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# DISTRIBUTIONAL CONSEQUENCES OF EXPUNGING JUVENILE DELINQUENCY RECORDS: THE PROBLEM OF LEMONS

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## INTRODUCTION

Most states and the federal government have laws that expunge a young offender's record of delinquency when he reaches a certain age.<sup>1</sup>

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1. The age varies but is usually between 17 and 21. *See, e.g.*, 18 U.S.C. § 3607(c) (1994) (federal statute allowing a first-time drug offender under the age of 21 who was sentenced to no more than one year of probation to apply for expungement); ALASKA STAT. § 47.10.090(c) (Michie 1996) (permitting the sealing of records at age 18); ARK. CODE ANN. § 9-27-309(b) (Michie Supp. 1995) (allowing for expungement of certain juvenile records at any time); CAL. WELF. & INST. CODE § 781(a) (West Supp. 1996) (permitting records to be sealed at anytime after age 18, and providing for sealing of records before age 18 under certain circumstances); MO. ANN. STAT. § 211.321.5 (West 1996) (stating that, subject to certain exceptions, "[t]he court may, either on its own motion or upon application by the child or his representative, or upon application by the juvenile officer, enter an order to destroy all social histories, records, and information, other than the official court file, and may enter an order to seal the official court file, as well as all peace officers' records, at any time after the child has reached his seventeenth birthday"); N.J. STAT. ANN. § 2A:4A-62 (West. Supp. 1996) (providing for the sealing of records after two crime-free years following discharge from custody or supervision or entry of court order); *see also* GA. CODE ANN. § 15-11-61(a) (Supp. 1996); 705 ILL. COMP. STAT. ANN. 405/1-9 (West 1992); KAN. STAT. ANN. § 38-1610 (1993); OR. REV. STAT. § 419A.260(c) (1995); 18 PA. CONS. STAT. ANN. § 9123 (West Supp. 1996); VA. CODE ANN. § 16.1-306 (Michie 1996). In fact, every state allows for expungement requests under varying conditions.

The stated purpose of this policy is to allow young men<sup>2</sup> who have been guilty of youthful indiscretions to enter adulthood without the heavy stigmatic freight of a criminal record.<sup>3</sup> And while it is easy to agree that there may well be a subset of delinquents whose records should be expunged once they have remained free of legal trouble for a certain length of time, states differ on who should decide when expungement is appropriate and on what material should be expunged.<sup>4</sup> These differences in turn have a substantial effect upon the distributional consequences that flow from the decision to expunge a given juvenile's record.<sup>5</sup>

An expungement policy limited to minor isolated crimes probably does little harm;<sup>6</sup> the expungement of such crimes should have few of the sort of distributional consequences analyzed by this Article. But expunging a record of serious criminality is another matter entirely. Some contemporary state expungement statutes allow for the expungement of important information from the offender's record, while others do not.<sup>7</sup> The Wisconsin expungement statute, for

2. And to a lesser extent, young women. See HOWARD N. SNYDER & MELISSA SICKMUND, *JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT* 47 (1995) (estimating that male offenders account for 88% of juvenile crimes).

3. See Adrienne Volenick, *Juvenile Court and Arrest Records*, 9 CLEARINGHOUSE REV. 169 (1975) ("Recognizing the near impossibility of changing societal views towards juvenile offenders, many legislators have attempted instead to combat the harmful effects of a delinquency adjudication by providing for concealment of juvenile records, on the grounds that such concealment will aid the child's reintegration into society."); Barry M. Portnoy, Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 314 (1970) (noting that expungement statutes "attempt to lessen the penalties that public opinion imposes on former offenders"); see also *Commonwealth v. Balboni*, 642 N.E.2d 576, 578 (Mass. 1994) ("The avoidance of attaching the stigma of a criminal to the child is of great importance."); *People v. Smith*, 470 N.W.2d 70, 74 (Mich. 1991) ("Literature describing [expungement statutes] indicates that their 'basic purpose . . . is to overcome the stigma of delinquency."); *In re R.D.*, 574 A.2d 160, 161 (Vt. 1990) ("The confidentiality of juvenile proceedings, records and files protects the delinquent from the stigma of his misconduct in order to make change and growth possible.").

4. Compare 705 ILL. COMP. STAT. ANN. 405/1-9 (West 1992) (setting out guidelines that limit a judge's discretion to expunge) with MO. ANN. STAT. § 211.321.5 (West 1996) (giving the court wide discretion in expungement).

5. To wit, they have a considerable effect on who benefits and who loses from the record's expungement. See *infra* Part V.B.1-3.

6. See T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 936-37 (setting forth the basic elements that expungement schemes should contain).

7. See Funk, *supra* note 6, at 936-37.

example, fairly represents those in the former category because it provides judges with virtually unbounded discretion to decide what should be expunged from a juvenile's record:

A juvenile who has been adjudged delinquent may, on attaining 17 years of age, petition the court to expunge the court's record of the juvenile's adjudication. The court may expunge the court's record of the juvenile's adjudication if the court determines that the juvenile has satisfactorily complied with the conditions of his or her dispositional order and that the juvenile will benefit and society will not be harmed by the expungement.<sup>8</sup>

Similarly, a Missouri statute provides that

The court may, either on its own motion or upon application by the child or his representative, or upon application by the juvenile officer, enter an order to destroy all social histories, records, and information, other than the official court file, and may enter an order to seal the official court file, as well as all peace officers' records, at any time after the child has reached his seventeenth birthday if the court finds that it is in the best interest of the child that such action or any part thereof be taken . . . .<sup>9</sup>

Neither of these statutes states with specificity when expungement is appropriate. The only guideline the Missouri statute provides its judges is that all court files and peace officer's records should be expunged if doing so is "in the best interest of the child."<sup>10</sup> Similarly, the Wisconsin statute authorizes expungement as long as the court finds that the juvenile has fully complied with his juvenile sentence, and that he "will benefit and society will not be harmed by the

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8. WIS. STAT. ANN. § 938.355(4m) (West Supp. 1996).

9. MO. ANN. STAT § 211.321.5 (West 1996).

10. *Id.*; see also T. Markus Funk, *Forgive-and-Forget Approach Won't Halt Juvenile Crime*, ST. LOUIS POST-DISPATCH, June 10, 1997, at 7B (criticizing Missouri's broad grant of discretion).

expungement.”<sup>11</sup>

One obvious problem with this grant of unbridled discretion is that it does not provide the court with any real guidance in how to exercise that discretion. For example, it does not provide a list of serious offenses that may not be expunged under any circumstances.<sup>12</sup> Therefore, a former juvenile with a string of sexual assault convictions may have his record expunged by a lenient judge in one court, while another juvenile in the same jurisdiction may be unsuccessful in petitioning a different and tougher judge to expunge his ten-year-old bicycle theft conviction. Moreover, the best interest of the seventeen-year-old “child” is often diametrically opposed to the best interest of his potential future victims. These potential victims have an undeniable interest in ensuring that the justice system keeps tabs on individuals with an established pattern of lawbreaking and a proven disrespect for other people’s rights.

In contrast to the unstructured discretion model, some jurisdictions, of which Virginia is a foremost example, have a more structured system: Virginia law calls for the automatic expungement of all court records for juveniles who are nineteen years old on January 2 of every year, provided they meet certain requirements.<sup>13</sup> The Virginia law therefore does not provide the court with discretion in the timing of expungement, and it ensures that more serious crimes or patterns of criminal conduct remain part of the individual’s criminal record.<sup>14</sup>

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11. WIS. STAT. ANN. § 938.355(4m) (West Supp. 1996).

