

THE PROBLEM OF LEMONS AND WHY WE MUST RETAIN JUVENILE CRIME RECORDS

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Most state and federal statutes “expunge” (destroy or seal) a young offender’s record of juvenile delinquency when he reaches age 17 or 18 (Funk 1996: 887). The justification for this policy is that it allows young men (and young women) who have been guilty of “youthful indiscretions” to enter adulthood without the heavy stigmatic freight of a criminal record (e.g., Volenick 1975: 169). At bottom, expungement laws seek to prevent employers, police officers, and even judges from finding out about a person’s criminal activities during his minority. Although a policy that allows for the expungement of isolated or minor acts of juvenile delinquency may not raise some of the problems discussed in this article, current statutes tend to aggressively expunge records full of serious and repeated criminal conduct. This article will discuss some of the not so obvious consequences that result from such expungement schemes.

Young Offenders Cause Much Damage

No one will quarrel with the humanitarian motives that support contemporary expungement schemes, but the unfortunate truth is that the policies have often failed to keep pace with reality. Unlike the juvenile offenders of 75 years ago, the delinquents of today are committing very “adult” crimes, involving vast harm to both persons and property. A 1995 U.S. Department of Justice study, for example, found that while the adult arrest rate for murder had risen a mere 9 percent between 1983 and 1992, the corresponding juvenile arrest rate jumped 128 percent. Juvenile arrests for aggravated assault went

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up 100 percent during that time (Snyder and Sickmund 1995: 113). And according to a 1991 survey, juveniles between the ages of 12 and 18 were responsible for approximately 28 percent of all personal crimes such as rape, personal robbery, aggravated and simple assault, and theft from a person (Snyder and Sickmund 1995: 47). Some criminologists fear that, by the year 2010, juvenile arrest rates for violent crime may more than double and juvenile arrest rates for murder may increase by 145 percent (Snyder and Sickmund 1995: 111). If that happens, the tragedy will follow this age cohort through the several generations of its life, for the vast majority of studies—both domestic and international—conducted on deviance show that patterns of chronic criminality remain remarkably stable throughout the late teens and into adulthood (e.g., Caspari and Silva 1995: 495–96; Constantino 1995: 260; Farrington 1995: 929).

Labeling Theory

Labeling theory is the immediate intellectual ancestor of the spate of expungement laws that were passed during the 1960s and 1990s. Labeling theorists thought that society at large should shoulder the blame for the actions of delinquent children (e.g., Becker 1963: 9; Blumer 1969: 78–82). They argued that the destruction of a harmful police record would remove a major impediment in the rehabilitation of an erring child, because the very act of explicitly labeling a behavioral deviant as such increases the likelihood that he will in fact adopt a criminal identity and live with it through life. As criminologist and labeling theorist Howard Becker (1963) wrote in *Outsiders*, “deviance is *not* a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an ‘offender.’ The deviant is one to whom the label has successfully been applied; deviant behavior is behavior that people so label.”

The emphasis in aggressive expungement thus was, and is, on the perpetrator’s youth and inexperience, rather than on the reality of his crimes and his unabated criminal tendencies. It is neither obvious nor even probable that this criminal law reform has in fact been beneficial to juvenile offenders themselves, let alone to society as a whole. There is an obvious mismatch between the regular institutions of the criminal law, which are meant to inflict personal shame and pain on offenders, and arrangements within the juvenile justice system that are meant—and understood as meant—to excuse, depreciate, or give amnesty to the acts that are ordinarily supposed to lead to shame and pain. Of course the juvenile justice system does occasionally deal with children too young to appreciate the moral dimensions or real-

world consequences of their behavior, but by far the majority of its caseload is taken up with the recidivistic and violent adolescent offenders, who usually do possess the cognitive and moralizing capacities that allow them to appreciate the distinction between right and wrong.

