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Expanding the Extraordinary: Expungements in Minnesota

Alena A. Simon†

Introduction

In 1990, when Alex was eighteen years old, they stole \$6,000 from their employer in order to have the resources to leave their abusive ex-partner.¹ They were caught, charged, and convicted of a felony in Minnesota under Minnesota Statutes Section 609.52(3)(2). Alex never served time for the offense and successfully completed probation in 1999. They have no prior or subsequent criminal history. In 2010, they completed a Registered Nursing education program, but when applying for nursing positions, each employer conducted a background check and Alex's felony conviction showed up, barring them from all employment opportunities in the nursing field. The collateral consequences of Alex's conviction continue to follow them thirty years later.

Collateral consequences are “legal disabilities” that are not a part of a criminal sentence but stem from a criminal conviction.² While not intended to be punitive,³ these consequences are often so severe they prohibit those with criminal convictions from ever fully reintegrating into society.⁴ They range from denial of public benefits, exclusion from jobs and housing, social stigma, voter disenfranchisement, and impacts on immigration status.⁵ The United States incarcerates more people than any other nation in the

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1. Alex is a hypothetical person based on real situations the Author witnessed while working at the Ramsey County Attorney's Office.

2. Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 NOTRE DAME L. REV. 301, 302 (2015).

3. Mackenzie J. Yee, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 GEO. J. ON POVERTY L. & POL'Y 169, 171 (2017).

4. Alice Ristroph, *Farewell to the Felony*, 53 HARV. C.R.-C.L. L. REV. 563, 605 (2018).

5. Jon Geffen & Stefanie Letze, *Chained to the Past: An Overview of Criminal Expungement Law in Minnesota—State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1332–33 (2005); see also Ristroph, *supra* note 4, at 566.

world.⁶ People of color are disproportionately impacted by mass incarceration⁷ and by the accompanying consequences.⁸ Recently, more attention has been given to the postconviction consequences of criminal convictions and states have implemented reforms to restore voting rights, mitigate immigration consequences, and seal or expunge criminal records.⁹ Expungement has emerged as a key policy tool to reintegrate individuals back into society,¹⁰ and over the past decade 80% of states have tried to expand expungement legislation.¹¹ In 2014, the Minnesota legislature greatly expanded which offenses were expungement eligible under Minnesota statutory law.¹² Yet, even under Minnesota's expanded law, Alex will never be eligible to expunge their conviction because theft greater than \$5,000 is ineligible, even if it is their only criminal conviction.¹³ Recognizing the limitations of the statute, in February of 2020, Minnesota House Representative Jamie Long introduced legislation to amend Minnesota's expungement statute.¹⁴ The new

6. ACLU OF MINN., BLUEPRINT FOR SMART JUSTICE MINNESOTA 4 (2019) [hereinafter ACLU SMART JUSTICE]; see also Yee, *supra* note 3, at 171 (noting that nearly one-third of all Americans have some type of criminal record).

7. JEREMY TRAVIS, AMY L. SOLOMON & MICHELLE WAUL, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 12 (2001) [hereinafter FROM PRISON TO HOME]; see also Brian M. Murray, *Unstitching Scarlet Letters?: Prosecutorial Discretion and Expungement*, 86 FORDHAM L. REV. 2821, 2832–33 (2018) (highlighting that nearly 50% of Black and Latino men will be arrested before the age of twenty-three).

8. Mayson, *supra* note 2, at 302.

9. MARGARET LOVE, JOSH GAINES & JENNY OSBORNE, COLLATERAL CONSEQUENCES RES. CTR., FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS 6–7 (2018) [hereinafter COLLATERAL CONSEQUENCES RES. CTR.]. See generally ACLU SMART JUSTICE, *supra* note 6 (analyzing changes needed to reduce prison populations).

10. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2523 (2019) [hereinafter Prescott & Starr, *Expungement Empirical Study*].

11. Murray, *supra* note 7, at 2843.

12. MINN. STAT. § 609A (2014). Prior to 2014, only arrest records not resulting in a conviction, juvenile crimes, and certain controlled substance offenses were eligible. See MINN. STAT. § 609A (1996). Following the legislative modification in 2014, expungement eligibility was expanded to cover misdemeanors, gross misdemeanors, and fifty enumerated felonies.

13. MINN. STAT. § 609A.02(3)(b)(20) (2014) allows for expungement of “theft of \$5000 or less.”

14. H.F. 3816, 91st Leg. (Minn. 2020). See MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020). Representative Long reintroduced a slightly modified version of this same legislation called the *Clean Slate Act* in the 2021 legislative session. H.F. 1152, 92nd Leg. (Minn. 2021). This Note will focus on the 2020 version, as that was the one available during the time it was written.

provisions would allow for automatic expungement of select misdemeanors and for prosecutor-initiated expungement.¹⁵

This Note focuses on the extent to which Minnesota currently offers a meaningful expungement remedy to address collateral consequences of criminal convictions. It specifically focuses on the 2014 revisions to the Minnesota expungement statute and argues they did not go far enough to effectively mitigate the negative impacts associated with criminal records. Part One will define expungement and examine why it can be beneficial; Part Two will walk through key provisions of Minnesota's 2014 expungement statute; Part Three will look at various ways other states have structured their expungement remedy; and Part Four will analyze the effectiveness of Minnesota's current statute, break down the 2020 revisions in H.F. 3816, and suggest amendments to H.F. 3816 to make expungement even more accessible. This Note argues that (1) Minnesota's 2014 revisions did not go far enough to make expungement accessible; (2) Minnesota should pass Representative Long's 2020 bill to allow for automatic expungement of misdemeanors, but automatic expungement should cover all arrest records, dismissed cases, petty misdemeanors, and misdemeanors, *including those offenses that may be used to enhance future penalties*; (3) Minnesota should enact H.F. 3816 to provide for prosecutor-initiated expungement because prosecutors do not have flexibility under the current law to expunge crimes initially under their jurisdiction; and (4) Minnesota should make all felonies expungement eligible subject to the balancing test factors in Minnesota's current expungement statute.¹⁶

I. Background and Benefits of Expungements

In the 1940s, support for sealing criminal records advanced nationally as a remedy for juveniles.¹⁷ It was thought juveniles were "easier to rehabilitate than adults," and that sealing their criminal

15. *Id.* The 2021 version of the bill includes the provisions regarding automatic expungement of qualifying petty misdemeanors, misdemeanors, gross misdemeanors, and limited felonies, but it no longer includes prosecutor-initiated expungement. The updated bill for automatic expungement has received support from the Minnesota County Attorney's Association and the Legal Rights Center, among others. *House Public Safety Committee Discusses Rep. Long's Bill to Provide Minnesotans with a Fresh Start*, MINN. LEGISLATURE (Feb. 23, 2021), <https://www.house.leg.state.mn.us/members/Profile/News/15529/31314> [perma.cc/N3TP-CUST].

16. MINN. STAT. § 609A.03(5)(c) (walking through the twelve-factor test judges may consider in determining whether to grant an expungement).

17. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 6.

records would provide “an incentive to reform.”¹⁸ Reformers in the 1960s sought to extend these remedies to adult offenders¹⁹ and the push for such reforms continued through the 1980s.²⁰ Today, expungement is more popular than ever.²¹ Over the past three years, over twenty states have updated their expungement laws, recognizing the important role expungement plays in facilitating reintegration into society.²² All states but nine allow for the closure of at least some adult convictions.²³ Expungement is governed by state law; there is no federal expungement statute.²⁴ Thus, the extent of the remedy, eligibility, and process for expungement varies from state to state.²⁵ Expungement generally seals a criminal

18. *Id.*; Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1709 (2003).

19. See Love, *supra* note 19, at 1708–10 (discussing the history of expungement). These remedies were initially drafted into the Penal Code and promoted by the National Council on Crime and Delinquency.

20. In the 1980s, the ABA encouraged states to adopt judicial expungement procedures. See Love, *supra* note 19, at 1713–14 (noting this would allow for the sealing of court records).

21. See Eric Westervelt, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019), <https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance> [perma.cc/QS6P-67EN] (discussing various expungement reform efforts in the United States).

22. *Id.*; see also David Schluskel & Margaret Love, *Record-Breaking Number of New Expungement Laws Enacted in 2019*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 6, 2020), <https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/> [perma.cc/E8E5-JRTB] (“In 2019, 27 states and D.C. made certain classes of convictions newly eligible for expungement, sealing, or vacatur relief.”).

23. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 7.

24. Murray, *supra* note 7, at n.115 (noting there is currently proposed legislation that would allow for expungement at the federal level). See Record Expungement Designed to Enhance Employment Act of 2019, H.R. Res. 2410, 116th Cong. (2019). The bill currently has twenty-eight co-sponsors and would allow for the expungement of non-violent federal offenses. For a list of cosponsors, see *Cosponsors: H.R. 2410 — 116th Congress (2019-2020)*, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/2410/cosponsors?searchResultViewType=expanded> [perma.cc/H29K-FPDJ].

