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THE PRICE OF FUNDAMENTAL RIGHTS: CRIMINAL CONVICTIONS, EXPUNGEMENT FEES, AND CONSTITUTIONAL CONCERNS

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ABSTRACT

The consequences of a criminal conviction last far beyond the sentence itself. A person may experience numerous challenges after a conviction, including difficulties finding housing, employment, and economic stability. A person may also forfeit certain fundamental rights, such as the right to vote.

Expungement offers one way for individuals to remove the ongoing impacts of a conviction by erasing public records of it. Many states have passed legislation increasing access to expungement in recent years, in recognition of its importance as a tool in criminal justice system reform. Yet, in many states, individuals must pay hefty fees to access the expungement process, making the restoration of a person's fundamental rights contingent upon his or her income. This article uses an access-to-justice framework to argue that this system—in which wealthier individuals have the ability to regain fundamental rights while poorer individuals do not—may run afoul of the Equal Protection and Due Process Clauses of the United States Constitution.

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INTRODUCTION

In 1998, Frederick Jones pleaded guilty to a single felony count of theft by failure to make the required disposition of property.[1] "[H]e spent several months incarcerated and . . . five years on supervised probation."[2] Years later—decades after his sentence ended—Mr. Jones was still experiencing the consequences of this conviction.[3] He struggled to find work and did not qualify for government assistance programs.[4] He could not vote.[5]

In 2018, over two decades after he entered his guilty plea, Mr. Jones decided to take advantage of Kentucky's new expungement laws,[6] which allow a person to expunge a single Class D felony from his record.[7] Mr. Jones hoped to remove that felony conviction and its ongoing effects. At the time, the fee to file a petition for a felony expungement was $500.[8] Mr. Jones asked the court to waive this fee, "explain[ing] that his monthly income was $948 per month, that he had no other assets, [or] savings . . . and that he could not pay the filing fee and [cover] his basic

1. Jones v. Commonwealth, 636 S.W.3d 503, 505 (Ky. 2021). These facts and those that follow are taken from *Jones*. The author was privileged to serve as legal counsel to Mr. Jones during this case.

2. *Id.*

3. *See* Brief for Appellant at 1, Jones v. Commonwealth, 636 S.W.3d 503 (Ky. 2021) (No. 2019-SC-0651) [hereinafter Brief for Mr. Jones].

4. *See id.* at 1, 2, 7.

5. *Id.* at 1.

6. *See Jones*, 636 S.W.3d at 505.

7. *See* KY. REV. STAT. ANN. § 431.073 (West 2022).

8. *See Jones*, 636 S.W.3d at 506 n.1.

living expenses."[9] He asked the court to let him file his petition *in forma pauperis* without paying the filing fee, a request courts often grant for other types of civil cases.[10]

The trial court denied Mr. Jones's fee waiver request.[11] The court agreed that Mr. Jones was a poor person and that he could not afford the filing fee.[12] But, in the trial court's view, it did not have to waive the filing fees because of the nature of his expungement case.[13] In the appellate court's view, expungement was a matter of "legislative grace"—a privilege and not a right.[14] The lower courts concluded that if Mr. Jones could not afford the fees, he could not complete his expungement.[15] Mr. Jones appealed. Years after he initially sought an expungement, Mr. Jones was finally able to access one without fees when the Supreme Court of Kentucky ruled in his favor in December 2021.[16]

Mr. Jones is not unique: across America, many people with felony convictions are unable to access expungements because of the associated costs.[17] This lack of access is important because expungements are a powerful tool for criminal justice reform—but only if those with the greatest need can access them. If low-income individuals, like Mr. Jones, cannot waive expungement fees, then expungement schemes remain out of reach for some of the groups that would benefit most.

This paper discusses expungements—and the associated costs—under an access-to-justice framework. An access-to-justice perspective examines our justice processes and tries to understand how the structure of our court systems impact who uses them.[18] In particular, it seeks to understand how our institutional choices—including things like filing fees—make it harder for marginalized groups to gain relief

9. Brief for Mr. Jones, *supra* note 3, at 5.
10. *See Jones*, 636 S.W.3d at 505.
11. *Id.*
12. Brief for Mr. Jones, *supra* note 3, at 4.
13. *Jones*, 636 S.W.3d at 505.
14. Brief for Mr. Jones, *supra* note 3, at 19.
15. *Jones*, 636 S.W.3d at 505.
16. *Id.*
17. *See, e.g.*, Maura Ewing, *Want to Clear Your Record? It'll Cost You $450: In Tennessee and Other States, Former Felons Can't Always Afford It*, MARSHALL PROJECT (May 31, 2016, 10:00 PM), https://www.themarshallproject.org/2016/05/31/want-to-clear-your-record-it-ll-cost-you-450.
18. Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1477 (2021) ("[C]ivil procedure scholars typically invoke the access-to-justice label as a byword for a more general stance on civil justice issues that supports the allocation of greater procedural resources and opportunities, generically defined, to economically disadvantaged individuals and opposes legislation, court rules, and judicial decisions that make it more difficult for such individuals to pursue their legal claims.").

from a court. In this context, that means understanding how the costs of expungements impact the ability of different groups to access them.

This topic is important to understand because expungements should be a critical part of ongoing conversations about criminal justice reform. In 2020, calls for racial equity led states across America to consider—and often implement—changes to their criminal justice systems.[19] In these conversations, much of the focus was on the point at which an individual becomes justice-involved: the moment he first makes contact with the justice system through an arrest or incarceration. Advocates successfully called for change to many procedures related to this point of contact, shepherding through new policies related to police oversight and accountability.[20]

These front-end changes are important. But so are back-end reforms—those that target the criminal justice system after a person has become entwined in it. Although they receive less attention, back-end reforms are an equally important part of comprehensive criminal justice changes. As explained below, expungements are one of the most powerful such tools.

The power of expungements is why the fees associated with them are so problematic. From a policy perspective, these fees mean that low-income people—who often experience poverty because of their conviction—cannot access the tool that would help them better their situation.[21] In contrast, higher-income individuals are able to pay for expungements and their associated benefits. This exacerbates already-existing inequity.

This system also raises constitutional concerns. Expungement fees mean that people are being denied access to the court system based on their inability to pay for that access. This is problematic because, in the case of felony convictions, an expungement can restore a person's fundamental rights—such as their right to vote and to possess a

19. *See, e.g.*, Press Release, Gretchen Whitmer, Governor, Off. of the Governor of Michigan, Governor Whitmer Signs Bipartisan "Clean Slate" Criminal Justice Reform Bills Expanding Opportunities for Expungement, Breaking Barriers to Employment and Housing Opportunities (Oct. 12, 2020) (available at https://www.michigan.gov/whitmer/news/press-releases/2020/10/12/governor-whitmer-signs-bipartisan-clean-slate-criminal-justice-reform-bills-expanding-opportunities); Press Release, Gurbir Grewal, Att'y Gen., Off. of the Att'y Gen. of New Jersey, AG Grewal Issues Statewide Order Requiring Law Enforcement Agencies to Identify Officers Who Commit Serious Disciplinary Violations (June 15, 2020) (available at https://www.nj.gov/oag/newsreleases20/pr20200615a.html).

20. *See* Weihua Li & Humera Lodhi, *Which States Are Taking on Police Reform After George Floyd?*, MARSHALL PROJECT (June 18, 2020, 3:00 PM), https://www.themarshallproject.org/2020/06/18/which-states-are-taking-on-police-reform-after-george-floyd.

21. *See, e.g.*, Ewing, *supra* note 17.

firearm.[22] Expungement fees, then, mean that some people are being denied the opportunity to regain fundamental rights because they do not have the ability to pay for this restoration. As explained below, this likely violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

Although many people have written about the importance and impact of expungements,[23] no one to date has thoroughly examined the associated fees. By doing so, this article fills a gap in the existing literature and adds nuance to conversations about expungement policy. Part I of this paper describes expungement, its importance as a tool, and trends in expungement policy. Part II discusses expungements in an access-to-justice context, explaining why due process requires low-income individuals be granted access to civil courts to pursue expungements. Part III explains why expungement access can also be viewed through an equal protection lens, and why denying low-income individuals access to expungements could also violate that clause of the Constitution. Part IV describes recent access-to-justice cases and hypothesizes about future litigation around expungements. Part V argues for policies that expand low-income individuals access to expungements.

I. AN INTRODUCTION TO EXPUNGEMENT

A. The Costs of Conviction

Interest in expungements has risen as the population of justice-involved people has increased.[24] Today, the Brennan Center estimates that the same number of Americans have a criminal record as have a

22. *See, e.g.*, MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION: A 50-STATE REPORT ON LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION 8–22 (2020) (describing the variations of the loss and restoration of Second Amendment and voting rights for felons in each state), https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf. Throughout this article these two fundamental rights are the ones explored most in depth. This is because these are the two areas with the most developed jurisprudence regarding the nature of the right and the ways in which it is fundamental.

23. *See, e.g.*, J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460 (2020); Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519 (2020); Brian M. Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 HARV. L. & POL'Y REV. 361 (2016).

24. *See* Milton Heumann, Gregory Cui & Matthew Kuchtyak, *Expunge-Worthy: Exploring Second Chances for Criminal Defendants*, 51 CRIM. L. BULL. 588, 589–90 (2015).

four-year college degree.[25] Nearly half of all Black men and forty percent of white men will be arrested by the time they turn twenty-three years old.[26] Many of those who are arrested will end up incarcerated: according to the Prison Policy Initiative, there were 2.3 million Americans incarcerated in 2020.[27] That means that more than 1 in 100 adult Americans are currently behind bars,[28] a number that places the United States ahead of any other nation for per capita incarceration rates.[29]

Many people have written about the costs of this trend, both for society and for the individuals that become justice-involved. A 2017 report estimated that mass incarceration costs America $182 billion per year.[30] This number includes $80.7 billion to run public corrections agencies, $63.2 billion for policing, and $12.3 billion to provide healthcare to incarcerated people.[31] The families of incarcerated individuals pay significantly as well, including $1.4 billion in non-refundable bail fees, and $2.9 billion on exorbitant charges for telephone calls and commissary expenses.[32] These numbers do not account for the human costs to incarcerated persons, including lost job opportunities and decreased health outcomes.[33]

The challenges justice-involved individuals face do not end when they have completed their sentence. Criminal convictions carry consequences that last well beyond the sentence itself. Felonies, typically thought of as more serious crimes, carry enormous consequences that significantly impact a person's rights. In nearly every state, someone convicted of a

25. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas.

26. *Id.*

27. WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html.

28. PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION'S EFFECT ON ECONOMIC MOBILITY 3 (2010), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/collateralcosts1pdf.pdf.

29. *Id.* at 3, 7 fig.1.

30. PETER WAGNER & BERNADETTE RABUY, PRISON POL'Y INITIATIVE, FOLLOW THE MONEY OF MASS INCARCERATION 1 (2017), https://www.prisonpolicy.org/factsheets/money2017.pdf.

31. *Id.*

32. *Id.*; Beatrix Lockwood & Nicole Lewis, *The Hidden Cost of Incarceration*, MARSHALL PROJECT (Dec. 17, 2019, 5:00 AM), https://www.themarshallproject.org/2019/12/17/the-hidden-cost-of-incarceration.