There are good reasons to be skeptical of some aspects of juvenile justice. But one should readily grant the central empirical claims of labeling theory. Being labeled as a “criminal” at an early point in life must surely injure an individual’s life chances. Nor should there be any doubt about the fact that young men often engage in impulsive, seemingly pointless, high-risk, egocentric behavior—which often means criminal behavior—nor that the disposition to behave in this way does not follow most of them very far into adulthood.

Distributional Consequences of Forgetting Criminal Pasts

Obviously there are distributional consequences that flow from the application of expungement laws. Some people win and some people lose from these laws’ operation. Expungement schemes assume that the class of juvenile offenders whose records have been expunged would gain, and that the class of persons (such as employers, admissions officers, prospective spouses, creditors, licensors, and joint venturers—which for the sake of brevity we will hereafter collectively refer to as “employers”) who might be negatively influenced by the unavailability of delinquency records would be the losers. However, the matter is not so simple. A better understanding of the problem and its consequences is important to advancing the work of those specially concerned with increasing the welfare of children. It is far from obvious that the set of children with records of delinquency to expunge are made better off by the practice of expungement. If the dynamics of such laws were better understood, perhaps those who support such laws would be less enthusiastic about them.

Pro-Expungement

The rationale of expungement statutes begins with a recognition that a juvenile criminal record is not necessarily a good predictor of a person’s current behavior—which is, after all, what the group we have described as “employers” are primarily interested in. Such prior involvement with the law could lead to sloppy or unfair inferences about how someone is likely to perform on the job. Social science cannot substantiate the fireside induction that, because this job applicant snatched a purse 20 years ago when he was 15, he is unlikely to

succeed driving a fork-lift truck in a warehouse today. Indeed, in many cases the curbstone predictivity of such information will be so low as to make it nearly worthless. What harm, therefore, could there be in depriving employers of such low-quality information?

Indeed, many members of the employer class will not even be *theoretically* worse off because of expungement laws. For example, employers who would have hired the applicant even had they known the suppressed information are certainly no worse off, having been deprived of information they would not have relied upon in any event. And even employers who would not have hired had they known the suppressed information will be no worse off if the applicant turns out, having been hired, to perform satisfactorily. The actual losers are a narrower class: those who would have turned down an applicant with an expunged record because of his record of delinquency, who instead hire the applicant, and are damaged thereby because the applicant, once hired, does not perform up to expectations that were fostered by his statutorily doctored record. That is not necessarily a large class, and it is certainly one that, on the whole, is richer and thus in a better position to bear the social costs associated with the suppression of this criminal-history information (at least when compared to the class of juveniles with delinquency records).

The idea is to subsidize a class of juvenile offenders at the expense of employers and such other members of society—effectively everybody—to whom employers are able to pass along such costs. It makes a great deal of sense, moreover, for there to be a careful debate about how the costs of late male adolescence should be borne in society, because society requires mature men, and cannot have them without having to cope with boys and immature men first. It is possible, for example, to think of the rules concerning the duties of possessors of land to trespassing children as an effort to find a broader cost-bearing base than simply the child or its family alone. Perhaps some similar concession is rightly to be accorded to delinquent juveniles, young men especially, whose predominance in the population of social deviants is for all intents and purposes a statistical constant irrespective of how harsh or permissive a given society's criminal justice system may be.

On the Defective Premises of Expungement Laws

The above argument is meant charitably to reconstruct the rationale of expungement statutes. We do not aim to contribute to that conversation, however. Indeed, it is our contention that the social cross-subsidy mechanism that is imagined by expungement statutes misses the mark, and that things surely must work out very differently in the real world.

Expungement statutes are based on theories of human behavior, of social incentives and of rational decisionmaking that we think are at best incomplete and at times naive. The cross-subsidy effected by the policy is not from employers to former delinquents, but rather it is from nondelinquent to delinquent members of the same age cohort, with a distinct surtax on black, Hispanic, and poor members of that cohort. This form of social wealth-transfer is not only perverse in that it boils down to a more or less explicit subsidy for serious misbehavior, but it is also deeply destructive because the policy taxes those who have not misbehaved to enrich members of the same class who have. Moreover, it tends to efface the distinction between “good” and “bad,” to make suckers out of well-intending individuals who want their behavior to reflect that distinction, and to perpetuate and increase the accuracy and economic value of negative racial stereotypes. Finally, it does not have these effects in secret or through some complicated chain of cause and effect that nobody understands, but on the contrary seems to be well understood by everyone connected with the system.