25. See Murray, *supra* note 7, at 2842; see also George Blum, Annotation, *Judicial Expunction of Criminal Record of Convicted Adult in Absence of Authorizing Statute*, 68 A.L.R.6th 1, 155 (2011) (noting a state does not have the authority to expunge a federal conviction or an offense from another state, their authority only extends to records within their jurisdiction). The extent to which a criminal record is viewable after expungement also varies from state to state. Expungement eligibility generally varies depending on the state, crime, number of convictions, and time since completion of sentence. See J.J. Prescott and Sonja B. Starr, *The Case for Expunging Criminal Records*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/opinion/expunge-criminal-records.html> [perma.cc/5W8Q-XFQQ] [hereinafter Prescott & Starr, *Case for Expunging*].

record.²⁶ While the verb “to expunge,” literally means to obliterate or destroy,²⁷ expungement generally does not destroy a criminal record.²⁸

*A. Impacts of a Criminal Record Are Severe and
Disproportionately Impact People of Color*

Technological advances have made criminal records easily accessible and online access has made the practice of background checking ubiquitous.²⁹ Employers and landlords often require the disclosure of criminal records to determine who they would like to rent housing to or hire.³⁰ A study from 2001 concluded that two-thirds of employers would not hire someone with a criminal conviction.³¹ Bias and stigma, perceptions of dishonesty,³² or fears of future lawsuits often drive hiring and leasing practices.³³ Some licensing professions completely exclude anyone with a criminal conviction.³⁴

These postconviction consequences disproportionately impact people of color.³⁵ Nationally, and in Minnesota, people of color are arrested, charged, and convicted at higher rates than their white

26. MINN. STAT. § 609A.01 (stating that in Minnesota, expungement prohibits the disclosure of the existence of a record unless by court order or statute).

27. *State v. CA*, 304 N.W.2d 353, 357 (Minn. 1981) (quoting BLACK'S LAW DICTIONARY 552 (5th ed. 1979)).

28. MINN. STAT. § 609A.03(7)(b) (noting expunged criminal records can be reopened by law enforcement, prosecutors, and judges, for the “purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order”).

29. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 2; *see also* Geffen, *supra* note 5, at 1342 (noting that prior to online access and a central Bureau of Criminal Apprehension online database, most criminal records were stored only on county computers, microfilm, or handwritten in books).

30. Geffen, *supra* note 5, at 1343.

31. *See* Travis, *supra* note 7, at 31 (“A survey of employers in five major cities across the country revealed that two-thirds of all employers indicated they would not knowingly hire an ex-offender and at least one-third checked the criminal histories of their most recently hired employees.”).

32. *See, e.g.*, FED. R. EVID. 609 (providing that evidence of a witness’ criminal conviction may be used when “attacking a witness’ character for truthfulness”).

33. T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 303–04 (1998) (noting employers may fear a negligence lawsuit if someone commits a crime while on the job). *See, e.g.*, Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2523–43 (discussing employment outcomes and criminal expungement).

34. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2470; CHIDI UMEZ & REBECCA PIRIUS, NATIONAL CONFERENCE OF STATE LEGISLATURES, BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS (2018), http://www.ncsl.org/Portals/1/Documents/Labor/Licensing/criminalRecords_v06_web.pdf [perma.cc/FC26-GEFL].

35. *See* Mayson, *supra* note 2, at 302–03.

counterparts.³⁶ Nationally, nearly 50% of Black and Latino men will be arrested before the age of twenty-three.³⁷ Minnesota has some of the largest racial disparities in marijuana possession arrest rates,³⁸ and in 2017, Black Minnesotans made up 34% of the prison population but only 6% of the state population.³⁹ Thus, collateral consequences from arrests and convictions are compounded on people of color and need to be addressed through criminal justice reforms.

B. The Benefits of Expungement Are Far Reaching and Can Result in Higher Wages, Reduced Recidivism, and Increased Tax Revenue

Expungements benefit both individuals and society and can help individuals rehabilitate and reintegrate.⁴⁰ For individuals with criminal histories, the sealing of criminal records allows for increased opportunities for employment, housing, and reintegration.⁴¹ Extensive research from Michigan shows that individuals who receive expungements have an easier time finding employment and housing, and their wages are nearly 25% higher than their pre-expungement trajectory.⁴² Higher wages, access to housing, and reintegration into communities correlate to lower recidivism rates.⁴³ Research shows those who receive an expungement are less likely to reoffend.⁴⁴ Low recidivism rates lead

36. See ACLU SMART JUSTICE, *supra* note 6, at 5, 22.

37. Murray, *supra* note 7, at 2832–33.

38. See ACLU SMART JUSTICE, *supra* note 6, at 5 (citing *The War on Marijuana in Black and White*, ACLU (June 2013), <https://www.aclu.org/report/report-war-marijuana-black-and-white> [perma.cc/AWD5-QJ6W]).

39. ACLU SMART JUSTICE, *supra* note 6, at 5 (noting in addition that Native Americans make up 10% of the prison population and 1% of the state population and Latinos make up 6% of the prison population, but only 4% of the general population).

40. See Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2462.

41. *Id.*

42. *Id.* at 2461 (noting that, on average, within one year of expungement, wages go up by 22%).

43. See *id.* at 2520–21; cf. William D. Payne, *Negative Labels: Passageways and Prisons*, 19 CRIME & DELINQ. 33 (1973) (arguing that labeling people as criminal or deviant produces negative social consequences for them, and thus secondary deviance). *But cf.* Chares R. Tittle, *Deterrents or Labeling*, 53 SOC. FORCES 399 (1975) (arguing that recidivism rates cannot establish that labeling people as deviants is what produces deviancy).

44. Only 3.4% of people are re-arrested and 1.8% are reconvicted within two years; 7.1% are re-arrested and 4.2% are reconvicted within five years. Rates for those who commit violent crimes or felonies are even lower. For example, within five years, only 2.6% are re-arrested and 0.6% are reconvicted for violent crimes; 2.7% are re-arrested and 1% are reconvicted for felonies. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2512.

to safer communities.⁴⁵ A cost-benefit analysis of expungement in California provided data that expungements lead to increased GDP and tax revenues because unemployment rates are lower and states spend less money on government assistance programs.⁴⁶ Thus, expungements increase public safety and save states money.⁴⁷

C. Expungements Are Hard to Obtain: Lack of Awareness and Resources Often Make Them Prohibitive

While expungements are highly beneficial to individuals and communities, the vast majority of people who qualify for an expungement never seek one.⁴⁸ In-depth research on the benefits of expungement from J.J. Prescott and Sonia B. Starr suggests that, in Michigan, only 6.5% of individuals eligible for expungement actually seek the remedy out⁴⁹ and nearly two-thirds of the people who actually receive an expungement are White.⁵⁰ Their research states:

Most people don't know they can get an expungement, or don't know how to do it, and don't have lawyers to advise them. The process is long and complicated, requiring visits to police stations and courthouses. The fees and costs (which in Michigan usually total close to \$100, not including transportation and time away from work) are a barrier for people in poverty. And people with records have often had painful experiences with the criminal justice system, making the prospect of returning to it for any reason daunting.⁵¹

Many people do not pursue expungement because they lack awareness that such a remedy exists or they lack resources to pursue relief.⁵² Fees, long applications, and court appearances

45. See, e.g., MEYLI CHAPIN, ALON ELHANAN, MATTHEW RILLERA, AUDREY K. SOLOMON & TYLER L. WOODS, A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 15 (2014) (“[E]xpungement can help people with criminal records not lose as much income as they would otherwise. In addition, the larger economy will prosper, as a substantial number of individuals will add worker productivity and gain increased spending power, and many families will be in much safer economic conditions.”).

46. *Id.* at 15.

47. *Id.*

48. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2466 (noting that Michigan’s expungement law is broadly representative of expungement laws nationally).

49. *Id.*

50. *Id.* at 2494.

51. Prescott & Starr, *Case for Expunging*, *supra* note 25.

52. See CHAPIN ET AL., *supra* note 45, at 4.

discourage individuals who would benefit most from expungement from pursuing the remedy.⁵³

II. Expungement in Minnesota

In Minnesota, there are three methods to remedy a criminal record, one resting with each branch of government.⁵⁴ Executive pardon, inherent judicial expungement authority, and statutory expungement all vary in remedy and in kind. Prior to 1940, an executive pardon was the primary remedy for a criminal conviction.⁵⁵ Pardons are given by the president or state governor and can restore rights lost from a criminal conviction but will not erase or expunge a conviction.⁵⁶ Inherent judicial authority allows a state court to seal all its own records.⁵⁷ However, inherent authority is limited to court records and will not seal records held in the Bureau of Criminal Apprehension or other executive agencies, thus these records may still appear on background checks.⁵⁸ Statutory expungement is a remedy offered by state legislatures.⁵⁹

A. *Limits on Expungement Under Minnesota's Statute*

In 1996, Minnesota enacted a uniform expungement statute, Minnesota Statutes Chapter 609A.⁶⁰ The legislation drew on

53. *See id.*

54. *See* MINN. STAT. § 638 (outlining the role and responsibility of the pardon board); *State v. M.D.T.*, 831 N.W.2d 276, 279 (Minn. 2013) (“There are two bases for expungement of criminal records in Minnesota: Minn.Stat. ch. 609A (2012) and the judiciary’s inherent authority.”).

55. *See* U.S. CONST. art. 2, § 2 (executive pardon power); MINN. STAT. § 638 (enacted in 1986).

56. *See Pardon Information and Instructions*, U.S. DEPT OF JUST. (2018), <https://www.justice.gov/pardon/pardon-information-and-instructions> [perma.cc/DK6R-PYKX]. Many state constitutions also speak to the pardon remedy. *See* MINN. CONST. art. 5, § 7 (establishing a board of pardons); COLLATERAL CONSEQUENCE RES. CTR., *supra* note 9, at 4.

57. *State v. M.D.T.*, 831 N.W.2d 276, 280 (Minn. 2013); *see also State v. C.A.*, 304 N.W.2d 353, 361–62 (Minn. 1981) (noting the court could order the sealing of records held by the district court clerk, the sheriff, or the county attorney).

