



**DRIVING FOR SECOND CHANCES:
A FOUNDATION FOR ESTABLISHING THE FIRST DUI
EXPUNGEMENT LAW IN NEW JERSEY**

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ABSTRACT

New Jersey's expungement statute covers a broad range of offenses that are eligible for expungement. However, the expungement statute does not cover DUIs because DUIs are legally classified as traffic offenses, a non-expungable class of offenses. Although traffic offenses are legally less serious than criminal offenses, DUI convictions can cause social stigmatization equivalent to the level of some serious crimes. Because of this level of stigma, barriers in current and prospective employment typically result, and ex-offenders are thus, isolated from society. Even if an ex-offender has been living a rehabilitative and law-abiding life since the conviction, the ex-offender has no legitimate post-conviction remedies available to alleviate the collateral consequences. This note discusses New Jersey's DUI and expungement laws, the issues encompassing New Jersey's bar on expungement for DUIs, how expungement can resolve these issues, and a feasible scheme for future DUI expungement legislation in New Jersey.

* J.D. Candidate, Rutgers Law School, May 2021. This note is dedicated to persons who suffer from the stigma of conviction of a crime. Hopefully, society can start viewing the prior crimes of ex-offenders with forgiveness and compassion, for without these two ideals, life is hollow. Thank you to my friends, family, and colleagues who have constantly encouraged and challenged me throughout the note-writing process.

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INTRODUCTION

The concept of second chances is a quintessential American value.¹ It is driven by the idea that people are inherently good but will often make mistakes.² Some mistakes can never be fixed. But when given second chances, people tend to learn from their mistakes and become better people because of it.³

This concept of second chances plays a deep role in expungement law.⁴ It is rooted in the reality that many people commit offenses and offenses translate into harms against society.⁵ Even though society was harmed, the person who committed the offense should not be immediately cast away as a villain.⁶ But sometimes, society is unwilling to accept that that person has truly met its redemption standards.⁷ Sometimes law must be made to protect people who committed certain offenses because they do not deserve to be stigmatized by that offense forever.⁸ This law, the law of second chances, is expungement.⁹ What

1. See Amitai Etzioni & Radhika Bhat, *Second Chances, Social Forgiveness, and the Internet*, AM. SCHOLAR (Mar. 1, 2009), <https://theamericanscholar.org/second-chances-social-forgiveness-and-the-internet/>.

2. See *id.*

3. See *id.* (“As individuals, we seek insights into our failings so we can learn to overcome them and achieve a new start. From a sociological perspective, people are thrown off course by their social conditions—because they are poor, for instance, and subject to discrimination. But these conditions can be altered, and then these people will be able to lead good lives.”).

4. See *State v. N.W.*, 747 A.2d 819, 823 (N.J. App. Div. 2000) (“[T]he [expungement] statute’s purpose is to give a one-time offender who has changed his or her life a second chance.”); see also Milton Heumann et al., *Expunge-Worthy: Exploring Second Chances for Criminal Defendants*, 51 CRIM. L. BULL. 588, 591 (2015) (“[Expungement] seem[s] to embody the ethic of giving people the opportunity to redeem themselves, the importance of which has been expressed prominently in recent times. . . . [I]f there is merit to the second chance argument for ex-offenders without expunged criminal records, then *a fortiori* the same argument should prevail to a greater degree for the defendant who has unburdened him- or herself of prior involvement with the law by having the records expunged.”).

5. See Alfred Blumstein & Kiminori Nakamura, *Paying a Price, Long After the Crime*, N.Y. TIMES (Jan. 9, 2012), <https://www.nytimes.com/2012/01/10/opinion/paying-a-price-long-after-the-crime.html>.

6. See Heumann et al., *supra* note 4, at 589–91; see also Blumstein & Nakamura, *supra* note 5.

7. See Blumstein & Nakamura, *supra* note 5 (“[I]n 2020, the Chicago Public Schools declined to hire Darrell Langdon for a job as a boiler-room engineer, because he had been convicted of possessing a half-gram of cocaine in 1985, a felony for which he received probation. It didn’t matter that Mr. Langdon, a single parent of two sons, had been clean since 1988 and hadn’t run into further trouble with the law.”).

8. See Heumann et al., *supra* note 4, at 588–89, 602; see also Blumstein & Nakamura, *supra* note 5.

9. Meg Leta Ambrose et al., *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 99, 141 (2012).

qualifications must one have for a second chance? More specifically, what qualifies an ex-offender¹⁰ for expungement? A number of factors may be relevant, such as the level of the offense and the person's "character and conduct since conviction."¹¹ Other potential factors include the collateral consequences of the offense.¹² However, even if an ex-offender has lived a rehabilitative and law-abiding life since the conviction and suffers significant collateral consequences from that offense, the offense may still be ineligible for expungement due to its legal classification.¹³ An example of this, and the subject of this article, is driving under the influence ("DUI").¹⁴

The New Jersey State Legislature decides what offenses are eligible for expungement.¹⁵ Legal classifications of offenses are a traditional source of guidance for the Legislature.¹⁶ But at some point, legislators may need to examine other issues and factors, in addition to legal classifications and tradition, to determine whether an offense should be eligible for expungement. More specifically, legislators should look to the history of the offense, the offense compared to other expungable offenses, the benefits that expungement would have in relieving the penalties and collateral consequences stemming from a conviction of the offense, the flaws in the judicial reasoning supporting the current statute, and the feasibility of creating a new law.¹⁷

In New Jersey, DUIs are ineligible for expungement due to their legal classification as a traffic offense.¹⁸ But if New Jersey legislators look at a number of issues and factors, DUIs seem to fit the bill for expungement

10. For the purposes of this note, "ex-offender" refers to anyone who committed a criminal or traffic offense, and has since rehabilitated herself, and is now living a law-abiding life.

11. *In re* LoBasso, 33 A.3d 540, 549 (N.J. App. Div. 2012) (citing N.J. STAT. ANN. § 2C:52-2(a)(2) (West 2020)).

12. *See In re* Kollman, 46 A.3d 1247, 1254 (N.J. 2012) ("In other words, the statute is designed to eliminate 'the collateral consequences imposed upon otherwise law-abiding citizens who have had a minor brush with the criminal justice system.'" (citation omitted)).

13. *See infra* Part III.

14. N.J. STAT. ANN. § 2C:52-28 (West 2020); *Id.* § 2C:39:4-50. Although other states may use different acronyms for driving under the influence, this note will only use "DUI" to refer to driving under the influence or any similar offense. *See OVI, DUI, OWI, DWI: What's the Difference?*, LIFESAFER: LIFESAFER BLOG, <https://www.lifesafefer.com/blog/ovi-dui-owi-dwi-whats-difference/> (last visited Nov. 14, 2020).

15. *See* N.J. CONST. art. IV, § 1.

16. *Compare* Act of June 20, 1936, ch.174, 1936 N.J. Laws 412, 414 (limiting expungement to criminal convictions), *with* N.J. STAT. ANN. § 2C:52-2 (West 2020) (permitting expungement to indictable offenses), *and Id.* § 2C:52-3 (allowing expungement for disorderly persons and petty disorderly persons offenses).

17. *See infra* Parts V, VI.

18. Hereinafter I will refer to motor vehicle violations generally as "traffic offenses." *See generally id.*; N.J. STAT. ANN. § 2C:52-28 (West 2020).

eligibility. First, DUIs historically should have been eligible for expungement due to their former classification as disorderly persons offenses.¹⁹ Second, DUIs have a similar stigma, criminal procedures, and punishment schemes as other expungable offenses.²⁰ Third, the judicial reasoning for supporting ineligibility of expungement for traffic offenses should not apply to DUIs and is outdated.²¹ Fourth, expungement would offer a valuable form of relief for the many ex-offenders suffering from the penalties and collateral consequences that result from the conviction of a DUI.²² Fifth, an expungement scheme for DUIs would be very feasible if certain requirements are met, and the scheme utilizes New Jersey's automatic expungement system.²³ Ultimately, if a DUI expungement law was created, it would promote one of the most important American values by giving former DUI offenders, who have lived a rehabilitative and law-abiding life, a second chance.

Part I of this note will review how New Jersey classifies criminal offenses, ordinance violations, and traffic offenses. Part II will explore the history and background of New Jersey's DUI laws and then explain the penalties and collateral consequences of DUIs. Part III will examine the history and background of New Jersey's current expungement statute, the expungement process, automatic expungement, and the DUI expungement laws of other states. Part IV will address the issues raised by the history of DUIs, the comparison of DUIs to other expungable offenses, the relevant judicial reasoning behind banning expungement for traffic offenses, and the barriers created by the penalties and collateral consequences of a DUI conviction that expungement could alleviate. Lastly, Part V will propose a basic scheme for DUI expungement in New Jersey, which will include requirements an ex-offender should meet to be eligible for expungement and how automatic expungement can be utilized to streamline the process.

I. CLASSIFICATION OF OFFENSES IN NEW JERSEY

To understand New Jersey's DUI and expungement laws, one must understand how New Jersey classifies criminal offenses, ordinance violations, and traffic offenses. This is important because New Jersey's

19. *See infra* Part I.

20. *See infra* Part IV.

21. *See infra* Part V.

22. *See infra* Part III.

23. *See infra* Part III

classification system for criminal offenses is unique when compared to the rest of the United States.²⁴

Up until 1979, New Jersey classified criminal offenses as misdemeanors and felonies.²⁵ That year, the Legislature abolished misdemeanors and felonies and introduced a new classification system.²⁶ Since then, misdemeanors have been classified as disorderly persons offenses or petty disorderly persons offenses, and felonies have been classified as crimes (“indictable offenses”).²⁷

Disorderly persons offenses have traditionally been considered “petty offenses” by the courts because they are believed to not carry the same stigma as an indictable offense.²⁸ The penalties for disorderly persons offenses carry a maximum incarceration period of six months²⁹ and a maximum fine of \$1,000.³⁰ Some examples of disorderly persons offenses are property theft,³¹ simple assault,³² and shoplifting.³³

Indictable offenses, on the other hand, contain “the most serious offenses and carry the greatest maximum sentences and fines.”³⁴ This includes imprisonment of up to twenty years³⁵ and fines of up to \$200,000.³⁶ Some examples of indictable offenses are aggravated assault,³⁷ car theft,³⁸ and death by auto.³⁹

24. *Are There Misdemeanors in New Jersey?*, TORMEY L. FIRM, LLC (Dec. 27, 2018), <https://criminallawyerinnj.com/are-there-misdemeanors-in-new-jersey/>.

25. See PAUL H. ROBINSON, DRUG POL'Y ALL., CRIME AND PUNISHMENT IN NEW JERSEY: THE CRIMINAL CODE AND PUBLIC OPINION ON SENTENCING 3 (2011), https://www.drugpolicy.org/sites/default/files/Crime%20and%20Punishment%20In%20New%20Jersey%20With%20All%20Appendices%20FINAL_0.pdf; 33 ROBERT RAMSEY, NEW JERSEY PRACTICE SERIES, MOTOR VEHICLE LAW AND PRACTICE § 1:4 (5th ed. 2019).

26. *Id.* § 1:5; N.J. STAT. ANN. § 2C:1-5 (West 2020).

27. See 33 RAMSEY, *supra* note 25, § 1:4. In New Jersey, crimes are classified as indictable offenses. *Id.* Because this note will compare various criminal statutes and certain offenses are classified differently depending on the state's criminal code, crimes within the meaning of New Jersey's criminal code, will hereinafter be called “indictable offenses.” See *id.*

28. See *State v. Doyle*, 200 A.2d 606, 613–14 (N.J. 1964).

29. *Id.* § 2C:43-8.

30. *Id.* § 2C:43-3; see also 33 RAMSEY, *supra* note 25, § 1:4.

31. *Id.* § 2C:20-2.

32. *Id.* § 2C:12-1.

33. *Id.* § 2C:20-11(c)(4).

34. See 33 RAMSEY, *supra* note 25, § 1:4.

35. *Id.* § 2C:43-6(a)(1).

36. *Id.* § 2C:43-3(a).

37. *Id.* § 2C:12-1(b).

38. *Id.* § 2C:20-2.1.

39. *Id.* § 2C:11-5, *invalidated in part by State v. Locane*, 184 A.3d 495, 503–04 (N.J. App. Div. 2018) (declaring § 2C:11-5b(2) unconstitutional).

Traffic offenses and ordinance violations are governed by Title 39 and Title 40 of the New Jersey Statutes, respectively.⁴⁰ Ordinance violations are legislated by municipal bodies who “prescribe penalties for such violations within a given range.”⁴¹ These penalties may include up to ninety days of jail-time and no more than \$2,000 in fines.⁴² Although penalties for traffic offenses vary, they usually only entail thousands of dollars of monetary penalties.⁴³ Regardless, both ordinance violations and traffic offenses are considered lesser offenses since they usually do not result in civil disabilities.⁴⁴

While ordinance violations may be construed as “criminal in nature,”⁴⁵ traffic offenses typically are not.⁴⁶ However, DUIs are considered “serious traffic offense[s]” and quasi-criminal offenses.⁴⁷ Quasi-criminal offenses fall into a gray area where the offense is not legally classified as a criminal offense but carries a punishment that is similar to a criminal offense.⁴⁸ In addition, the New Jersey courts have noted that while a DUI is a traffic offense, it shares a very similar, if not almost identical, procedure as criminal offenses.⁴⁹

40. See *id.* §§ 39:4-1, 40:49-1.

41. 17A ROBERT RAMSEY, NEW JERSEY PRACTICE SERIES, MUNICIPAL COURT PRACTICE § 55:1 (3d ed. 2019); see also N.J. STAT. ANN. § 40:49-5 (West 2020).

42. *Id.* § 40:49-5.

43. *Fines for Traffic Violations in New Jersey*, LAW OFFICES JAMES A. ABATE, <https://www.jabatelaw.com/traffic-offenses-fines-points/> (last visited Nov. 23, 2020) [hereinafter *Fines for Traffic Violations*]; see, e.g., § 39:4-50 (West 2020).

44. See *State v. Owens*, 254 A.2d 97, 98–100 (N.J. 1969) (“[O]ther statutes provid[e] for lesser offenses with [] lower limits on punishment, such as the Motor Vehicle Act, and of course there are municipal ordinances as well. All of the offenses below the grade of crime come within the generic category of ‘petty offenses,’ not to suggest thereby that the authorized punishments are trivial but rather to say that because the consequences of a conviction are limited, these offenses are beyond the concept of ‘crime.’” (citations omitted)).