12. See Carlton J. Snow, *Expungement and Employment Law: The Conflict Between an Employer’s Need to Know About Juvenile Misdeeds and an Employee’s Need to Keep Them Secret*, 41 WASH. U. J. URB. & CONTEMP. L. 3, 25 (1992); see also *Thomas v. United States*, 121 F.2d 905, 908 (D.C. Cir. 1941) (“The fundamental philosophy of the juvenile court laws is that a delinquent child is to be considered and treated not as a criminal but as a person requiring care, education and protection. He is not thought of as ‘a bad man who should be punished, but as an erring . . . child who needs help.’ Thus, the primary function of juvenile courts . . . is not conviction or punishment for crime, but crime prevention and delinquency rehabilitation.”) (footnotes omitted); *S\*\*\*\* v. State*, 299 A.2d 560, 566 (Me. 1973) (“The purpose of juvenile courts, and laws relating to juvenile delinquency, is to carry out a modern method of dealing with youthful offenders, so that there may be no criminal record against immature youth to cause detrimental local gossip and future handicaps because of childhood errors and indiscretions . . . .”) (quoting *Wade v. Warden of State Prison*, 73 A.2d 128, 131 (Me. 1950)).

13. See VA. CODE ANN. § 16.1-306 (Michie 1996).

14. See *id.*

Illinois is another jurisdiction that more carefully balances the needs of society with the needs of juveniles who have proven that they are no longer threats to society. The Illinois statute permits the expungement of relatively minor and isolated acts of juvenile delinquency, while continuing to keep a record of other, more significant juvenile crimes.<sup>15</sup> Virginia and Illinois therefore have expungement statutes that deserve to be called “non-aggressive,”<sup>16</sup> and that raise fewer of the

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15. The Illinois statute provides:

(1) Whenever any person has attained the age of 17 or whenever all juvenile court proceedings relating to that person have been terminated, whichever is later, the person may petition the court to expunge law enforcement records relating to incidents occurring before his 17th birthday or his juvenile court records, or both, but only in the following circumstances:

(a) the minor was arrested and no petition for delinquency was filed with the clerk of the circuit court; or

(b) the minor was charged with an offense and was found not delinquent of that offense; or

(c) the minor was placed under supervision . . . and such order of supervision has since been successfully terminated.

(2) Any person may petition the court to expunge all law enforcement records relating to any incidents occurring before his 17th birthday and not resulting in criminal proceedings and all juvenile court records relating to any adjudications for any crimes committed before his 17th birthday, except first degree murder, if he has had no convictions for any crime since his 17th birthday and:

(a) 10 years have elapsed since his 17th birthday; or

(b) 10 years have elapsed since all juvenile court proceedings relating to him have been terminated or his commitment to the Department of Corrections pursuant to this Act has been terminated; whichever is later of (a) or (b).

705 ILL. COMP. STAT. ANN. 405/1-9 (West 1992); *see also* T. Markus Funk, Editorial, *Youth Crime: Legislation Assures Past Will Not Be Buried*, THE PANTAGRAPH (Bloomington, Illinois), July 20, 1997, at A13 (discussing positive aspects of Illinois' expungement statute).

16. “Non-aggressive” in the sense that the statute does not permit the expungement of serious crimes or aggregations of smaller crimes, both of which are reasonably prognostic of future criminality. *See* ILL. COMP. STAT. ANN. 405/1-9; VA. CODE ANN. § 16.1-306; *see generally* DORA NEVARES ET AL., DELINQUENCY IN PUERTO RICO 121 (1990) (“[W]hen youths continue to break the law three, four, or more times, then delinquency becomes more significant because it then begins to represent the initiation of a pattern of deviance that can continue into adulthood.”); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1010 (1995) (finding that “[a]dolescence is a developmental continuum, and young people are not irresponsible children one day and responsible adults the next”); U.S. SENTENCING GUIDELINES MANUAL § 4A1.1, at 253 (1995) (“A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment. . . . To protect the public from further crimes of the particular defendant, the likelihood of recidivism and future criminal behavior must be considered. Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.”); *cf.* United States v. Davis, 48 F.3d 277, 280 (7th

*same* distributional concerns that will be discussed below.

At their heart, expungement laws seek to prevent groups such as employers, high school administrators, college admissions offices, police officers, and even judges from gaining knowledge of a person's criminal activities during his minority.<sup>17</sup> In this Article, we will limit our examination to the widely ignored distributional consequences that expungement laws have on those young adults who are sentenced in jurisdictions that aggressively expunge juvenile criminal records. We conclude that expungement laws have the perverse effect of penalizing law-abiding youths, while unjustly rewarding lawbreakers.<sup>18</sup>

## I. "MERE" ACTS OF JUVENILE DELINQUENCY: A BRIEF LOOK AT THE PROBLEM

The policy of expunging juvenile criminal records has not kept pace with the reality that the delinquents of today are committing very "adult" crimes involving considerable harm to both persons and property. A 1995 United States Department of Justice study, for example, found that while the adult arrest rate for murder rose a mere 9% between 1983 and 1992,<sup>19</sup> the juvenile arrest rate for murder jumped 128%,<sup>20</sup> and juvenile arrest rates for aggravated assault went up 100% during the same time period.<sup>21</sup> Indeed, a 1991 survey found

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Cir. 1995) (noting that "pubescent transgressions . . . help the sentencing judge to determine whether the defendant has simply taken one wrong turn from the straight and narrow or is a criminal recidivist").

17. See Funk, *supra* note 6, at 886 ("Although no universally accepted definition for the 'expungement' of juvenile records exists, the term generally refers to the destruction or obliteration of an individual's criminal file by the relevant authorities in order to prevent employers, judges, police officers, and others from learning of that person's prior criminal activities conducted during his minority.") (footnotes omitted).

18. See *infra* Part V.B.1-3.

19. See HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: A NATIONAL REPORT 113 (1995); see also Joseph F. Yeckel, Note, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 354-55 (1997) (noting the recent increase in the delinquency case rate and violent juvenile crime).

20. See *id.* at 108; see also JUVENILE CRIME, TESTIMONY BEFORE THE SUBCOMMITTEE ON YOUTH VIOLENCE OF THE SENATE COMMITTEE ON THE JUDICIARY, 105th Cong., Apr. 16, 1997 (statement of James Wootlan, former Deputy Administrator of the Office of Juvenile Justice and Delinquency Prevention).

21. See SNYDER & SICKMUND, *supra* note 19, at 112.

juveniles were responsible for approximately 28% of all personal crimes such as rape, personal robbery, aggravated and simple assault, and theft from a person.<sup>22</sup> Estimates suggest that by the year 2010 juvenile arrest rates for violent crime will double, and juvenile arrest rates for murder will increase 145% over the 1992 rate.<sup>23</sup> Additionally, the 1994 caseload of the juvenile courts was 41% higher than the 1985 caseload.<sup>24</sup>

These statistics are even more troubling when one takes into account that the vast majority of studies conducted on childhood development and deviance show that anti-social behavior emerges in early childhood, and that patterns of serious and chronic criminality remain remarkably stable throughout the late teens and into adulthood.<sup>25</sup> The maturation process is, of course, a developmental

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22. See *id.* at 47.