58. *See Bergman v. Caulk*, 938 N.W.2d 238, 252 (Minn. 2020) (holding petitioner was not able to obtain a permit to carry a firearm because, although his 2007 misdemeanor domestic assault conviction had been judicially expunged, it showed up in a background check, and finding: “expungement by inherent authority does not by itself satisfy the federal meaning of expungement, and Bergman’s right to carry a firearm in Minnesota cannot be reinstated under these circumstances.”); *State v. C.A.*, 304 N.W.2d at 361–62.

59. *See Murray*, *supra* note 7, at 2842.

60. Geffen, *supra* note 5, at 1344 (noting the statute was enacted to make the process more consistent across the state).

various provisions provided for in prior statutes and allowed for expungement of certain controlled substance offenses,⁶¹ juvenile records when the juveniles were prosecuted as adults,⁶² and when the proceedings were resolved in favor of the petitioner or when charges did not result in a conviction.⁶³ These three realms tracked what was happening nationally.⁶⁴

Minnesota Statutes Chapter 609A went through minor revisions in 1999, 2001, 2005, 2014, and 2018.⁶⁵ The statute was revised substantially in 2014 to expand the convictions that were statutorily eligible for expungement. The 2014 changes expanded section 609A.02(3)(a) to include clauses (2), (3), (4), and (5). These clauses allowed for expungement when a petitioner successfully completed a diversion program or received a stay of adjudication. It also allowed for expungement of convictions for petty misdemeanors, misdemeanors, gross misdemeanors, and fifty enumerated felonies.⁶⁶ Before becoming eligible for expungement, a petitioner must go through waiting times—state-imposed periods of time following the completion of a sentence without any subsequent arrests. Under chapter 609A, the waiting time after completing a

61. See MINN. STAT. § 609A.02(1). This came from prior legislation. See MINN. STAT. § 152.18 (1971) (repealed 1996).

62. See MINN. STAT. § 609A.02(2). This came from MINN. STAT. §§ 609.166–.168 (1971) (repealed 1996). These provisions allowed a conviction to be set aside when the offense was committed before the offender was twenty-one, the offense was the only felony or gross misdemeanor the person had been convicted of, five years had passed since the person had served their sentence or been discharged from probation, and the offense was not one for which a life sentence would be imposed. Geffen, *supra* note 5, at n.65.

63. See MINN. STAT. § 609A.02(3). This came from MINN. STAT. § 299C.11, a statute which provides for the return of certain identification data obtained by police officers during arrest if a determination is made in favor of an arrestee. See also *City of St. Paul v. Froysland*, 246 N.W.2d 435, 439 at n.1 (Minn. 1976) (holding that section 299C.11 implicitly included arrest records although it only specified “finger or thumb prints, photographs, [or] other identification data”); *State v. C.A.*, 304 N.W.2d at 359.

64. Murray, *supra* note 7, at 2842 (stating that initially expungement remedies were largely available only if the charges were resolved in favor of the petitioner, and that while one could expunge an arrest record, one could not expunge if that arrest actually resulted in a conviction). The Minnesota statute was intended to be uniform, but did not revise much of the Minnesota law at the time. See Geffen, *supra* note 5, at 1344.

65. For example, in 2001, Section 609A.02(3) was modified to say that “a verdict of not guilty by reason of mental illness is not a resolution in favor of the petitioner.”

66. MINN. STAT. § 609A. Some of the enumerated felonies include controlled substance in the fifth degree, certain felony theft offenses, aggravated forgery, criminal damage to property, financial transaction card fraud, altering a livestock certificate, false declaration in assistance application, willful evasion of fuel tax, and false certification for title on watercraft. *Id.*

diversion program or receiving a stay of adjudication is one year.⁶⁷ Waiting time for a petty misdemeanor or a misdemeanor is two years,⁶⁸ a gross misdemeanor is four years,⁶⁹ and a felony conviction is five years.⁷⁰

There are fifty enumerated felonies that are expungable under the Minnesota Statutes, but many of them have extremely low conviction rates, and thus rarely result in an expungement.⁷¹ The legislature chose to include these fifty felonies because they are a severity level one or two under the Minnesota Sentencing Guidelines and are not crimes of violence.⁷² Data from the Minnesota Sentencing Commission shows that of the 18,284 offenders sentenced in Minnesota for felony offenses in 2018, only 6,418 (35%) of them will ever be eligible for statutory expungement.⁷³ In 2018, only 6 of the 50 expungement eligible felonies resulted in over 100 convictions.⁷⁴ The possession of a controlled substance in the fifth degree⁷⁵ accounted for the vast majority of expungement eligible convictions and represented 4,026

67. MINN. STAT. § 609A.02(3)(a)(2) (“[P]etitioner has successfully completed the terms of a diversion program or stay of adjudication and has not been charged with a new crime for at least one year since completion of the diversion program or stay of adjudication.”); *see also* H.F. 2576, 2014 Leg., 88th Sess., 2014 Minn. Sess. L. Serv. 246.

68. MINN. STAT. § 609A.02(3)(a)(3) (“[T]he petitioner was convicted of or received a stayed sentence for a petty misdemeanor or misdemeanor and has not been convicted of a new crime for at least two years since discharge of the sentence for the crime.”).

69. *Id.* at (3)(a)(4) (“[T]he petitioner was convicted of or received a stayed sentence for a gross misdemeanor and has not been convicted of a new crime for at least four years since discharge of the sentence for the crime.”).

70. *Id.* at (3)(a)(5) (“[T]he petitioner was convicted of or received a stayed sentence for a felony violation and has not been convicted of a new crime for at least five years since discharge of the sentence for the crime.”). These wait times have not been modified since 2014.

71. *See* § 609A.02(3)(b).

72. *See* MINN. SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 94–98 (Aug. 2020), <https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf> [perma.cc/8UEY-FY42] (listing all felonies of severity level one and two). Crimes that disqualify individuals from obtaining a permit to carry are enumerated in chapter 609. Crimes of violence disqualify individuals from obtaining a permit to carry a firearm.

73. Information Request, Minn. Sentencing Guidelines Comm’n, Expungement Eligible Felony Offenses, Sentenced 2018, at 3 (Jan. 29, 2020) (on file with Minnesota Journal of Law & Inequality).

74. *Id.*

75. MINN. STAT. § 152.025.

(or 62.7%) of those eligible offenders.⁷⁶ For other expungement eligible offenses, theft accounted for 764 (or 11.9%);⁷⁷ check forgery accounted for 428 (or 6.7%);⁷⁸ receiving stolen property accounted for 402 (or 6.3%);⁷⁹ financial card transaction fraud offenses accounted for 353 (or 5.5%);⁸⁰ and criminal damage to property accounted for 167 (or 2.6%).⁸¹ Nearly half of the expungement eligible offenses resulted in no convictions in 2018.⁸² For example: failure to control regulated animal, rustling and livestock theft, tampering with fire alarm, false certification for title on watercraft, willful evasion of fuel tax, altering a livestock certificate, false declaration in assistance application, and duty to render aid⁸³ resulted in no convictions in 2018.⁸⁴ The fifty enumerated felonies give the appearance of an expansive remedy, but in reality, the fact that only six felonies had significant conviction numbers significantly limits the remedy. If the offenses eligible for expungement are obscure and result in negligible conviction numbers, those provisions in chapter 609A provide ineffective expungement remedies.

B. Expungement Remains an “Extraordinary Remedy”

Expungement remains an “extraordinary remedy”⁸⁵ in Minnesota. Just because a conviction is eligible for expungement under the statute does not mean a court will grant the expungement.⁸⁶ The court may only grant expungement if the petitioner can meet their burden to establish by clear and convincing evidence that an expungement would yield them a benefit “commensurate with the disadvantages to the public and

76. Information Request, Minn. Sentencing Guidelines Comm’n, *supra* note 73, at 3; MINN. SENTENCING GUIDELINES COMM’N, 2018 SENTENCING PRACTICES 50 (2020), <https://mn.gov/msgc-stat/documents/reports/2018/MSGC2018AnnualSummaryStatistics.pdf> [perma.cc/5TFL-KCBB].

77. Information Request, Minn. Sentencing Guidelines Comm’n, *supra* note 73, at 3; *accord* MINN. STAT. § 609.52.

78. Information Request, Minn. Sentencing Guidelines Comm’n, *supra* note 73, at 3 (referencing severity level 2 check forgery).

79. *Id.* (Information Request); *accord* MINN. STAT. § 609.53.

80. *Id.* (Information Request); *accord* MINN. STAT. § 609.821.

81. *Id.* (Information Request); *accord* MINN. STAT. § 609.595.

82. Information Request, Minn. Sentencing Guidelines Comm’n, *supra* note 73, at 3. Only twenty-one offenses had convictions in the 2018 data.

83. MINN. STAT. § 609A.02(3)(b) (listing expungement eligible offenses).

84. Information Request, Minn. Sentencing Guidelines Comm’n, *supra* note 73, at 3.

85. MINN. STAT. § 609A.03(5).

86. *Id.*

public safety” of the expungement and burdens on the court in monitoring the order.⁸⁷ The statute lays out a twelve-factor balancing-test judges should use in deciding whether the benefits would be commensurate with the disadvantages, and therefore whether to grant expungement.⁸⁸ Under Minnesota Statutes Section 609A.03(5)(c), judges should consider the nature and severity of the crime; the risk the petitioner poses to society; the length of time since the offense; the steps taken by the petitioner toward rehabilitation; any aggravating or mitigating factors of the crime; the reasons petitioner is seeking expungement (including attempts to obtain housing and employment); prior and subsequent criminal record; the employment record and community involvement of the individual; the recommendation of prosecutors, law enforcement, and victims; whether victims were minors; any outstanding restitution; and any other factors deemed relevant by the court.⁸⁹ Thus, Minnesota courts have a significant amount of discretion in determining whether to expunge an offense, but only if it is enumerated in chapter 609A.⁹⁰ There are no limits on the number of offenses one may expunge, but prior and subsequent convictions is one of the twelve factors the courts may consider in determining whether to grant an expungement.⁹¹ In order to begin the expungement process in Minnesota, one must file a petition with the court, pay a filing fee, and wait at least sixty days.⁹²

87. *Id.* at (5)(a).