45. See *State v. Golin*, 833 A.2d 660, 664 (N.J. App. Div. 2003).

46. See *State v. Hammond*, 571 A.2d 942, 944–45 (N.J. 1990) (“[Traffic] violations were [not] intended to constitute ‘offenses’ under the [Criminal] Code.” (citations omitted)).

47. See *State v. Rodriguez*, 682 A.2d 764, 766–67 (N.J. App. Div. 1996) (citations omitted).

48. See *id.* at 767 n.4 (“[Quasi-criminal offenses are] a class of offenses against the public which have not been declared crimes, but wrongful against the general or local public which it is proper should be repressed or punished by forfeitures or penalties . . . ‘[q]uasi-criminal’ is not an empty label. The classification is in no sense illusory; it has reference to the safeguards inherent in the very nature of the offense, the punitive quality that characterizes the proceeding, and the requirements of fundamental fairness and essential justice to the accused.” (internal quotation marks omitted) (quoting *State v. Laird*, 135 A.2d 859 (N.J. 1957))).

49. See, e.g., *Rodriguez*, 682 A.2d at 767 (“Nevertheless, both traffic offenses share some of the attributes of a criminal statute. Conviction requires proof beyond a reasonable doubt, and jail time is possible, even for first-time offenders. . . . [D]ecisional law has insisted that proceedings in the prosecution of violators of [DUIs] shall be so conducted as to respect and

Compared to the rest of the United States, New Jersey's classification of a DUI as a traffic offense remains an anomaly. More specifically, forty-eight states and Washington, D.C., classify their first offense DUIs as misdemeanors.⁵⁰ The only other state that does not classify a first offense DUI as a misdemeanor is Wisconsin, which views a first offense DUI as a civil offense.⁵¹

In interpreting the States' criminal laws, the New Jersey Supreme Court has tried to evaluate offenses by their classification rather than the stigma attached to the offense, suggesting that some offenses have greater stigma than their classification.⁵² The Court has reasoned that legal classification is an issue to be decided by the Legislature and that the Legislature probably considered stigma when promulgating the legal classification of the offense.⁵³ This may be a reason why some commentators have criticized New Jersey's criminal code for having gradation issues.⁵⁴ Some of these issues include the grading system,

safeguard those basic rights normally to be accorded one accused of a criminal offense." (citations omitted) (internal quotation marks omitted).

50. See ALA. CODE § 32-5A-191 (2020); ALASKA STAT. § 28.35.030 (2020); ARIZ. REV. STAT. ANN. § 28-1381 (2020); ARK. CODE ANN. § 5-65-103 (2020); CAL. VEH. CODE § 23152 (West 2020); COLO. REV. STAT. ANN. § 42-4-1301 (West 2020); CONN. GEN. STAT. ANN. § 14-227a (West 2020); DEL. CODE ANN. tit. 21, § 4177 (West 2020); D.C. CODE ANN. § 50-2206.13 (West 2020); FLA. STAT. § 316.193 (2020); GA. CODE ANN. §40-6-391 (West 2020); HAW. REV. STAT. § 291E-61 (2020); IDAHO CODE ANN. § 18-8004 (West 2020); 625 ILL. COMP. STAT. 5/11-501 (2020); IND. CODE § 9-30-5-1 (2020); IOWA CODE § 321J.2 (2020); KAN. STAT. ANN. § 8-1567 (2020); KY. REV. STAT. ANN. §§ 189A.010, 532.020 (West 2020); LA. STAT. ANN. § 14:98.1 (2020); ME. STAT. tit. 29-A, § 2411 (2020); MD. CODE ANN., TRANSP. § 21-902 (West 2020); MASS. GEN. LAWS ch. 90, § 24 (2020); MICH. COMP. LAWS § 257.625 (2020); MINN. STAT. § 169A.27 (2020); MISS. CODE ANN. § 63-11-30 (2020); MO. REV. STAT. § 577.010 (2020); MONT. CODE ANN. § 61-8-711 (2020); NEB. REV. STAT. § 28-106 (2020); NEV. REV. STAT. § 484C.400 (2020); N.H. REV. STAT. ANN. § 265-A:18 (2020); N.M. STAT. ANN. § 66-8-102 (West 2020); N.Y. VEH. & TRAF. LAW § 1193 (McKinney 2020); N.C. GEN. STAT. ANN. § 20-138.1 (West 2020); N.D. CENT. CODE ANN. § 39-08-01 (West 2020); OHIO REV. CODE ANN. § 4511.19 (West 2020); OKLA. STAT. tit. 47, § 11-902 (2020); OR. REV. STAT. ANN. § 813.010 (West 2020); 75 PA. STAT. AND CONS. STAT. ANN. § 3804 (West 2020); 31 R.I. GEN. LAWS ANN. § 31-27-2 (West 2020); S.C. CODE ANN. § 16-1-20 (2020); S.D. CODIFIED LAWS § 32-23-2 (2020); TENN. CODE ANN. § 55-10-402 (West 2020); TEX. PENAL CODE ANN. § 49.04 (West 2020); UTAH CODE ANN. § 41-6a-503 (West 2020); VT. STAT. ANN. tit. 23, § 1201 (2020); VA. CODE ANN. § 18.2-270 (West 2020); WASH. REV. CODE § 46.61.502 (2020); W. VA. CODE ANN. § 17C-5-2 (West 2020); WYO. STAT. ANN. § 31-5-233 (2020).

51. See WIS. STAT. § 346.63(2)(am) (2020).

52. See *State v. Owens*, 254 A.2d 97, 98–101 (N.J. 1969) ("Nor do we think it useful to sample popular opinion to determine how much stigma is attributed to each act of misconduct and thereupon to decide, in some way which escapes us, whether an offense is more than petty notwithstanding the statute has so treated it. It is for the Legislature alone to assay the public's judgment, and the Legislature does so when it prescribes the legal consequences which may attend a conviction.").

53. See *id.* at 101.

54. See ROBINSON, *supra* note 25.

leaving some lesser offenses to be punished more harshly than more serious offenses, while some similar offenses are being punished inconsistently.⁵⁵ This disorganization may have been the result of poor legislative draftsmanship.⁵⁶ Nevertheless, the classification system for criminal offenses, ordinance violations, and traffic offenses has relatively been static since 1979.⁵⁷

II. DUIs

DUIs have had a long and unique background in New Jersey. Since their inception as a criminal offense, they have had different enforcement methodologies reflecting societal views of DUIs.⁵⁸ Eventually, this has led to the current penalties and collateral consequences of DUIs, which are notoriously severe.⁵⁹

A. *History and Background of New Jersey's DUI Laws*

Historically, DUIs were not always classified as traffic offenses.⁶⁰ The original DUI statute was enacted in 1909 and classified driving under the influence as a misdemeanor.⁶¹ The Legislature changed the statute in 1913 with the Disorderly Persons Act classifying a DUI as a disorderly persons offense, not a misdemeanor.⁶²

55. See *id.* at 4–6. For example, under New Jersey's criminal code, it is possible for a person convicted of a disorderly persons offense to receive no jail time or fine, while a person convicted of an ordinance violation may receive up to 90 days in jail time and a \$2,000 fine. Compare 33 RAMSEY, *supra* note 25, § 1.4 (describing the maximum jail time and fines of a disorderly persons offense), with N.J. STAT. ANN. § 40:49-5 (West 2020) (describing the maximum jail time and fines for an ordinance violation).

56. See ROBINSON, *supra* note 25, at 9 (“Although the separation of criminal offenses into different titles does not rise to the level of a constitutional violation, such an approach to drafting ‘commonly does a poor job at this most important function: telling people what they can, must, and must not do, under threat of criminal sanction.’ The drafters of the New Jersey Criminal Code recognized the importance of fair notice by incorporating it into the code’s ‘purposes’ provision: ‘[t]he general purposes of the provisions governing the definition of offenses are: . . . [t]o give fair warning of the nature of the conduct proscribed and of the sentences authorized upon conviction. . . .’ In keeping faithful to that purpose, criminal offenses should be organized in a manner that allows citizens to learn what the criminal law requires of them.” (citations omitted)).

57. See 33 RAMSEY, *supra* note 25, § 1:4.

58. See *State v. Hamm*, 577 A.2d 1259, 1262–64 (N.J. 1990); N.J. STAT. ANN. § 39:4-50 (West 2020).

59. *Hamm*, 577 A.2d at 1263.

60. *Id.* at 1264.

61. *Id.*

62. *Id.*

In 1921, the Legislature enacted an unprecedented law that officially made drunk driving a traffic offense.⁶³ This legislation was guided by the Motor Vehicle Commission Report from 1920.⁶⁴ One of the report's main purposes was to find ways to finance the state government, which was likely the reason the change in legal classification was made.⁶⁵

Over the next few decades, DUI legislation went on a rollercoaster ride in terms of how DUI offenders would be punished.⁶⁶ Legislation in the 1950s and 1960s saw a significant effort to punish DUI offenders more vigorously to reduce serious injuries and fatalities, which is the basis of New Jersey's modern public policy for DUIs.⁶⁷ In the 1970s and 1980s, penalties were lessened, and the Legislature focused on introducing more rehabilitative programs.⁶⁸ This rehabilitative approach did not last long, though.

Enforcement and adjudication of DUIs became radically aggressive in the early 1990s.⁶⁹ Mothers Against Drunk Driving advocated for stricter drunk driving laws because stricter laws would lead to "a decline in the rate of accidents," thus reducing the amount of fatalities produced by DUIs.⁷⁰ As a result, every state lowered statutory blood alcohol concentration limits and enhanced penalties for DUI offenders.⁷¹ Since then, it may be estimated that the number of ex-offenders convicted of a

63. *See id.* at 1265.

64. *See* REPORT OF THE NEW JERSEY MOTOR TRAFFIC COMMISSION, MOTOR VEHICLE AND TRAFFIC ACT, S. 974-90, 1921 Sess., at 3-4 (N.J. 1920) [hereinafter COMMISSION REPORT].

65. *See id.*

66. *See Hamm*, 577 A.2d at 1265-66 (discussing the significant changes and progression of DUI penalties throughout the mid-1900s).

67. *See* State v. Tischio, 527 A.2d 388, 392-93 (N.J. 1987) (finding that the legislative purpose behind New Jersey's drunk driving laws is to prevent serious injury and death by eliminating drunk drivers from the roadways); *see also* State v. Johnson, 199 A.2d 809, 819 (N.J. 1984) ("[T]he common knowledge that a great number of serious accidents have involved drinking drivers - a fact which becomes of greater importance and public concern almost daily in this motor age with ever increasing vehicle speeds, the constantly growing number of vehicles on the roads and staggeringly mounting accident toll.").

68. *See Hamm*, 577 A.2d at 1266 (discussing that the legislation "turned to rehabilitation as a social goal" by implementing community service programs, work-release programs, outpatient programs, and introducing the Intoxicated Driver Resource Centers to educate DUI offenders and prevent recidivism).

69. *See* Margaret G. Tebo, *New Test For DUI*, 91 A.B.A. J. 35, 36 (2005).

70. *See id.*

71. *See* Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of the Current Problems and Related Statutes*, 40 J. SAFETY RSCH. 77, 78 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2760408/pdf/nihms119866.pdf>.

DUI in New Jersey might be in the hundreds of thousands if not millions.⁷²

There is no doubt that stricter drunk driving laws have had an impact on the reduction of drunk driving arrests and fatalities. In 1986 there were 1.8 million arrests for driving under the influence, which has decreased to about 1 million arrests in 2016.⁷³ A similar trend is happening with drunk driving fatalities. In New Jersey, fatalities decreased from 622, in 1982, to 201, in 2014.⁷⁴ This is a national trend: for example, in Texas, fatalities decreased from 2,801 in 1982 to 1,437 in 2009.⁷⁵ Considering that the country's current number of licensed drivers has more than doubled since 1970,⁷⁶ the drop in arrests and fatalities is a remarkable change.

It is also undeniable that, consistent with the purpose of the 1921 amendments,⁷⁷ traffic offenses make up an important source of revenue for New Jersey's government. In 2015, there was over \$405 million in fines and fees generated in New Jersey from the millions of traffic

72. Although New Jersey has not released the exact number of people convicted of a DUI, the available municipal court statistics can estimate how many people have been convicted of a DUI since New Jersey began aggressive DUI enforcement. To illustrate, if there has been on average between 30,000-36,000 DUIs per year since 1990, then there is likely between 900,000 and 1,080,000 people convicted of a DUI in New Jersey. See *Municipal Court Statistics: July 2018-June 2019*, N.J. CTS., <https://njcourts.gov/public/assets/stats/munc1906.pdf?c=bww> (last visited Nov. 14, 2020) (finding that there were 29,638 DUIs between 2018-19); *Municipal Court Statistics July 2004-June 2005*, N.J. CTS., <https://njcourts.gov/public/assets/stats/munc0506.pdf?c=HTx> (last visited Nov. 14, 2020) (finding that there were over 36,000 DUIs between 2004-05); LAURA M. MARUSCHAK, U.S. DEPT OF JUST., BUREAU OF JUST. STATS., DWI OFFENDERS UNDER CORRECTIONAL SUPERVISION 3 tbl.3 (1999), <https://www.bjs.gov/content/pub/pdf/dwiocs.pdf> (finding that New Jersey had 29,300 DUI arrests in 1991).

73. Compare LAWRENCE A. GREENFELD, U.S. DEPT OF JUST., BUREAU OF JUST. STATS., DRUNK DRIVING 2 (1988), with FBI: UCR, *2016 Crime in the United States*, tbl.18, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-18> (last visited Nov. 14, 2020).

74. See *New Jersey Drunk Driving Statistics*, ALCOHOLALERT!, <http://www.alcoholalert.com/drunk-driving-statistics-new-jersey.html> (last visited Nov. 14, 2020).

75. See *Texas Drunk Driving Statistics*, ALCOHOLALERT!, <http://www.alcoholalert.com/drunk-driving-statistics-texas.html> (last visited Nov. 14, 2020).