33. *See* TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 4 (2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal.

felony will lose his right to vote for at least some period of time.[34] A felony conviction can also be the basis for a person to lose his right to be in the United States if he is not a citizen.[35] A conviction can also affect a person's ability to practice their occupation.[36] One study estimated that employment barriers—like the inability to obtain an occupational license—reduced the United States workforce by 1.7 million workers.[37]

In addition to losing certain rights, a person convicted of a felony suffers enormous financial consequences. One study estimated that a felony conviction decreases a person's annual earnings by twenty-two percent.[38] These financial costs perpetuate poverty and racial inequality, as data suggests that white people who have been incarcerated see their income trend upward after their incarceration, whereas Black and brown people do not.[39]

But it is not just felonies that come with costs, misdemeanors can carry severe consequences as well. Nationally, eighty percent of crimes are misdemeanors,[40] and 45 million Americans have been convicted of a misdemeanor crime.[41] A person convicted of a misdemeanor may lose or be unable to obtain an occupational license for a regulated industry.[42] These regulated industries are broad, and may include occupations such as schoolteacher, tow truck driver, bus driver, embalmer, nurse, pharmacy technician, physical therapist, home inspector, athletic trainer, security guard, cosmetologist, and more.[43] A person may also lose his Second Amendment right to own a gun if he is convicted of a certain type of misdemeanor crime.[44] If the misdemeanor was drug-related, a

34. *Felon Voting Rights*, NAT'L CONF. OF STATE LEGISLATURES (June 28, 2021), https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

35. *See* Abby Budiman, *Key Findings About U.S. Immigrants*, PEW RSCH. CTR. (Aug. 20, 2020), https://www.pewresearch.org/fact-tank/2020/08/20/key-findings-about-u-s-immigrants/ (noting that in 2018, 149,000 people were removed from the United States because of a criminal conviction).

36. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012).

37. *Barriers to Work: People with Criminal Records*, NAT'L CONF. OF STATE LEGISLATURES (July 17, 2018), https://www.ncsl.org/research/labor-and-employment/barriers-to-work-individuals-with-criminal-records.aspx.

38. CRAIGIE ET AL., *supra* note 33, at 6.

39. *See id.*

40. MARK FLATTEN, GOLDWATER INST., CITY COURT: MISDEMEANOR CONVICTIONS LEAD TO LIFE-LONG, "BEYOND HORRIFIC" CONSEQUENCES 3 (2018), https://goldwaterinstitute.org/article/city-court-misdemeanor-consequences/.

41. CRAIGIE ET AL., *supra* note 33, at 6.

42. Chin, *supra* note 36, at 1790.

43. FLATTEN, *supra* note 40, at 4.

44. *See* 18 U.S.C. § 922(g)(9) ("It shall be unlawful for any person . . . who has been convicted in any court of a misdemeanor crime of domestic violence . . . to . . . possess . . . any firearm . . . .").

person used to become ineligible to receive government services like student loans[45] or government-subsidized housing.[46] One study estimated that a person with a misdemeanor on his record will see his annual wages decrease by sixteen percent.[47]

These consequences are not an accident—they are the result of intentional policy choices. When someone is convicted of a crime, society sees them as having a "shattered character."[48] This character judgment drives the policy consequences: the convicted person loses civil and legal rights for the rest of his life.[49] One court, speaking to these consequences, noted "disabilities . . . imposed upon the convict" are "part of the punishment, and in many cases the most important part."[50] The informal punishment for the criminal act follows a person for the rest of his life.[51] This is problematic because in our rhetoric we espouse "second chances" and "fresh beginnings," yet we set up systems that make these things challenging to achieve in reality.

Not only are these consequences indefinite, but they are also distributed in racially inequitable ways because of bias at every stage of our criminal justice system. In the 1980s, the height of the "war on drugs," a Black man was eleven times more likely to be incarcerated than a white man.[52] These biases continue today: between 2010 and 2018, the ACLU found that police were three times more likely to arrest a Black person than a white person for cannabis possession, even though the two groups use cannabis at equal rates.[53] "[I]n every state and 95% of counties with more than 30,000 people in which at least 1% of the residents are Black, Black people are" more likely to be charged for cannabis possession than white people.[54]

Additionally, Black individuals are more likely to be charged with a serious crime and more likely to face a longer sentence than white

45. *Students with Criminal Convictions Have Limited Eligibility for Federal Student*, FAFSA, https://studentaid.gov/understand-aid/eligibility/requirements/criminal-convictions (last visited Apr. 7, 2022).

46. FLATTEN, *supra* note 40, at 4; *see generally* HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING (2004), https://www.hrw.org/reports/2004/usa1104/usa1104.pdf.

47. CRAIGIE ET AL., *supra* note 33, at 14.

48. Chin, *supra* note 36, at 1799 (quoting Chaunt v. United States, 364 U.S. 350, 358 (1960) (Clark, J., dissenting)).

49. *Id.* at 1799–80.

50. Sutton v. McIlhany, 1 Ohio Dec. Reprint 235, 236 (Ct. Com. Pl. 1848).

51. Chin, *supra* note 36, at 1799–80.

52. CRAIGIE ET AL., *supra* note 33, at 6.

53. ACLU, A TALE OF TWO COUNTRIES: RACIALLY TARGETED ARRESTS IN THE ERA OF MARIJUANA REFORM 29 (2020), https://www.aclu.org/report/tale-two-countries-racially-targeted-arrests-era-marijuana-reform.

54. *Id.* at 5–6.

people.[55] The evidence that prosecutors are more likely to charge Black individuals with a crime is one of the reasons that San Francisco has begun removing demographic information from police citations before prosecutors review them to make charging decisions.[56] Research also shows that Black people face more barriers to receiving parole after they have been convicted of a crime.[57]

The bias in our criminal justice system further entrenches inequity in our society. A recent report by the Brennan Center explained that the fact that people involved in the justice system are disproportionately poor and Black means that these groups also disproportionately "face economic barriers [like] hiring discrimination and lost job opportunities."[58] That means that criminal justice systems are "system-wide drivers of inequality [that] are so large as to have macroeconomic consequences."[59] Furthermore, the report noted the fact that so many people convicted of a crime lose their right to vote, which means that "[m]ass incarceration has been a key instrument in voter suppression."[60] Because poor and Black people are disproportionately disenfranchised, they are also disproportionately underrepresented in democratic systems.[61]

Growing recognition of the challenges people with a conviction face has led to calls for policy change in recent years. President Obama called for "removing barriers to employment, housing and voting for former prisoners."[62] President Trump signed bipartisan federal criminal justice reform legislation and spoke of its importance.[63] Leadership of both

55. ELIZABETH HINTON, LESHAE HENDERSON & CINDY REED, VERA INST. JUST., AN UNJUST BURDEN: THE DISPARATE TREATMENT OF BLACK AMERICANS IN THE CRIMINAL JUSTICE SYSTEM 1 (2018), https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf.

56. Timothy Williams, *Black People Are Charged at a Higher Rate than Whites. What if Prosecutors Didn't Know Their Race?*, N.Y. TIMES (June 12, 2019), https://www.nytimes.com/2019/06/12/us/prosecutor-race-blind-charging.html; Alex Chohlas-Wood et al., *Blind Charging: Mitigating Bias in Charging Decisions with Automated Race Redaction*, STAN. COMPUTATIONAL POL'Y LAB (2021), https://policylab.stanford.edu/projects/blind-charging.html.

57. *See* Leo Carroll & Margaret E. Mondrick, *Racial Bias in the Decision to Grant Parole*, 11 L. & SOC'Y. REV. 93, 104 (1976).

58. CRAIGIE ET AL., *supra* note 33, at 4.

59. *Id.*

60. *Id.*

61. *Id.*

62. Editorial, *President Obama Takes on the Prison Crisis*, N.Y. TIMES (July 16, 2015), https://www.nytimes.com/2015/07/17/opinion/president-obama-takes-on-the-prison-crisis.html?ref=opinion.

63. Lea Hunter et al., *Fact Sheet: Trump Says One Thing and Does Another on Criminal Justice*, CTR. FOR AM. PROGRESS (Feb. 3, 2020), https://www.americanprogress.org/issues/

political parties at all levels of government have called for significant policy change.[64]

In some ways these calls have been successful, and there have been some policy changes in recent years.[65] Cities like Seattle and Washington, D.C. have banned landlords from asking about conviction status on rental applications.[66] Georgia opened a "reentry" prison where people with less than eighteen months left on their sentence can receive job training and housing support.[67] Georgia has also given judges the discretion to allow someone convicted of a felony to keep their driver's license, and allows people who are incarcerated to qualify for a professional license in some circumstances.[68] Congress passed the First Step Act, which requires the Attorney General to develop tools and relationships to place people who are in prison into programs that reduce recidivism.[69] The law also requires the Bureau of Prisons to help those in its custody apply for government benefits, a driver's license, and a social security card.[70]

These policy changes are laudable and important. Yet the barriers impacting those with a criminal conviction are pervasive, and any policy change only targets a single piece of a multi-faceted problem. One report identified 44,000 legal sanctions that justice-involved people can face,[71] an overwhelming number that would be difficult to eliminate through legislation alone. Some believe "it will take generations to restore

criminal-justice/reports/2020/02/03/480028/fact-sheet-trump-says-one-thing-another-criminal-justice/.

64. *See* Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUST. (Jan. 4, 2019), https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next; *see also President Obama Takes on the Prison Crisis*, *supra* note 62.

65. These reforms have had varying success in achieving their intended outcome. The highly publicized "ban the box" legislation, which prohibited employers from asking about conviction status until later in the job application process, seems to have widened the racial disparities in hiring practices. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191, 191, 194–95 (2018).

66. Teresa Wiltz, *Where 'Returning Citizens' Find Housing After Prison*, PEW CHARITABLE TRS. (Apr. 23, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/04/23/where-returning-citizens-find-housing-after-prison.

67. *Id.*

68. *Prisoner Reentry Initiative*, GA. CTR. FOR OPPORTUNITY, https://georgiaopportunity.org/employment/prisoner-reentry/ (last visited Apr. 7, 2022).

69. *An Overview of the First Step Act*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/fsa/overview.jsp (last visited Apr. 7, 2022).

70. *Id.*

71. Jaboa Lake, *Criminal Records Create Cycles of Multigenerational Poverty*, CTR. FOR AM. PROGRESS (Apr. 15, 2020), https://www.americanprogress.org/issues/poverty/news/2020/04/15/483248/criminal-records-create-cycles-multigenerational-poverty/.

[formerly incarcerated] peoples' full rights and freedom" using piece-by-piece policy solutions.[72]

In contrast to these more fragmented reforms, expungement has the potential to lead to broader, swifter change. That is because expungement is a tool to erase the underlying conviction. As explained in the next section, this makes expungement a more efficient way to address many of the ongoing, collateral consequences of a conviction.

B. Expungement as a Tool for Reform

Expungement, broadly speaking, is a process that removes a conviction from public records.[73] Each state has its own laws that govern the expungement process, and these can vary widely.[74] In some jurisdictions, expunged records are sealed and may be accessed by law enforcement but not by the public.[75] In others, all evidence of the record may be deleted, meaning that no documentation of the conviction exists in the public record.[76]

This does not mean, however, that all evidence of a conviction disappears. In the case of *G.D. v. Kenny*, an aide to a political candidate sued individuals who circulated flyers referring to his expunged criminal background.[77] The court rejected the aide's tort claims on the ground that "the information expunged is never truly 'private.'"[78] It noted that while "an expunged conviction is 'deemed not to have occurred'" from a legal perspective,[79] an expungement does not erase all evidence of an event. "It does not require the excision of records from the historical archives of newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories."[80] Importantly for that court, it did not prohibit individuals from using the campaign aide's background to publicly attack the political candidate who had hired him.[81]

72. KIMBERLY G. WHITE ET AL., HAAS INST., ENDING LEGAL BIAS AGAINST FORMERLY INCARCERATED PEOPLE 3 (2019), https://belonging.berkeley.edu/sites/default/files/ending_legal_bias_formerly_incarcerated_aug_2019.pdf?file=1&force=1.

73. Heumann, Cui & Kuchtyak, *supra* note 24, at 588.

74. *What Is "Expungement?,"* AM. BAR ASS'N (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-_expungement-/.

75. *Id.*

76. *Id.*

77. 15 A.3d 300, 304 (N.J. 2011).

78. *Id.* at 320 (quoting Nunez v. Pachman, 578 F.3d 228, 229 (3d Cir. 2009)).

79. *Id.* at 315–16 (quoting N.J. STAT. ANN. § 2C:52-27).

80. *Id.*

81. *See id.* at 321.

Expungements are limited only to public records under the jurisdiction of the court.