88. *Id.* at (5)(c).

89. *Id.*

90. *See id.*

91. *Id.* at (5)(c)(7).

92. § 609A.03(1)–(4). The process for expungement begins by the submission of a petition and filing fee. Section 609A.03(2) lays out the required contents of the petition. Petitioner must submit: their full legal name, address(es), why expungement is sought and the legal authority for expungement, details of the offense or arrest for which expungement is sought, steps petitioner has taken for rehabilitation in the case of a conviction, petitioner’s entire criminal record (prior or pending), prior requests for expungements, and any past or present victim no-contact orders. When an individual is seeking expungement, the petition and proposed order must be served on the jurisdiction with prosecutorial control over the offense and all other jurisdictions whose records would be affected by the expungement. *See In re H.A.L.*, 828 N.W.2d 476 (Minn. Ct. App. 2013) (holding that the district court erred when it ordered the sealing of Minnesota Department of Human Services (MDHS) records without proper service on MDHS by petitioner). The prosecutorial office with jurisdiction over the offense must notify any victims pursuant to MINN. STAT. § 611A.06. *See* § 611A.06(1)(a); *see also* § 611A.0385 (requiring the court to make good faith efforts to notify each affected victim of the petitioner’s expungement).

III. Expungement in Other States

Since expungement is fully governed by state law, states vary drastically in their expungement schemes. All but three states allow for the sealing of arrest or juvenile records,⁹³ and forty-one states allow for expungement of at least some adult convictions.⁹⁴ Over twenty states have updated or expanded their expungement statutes within the last several years.⁹⁵ These reforms have taken different shapes. Some have increased the number and type of convictions eligible for expungement;⁹⁶ others allow for the expungement of an entire criminal record, including severe felonies, but limit the remedy to once a lifetime.⁹⁷ Some states have reduced waiting periods⁹⁸ or modified restrictions on how expunged records may be used.⁹⁹ Recently, Pennsylvania, California, and Utah have passed legislation for automatic expungement for eligible convictions.¹⁰⁰ Essentially no states allow for the expungement of homicide or certain sex offenses.¹⁰¹ Only Puerto Rico allows for the expungement of serious violent felonies.¹⁰²

A. *Some States Have Made a Wider Range of Convictions Eligible for Expungement but Limit the Use of the Remedy*

Wyoming, Illinois, New York, and Oregon are among the states that have structured their remedy to allow for expungement

93. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 11. Only Arizona, Idaho, and Wisconsin have no remedy to limit public access to arrest records where no conviction results.

94. *Id.* at 84–112.

95. Westervelt, *supra* note 21.

96. *See, e.g.*, WYO. STAT. § 7–13–1502 (2011) (allowing for the expungement of all felonies, other than those enumerated).

97. *E.g.*, 20 ILL. COMP. STAT. § 2630/5.2(c) (2018).

98. *See, e.g., id.* at (b)(2).

99. Murray, *supra* note 7, at 2842–44.

100. Pennsylvania passed its bill in the summer of 2018. *See* Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2474.

101. *See, e.g., id.* at 2482 (highlighting that although Michigan’s expungement laws cover most violent offenses, certain sex offenses and offenses carrying potential life-imprisonment terms are not eligible). For example: Arizona, Colorado, Idaho, Illinois, Kansas, Missouri, New York, North Dakota, Ohio, Oklahoma, Oregon, Tennessee, Utah, Washington, and West Virginia all allow for expungement of most felonies but prohibit expungement of a class of the most violent offenses and sex offenses, but California, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Massachusetts, Minnesota, Nevada, North Carolina, Rhode Island, Vermont, Wisconsin, and Wyoming allow for expungement of some minor and non-violent felonies. *See* COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 84–112.

102. P.R. LAWS ANN. tit. 34, § 1725a-2.

of a broader range of felony convictions but limit the number of offenses that can be expunged. For example, Wyoming's expungement statute grants broad expungement authority by enumerating felonies which are *not* eligible for expungement.¹⁰³ Non-expungement eligible offenses include violent felonies, felonies involving a firearm, vehicular homicide, drug induced homicide, and assault.¹⁰⁴ Wyoming will only allow for the expungement of one felony in a person's lifetime, whereas Minnesota has no such limitation on number of expungable offenses.¹⁰⁵ The waiting period in Wyoming is ten years after the discharge of a sentence,¹⁰⁶ which is twice as long as Minnesota's five year wait period for enumerated felonies.¹⁰⁷

Illinois allows for the sealing of records for all but a few serious felonies.¹⁰⁸ Offenses like driving under the influence, domestic battery, and sex crimes are never eligible.¹⁰⁹ In contrast to Wyoming, Illinois offers the remedy to multiple eligible offenses, but the remedy is limited to once in a lifetime.¹¹⁰ Once a petitioner has had their entire record sealed, a subsequent felony conviction may result in the unsealing of any previously sealed convictions.¹¹¹ Illinois has a uniform waiting period of three years.¹¹²

103. WYO. STAT. § 7-13-1502 (2011).

104. *Id.*

105. *Wyoming Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION OF RIGHTS PROJECT (Jan. 2, 2021), <https://ccresourcecenter.org/state-restoration-profiles/wyomingrestoration-of-rights-pardon-expungement-sealing/> [perma.cc/N7F3-NB3C]. Nowhere in Minnesota Statutes Chapter 609A is expungement limited by the number of offenses. However, this is a factor courts may consider in the twelve-part balancing test under § 609A.03(5)(c).

106. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 71.

107. MINN. STAT. § 609A.02(3)(a)(5).

108. Illinois differentiates expungement (destroying records) from sealing records (sealing court records from the public); only arrest records are eligible for expungement whereas convictions may be sealed. See Jessica Gillespie, *Expunging or Sealing Adult Criminal Records in Illinois*, CRIM. DEF. LAW., <https://www.criminaldefenselawyer.com/resources/criminal-defense/criminal-records-expungement/illinois.htm> [perma.cc/D6RR-85SM].

109. *Id.* For the full list of ineligible convictions and required waiting periods, see 20 ILL. COMP. STAT. § 2630/5.2(c) (2018).

110. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 9. Indiana has a similar provision. *Id.*

111. 20 ILL. COMP. STAT. § 2630/5.2(c)(4) (2018) (“A person may not have subsequent felony conviction records sealed as provided in this subsection (c) if [they are] convicted of any felony offense after the date of the sealing of prior felony convictions as provided in this subsection (c). The court may, upon conviction for a subsequent felony offense, order the unsealing of prior felony conviction records previously ordered sealed by the court.”).

112. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 7.

New York and Oregon allow for the expungement of serious felony convictions, but only if it is an individual's only serious offense.¹¹³ Missouri allows for the clearing of one felony and two misdemeanors within a person's lifetime.¹¹⁴ The idea of rehabilitation is supported by giving individuals an opportunity to expunge one felony.¹¹⁵ Alex would be eligible for expungement under these statutory schemes which allow for expungement of a broader range of felony convictions but limit the number of offenses that can be expunged.¹¹⁶ However, states like New York and Oregon would provide no remedy for an individual who committed several felonies at a young age and then reformed, or, in the case of Illinois, sealed their entire record, obtained employment and housing, and later was convicted of a new felony, thus reopening the entirety of their criminal history.

B. Connecticut Actually Erases Expunged Convictions

Most states do not actually destroy expunged records.¹¹⁷ Some states keep the criminal records but write "expunged" next to any convictions that have been expunged.¹¹⁸ Others, like Minnesota, can re-open expunged records for the "purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order."¹¹⁹ Yet, in Connecticut, expunged records are actually erased and cannot be reopened, even by the courts.¹²⁰

Actual destruction of a criminal record truly clears a person's name and relieves them of the lifelong collateral consequences associated with a criminal conviction.¹²¹ It tells those with

113. *Id.* at 8; *see, e.g.*, N.Y. CODE CRIM. PROC. § 160.59(2)(a) (2020) ("A defendant who has been convicted of up to two eligible offenses but not more than one felony offense may apply . . . to have such conviction or convictions sealed.").

114. COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 8.

115. In Minnesota, a habitual offender with dozens of convictions may be eligible to expunge them all, but an individual with one serious felony conviction is not. *See* MINN. STAT. § 609A. A one-time serious offender, like Alex, may recognize the gravity of their actions, reform, and never get a subsequent conviction, but they are barred from the remedy.

116. This is because Alex only has one felony conviction, their conviction for theft.

117. *See, e.g.*, 20 ILL. COMP. STAT. ANN. 2630/5.2(c)(4) (2018) (outlining the procedure for processing expunged records).

118. *Id.*

119. MINN. STAT. § 609A.03(7)(b). The statute also states that "an expunged record of a conviction may be opened for purposes of evaluating a prospective employee in a criminal justice agency without a court order." *Id.*

120. CONN. GEN. STAT. §54-142a (noting that a pardon will erase criminal records and bar their opening by prosecutors and law enforcement).