The Market for Lemons

Imagine a sentencing judge facing a youthful adult offender following the latter’s conviction for a crime. In many expungement jurisdictions the sentencing judge must necessarily ponder whether the 19-year-old defendant before him has thus far not run afoul of the law, or whether he instead is a recidivist, because any verifying or impeaching information has been permanently physically purged from the individual’s file. The judge in this scenario is situated identically to, and is a member of, the class which we have above designated “employers.” Because of expungement, all must act in a pall of statutorily created uncertainty.

A generation ago, economist George Akerlof (1970) explained the changes one could expect to see in the behavior of risk-averse consumers who were attempting to estimate the correct bid price for commodities in a market where the quality of individual units was (1) liable to significant variation and (2) difficult or impossible for a potential consumer to ascertain. For example, in the securities market there is often a large disparity of information between investors on the one hand and the issuers of securities on the other concerning the securities’ quality. Debtors generally possess much more information about the safety of a bond—in other words about their own creditworthiness—than prospective creditors do. The result of this information asymmetry is that prospective investors will be willing to bid an amount that assumes that the security has only some average probability of

default in a range of uncertainty. Sellers of low quality securities in such a market will profit more, and sellers of high quality securities will profit less, as a corollary of this quality uncertainty. The standard cure for this market imperfection is reliable information. In the securities market, for example, an issuer can purchase insurance that will reveal the true default probability, or make some other sort of disclosure arrangement with the issuer.

Akerlof considered this in the context of the market for used cars. In the used car market there is also an informational asymmetry, analogous to that in the securities market, between the seller of a given used car and its buyer concerning the quality of the car. The seller has driven the car for years and knows what his own habits have been concerning scheduled maintenance items that can significantly affect the service life of machinery. This information is difficult, and practically speaking impossible, for a purchaser to discover for him or herself. Buyers as a result are often forced to rely on various approximation techniques that allow them to make inferences from the visible to the invisible: for example, they might reason that a well-groomed car, carefully detailed and with few dings and scratches, is more likely to possess well-maintained mechanicals than an obvious jalopy.

It isn't necessarily so, however. Most people soon learn that such inferences are subject to type-I error (in other words, affirming the untrue proposition that a pretty car is therefore a good car). A potential buyer bidding on a used car must arrive at a price based on conjecture supplemented with approximation techniques relative to some of the most important aspects of the deal, and he or she therefore can be expected to submit a meaningfully lower offer for the car than someone who knew that, as a matter of fact, the seller had taken awesome care of the machine. This offer will in fact tend to converge with the offer that would be submitted by a bidder who knew for a fact that the previous owner only changed oil when the dipstick indicated "empty." A market of this sort could be expected to attract, by tendency, outwardly beautiful but poorly maintained or otherwise invisibly defective cars. Over time, whatever value widely used estimation techniques might have had to begin with would tend to erode, hence increasing bidders' uncertainty about the quality of the product and pushing down the rational bid price. The way to escape from this failing market is to find a way to upgrade the information that flows from seller to buyer concerning the "true" value of the car. One could deal only with relatives or friends, provide (or demand) certified service records, or purchase from an established dealer who will have caused an expert inspection of the machine to be conducted, and who will offer a

warranty that the product will at least meet certain agreed-upon expectations for at least an agreed-upon period of time. Naturally, a quality car *and* accurate information about its (high) quality is significantly more valuable than the car without the information. This is one reason why people pay auto dealers more for a given used car than they would offer an unknown stranger for it.