76. Compare *Highway Finance Data Collection*, U.S. DEPT OF TRANSP., FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/policyinformation/pubs/hf/pl11028/chapter4.cfm> (last updated Nov. 7, 2014) (showing that in 1970 there were about 112,000,000 licensed drivers in the country), with *Total Number of Licensed Drivers in the U.S. in 2018, by State*, STATISTA (Feb. 26, 2020), <https://www.statista.com/statistics/198029/total-number-of-us-licensed-drivers-by-state/> (finding that in 2018 there were about 227,500,000 licensed drivers in the country).

77. See COMMISSION REPORT, *supra* note 64, at 4.

offenses charged that year.⁷⁸ These proceeds are split half and half between the State and municipalities.⁷⁹

Yet, the State already has other sources of funding for enforcing DUIs. This funding is achieved through the Transportation Equity Act for the 21st Century.⁸⁰ Under this act, the state government receives federal funding for imposing stricter non-monetary punishments on DUI offenders.⁸¹

Furthermore, the amount that DUIs actually contribute to the traffic offense revenue stream is marginal and actually decreasing every year. To illustrate, in 2018-19, there were 5,743,197 citations for traffic offenses in New Jersey, an increase of 9% from the previous year.⁸² However, DUIs only made up about .05% of those citations.⁸³ The number of DUIs are, in fact, decreasing in violations per year, showing that other traffic offenses are responsible for the overall increase.⁸⁴

B. Penalties and Collateral Consequences

Penalties and collateral consequences play a substantial role in punishing ex-offenders. Collateral consequences, in general, have a significant impact on the lives of ex-offenders due to the stigma attached to the offense.⁸⁵ However, in context of DUIs, the collateral consequences become significantly worse.

78. See Laura Herzog, *We Paid \$405M in Tickets Last Year; See Where the Money Went*, NJ.COM (Jan. 16, 2019), https://www.nj.com/news/2016/05/where_your_ticket_payment_money_goes_funds_new_jer.html [hereinafter Herzog, *Ticket Revenue*]; *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72.

79. See Herzog, *Ticket Revenue*, *supra* note 78.

80. See *Funding Programs*, N.J. DEP'T OF TRANSP., <https://www.state.nj.us/transportation/business/localaid/funding.shtm> (last visited Nov. 14, 2020).

81. See *id.*; Tebo, *supra* note 69, at 37; *Funding Programs*, *supra* note 80.

82. See *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72.

83. *Id.* To be exact, DUI citations totaled 29,638 in 2018-19, which made up .05% of the 5,743,197 traffic offense citations in that same year. *Id.*

84. See *id.* (finding that the number of DUIs decreased by 1%). Compare *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72 (showing that the number of DUIs in 2018-19 was 29,638), with *Municipal Court Statistics: July 2004-June 2005*, *supra* note 72 (showing that the number of DUIs in 2004-05 was about 36,000, which means that DUIs have decreased by 25% since 2004-05).

85. See Jeffrey Selbin et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 20 (2018).

1. Collateral Consequences Generally

Collateral consequences are generally characterized as penalties that are incurred in addition to a criminal sentence.⁸⁶ Collateral consequences typically include social stigmatization and employment barriers.⁸⁷

Stigma derives from stereotypical assumptions that ex-offenders are “less credible and less trustworthy”⁸⁸ and, from an employer’s perspective, that the productivity of ex-offenders is lower.⁸⁹ Because of these assumptions, ex-offenders are often viewed as a lower class of people within society.⁹⁰ This greatly diminishes the potential for interaction between non-offenders and ex-offenders⁹¹ and prevents ex-offenders from being full members of society.⁹² For ex-offenders, such stigma serves as an “external incentive, like a jail term[.]”⁹³

As a result of stigma, records of arrests and convictions will ultimately disadvantage ex-offenders in obtaining or maintaining employment, even if the record is only minor.⁹⁴ Although employers may want to legitimately avoid “potential liability,”⁹⁵ employers may end up refusing to employ ex-offenders because of the stigma attached to the conviction rather than qualifications.⁹⁶

Ready accessibility to arrest and conviction records have aggravated this problem. Criminal background checks have become a standard in

86. See Logan Danielle Wayne, Comment, *The Data-Broker Threat: Proposing Federal Legislation to Protect Post-Expungement Privacy*, 102 J. CRIM. L. & CRIMINOLOGY 253, 260 (2012) (“Black’s Law Dictionary defines ‘collateral consequences’ as ‘[a] penalty for committing a crime in addition to the penalties included in the criminal sentence.’” (quoting BLACK’S LAW DICTIONARY 298 (9th ed. 2009))).

87. See *id.*; see also Selbin et al., *supra* note 85, at 20 (“Criminal records stigmatize people and create collateral consequences that limit their opportunities.”).

88. See Wayne, *supra* note 86, at 258–59.

89. See Christopher Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 630 (2014).

90. See Wayne, *supra* note 86, at 258 n.32.

91. See Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. L. & ECON. 519, 520 (1996) (“Stigma refers to someone’s reluctance to interact with someone else who has a criminal record.”).

92. See Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPICUOUS 123, 130 (2010).

93. Rasmusen, *supra* note 91, at 520.

94. Selbin et al., *supra* note 85, at 19.

95. Matt Boyer, *Tiptoeing the Minefield: Avoiding the Pitfalls of Background Checks, Negligent Hiring, and “Ban the Box” Legislation*, 10 IN-HOUSE DEF. Q. 6, 7–8 (2015). Many businesses do not want to take on “the potential liability of hiring an ex-offender” because most jurisdictions recognize the torts of negligent retention and negligent hiring as valid causes of action; some businesses have even gone as far as to prohibit hiring anyone with a criminal record. See *id.*

96. See Uggen et al., *supra* note 89, at 630; Wayne, *supra* note 86, at 259.

screening potential job applicants.⁹⁷ A recent survey found that around 96% percent of employers “conduct at least one type of employment background check screening.”⁹⁸ Today, obtaining a background check is as simple as going on the Internet and typing in the applicant or employee’s name.⁹⁹

Collateral consequences are especially problematic for minorities. African Americans and Latinos face denial of employment more than any other racial groups when such denial is “based solely on the existence of a criminal history[.]”¹⁰⁰ This discrimination extends even to the existence of arrest records, not resulting in conviction.¹⁰¹ Indeed, arrest records have a negative impact on employment, homeownership, education, individual income, and the economy.¹⁰² Since minorities are disproportionately arrested compared to their relative populations, they are the most at risk for losing employment opportunities due to arrest records.¹⁰³

2. Penalties and Collateral Consequences of DUIs

Although penalties and collateral consequences generally are burdensome for ex-offenders, they become much more overwhelming in the context of New Jersey’s DUI laws. The Legislature even wrote into the DUI statute that “[t]his State’s penalties for drunk driving . . . are

97. See Boyer, *supra* note 95, at 6; Peter Leasure & Tia Stevens Andersen, *Recognizing Redemption: Old Criminal Records and Employment Outcomes*, 41 HARBINGER 271, 274–75 (2017); Uggen et al., *supra* note 89, at 627.

98. *Survey Finds Employment Background Checks Nearly Universal Today*, GLOBALHR RSCH., <https://www.ghrr.com/survey-finds-employment-background-checks-nearly-universal-today/> (last visited Nov. 14, 2020); see also Boyer, *supra* note 95, at 6 (“The use of criminal background checks has become an almost standard practice in the hiring process.”).

99. See, e.g., *Public Records Search Service*, INSTANT CHECKMATE, <https://www.instantcheckmate.com/> (last visited Nov. 14, 2020).

100. See PERSIS S. YU & SHARON M. DIETRICH, *BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES*, NAT’L CONSUMER L. CTR. 7 (2012), <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf>.

101. See Gary Fields & John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J. (Aug. 18, 2014, 10:30 PM), <https://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>.

102. *Id.*

103. See *id.* (finding that for males under the age of 23, 49% of African-American and 44% of Hispanics have been arrested); see also YU & DIETRICH, *supra* note 100, at 7 (finding that African-Americans and Latinos “account for 28.3[%] of all arrests in the United States, although they represent just 12.9[%] of the population. . .”).

among the strongest in the nation.”¹⁰⁴ The penalties and collateral consequences of DUIs include legal disabilities, statutory penalties, stigma, and diminished employability, and a lack of post-conviction remedies.

a. Legal Disabilities

Aggressive DUI enforcement has led to an array of legal disabilities for DUI defendants. This includes a ban on plea bargaining to reduce the DUI to a lesser offense.¹⁰⁵ The rationale underlying the ban on plea bargaining for DUIs is that “municipal court prosecutor[s] must have a degree of latitude to ensure that justice be done in individual [DUI] cases.”¹⁰⁶ Some states have allowed plea bargaining by reducing the DUI to a reckless driving offense, which is much less serious.¹⁰⁷ However, New Jersey likely will not lift the ban on plea bargaining due to its perceived underlying rationale of “ensur[ing] . . . justice be done”¹⁰⁸

DUI defendants in New Jersey have also lost many traditional defenses that other criminal defendants could raise at trial.¹⁰⁹ These defenses include, but are not limited to, traditional entrapment,¹¹⁰ quasi entrapment,¹¹¹ extrapolation of evidence,¹¹² and involuntary intoxication.¹¹³ In addition, certain constitutional rights do not apply to DUI offenders.¹¹⁴ Among these constitutional rights are the right to jury

104. N.J. STAT. ANN. § 39:4-50.16 (West 2020).

105. See 24 ROBERT RAMSEY, NEW JERSEY PRACTICE SERIES, MOTOR VEHICLE LAW AND PRACTICE § 4:315 (4th ed. 2019) (“[N]o plea agreements whatsoever will be allowed in cases involving driving under the influence of liquor or drugs.”).

106. See *id.*

107. See, e.g., CAL. VEH. CODE § 23635 (West 2020); CONN. GEN. STAT. ANN. § 14-227a (West 2020); FLA. STAT. ANN. § 943.0585 (West 2020); N.H. REV. STAT. ANN. § 265-A:21 (2020); N.C. GEN. STAT. ANN. § 20-138.4 (West 2020); S.D. CODIFIED LAWS § 32-23-1.3 (2020). See generally *Anti-Plea Bargaining Laws and Other Laws Related to Deferred Prosecution in Impaired Driving Cases*, NAT’L CONF. OF STATE LEGISLATURES. (Feb. 16, 2017), <https://www.ncsl.org/research/transportation/anti-plea-bargaining-laws-and-other-laws-related-to-impaired-driving.aspx> (comparing various state anti-plea bargaining laws in the context of DUIs).

108. See 24 RAMSEY, *supra* note 105, § 4:315.

109. See 24 RAMSEY, *supra* note 105, § 4:259 (discussing that New Jersey’s public policy on drunk driving laws has led to the elimination, by the Supreme Court, of many of the defenses that had been traditionally used by attorneys in drunk driving cases).

110. See *State v. Fogarty*, 607 A.2d 624, 626–27 (N.J. 1992).

111. See *id.* at 626–28.

112. See *State v. Tischio*, 527 A.2d 388, 397 (N.J. 1987). Ironically, the State may use extrapolation of evidence to show a defendant’s BAC during a DUI prosecution. See *State v. Oriole*, 581 A.2d 142, 145–46 (N.J. App. Div. 1990).

113. See *State v. Hammond*, 571 A.2d 942, 948 (N.J. 1990).

114. See *Fogarty*, 607 A.2d at 627 (“Moreover, due to the comparative lack of severity of penalties for DWI, certain constitutional rights do not apply to DWI proceedings.”).

trial,¹¹⁵ and *Miranda* warnings are not required before a breathalyzer test.¹¹⁶ Taken altogether, these legal disabilities put the DUI defendant in a position where the prosecution is more likely to secure a conviction because the defendant has fewer options to defend the charge.

b. Statutory Penalties

The statutory penalties for a DUI include non-monetary and monetary penalties:

If you are arrested for a DUI, and it is your first offense, the penalties will include a drivers license suspension of 3 to 12 months; fines and fees of approximately \$750 to \$1,000; up to 30 days in jail; up to 48 hours of driver instruction at the Intoxicated Driver Resource Center (IDRC) and a \$1,000 per year surcharge for three years.

The penalties for a second offense include a two year loss of license; 30 days of community service and up to 90 days in jail; 48 hours at the IDRC; up to \$1,500 in fines and fees as well as the mandatory \$3,000 in surcharges.

A third offense DUI will include mandatory jail time of 180 days; a 10 year loss of license as well as fines, fees and surcharges of over \$5,000. A person convicted of a second or subsequent DUI offense must also install an interlock device on any vehicle they own.¹¹⁷

The most significant statutory non-monetary penalties are potential jail time and license suspension.¹¹⁸ While jail time for a first offense, DUI is usually minimal, driving while serving a license suspension resulting from a DUI is an indictable offense and can lead to further jail time and fines.¹¹⁹

The monetary penalties can be significantly worse than the non-monetary penalties. In addition to any court-imposed fines, surcharges of \$1000 per year for three years for the first and second DUI offense will

115. See *State v. Hamm*, 577 A.2d 1259, 1269–70 (N.J. 1990) (finding no right to jury trial in prosecution for third DWI offense).

116. See *State v. Macuk*, 268 A.2d 1, 9–10 (N.J. 1970).

117. Victoria Dalton, *Penalties for a DUI in N.J. – What You Need to Know*, NJ.COM (Jan. 16, 2019), https://www.nj.com/south-jersey-voices/2016/05/your_lawyer_and_dui.html; see also N.J. STAT. ANN. § 39:4-50 (West 2020).

118. See N.J. STAT. ANN. § 39:4-50 (West 2020).

119. See *id.* § 2C:40-26.

apply.¹²⁰ Sometimes the monetary penalties can cumulatively add up to \$6500.¹²¹ Failure to pay the surcharges results in a judgment, putting ex-offenders in debt.¹²² Employers may be able to view the judgment since it may be contained in a background check.¹²³ Such a judgment is also hard to remove from the ex-offender's credit report¹²⁴ and could be detrimental to the ex-offender's credit.¹²⁵ The most New Jersey offers to people who cannot afford the monetary penalties is a monthly installment plan, but the surcharges are still expected to be paid in full at some point in the future.¹²⁶

The statutory penalties can be especially burdensome for minorities. Demographically, while Caucasian offenders make up the highest proportion of DUIs per year in New Jersey, African-Americans and Hispanics still constitute a disproportionate segment relative to their populations.¹²⁷ This has led to the proposition that minorities are more vulnerable to a charge of impaired driving than Caucasians, even though Caucasians are cited for DUIs the most out of any racial group.¹²⁸

When including the vast wealth disparity between Caucasians and minorities, as a general matter, New Jersey's monetary penalties are clearly more financially damaging to the latter.¹²⁹ For example, Camden,

120. See *Surcharge Violation System*, STATE OF N.J., <https://www.state.nj.us/mvc/license/documents/SurchargeBrochureISS502017.pdf> (last visited Nov. 14, 2020).