121. *See* Raj Mukherji, *In Search of Redemption: Expungement of Federal Criminal Records*, 163 SETON HALL L. SCH. STUDENT SCHOLARSHIP (May 1, 2013).

convictions that society trusts in their ability to reform and is willing to offer them a true second chance. After all, if a criminal record is still viewable by employers and landlords with the mere notation of “expunged,” how effective is the remedy?¹²² Yet, actual destruction of criminal records would tie the hands of judges and prosecutors in the rare event of a subsequent conviction. Allowing these convictions to be reopened with a court order allows them to be hidden from public view while still providing security for prosecutors and judges that they could be reopened if necessary.

C. Puerto Rico Has One of the Broadest Expungement Statutes in the United States and Allows for the Expungement of Some Violent Felonies

In Puerto Rico, courts have broad expungement authority that extends to nearly all offenses.¹²³ Puerto Rico is the only territory in the United States that allows for expungement of violent offenses.¹²⁴ Even still, certain registration offenses including violent sex crimes and abuse of children are not eligible.¹²⁵ Crimes of corruption are also not eligible.¹²⁶ In Puerto Rico, individuals must wait five years from the completion of their sentence, maintain a good reputation in the community, and provide a DNA sample in order to be considered for expungement.¹²⁷ The power to make an ultimate decision on whether to grant expungement is held by courts alone.¹²⁸ The court may consider the recommendations of the Secretary of the Department of Corrections and Rehabilitation and the Secretary of Justice.¹²⁹ They also may consider any evidence submitted, statements from the victim and their family, offender’s conduct during incarceration, and their rehabilitation plan.¹³⁰

122. *Id.* at 40 (arguing the remedy is only effective if the record of the conviction is not disseminated).

123. P.R. LAWS ANN. tit. 34, § 1725a-2.

124. *See id.*; COLLATERAL CONSEQUENCES RES. CTR., *supra* note 9, at 59.

125. P.R. LAWS ANN. tit. 34, § 1725a-2 (legislating that “[a]ny person convicted of a felony who is not subject to the Register of Persons Convicted for Violent Sexual Crimes and Abuse of Minors nor to the Register of Persons Convicted for Corruption” is eligible for expungement).

126. *Id.*

127. *Id.* at § 1725a-2.

128. P.R. LAWS ANN. tit. 33, § 4732.

129. *Id.*

130. *Id.*

D. Pennsylvania, California, and Utah All Offer Automatic Expungement for Qualified Misdemeanors

Pennsylvania, California, and Utah all have enacted legislation for automatic expungement of eligible criminal convictions.¹³¹ In 2018, Pennsylvania was the first state to adopt legislation for the automatic expungement of adult non-violent misdemeanor convictions.¹³² Under the Pennsylvania law, individuals are eligible for automatic sealing of their second- and third-degree non-person misdemeanor convictions¹³³ after ten years crime-free and if all fines are paid.¹³⁴

California recently passed even more expansive legislation allowing for the automatic record clearing of misdemeanors and minor felonies, without waiting periods.¹³⁵ Under California's new law, convictions are automatically expunged so long as the person was never incarcerated in state prison or required to register as a sex offender, completed their sentence, and does not have an active criminal record.¹³⁶ California's law allows probation or the

131. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2473–74.

132. *Id.* at 2473; *see also Act 56 of 2018 (HB 1419) – Limited Access Petitions & Clean Slate Limited Access*, REP. PATTY KIM: 103RD DISTRICT / DAUPHIN COUNTY, <https://www.pahouse.com/Kim/cleanslate/> [perma.cc/2V2X-63NL] (discussing in detail Pennsylvania's clean state law).

133. *See* David J. Cohen, *Pennsylvania Crime Classification*, DAVID J. COHEN LAW FIRM, LLC (2020), <https://www.davidcohenlawfirm.com/pennsylvania-crime-classification> [perma.cc/JDC4-VDZG]. Second- and third-degree misdemeanors in Pennsylvania are punishable by up to six months to two years in prison and includes crimes such as shoplifting, theft of property up to \$200, strangulation (but strangulation is not eligible for automatic expungement because it involves danger to another person), possession of marijuana, open lewdness, and loitering at night. *Id.* Note that this is different from Minnesota, where misdemeanors carry a maximum jail sentence of ninety days. MINN. STAT. § 609.02. In Minnesota, some of these crimes are classified as misdemeanors and some are classified as felonies. *See* MINN. STAT. § 617.23. First degree misdemeanors still require the filing of a petition in Pennsylvania. Cohen, *supra*. In Pennsylvania, these include simple assault, terroristic threats, stalking, multiple DUI offenses, and theft of property of \$200–\$2000. *Id.*

134. Press Release, Gov. Tom Wolf, “My Clean Slate” Program Introduced to Help Navigate New Law (2019), <https://www.governor.pa.gov/newsroom/governor-wolf-my-clean-slate-program-introduced-to-help-navigate-new-law/> [perma.cc/VN34-E8HM]. The law passed by the state legislature 188-2 and was signed into law by PA Governor Tom Wolf on June 28, 2018. *Id.*

135. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2474. *See also* Assem. B. 1076, Reg. Sess. (Cal. 2019) (allowing for automatic record clearing of eligible offense after January 1, 2021); Press Release, Assembly Member Phil Tang, First-in-the-Nation Legislation Introduced to Automate Arrest and Conviction Relief (2019), <https://a19.asmdc.org/press-releases/20190307-first-nation-legislation-introduced-automate-arrest-and-conviction-relief> [perma.cc/HKR2-HQNK].

136. Assem. B. 1076, Reg. Sess. (Cal. 2019). Note that the prosecutor or probation

prosecuting attorney to file an opposition to automatic expungement.¹³⁷ California cut major costs by switching to an automated system.¹³⁸ Under the old system, each expungement petition filed cost \$3,757; under the new system it costs four cents per record.¹³⁹

Utah passed similar “clean-slate” legislation to automatically seal low-level criminal convictions.¹⁴⁰ Utah’s law only covers low-level offenses and requires a waiting period of five to seven years, depending on the underlying offense.¹⁴¹ DUI offenses, felonies, and violent misdemeanors such as domestic violence and sexual battery are never eligible for expungement.¹⁴² These clean slate bills have received bi-partisan support because they save counties money and allow individuals an opportunity to move on after their criminal convictions.¹⁴³

IV. Analysis

A study by researchers at Stanford recommends increasing awareness and accessibility in order to maximize the benefits of expungement legislation.¹⁴⁴ Using 2018’s numbers as a proxy, only 35% of convicted felons will be eligible for expungement in Minnesota.¹⁴⁵ This means nearly 11,866 individuals sentenced for a felony will never be able clear their record.¹⁴⁶

This section will argue (1) Minnesota’s 2014 statutory revisions did not go far enough to effectively mitigate the negative impacts associated with criminal records. (2) Minnesota should

may file a petition to prohibit automatic relief “based on a showing that granting such relief would pose a substantial threat to the public safety.” *Id.*

137. If the court grants the state’s petition, the individual would not be eligible for automatic expungement but would be eligible under existing procedures, including filing their own petition with the court. *See* Assem. B. 1076, Reg. Sess. (Cal. 2019).

138. *CA Bill Would Expunge Many Criminal Records*, CRIME REPORT (Sept. 11, 2019), <https://thecrimereport.org/2019/09/11/ca-bill-would-expunge-many-criminal-records/> [https://perma.cc/SLW8-UTMX].

139. *Id.*

140. *See* Expungement Act Amendments, 2019 Utah Laws 3160; H.B. 431, Gen. Sess. (Utah 2019).

141. Jessica Miller, *Utah Lawmakers Pass the ‘Clean Slate’ Bill to Automatically Clear the Criminal Records of People Who Earn an Expungement*, SALT LAKE TRIB. (Mar. 4, 2019), <https://www.sltrib.com/news/2019/03/14/utah-lawmakers-pass-clean/> [perma.cc/8DFU-ZPWK].

142. *Id.*

143. *Id.*

144. *See* CHAPIN ET AL., *supra* note 45, at 5.

145. MSGC, Expungement Eligible Felony Offenses, *supra* note 73, at 3.

146. *Id.*

make the remedy more accessible by passing Representative Long's 2020 amendments to Minnesota Statutes Chapter 609A to allow for automatic expungement of misdemeanors. However, Minnesota should not limit automatic expungement to non-enhanceable offenses. Automatic expungement should cover all arrest records, dismissed cases, petty misdemeanors, and misdemeanors, including offenses that may be used to enhance future penalties. (3) Minnesota should enact H.F. 3816 to provide for prosecutor-initiated expungement because prosecutors do not have flexibility under the current law to expunge crimes initially under their jurisdiction. (4) Minnesota should make all felonies expungement-eligible subject to the balancing test factors in Minnesota's current expungement statute.¹⁴⁷ Minnesota should increase awareness of the remedy by announcing at sentencing when an individual will be eligible for expungement.

*A. Minnesota's 2014 Statutory Revisions Did Not Go Far
Enough to Effectively Mitigate the Negative
Impacts Associated with Criminal Records*

The current statutory framework which allows only for the expungements of fifty enumerated felonies limits expungements to about 35% of convicted felons in Minnesota.¹⁴⁸ There is not a lot of flexibility within the current statute to expunge offenses not enumerated.

Jon Geffen and Stefanie Letze's research on Minnesota's expungement remedy prior to the 2014 legislative changes suggests that because chapter 609A specifically prohibited the expungement of registration offenses under section 243.166, that provision would be superfluous if courts were not able to "expunge convictions outside of the narrow provisions set forth in [section 609A.02]."¹⁴⁹ Geffen used this argument to show that chapter 609A did not overrule courts inherent judicial authority to expunge records not enumerated in 609A.¹⁵⁰ Likewise, 609A provides grounds for the sealing of records under section 609A.02(3), "or other applicable

147. MINN. STAT. § 609A.03(5)(c) (walking through the twelve-factor test judges may consider in determining whether to grant an expungement).