Expungements are creatures of statute: they are created by legislatures and the process does not exist without legislative action. This means that legislative bodies have wide latitude to define the boundaries of the process, and states choose to define these boundaries differently.[82]

One aspect on which states differ is the type of convictions that are eligible. As of October 2021, thirty-seven states offered some type of process to expunge a felony conviction from a person's record.[83] Eight states and Washington, D.C. only allowed a person to expunge a misdemeanor or a pardoned conviction and five states, plus the federal government, had not passed any expungement legislation.[84] In these jurisdictions there is no offense that a person can remove from his record.

Another dimension on which states vary is whether expungement is automatic or requires a judicial proceeding. If the process is automatic, an eligible conviction is removed from a person's record by default—the person with the conviction does not need to take any action to start the process. In contrast, in states that require a judicial proceeding, an individual must file a petition to initiate the expungement process.[85]

Currently, expungement or sealing of a conviction is automatic in nine states.[86] In states where the process is automatic, not every offense is eligible—most states limit the automatic processes to misdemeanors or minor cannabis offenses.[87] Only two states, Michigan and New Jersey, allow any felonies to be automatically expunged, and both of those states limit the automatic process to specifically named felonies.[88] Every other state requires a person seeking an expungement to proceed through a judicial process.[89]

For those that go through a judicial process, the journey begins with filing a petition for expungement, a separate civil action that is filed in

82. One online resource that contains useful information on each state's policy is the Collateral Consequences Resource Center. This helpful database will be referenced throughout. RESTORATION OF RTS. PROJECT, COLLATERAL CONSEQUENCES RES. CTR., 50-STATE COMPARISON: EXPUNGEMENT, SEALING & OTHER RECORD RELIEF (2021), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ [hereinafter CCRC STATE SURVEY].

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

the underlying criminal matter.[90] In this way, expungement is closely related to habeas corpus, which is "not a criminal proceeding, but is considered to be civil in nature."[91] Other types of postconviction proceedings, too, are civil in nature although they occur in criminal cases. As one court noted, "[a] postconviction proceeding is not an appeal of a criminal conviction, but, rather, a collateral civil attack on the judgment."[92]

The categorization of expungements as civil rather than criminal matters directly impacts how much access a low-income person must be given to the court system. Generally speaking, a state has less of an obligation to provide access to civil court services than it does to provide access to criminal proceedings.[93] This means that states can restrict access to expungement processes more because it is a civil law process.

After a court grants an expungement, it enters an order requiring the clerk, and sometimes other agencies, to take certain steps. Under the Kentucky expungement statute, for example, "[e]very agency, with records relating to the arrest, charge, or other matters arising out of the arrest or charge" shall delete the records within sixty days.[94] If the underlying case has been appealed, the "appellate court which issued an opinion in the case shall order the appellate case file to be sealed and also direct that the version of the appellate opinion published . . . be modified

90. *See, e.g.*, Keene v. State, 118 N.E.3d 801, 802 (Ind. Ct. App. 2019) ("While expungement proceedings are related to criminal proceedings, we can only conclude that expungement proceedings are civil in nature."); State v. C.A., 2015 Ohio 3437, at ¶ 17 (Ohio Ct. App. 2015) ("Expungement is a civil proceeding." (quoting State v. Hutchen, 191 Ohio App.3d 388, 390, 946 N.E.2d 270, 271 (Ohio Ct. App. 2010))); People v. Lewis, 2011 IL App (5th) 110279, ¶ 10, 961 N.E.2d 1237, 1239–40 (Ill. App. Ct. 2011) ("[W]e find that expungement actions are not criminal . . . regardless of the classification or the docket number, expungement is nonetheless a civil remedy."); Texas Dep't of Pub. Safety v. J.H.J., 274 S.W.3d 803, 806 (Tex. App. 2008) ("Although the expunction statute is located in the Texas Code of Criminal Procedure, an expunction proceeding is civil rather than criminal . . . ."); People v. Lau, 2007 Guam 4 ¶ 4 (Guam 2007) ("Generally, requesting expungement pursuant to a statute is considered a civil matter. . . . Guam's general expungement statute is codified in the criminal procedure section of the code, but, as other courts have found, this location in the criminal procedure code does not control, and expungement under 8 GCA § 11.10 is a civil matter."); State v. Brasch, 118 Ohio App.3d 659, 662, 693 N.E.2d 1134, 1136 (Ohio Ct. App. 1997) ("Expungement is a civil remedy.").

91. *See* Rawles v. Holt, 822 S.E.2d 259, 263 (Ga. 2018) (quoting Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999)).

92. State v. Steffen, 70 Ohio St. 3d 399, 410, 639 N.E.2d 67, 76 (Ohio 1994).

93. See James v. State, 61 So. 3d 357, 383 (Ala. Crim. App. 2010) (noting that the state did not have to provide assistance to hire an expert in a postconviction hearing, which is a civil proceeding, although it would have to provide assistance to hire an expert in a criminal proceeding).

94. KY. REV. STAT. ANN. § 431.076(4) (West 2020).

to avoid use of the defendant's name."[95] Even the orders "enforcing the expungement procedure" are eventually deleted.[96] In this way expungement is a unique type of proceeding, as a court can order numerous government agencies—including the higher courts that oversee it—to take particular actions.

In addition to describing what records must be expunged and how, expungement statutes may also provide guidance about how a person with a criminal record must treat that record in terms of disclosure. The statute may also explicitly note that the person seeking the expungement regains certain civil rights. Continuing with the Kentucky statute as an example, that statute specifically notes that after a person has obtained an expungement, he does not have to disclose the conviction on any application for employment or credit,[97] and that he regains civil rights, such as the ability to serve on a jury and hold public office.[98]

From this example it is easy to see why expungement is such a powerful tool. It erases a wide swath of public records relating to a conviction, and it explicitly allows a person not to disclose the conviction in some contexts. With the conviction gone, many of the collateral consequences disappear as well. For many outward facing processes, it is as if the conviction never happened.

The power of expungement as a reform tool explains why so many states have passed expungement statutes in recent years. Reentry policies focus on transitioning individuals with a criminal conviction back into the community, and there are many categories of these policies.[99] In 2020, statutory mechanisms to expunge or limit access to criminal convictions were the most popular reentry policy states passed, with twenty states passing thirty-five bills and two ballot measures.[100] Each state's legislation was unique: Georgia, for example, authorized sealing convictions for the first time ever, while North Carolina added more types of felonies and misdemeanors to the list of offenses eligible for expungement.[101] The large number of 2020 reforms is especially

95. *Id.* § 431.076(5)(a).
96. *Id.* § 431.076(4).
97. *Id.* § 431.073(7).
98. *See* KY. REV. STAT. ANN. § 29A.080(2)(e) (West 2002); KY. CONST. § 150.
99. *Reentry Programs*, CHARLES KOCH INST. (Sept. 5, 2018), https://charleskochinstitute.org/stories/reentry-programs/.
100. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR, THE REINTEGRATION AGENDA DURING PANDEMIC: CRIMINAL RECORD REFORMS IN 2020, at 3 (2021), https://ccresourcecenter.org/wp-content/uploads/2021/01/CCRC_The-Reintegration-Agenda-During-Pandemic_2020-Reforms.pdf.
101. *Id.* at 3–4.

noteworthy given that many state legislatures had busier-than-usual agendas as they struggled to address needs related to Covid-19.[102]

The trend in 2020 was not unique. Since 2013, every state legislature has passed legislation to reduce the negative impact of a criminal record.[103] These reform efforts peaked in 2019, with thirty-one states enacting sixty-seven laws that sealed, expunged, or vacated convictions.[104]

As more states expand expungement schemes, we learn more about the benefits of these policies. Data shows that expungement is effective at achieving its intended consequences: a recent study found that those who obtained expungements earned more money—on average a twenty-two percent increase in wages—within a year of receiving an expungement.[105] Another analysis showed that record clearing allowed ex-offenders better access to housing and government aid.[106] A report by one local government suggested expungements improved health outcomes by increasing housing stability, access to healthy food, and mental health.[107] Studies show that these benefits do not only accrue to the individuals receiving the expungements, but also to society, because those who receive an expungement are less likely to commit a future crime.[108] The more data we gather, the more we understand the power of these laws.

Yet, despite these benefits, most people who are eligible for expungements do not receive them. A groundbreaking study of expungement access in Michigan concluded that only 6.5% of individuals who are eligible for an expungement receive one within five years of becoming eligible.[109] Of the remaining pool, 91.2% did not apply for an expungement and 2.3% had their application denied by a judge.[110] Those who did receive an expungement were more likely to have been convicted

102. *Id.* at 1.

103. *Id.*

104. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019, at 10–11 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.

105. J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461 (2020).

106. Ericka B. Adams et al., *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC'Y 23, 25–26 (2016).

107. LOUISVILLE METRO DEP'T OF PUB. HEALTH & WELLNESS, HEALTH IMPACT ASSESSMENT OF EXPUNGEMENT POLICY IN KENTUCKY 3 (2020), https://louisvilleky.gov/document/expungementhiapdf.

108. Adams et al., *supra* note 106, at 46–47.

109. Prescott & Starr, *supra* note 105, at 2466.

110. *Id.* at 2489.

of a felony and less likely to have been incarcerated for the crime.[111] They were "less likely to be male and more likely to be Black."[112]

The Michigan study is by far the most extensive study of the uptake gap; however, its results are in line with other analyses. One Kentucky study found that only 2,032 individuals received an expungement between 2016 and 2018, even though 242,987 individuals had completed their underlying sentences and were likely eligible.[113]

There are many reasons that could explain this uptake gap, and the Michigan study made several hypotheses. In particular, it noted the lack of information about the availability of expungement, burdensome administrative requirements, fees and costs, and lack of access to legal counsel.[114] Another report explained that the uptake gap exists because expungement can be "costly and complicated."[115] A recent article argued that "[p]rocedure is one aspect of a multi-factored 'uptake gap' that undermines the broader utility of expungement."[116] In short: barriers make expungements more difficult to begin, continue, and complete.

This paper focuses on one of these barriers—fees and costs—through an access-to-justice lens. These financial barriers come into play either as a filing fee—to file the initial petition—or an expungement fee—to be paid to complete the judicial process.[117] Their amount varies by state: the total fees charged in Kentucky are $300, in Kansas $195, in South Carolina $250, in Tennessee $100, in Alabama $500.[118]

Although these amounts may not seem significant, one article showed that the majority of Americans have less than $500 in savings.[119] Moreover, people who have been convicted of a crime tend to earn less money than those without a conviction, making it even harder for those

111. *Id.* at 2495.

112. *Id.*

113. THE LEAGUE OF WOMEN VOTERS OF KY., FELONY DISENFRANCHISEMENT IN THE COMMONWEALTH OF KENTUCKY 2 (2019), http://static1.squarespace.com/static/5da3dbee03dd2c4493abed8b/5da3ded30d130c328ae1dcf8/5da3df000d130c328ae1e712/1571020544541/final-2019-felon-voting-report-1-2019-pdf.pdf?format=original.

114. Prescott & Starr, *supra* note 105, at 2501–06.

115. Kristian Hernández, *More States Consider Automatic Criminal Record Expungement*, PEW CHARITABLE TRS. (May 25, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/25/more-states-consider-automatic-criminal-record-expungement.

116. Brian Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 668 (2021).

117. *See* KY. REV. STAT. ANN. § 431.073(10)–(11) (West 2019) (noting that a petitioner is to pay a $50 initial filing fee and a $250 expungement fee before an expungement can be completed).

118. *See* CCRC STATE SURVEY, *supra* note 82.

119. Kathryn Vasel, *6 in 10 Americans Don't Have $500 in Savings*, CNN MONEY (Jan. 12, 2017, 8:21 AM), https://money.cnn.com/2017/01/12/pf/americans-lack-of-savings/index.html.

in need of expungement to justify the cost.[120] For those living on limited incomes, the value of an expungement may seem less urgent than other needs such as housing, food, and transportation.

It is easy to see why the fees associated with expungements may be problematic from a policy perspective. It seems unfair if people who are eligible for expungements are not getting them only because they cannot afford the associated fees. It seems unjust that low-income people face lifelong consequences, while more-resourced individuals are able to shed the collateral effects of a conviction because they have more money. Regardless of how one feels about the existence of expungement laws, most people agree that if expungements are legally authorized, then wealth should not be the determining factor as to whether someone can access that process.