121. See *State v. Denelsbeck*, 137 A.3d 462, 477 (N.J. 2016) (Albin, J., dissenting).

122. *Surcharges*, N.J. MOTOR VEHICLE COMM'N., <https://www.state.nj.us/mvc/license/surcharge.htm> (last visited Nov. 14, 2020).

123. See Kevin J. Skelly, *Background Checks: A Primer for New Jersey Employers*, 23 N.J. EMP. L. LETTER 1, 3 (2015).

124. See *Frequently Asked Questions About Judgments*, N.J. CTS., <https://njcourts.gov/courts/superior/faqjudgments.html?lang=eng> (last visited Nov. 14, 2020) (describing the process for removing a judgment from the ex-offender's credit report).

125. Latoya Irby, *Public Records and Your Credit Report*, BALANCE (Sept. 9, 2018), <https://www.thebalance.com/public-records-and-your-credit-report-960740>.

126. See N.J. STAT. ANN. § 17:29A-35 (West 2020); *Surcharges*, *supra* note 122.

127. See N.J. DEPT OF HUM. SERVS., INTOXICATED DRIVING PROGRAM 2013 STATISTICAL SUMMARY REPORT 3 (2014), https://www.state.nj.us/humanservices/dmhas/publications/idp/Statistical_Summary_Repts/Statistical_Rept_2013.pdf. (finding that Caucasians made up 59% of IDRC patients and had a population estimated to be 61%, while African-Americans and Hispanics made up about 36% of IDRC patients and had a population estimated to be 28%.); see also YU & DIETRICH, *supra* note 100. New Jersey has not done a study on race and ethnicity of DUI offenders, but because IDRC is a mandatory treatment program, it should be a good assessment tool in considering the demographics of DUI offenders in New Jersey. See N.J. STAT. ANN. § 39:4-50 (West 2020).

128. See U.S. DEPT OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., ALCOHOL AND HIGHWAY SAFETY: SPECIAL REPORT ON RACE/ETHNICITY AND IMPAIRED DRIVING 6 (2010).

129. See N.J. DEPT OF LAB., MEDIAN HOUSEHOLD INCOME IN 1999 BY RACE AND HISPANIC ORIGIN OF HOUSEHOLDER: NEW JERSEY AND COUNTIES (2000), <https://www.nj.gov/labor/lpa/census/2kccensus/inc/hhrace.htm>; see also *Wealth Inequality in the United States*,

New Jersey, has high poverty and unemployment rates compared to the nation as a whole.¹³⁰ As recently as 2012, Camden was declared the poorest city in the country,¹³¹ which New Jersey's high cost of living aggravates.¹³² As of 2018, Camden's population was roughly 93% African-American and Hispanic.¹³³ In that same year, Camden's median income was \$27,070.¹³⁴ Between 2017 and 2018, Camden police issued the most DUIs in New Jersey.¹³⁵ Based on these statistics, minorities likely made up the majority of DUI offenders in Camden. If minorities made up the majority of DUI offenders in Camden, then the city's low median income combined with the high cost of living in New Jersey makes the monetary penalties for DUIs clearly unbearable for minorities.¹³⁶

c. Stigma and Diminished Employability

Collateral consequences are much greater for DUIs due to their notable creation of stigma and extreme impact on employability. Stigma is clearly heightened when a person has been convicted of a DUI. In some cases, the stigma of a DUI may be based on an ancient conviction and/or an arrest, even when the final disposition is not available.¹³⁷ Some employers attempt to make the distinction between the more severe crimes and lower level offenses when hiring applicants.¹³⁸ This distinction relies on the traditional classification of offenses, such as

INEQUALITY.ORG, <https://inequality.org/facts/wealth-inequality/#racial-wealth-divide> (last visited Nov. 14, 2020).

130. See *Economy in Camden, New Jersey*, BESTPLACES, https://www.bestplaces.net/economy/city/new_jersey/camden (last visited Nov. 14, 2020).

131. See *The Poorest City in the Nation is Camden, NJ*, PBS: METROFOCUS (Sept. 21, 2012, 7:21 PM), <https://www.thirteen.org/metrofocus/2012/09/the-poorest-city-in-the-nation-is-camden-nj/>.

132. Karen Price Mueller, *The High Cost of Jersey: Why We Leave*, NJ.COM (Mar. 29, 2019), https://www.nj.com/inside-jersey/2015/03/the_high_cost_of_jersey_why_we_go.html.

133. *QuickFacts: Camden City, New Jersey*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/camdencitynewjersey> (last visited Nov. 14, 2020).

134. See *id.*

135. Bill Duhart, *The 21 Towns That Issued the Most DWIs in Their Counties*, NJ.COM (May 14, 2019), https://www.nj.com/news/2018/08/21_towns_issued_the_most_dwis_in_their_counties.html.

136. See Mueller, *supra* note 132.

137. Compare Vianna Davila, *Poteet Football Coach Hit with DWI Charge*, MY SAN ANTONIO (Oct. 28, 2010, 12:06 PM), <https://www.mysanantonio.com/news/local/article/Poteet-football-coach-hit-with-DWI-charge-649714.php> (discussing how a football coach, Mario Heredia, was charged with his second DUI after the first one occurred 17 years before), with Jessica Sundance Joyner, *The Social Stigma of DWI*, AVVO (Sept. 30, 2010), <https://www.avvo.com/legal-guides/ugc/the-social-stigma-of-dwi> (discussing Mario Heredia's arrest and the public comments purporting that he should not be allowed to be a football coach, even though no final disposition had been given yet).

138. See Uggen et al., *supra* note 89, at 647.

felonies and misdemeanors.¹³⁹ However, sometimes public perception goes beyond the legal classification of an offense. At least one study shows that a DUI is perceived to be more severe than aggravated assault but less severe than car theft.¹⁴⁰ Translating these offenses to New Jersey's criminal code, aggravated assault is between a fourth- and second-degree crime,¹⁴¹ while car theft is a third-degree crime.¹⁴² This shows that a DUI may carry the same stigma as a second or third-degree crime, although it is classified as a traffic offense.¹⁴³

The stigma and statutory penalties that follow a DUI conviction will inevitably lead to employment issues.¹⁴⁴ Loss of driving privileges may interrupt employment via absences and tardiness, which could result in termination.¹⁴⁵ Professional licenses for “lawyers, doctors, nurses, and even plumbers” may also be affected by a conviction.¹⁴⁶ Some employers even have mandatory firing policies upon learning of the conviction, which may ultimately hurt an ex-offender's career in the future.¹⁴⁷ Furthermore, applications for securing employment, housing, loans, or higher education may ask if the applicant has ever been arrested, and can be affected negatively by whether the applicant answers in the affirmative.¹⁴⁸

139. See *id.* at 647–48 (“Most employers explicitly distinguished between felonies and misdemeanors, consistent with legal and popular notions of severity . . . employers attached far heavier and more *enduring* stigma to felonies than to misdemeanors, with the former often disqualifying applicants and the latter more typically leaving some latitude for discretion.”).

140. See Rajeev Ramchand et al., *A Developmental Approach for Measuring the Severity of Crimes*, 25 J. QUANTITATIVE CRIMINOLOGY 129, 146 (2009). Although this study analyzes and discusses public perceptions on the severity of certain offenses, severity directly translates to stigma of an offense. See Uggen et al., *supra* note 89, at 647–48.

141. See N.J. STAT. ANN. § 2C:12-1(b) (West 2020).

142. See *id.* § 2C:20-2(b)(2)(b).

143. See Ramchand et al., *supra* note 140, at 146 (finding that the public perception of a DUI is that it is more severe than aggravated assault but less severe than car theft). Compare N.J. STAT. ANN. § 39:4-50 (West 2020), with N.J. STAT. ANN. § 2C:12-1(b) (West 2020), and N.J. STAT. ANN. § 2C:20-2.1 (West 2020).

144. See Selbin et al., *supra* note 85, at 2, 4, 6-7; see also Donna Ballman, *9 Ways A DUI Will Destroy Your Career*, AOL (Jan. 21, 2014, 5:00 AM), <https://www.aol.com/2014/01/21/dui-will-destroy-your-career/>.

145. See Ballman, *supra* note 144.

146. See *id.*

147. See *id.*

148. See Fields & Emshwiller, *supra* note 101 (“[A] lingering arrest record can ruin their chance to secure employment, loans and housing.”); *Can an Arrest Affect My College Application?*, LEGAL SETTLEMENT FUNDING (Mar. 2, 2018), <http://blog.umd.edu/legal-settlementfunding/2018/03/02/can-an-arrest-affect-my-college-application/> (finding that colleges still ask on college applications whether the applicant was arrested at any time prior to applying to the college).

Employability issues are aggravated by the accessibility and extensiveness of employment background checks. Because a DUI is a traffic offense, it would be included in driving records.¹⁴⁹ Background checks, which are also called consumer reports, unveil various pieces of personal information about an applicant and very often include driving records.¹⁵⁰ It has been estimated that around 68% of employers conducting background checks also search the applicant's driving record.¹⁵¹ Currently, driving records are more available than ever because New Jersey shares its driving records with at least forty-three other states.¹⁵²

Because a DUI is a traffic offense, if an application requires a person to only disclose criminal arrests and convictions, then an ex-offender is protected from having to disclose that she has been convicted of a DUI.¹⁵³ This might help an ex-offender if the only question pertaining to the ex-offender's criminal history is whether the ex-offender has been convicted of a criminal offense, but that may not be the case. Applications may still ask whether the applicant was ever arrested, and some may even directly ask whether the applicant was convicted of a DUI.¹⁵⁴ The Equal Employment Opportunity Commission recommends that an employer should not reject an applicant based on that applicant's arrest record.¹⁵⁵ But an arrest record can still create the same employment barriers that

149. *How Long Does a DWI Conviction Stay on a New Jersey Criminal Record?*, HG.ORG, <https://www.hg.org/legal-articles/how-long-does-a-dwi-conviction-stay-on-a-new-jersey-criminal-record-46254> (last visited Nov. 14, 2020).

150. *Consumer Reports: What Insurers Need to Know*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/business-center/guidance/consumer-reports-what-insurers-need-know> (last updated Jan. 2020) [hereinafter *Consumer Reports*] ("Consumer reports may include information about a person's credit history, medical conditions, driving record, criminal activity, and even their participation in dangerous sports."); see also Skelly, *supra* note 123 ("Employment background checks, which are referred to as 'consumer reports,' may include information about an individual's creditworthiness, character, reputation, criminal background, driving record, and civil lawsuits against him, among other information.").

151. See *Survey Finds Employment Background Checks Nearly Universal Today*, *supra* note 98.

152. See Elizabeth Buner, *Traffic Resource Center for Judges: The Driver License Compact*, NAT'L CTR. FOR STATE CTS. 1, 2 (Oct. 2015), <http://home.trafficresourcecenter.org/~media/Microsites/Files/traffic-safety/IssueBrief9TheDriverLicenseCompact.ashx> ("[M]ember states are bound to share licensing information with other member states . . .").

153. See 24 RAMSEY, *supra* note 105, § 5:93.

154. See Ballman, *supra* note 144; see also Fields & Emshwiller, *supra* note 101.

155. *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, EEOC (Apr. 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.

a conviction would create¹⁵⁶ because arrest records still have similar stigma as convictions.¹⁵⁷

d. Lack of Post-Conviction Remedies

A substantial limitation that exacerbates ex-offender employability after conviction is that ex-offenders do not have any meaningful options for post-conviction remedies. Currently, the only available post-conviction remedy, in the context of DUIs, is post-conviction relief.¹⁵⁸ Generally, post-conviction relief challenges the judgment of conviction in a limited number of circumstances.¹⁵⁹ When challenging a DUI conviction, those circumstances become fewer and actually may hurt the defendant with more penalties.¹⁶⁰ Ultimately, courts typically refuse to hear post-conviction relief cases, which proves that motions for post-conviction relief are ineffective for giving DUI offenders a second chance.¹⁶¹

The most notable absence in available post-conviction remedies is that DUIs are ineligible for expungement.¹⁶² Although New Jersey courts have not rationalized why a DUI specifically is ineligible for expungement, our judges have reasoned why traffic offenses are ineligible for expungement.¹⁶³ One reason is that the stigma of traffic offenses is not as high as criminal offenses.¹⁶⁴ Another is that because there are so many traffic offenses per year, it would be an administrative

156. See Calvert & Bruno, *supra* note 92, at 130–31 (“The magnitude of negative consequences of having either a criminal conviction or a mere criminal arrest record in one’s past can be deleterious, if not profoundly damning. . . . [A]rrest records can be a hindrance to an innocent citizen’s ability to obtain employment, an education or to obtain credit.” (quoting DEL. CODE ANN. tit. 11 § 4371 (2010))).

157. See Boyer, *supra* note 95, at 7–8; see also Joyner, *supra* note 137 (discussing how people stigmatized a football coach arrested for a DUI, although no final disposition was given).

158. N.J. CT. R. 3:22.

159. See *id.*

160. See 33A ROBERT RAMSEY, NEW JERSEY DRUNK DRIVING LAW § 30:1 (2020 ed.) (“When the underlying reason for the defendant’s license suspension stems from drunk driving or refusal to take a breathalyzer test conviction, he or she will be subject to enhanced penalties. . . .”).

161. See *id.* (“Despite the importance and utility of PCR applications, they are neither heard nor granted in municipal court as a matter of routine.”).

162. N.J. STAT. ANN. § 2C:52-28 (West 2020).

163. See, e.g., *State v. Hammond*, 571 A.2d 942, 944–45 (N.J. 1990) (“[Traffic] violations were [not] intended to constitute ‘offenses’ under the [Criminal] Code.” (citations omitted)).

164. Cf. *State v. Owens*, 254 A.2d 97, 98–100 (N.J. 1969) (explaining how the defendant is charged with a “petty offense” which does not carry the same stigma which follows a “conviction of crime”).

burden to allow traffic offenses to be eligible for expungement.¹⁶⁵ Because post-conviction relief is ineffective, and because expungement is prohibited for DUIs, the resulting lack of available post-conviction remedies creates a major obstacle for ex-offenders living a rehabilitative and law-abiding life to integrate into society.