148. MSGC, Expungement Eligible Felony Offenses, *supra* note 73, at 3.

149. Geffen, *supra* note 5, at 1370–71 ("The provision prohibiting expungement of offenses that require registration is rendered superfluous if courts are not allowed to expunge convictions outside of the narrow provisions set forth in [Minn. Stat. 609A.02]. The only way to give effect to the prohibition on expunging such convictions is to interpret chapter 609A as acknowledging expungement of convictions not enumerated in chapter 609A.").

150. *Id.*

law.”¹⁵¹ Geffen argues the phrase “or other applicable law” again suggests that there are other modes of expungement beyond the bounds of the statute, namely, inherent judicial authority.¹⁵² However, the scope of inherent judicial authority does not extend to records held in the Bureau of Criminal Apprehension and therefore is not as substantive as chapter 609A. There appears to be no statutory authority to expunge felonies not enumerated in 609A and thus the 2014 revisions to 609A did not go far enough to offer a meaningful remedy for the vast majority of convicted felons in Minnesota.

The language in section 609A(3)(b)(5) limits the expungements of some misdemeanors. The statute states that felonies are expungable if “the petitioner was convicted of or received a stayed sentence for a felony violation of an offense listed.”¹⁵³ Thus, if petitioner received a stay of imposition or a stay of adjudication on a felony offense, it is only expungable if it is one of the fifty enumerated felonies.¹⁵⁴ A stay of imposition will turn a felony conviction to a misdemeanor and a stay of adjudication will leave the offender with no conviction record if they successfully complete probation.¹⁵⁵ A stay of imposition is discretionary by courts but the commissioner recommends “that convicted felons be given one stay of imposition, although for very low severity offenses, a second stay of imposition may be appropriate.”¹⁵⁶ Yet, if an individual received a stay of imposition for what was initially a felony offense not enumerated under section 609A.02(3)(b)(5) and they successfully completed probation, turning their conviction to a misdemeanor, they are not eligible for expungement for this misdemeanor conviction.¹⁵⁷ An individual convicted of a felony under Minnesota Statutes Section 624.7132(15)(b), for example, transferring a pistol to a minor, could have their felony expunged, but one charged with third degree assault under section 609.222 who attacked an abusive partner in self-defense and received a stay of imposition (and therefore had a misdemeanor conviction after successfully completing probation) would never be able to expunge their misdemeanor.¹⁵⁸ The legislature should revisit the stay provision in

151. See MINN. STAT. § 609A.01.

152. Geffen, *supra* note 5, at 1370.

153. MINN. STAT. § 609A(3)(b)(5).

154. *Id.*

155. SENTENCING GUIDELINES, MINN. CT. R. 3.A.1.b.

156. *Id.*

157. *Id.* There is no authority for this under the statute because of the language “or received a stayed sentence” in section 609A.02(3)(b)(5).

158. *Id.*

section 609A(3)(b)(5) to make stays of imposition and adjudication expungable in Minnesota. The statute currently does not go far enough to remedy the collateral consequences of a criminal record and the “stay” provision in section 609A(3)(b)(5) further limits expungement eligibility for misdemeanors.

*B. Minnesota Should Pass Representative Jamie Long’s
Revisions to 609A*

Minnesota should pass legislation similar to Pennsylvania, California, and Utah to allow for the automatic expungement of certain low-level non-violent offenses. Expungement can be time consuming, complex, and expensive.¹⁵⁹ Some people do not know it exists and others have inadequate resources to pursue relief.¹⁶⁰ The application process under section 609A.03 is complex and governed by a seven-page statute.¹⁶¹ It is no wonder only about 6.5% of eligible individuals apply.¹⁶² The impacts of criminal records disproportionately impact low-income people and people of color, yet these groups are often least likely to undertake expungement on their own.¹⁶³ The in-depth study done of expungements in Michigan suggests that nearly two-thirds of people who receive expungements are White.¹⁶⁴ Implementing automatic expungements for eligible convictions in Minnesota would help alleviate barriers, level the playing field, and make our criminal justice system more equitable.

Opponents of automatic expungement often cite safety concerns. They argue law enforcement, employers, and landlords should be able to retain individuals’ criminal records.¹⁶⁵ For example, when the police arrive at the scene of a crime, they want immediate access to the criminal history of those involved.¹⁶⁶ When hiring and renting, employers and landlords seek to ensure the honesty of their employees and renters; they may want to know

159. Rachel Looker, *Minor Crimes Get ‘Clean Slate’ in Utah*, NAT’L ASSOC. OF COUNTIES (2019), <https://www.naco.org/articles/minor-crimes-get-clean-slate-utah> [perma.cc/89G3-FHMT].

160. CHAPIN ET AL., *supra* note 45.

161. *See* MINN. STAT. § 609A.03.

162. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2461. Michigan’s expungement law is broadly representative of expungement laws nationally. This is the only study that has done an in-depth analysis of actual expungement numbers in the United States.

163. Funk, *supra* note 33, at 301 (1998) (criticizing expungement statutes because they require access and resources).

164. Prescott & Starr, *Expungement Empirical Study*, *supra* note 10, at 2494.

165. *See* Funk, *supra* note 33.

166. *Id.* at 302.

whether an individual has a conviction for a crime of dishonesty before leaving them alone with cash or property.¹⁶⁷ Employers do not want to hire someone who may re-offend on the job and expose the employer to liability.¹⁶⁸ Judges and prosecutors also need access to prior convictions to accurately compute criminal history scores and sentences.¹⁶⁹ Yet, in Minnesota, expunged records can be reopened for the “purposes of a criminal investigation, prosecution, or sentencing, upon an ex parte court order.”¹⁷⁰ Thus, these records can be accessed in the event of a future prosecution without remaining public.¹⁷¹ The hard data shows that expungements actually increase public safety by lowering recidivism rates.¹⁷² This is because expungements allow for increased opportunities for employment, housing, reintegration, and rehabilitation.¹⁷³

Opponents of automatic expungements also argue automatic expungement would place the burden on record management and court personnel rather than on the defendants.¹⁷⁴ These areas are already short staffed and lack sufficient resources to transition to an automated system.¹⁷⁵ The Stanford study found that the primary major cost to expungement was processing costs for probation and the courts.¹⁷⁶ Yet, in implementing their automatic expungement program, California cut major costs by automating the system.¹⁷⁷ District Attorneys across California worked with Code for America, a non-profit that created ‘Clear My Record,’ an automated algorithm system that allowed the government to automatically

167. *Id.*

168. Geffen, *supra* note 5, at 1341.

169. MINN. STAT. § 609.115 (“When a defendant has been convicted of a misdemeanor or gross misdemeanor, the court may, and when the defendant has been convicted of a felony, the court shall, before sentence is imposed, cause a presentence investigation and written report to be made to the court concerning the defendant’s individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community.”).

170. MINN. STAT. § 609A.03(7)(b). The statute also states that “an expunged record of a conviction may be opened for purposes of evaluating a prospective employee in a criminal justice agency without a court order.”

171. *Id.*

172. See Prescott & Starr, *Expungement Empirical Study*, *supra* note 10.

173. *Id.* at 2528. Those whose records have been sealed have wages nearly 25% higher than their pre-expungement trajectory and are more likely to find housing.

174. See Funk, *supra* note 33.

175. *Concurrence in Senate Amendments: Hearing on AB 1076 Before the Senate* (Cal. 2019).

176. CHAPIN ET AL., *supra* note 45, at 4.

177. *CA Bill Would Expunge Many Criminal Records*, CRIME REPORT, *supra* note 138.

clear eligible convictions.¹⁷⁸ This cut costs by over \$3,750 per record, and under the new system of automatic expungement, it costs four cents per record.¹⁷⁹ Minnesota could partner with Code for America to automate the process. Automating this process would increase awareness of expungement, cut costs, and make it more accessible for those who would benefit the most.

i. H.F. 3816 Allows for Automatic Expungement of
Non-enhanceable Offenses Following a One-Year
Wait Period

Legislation introduced by Representative Jamie Long in February of 2020 would allow for the automatic expungement of what is already expungable under Minnesota Statutes Sections 609A.02(3)(a) and (b)(1), (2), and (3). This would include arrest records, actions resolved in favor of petitioner, successful completion of a diversion program, petty misdemeanors, and misdemeanors. The automatic expungement of misdemeanors would occur after a one-year wait period and would be limited to non-enhanceable misdemeanors.¹⁸⁰ For example, disorderly conduct,¹⁸¹ fourth degree criminal damage to property,¹⁸² and careless driving¹⁸³ are non-enhanceable misdemeanors that would be eligible for automatic expungement under H.F. 3816. Enhanceable offenses are crimes that lead to increased severity, penalty, and sentence for subsequent convictions of the same offense.¹⁸⁴ They include DWIs, domestic assault, violation of a domestic abuse no contact order, violation of a harassment restraining order, fifth degree assault, prostitution, driving without insurance, indecent exposure, and in some instances, trespass.¹⁸⁵

178. *Clear My Record*, CODE FOR AMERICA, <https://www.codeforamerica.org/programs/clear-my-record> [perma.cc/EE68-ANTS]. This pilot program was launched in five counties in California. San Francisco announced their plan to partner with Code for America in 2018, and four other joined as a pilot program. Jenni Avins, *A Simple Algorithm Could Help Clear Thousands of Cannabis Convictions*, QUARTZ (Feb. 26, 2019), <https://qz.com/1560417/san-franciscos-code-for-america-program-to-expunge-8000-weed-convictions/> [perma.cc/QU6B-XEM5].