But, beyond concerns about fairness, there are also legitimate questions about the constitutionality of these expungement fees. If those incapable of paying these fees are not able to waive them through the judicial process, then these financial barriers may violate the Fourteenth Amendment of the U.S. Constitution. The next section explains why.

II. EXPUNGEMENTS, ACCESS TO THE COURTS, AND DUE PROCESS

A. Defining Access to Justice

The remainder of this paper uses an access-to-justice framework to examine how financial barriers—filing fees and expungement fees—affect access to expungements. Access to justice has "different meanings and interpretations" but broadly speaking it seeks to understand "what happens when lay people interact with the court system, and the degree to which they can have meaningful legal redress."[121] Access to justice is a concept that involves both justice-system accessibility, ensuring everyone can access judicial processes, and fairness, ensuring justice processes are fair.[122]

Traditionally, access-to-justice refers to the availability of attorneys to assist low-income litigants for free in certain types of civil cases.[123] Much access to civil justice scholarship focuses singularly on the costs

120. CRAIGIE ET AL., *supra* note 33, at 32.

121. Nourit Zimerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 FORDHAM URB. L.J. 473, 480 (2010).

122. Hadas Cohen & Michal Albertstein, *Multilevel Access to Justice in a World of Vanishing Trials: A Conflict Resolution Perspective*, 47 FORDHAM URB. L.J. 1, 7 (2019).

123. *See* Bruce A. Green, *Access to Criminal Justice: Where Are the Prosecutors?*, 3 TEX. A&M L. REV. 515, 515–17 (2016).

associated with legal representation and attorney access.[124] However, the costs associated with the actual judicial process itself are equally as important.[125] If a person cannot afford the costs inherent to court processes, it does not matter if they have legal representation in those processes or not: the doors of the courthouse will remain closed to them.

Access to justice involves understanding financial barriers and how these barriers could prevent individuals from bringing a legal case.[126] Of all the financial barriers, filing fees are arguably the most important, as they serve a gatekeeping function to the court. If a person cannot afford the filing fee, he will not be able to initiate his case and will not have access to any further court processes.

Filing fees have been examined in an access-to-justice context,[127] however no published study has specifically examined expungement fees under this framework. This examination is important because expungements are one of the most important civil court processes low-income individuals need to access. The quasi-criminal space that they occupy makes them different in kind than other types of civil proceedings, and expungements can be practically thought of as a continuation of criminal process.

Access to expungements is tied to the ability to exercise other important rights and programs. To that end, access to justice advocates should prioritize access to this process. If fees are deterring or prohibiting individuals from expunging their records and obtaining the associated benefits, that is an access to justice problem.

B. Access to Justice and Due Process

Before examining expungement access specifically, it is helpful to understand the law around access to civil courts generally. The United States Supreme Court has addressed the boundaries of access to justice in civil cases, and understanding those boundaries is helpful here.

The Supreme Court has concluded that substantive due process prohibits a state from denying a person access to the courts solely because of his inability to pay for that access.[128] The seminal case on this issue is *Boddie vs. Connecticut*. There, the Supreme Court considered a class-

124. *See, e.g.*, Lisa R. Pruitt et al., *Legal Deserts: A Multi-State Perspective on Rural Access to Justice*, 13 HARV. L. & POL'Y REV. 15 (2018).

125. *See* Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U.L. REV. 55, 70 (2016).

126. *See* Zimerman & Tyler, *supra* note 121, at 480.

127. Erin K. Burke, Note, *Utah's Open Courts: Will Hikes in Civil Filing Fees Restrict Access to Justice?*, 2010 UTAH L. REV. 201, 201.

128. Boddie v. Connecticut, 401 U.S. 371, 382 (1971).

action case where low-income women were unable to file for divorce because they could not pay the required $60 fee.[129] There was "no dispute" that the women could not afford the fee, and that they were acting in "good faith" in their attempt to access the courts.[130] Nonetheless, a federal district court ruled that the State could "limit access to its civil courts and particularly [sic] in this instance, to its divorce courts, by the requirement of a filing fee or other fees which effectively bar persons on relief from commencing actions therein[.]"[131] In short, that court concluded it could deny would-be plaintiffs access to the civil courts if they could not afford to pay a mandated fee.[132]

The Supreme Court reversed.[133] The *Boddie* Court began its analysis by noting that American society has structured dispute resolution on the common-law model and that this model gives the State a "monopoly over techniques for binding conflict resolution."[134] In short: the court system is the only place that we can resolve our legal disputes. The Court went on to explain that this State monopoly is only acceptable because of the idea of due process: that we agree not to deprive anyone of his rights without procedures to protect these legal rights.[135]

Typically, we think of due process in the court system as something that applies to defendants, a way to ensure adequate processes before we strip someone of a right. However, the *Boddie* Court explained that due process also applies to plaintiffs—that it can be implicated when someone is seeking to be a plaintiff in a civil case.[136] Due process concerns apply to would-be plaintiffs, the Court said, where the judicial system offers "the only available, legitimate means of resolving private disputes."[137] In such cases, denying access to the court system is the equivalent of stripping someone of a right—their right to be heard in the only dispute resolution forum.

The *Boddie* Court went on to explain why this case implicated due process concerns. It noted that, for the women seeking divorces, "resort to the state courts is the only avenue to dissolution of their marriages."[138] In that way, "[r]esort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to

129. *See id.* at 372.
130. *Id.* at 372–73.
131. Boddie v. Connecticut, 286 F. Supp. 968, 972, 974 (1968).
132. *Id.*
133. *Boddie*, 401 U.S. at 374.
134. *Id.* at 375.
135. *Id.* at 375–76.
136. *See id.* at 376–77.
137. *See id.* at 375.
138. *Id.* at 376.

defend his interests in court."[139] If the women wanted to dissolve their marriages, they had no choice but to utilize the judicial process.[140] For that reason, the Court explained, it was appropriate to examine the divorce process the women sought to invoke under a due process framework.[141]

The Court concluded that due process required the state court to admit the women to the courts to have "an opportunity to be heard upon their claimed right to a dissolution of their marriages."[142] It reached this conclusion by analogizing to other types of civil cases, where courts have determined that the Constitution requires "an opportunity granted at a meaningful time and in a meaningful manner for (a) hearing appropriate to the nature of the case."[143] Any law that deprives an individual of this right, the Court explained, violates due process.[144] A law that requires women to pay a fee they cannot afford in order to access the courts, is tantamount to denying the women the opportunity to be heard.[145]

Boddie, however, left open some questions. The Court was clear to say that its decision—that due process required a court to grant affirmative access to the would-be plaintiffs—was limited only to the facts of that particular case.[146] It reiterated that this case involved rights of "basic importance in our society,"[147] and implied, without fully explaining, that those rights were somehow a dividing line.

It was perhaps because of that ambiguity that the Court felt compelled to take another civil filing fee case just two years later. In 1973, the Court considered the case of *United States v. Kras*, where Robert Kras sought to challenge the $50 fee he had to pay in order to file for bankruptcy.[148] Although the government did not dispute that Kras was unable to afford the fee, it did believe that the interests in *Boddie* were distinct from the interests implicated by a bankruptcy case.[149]

The Supreme Court ultimately agreed, explaining that the *Boddie* Court based its decision on the fact that marriage implicated "interests of basic importance in our society" and that the "state monopoliz[ed] . . . the means for legally dissolving this relationship."[150] It then

139. *Id.* at 376–77.
140. *Id.*
141. *Id.*
142. *Id.* at 380.
143. *Id.* at 378 (internal quotations omitted) (citations omitted).
144. *Id.* at 380.
145. *Id.*
146. *Id.* at 382.
147. *Id.* at 376.
148. United States v. Kras, 409 U.S. 434, 435–36 (1973).
149. *Id.* at 441.
150. *Id.* at 444 (quoting *Boddie*, 401 U.S. at 374).

distinguished *Kras* by first noting that "elimination of his debt burden" and "desired new start in life" was "important" but "does not rise to the same constitutional level."[151]

Similarly, the "Government's control over the establishment, enforcement, or dissolution of debts [was not] so exclusive as Connecticut's control over the marriage relationship in Boddie."[152] For that reason, the Court concluded it did not violate due process to require someone to pay a filing fee to be able to access the bankruptcy process.[153]

The Court later reiterated that *Boddie* was unique and that states do not usually have to allow access to its judicial processes if an individual cannot pay for that access.[154] In *M.L.B. v. S.L.J.*, the Court determined that it was unconstitutional to deny low-income people a right to appeal a termination of their parental rights because they could not afford to pay for the required transcript.[155] Although this case did not involve a filing fee to initiate a case, it did—like *Boddie* and *Kras*—involve statutorily mandated fees in a civil case.[156]

The Court again noted that the category of civil cases in which a state must waive fees is "narrow."[157] However, it once again emphasized that cases that involve a "fundamental interest . . . gained or lost depending on the availability of the relief sought" were different, and required courts to grant access to the process regardless of a petitioner's ability to pay for it.[158] Because the *M.L.B.* case implicated fundamental rights around parenting and family relationships, the Court decided that the plaintiff had a right to access the appellate process, even though the plaintiff could not afford the costs.[159]

Reading *Boddie* and *Kras* in combination makes it clear that two factors are important when a court considers whether filing fees are constitutional: 1) does the proceeding implicate a fundamental right? and; 2) does the state monopolize the means for adjudicating or accessing that right?[160] If the answer to both of these questions is yes, and there is

151. *Id.* at 445.
152. *Id.*
153. *Id.* at 449–50.
154. M.L.B. v. S.L.J., 519 U.S. 102, 114 (1996).
155. *Id.* at 107, 128.
156. *Id.* at 106.
157. *Id.* at 113.
158. *Id.* at 115–16 (internal quotations omitted).
159. *Id.* at 124.
160. Justice Brennan made the point that this prong is, in some ways, unworkable because every judicial process is a monopolization of enforcing a legal right. Boddie v. Connecticut, 401 U.S. 371, 386–88 (1971) (Brennan, J., concurring in part). For that reason, he would have found that due process required a person to have an opportunity to access the courts for any legal right. *Id.*

no countervailing state interest,[161] then a person has a due process right to access the courts, regardless of his ability to pay.

Expungements, in some circumstances, satisfy all of these criteria. As explained below, these criteria are most likely to be met in the case of felony convictions, where an individual is more likely to forfeit important civil liberties because of his record. There may be some cases where a misdemeanor conviction will meet these criteria because that conviction implicates a fundamental right—for example when a person loses his ability to possess a gun because of a misdemeanor. These circumstances are, however, more limited.

C. Expungements Implicate a Fundamental Right

A felony conviction can deprive citizens of *at least* two rights the United States Supreme Court has recognized to be of "basic importance to society": the right to vote and the right to bear arms.[162] Both of these rights have been the topic of heated political debates in recent years, and it is likely that these debates motivate state's policy choices around expungement. States that value expanded voting access may enact pro-expungement policies because of their impact on expanding the electorate. States that value Second Amendment possession rights may enact pro-expungement policies because they elevate the importance of firearm possession. The way that states strike a balance between these rights—which are valued differently by different political parties—will impact what a state's expungement scheme looks like, what offenses it makes eligible, and what collateral consequences it removes.

The disenfranchisement of a person convicted of a felony has deep roots. Both the Greek and Roman societies stripped individuals convicted of severe crimes of their right to vote.[163] This practice was based on the idea that those who violate the social contract should lose the ability to administer it by choosing leaders and policies.[164] This type of disenfranchisement took hold in America and expanded over time.[165] As

161. *Id.* at 377 (majority opinion).

162. *See* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181, 210 (2008) ("It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" (quoting Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979))); District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (holding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons").

163. Schroeder v. Minn. Sec'y of State, No. 62-CV-19-7440, 2020 U.S. Dist. LEXIS 458, at *2 (D. Minn. Aug. 11, 2020).

164. Eli L. Levine, Note, *Does the Social Contract Justify Felony Disenfranchisement?*, 1 WASH. U. JURIS. REV. 193, 203 (2009).

165. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 781 (2002).

of 2019, forty-eight states disenfranchised persons convicted of felonies while they served their sentence, twenty-nine disenfranchised them while they were on probation, and at least four states permanently disenfranchised persons based on a felony conviction.[166]

The Supreme Court has expressly stated that felon disenfranchisement laws do not, generally speaking, violate the Constitution.[167] In *Richardson v. Ramirez*, the Court considered and rejected an equal protection challenge to California's disenfranchisement laws.[168] More recently, the Eleventh Circuit rejected another equal protection challenge to Florida's felony disenfranchisement laws in *Johnson v. Governor of Florida*.[169] In *Hunter v. Underwood*, the Court explained that a felon disenfranchisement law that is neutral on its face will only violate equal protection if a person can show that racial discrimination was a "substantial" or "motivating" factor behind enacting the law.[170] Thus, as it stands, the majority of felon disenfranchisement laws are constitutionally permissible.

Today, in the states where a felony conviction permanently alters someone's voting rights, there are hundreds of thousands of people who cannot vote because of a conviction. The Sentencing Project estimates that, as of fall 2020, there were 5.2 million Americans who could not vote because of felony disenfranchisement laws.[171] In Kentucky—one state with harsh disenfranchisement laws—312,046 Kentuckians could not vote because of a felony conviction as of 2019.[172] As a result of Kentucky's felony voting laws, the state had the highest rate of disenfranchised Black voters in the country, at 26.2%.[173] Mississippi, too, has stringent disenfranchisement laws, and as a result, there are 176,881 individuals who cannot vote after completing their sentence.[174] It has the highest overall disenfranchisement rate in the nation, with 10.55% of the adult population of that state ineligible to vote.[175] Tennessee is not far behind,

166. Jean Chung, *Felony Disenfranchisement: A Primer*, SENT'G PROJECT (June 27, 2019), https://web.archive.org/web/20190629065917/http://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

167. Richardson v. Ramirez, 418 U.S. 24, 53–54, 56 (1974).

168. *Id.* at 56.

169. 405 F.3d 1214, 1224 (11th Cir. 2005) (en banc).

170. 471 U.S. 222, 227–28 (1985).

171. Christopher Uggen et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, SENT'G PROJECT (Oct. 30, 2020), https://www.sentencingproject.org/wp-content/uploads/2020/10/Locked-Out-2020.pdf [hereinafter *Locked Out 2020*].

172. THE LEAGUE OF WOMEN VOTERS OF KY., *supra* note 113, at 2.

173. *Id.*

174. *Locked Out 2020*, *supra* note 171.

175. *Id.*

with 9.09% overall disenfranchisement, and 360,103 individuals who cannot vote after completing their sentence.[176]

Recently, several states—including Kentucky and Iowa—have issued executive orders that at least temporarily restore the voting rights of some people convicted of felonies.[177] In Kentucky, Governor Andy Beshear's executive order allowed 140,000 people convicted of nonviolent felonies to vote.[178] Relatedly, Iowa became the last state in the nation to afford some type of relief to those convicted of a felony when Governor Kim Reynolds restored the voting rights of 60,000 people through a 2020 executive order.[179]

But these executive orders do not represent permanent policy change. Kentucky had a similar executive order issued in 2015, which restored the voting rights of some individuals with a felony conviction.[180] But the governor issued this executive order at the end of his term, and the new administration reversed just days later, stripping these same individuals of their voting rights once more.[181]

Virginia, too, has set up a system that depends on executive discretion. In that state, the governor reviews files to individually restore voting rights on a monthly basis.[182] But there are still laws on the books that automatically disenfranchise persons convicted of felonies, meaning the restoration of voting rights depends upon the executive branch's

176. *Id.*

177. Exec. Order No. 2019-003, Governor of the Commonwealth of Kentucky (Dec. 12, 2019), https://civilrightsrestoration.ky.gov/Documents/Civil%20Rights%20Restoration%20Executive%20Order.pdf; Exec. Order No. 7, Governor of the State of Iowa (Aug. 5, 2020), https://governor.iowa.gov/sites/default/files/documents/EO7%20-%20Voting%20Restoration.pdf?utm_medium=email&utm_source=govdelivery.

178. Jonathan Bullington & Chris Kenning, *Gov. Andy Beshear Restores Voting Rights to More than 140,000 Nonviolent Kentucky Felons*, COURIER J. (Dec. 13, 2019, 11:13 AM), https://www.courier-journal.com/story/news/politics/ky-governor/2019/12/12/felons-right-vote-kentucky-restores-voting-rights-more-than-100000/4397887002/.

179. Stephen Gruber-Miller & Ian Richardson, *Gov. Kim Reynolds Signs Executive Order Restoring Felon Voting Rights, Removing Iowa's Last-in-the-Nation Status*, DES MOINES REG. (Aug 5, 2020, 7:29 PM), https://www.desmoinesregister.com/story/news/politics/2020/08/05/iowa-governor-kim-reynolds-signs-felon-voting-rights-executive-order-before-november-election/5573994002/; *see also* Katarina Sostaric, *Governor Acts to Restore Voting Rights to Iowans with Felony Convictions*, NPR (Aug. 5, 2020, 12:54 PM), https://www.npr.org/2020/08/05/899284703/governor-acts-to-restore-voting-rights-to-iowans-with-past-felony-convictions.

180. *Voting Rights Restoration Efforts in Kentucky*, BRENNAN CTR. FOR JUST. (Aug. 5, 2020), https://www.brennancenter.org/our-work/research-reports/voting-rights-restoration-efforts-kentucky.

181. *Id.*

182. *Felony Disenfranchisement Laws (Map)*, ACLU, https://www.aclu.org/issues/voting-rights/voter-restoration/felony-disenfranchisement-laws-map (last visited Apr. 7, 2022).

ongoing willingness to use its power to restore these rights.[183] If the review process stopped, the restoration of rights would also stop.

That is why expungements—which permanently remove a conviction—are the best way to ensure one's voting rights are permanently restored. Executive orders restore a person's rights despite the prior conviction. Expungement, in contrast, restores someone's rights because there is no longer an underlying conviction. Disenfranchisement laws are political at their core and are enacted and changed by political bodies. Completing an expungement removes any given individual—and his voting rights—from these political processes and grants him permanent relief.

The second fundamental right that a person with a felony conviction may forfeit is the Second Amendment right to bear arms.[184] Dispossession laws that prohibit people convicted of a felony from owning or possessing a gun are rooted in the idea of a "virtuous citizenry," and center around the idea that "persons who have committed serious crimes forfeit the right to possess firearms much the way they forfeit other civil liberties."[185]

The idea that a person convicted of a felony should lose his gun rights is ingrained in society. It is so ingrained that the Supreme Court, when considering the famous *Heller* case, went out of its way to state that its decision only went to the ability of "law-abiding, responsible citizens to use arms in defense of hearth and home."[186] The Court specifically noted that felon dispossession statutes were "presumptively lawful."[187] In short, the ability to remove the gun rights of people convicted of a felony is interwoven into our societal and legal systems.

It is unsurprising, then, that every state has some version of a felon dispossession statute.[188] States have wide latitude to shape dispossession statutes, and laws related to the impact of a conviction are varied.[189] Several states remove an individual's right to own and/or possess a handgun upon a felony conviction and these rights can only be restored

183. *See id.*

184. District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (holding that the Second Amendment "guarantee[s] the individual right to possess and carry weapons"); RESTORATION OF RTS. PROJECT, 50-STATE COMPARISON: LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS (2021), https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/ [hereinafter LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS].

185. Binderup v. Att'y Gen. U.S., 836 F.3d 336, 348–49 (3d Cir. 2016) (internal quotations omitted).

186. *Heller*, 554 U.S. at 635.

187. *Id.* at 627 n.26.

188. LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS, *supra* note 184.

189. *See id.*

by a pardon.[190] Other states will also remove someone's possession rights if they are convicted of a certain type of misdemeanor.[191] In many states, these bans are written into law in such a way so as to make them permanent.[192]

Recent case law makes it clear that state laws that permanently strip a person of their possession rights based on a conviction are constitutional. In *Kanter v. Barr*, the Seventh Circuit considered a challenge to both federal and state dispossession laws.[193] Kanter, a former CEO, pled guilty to a single count of mail fraud—a non-violent crime—in 2011.[194] He was sentenced to one year and one day in jail, and—several years after his sentence was complete—filed suit on the theory that the Wisconsin statute that prohibited him from possessing a gun was unconstitutional.[195]

The Seventh Circuit rejected Kanter's arguments. It did so because it concluded that the Second Amendment was meant to apply to "virtuous" "law-abiding" citizens, and that those convicted of a felony—even a non-violent one—fell outside of its bounds.[196] The majority of circuits that have considered dispossession statutes have similarly concluded that Second Amendment challenges to these laws are unpersuasive.[197]

Collectively, this means that at least some people in most states will experience Second Amendment consequences from a conviction. In many states, an expungement is the only way a person would be able to regain his ability to possess a firearm. That is because many states with dispossession statutes contain a carve out that "[a]ny conviction which has been expunged[] or set aside . . . is not a conviction for purposes of the statute."[198]

Based on the foregoing, it is clear that expungement—particularly of felonies—does implicate an interest of basic importance, as required by the first prong of the due process test. When applied in this context, it is a judicial process that implicates voting rights and firearm possession

190. *Id.*
191. *Id.*
192. *See, e.g.*, KY. REV. STAT. ANN. § 527.040(1) (West 2018).
193. 919 F.3d 437, 440 (7th Cir. 2019).
194. *Id.*
195. *Id.*
196. *Id.* at 446.
197. *Id.* at 442–43.
198. *See, e.g.*, *id.* at 437 (alteration in original) (internal quotations omitted) (quoting 18 U.S.C. § 921(a)(20)).

rights. Courts have declared these rights to be fundamental, and at least as important as the marriage interest implicated in *Boddie*.[199]

D. The State Has Fully Monopolized the Means for Accessing the Implicated Right

The question then becomes whether the state has monopolized the means to fully access the implicated rights. There is not much case law interpreting what it means for the state to monopolize a process, although the Supreme Court in *Kras* suggested the key inquiry is the "exclusiveness of court access and court remedy."[200] In short, is there another way outside of the court system for an individual to achieve the same outcome?

Of course, in some ways the answer to this question will always be no. As the Court recognized in *Boddie*, our judicial system is based on the courts as the exclusive way to resolve disputes.[201] Although people may be able to achieve a similar outcome through non-judicial processes—for example negotiating with creditors to reduce their debt burden instead of filing for bankruptcy as the Court suggested in *Kras*[202]—these outcomes will never have the full force of law that a court order carries. A contract with a creditor does not carry the same weight as a court order discharging debt. In some ways, then, the state has monopolized the means for every judicial action.

However, as the case law makes clear, courts considering due process in this context are primarily concerned with the nature of the role of government. In his concurring opinion in *Kras*, Chief Justice Burger further elaborated on this issue.[203] Specifically, he noted that:

> In a bankruptcy proceeding the government, through the court, is no more than the overseer and the administrator of the process;

199. Boddie v. Connecticut, 401 U.S. 371, 376 (1971) ("As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society."); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) ("[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); District of Columbia v. Heller, 554 U.S. 570, 592 (2008) (explaining an individual's guarantee to possess and carry weapons "is strongly confirmed by the historical background of the Second Amendment"); Mass. Pub. Int. Rsch. Grp. v. Sec'y of the Commonwealth, 375 N.E.2d 1175, 1181 (1978) ("[V]oting has long been recognized as a *fundamental* political *right* and indeed the 'preservative of all *rights*.'" (emphasis added) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886))).

200. United States v. Kras, 409 U.S. 434, 445 (1973).

201. *Boddie*, 401 U.S. at 375–76.

202. *Kras*, 409 U.S. at 445.

203. *Id.* at 450 (Burger, C.J., concurring).