IV. EXPUNGEMENT

Expungement is a unique and powerful remedy for ex-offenders in New Jersey. Originally only applying to certain criminal convictions, expungements have since broadened to include many offenses.¹⁶⁶ But New Jersey's expungement process has been criticized for its slow and confusing manual petition process.¹⁶⁷ This has led to the implementation of an automatic expungement system, although this system will be heavily underutilized due to its long waiting period.¹⁶⁸ Ultimately, other states have been progressive and have advanced their own expungement laws, some of which incorporate automatic expungement and extend expungement eligibility to DUIs.¹⁶⁹

A. *History and Background of New Jersey's Expungement Laws*

New Jersey's expungement law originated from a 1931 and 1936 bill intended to relieve former criminal offenders of the burden of conviction.¹⁷⁰ The 1936 expungement statute only applied to criminal convictions and was available to criminal offenders if they did not incur a subsequent conviction within ten years after the initial conviction.¹⁷¹

165. See *Division of Highway Traffic Safety: Fact Sheet*, N.J. DEPT. OF L. & PUB. SAFETY, https://www.nj.gov/oag/hts/youlose_factsheets.html (last visited Nov. 15, 2020); see also 24 RAMSEY, *supra* note 105, § 5:93 (“Despite the serious consequences associated with this offense, a drunk driving violation does not constitute a disorderly persons offense. . .”).

166. *Id.* § 2C:52-2 (West 2020).

167. See Heumann et al., *supra* note 4, at 605–08.

168. See N.J. STAT. ANN. § 2C:52-5.4 (West 2020); see also Nila Bala, *Why Other States Should Follow the Lead on New Jersey Clean Slate Law*, HILL (Jan. 10, 2020, 4:00 PM), <https://thehill.com/opinion/criminal-justice/477745-why-other-states-should-follow-the-lead-on-new-jersey-clean-slate-law>.

169. See *infra* note 248 (listing the various state statutes for expunging DUIs); see also, *Driver Record Expungement by Request*, *infra* note 243.

170. Act of Apr. 28, 1931, ch. 345, 1931 N.J. Laws 843, 843–44; Act of June 20, 1936, ch. 174, 1936 N.J. Laws 412, 412–14; see also *In re J.S.*, 121 A.3d 322, 328 (N.J. 2015) (“The purpose of [the 1936] act is to assist only those persons who have one single conviction against them, and from time of the conviction and for a period of ten years thereafter have lived exemplary lives during that time and are able to show by their petition that they have made a complete moral change.” (quoting Act of June 20, 1936, ch. 174, 1936 N.J. Laws 412) (statement of Sponsor)).

171. See *J.S.*, 121 A.3d at 328.

After 1936, the Legislature began promulgating multiple statutes that included their own expungement provisions.¹⁷² In 1979, the Legislature consolidated these statutes into the current uniform expungement statute (“the expungement statute”).¹⁷³ The expungement statute was meant to create “an equitable system of expungement of indictable and nonindictable offenses as well as of arrest records”¹⁷⁴ and to promote uniformity in the court system.¹⁷⁵ While expungement was originally created to relieve the burden of conviction, today expungement is meant to relieve the burden of collateral consequences for criminal offenders.¹⁷⁶

Expungement is considered a powerful form of relief for ex-offenders. Typically, expungement will either remove or seal arrest and conviction records after a certain period of time has lapsed since the arrest and conviction.¹⁷⁷ How expungement statutes are effectuated varies greatly from state to state.¹⁷⁸ Specifically in New Jersey, “[e]xpungement is defined as the extraction and isolation of all records ‘of an offense within the criminal justice system.’”¹⁷⁹ If an expungement is granted, the arrest and conviction is “deemed not have occurred.”¹⁸⁰ This renders the ex-offender’s arrest and/or criminal record as a legal “nullity,” which means that the ex-offender can deny that his arrest or conviction ever happened.¹⁸¹ There are certain entities to whom an ex-offender cannot deny expunged arrests or convictions when applying for employment, such as the state judiciary and law enforcement.¹⁸² However, the ability

172. See *State v. T.P.M.*, 460 A.2d 167, 169–70 (N.J. App. Div. 1983) (describing the Controlled Dangerous Substances Act of 1970, which allowed for expungements of certain drug offenses).

173. See *id.*

174. See *id.* at 170 (quoting S. Judiciary Comm. Statement to S. 3203 (1979)).

175. See *id.* (“Before the enactment of chapter 52 there was no cohesive or uniform expungement practice in [New Jersey’s] criminal justice system.”).

176. See *In re Kollman*, 46 A.3d 1247, 1254 (N.J. 2012) (“[T]he statute is designed to eliminate ‘the collateral consequences imposed upon otherwise law-abiding citizens who have had a minor brush with the criminal justice system.’” (quoting *In re T.P.D.*, 715 A.2d 1048 (N.J. Super. Ct. Law Div. 1997), *aff’d*, 715 A.2d 994 (N.J. Super. Ct. App. Div. 1998)); *State v. K.M.*, 532 A.2d 254, 255 (N.J. App. Div. 1987) (“The purpose of expungement is to eradicate the stigma of a record of an arrest and prosecution.” (citation omitted)).

177. See generally *Kollman*, 46 A.3d at 1254.

178. Doris Del Tosto Brogan, *Expungement, Defamation, and False Light: Is What Happened Before What Really Happened or Is There a Chance for a Second Act in America?*, 49 LOY. UNIV. CHI. L. J. 1, 14–15 (2017).

179. *K.M.*, 532 A.2d at 254 (quoting N.J. STAT. ANN. § 2C:52-1 (West 2020)).

180. N.J. STAT. ANN. § 2C:52-27 (West 2020).

181. Heumann et al., *supra* note 4, at 602 (“[I]n the eyes of the law, [the offense] never happened.”).

182. *Id.* § 2C:52-27(c).

to generally deny disclosure of expunged arrests and convictions still remains the most important component of the expungement statute.¹⁸³

In addition to relieving the burden of an arrest and conviction record, there are societal benefits of expungement, such as reducing recidivism and boosting the economy. The key to reducing recidivism is the time lapsed after conviction and employability.¹⁸⁴ Studies have shown that “an individual’s propensity to commit a future crime decreases as that individual’s crime-free duration increases.”¹⁸⁵ Interestingly, it has also been noted that “the more time that elapses between the creation of the arrest record and the expungement, the more time exists for an individual to enter the record-recidivism cycle.”¹⁸⁶ If expungement is granted, it would significantly boost the ex-offender’s employability, which would reduce the likelihood to recidivate.¹⁸⁷ Thus, an ex-offender who remains law-abiding for a certain amount of time should be granted an expungement because the ex-offender’s propensity to reoffend will have dropped significantly. This propensity to reoffend will keep decreasing if the ex-offender gains employment.¹⁸⁸

Economically, expungement actually saves money for the economy, employees, and employers. In 2014, it was estimated that 1.7 million workers were excluded from the workforce due to their criminal records, which resulted in an economic loss of \$78 billion.¹⁸⁹ This estimate may be even higher considering that the study did not include misdemeanor convictions.¹⁹⁰ Furthermore, the economic benefits of expungement would see “wages increase by 25 percent on average” and “[e]mployers . . . gain a larger pool of potential workers to choose from when hiring,” thus boosting productivity and economic growth.¹⁹¹

183. *See id.* § 2C:52-27.

184. *See also* YU & DIETRICH, *supra* note 100, at 7 (“Research demonstrates that the single greatest predictor of recidivism is the lack of stable employment. . . . [P]roviding individuals the opportunity for stable employment actually lowers crime recidivism rates and thus increases public safety.” (quoting MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMMELM, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011))).

185. *See* Leasure & Andersen, *supra* note 97, at 272.

186. *See* Anna Kessler, *Excavating Expungement Law: A Comprehensive Approach*, 87 TEMP. L. REV. 403, 437 (2015).

187. *See* Bala, *supra* note 168.

188. *See id.*

189. *Barriers to Work: People with Criminal Records*, NAT’L CONF. OF STATE LEGISLATURES (June 7, 2018), <https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx> [hereinafter *Barriers to Work*].

190. *See id.*

191. *See* Bala, *supra* note 168.

B. Eligible and Ineligible Offenses

The expungement statute is generally a broad statute. It covers a large range of offenses including most indictable offenses,¹⁹² disorderly persons and petty disorderly persons offenses,¹⁹³ ordinance violations,¹⁹⁴ adjudications of juvenile delinquency,¹⁹⁵ and convictions of certain drug offenses.¹⁹⁶ Even dismissals and certain records of arrests not resulting in convictions are eligible for expungement.¹⁹⁷

Expungement eligibility for disorderly persons offenses is especially broad. For example, the only limitation the expungement statute presents for expunging disorderly persons offenses is that the ex-offender must not be convicted of more than four offenses and must not have been convicted of an indictable offense.¹⁹⁸

The expungement statute specifically enumerates indictable offenses that are ineligible for expungement.¹⁹⁹ This includes criminal homicide, death by auto, kidnapping, luring and enticing, human trafficking, sexual assault, aggravated sexual assault, false imprisonment, robbery, arson, child endangerment, pedophilia-related offenses, terrorism, and certain drug distribution or possession offenses.²⁰⁰ These indictable offenses are likely ineligible for expungement because they reflect some of the most heinous crimes.²⁰¹ This enumeration makes the statute broad because if an indictable offense was not enumerated under this provision, it is presumptively eligible for expungement.²⁰²

While some parts of the expungement statute are very broad, some parts are specifically narrow. The most narrow provision is the one making traffic offenses ineligible for expungement.²⁰³ As said before, New Jersey courts reason that because traffic offenses do not carry the same

192. N.J. STAT. ANN. § 2C:52-2 (West 2020).

193. *Id.* § 2C:52-3.

194. *Id.* § 2C:52-4.

195. *Id.* § 2C:52-4.1.

196. *Id.* § 2C:52-5.

197. *Id.* § 2C:52-6.

198. *Id.* § 2C:52-3.

199. *Id.* § 2C:52-2.

200. *Id.*; see also *State v. T.P.M.*, 460 A.2d 167, 170–72 (N.J. App. Div. 1983) (finding defendant's two convictions for drug possession were not subject to expungement under the newly promulgated expungement statute).

201. See FREDERIC G. REAMER, HEINOUS CRIME: CASES, CAUSES, AND CONSEQUENCES 9–11 (2004); see also Ramchand et al., *supra* note 140, at 146 (finding that the most severe offenses are arson and murder).

202. See N.J. STAT. ANN. § 2C:52-2 (West 2020).

203. See *id.* § 2C:52-28 (“Nothing contained in this chapter shall apply to arrests or conviction for motor vehicle offenses contained in Title 39.”).

stigma as a criminal offense, they do not warrant expungement.²⁰⁴ Courts also reason that because there are large numbers of traffic offenses occurring every year, permitting expungement for traffic offenses would be an administrative burden.²⁰⁵ This reasoning is not totally unfounded, considering most traffic offenses are punished in a summary fashion with de minimis fines and driver's license points.²⁰⁶ Moreover, the volume of traffic offenses that occur every year is in the millions and seems to be steadily growing.²⁰⁷

Regardless, the goal of the expungement statute remains the same. It is a statute meant to provide a second chance to criminal offenders who have rehabilitated and have become law-abiding citizens.²⁰⁸ This underlying purpose is continuously progressing and expanding the expungement statute.²⁰⁹ It also seems unjust to exclude traffic offenses merely because it is inconvenient to the court system.

C. *The Expungement Process*

Expungement has often been called a “20th century solution to a 21st century problem” partly because of its complicated manual petition process.²¹⁰ New Jersey offers an online expungement handbook that may serve as a guide to the expungement process.²¹¹ This handbook is meant to be used by the ex-offender but uses legal terminology an ex-offender

204. See *State v. Owens*, 254 A.2d 97, 98–100 (N.J. 1969).

205. See, e.g., *State v. K.M.*, 532 A.2d 254, 255 (N.J. App. Div. 1987) (“The purpose of expungement is to eradicate stigma of a record of an arrest and prosecution. . . . Generally, Title 39 violations do not carry the same stigma as the offenses specified in the expungement statute. . . . Moreover, the legislature in removing Title 39 violations from the expungement statute must have been aware of the great number of such violations which are processed each year and may have decided not to burden our courts with their expungement.” (citations omitted)).

206. See *Fines for Traffic Violations*, *supra* note 43.

207. See *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72 (finding that there were 5,743,197 traffic-related citations in 2018-19, which was a 9% increase from the previous year).

208. See 33A ROBERT RAMSEY, NEW JERSEY PRACTICE SERIES, CRIMINAL LAW § 46:1 (5th ed. 2019).

209. See, e.g., N.J. STAT. ANN. § 2C:52-32 (West 2020) (“This chapter shall be construed with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby persistent violators of the law or those who associate themselves with continuing criminal activity have a regular means of expunging their police and criminal records.”); see also *State v. A.N.J.*, 487 A.2d 324, 328 (N.J. 1985).

210. See Heumann et al., *supra* note 4, at 604.

211. See *How to Expunge Your Criminal and/or Juvenile Record*, N.J. CTS., https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/10557_expunge_kit-11-2012.pdf (last updated Nov. 2, 2012) [hereinafter *Expungement Handbook*].

likely would not understand.²¹² In addition, there are many forms that have to be filled out with precise accuracy.²¹³

The most cumbersome part of the process may be that the ex-offender must gather court documents and information pertaining to the prior judgment and disposition of the arrest and conviction.²¹⁴ This information encompasses the ex-offender's arrest date, the statute violated, the initial indictment or summons, the final disposition, and the punishment.²¹⁵

After gathering these documents and filling out the forms, the ex-offender must serve the petition to the government agencies involved in the case.²¹⁶ This includes, but is not limited to, the attorney general, superintendent of state police, county prosecutor, court clerk, and chief of police where the arrest occurred.²¹⁷ Any of these parties may object to a petition and argue for its denial.²¹⁸ Ultimately, it can take between eight to twelve months for the petition to be either granted or denied.²¹⁹

In order for an offense to be eligible for expungement, enough time must have elapsed since completion of the sentence or last payment of the fines, whichever is later.²²⁰ For indictable offenses, the waiting period is 6 years.²²¹ For disorderly person offenses or petty disorderly persons offenses, the waiting period is 5 years.²²² For ordinance violations, the waiting period is 2 years.²²³ Because waiting periods start after completion of the sentence and after all fines are paid, an ex-offender might not be eligible for expungement for many years after conviction.²²⁴

In 2012, the New Jersey Supreme Court created a judicial process in an attempt to reduce the waiting periods by granting of earlier expungements.²²⁵ In *In re Kollman*, the Court found that an ex-offender could qualify for an early expungement if the expungement was in "the public interest."²²⁶ Factors that weighed into whether an expungement

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.*

216. *See id.*

217. *See id.*; *see also* N.J. STAT. ANN. § 2C:52-10 (West 2020).