179. *Id.*

180. See MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

181. MINN. STAT. § 609.72(1).

182. MINN. STAT. § 609.595(3).

183. MINN. STAT. § 169.13(2).

184. See *The Importance of Enhancements in Criminal Sentencing*, WILSON LAW GROUP (Dec. 27, 2015), <https://wilsonlg.com/criminal/blog/importance-enhancements-criminal-sentencing> [perma.cc/J49M-AG9Y].

185. See MINN. STAT. §§ 609.02(16), 609.322 (most enhancements require another

For these offenses, the first offense is typically treated as a misdemeanor, a second conviction may result in a gross misdemeanor, and a third or more may result in a felony.¹⁸⁶ The legislature has made these offenses enhanceable because subsequent convictions are considered more dangerous and threaten public safety.¹⁸⁷ Under Representative Long's proposed legislation, enhanceable offenses would remain eligible for expungement under section 609A.02(3)(3) but would not be automatically expunged.¹⁸⁸ Each offense that could enhance a future penalty would still be reviewed individually under Minnesota's twelve-factor test in section 609A.03(5)(c) before being expunged.¹⁸⁹ It is likely that automatic expungement will gain more political traction when it is focused on low-level, non-person offenses such as marijuana offenses and minor theft.¹⁹⁰

ii. Suggested Amendments to H.F. 3816: Automatic
Expungement Should Include All Misdemeanors—
Including Enhanceable Offenses

Representative Long's bill to automate expungements would make the remedy more accessible in Minnesota. A suggested amendment to the proposed bill would be to make *all* misdemeanors eligible for automatic expungement and not limit the remedy to non-enhanceable offenses. Under Minnesota law, expunged records can be reopened for the purposes of any criminal investigation or subsequent prosecution or sentencing with a court order.¹⁹¹ Therefore, prosecutors, law enforcement officers, and judges can still use previous expunged convictions to enhance future sentencing in the event that an offender were to reoffend,¹⁹² but allowing for automatic expungement of these records would shield the information from the public and reduce stigma. Additionally, the 2020 legislative proposals limit automatic expungement to those who are not arrested, charged, or convicted of a new offense

conviction to occur within ten years, prostitution requires another conviction within six months); MINN. STAT. § 617.23 (indecent exposure charges are enhanced if a person gets another conviction in their lifetimes). *See also Enhanceable Crimes*, PROJUSTICE MN, <https://www.projusticemn.org/library/attachment.157398> [perma.cc/N55D-6R44].

186. *Id.* Whether these convictions are the correct convictions to be enhanceable is beyond the scope of this Note.

187. MINN. STAT. § 609.1095.

188. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

189. *See* MINN. STAT. § 609A.03(5)(c).

190. *See* § 609A.015(3)(2).

191. § 609A.03(7)(b).

192. *Id.*

during the waiting period.¹⁹³ If an individual continues to offend during their probationary period, they will not be eligible for automatic expungement.¹⁹⁴ This ensures that even automatic expungement is reserved for those who work to rehabilitate and are compliant throughout their probationary period.

iii. Reduction of Wait Times to One Year Increases
Accessibility of Expungement

Representative Long's bill reduces wait periods for expungements of misdemeanors from two years to one year, which increases accessibility to expungement. In order to be eligible for automatic expungements, offenders must successfully complete probation.¹⁹⁵ The probationary period for a misdemeanor is generally one year and requires compliance with all court orders including fees, restitution, and treatment.¹⁹⁶ Under the current language of chapter 609A, individuals must complete their year of probation and then wait an additional two years before they can apply for expungement of a misdemeanor.¹⁹⁷ Automatic expungements under H.F. 3816 would reduce this wait to one year. Expungement offers the most rehabilitative impact in the years immediately following a conviction.¹⁹⁸ Those working for automatic expungement programs have noted not to “underestimate how much even the most minor of misdemeanor convictions—including marijuana or trespassing or any kind of conviction—can affect someone’s ability to get a job, to get housing and to function fully in society.”¹⁹⁹ Thus, reducing wait periods can help offenders reintegrate into society more quickly.

193. H.F. 3816, 91st Leg. (Minn. 2020) § 609A.015(3)(2)–(3); MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020). California structured their automatic expungement statute in a similar way, which limited automatic expungement to those who successfully completed their sentences and who do not have an active criminal record. *See California Restoration of Rights and Record Relief*, COLLATERAL CONSEQUENCES RES. CTR.: RESTORATION RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/california-restoration-of-rights-pardon-expungement-sealing/> [perma.cc/VWD3-BU6A]; *see also* Assem. B. 1076, Reg. Sess. (Cal. 2019) (providing for “clean slate” automated relief for convictions and non-convictions).

194. *See* MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

195. *Id.*

196. *See Probation Length*, BRANDT CRIM. DEF., <https://brandtdefense.com/probation-length.html> [perma.cc/K9MG-FJ2S]. However, probationary periods vary depending on the offense.

197. MINN. STAT. § 609A.02(3)(3); *see also* Yee, *supra* note 3, at 185.

198. Yee, *supra* note 3, at 185.

199. Westervelt, *supra* note 21 (quoting Jenny Roberts, Co-director, Crim. Just. Clinic, American University, Washington, D.C.).

The benefits to the public of expunging low-level misdemeanors significantly outweigh the benefits of keeping them.²⁰⁰ Because expungement is often only used by those with access, knowledge, and resources, implementing automatic expungement and eliminating waiting times in Minnesota would increase these benefits for individuals and the State. These reforms would also help level the playing field and minimize the perpetuation of marginalization and poverty.

*C. Minnesota Should Enact H.F. 3816 to Implement
Prosecutor-Initiated Expungement Because
Prosecutors Do Not Have Flexibility Under the
Current Statute to Support Expungement of
Crimes Not Enumerated*

Currently, prosecutors are not free to support expungement of felonies not enumerated in chapter 609A. Representative Long's modifications to 609A would give more discretion to prosecutors by allowing for prosecutors to initiate expungement. Section 609A.025 currently states that:

[i]f the prosecutor agrees to the sealing of a criminal record, the court shall seal the criminal record for a person described in § 609A.02, subdivision 3, without the filing of a petition unless it determines that the interests of the public and public safety in keeping the record public outweigh the disadvantages to the subject of the record in not sealing it.²⁰¹

The statute still limits expungement to crimes enumerated in section 609A.02(3).

i. Prosecutors May Have Some Discretion to Sentence for
Expungement Under Section 609A.02(3)(5)(b)(20)

The felony theft provision under section 609A.02(3) contains unique language which may offer prosecutors some discretion during sentencing. Section 609A.02(3)(5)(b)(20) allows for expungement when the theft was under \$5000 or when the amount was less than \$1000 with risk of bodily harm, but it also allows for expungement of any other theft offense "sentenced under this provision."²⁰² This provision is the only one that includes this language and presumably expands expungement as a remedy for

200. CHAPIN ET AL., *supra* note 45.

201. MINN. STAT. § 609A.025(a).

202. § 609A.02(3)(5)(b)(20).

one whose charge was for a greater theft offense but was pleaded or sentenced down under section 609.52(3)(3)(a). Thus, had Alex been sentenced under this provision, which governs theft under \$5000, rather than under section 609.52(3)(2), which governs theft greater than \$5000, their conviction would be eligible for expungement. Judges and prosecutors concerned about collateral consequences may consider sentencing a first-time theft offender whose crime exceeds \$5000 under section 609.52(3)(3)(a) so the offender may later be eligible for expungement. Beyond this, prosecutors have very limited authority to support expungement beyond what is enumerated in chapter 609A.

ii. H.F. 3816 Allows for Prosecutor-Initiated Expungement

H.F. 3816 would allow for prosecutor-initiated expungement under a new provision, section 609A.026.²⁰³ This provision would allow a prosecutor to initiate expungement for an offense enumerated in 609A.02(3) or for any other felony conviction other than a registration offense under 243.166, after a wait period of five years.²⁰⁴

Giving this authority to prosecutors makes sense. Prosecutors brought charges in the first place and have a vested interest in justice and public safety. If they think the benefits of expungement are commensurate with the disadvantages to the public of sealing the record, they should have the authority to grant the remedy. Other states agree. In 2018, Delaware updated their expungement law, which now mandates expungement when the prosecutor files the petition.²⁰⁵ In Hawaii, full expungement authority is given to the initial prosecuting office.²⁰⁶ It is somewhat unique for states to hand off the entire oversight of the remedy to prosecutors, but nearly every state's expungement statute allows for at least some input by prosecutors.²⁰⁷

Opponents may be concerned that prosecutors will not be fair and impartial when criminal records are concerned;²⁰⁸ others think prosecutors already have too much discretion.²⁰⁹ Some fear that this

203. See MINN. H. RESEARCH, BILL SUMMARY: H.F. 3816 (Feb. 26, 2020).

204. H.F. 3816, 91st Leg. (Minn. 2020).

205. Murray, *supra* note 7, at 2847; DEL. CODE ANN. tit. 11, § 4374 (c) (2018).

206. Murray, *supra* note 7, at 2847; HAW. REV. STAT. ANN. § 831–3.2 (2018).

207. Murray, *supra* note 7, at 2848.

208. *Id.* at 2859.