> it is not the absolute and exclusive controller as with the dissolution of marriage. . . . [T]he bankruptcy court is but one mode of orderly adjustment with creditors; it is not the only one since many debtors work out binding private adjustments with creditors.[204]

Under this view, it is the availability of other binding alternatives that is centrally important.

On first glance, it may seem that there are other alternatives to expungement. Many states have laws that allow a person to regain civil rights—including voting and gun rights—if they receive an executive pardon.[205] Some might argue that the availability of this alternative, executive branch system means that the state has not fully monopolized the means for accessing these fundamental rights.

Yet there are several reasons why—despite the availability of pardons—expungements still satisfy the state monopolization requirement. First, the judicial process is still the only way that a person can actually expunge their record.[206] Although a pardon may remove some of the consequences of a conviction, "the granting of a pardon is in no sense an overturning of a judgment of conviction by some other tribunal; it is '[a]n executive action that mitigates or sets aside *punishment* for a crime.'"[207] This distinction matters because a pardon does not erase the underlying conviction the way an expungement does—it only erases particular effects. This means that the state has monopolized the only means to truly erase a conviction: the expungement process.[208]

Second, state constitutions place the authority to pardon an individual for a crime solely within the discretion of the state's executive branch.[209] In most states, executive branch officials use this power sparingly—the Restoration of Rights Project categorizes a state as

204. *Id.*

205. LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS, *supra* note 184.

206. *What Is "Expungement?"*, *supra* note 74.

207. Nixon v. United States, 506 U.S. 224, 232 (1993) (alteration in original) (quoting *Pardon*, BLACK'S LAW DICTIONARY (6th ed. 1990)).

208. *What Is "Expungement?"*, *supra* note 74; *see* Boddie v. Connecticut, 401 U.S. 371, 376–77 (1971).

209. *See, e.g.*, KY. CONST. § 77; Walker v. Barron, 172 N.E.3d 255, 261–62, 268 (Ill. App. Ct. 2021) (Walker, J., dissenting) (noting that the "discretion to act is entirely that of the Governor" (quoting 6 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 390 (1972))); RESTORATION OF RTS. PROJECT, 50-STATE COMPARISON: PARDON POLICY & PRACTICE (2021), https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/ [hereinafter PARDON POLICY & PRACTICE].

"frequent[ly] and regular[ly]" granting pardons if a mere thirty percent of applications are eventually approved.[210] Notably, only sixteen states fell into this category.[211]

In many states, pardons are extremely rare. By way of example, Alaska has only issued three pardons since 1995.[212] Hawai'i has not granted any pardons since its current governor took office in 2014, and the prior administration issued just eighty-three pardons.[213]

As of 2020, the Governor of Maryland had granted no pardons during his first five years in that position.[214] These small numbers, based on an entirely discretionary system, mean that the pardon system is effectively unavailable as a means to restore rights.

In contrast, one study of expungement showed that over 74% of those applications were granted in Michigan in 2016 and 2017.[215] This difference makes sense, as expungement systems have been set up with the explicit goal of helping individuals erase a conviction and its collateral consequences. In 2018, a bipartisan group of governors published an opinion piece in *USA Today* specifically noting that they were enacting expungement schemes to "clear[] away some of the barriers that can hold people back from leading successful, law-abiding lives."[216] Expungements are designed to be processed, approved, and helpful to achieving policy goals.

It is also worth noting that the key inquiry for due process is the "*state* monopolization of the means" of accessing a fundamental right.[217] Here, it is undeniable that the state has monopolized the process for restoring one's lost rights from a conviction. Both expungements and pardons are state-controlled processes. There is no non-state-controlled process to restore one's rights. A person cannot privately contract to have a conviction removed from his record or pay money to a private company to regain his right to vote. The state defines crimes, decides whether to bring criminal charges, enacts any punishment for a crime, and ultimately has the sole power to remove or set aside that conviction.

210. *See* PARDON POLICY & PRACTICE, *supra* note 209.
211. *See id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. Prescott & Starr, *supra* note 105, at 2489.
216. Matt Bevin et al., *Governors: We Need Bipartisan Criminal Justice Reform to Improve Lives and Our Workforce*, USA TODAY (Aug. 14, 2018, 5:54 PM), https://www.usatoday.com/story/opinion/2018/08/14/bipartisan-criminal-justice-reform-improve-lives-workforce-safety-column/972691002/.
217. Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (emphasis added).

The Constitution requires a low-income person be granted access to the courts if there is a state-monopolized process that implicates a fundamental right.[218] It does not require that the judicial process be the only state-controlled process—it merely requires that the state has monopolized the space. In that way, it does not matter if pardons and expungements are both ways to restore rights: what matters is that they are both controlled by the government.

This focus on the role of government as a deciding factor makes sense. If government has not fully monopolized a process, then the private market might have a role to play. If private companies could restore civil rights, for example, we might expect market forces to create an option to provide restoration for less than the government fee. But if the government holds the exclusive power, as it does here, there is no space for privately-brokered solutions. The government's refusal to waive the costs is a complete denial of the chance to access the implicated right. The denial of that chance is what violates an individual's due process rights.

E. There Is No Countervailing State Interest

Even if a state-monopolized process implicates a fundamental right, a state may still deny a low-income person access to it if there is a sufficient countervailing state interest.[219] In *Boddie*, the Court considered the types of state interests implicated by filing fees, noting that "[t]he arguments for this kind of fee and cost requirement are that the State's interest in the prevention of frivolous litigation is substantial, [and] its use of court fees and process costs to allocate scarce resources is rational."[220] These interests are identical to those implicated by expungement filing fees, or any other type of filing fee. It is true that the state has an interest in deterring frivolous litigation and the financial resources generated by filing fees. The question is if that interest outweighs the interests of the would-be plaintiffs in a particular type of proceeding.

In *Boddie*, the Court unequivocally rejected these interests, noting that "none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open" for resolving their dispute.[221] It went on to note that there were other ways a court could deter frivolous litigation, and that it had already rejected a

218. *See id.*
219. *See id.* at 377.
220. *Id.* at 381.
221. *Id.*

state's interest in the revenue generated by filing fees in *Griffin v. Illinois*.[222] The Court even went so far as to imply that the State's interest in revenue from filing fees here was less compelling than its interest in *Griffin*, explaining that the access to a transcript that the plaintiff sought in *Griffin* was "a convenient but not necessary predicate to court access."[223] In the case of the filing fee in *Boddie*, however, the filing fee was necessary to make it through the courthouse doors.[224] There is no reason to think that a court considering the state's interest in expungement fees would find any differently.

It is worth quickly addressing the argument that the state's interest in expungement is different because expungements—particularly the type of expungements that implicate due process—involve convictions, often for serious crimes. Some may try to argue that states have a different type of interest in ensuring only those it deems "worthy" are allowed to expunge their criminal records. But in this context, that argument is a red herring. When discussing filing fees, the issue is not what the state's interest is in creating the underlying civil action—a state may create an expungement scheme that allows any conviction or no conviction to be expunged. A state can choose to omit violent offenses—or any offense—from those eligible for expungement.

So, the key question when considering filing fees is what the state's interest is in collecting that particular fee for that particular type of action—and why someone's wealth status should determine whether he has access to the courts for that particular purpose. The *Boddie* Court did not, for example, consider the State's interest in creating a judicial process for dissolving marriages. Nor did it ask who was eligible for divorce or what criteria they should have to satisfy to have their marriages dissolved. The Court only examined what the State's interest was in charging a fee to access that process. The same is true when considering the state's interest in expungement fees.

F. Conclusion to Expungement and Due Process

Expungement—at least in some circumstances—satisfies the due process factors that trigger mandatory court access. Expungement implicates the fundamental rights of voting and gun possession, and it is a process that is monopolized by the state. There are no countervailing state interests that would justify restricting access. For those reasons, it

222. *Id.* at 381–82 (citing Griffin v. Illinois, 351 U.S. 12 (1956)).
223. *Id.* at 382.
224. *Id.*

would violate due process to deny a low-income person access to the court system for certain felony expungement proceedings.

From a policy perspective, this result is somewhat counterintuitive. States have been comfortable relaxing access to expungements for more minor offenses,[225] perhaps *because* of the minor nature of those crimes. States are more reticent, however, to grant access to felony expungements,[226] likely because of the more serious nature of those crimes. When the Kentucky Governor restored the voting rights of some felons, he specifically excluded violent felonies because "some offenses . . . were too heinous to forgive."[227] Yet, the due process analysis above concludes that constitutional concerns apply only to cases that implicate fundamental rights, most often felonies. Of course, those crimes implicate fundamental rights in the first place because states view them as serious enough to warrant extreme consequences—including losing one's fundamental rights. But this topsy-turvy policy landscape is best left to the political branches to navigate.

III. EXPUNGEMENTS UNDER AN EQUAL PROTECTION FRAMEWORK?

A. Grounding Access in Equal Protection

Most courts that have considered filing fees and access to civil courts have grounded this analysis in due process rather than equal protection. However, in *Boddie*, Justice Douglas argued that equal protection was a more natural home for this type of case.[228] For Justice Douglas in *Boddie*, the "sturdy growth" of the *Griffin* line of cases stood for the proposition "that differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution."[229] Because access to civil courts fundamentally involve access differences that are rooted in a person's financial situation, he believed equal protection provided a more fitting

225. *See* David Schlussel & Margaret Love, *Record-Breaking Number of New Expungement Laws Enacted in 2019*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 6, 2020), https://ccresourcecenter.org/2020/02/06/new-2019-laws-authorize-expungement-other-record-relief/.

226. *See id.*; Eric Westervelt & Barbara Brosher, *Scrubbing the Past to Give Those with a Criminal Record a Second Chance*, NPR (Feb. 19, 2019, 4:58 AM), https://www.npr.org/2019/02/19/692322738/scrubbing-the-past-to-give-those-with-a-criminal-record-a-second-chance.

227. Michael Wines, *Kentucky Gives Voting Rights to Some 140,000 Former Felons*, N.Y. TIMES, https://www.nytimes.com/2019/12/12/us/kentucky-felons-voting-rights.html (Apr. 7, 2021).

228. *Boddie*, 401 U.S. at 383–86.

229. *Id.* at 383.

home for this line of cases.[230] Other scholars, too, have questioned if due process was the right framework to place low-income individuals' right to access civil courts and whether an equal protection framework would be a more natural fit.[231]

What would it look like to ground expungement access in equal protection? The Equal Protection Clause of the Fourteenth Amendment states that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[232] The Supreme Court, interpreting this Amendment, has said its requirements boil down to this: "all persons similarly situated should be treated alike."[233] When laws draw classifications based on a suspect class, or burden a fundamental right, courts examine these laws under strict scrutiny.[234] This doctrine "invokes heightened review as a means of providing vigorous judicial protection for core rights."[235] When applying strict scrutiny, a court examines whether a suspect law is "suitably tailored to serve a compelling state interest."[236]

The argument for examining expungement filing fees under an equal protection framework is—like the due process analysis—rooted in the fundamental rights that are impacted by expungement. In *Shapiro v. Thompson*, the Supreme Court held that all classifications that relate to the "distribution of fundamental rights" are subject to strict scrutiny.[237] Laws that draw distinctions between groups' expungement access based on fees should be subjected to strict scrutiny because these laws touch on fundamental rights.

Specifically, these laws implicate both voting rights and wealth status, which the Supreme Court has consistently held should be closely scrutinized. In *McDonald v. Board of Election Commissioners*, for example, the Court examined a challenge to Illinois' absentee voting provisions and noted "a careful examination [of a law] on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[238] The

230. *Id.* at 383–86.

231. James R. Lee, Note, *Constitutional Law—Due Process Clause—Access to Divorce Courts for Indigents*, 46 TUL. L. REV. 799, 801–02 (1972).

232. U.S. CONST. amend. XIV, § 1.

233. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985).

234. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 797 (2006).

235. *Id.* at 803.

236. *City of Cleburne*, 473 U.S. at 440.

237. 394 U.S. 618 (1969); Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1282 (2007).

238. 394 U.S. 802, 803, 807 (1969) (citation omitted).