23. See *id.* at 111; see also SNYDER ET AL., JUVENILE OFFENDERS AND VICTIMS: 1996 UPDATE ON VIOLENCE-STATISTICS SUMMARY 15 (1996) (noting that, based on 1994 actual data, the estimates may be too low); see generally Marty Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 459 (1996) (discussing the juvenile arrest rate for homicide and concluding that “the dramatic rise in homicide by mid- to late- adolescents, the racial concentration of perpetrators and victims of violence, and arrests of increasingly younger juveniles for violence certainly justify public concerns”); Beth Wilbourn, Note, *Waiver of Juvenile Court Jurisdiction: National Trends and the Inadequacy of the Texas Response*, 23 AM. J. CRIM. L. 633, 635 (1996) (discussing the recent research conducted in the area of juvenile crime and concluding that, “[u]nfortunately, the rehabilitative system envisioned in turn-of-the-century America is more difficult to justify in our violent society. In fact, the public perception that juvenile crime is ‘more widespread and vicious than ever before’ is accurate”) (footnote omitted).

24. JEFFREY A. BUTTS, U.S. DEP’T OF JUSTICE, PERSON OFFENSES IN JUVENILE COURT, 1985-1994 (Fact Sheet No. 48) (1996).

25. See Robert J. Sampson & John H. Laub, *Crime and Deviance in the Life Course*, 18 ANN. REV. SOC. 63, 64 (1992) (examining studies conducted on the link between early childhood behaviors and later adult outcomes and concluding that the evidence “indicates an early onset of delinquency as well as continuity of criminal behavior over the life course”); see also David P. Bernstein et al., *Childhood Antecedents of Adolescent Personality Disorders*, 153 AM. J. PSYCHIATRY 907 (1996) (“[T]here is substantial continuity in antisocial behavior over time, but the manifestation of these behaviors varies according to the child’s developmental stage.”); Avshalom Caspi et al., *Behavioral Observations at Age 3 Years Predict Adult Psychiatric Disorders*, 52 ARCH. GEN. PSYCHIATRY 1033, 1037-38 (1996) (longitudinal-epidemiological study concluding that undercontrolled three-year-olds were 4.5 times as likely to be convicted of violent offenses, 2.2 times as likely to be recidivistic offenders, and 2.9 times as likely to be diagnosed with antisocial personality disorder than well-adjusted three-year-olds); John N. Constantino, *Early Relationships and the Development of Aggression in Children*, 2 HARV. REV. PSYCHIATRY 259, 260 (1995) (finding that “childhood aggression appears to be a precursor for antisocial behavior (including violent crime) in adulthood”); David P. Farrington, *The*

continuum, and therefore it is exceedingly rare to find chronic adult recidivists who were not also at one point officially catalogued as juvenile delinquents.<sup>26</sup> Consequently, as today's violent and recidivistic juveniles enter into adulthood, it is entirely reasonable to predict that the overall crime rate for both violent and non-violent crime will rise dramatically.<sup>27</sup>

## II. "LABELING THEORY" AND EXPUNGEMENT

Widespread support for expungement laws began in the 1960s and 1970s.<sup>28</sup> This support can be directly traced to the work of the

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*Development of Offending and Antisocial Behavior from Childhood: Key Findings from the Cambridge Study in Delinquent Development*, 360 J. CHILD PSYCHOL. PSYCHIATRY 929 (1995) (conducting prospective longitudinal study of 411 males, and concluding that there was continuity of aggression and violence from ages 8 to 32); Michael J. Lyons et al., *Differential Heritability of Adult and Juvenile Antisocial Traits*, 52 ARCH. GEN. PSYCHIATRY 906, 912-14 (1995) (discussing genetic influences on adult antisocial traits); David R. Offord & Kathryn J. Bennett, *Conduct Disorder: Long-Term Outcomes and Intervention Effectiveness*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1069, 1071 (1994) ("A summary of [the] literature reveals that [childhood] conduct problems predict antisocial behavior in adulthood."); Adrian Raine et al., *Birth Complications Combined With Early Maternal Rejection at Age 1 Year Predispose to Violent Crime at Age 18 Years*, 51 ARCH. GEN. PSYCHIATRY 984, 986 (1994) ("[T]hose who experienced both high birth complications and early child[hood] [maternal] rejection were most likely to become adult violent criminals, ie, [sic] of offenders who had both risk factors, 47.2% became violent compared with 19.7% of offenders who had neither risk factor or only one."); D.S. Moskowitz et al., *Stability and change in Aggression and Withdrawal in Middle Childhood and Early Adolescence*, 94 J. ABNORMAL PSYCHOL. 30 (1985) ("[T]here is ample evidence that multiple acts of highly aggressive behaviors in middle childhood are predictive of antisocial and criminal behavior in adulthood.")

26. See Feld, *supra* note 16, at 1010; MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, A GENERAL THEORY OF CRIME 253 (1990) ("People having a high degree of criminality at one time will tend to have a high degree of criminality later in life . . . ."); GLENN D. WALTERS, THE CRIMINAL LIFESTYLE 57 (1990) ("[P]ast criminality is one of the better predictors of future criminality . . . [and] early-onset criminality is a strong predictor of serious lawbreaking behavior later on in life . . . .").

27. See SNYDER & SICKMUND, *supra* note 19, at 111; see also Thomas S. Ulen, *The Law and Economics of the Elderly*, 4 ELDER L.J. 99, 138 n.128 (1996) (reviewing RICHARD A. POSNER, AGING AND OLD AGE (1995)) ("[T]here is a large cohort of young males who are going to mature into their most crime-prone years within the next five years, which is likely, all other things equal, to cause an increase in crime rates . . . ."); Why the GOP is Right to Oppose the Crime Bill and Where to Go From Here, reprinted in 140 CONG. REC. H7944 (daily ed. Aug. 11, 1994) ("Today's high-rate juvenile offenders are tomorrow's adult prisoners, but today's adult criminal records don't comprehend yesteryear's slew of juvenile crimes.") (quoting from a speech by Professor John Dilulio at Princeton University and the Brookings Institution at a Forum).

28. See Snow, *supra* note 12, at 16.

“labeling theorists,” who sought to “reform” the juvenile justice system by asserting that society should shoulder the blame for the actions of delinquent children.<sup>29</sup> “[S]ocial groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders.”<sup>30</sup> Labeling theory therefore is based upon the notion that the perceptions of others control or influence one’s behavior,<sup>31</sup> and accordingly, labeling theorists view the destruction of a police record as removing a major obstacle impeding the rehabilitation of the juvenile.<sup>32</sup> This is true, they argue, because the very act of labeling him a “deviant” increases the likelihood that he will, in fact, ultimately live a criminal lifestyle.<sup>33</sup> “[D]eviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’ The deviant is one to whom that label has successfully been applied; deviant behavior is behavior that people so label.”<sup>34</sup>

29. See Funk, *supra* note 6, at 897-901.

30. HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963) (emphasis omitted).

31. See FRANK TANNENBAUM, *CRIME AND THE COMMUNITY* 20 (1938) (“[T]he entire process of dealing with the young delinquent is mischievous in so far as it identifies him to himself or to the environment as a delinquent person.”); see also ROBERT C. TROJANOWICZ & MERRY MORASH, *JUVENILE DELINQUENCY: CONCEPTS AND CONTROL* 59-61 (4th ed. 1987); Walter R. Gove, *The Labelling Perspective: An Overview*, in *THE LABELLING OF DEVIANCE* 9-13 (Walter R. Gove ed., 2d ed. 1980); Anne Rankin Mahoney, *The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence*, 8 L. & SOC’Y REV. 583, 584-86 (1974).

32. See, e.g., Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147, 162 (advocating expungement as a means of removing the harmful label of “juvenile delinquent”).