209. See *id.* at 2860–61 (citing Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 36 (2009)).

could actually lengthen the process and make an expungement more difficult to obtain.²¹⁰ Allowing more prosecutorial discretion in expungements may increase disparities across the state because judges and prosecutors vary in their application of the twelve-part balancing test.²¹¹ Yet, the same is true of any charging and sentencing decision. Prosecutors have the authority to make charging and sentencing decisions and it makes sense that they also have the power to initiate an expungement. Passing this new provision in chapter 609A would give individuals like Alex a second chance while continuing to ensure that expungement is an extraordinary remedy.²¹² Minnesota should implement prosecutor-initiated expungement.

*D. Minnesota Should Make All Felony Convictions Eligible
for Expungement Subject to the Twelve-Part
Balancing Test*

Minnesota's statute should be amended beyond H.F. 3816 to remove the fifty-enumerated felonies and make all felonies expungement eligible subject to the twelve-part test in section 609A.03(5)(c). Puerto Rico's statute that allows for expansive expungement eligibility²¹³ is a good model for how Minnesota could amend its statute to be more comprehensive. While no states give unlimited expungement discretion to courts, or allow for the expungement of the most serious violent felonies, reforming the

210. *Id.* at 2848.

211. This Author observed a typical misdemeanor expungement calendar in Hennepin County. It appeared that at least some judges rarely grant expungements. Although all misdemeanors are statutorily eligible for expungement, many judges do not view the disadvantages to the individual as rising to surpass the benefit of maintaining those records. See Sarah Horner, *New Program Helps People Convicted of Low-Level Crimes Clear Their Records*, TWIN CITIES PIONEER PRESS (Oct. 3, 2019), <https://www.twincities.com/2019/10/03/ramsey-washington-county-expunge-criminal-record-courts/> [perma.cc/F2YS-XXAZ] (explaining that Washington and Ramsey Counties are working with Southern Minnesota Regional Legal Services to implement an expungement program that would help those with eligible convictions obtain expungement).

212. See discussion *supra* note 1 and accompanying passage. Since this Note was written, the Minnesota Attorney General's office started a new tool to connect residents with prosecutors to streamline the process of sealing records in most Minnesota counties. See AG Ellison, *Partners Launch HelpSealMyRecord.org to Increase Access to Expungements*, THE OFF. OF MINN. ATT'Y GEN. KEITH ELLISON (Oct. 1, 2020), https://www.ag.state.mn.us/Office/Communications/2020/10/01_HelpSealMyRecord.asp [perma.cc/RTJ8-M9FP].

213. P.R. LAWS ANN. tit. 34, § 1725a-2 (2021) (allowing for expungement of any conviction unless it is a felony triggering listing on the Register of Persons Convicted for Violent Sexual Crimes and Abuse of Minors or the Register of Persons Convicted of Corruption).

statute in this way would make Minnesota a national leader in expungement reform. In Minnesota, expungement would remain an “extraordinary remedy,” to be used to support those most deserving of a second chance.²¹⁴ Restricting expungement to fifty felonies excludes offenses where unique circumstances may warrant individual consideration for expungement.

i. The Case of Amreya Shefa Shows Why Expungement May Be Warranted, Even for Heinous Crimes

The case of Amreya Shefa paints a compelling picture for expanding the expungement remedy.²¹⁵ In 2013, Ms. Shefa was found guilty of manslaughter for stabbing her abusive husband.²¹⁶ She served time in prison and was awaiting deportation to Ethiopia, where it is likely her husband’s family would have her killed.²¹⁷ She had no other criminal convictions and felt she had no other options to escape her husband.²¹⁸ In June of 2018, she made her case for a pardon before the Minnesota Board of Pardons.²¹⁹ A pardon or expungement may have halted her deportation and saved her life.²²⁰ The Pardon Board denied her pardon.²²¹ Today, Ms. Shefa has no remedy under Minnesota’s expungement statute.²²²

214. *See generally* MINN. STAT. § 609A.03(5) (outlining expungement requirements).

215. *See* Brett Hoffland, *Minnesota Woman Convicted of Killing Her Husband Pleading for a Pardon*, KSTP (Jun. 25, 2019), <https://kstp.com/news/minnesota-woman-convicted-of-killing-her-husband-pleading-for-a-pardon/5402752/> [perma.cc/E2C4-V7JY].

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. The Minnesota Pardon Board is composed of the Governor, Attorney General, and the Chief Justice of the Minnesota Supreme Court, and a vote must be unanimous among them to grant a pardon. The Chief Justice, Lorie Gildea, indicated she was unwilling to extend a pardon in Shefa’s case before the Board officially decided it. Andy Monserud, *Minnesota Woman Who Killed Abusive Husband Seeks Change of Pardon System*, COURTHOUSE NEWS SERV. (May 10, 2020), <https://www.courthousenews.com/minnesota-woman-who-killed-abusive-husband-seeks-change-of-pardon-system/> [perma.cc/X8AG-YYPF]. Thereafter, Shefa filed a complaint in Hennepin County District Court to place the pardoning power entirely in the hands of the Minnesota Governor. *Id.*

222. Hoffland, *supra* note 215. Since this Note was written, Amreya Shefa’s attorneys continued to challenge Minnesota’s unanimous pardon requirement; it was ruled unconstitutional by a Ramsey County judge in April, 2021. *See* Stephen Montemayor, *Minnesota’s Unanimous Pardon Board Requirement Ruled Unconstitutional*, STAR TRIB. (Apr. 21, 2021), <https://www.startribune.com/minnesota-s-unanimous-pardon-board-requirement-ruled-unconstitutional/600048574/> [perma.cc/CXD9-7BS5].

Ms. Shefa's case presents an "extraordinary" case. If the legislature did away with the fifty enumerated felonies and made all crimes expungement eligible subject to the section 609A.03 twelve-factor test, a court may have granted Ms. Shefa's expungement.²²³ While the nature of the crime was severe²²⁴ and the victim's family strongly opposed the pardon,²²⁵ it is unlikely that Ms. Shefa poses a future danger to society.²²⁶ There were serious mitigating factors.²²⁷ Ms. Shefa became an active member of the community through her church, and during her time in prison she started a woman's support group.²²⁸ Perhaps most importantly, the reason she sought a pardon was to stop her deportation and protect her life.²²⁹ Yet today, Ms. Shefa is not eligible for expungement in Minnesota. If Minnesota law allowed for expungement of even the most serious felonies, the twelve-factor test would ensure expungement was only granted in the most compelling cases.²³⁰ The burden would still remain with the petitioner to prove by clear and convincing evidence why their case warranted expungement.²³¹

ii. We Should Trust Our Courts to be Just with
Expungements

Many would oppose the removal of enumerated felonies and the expansion of expungable offenses because doing so would potentially allow those who have committed the most heinous offenses to apply for expungement. Even Puerto Rico prohibits expungement for certain sex offenses, child abuse, and corruption crimes.²³² Giving a single judge complete discretion to apply the twelve-part test may lead to disparate results in expungement across the state, and petitioners may 'judge shop' to seek to have their case heard before a favorable judge. Minnesota is a sentencing guideline state and sentencing guidelines function to eliminate indeterminate discretion of judges to foster more equitable outcomes.²³³ Unfettered discretion of judges increases sentencing

223. MINN. STAT. § 609A.03(5)(a).

224. Hoffland, *supra* note 215; *accord* § 609A.03(5)(a)(1).

225. Hoffland, *supra* note 215; *accord* § 609A.03(5)(a)(10).

226. Hoffland; *accord* § 609A.03(5)(a)(2).

227. Hoffland; *accord* § 609A.03(5)(a)(5).

228. Hoffland; *accord* § 609A.03(5)(a)(4), (8).

229. Hoffland; *accord* § 609A.03(5)(a)(6).

230. *See* § 609A.03(5)(a).

231. *See id.*

232. P.R. LAWS ANN. tit. 34, § 1725a-2 (2021).

233. *See What Are Sentencing Guidelines?*, ROBINA INST. OF CRIM. L. & CRIM.

disparities.²³⁴ Opponents to the elimination of enumerated felonies would argue, likewise, this will increase expungement disparities. But sentencing guidelines are still discretionary; the ability to expunge felonies not enumerated in chapter 609A is not. The twelve-factor balancing test provides guided discretion.

We should trust our courts and prosecutors, those most intimately connected to the criminal justice system, to be fair and just in managing expungements. Are there certain crimes so categorically heinous that we, as a society, are willing to say the offender never deserves a second chance, regardless of compelling mitigating circumstances? In the absence of absolute certainty, we should eliminate the fifty enumerated felonies and rely on the twelve-part balancing test. This would function to ensure expungement remains an “extraordinary remedy,” reserved only for those most deserving.

Conclusion

In the past decade, many states have greatly expanded their expungement statutes, recognizing the debilitating impacts of a criminal conviction and expungement as an effective remedy. In 2014, Minnesota expanded its statute and took steps to make expungements more accessible by allowing for the expungement of misdemeanors, gross misdemeanors, and fifty enumerated felonies. While Minnesota’s statute is more comprehensive than expungement statutes in other states, it still excludes most individuals from the benefits of expungement. Recognizing this, in 2020, Representative Jamie Long introduced H.F. 3816 to amend Minnesota Statutes Chapter 609A to allow for automatic expungement of misdemeanors and prosecutor-initiated expungement. Minnesota should pass this legislation but not limit automatic expungement to non-enhanceable offenses. Minnesota should make all felonies expungement eligible subject to the balancing test factors in Minnesota’s current expungement statute. These additions would benefit individuals and the State by making expungements more accessible and comprehensive. These legislative changes would continue to address the collateral consequences of a criminal conviction while advancing equality and justice in Minnesota’s criminal justice system.

JUST. (Mar. 21, 2018), <https://sentencing.umn.edu/content/what-are-sentencing-guidelines> [perma.cc/L52P-HY32].

234. *Id.*