Court reached a similar conclusion in *Bullock v. Carter*, where it held that a primary election system that required candidates to pay hefty filing fees "must be 'closely scrutinized.'"[239] These cases make it clear that laws affecting the voting rights of poor individuals are entitled to heightened scrutiny.

Of course, the fact that expungement fee laws are subject to strict scrutiny does not mean, by itself, that they are unconstitutional. The Supreme Court has noted that it wants "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[240] Indeed, the Court has implied that even laws that draw lines based on race can survive strict scrutiny in some cases.[241] This is noteworthy because the key purpose of the Equal Protection Clause is to prevent race-based discrimination.[242]

When closely scrutinizing expungement filing fees, a court will ask if those laws are narrowly tailored to further a compelling government interest. As discussed above, the governmental interest implicated by filing fees is its interest in collecting revenue, allocating scarce resources, and deterring frivolous litigation.[243] Yet the Court has indicated in both *Griffin* and *Boddie* that neither of these is important enough to override a plaintiff's interest in accessing the civil court system.[244] This could open the door for a court to find neither compelling enough to survive strict scrutiny. Similarly, from a narrow tailoring perspective, it is at least possible that a court could find other ways to achieve its goals related to revenue, perhaps by increasing the filing fee for those who could afford to pay more or exploring other government revenue sources. So, too, could a court deter frivolous litigation through other means, such as imposing an after the fact charge for those it finds to have misused the court system in this way.

Any equal protection challenge to expungement fees may be an uphill climb for advocates given the current state of jurisprudence on access to justice. However, it is possible that this framework for thinking about court system costs could gain traction with concerted effort by advocates. Expungements—because of the clear jurisprudence that can connect them to fundamental rights—may be a good place to test this strategy.

239. 405 U.S. 134, 135, 144 (1972).

240. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

241. *Id.* (noting that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test").

242. Washington v. Davis, 426 U.S. 229, 239 (1976).

243. Boddie v. Connecticut, 401 U.S. 371, 381 (1971).

244. *See id.* at 382; Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.").

Some people may also be interested in analyzing expungement fees based on their racially disproportionate impact. As explained above, felon disenfranchisement laws have led to a situation where one in thirteen Black people in America are unable to vote—a rate that is four times that of other Americans.[245] There is evidence that this racial impact was intentional: many states enacted felony disenfranchisement policies after the Civil War, with some states tailoring these disenfranchisement laws to target the offenses policymakers believed Black people were most likely to be convicted of.[246] In Mississippi, for example, policymakers tried to disenfranchise those convicted of theft, arson, and burglary[247] likely because they believed bias in the justice system meant Black people would be disproportionately convicted of the former types of offenses.

Yet, prior case law suggests that any race-based equal protection challenge to expungement fees is unlikely to be successful. Yes, it is true that felon disenfranchisement laws disproportionately impact Black people, and that expungement fees are tied to those same individuals regaining their fundamental rights. But, as the Supreme Court explained in *Washington v. Davis*, racially disproportionate outcomes are not enough to sustain an equal protection challenge.[248] Instead, the Court explained, "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[249]

In regard to laws that specifically disenfranchise those convicted of a felony, the Court has laid out a two-step equal protection test. In *Hunter v. Underwood*, the Court considered a challenge to Alabama's criminal disenfranchisement law.[250] The Court articulated a test to determine whether a felon disenfranchisement law violates equal protection.[251] First, a court must determine if racial discrimination was a substantial or motivating factor in the decision to disenfranchise people convicted of a felony.[252] If it was, the burden shifts to the state to show that the provision would have been enacted if the discriminatory motive had not

245. Karina Schroeder, *How Systemic Racism Keeps Millions of Black People from Voting*, VERA INST. OF JUST. (Feb. 16, 2018), https://www.vera.org/blog/how-systemic-racism-keeps-millions-of-black-people-from-voting.

246. Jean Chung, *Voting Rights in the Era of Mass Incarceration: A Primer*, SENT'G PROJECT (July 28, 2021), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/.

247. *Id.*

248. Washington v. Davis, 426 U.S. 229, 239 (1976).

249. *Id.* at 240.

250. 471 U.S. 222, 223 (1985).

251. *Id.* at 227–28.

252. *Id.* at 228.

been present.[253] In the case of Alabama, the Court found its disenfranchisement laws unconstitutional because it was adopted in 1901 with the goal of minimizing the political power of Black people.[254]

However most equal protection challenges to disenfranchisement laws have been unsuccessful. In *Johnson v. Governor of Florida*, for example, the court considered a challenge to Florida's laws that prohibited those convicted of a felony from voting.[255] The plaintiffs argued that the disenfranchisement law was motivated by intentional racial discrimination when the State passed it in 1868, and that it accordingly satisfied the *Hunter* test.[256] The court rejected this challenge, however, because it said the State's decision to readopt—and slightly modify—the disenfranchisement law meant that even if there was racial animus behind the original law, the subsequent re-enactment would have "eliminate[d] the taint from a law that was originally enacted with discriminatory intent."[257]

The ability for subsequent policy decisions to remove the taint of an originally racist law is why a race-based equal protection challenge to expungement fees is likely to fail. Even if racial discrimination motivated the enactment of many disenfranchisement laws, expungements are a subsequent legislative act that modifies those original schemes and provides a forum to undo some of their harm. To succeed on an equal protection challenge, a plaintiff would need to show that the decision to require mandatory fees was expressly motivated by racial animus and that a state would not have charged fees but for its racist intent. This would be a heavy lift given that the stated purpose of many expungement laws is to reduce racially disproportionate impacts of the criminal justice system.

B. Beyond Legislative Grace

When scrutinizing any expungement fees, a court is likely to consider whether expungements are simply a matter of "legislative grace" or "statutory privilege."[258] It is true that a state has discretion whether to enact an expungement scheme. Yet binding precedent from the United States Supreme Court indicates that if a state chooses to make a process

253. *Id.*
254. *Id.* at 228–29, 233.
255. 405 F.3d 1214, 1216 (11th Cir. 2005).
256. *Id.* at 1217–18.
257. *Id.* at 1223–24.
258. Jones v. Commonwealth, No. 2019-CA-000172-MR, 2019 WL 5089922, at *1–2 (Ky. Ct. App. Oct. 11, 2019), *rev'd*, 636 S.W.3d 503 (Ky. 2021).

that implicates a fundamental right available to some individuals, it cannot deny this process to poor individuals.[259]

In *Griffin*, the Supreme Court considered whether a state law that required all criminal defendants to pay for a transcript of their trial proceedings, whether indigent or not, violated the Equal Protection Clause.[260] The Court ultimately concluded that equal protection required equal access to the courts regardless of financial status.[261] That was true even though the Constitution does not require a state to provide appellate review.[262] But where a state chooses to provide appellate review, the Court concluded it cannot provide it "in a way that discriminates against some convicted defendants on account of their poverty."[263] The same is true of expungements.

The Supreme Court addressed a similar issue of "legislative grace" in the case of *Smith v. Bennett*.[264] There, two state prisoners tried to file writs of habeas corpus, but did not pay the required filing fee.[265] Because they did not include the fee, the clerk would not docket the motions.[266] The State acknowledged that these fees meant that some people who were imprisoned were unable to file a petition for habeas review because of their financial circumstances.[267] But—among other arguments—the State said that it was able to do so because state habeas review was a matter of legislative grace.[268] The Court rejected this argument, noting that "[b]ecause [the State] has established such a procedure" it did not need to consider whether "the remedy is a matter of legislative grace."[269] Regardless of whether the State was constitutionally required to create a habeas review scheme, it had created one, and equal protection meant the State could not make "it available only to those persons who can pay the necessary filing fees."[270]

Expungements may be a matter of legislative grace. As described earlier, five states and the federal government have no expungement scheme,[271] and it is likely the Constitution does not require them to enact one. But where a state chooses to enact an expungement system—and

259. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
260. *Id.* at 13–15.
261. *See id.* at 19.
262. *Id.* at 18.
263. *Id.*
264. 365 U.S. 708, 713 (1961).
265. *Id.* at 709–10.
266. *Id.*
267. *See id.* at 711.
268. *Id.* at 711, 713.
269. *Id.* at 713.
270. *Id.* at 714.
271. CCRC STATE SURVEY, *supra* note 82.

that expungement system allows individuals to regain important rights—it cannot make it available only to those who can afford to pay for it.

IV. RECENT EXPUNGEMENT ACCESS CASES

There have been several court cases recently that address issues of expungement access for low-income individuals.[272] This section examines these recent cases and uses those cases to discuss trends in expungement litigation.

Recent expungement access cases implicate *in forma pauperis* statutes, and it is worth explaining these types of statutes. *In forma pauperis* statutes, which exist in every jurisdiction, are designed to allow low-income people to waive certain costs associated with the court system.[273] The concept of *in forma pauperis* is traced to a 1495 English statute that allowed individuals who were poor to have legal services and legal representation free of charge.[274]

Modern *in forma pauperis* statutes are more narrow and typically only apply to the initial filing fees to initiate a lawsuit.[275] Kentucky's statute, for example, notes that a court should allow "a poor person" to "file or defend any action or appeal therein without paying costs . . . and shall have from all officers all needful services and process."[276]

Although this statute might sound broad, court decisions have made it clear that it creates a limited right. In the case of *Spees v. Kentucky Legal Aid*, the Kentucky Supreme Court considered whether a low-income woman, who had been granted *in forma pauperis* status earlier in her case, had to pay a warning order attorney's fee.[277] The supreme court held that she did, because these types of charges—payable to someone other than the court—were not "needful services" under the relevant Kentucky law.[278] The court reached this conclusion despite a Kentucky statute that required the court to appoint a warning order

272. *See, e.g.*, State v. Scheffler, 932 N.W.2d 57, 58 (Minn. Ct. App. 2019); Jones v. Commonwealth, No. 2019-CA-000172-MR, 2019 WL 5089922, at *1 (Ky. Ct. App. Oct. 11, 2019), *rev'd*, 636 S.W.3d 503 (Ky. 2021); E.B. v. Landry, No. CV 19-862-JWD-SDJ, 2021 WL 1201667, at *1–2 (M.D. La. Mar. 30, 2021).

273. *Legal Definition of Forma Pauperis*, UPCOUNSEL, https://www.upcounsel.com/legal-def-forma-pauperis, (last visited Apr. 7, 2022).

274. Annie Prossnitz, Note, *A Comprehensive Procedural Mechanism for the Poor: Reconceptualizing the Right to* In Forma Pauperis *in Early Modern England*, 114 NW. U.L. REV. 1673, 1676–77 (2020).

275. *Id.* at 1677.

276. KY. REV. STAT. ANN. § 453.190 (West 2013).

277. 274 S.W.3d 447, 448 (Ky. 2009).

278. *Id.* at 450.

attorney before a judgment of divorce could be entered in cases like the one before it.[279]

The trend in recent years seems to be toward limiting the use and scope of *in forma pauperis* laws.[280] Many *in forma pauperis* cases involve statutory interpretations of what services do and do not fall within these laws.[281] Usually a petitioner is arguing that a particular service is covered by the statute and respondents take the position that it is not.[282]

Courts should, in theory, resolve these cases on these statutory grounds due to the canon of constitutional avoidance. This canon "comes into play" if there is more than one plausible interpretation of a statute.[283] If there is, and one of the interpretations would raise "a serious doubt" about a statute's constitutionality, a court should interpret the statute to avoid the constitutional issue.[284]

For expungements, that means that a court should construe *in forma pauperis* statutes broadly so as to avoid reaching any due process or equal protection issues. In reality, as described below, some courts have preemptively waded into the constitutional law issues implicated by expungement access.