218. *See* N.J. STAT. ANN. § 2C:52-14 (West 2020).

219. *See* Katherine O'Brien, *Drug Court Expungement: Frequently Asked Questions*, 322 N.J. L. 40, 43 (2020) ("The current processing time for a general expungement in New Jersey is eight to twelve months, and in some cases, may take even longer.").

220. *See* N.J. STAT. ANN. § 2C:52-2 (West 2020); § 2C:52-3; § 2C:52-4.

221. *See id.* § 2C:52-2.

222. *See id.* § 2C:52-3.

223. *See id.* § 2C:52-4.

224. *See id.* § 2C:52-2; *id.* § 2C:52-3; *id.*

225. *See In re Kollman*, 46 A.3d 1247, 1261–1262 (N.J. 2012).

226. *See id.* at 1250–51.

was in the public interest included the level of the offense and the ex-offender's current character and conduct.²²⁷ Yet, today, expungements in the public interest are "rarely pursued."²²⁸ This may be due to the substantial cost of retaining an attorney.²²⁹ In addition, even if it is pursued, there are some doubts as to what the outcome will be because "[j]udges . . . treat these petitions with great caution[.]"²³⁰

Is the manual petition process really necessary anymore? Some commentators believe it is not because expungement is invariably granted as long as "the case satisfies the minimum conditions."²³¹ Court appearances are rarely required, and although the expungement statute allows government officials to object to the expungement after the petition is filed, the objector would have to show that "[t]he need for the availability of the records outweighs the desirability of having a person freed from any disabilities."²³² The need for availability of the records has outweighed the latter in very limited circumstances.²³³ But it has also been suggested that the lack of objections and consistent approval of expungement applications render denials as "largely symbolic."²³⁴

D. Automatic Expungement

The complexity of manual petition processes has led to the rise of states adopting automatic petition processes so that expungement is automatic as soon as an ex-offender is eligible for expungement.²³⁵ Aside from technical know-how, an automatic expungement system is as simple as creating an electronic filing system, appointing a task force, and budgeting to hire people that can run the electronic filing system.²³⁶ An automatic petition process costs significantly less money than a manual

227. See *id.* at 1261.

228. See Heumann et al., *supra* note 4, at 606.

229. See *id.*

230. See *id.*

231. See *id.* ("[A]s one respondent put it, "at least 999 out of 1000 times [expungement is granted.]"); see also Allan Marain, *Expungement of Criminal Proceedings*, 232 N.J. L. 24, 27 (2005) ("Most courts do grant expungement applications on the papers.").

232. See N.J. STAT. ANN. § 2C:52-14 (West 2020); see also O'Brien, *supra* note 219, at 42 ("In the vast majority of expungement cases, no court appearance is required. . .").

233. See Heumann et al., *supra* note 4, at 605; O'Brien, *supra* note 219, at 42.

234. See Heumann et al., *supra* note 4, at 606–07.

235. See Bala, *supra* note 168; see also Hannah Knowles, *Criminal Records Can Be a 'Life Sentence.' This State Is Automatically Sealing Some*, WASH. POST (July 1, 2019, 4:59 PM), <https://www.washingtonpost.com/nation/2019/07/01/criminal-records-can-be-life-sentence-poverty-this-state-is-automatically-sealing-some/> (discussing how Pennsylvania recently became the first state to introduce an automatic expungement system).

236. See Bala, *supra* note 168.

petition process and is more efficient.²³⁷ The automatic petition process also allows ex-offenders, who may not understand the complicated manual petition process or have no knowledge of expungement as a form of relief, to more easily attain expungement.²³⁸

Many states have already implemented automatic expungement systems.²³⁹ For example, Pennsylvania established an automatic expungement system that automatically expunges records after ten years.²⁴⁰ Another example is Utah, which automatically expunges records in as little as five years.²⁴¹ Utah's process requires an ex-offender to meet certain requirements including being "crime-free for specific time periods based on the type of crime committed, hav[ing] no open or pending criminal cases[,] and [having] no outstanding fees or fines due."²⁴²

Some states have even begun introducing automatic expungement for traffic offenses.²⁴³ For example, Maryland allows many traffic offenses to be expunged if the person was not convicted of a traffic offense in the past three years, and the person's driver's license is not suspended or revoked.²⁴⁴ One of the only limitations in Maryland's automatic expungement system for traffic offenses is that DUIs are ineligible for expungement.²⁴⁵

237. See *id.* ("Despite the initial costs, automating expungements can likely save money in the long run. One study found that the cost to clear each record in an automated system is around five cents. This is much less expensive than the costs for each record in a model based on petitions, which . . . is estimated to be in the thousands.")

238. See Kessler, *supra* note 186, at 437 ("Automatic expungement saves judicial and individual resources, and mitigates the problem of unawareness of the expungement remedy."); see also Bala, *supra* note 168 ("[O]nly about 6 percent of eligible individuals actually apply for expungement . . . while most charges can be expunged, many individuals do not apply simply because they do not know expungement exists. Even if they do know, the process is costly and cumbersome[.]").

239. See Adam H. Rosenblum, *Which States Are Making It Easier to Clear a Criminal Record*, ROSENBLUM L. (July 16, 2020), <https://rosenblumlaw.com/data/clearing-criminal-records-ranking-the-states-from-toughest-to-easiest/updates>.

240. Knowles, *supra* note 235.

241. 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. 16, 2020), <https://www.sltrib.com/news/2019/03/14/utah-lawmakers-pass-clean/>; *Utah Becomes the Second State with Automatic Expungement*, RECORDGONE (Apr. 17, 2019), <https://www.recordgone.com/news/2019/utah-automatic-expungement-hb431> [hereinafter *Utah's Automatic Expungement*].

242. Rachel Looker, *Minor Crimes Get 'Clean Slate' in Utah*, NACO (Apr. 29, 2019), <https://www.naco.org/articles/minor-crimes-get-clean-slate-utah>.

243. See *Driver Record Expungement by Request*, MD. DEPT OF TRANSP., <https://mva.maryland.gov/about-mva/Pages/info/26100/26100-21T.aspx> (last visited Nov. 15, 2020).

244. *Id.*

245. *Id.*

New Jersey has passed legislation for automatic expungement of certain crimes, disorderly persons offenses, and petty disorderly persons offenses after ten years.²⁴⁶ However, this system may be quite underutilized since an ex-offender will only be eligible for automatic expungement after ten years since the completion of the sentence and if all fines have been paid.²⁴⁷

E. *DUI Expungement in Other States*

Expungement laws pertaining to DUIs is not a theoretical concept. At least twenty-four states have some form of expungement or record sealing relief for DUI offenders.²⁴⁸ For example, California's DUI expungement statute permits an ex-offender to expunge a DUI conviction if they are currently not being charged with another crime, completed all sentence requirements, paid all fines, and waited at least three years since conviction.²⁴⁹ Another more recent record sealing law is Texas's H.B. 3016.²⁵⁰ This legislation permits first-time DUI offenders to seal their record if they had not been convicted of another offense, paid all costs and fines, and a waiting period of between two and five years has lapsed since conviction.²⁵¹

Recently, Wisconsin proposed similar legislation, modeling their statute upon Texas's H.B. 3016.²⁵² One of the bill's sponsors, Senator André Jacque, reasoned:

Having a [DUI] conviction on your record can have far-reaching consequences, from showing up as a red flag on a potential

246. N.J. STAT. ANN. § 2C:52-5.4 (West 2020); *see also* Bala, *supra* note 168.

247. *See id.* § 2C:52-5.4; *see also* Bala, *supra* note 168.

248. *See* ARIZ. REV. STAT. ANN. § 13-905 (2020); ARK. CODE ANN. §§ 16-90-1401, -1405 (2020); CAL. PENAL CODE § 1203.4 (West 2020); COLO. REV. STAT. ANN. § 19-1-306 (West 2020); CONN. GEN. STAT. ANN. § 54-142a(d) (West 2020); DEL. CODE ANN. tit. 11, § 4374 (West 2020); IDAHO CODE ANN. § 19-2604 (West 2020); IND. CODE ANN. § 35-38-9-6 (West 2020); IOWA CODE ANN. §§ 907.3, 907.9 (2017); KAN. STAT. ANN. § 21-6614 (West 2020); KY. REV. STAT. ANN. § 431.078 (West 2020); MASS. GEN. LAWS ANN. ch. 276, § 100A (West 2020); MINN. STAT. ANN. § 609A.02 (West 2020); MO. ANN. STAT. § 577.054 (West 2020); MONT. CODE ANN. § 46-18-1108 (West 2020); NEV. REV. STAT. ANN. § 179.285 (West 2020); N.H. REV. STAT. ANN. § 651-C:5 (2020); N.C. GEN. STAT. ANN. § 15A-145 (West 2020); OKLA. STAT. ANN. tit. 22, § 18 (West 2020); 18 PA. CONS. STAT. § 9122 (2020); 12 R.I. GEN. LAWS ANN. § 12-1.3-2 (West 2020); S.D. CODIFIED LAWS § 23-6-8.1 (2020); TEX. GOV'T CODE ANN. § 411.0731 (West 2020); WYO. STAT. ANN. § 7-13-1501 (West 2020).

249. CAL. PENAL CODE § 1203.4 (West 2020); CAL. VEH. CODE § 23600 (West 2020).

250. H.B. 3016, 85th Leg., Reg. Sess. (Tex. 2017).

251. *Id.*

252. *Testimony on S. B. 198 Before the S. Judiciary and Pub. Safety Comm.*, 2019 WIS. SESS. LAWS 198 (Wis. 2019) (statement of Sen. André Jacque, Vice-Chair, S. Judiciary and Pub. Safety Comm.) [hereinafter *Wisconsin Senate Testimony on S.B. 198*].

employer's background check, to preventing a person from qualifying for a professional license, to affecting their ability to meet financial aid requirements for college or graduate school.

SB 198 gives first time offenders a second chance as long as they don't try to drive drunk again.²⁵³

The bill has garnered support from Wisconsin senators and it is even backed by Mothers Against Drunk Driving.²⁵⁴

One of the driving points behind the Texas and Wisconsin legislation is that expungement is only available to first-time DUI offenders.²⁵⁵ This conclusion makes sense because first-time DUI offenders comprise the vast majority of DUI offenses in the United States.²⁵⁶ Moreover, legislators and courts often view repeat DUI offenders as having substance abuse problems, while first-time DUI offenders are regarded as "social drinkers."²⁵⁷ The perceived difference is that first-time DUI offenders only need lighter sanctions to be effectively deterred from drunk driving.²⁵⁸ This view is not unfounded, since the recidivism rate of DUI offenders is declining.²⁵⁹ Thus, it is not unreasonable to believe that once arrested, a first-time DUI offender is unlikely to be cited for a DUI again.²⁶⁰

V. DISCUSSION

Expungement and DUI laws raise several issues that need to be resolved. The first issue is that the ban on expungement of DUIs solely due to its classification as a traffic offense is illogical when comparing

253. *Id.*

254. *Id.*

255. H.B. 3016, 85th Leg., Reg. Sess. (Tex. 2017); *Wisconsin Senate Testimony on S.B. 198*, *supra* note 252.

256. See NATHAN WARREN-KIGENYI & HEIDI COLEMAN, U.S. DEPT OF TRANSP., *DWI RECIDIVISM IN THE UNITED STATES: AN EXAMINATION OF STATE-LEVEL DRIVER DATA AND THE EFFECT OF LOOK-BACK PERIODS ON RECIDIVISM PREVALENCE 1* (2014) (finding that repeat offenders make up 25% of drivers arrested for DUIs).

257. See William J. Rauch et al., *Risk of Alcohol-Impaired Driving Recidivism Among First Offenders and Multiple Offenders*, 100 AM. J. PUB. HEALTH 919, 919 (2010).

258. See *id.* ("It is a widely held belief among the legislative and judicial branches of state government that most first offenders criminally convicted of an alcohol-related traffic offense are overindulging 'social drinkers' who may have had only a single isolated drinking and driving episode that resulted in arrest. This belief often translates into lighter sanctions for first offenders. . . . Moreover, the general perception of the first-time offender is someone who is not a problem drinker, is generally law abiding, can be reasoned with, and only needs education.").

259. *Id.* at 921.

260. See *id.*

DUIs to other expungable offenses. The second consideration is that DUIs would have been eligible for expungement if they remained disorderly persons offenses as previously classified, and that the fiscal purpose behind changing the DUI's classification to a traffic offense is no longer necessary. The third issue is that the judicial reasoning behind barring expungement for traffic offenses should not apply to DUIs because DUIs clearly have a greater stigma than traffic offenses, and, since DUIs only make up an insignificant portion of traffic offenses and the automatic petition process could help expedite the petition process, there would not be a great administrative burden. The last concern is that the penalties and collateral consequences of DUIs create significant obstacles for ex-offenders who are trying to live a rehabilitative and law-abiding life, and expungement would help relieve those barriers.

A. *Comparison of Stigma, Criminal Procedures, and Punishment Schemes of DUIs to Other Expungable Offenses*

It is unreasonable that most criminal offenses and ordinance violations are eligible for expungement when DUIs are not, solely due to their classification as a traffic offense. The New Jersey Supreme Court has suggested that the actual stigma of an offense might be greater than the Legislature's classification of that offense.²⁶¹ Further, the Court has found that the purpose of expungement was meant to relieve the stigma that attaches to offenses.²⁶² Based on these rationales, it seems that because DUIs are classified as traffic offenses, yet carry a greater stigma than their classification, DUIs are the prototypical offenses that should be eligible for expungement.