33. See Robert W. Sweet, Jr., *Deinstitutionalization of Status Offenders: In Perspective*, 18 PEPP. L. REV. 389, 404 (1991) (“Proponents [of labeling theory] argued that most juveniles would mature out of delinquency if left alone. They charged that agents of control exacerbate delinquency by setting into motion a self-fulfilling prophecy by officially labeling youths as ‘bad’ or ‘delinquent’ as a result of overly dramatizing initial wayward acts.”).

34. BECKER, *supra* note 30, at 9; see also *In re J.S.*, 438 A.2d 1125, 1129 (Vt. 1981) (arguing that the stigma of delinquency could become self-perpetuating and make rehabilitation impossible); Malcolm W. Klein, *Labeling Theory and Delinquency Policy: An Experimental Test*, 13 CRIM. JUST. & BEHAV. 47, 76-78 (1986) (examining whether involvement in the juvenile justice system is related to increased delinquency once the juvenile is so labeled, and arguing that girls are among those most vulnerable to the labeling effect); William H. Barton, *Discretionary Decision-Making in Juvenile Justice*, 22 CRIME & DELINQ. 470, 471 (1976) (discussing possibility that labeling a child “delinquent” may cause him to behave accordingly).

No doubt a criminal “label” is a liability, sometimes a serious one, in later life. But labeling theory suffers from a number of analytical and practical defects. It is, for example, not always or necessarily true that an accurate label “causes” an otherwise (mostly) upright youngster to fall into a life of crime.<sup>35</sup> Having a spoiled reputation may, of course, make criminal opportunities more attractive to an individual by diminishing his opportunities in the “straight” world, but he should be realistic enough to see that labeling occurs informally, and preexists any involvement of the court, the police, or the agency in the juvenile’s life; the juvenile’s peers, family, and community likely have already determined independently that the juvenile is a delinquent.<sup>36</sup> Moreover, the labels attached by these informal groups are far more permanent than those purportedly attached by “the system.”<sup>37</sup>

Labeling theory also wholly ignores the value of the symbolic significance that attaches to any form of punishment, including, of course, the punishment of juvenile delinquents.<sup>38</sup> Specifically, labeling

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35. See WILLIAM J. MACKEY ET AL., URBANISM AS DELINQUENCY 64 (1993) (“It is taken as an axiom of faith that *if* the juvenile[’s] record becomes public knowledge, he will take on that role that has been assigned him by his own record being made public. There is a little bit of tautology here; circular reasoning shows through.”) (emphasis in original); Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1920 (1991) (finding that “no empirical data prove that the secondary deviance is a result of [being labeled a delinquent], versus whatever conditions or instincts prompted the primary offense”) (footnote omitted); Mahoney, *supra* note 31, at 608-09 (examining studies claiming to show that later delinquent behavior increases as a result of labeling, and finding that research on labeling theory is in conflict); Charles E. Springer, *Rehabilitating the Juvenile Court*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 397, 412 n.61 (1991) (arguing that labeling theory “has now, after the expenditure of millions of dollars in social science research funds, been generally discredited”); Gove, *supra* note 31, at 13-15 (noting that the research conducted in the field indicates that there is no empirical data to prove that the secondary deviance is a result of the labeling, versus whatever conditions or instincts prompted the primary offense); cf. Harrington, *Labeling Theory in the Juvenile Justice System: Myth or Reality?*, 3 CHILDREN & YOUTH SERVICES 1 (1980) (discussing labeling theory in relation to the juvenile justice system).

36. See MACKEY ET AL., *supra* note 35, at 78.

37. See *id.*

38. See generally EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (George Simpson trans., 1933); JOEL FEINBERG, DOING & DESERVING 98 (1970); DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY (1990); IMMANUEL KANT, THE PHILOSOPHY OF LAW 194-98 (W. Hastie, B.D. trans., 1887); Joel Feinberg, *The Expressive Function of Punishment*, in A READER ON PUNISHMENT 74 (Antony Duff & David Garland eds., 1994).

theory does not take into account the importance of making the person labeled aware that he has violated communal values, and that such violations carry with them certain negative consequences.<sup>39</sup>

The most dominant defect of labeling theory therefore is that it fails to respect juveniles as morally autonomous actors who are able to distinguish between right and wrong.<sup>40</sup> Whatever the purely moral objections to failing to regard juveniles as autonomous actors, the purely utilitarian costs are quite high. There is absolutely no reason to think that juvenile offenders do not learn the values of a system that insists they have no responsibility for their own behavior. There are, of course, statutory alternatives for reducing stigmatization, such as restitutionary schemes that force young offenders to work in order to compensate their victims,<sup>41</sup> but for the purposes of this discussion we need only recognize the importance that the labeling philosophy has had on the popular adoption of expungement laws.

The effect of labeling theory on expungement laws is that the statutory focus has been on the perpetrator's youth, rather than on his crimes.<sup>42</sup> However, as noted above,<sup>43</sup> repeated acts of delinquent behavior signal the beginning of an anti-social life that maturation typically will not alter.<sup>44</sup> Whether expungement has in fact been cost-effective from the point of view of juvenile offenders themselves, let alone society as a whole, is not obvious. There is plenty of room, in

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39. See Herbert Morris, *A Paternalistic Theory of Punishment*, in *A READER ON PUNISHMENT*, *supra* note 38, at 98-99; FEINBERG, *supra* note 38, at 74-75 (discussing the aspect of "moral condemnation" that is an intricate part of punishment); see also GARLAND, *supra* note 38, at 74-78.

40. See generally *Wisconsin v. Yoder*, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting) (discussing findings by prominent behaviorists, sociologists, and psychologists, and concluding "that the moral and intellectual maturity of the 14-year-old approaches that of the adult"); Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 205-06 (1977) (arguing that punishment, when linked to a blameworthy act, is an integral part of human autonomy and human dignity).

41. See Funk, *supra* note 6, at 933-36.

42. See D.J. WEST, *DELINQUENCY, ITS ROOTS, CAREERS, AND PROSPECTS* 47-48 (1982).

43. See *supra* notes 25-27 and accompanying text.

44. See MARVIN E. WOLFGANG ET AL., *FROM BOY TO MAN, FROM DELINQUENCY TO CRIME* 36 (1987) ("[S]ubjects with long and serious juvenile careers are likely to have long and serious adult careers. This finding is consistent with previous longitudinal research and suggests the continuity of offensive careers across both the juvenile and adult years."). See also *supra* note 25.

hindsight, to doubt the wisdom of institutional arrangements that were understood as being intended to excuse, decrease, or give amnesty to the personal shame and responsibility that is supposed to accompany misconduct by those with the cognitive capacity to distinguish right and wrong<sup>45</sup>—a capacity with which older adolescents, at least, are normally well endowed.<sup>46</sup> Still, it cannot be denied that being labeled a “criminal” at an early point in life must surely worsen one’s life chances. And no one should doubt that young men are apt to engage in impulsive, often seemingly pointless, high-risk, egocentric behavior—which often includes criminal behavior—or that the disposition to behave this way usually follows most of them far into adulthood.<sup>47</sup> Expungement laws are meant to capitalize on these items of common knowledge, but they also impart an unarticulated assumption, namely that employers, admissions officers, and so on will be incapable both of discounting immature juvenile misbehavior and of distinguishing between youthfully indiscreet but “grown-out-of-it” applicants, on the one hand, and bona fide hard cases on the other. It is this hidden assumption that ought to be challenged. Indeed, the problem of youthful criminality cannot be hidden in any meaningful sense, it can only be rearranged, with distributional consequences that are disturbing.