A. State v. Scheffler

In *State v. Scheffler*, a Minnesota case, the petitioner, Scheffler, sought to expunge a misdemeanor seatbelt violation.[285] The relevant Minnesota expungement statute allowed a person to expunge this type of conviction, and there was no dispute that Scheffler qualified for the expungement.[286]

But Scheffler could not afford the $285 filing fee for the expungement petition.[287] Although the expungement statute specifically noted that a court *may* waive the filing fee for low-income individuals, it did not make that waiver mandatory.[288] Minnesota also had an *in forma pauperis* statute that applied generally to civil actions.[289] That statute made

279. KY. R. CIV. P. 4.07.
280. *See* Prossnitz, *supra* note 274, at 1677.
281. *See, e.g.*, State *ex rel.* Jakai C. v. Tiffany M., 871 N.W.2d 230, 235, 240 (Neb. 2015).
282. *See id.* at 240.
283. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 842 (2018) (quoting Clark v. Martinez, 543 U.S. 371, 385 (2005)).
284. *See* Crowell v. Benson, 285 U.S. 22, 62 (1932).
285. 932 N.W.2d 57, 59 (Minn. Ct. App. 2019).
286. *See id.*
287. *See id.* at 59–60.
288. *Id.* at 59.
289. *Id.* at 59–60.

waiver of the filing fees mandatory if the court determined a person was indigent.[290]

Scheffler submitted his application to proceed *in forma pauperis* under the general civil statute.[291] The trial court denied his application and held Scheffler had to pay the $285 fee.[292] Scheffler appealed.[293]

When first considering Scheffler's case, the court of appeals noted that the two statutes conflicted: the expungement statute made a fee waiver discretionary while the general *in forma pauperis* statute made it mandatory.[294] The court then applied the canon of interpretation that provides "where two statutes contain general and special provisions which seemingly are in conflict, the general provision will be taken to affect only such situations within its general language as are not within the language of the special provision."[295] The court noted that the overarching *in forma pauperis* statute was more general than the specific fee waiver language in the expungement statute,[296] and—although Scheffler was entitled to a fee waiver under the *in forma pauperis* statute—his case was governed by the expungement statute.[297] Ultimately, the court reversed and remanded Scheffler's case because it believed the lower court had erroneously determined that Scheffler was not indigent.[298]

On remand, the lower court explicitly found that Scheffler was indigent, but it still refused to grant him a fee waiver.[299] This was because, in the court's view, the expungement statute made fee waivers discretionary, and "Scheffler's stated reasons for seeking expungement did not warrant a discretionary fee waiver."[300] In his petition, Scheffler noted that he was seeking expungement because his "[r]ecord looks too long. People publicly access the record such as potential girlfriends and it looks like a lot to explain. Trying to clean up as much as I can."[301] The trial court pointed out that Scheffler "does not allege any adverse impact to employment or housing opportunities nor does he allege he is

290. *Id.*
291. *Id.* at 59.
292. *Id.* at 60.
293. *Id.*
294. *Id.* at 62.
295. *Id.* (quoting Ehlert v. Graue, 195 N.W.2d 823, 826 (Minn. 1972)).
296. *Id.* at 61–62.
297. *Id.* at 62.
298. *Id.* at 63.
299. State v. Scheffler, No. A19-1310, 2020 WL 774011, at *2 (Minn. Ct. App. Feb. 18, 2020).
300. *Id.* at *1–2.
301. *Id.*

prevented from obtaining any necessary licensure."[302] Scheffler again appealed.[303]

This time the court of appeals affirmed.[304] It concluded "the district court reasonably considered Scheffler's financial circumstances, the minor nature of his seatbelt violation, and the reasons he gave for seeking expungement."[305] In the court's view, it was not inappropriate to "focus on Scheffler's personal reasons for seeking expungement—which are a far cry from concerns about employment or housing for which expungement is often sought."[306]

Scheffler leaves open important questions. The court of appeals noted that Scheffler was seeking to expunge a very minor misdemeanor, and it implied that the impact of this misdemeanor was not great. Scheffler did not forfeit any fundamental rights because of this conviction, and he could not allege that expunging it would restore any fundamental rights.

It is not clear from the opinion how the court would have ruled had Scheffler sought to expunge a conviction that carried more consequences. It is also not clear what decision the court would have reached had Scheffler articulated the impact of his misdemeanor conviction in a different way—perhaps by framing it in terms of the conviction's impact on his housing or employment.

The court's express approval of considering a petitioner's "personal reasons for seeking expungement" is significant.[307] This perhaps suggests that courts, when considering requests for expungement fee waivers, will balance the impact of the expungement to the individual against the state's lost revenue from the fee waiver. This could create a system where expungement access becomes even more limited, with courts only granting fee waivers to those who are doing so for reasons the court finds laudable. In this way, the key question becomes not a person's income but rather his motivations for seeking an expungement. This judicial inquiry into an individual's motives could perhaps advantage more sophisticated litigants who can more clearly articulate why they are seeking an expungement and how it will benefit them.

B. Jones v. Commonwealth

In contrast to *Scheffler*, where the court did not address constitutional issues around expungement access, the court did consider

302. *Id.* at *2.
303. *Id.* at *1.
304. *Id.* at *2.
305. *Id.*
306. *Id.*
307. *Id.*

due process and equal protection arguments in *Jones v. Commonwealth*—the case this article delved into at its beginning.[308] In *Jones*, the petitioner sought to expunge a single "felony count of theft by failure to make the required disposition of property," which he was convicted of twenty years before.[309] As part of his petition, Jones included a motion to proceed *in forma pauperis*, and waive the then $500 fee—which has subsequently been reduced to $300.[310] The court did not dispute that Jones was indigent, but believed that the expungement statute did not allow petitioners to proceed *in forma pauperis* on expungement actions.[311] Jones appealed.[312]

Specifically, Jones advanced two arguments: that the *in forma pauperis* statute authorized courts to waive expungement fees, and that—if the statute did not allow these fee waivers—it would violate his right to due process and equal protection.[313]

Jones rested his statutory argument on the text of Kentucky's *in forma pauperis* statute, which noted that courts "shall allow a poor person . . . to file or defend any action."[314] Since an expungement is an action, Jones argued, the statute required him to be able to access the courts without fees.[315] The court of appeals rejected Jones's statutory argument, noting that there was nothing in the expungement statute that expressly authorized fee waivers, using that as evidence that the legislature had intended to preclude such waivers.[316]

More important here, the court of appeals also rejected Jones's constitutional arguments.[317] It did so because, in the court's view, "expungement is not a *right* but a statutory *privilege*" which the legislature may "provide subject to conditions," including the payment of fees.[318] In the court's view, this meant that it was fine to condition access to this process on one's ability to pay.[319]

308. Jones v. Commonwealth, No. 2019-CA-000172-MR, 2019 WL 5089922, at *1 (Ky. Ct. App. Oct. 11, 2019), *rev'd*, 636 S.W.3d 503 (Ky. 2021).

309. *Id.*

310. Jones v. Commonwealth, 636 S.W.3d 503, 505, 506 n.1 (Ky. 2021); CCRC STATE SURVEY, *supra* note 82.

311. *See Jones*, 2019 WL 5089922, at *1.

312. *Id.*

313. *Jones*, 636 S.W.3d at 505.

314. *See Jones*, 2019 WL 5089922, at *2 (quoting KY. REV. STAT. ANN. § 453.190 (West 2017)).

315. *Jones*, 636 S.W.3d at 505.

316. *Jones*, 2019 WL 5089922, at *2.

317. *Id.* at *1.

318. *Id.*; *see also In re* Expunction of Wilson, 932 S.W.2d 263, 265 (Tex. Ct. App. 1996) (describing expungement as a "statutory privilege").

319. *See Jones*, 2019 WL 5089922, at *1.

Interestingly, the court of appeals' decision did not address Jones's arguments about the way the expungement process implicated fundamental rights. In Kentucky, those convicted of a felony lose both gun rights and voting rights.[320] The fact that the court of appeals did not consider this aspect of Jones's due process and equal protection claims is perhaps part of the reason that the Kentucky Supreme Court granted discretionary review in Jones's case.

Ultimately, the court reversed and ruled in favor of Jones. It did so based on his statutory argument, noting that "[a]n indigent person is unable to achieve his or her aim—expungement—unless he or she pays both the filing fee and the expungement fee."[321] Interpreting this *in forma pauperis* statute this way concerned the court, as the unanimous bench noted "[w]e can identify no other situation in our Commonwealth where a judge renders a judgment that a litigant is entitled to a benefit under the law, but that litigant cannot obtain the benefit of that judgment unless and until he pays a fee."[322] Ultimately, the court concluded that interpreting the *in forma pauperis* statute to deny this type of access to the courts would be "contrary to the purpose" of it.[323]

C. E.B. v. Landry

There is one other case worth mentioning that is currently pending. *E.B. v. Landry* is a federal district court case in Louisiana where a group of plaintiffs are challenging the $550 expungement fee on due process and equal protection grounds.[324] They allege that they are being treated differently than other groups because they are low income and cannot afford to pay the expungement fees.[325] They claim that the inability to access the court system for an expungement denies "them a liberty interest in their good name and integrity."[326] Interestingly, the plaintiffs in *E.B.* attempt to characterize expungement as a criminal matter, arguing that they are being shut out of "a key part of criminal process because they cannot afford the $550 expungement fee."[327] Successfully framing expungement as criminal rather than civil would have far-reaching impacts, as individuals are entitled to more court access for criminal matters.

320. LOSS & RESTORATION OF CIVIL/FIREARMS RIGHTS, *supra* note 184.
321. Jones v. Commonwealth, 636 S.W.3d 503, 508 (Ky. 2021).
322. *Id.*
323. *Id.*
324. No. CV 19-862, 2021 WL 1201667, at *1–2 (M.D. La. Mar. 30, 2021).
325. *Id.* at *2–3.
326. *Id.*
327. *Id.*

This case is perhaps the tip of the iceberg. As interest in criminal justice reform grows, one would expect to see renewed focus on expungement as a tool to alleviate some of the disparate outcomes of the legal system. Courts will play a role as those who are shut out of judicial systems challenge the laws that limit their access. These legal challenges should be successful in some cases. The analysis in this paper hopefully offers a roadmap to those who seek to remove mandatory fees and the access barriers they create.

Of course, legal challenges take time and are often unpredictable. Mr. Jones, who was introduced at the outset of this paper, has been waiting three years for his due process challenge to expungement fees to be resolved. During this time Mr. Jones has continued to face the collateral consequences of his conviction.

To that end, legislative changes will also be important. States have the ability to pass statutes that remove expungement fees, and such steps would help eliminate the uptake gap and encourage individuals to move forward in the expungement process. States can also choose to amend their expungement laws to expressly note that *in forma pauperis* laws apply and that low-income petitioners should have access to the courts without fees.

Another set of reforms could make expungements of certain convictions for minor offenses automatic—as eleven states have already done.[328] Automating the expungement process is the best way to ensure that low-income individuals have access to expungements, as it not only removes the direct financial barriers but also the indirect barriers—such as lack of knowledge about the process, lack of time for the paperwork and court dates, and inability to afford legal counsel to help navigate the complicated process. Virginia recently passed a law that automates expungement for certain types of convictions, while maintaining a petition-based system for expunging more serious crimes.[329] The law received bipartisan support, and advocates noted that it marked a significant step forward in a state known for being a difficult place to clear one's record.[330]

328. Hernández, *supra* note 115.

329. *Id.*

330. *Id.*; Julia Cusick, *Statement: CAP's Rebecca Vallas Applauds Virginia's Automatic Record-Sealing Legislation*, CTR. FOR AM. PROGRESS (Mar. 2, 2021), https://www.americanprogress.org/press/statement/2021/03/02/496635/statement-caps-rebecca-vallas-applauds-virginias-automatic-record-sealing-legislation/.

V. CONCLUSION

The consequences of a criminal conviction in America are enormous and continue well beyond the imposed sentence. Expungements offer the opportunity to remove some of these collateral consequences and successfully reintegrate an individual into society. Research suggests that expungement is effective at reducing recidivism and increasing wages, suggesting that everyone benefits when expungements are more accessible. Yet, despite this data, states continue to charge expungement fees, and these fees continue to shut our most vulnerable populations out of the system. Low-income individuals are most likely to benefit from expungements, but perhaps the least likely to access them because of the financial costs.

Removing the financial costs associated with expungement is an important way to expand expungement access. Advocates should pursue legislative changes to this end. But, where legislatures refuse to act, legal challenges to these fees could provide another way to expand access.