Comparing the stigma of various offenses that are eligible and ineligible for expungement underscores why DUIs should not be precluded from expungement due to their classification as traffic offenses. First, the specifically enumerated indictable offenses ineligible for expungement are the most heinous offenses and no doubt have worse stigma than DUIs.²⁶³ Second, ordinance violations are eligible for

261. *State v. Owens*, 254 A.2d 97, 99 (N.J. 1969).

262. *Compare Owens*, 254 A.2d at 99–100 (suggesting that the actual stigma of an offense may be greater than its legal classification), *with In re Kollman*, 46 A.3d 1247, 1254 (N.J. 2012) (finding that the expungement statute's purpose was to eliminate collateral consequences of a conviction), *and State v. K.M.*, 532 A.2d 254, 255 (N.J. App. Div. 1987) (“The purpose of expungement is to eradicate the stigma of a record of an arrest and prosecution.”).

263. *Compare* N.J. STAT. ANN. § 2C:52-2 (West 2020) (enumerating indictable offenses ineligible for expungement, such as criminal homicide, arson, and robbery), *with Ramchand et al.*, *supra* note 140, at 146 (finding that DUI's are viewed as moderately severe, and that more heinous crimes such as murder, arson, and robbery are viewed as more severe).

expungement even though they have a similar stigma to traffic offenses.²⁶⁴ Third, aggravated assault and car theft are eligible for expungement,²⁶⁵ and a study has shown that DUIs have a similar level of stigma to aggravated assault but a lesser level of stigma than car theft.²⁶⁶ If a DUI has less stigma than a non-expungable indictable offense, some lesser offenses may be expunged, and some of the expungable indictable offenses have a similar or greater stigma than DUIs, then DUIs manifestly should be eligible for expungement due to their stigma.

Arguably, the Court has reasoned that the actual stigma of an offense should be viewed separately from the offense's classification.²⁶⁷ But even disregarding the stigma, DUIs carry striking similarities to disorderly persons offenses and ordinance violations, both of which are expungable offenses. Procedurally, DUIs share essentially the same criminal proceedings as disorderly persons offenses and ordinance violations.²⁶⁸ Schematically, disorderly persons offenses, ordinance violations, and DUIs all share similar punishment schemes in terms of jail time and monetary penalties.²⁶⁹ Although DUIs are not considered criminal offenses, both their criminal-like proceedings and punishment schemes are significant enough to classify DUIs as quasi-criminal offenses.²⁷⁰ Thus, even if stigma is not evaluated in considering whether DUIs should be eligible for expungement, the similarity between the criminal proceedings and punishment schemes for disorderly persons offenses, ordinance violations, and DUIs should still render DUIs expungable offenses.

B. *DUIs Had the Right Classification at the Wrong Time*

DUIs should be eligible for expungement because, historically, they would have been eligible for expungement if they remained a disorderly persons offense.²⁷¹ Nothing in the expungement statute limits whether a specific disorderly persons offense may not be eligible for expungement.²⁷² The only limitation is that the ex-offender must not

264. N.J. STAT. ANN. § 2C:52-4 (West 2020); see *Owens*, 254 A.2d at 98–100 (noting that traffic offenses and ordinance violations are generally lesser offenses).

265. See N.J. STAT. ANN. § 2C:52-2 (West 2020); see also *id.* § 2C:12-1.b; *Id.* § 2C:20-2.1.

266. See Ramchand et al., *supra* note 140, at 146.

267. See *Owens*, 254 A.2d at 98–100.

268. See *State v. Rodriguez*, 682 A.2d 764, 767 (N.J. Super. Ct. Law Div. 1996).

269. Compare N.J. STAT. ANN. § 39:4-50 (West 2020), with N.J. STAT. ANN. § 2C:43-8 (West 2020), and N.J. STAT. ANN. § 40:49-5 (West 2020).

270. See *Rodriguez*, 682 A.2d at 766–67.

271. See *State v. Hamm*, 577 A.2d 1259, 1264 (N.J. 1990).

272. See N.J. STAT. ANN. § 2C:52-3 (West 2020).

have been convicted of more than four disorderly persons offenses nor has been convicted of any crime.²⁷³ DUIs would have been eligible for expungement today if the 1921 legislation did not change their classification into a traffic offense.²⁷⁴

Furthermore, the original purpose of downgrading DUIs to traffic offenses is outdated and has lost its significance. DUIs were downgraded to traffic offenses²⁷⁵ when the New Jersey Motor Vehicle Commission decided that the change was necessary to fund the state government.²⁷⁶ But now the State is collecting over \$200 million per year from traffic offenses, of which DUIs only make up an insignificant portion.²⁷⁷ The state also receives funding from the federal government for imposing stricter non-monetary punishments on DUI offenders.²⁷⁸ Consequently, because DUIs make up a small portion of traffic offenses in New Jersey and the State already receives federal funding for imposing stricter DUI laws, DUIs remaining as disorderly persons offenses would have a negligible impact on the state government's revenue stream.

The argument, that DUIs would be expungable if they were still disorderly persons offenses and that the purpose of the 1921 DUI statute is no longer valid, may lead to the proposition that DUIs should be upgraded to disorderly persons offenses. Indeed, the vast majority of states classify first offense DUIs as misdemeanors, the equivalent of a disorderly persons offense in New Jersey.²⁷⁹ However, disrupting the current legal classification system could have a serious consequence in interrupting funding for *local* governments.²⁸⁰ Considering some municipalities are highly impoverished, such as Camden, this is likely a necessary source of revenue for them.²⁸¹ Allowing DUIs to become eligible for expungement is a better option because it would fill in the gaps

273. See *id.* § 2C:52-3(b).

274. See *Hamm*, 577 A.2d at 1265.

275. See *id.*

276. See COMMISSION REPORT, *supra* note 64, at 4.

277. Compare Herzog, *Ticket Revenue*, *supra* note 78 (finding that the state collected over \$405 million in 2015 from traffic offenses), with *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72 (showing that out DUIs make up only .05% of all traffic violations in 2018-19).

278. See Tebo, *supra* note 69, at 37; *Funding Programs*, *supra* note 80.

279. See *supra* note 50.

280. See Herzog, *Ticket Revenue*, *supra* note 78 (discussing how half of the proceeds of traffic offenses go to the municipalities).

281. See *Economy in Camden, New Jersey*, *supra* note 130 (comparing Camden's economy with the United States economy); Duhart, *supra* note 135. To be exact, DUIs make up .05% of traffic offenses and traffic offenses amount to \$405 million in revenue, which would make DUIs responsible for roughly \$20.25 million, half of which goes to the municipalities. Compare Herzog, *Ticket Revenue*, *supra* note 78, with *Municipal Court Statistics: July 2018-June 2019*, *supra* note 72.

history had left open without impairing any impoverished municipalities' need for revenue.

C. The Judicial Reasoning for Barring Expungement of Traffic Offenses Should Not Apply to DUIs

New Jersey's case law on exempting traffic offenses from expungement is unpersuasive in that its consideration of stigma and administrative burden are misleading and outdated.²⁸² The first rationale, that the stigma for traffic offenses is less than the stigma of criminal offenses, is not entirely true because a DUI has been viewed as having a similar stigma to some indictable offenses.²⁸³ It is not fair that traffic offenses are analyzed collectively while DUIs are a clear outlier of the group.

This rationale is most problematic when seen in the employment context. While some employers may differentiate between indictable offenses and disorderly persons offenses, the public perception of DUIs as more severe than some indictable offenses pushes the stigma of DUIs beyond their classification as traffic offenses.²⁸⁴ With the growing likelihood that a background check will include both the criminal history and driving records, this might lead to misinterpretations by employers that could be fatal to an ex-offender's employment prospects.²⁸⁵

Consider, for example, if a former DUI offender fills out a job application and answers a question about her criminal history in the negative. If the prospective employer performs a background check that includes driving records, he will see the DUI in her driving records but not in her criminal history.²⁸⁶ If the prospective employer does not understand that a DUI is not a criminal offense,²⁸⁷ he may believe the ex-offender is lying about her criminal history because he may subjectively feel that the stigma of a DUI is equivalent to some indictable offenses.

282. See *State v. K.M.*, 532 A.2d 254, 255 (N.J. App. Div. 1987).

283. See *Ramchand et al.*, *supra* note 140, at 146. Compare N.J. STAT. ANN. § 39:4-50 (West 2020), with N.J. STAT. ANN. § 2C:12-1(b) (West 2020), and N.J. STAT. ANN. § 2C:20-2.1 (West 2020).

284. Compare *Uggen et al.*, *supra* note 89, at 647 (discussing that severity attached to the legal classification may affect an employer's decision to hire a prospective employee), and *K.M.*, 532 A.2d at 255 (reasoning that expungement may not be allowed for traffic offenses partly because stigma of traffic offenses is less than criminal offenses), with *Ramchand et al.*, *supra* note 140, at 146 (finding that the public perception of the severity of a DUI is between aggravated assault and car theft). See also *ROBINSON*, *supra* note 25, at 4–6 (criticizing New Jersey's gradation system due to improper grading of offenses).

285. See *Survey Finds Employment Background Checks Nearly Universal Today*, *supra* note 98.

286. See *supra* Part II.

287. See *supra* Part I.

Ironically, although the ex-offender legally had not lied, she may still suffer employment difficulties due to the stigma associated with DUIs. This scenario is even more likely to happen with a New Jersey resident looking for out-of-state employment because a DUI is viewed as a misdemeanor in the vast majority of other states²⁸⁸ and driving records are readily available to out-of-state employers.²⁸⁹

The second rationale, that expungement of traffic offenses would cause an administrative burden for the courts, is simply too broad and outdated. The rationale is too broad because DUIs only make up a very insignificant portion of the total number of traffic offenses per year and are steadily decreasing over time.²⁹⁰ The rationale is outdated because, at the time, the manual petition process was the only way to expunge arrest and conviction records.²⁹¹ It was then reasonable to believe that, because there are millions of traffic violations every year,²⁹² there could be an overwhelming volume of manual petitions which would burden the system.²⁹³

Nevertheless, in the present, all traffic offenses could probably be efficiently expunged without causing an administrative burden because New Jersey has already implemented an automatic expungement system.²⁹⁴ Many states already expunge DUIs,²⁹⁵ and some states have begun automatically expunging traffic offenses.²⁹⁶ However, this Note only argues that merely DUIs, and not all traffic offenses, should be eligible for expungement. Thus, it should not be an administrative burden to expunge DUIs because DUIs make up an insignificant portion of all traffic offenses, and New Jersey has already implemented an automatic expungement system which could be used to expedite the petition process for expunging DUIs.

288. *Supra* note 50.

289. *See* Buner, *supra* note 152.

290. *See Municipal Court Statistics: July 2018-June 2019, supra* note 72.

291. *See supra* Part III.

292. *See Municipal Court Statistics: July 2018-June 2019, supra* note 72.

293. *See* State v. K.M., 532 A.2d 254, 255 (N.J. App. Div. 1987) (describing the administrative burden that results from allowing traffic offenses to be expunged).

294. *See* N.J. STAT. ANN. § 2C:52-5.4 (West 2020); *see also* Bala, *supra* note 168 (discussing cost and efficiency benefits of an automatic expungement system).

295. *See supra* note 248 (listing the various state statutes for expunging DUIs).

296. *See, e.g., Driver Record Expungement by Request, supra* note 243.

D. Expungement Offers a Valuable Form of Relief From the Penalties and Collateral Consequences of a DUI Conviction

Penalties and collateral consequences create significant economic and social barriers to the many DUI defendants and ex-offenders.²⁹⁷ Various legal disabilities pose obstacles in defending or reducing a DUI charge, raising the likelihood that prosecutors will secure the conviction.²⁹⁸ After conviction, the monetary penalties are burdensome and are especially taxing for the minority populations who are expected to pay the fines and surcharges regardless of their financial circumstances.²⁹⁹ If ex-offenders cannot pay the monetary penalties, the judgment and indefinite license suspension can be detrimental to a person's credit and employability, while also leaving the ex-offender in serious debt.³⁰⁰ Collectively, the collateral consequences that result from the conviction create substantial difficulties in employment, whether that employment be current or prospective.³⁰¹

A direct and effective form of relief from the burden caused by legal disabilities, statutory penalties, and collateral consequences would be expungement. Expunging DUIs would afford some fairness to the system by increasing employability of ex-offenders after conviction.³⁰² This increase in employability and wages should help ex-offenders afford the monetary penalties, diminish the ex-offender's debt, reduce recidivism, decrease economic debt, and boost the available workforce with qualified candidates.³⁰³ Eventually, the benefits of expungement could improve the overall economy, advance public safety, and help the ex-offender become a full and productive member of society.³⁰⁴

297. See *supra* Part II.

298. See *State v. Fogarty*, 607 A.2d 624, 626–27 (N.J. 1992) (traditional and quasi entrapment); *State v. Hamm*, 577 A.2d 1259, 1264 (N.J. 1990) (right to jury trial); *State v. Hammond*, 571 A.2d 942, 948 (N.J. 1990) (involuntary intoxication); *State v. Tischio*, 527 A.2d 388, 397 (N.J. 1987) (extrapolation of evidence); *State v. Macuk*, 268 A.2d 1, 9–10 (N.J. 1970) (*Miranda* rights before submitting to a breathalyzer test), *overruled by State v. Stever*, 527 A.2d 408 (N.J. 1987); 24 RAMSEY, *supra* note 105, § 4:315 (ban on plea bargaining).

299. See N.J. STAT. ANN. § 39:4-50 (West 2020); *Surcharges*, *supra* note 122.

300. See Ballman, *supra* note 144; *Surcharges*, *supra* note 122.

301. See N.J. STAT. ANN. § 39:4-50 (West 2020); Selbin et al., *supra* note 85, at 19; Joyner, *supra* note 137; see also Ballman, *supra* note 144.

302. See *State v. Owens*, 254 A.2d 97, 98–101 (N.J. 1969); Bala, *supra* note 168.

303. See N.J. STAT. ANN. § 39:4-50 (West 2020); Bala, *supra* note 168; *Barriers to Work*, *supra* note 189. See generally *supra* Part III.