It is to these distributional consequences that we now turn. Who wins and who loses from the application of these laws? At first blush

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45. See, e.g., *United States v. McDonald*, 991 F.2d 866, 872 (D.C. Cir. 1993) (holding that a juvenile conviction that had been set aside under District of Columbia Youth Rehabilitation Act should be counted in defendant’s criminal history, because if a juvenile offender turns into a recidivist, “[s]ociety’s stronger interest is in punishing appropriately an unrepentant criminal”).

46. See generally JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1965) (analyzing the development of, and influences on, a child’s moral judgment).

47. See JOHN MONAHAN, *PREDICTING VIOLENT BEHAVIOR* 92 (1981) (“Research indicates that . . . a history of early [childhood] violence[] relate[s] to the commission of violent behavior as an adult. Outcome studies of clinical prediction with adult populations underscore the importance of past violence as a predictor of future violence . . . .”); WALTERS, *supra* note 26, at 78 (finding that “research conducted over the past several years demonstrates that the onset of lawbreaking behavior at an early age is strongly prognostic of high-rate criminality later in life”); 1 *CRIMINAL CAREERS AND “CAREER CRIMINALS”* 23-24 (Alfred Blumstein et al. eds., 1986) (concluding that chronic offenders begin their criminal careers in their mid-teens); *but see* Gough, *supra* note 32, at 189 (advocating the expungement of juvenile criminal records because “most offenders do not remain criminals all their lives, and we should not treat them as if they do”).

it seems that the whole class of juvenile offenders whose records have been expunged would gain.<sup>48</sup> Conversely, the class of persons (such as employers, admissions officers, high school administrators, prospective spouses, creditors, licensers, and joint venturers—which for the sake of brevity we will hereafter call “employers”) who might view a record of juvenile delinquency in an unfavorable light, might be thought to lose.<sup>49</sup> But we think the matter is not quite so simple, and that a better understanding of the problem and its consequences is important in order to advance the work of those specially concerned with the welfare of children. As we shall explain presently, it is certainly not true that the whole class of juveniles benefit from expungement statutes. Further, it is not even true that all juveniles *with records of delinquency to expunge* are made better off by this

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48. See *United States v. Hall*, 452 F. Supp. 1008, 1010, 1013 (S.D.N.Y. 1977). In *Hall*, the court stated:

The evils of a criminal record are well known. The convicted are forever branded as untrustworthy members of society. Their job prospects are permanently compromised; they are often the subject of suspicion and mistrust.

....

... [Expungement ensures that] the defendant no longer has a criminal “record” and [that he] can resume his life anew without the stigma of a conviction.

*Id.*; see also *People v. Smith*, 470 N.W.2d 70, 75 (Mich. 1991) (“The purpose of the court rule [permitting the expungement of juvenile delinquency records], and of similar rules or statutes in other jurisdictions, is to prevent a juvenile record from becoming an obstacle to educational, social, or employment opportunities.”); 47 AM. JUR. 2D *Juvenile Courts* § 114 (1995) (discussing the fresh start given to juveniles who have had their delinquency records expunged); Volenick, *supra* note 3, at 170 (“As long as anyone other than the child or his representative has access to court records—as long as a judge may authorize inspection without the permission of the child—these records will haunt him, labeling him a criminal and adversely affecting his future both economically and socially, regardless of the noble intentions of legislators to the contrary.”).

49. See, e.g., *Snow*, *supra* note 12, at 4-5.

An employer has a common sense need for job applicant information because an employer bears the ultimate risk of an employee’s damage. If an employer breaches his or her duty to use reasonable care in selecting competent employees, the employer can be held liable for an employee’s intentional torts inflicted on third parties. An employer has a duty to protect employees, company property, and the general public. Imposition of vicarious liability requires that the employer had, or should have had, knowledge about an employee’s propensity to injure a third party.

... If an employer knows about a job applicant’s past convictions, an employer can weigh the risk and take appropriate steps to tailor security and supervision needs.

*Id.* (footnotes omitted).

practice.

### III. RECONSTRUCTING THE RATIONALE OF JUVENILE EXPUNGEMENT STATUTES<sup>50</sup>

The argument in favor of expungement begins with a recognition that a juvenile criminal record does not necessarily have much forecasting power with respect to the domain of behaviors that might conceivably be of concern to employers.<sup>51</sup> Such non-standardized information, upon which sloppy or unjust inferences about how someone is likely to perform on the job, will not have been “validated” as the predictivity of standardized tests usually are. Social science cannot substantiate the fireside induction that because this job applicant snatched a purse twenty years ago when he was fifteen, he is unlikely to succeed driving a fork-lift truck in a warehouse today. In many cases, the curbstone predictivity of such information will be so low as to be nearly worthless. By depriving employers of such low-quality information, expungement imposes a fairly negligible burden on the members of this class and on society generally.<sup>52</sup>

Indeed, many members of the employer class will not even be *theoretically* worse off because of expungement laws. For example, employers who would have hired the applicant even had they known the expunged information are obviously no worse off. Moreover, even employers who would *not* have hired the juvenile offender had they known the expunged information can not be said to be any worse off if the applicant ultimately performs satisfactorily. The actual net losers,

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50. The following argument is meant to charitably reconstruct the rationale advanced in support of expungement statutes.

51. See HOWARD B. KAPLAN, PATTERNS OF JUVENILE DELINQUENCY 124-25 (1984); see also Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 899-900 (1988) (“Relative to adults, juveniles are less able to form moral judgments, less capable of controlling their impulses, and less aware of the consequences of their acts. Juveniles are less responsible, hence less blameworthy, than adults . . .”).

52. See *State v. Miller*, 520 P.2d 1248, 1253 (Kan. 1974) (“[Expungement] is a legislative recognition of the fact that ex-offenders need the understanding and respect of others—not their scorn and ill will. Such statutes are based on the philosophy that fallen men can rise again and should be helped to do so.”).

therefore, are merely those who would have turned down an applicant based on his record of juvenile crime, but instead hired the applicant because they were not aware of this record, and subsequently were damaged because the applicant, once hired, did not perform up to the expectations that were fostered by the statutorily doctored record. This may not necessarily be a large class of employers, and it is certainly one that, on the whole, is in a better position to bear the social costs associated with the expungement of this criminal history information (at least when compared to the class of juveniles with delinquency records who may be forced to endure unfair stigmatic consequences) if expungement is unavailable.

The substratum effect of this policy, therefore, is to subsidize a class of juvenile offenders (to wit, those who had their records expunged either automatically or after petitioning the court) at the expense of the class we have termed “employers” and such other members of society—effectively everybody—to whom employers are able to pass along such liability costs. But this subsidy actually makes a great deal of sense because society requires mature men and women, but cannot have them without having to cope with immature boys and girls first. By analogy, it is possible to think of the rules concerning the duties of possessors of land to trespassing children as being similar to expungement schemes, in that the laws represent an effort to find a broader cost-bearing base than simply the child or its family alone (or, in the case of expungement, the child criminal alone).<sup>53</sup> Perhaps some similar concession is rightly accorded to delinquent juveniles, young men especially, whose predominance in the population of social deviants is for all intents and purposes a statistical constant

