLIC INTEREST LAW, CRIMINAL RECORDS IN THE DIGITAL AGE: A REVIEW OF CURRENT PRACTICES AND RECOMMENDATIONS FOR REFORM IN TEXAS 29 (2013) (proposing a mechanism for automatic expunctions in Texas and describing similar models in other states). See generally Charles J. Johnson, *Automatic (Expunctions) for the People: For a Court-Initiated Expunction Right in North Carolina for Charges Not Resulting in Conviction*, 96 N.C. L. REV. 573 (2018) (proposing reforms to North Carolina’s expunction statutes to create an “automatic” expunction process).

feasible to require that expunctions become automatic. However, it is reasonable to shift some of the burdens of expunction to counties, which have staff who can quickly and easily find information needed to supplement an individual's expunction request.

Another step toward making expunctions more accessible to all Texans would be to waive the fees associated with this type of relief. While the fees counties charge to file an expunction can be waived with the completion of a Statement of Inability to Pay Court Costs, it is not clear how many individuals are aware of this option. Additionally, requiring that indigent individuals provide a significant amount of financial information and supporting documentation places an additional burden on those already struggling. Given the correlation between poverty and criminality⁷⁰ and given the overactivity of law enforcement in low-income neighborhoods,⁷¹ it is likely that a significant percentage of those seeking expunctions are indigent and would benefit from having all fees waived automatically. For this reason, counties should absorb the costs of expunctions to ease the burden on low-income petitioners and to simplify the process of obtaining this form of relief.

The state of Texas can further simplify the expunction process and ease the burden placed on petitioners by eliminating the requirement that petitioners attend a hearing in court. Because the state is required to grant expunction to those who fulfill the statutory requirements, there is no reason for a live hearing. Mandating that petitioners show up to a live hearing generally requires petitioners to take time off work, arrange for childcare, and travel long distances. The process also instills fear and discomfort in petitioners, who may be either traumatized by or disillusioned with the criminal justice system. Finally, scheduling, rescheduling, and staffing live hearings likely places a burden on the judicial system. These problems can be alleviated by ridding Texas's expunction procedure of the hearing requirement.

Conclusion

For the millions of Texans with criminal records, expunction is a valuable mechanism for removing arrests and offenses from their records. Removing arrests can vastly improve an individual's chances of getting a job, a place to live, or a professional license. However, because of the narrow eligibility requirements and the expense and difficulty associated with obtaining an expunction, far too few Texans can reap the benefits of this form of relief. Small changes to expunction eligibility and procedure can allow

70. Oppel Jr. & Patel, *supra* note 67; Kopf & Rabuy, *supra* note 66.

71. David Kennedy, *Black Communities: Overpoliced for Petty Crimes, Ignored for Major Ones*, LOS ANGELES TIMES: OPINION (Apr. 10, 2015, 6:36 PM), <https://www.latimes.com/opinion/bookclub/la-reading-los-angeles-kennedy-ghettoside-20150404-story.html> [<https://perma.cc/8Y9H-TTF4>].

more people the second chance that expunction is meant to provide. If we maintain the status quo and continue to subscribe to the idea that only a narrow set of individuals is entitled to a second chance after acquiring a criminal record, we will prevent many others from truly reentering society and finding success, stability, and fulfillment.