304. See Calvert & Bruno, *supra* note 92, at 130–31.

It may be argued that some job applications and background checks only look into criminal records, so expungement is not necessary.³⁰⁵ It may be further asserted that an ex-offender also is not empty-handed with respect to post-conviction remedies because she may challenge the DUI conviction in a motion for post-conviction relief.³⁰⁶ But considering the fact that most background checks include driving records,³⁰⁷ the growing trend of job applications asking about arrest records,³⁰⁸ and the overall ineffectiveness of post-conviction relief,³⁰⁹ greater protection is needed. Expungement of DUIs, in this respect, would help shield ex-offenders from extensive background checks and offer ex-offenders legitimate post-conviction relief from the collateral consequences of DUIs.

V. DUI EXPUNGEMENT LEGISLATION: A BASIC SCHEME

The Legislature should modify the expungement statute's ban on expungement for traffic offenses to allow DUIs to become eligible for expungement.³¹⁰ This amendment would provide that former DUI offenders could be eligible for expungement if they fulfill certain requirements. These should include that the DUI must be a first offense, it must not have resulted in death, the ex-offender must not have been convicted of a subsequent DUI or criminal offense, the ex-offender must have completed the license suspension and paid all fines and surcharges, and that a waiting period of three years must have lapsed since the conviction. Upon completing all the requirements, at the end of the three year waiting period, the DUI conviction would be automatically expunged. The legislative scheme needed is detailed as follows:

A. Proposed Requirements

1. First Offense DUI

The expungement statute should extend to first-time DUI offenses. This requirement is rooted in the expungement statute's original purpose

305. See Boyer, *supra* note 95; Leasure & Andersen, *supra* note 97, at 272–73; Selbin et al., *supra* note 85, at 19; Uggen et al., *supra* note 89, at 628–29.

306. See 33A RAMSEY, *supra* note 160, § 30:1.

307. See Skelly, *supra* note 123; *Survey Finds Employment Background Checks Nearly Universal Today*, *supra* note 98; see also Buner, *supra* note 152.

308. See Ballman, *supra* note 144; Fields & Emshwiller, *supra* note 101.

309. See 33A RAMSEY, *supra* note 160, § 30:1.

310. See N.J. STAT. ANN. § 2C:52-28 (West 2020).

of expunging first-time offenses.³¹¹ This also goes to the heart of the American value of second chances, in that sometimes people make mistakes, but they should not be branded by that mistake for eternity.³¹² Therefore, an ex-offender who committed a single DUI should not be barred from expunging that DUI because the purpose of the expungement statute is to expunge first-time offenses.

Expungement should only be allowed for first offense DUIs because first-time DUI offenders likely will not be cited for a DUI again.³¹³ DUI arrests and fatalities have dropped significantly in the past twenty years,³¹⁴ showing that the DUI statute is effectively serving its purpose in reducing serious injuries and eliminating fatalities.³¹⁵ Not only is the DUI recidivism rate declining, but first-time offenders make up the vast majority of DUI offenders.³¹⁶ First-time DUI offenders should not have to suffer the consequence of having a DUI on their record for life since DUI arrests and fatalities have significantly dropped and the vast majority of first-time DUI offenders will likely not be cited for a DUI offense again.³¹⁷

Legislation for expunging first-time DUI offenses in New Jersey would not be a new concept since similar legislation already exists in other states.³¹⁸ This legislation would share the same purpose as other state laws which give first-time DUI offenders a second chance by reducing stigma and increasing employability of ex-offenders.³¹⁹ Moreover, considering Mothers Against Drunk Driving supported Wisconsin's expungement legislation for first-time DUI offenses, the organization may very well support this proposed legislation.³²⁰

311. See *State v. N.W.*, 747 A.2d 819, 823 (N.J. App. Div. 2000) (“[T]he [expungement] statute’s purpose is to give a one-time offender who has changed his or her life a second chance.”).

312. See Etzioni & Bhat, *supra* note 1.

313. See WARREN-KIGENUI & COLEMAN, *supra* note 256.

314. GREENFELD, *supra* note 73; 2016 *Crime in the United States*, *supra* note 73; *New Jersey Drunk Driving Statistics*, *supra* note 74.

315. See *State v. Tischio*, 527 A.2d 388, 392 (N.J. 1987) (“The primary purpose behind New Jersey’s drunk-driving statutes is to curb the senseless havoc and destruction caused by intoxicated drivers.”).

316. See *supra* note 257, at 921.

317. See *id.*

318. See *supra* note 248; see, e.g., H.B. 3016.

319. See *Wisconsin Senate Testimony on S.B. 198*, *supra* note 252 (discussing the purpose of allowing expungement for first-time DUI offenses is to relieve the collateral consequences associated with the conviction and to give the ex-offender a “second chance”).

320. See *id.*

2. DUI Did Not Result in Death

DUI expungement should only be limited to cases of DUIs that did not result in death.³²¹ A DUI resulting in death is an indictable offense that is ineligible for expungement under the expungement statute.³²² In addition, New Jersey's public policy behind its DUI punishment scheme is to eliminate drunk driving fatalities.³²³ Allowing a DUI resulting in death to be expunged would be counterintuitive to the expungement statute's provision barring certain indictable offenses from expungement and the state's public policy on DUIs.³²⁴

3. No Subsequent DUI or Criminal Conviction

The ex-offender shall not have been convicted of any subsequent DUIs or criminal offenses. This is a common requirement for states with DUI expungement statutes.³²⁵ The rationale behind having this requirement is that it goes to the heart of the expungement statute's purpose in giving ex-offenders a second chance when they have led rehabilitative and law-abiding lives since conviction.³²⁶ If an ex-offender is convicted of a DUI or other criminal offense soon after the first DUI conviction, she is not truly living a rehabilitative and law-abiding life,³²⁷ and thus the conviction should not be eligible for expungement.

4. License Suspension Completed and All Fines and Surcharges Paid

The license suspension must have been completed and all fines and surcharges must have been paid. The DUI statute imposes a license suspension, fines, and surcharges as punishment for committing the offense.³²⁸ In order to be in compliance with the DUI statute, the ex-offender must fulfill the penalties stipulated by this statute.³²⁹ This is also one of the first steps in a DUI offender taking responsibility after the

321. See generally S.B 198, 2019 Leg., Reg. Sess. (Wis. 2019); see also N.J. STAT. ANN. § 2C:11-5 (West 2020).

322. *Id.* § 2C:52-2(b).

323. See State v. Tischio, 527 A.2d 388, 392–93 (N.J. 1987).

324. See *id.* § 2C:52-2 (West 2020); Tischio, 527 A.2d at 392–93.

325. See TEX. GOV'T CODE ANN. § 411.0731 (West 2020); see also CAL. PENAL CODE § 1203.4 (West 2020).

326. See 33A RAMSEY, *supra* note 208, § 46:1(A).

327. See *id.*

328. See *id.* § 39:4-50 (West 2020).

329. See *id.*

conviction. Completion of these requirements serve as proof that she is complying with the law and living a rehabilitative life.³³⁰

5. Waiting Period of Three Years Has Lapsed

The ex-offender needs to have waited at least 3 years after conviction. A minimum three year waiting period would coincide with New Jersey's expungement timetable based on the stigma of the offense.³³¹ The current statutory waiting periods are: six years for indictable offenses,³³² five years for disorderly persons and petty disorderly persons offenses,³³³ and two years for ordinance violations.³³⁴ Because New Jersey views traffic offenses as less stigmatized offenses than criminal offenses,³³⁵ the waiting period for DUI expungement should be less than five or six years. On the other hand, a DUI is also clearly more stigmatized than an ordinance violation,³³⁶ and accordingly should have a waiting period longer than two years. Thus, three years should be a sufficient waiting period until eligibility becomes available.

Under the expungement statute, waiting periods begin after the sentence has been served and all fines have been paid.³³⁷ Hence, the argument can be made that the three year waiting period should start after the last surcharge is paid. However, other states permit the waiting period to start after conviction rather than after the sentence is completed and all fines are paid.³³⁸ The only requirement in those states is that in order to be eligible for expungement, the waiting period must lapse and all the requirements have been met.³³⁹ In addition, allowing earlier expungement would have substantial economic and societal benefits by increasing the workforce, decreasing debt, and reducing the likelihood the ex-offender will recidivate.³⁴⁰ Thus, permitting the waiting

330. See 33A RAMSEY, *supra* note 208, § 46:1(A).

331. See *State v. K.M.*, 532 A.2d 254, 255 (N.J. App. Div. 1987).

332. See *id.* § 2C:52-2 (West 2020).

333. See *id.* § 2C:52-3.

334. See *id.* § 2C:52-4.

335. See *State v. Rodriguez*, 682 A.2d 764, 767 (N.J. App. Div. 1996) (explaining that “[d]riving under the influence of alcohol (DUI) is not characterized as a crime in New Jersey but rather a ‘serious traffic offense’”).

336. Compare *id.* (characterizing a DUI as a “serious traffic offense”), with *State v. Owens*, 254 A.2d 97, 98–100 (N.J. 1969) (describing ordinance violations and traffic offenses as petty offenses). See also *Ramchand et al.*, *supra* note 140, at 144 (finding the severity of a DUI to be between aggravated assault and car theft).

337. See § 2C:52-2 (West 2020); § 2C:52-3; § 2C:52-4.

338. See CAL. PENAL CODE § 1203.4 (West 2020); TEX. GOV'T CODE ANN. § 411.0731 (West 2020).

339. See CAL. PENAL CODE § 1203.4; TEX. GOV'T CODE ANN. § 411.0731.

340. See *Bala*, *supra* note 168; *Barriers to Work*, *supra* note 189.

period to begin immediately after conviction should not be problematic as long as all of the aforementioned requirements are met.

B. Utilizing the Automatic Expungement System

Utilizing the automatic expungement system for expunging DUIs would expedite the expungement process and alleviate any administrative burden that the manual petition process would entail. Although New Jersey currently only limits automatic expungement to criminal offenses,³⁴¹ it could extend the automatic expungement system to DUIs. In addition, while automatic petition process currently takes ten years to automatically expunge a conviction,³⁴² the New Jersey petition process could more closely follow Utah's timetable, in allowing earlier automatic expungements.³⁴³ More concisely, expungement should be automatic the moment the ex-offender is eligible to file the petition for expungement.³⁴⁴ In the present scenario, this would mean that the automatic petition process for DUIs would start after the ex-offender meets all of the aforementioned requirements.³⁴⁵

The rationale behind utilizing an automatic petition process for expunging DUIs is four-fold. First, expungement petitions are almost always granted when petitions "satisf[y] the minimum conditions."³⁴⁶ Although objections from government officials would halt the petition process, these objections are rare.³⁴⁷ Thus, if expungements are typically uncontested and granted, there is no reason not to allow an automatic petition process.

Second, the manual petition process is a complicated process that is unfair to ex-offenders. Ex-offenders who are lucky enough to obtain the expungement handbook might end up being confused by its complex legal

341. *Id.* § 2C:52-5.4.

342. *Id.*

343. *See Utah's Automatic Expungement*, *supra* note 241 ("5 years for a class C misdemeanor or infraction, 6 years for a class B misdemeanor, and 7 years for a class A misdemeanor possession conviction.").

344. This is referring to the normal waiting period of an expungement, not the accelerated waiting period of an expungement in the public interest. *See Heumann et al.*, *supra* note 4, at 595–96.

345. *Compare Dalton*, *supra* note 117 (describing New Jersey's DUI punishment scheme), *with Looker*, *supra* note 242 ("An individual must be crime-free for specific time periods based on the type of crime committed, have no open or pending criminal cases and no outstanding fees or fines due.").

346. *See Heumann et al.*, *supra* note 4, at 606 ("[A]s one respondent put it, 'at least 999 out of 1000 times' [expungement is granted.]); *see also Marain*, *supra* note 231, at 27 ("Most courts do grant expungement applications on the papers.").

347. *See Heumann et al.*, *supra* note 4, at 605–06.

terminology.³⁴⁸ It might also be difficult for ex-offenders to obtain all of the relevant judicial documents and to send them out to all the required public officials.³⁴⁹ Moreover, because the expungement statute has multiple waiting periods for various offenses and New Jersey's classification system of offenses is complex, ex-offenders may be confused when a specific waiting period begins.³⁵⁰ Automatic expungement would alleviate these procedural hurdles, and give the ex-offender a speedier and fairer process.

Third, automatic expungement would provide dual benefits to society by boosting economic growth and increasing public safety. The sooner an ex-offender is allowed to expunge her record, the more likely it is that she will attain employment and the less likely that she will reoffend.³⁵¹ Expungement also offers prospective employers a larger pool of qualified applicants, gives better employment prospects to ex-offenders, and lessens economic debt.³⁵² Thus, automatic expungement would promote public safety and the economy because increasing the employability of ex-offenders would reduce the likelihood of recidivism and boost the workforce while decreasing personal debt.

Fourth, other states are already automatically expunging traffic offenses, so it would not be extraordinary if New Jersey followed suit in expanding automatic expungement to DUIs. For example, Maryland has already implemented an automatic expungement system for traffic offenses.³⁵³ Even though Maryland does not extend its automatic expungement system to DUIs,³⁵⁴ other states already do expunge DUIs.³⁵⁵ It would not be far-fetched to believe that, based on other states' expungement laws, New Jersey could utilize its automatic expungement system to efficiently expunge DUI convictions.

348. See *Expungement Handbook*, *supra* note 211.

349. See *id.* at 4–8.

350. See N.J. STAT. ANN. § 2C:52-2 (West 2020); *Id.* § 2C:52-3; *Id.* § 2C:52-4.

351. Compare Leasure & Andersen, *supra* note 97, at 272 (“[A]n individual’s propensity to commit a future crime decreases as that individual’s crime-free duration increases.” (citation omitted)), with Kessler, *supra* note 186, at 437 (“[T]he more time that elapses between the creation of the arrest record and the expungement, the more time exists for an individual to enter the record-recidivism cycle.”), and Bala, *supra* note 168 (“[B]ecoming gainfully employed dramatically cuts down the chances that these individuals will reoffend.”).

352. See Bala, *supra* note 168; *Barriers to Work*, *supra* note 189.

353. See *Driver Record Expungement by Request*, *supra* note 243.

354. See *id.*

355. See *supra* note 248.

CONCLUSION

Although New Jersey currently does not recognize expungement of DUIs, introducing DUI expungement legislation has many justifications. This note has outlined a realistic and viable scheme to serve as a model for future legislation. It is hoped that our Legislature will act to give former DUI offenders who have lived a rehabilitative and law-abiding life a second chance.