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53. The courts recognize an explicit exception to the duty of care owed to trespassers when the trespasser is a child: a landowner must exercise care to remedy a dangerous condition or otherwise protect children who will foreseeably intrude upon the premises and are incapable of appreciating the risk. *See, e.g.*, *MacNeil v. Perkins*, 324 P.2d 211, 216 (Ariz. 1958); *Kelly v. Ladywood Apartments*, 622 N.E.2d 1044, 1048 (Ind. Ct. App. 1993); *Rodriguez v. Norfolk & Western Ry. Co.*, 593 N.E.2d 597, 607 (Ill. App. Ct. 1992); *Pocholec v. Giustina*, 355 P.2d 1104, 1107-08 (Or. 1960); *Schneider v. City of Seattle*, 600 P.2d 666, 670-71 (Wash. Ct. App. 1979); *Nechodomu v. Lindstrom*, 77 N.W.2d 707, 711 (Wis. 1956); *see also Best v. District of Columbia*, 291 U.S. 411, 419 (1934); RESTATEMENT (SECOND) OF TORTS § 339 (1965) (recognizing child’s status as a trespasser, while imposing on the landowner a limited duty of reasonable care toward the child).

irrespective of how harsh or permissive a given society's criminal justice system may be.<sup>54</sup>

#### IV. OF THE DEFECTIVE PREMISES OF THE EXPUNGEMENT LAWS

Although the preceding discussion attempted to set forth the most compelling arguments advanced in favor of expungement schemes, we do not aim to contribute to that conversation. Indeed, we think the social cross-subsidy mechanism that is imagined by expungement statutes is mistaken; that things must certainly work very differently in the real world. Expungement statutes are not based on facts but on theories—theories of human behavior, of social incentives, and of rational decisionmaking.<sup>55</sup> We think those theories are at best incomplete, and at times naive, because the cross-subsidy affected by the policy of aggressive expungement is not from employers to former delinquents, but in fact is from non-delinquent to delinquent members of the same age cohort, with a distinct surtax on black (and to a lesser extent Hispanic) members of that cohort.<sup>56</sup>

This form of social wealth-transfer is not only perverse because it reflects a more or less explicit subsidy for serious misbehavior, but it also is deeply destructive because the policy: (1) taxes those who have not misbehaved to enrich members of the same class who have; (2) tends to efface the distinction between “good” and “bad”; (3) is apt to eviscerate the strivings of well-intended individuals who want their behavior to reflect that distinction; and (4) tends to perpetuate and increase the value of negative racial stereotypes.

#### V. THE “MARKET FOR LEMONS” AND ITS EFFECT ON SENTENCING JUDGES

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54. See generally John Monahan, *Slouching Toward Crime*, 95 YALE L.J. 1536, 1547 (1986) (reviewing JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985)) (discussing higher proportion of young males in the population as one factor accounting for the rising crime rates in industrialized western nations since the 1950s).

55. See generally EDWIN M. SCHUR, *RADICAL NONINTERVENTION: RETHINKING THE DELINQUENCY PROBLEM* 154 (1973).

56. See *infra* Part V.B.2.

### A. *The Theory of the Lemons Market*

Imagine a judge facing a youthful adult offender—a 19-year-old, let's say—following the latter's conviction for a crime. "Your Honor," says the defense attorney, "as you consider the appropriate sentence, we ask you to bear in mind that this is a first offense." But in many expungement jurisdictions, the sentencing judge must necessarily wonder whether this is true, because any verifying or impeaching information will have been permanently physically purged from the individual's court and police record.<sup>57</sup> In this hypothetical, the judge is situated identically to, and indeed is a member of, the class which we have for convenience sake called "employers."<sup>58</sup> Because of expungement, the judge must act in a pall of statutorily created uncertainty, and this uncertainty has some consequences that should be unsettling to even the most vigorous proponent of aggressive expungement.

A generation ago, economist George Akerlof explicated certain changes one could expect to see, and in fact does see, in the behavior of risk-averse consumers who are attempting to estimate the correct bid price for commodities in a market where the quality of individual units is both significantly variable and unknown.<sup>59</sup> Akerlof's

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57. See, e.g., ARK. CODE ANN. § 9-27-309(b) (Michie 1995) ("For purposes of this section [on the confidentiality of juvenile criminal records], 'expunge' means to destroy."); OR. REV. STAT. § 419A.262(21) (1995) ("Juvenile courts, by court rule or by order related to a particular matter, may direct that records concerning a subject child be destroyed."); UTAH CODE ANN. § 78-3a-904(6) (1996) ("When a minor's juvenile record is expunged, all photographs and other records as ordered shall upon court order be destroyed by the law enforcement agency."); see also Volenick, *supra* note 3, at 170-71 (arguing that an "effective means of protecting juvenile records from inquisitive eyes is incorporated into the statutes of many states where . . . 'destruction' of records is authorized").

58. See *supra* text accompanying note 49.

59. See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. ECON. 488 (1970); see also Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953 (1996) (applying lemons theory to explain the absence of "just cause" contracts in the non-union workplace); VICTOR P. GOLDBERG, READINGS IN THE ECONOMICS OF CONTRACT LAW 2 (Victor P. Goldberg ed., 1989) (noting that the economic term "[a]dverse selection now refers to any situation in which an individual has knowledge about his own quality (the goods he sells, his ability to perform, his health status) while whomever he is dealing with knows only about the characteristics of the average member of the group"); William

illustration of this problem considered the market for used cars.<sup>60</sup> In the used car market there is an informational asymmetry between the seller of a given used car and its buyer concerning the car's quality.<sup>61</sup> The seller has lived with the car for years and knows what his own habits have been regarding scheduled maintenance procedures that can significantly affect the car's service life, but that are difficult, and practically speaking impossible, for a buyer to discover for himself.<sup>62</sup> Sellers therefore typically know whether they are selling a "lemon."<sup>63</sup> Buyers, in contrast, often must rely on various approximation techniques that allow one to make inferences from the visible to the invisible.<sup>64</sup> For example, a buyer may reason that a well-groomed car, carefully detailed with few dings and scratches, is more likely to possess well-maintained mechanics than an obvious jalopy, thus making appearance an approximation of the car's mechanical reliability.

However, most people soon learn the liability of that sort of inference as type-1 errors—that is, affirming the untrue proposition that a pretty car is therefore a good car. A consumer bidding on a used car, who must arrive at a price based on conjecture supplemented with approximation techniques relative to some of the more important

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Samuelson, *Bargaining Under Asymmetric Information*, 52 *ECONOMETRICA* 995 (1984) (examining optimal bargaining behavior for informed and uninformed buyers). For more examples illustrating that, unless the quality of a commodity can be accurately determined at the point of sale, consumers face the possibility of buying low-quality products at high-quality prices, see Lucian A. Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 *RAND J. ECON.* 404 (1984); Gregg Jarrell & Sam Peltzman, *The Impact of Product Recalls on the Wealth of Sellers*, in *EMPIRICAL APPROACHES TO CONSUMER PROTECTION ECONOMICS* 377 (Pauline M. Ippolito & David T. Scheffman eds., 1986); Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 *J. POL. ECON.* 615 (1981); Sam Peltzman, *An Evaluation of Consumer Protection Legislation: The 1962 Drug Amendments*, 81 *J. POL. ECON.* 1049 (1973); Carl Shapiro, *Premiums for High Quality Products as Returns to Reputations*, 98 *Q. J. ECON.* 659 (1983); Thomas S. Ulen, *The Coasean Firm in Law and Economics*, 18 *J. CORP. L.* 301 (1993); see generally JACK HIRSHLEIFER & JOHN G. RILEY, *THE ANALYTICS OF UNCERTAINTY AND INFORMATION* (1992).

60. See Akerlof, *supra* note 59, at 489.

61. See *id.*

62. See *id.*

63. See *id.*

64. See Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 *CAL. L. REV.* 83, 95-96 (1989) (discussing proxies used to measure the quality of dairy products).

aspects of the deal, such as reliability, can be expected to submit a meaningfully lower offer for the car than someone who knows that the previous owner had taken meticulous care of the machine.<sup>65</sup> One would expect a market of this sort to attract outwardly beautiful, but poorly maintained or otherwise defective, cars.<sup>66</sup> Consequently, this weakens, over time, whatever value widely used estimation techniques had to begin with, thereby increasing bidders' uncertainty about the quality of the product and further lowering the rational bid price.<sup>67</sup> With the passage of time, buyers discover through experience that sellers are bringing below-average products to the market, and this realization of the declining quality of products is in turn reflected by declining prices of those products.<sup>68</sup>

The obvious means of escape from this failing market is to find some cheap and reliable means of communicating the "true" value of the goods: for example, dealing only with relatives or friends; providing certified service records; or purchasing from an established dealer who will have an expert inspection of the machine conducted, and who will offer a legally enforceable promise in the form of a warranty that the product will at least meet certain agreed-upon expectations for a minimum agreed-upon period of time.<sup>69</sup> Of course a car *plus* good information about its (high) quality is more valuable than the car alone—which is one reason why it is no surprise that (other things equal) people pay auto dealers more for a given used car than they would offer an unknown stranger.<sup>70</sup>

In the securities market one can find an informational asymmetry

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65. See Akerlof, *supra* note 59, at 490-92 (noting that the price someone with imperfect information will bid will be somewhere between the price of a known "bad" car and a known "good" car).

66. Assuming, of course, that the cost of maintaining a car's appearance is less than the cost of maintaining a car's mechanics.

67. See Akerlof, *supra* note 59, at 490-92; Bruce Mann & Thomas J. Holdych, *When Lemons Are Better than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 2 n.7 (1996).

68. See Akerlof, *supra* note 59, at 491 (noting that, consequently, "at no price will any trade take place at all").

69. See *id.* at 499-500.

70. See *id.*

analogous to that in the used car market.<sup>71</sup> As noted above, there are certain changes one could expect to see in the behavior of risk-averse consumers who are attempting to estimate the correct bid price for commodities in a market where the quality of individual units is both significantly variable and incapable of ascertainment. For example, in the securities market there is often a large disparity of information between investors and issuers of securities concerning the securities' quality. Debtors generally possess much more information about the safety of a bond than prospective creditors. The result of this information asymmetry is that prospective investors will be willing to bid an amount that assumes that the security only has some average risk of default. Sellers of low quality securities in such a market will profit more, and sellers of high quality securities will profit less, as a corollary of this quality uncertainty. The standard cure for this market imperfection is reliable information.<sup>72</sup>

### *B. The Sentencing Judge and the Lemons Market*

#### 1. Taking from the Good and Giving to the Bad

A sentencing judge in a jurisdiction that aggressively expunges juvenile criminal records is in very much the same position as the prospective car buyer or securities investor who lacks information about the product/security he is evaluating. A young offender presents himself for sentencing and claims to be a first-time offender; but is he *in fact* a first-time offender, or is he so merely by dint of a statutorily-imposed fiction? Of course the judge may not know the answer to this because, although the individual's "complete" file may be available to the court, it may have already been permanently purged of a string of

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71. See Frank H. Easterbrook, *Managers' Discretion and Investors' Welfare: Theories and Evidence*, 9 DEL. J. CORP. L. 540 (1984).

72. In the securities market, for example, an investor can purchase insurance that will reveal the true default probability, or make some sort of disclosure arrangement with the issuer. See George J. Benston, *Required Periodic Disclosure Under the Securities Acts and the Proposed Federal Securities Code*, 33 U. MIAMI L. REV. 1471, 1473-76 (1979) (discussing the benefits of corporate information disclosure).

juvenile convictions.<sup>73</sup> An individual with four prior convictions for property theft while a juvenile, for example, may therefore appear before the sentencing court after having been convicted for a burglary committed a few days after reaching majority, but the judge may not have a record of these highly relevant prior offenses.

If this juvenile is in fact a first-time offender, and the judge knows it, the judge will in all likelihood impose a relatively lenient sentence because the offender has not yet evidenced a lack of rehabilitative potential. This is because, as the Supreme Court stated in *Williams v. New York*,<sup>74</sup> “[t]oday’s philosophy of individualizing sentences makes sharp distinctions . . . between first and repeated offenders.”<sup>75</sup> If, on the other hand, the youth is a repeat offender who has, on the basis of his multiple encounters with the justice system, proved himself a “hard case,” then the judge can be expected to impose a more severe sentence.<sup>76</sup> These outcomes are indeed desired in a system which strives to make the punishment fit both the crime and the criminal.<sup>77</sup>

Given that judges regularly observe the distinction between the first-time offender and the repeat offender,<sup>78</sup> and that they make real-

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73. See *supra* note 1 and accompanying text.

74. 337 U.S. 241 (1949).

75. *Id.* at 248.

76. See *United States v. Johnson*, 28 F.3d 151, 155 (D.C. Cir. 1994) (“Recidivism, so Congress and the [Sentencing] Commission concluded, generally warrants increased punishment.”).

77. See generally Jose A. Cabranes, *Sentencing Guidelines: A Dismal Failure*, 207 N.Y. L.J. 2 (1992) (arguing that “our system of criminal justice is a human institution, and since biblical times we have assumed that the quintessential duty of a judge in a criminal case is to exercise judgment in sentencing, to make sure that the punishment fits the crime and also that the punishment fits the criminal”); see also *United States v. Lara-Velasquez*, 919 F.2d 946, 954 n.9 (5th Cir. 1990) (holding that the district court erred when it failed to consider rehabilitative potential in assessing a sentence within Sentencing Guidelines range); David H. Norris & Thomas Peters, *Fiscal Responsibility and Criminal Sentencing in Illinois: The Time for Change is Now*, 26 J. MARSHALL L. REV. 317, 351 n.227 (1993) (“Rehabilitative potential, usually found in young or first-time offenders, provides a reason for imposing a less severe sentence.”); cf. Note, *An Argument for Confrontation Under the Federal Sentencing Guidelines*, 105 HARV. L. REV. 1880, 1881 (1992) (arguing that sentencing under the federal sentencing guidelines has moved away from being concerned with predicting rehabilitative potential and now is “a thoroughly fact-driven process,” in which the sentence results from numerous findings regarding the nature of the offense).

78. See *Williams*, 337 U.S. at 247-50; *Johnson*, 28 F.3d at 155.

world decisions based on the distinction,<sup>79</sup> the existence of uncertainty concerning whether the judge is dealing with an ingenue or a recidivist could be expected to produce two entirely unwelcome results. First, the theory of lemons would lead one to expect judges to sentence career juvenile offenders too leniently, and genuine first-time juvenile offenders too harshly, but with a tendency, depending on the judge's degree of risk-aversion, toward being too harsh with genuine first offenders.<sup>80</sup> We make these assumptions because judges, given full information, will sentence "true" first-time offenders relatively leniently, while being more inclined to "throw the book" at chronic recidivists.<sup>81</sup> However, absent knowledge of who is who, the judge is expected to sentence young first-time offenders who *appear* to have clean criminal histories<sup>82</sup> somewhere between the minimum punishment that otherwise would have been applied to the "true" first-time offender, and the maximum punishment that would have been applied to the recidivist offender. In so doing, the judge is acting very much like the buyer of a used car who, lacking reliable information on the actual quality of the car being considered, will tend to pay a price that lies somewhere near the middle of the range between what he would be willing to pay for a high-quality car and what he would be willing to pay for a lemon, thereby benefitting the seller of the jalopy and hurting the seller of the well-maintained automobile.<sup>83</sup>

Expungement therefore imposes a direct cost upon those young offenders who have remained crime-free during their minority by preventing them from benefitting from their prior law-abiding behavior by receiving a relatively lenient sentence. On the other hand, aggressive expungement benefits those young offenders who have lived outside of the law most of their lives, because they are now treated, for sentencing purposes, as if they have never broken the law

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79. See *United States v. Davis*, 48 F.3d 277, 280 (7th Cir. 1995); *United States v. Griess*, 971 F.2d 1368, 1374 (8th Cir. 1992).

80. See *supra* note 65 and accompanying text.

81. See *Johnson*, 28 F.3d at 155; U.S. SENTENCING GUIDELINES MANUAL, *supra* note 16, at 253.

82. In other words, both those who actually had a crime-free past and thus a clean record, and those whose prior criminal acts have been expunged.

83. See *Akerlof*, *supra* note 59, at 490-92.

before reaching adulthood.<sup>84</sup> Additionally, the deterrent effect that a conviction may have on a young offender will decrease because he knows that his juvenile misbehavior will not carry any serious long-term consequences.

## 2. The Danger of Race Becoming a Proxy for Recidivism

Another potential, and troubling, effect of aggressive expungement is that judges who are not provided with a record that accurately reflects the criminal history of the offenders appearing before them may (perhaps unconsciously) rely on estimation techniques for conveying relevant information about an offender's history that expungement statutes suppress. The likelihood of this outcome becomes apparent when one considers that adult criminality virtually never emerges *de novo*,<sup>85</sup> that it is typically preceded by juvenile criminality,<sup>86</sup> and that judges working within the system can be expected to be aware of this fact. Like the car buyer who uses the car's physical appearance as a proxy for the car's quality and value,<sup>87</sup> the judge can also be expected to attempt to solve the informational asymmetry by looking for other ways of estimating whether or not the juvenile before him or her is in fact a first-time offender. Inasmuch as the crime rate among black (and, for that matter, poor) adolescents in the jurisdiction is believed by the judge to be many times that of their white counterparts,<sup>88</sup> one should expect that black first-time offenders are sentenced somewhat more harshly than white first-time offenders by the same judge (of course, the same outcome can be expected with regard to individuals with other similar outwardly visible

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84. See T. Markus Funk, *Young & Arrestless: The Case Against Expunging Juvenile Crime Records*, REASON MAGAZINE, Feb. 1996, at 50.

85. See WEST, *supra* note 42, at 75 (referring to adult offenders as "juvenile delinquents grown up"); see also GOTTFREDSON & HIRSCHI, *supra* note 26, at 240-48; MARVIN E. WOLFGANG ET AL., FROM BOY TO MAN, FROM DELINQUENCY TO CRIME 196 (1987).

86. See Funk, *supra* note 6, at 906; WEST, *supra* note 42, at 75; WOLFGANG, *supra* note 85, at 196.

87. See *supra* note 64 and accompanying text.

88. See, e.g., WOLFGANG, *supra* note 85, at 196 (noting that "[p]ersistent offenders were more likely to be drawn from socially disadvantaged groups").

characteristics, such as—at times—socio-economic class).<sup>89</sup> By suppressing valuable and accurate information, the judge may be more tempted, either consciously or unconsciously, to improperly use visible characteristics such as race as a proxy for criminal history and amenability to rehabilitation.

### 3. Reduced Incentives to Remain Crime-Free

Because the economic distinction between well-maintained and poorly maintained used cars is small due to an absence of information about which is which, car owners have diminished incentives to maintain their cars properly.<sup>90</sup> At least this much is true: to whatever extent their maintenance decisions are based on a desire to preserve the resale value of their car, an information-impaired used car market diminishes that incentive, and should tend, over time, to produce a more poorly-maintained fleet of cars for resale than would be the case in an environment where maintenance information was highly reliable and easily obtained.<sup>91</sup> Expungement laws similarly suppress valuable

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89. We should note that there is no empirical evidence clearly supporting or disproving this theory; there are simply no studies available comparing the sentences handed out to first-time offenders in jurisdictions that aggressively expunge juvenile crime records to sentences handed out in other jurisdictions. However, there is a good deal of literature arguing that black defendants, on the whole, receive harsher sentences for similar crimes. *See generally* AMOS N. WILSON, BLACK-ON-BLACK VIOLENCE: THE PSYCHODYNAMICS OF BLACK SELF-ANNIHILATION IN SERVICE OF WHITE DOMINATION 23 (1990) (arguing that blacks usually receive harsher sentences for similar crimes); Vada Berger et al., Comment, *Too Much Justice: A Legislative Response to McClesky v. Kemp*, 24 HARV. C.R.-C.L. L. REV. 437, 459-60 (1989) (arguing that convicted blacks are likely to receive harsher sentences than whites for the same crimes); *see also* Erika L. Johnson, "A Menace to Society:" *The Use of Criminal Profiles and Its Effects on Black Males*, 38 HOW. L.J. 629, 645-46 (1995) (noting the disparity in sentencing for blacks and whites in drug offenses); Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2189 (1995) (discussing how the Federal Sentencing Guidelines were instituted in part because underclass blacks received harsher sentences); *cf.* 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 93 (Alfred Blumstein et al. eds., 1983) (arguing that "[w]hile there is no evidence of a widespread systematic pattern of discrimination in sentencing, some pockets of discrimination are found for particular judges, particular crime types, and in particular settings").

90. *See* David M. Green, Comment, *Due Diligence Under Rule 415: Is the Insurance Worth the Premium?* 38 EMORY L.J. 793, 818 n.137 (1989) (noting that, because consumers with imperfect information will only bid an "average" amount, the sellers of above average cars have no incentive to enter the market).

91. *See id.*

information about a person's criminal records.<sup>92</sup> By thus effacing the distinction between good behavior and bad behavior, they do not merely give those who have been youthfully indiscreet a subsidy, *they extract that subsidy from members of their own cohort*, the vast majority of whom will have been law-abiding.<sup>93</sup> In other words, because a repeat offender in an aggressive expungement jurisdiction may have his record erased upon reaching majority, the threat of enhanced sentencing is reduced, and thus the potential of receiving a juvenile conviction will have a diminished deterrent effect. To the extent incentives of this kind matter in determining an individual's behavior—and of course the criminal law assumes that they do indeed matter—the effect of expungement laws is to give criminally-inclined people less reason to refrain from criminality at the same time that they give well-motivated people less reason to remain good.

#### CONCLUSION

The redistributive effects of aggressive expungement laws are very different from the effects that the proponents of these laws have supposed. These laws in fact do not tax the producer class in order to finance sorely-needed breaks for society's prodigal sons, as expungement proponents assert. Rather, they tend to tax those who have avoided scrapes with the law in order to subsidize the habitual law breakers. Expungement laws also increase the value, and undoubtedly the currency, of racist estimation criteria that will almost certainly affect the sentences that judges apply to young men who come before them for justice. Finally, such laws make the status of criminal less obnoxious and the status of law-abider less advantageous.<sup>94</sup> It would be hard to improve on the perversity of such laws, and because repealing or drastically modifying them is an

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92. See *supra* notes 8-16 and accompanying text.

93. The number of juveniles who engage in criminal conduct is small relative to the juvenile population. For example, in 1994 the national delinquency case rate was only 56.1 cases disposed per 1,000 youth at risk. See BUTTS, *supra* note 24. Thus, the vast majority of juveniles refrain from criminal activity.

94. This general proposition of course applies to other decisionmakers faced with a young man who is looking for a job, for admission to a school, for a loan, and so on.

option, it would be easy to abate the damage they do.