Some Effects of the Lemons Problem on Sentencing

A sentencing judge in a jurisdiction that aggressively expunges juvenile crime records by destroying them is in very much the same position as the prospective creditor or car buyer. A young adult is convicted of some crime and appears for sentencing. Now the judge must determine whether he is in fact a first (or second, etc.) offender, or whether he instead is so merely as a result of a statutorily imposed fiction. Assuming judges—and others in the employer class—might regularly observe the distinction between first offenders and chronic ones and make real-world consequences turn on it, the existence of uncertainty concerning whether one was dealing with an ingenuer or a recidivist offender could be expected to produce two altogether unwelcome results. Just as one could expect information-impaired bidders to bid too little for good used cars and too much for bad ones, one could expect judges to sentence career criminals too leniently and genuine first offenders too harshly, but with a tendency, depending on the judge's degree of risk-aversion, toward being too harsh with actual first offenders.

Not that judges would be uninterested in this datum, of course. No doubt they consciously or unconsciously try to work around their ignorance of an offender's background by substituting estimation techniques for particularized information, including, one can hardly doubt, looking at easily ascertained and roughly correlating facts such as an individual's race or socioeconomic class. There is no reason to think, in other words, that by destroying real information, expungement statutes make the world any less dependent on information than it was before. If employers (judges, etc.) cannot get good information, they will do their best with bad information. To the extent that the rate of serious criminal offending among poor and/or black or Hispanic adolescents is believed to be higher than that of their white and/or wealthier counterparts, one should not be surprised if it turned out to be the case that black, Hispanic, and poor first-time offenders are treated somewhat more harshly in expungement jurisdictions than wealthier white first-time offenders are.

Because the economic distinction between well-maintained and poorly maintained used cars is small due to an absence of information about which is which, car owners have diminished incentives to maintain their cars properly. At least this much is true: to whatever extent their maintenance decisions are based on a desire to keep up the resale value of their car, an information-impaired used car market diminishes that incentive and should tend over time to produce a more poorly maintained fleet of cars for the resale market than would be the case in a world where maintenance information was highly reliable and easily obtained. The same dynamic should also apply to people's behavior more generally. To some degree, people choose good behavior in the present because, in the future, they want to enjoy a reputation for good behavior. To whatever extent incentives of this kind matter in determining people's behavior—and of course the criminal law assumes that they do indeed matter—the effect of expungement laws is to give evily inclined adolescents less reason to refrain from evil at the same time that they give well-motivated adolescents less reason to continue to be good.

Conclusion

Proponents of expungement laws believe that, in effect, they take what would be a very concentrated harm (a juvenile criminal record), and then leach its hardship out into the society as a whole, which they feel is far better able to bear these costs as a part of the overhead of daily life. Prodigal sons need to be forgiven, and there is no percentage in repentance if one's adolescent follies are to follow one throughout life. In fact, though, it is highly doubtful that "society" will bear the burden for the prodigal. Rather, the burden will be borne, for the most part, by members of the offender's own age cohort, by people who look like him but who do not have criminal records. The subsidy is not from the rich to the deserving, but from the well-behaved to the ill-behaved. What is possibly worse, expungement laws increase the value of racial stereotypes and therefore serve to perpetuate them.

What, then, is to be done about the youthful indiscretions of juvenile offenders? Are their missteps to follow them forever? One of the assumptions on which expungement laws rest is that only lawyers, only people who draft and sponsor reform statutes, will really and truly know how to forgive and forget. We need expungement statutes, in other words, because employers, the families of prospective spouses, judges, admissions officers and so on, can be expected to abuse their positions and to be bigoted toward people with past criminal entangle-

ments, instead of merely being skeptical about whether they have straightened themselves out.

It is a mistake to rely on expungement statutes for this purpose. While it is undoubtedly true that an individual's isolated and minor past scrapes with the law will have little or no current relevance to decisions "employers" may make about that individual, sometimes they may. In any case, "employers" will often have virtuous incentives for sorting things out and deciding which is which. It would be extraordinary if a simple statutory rule ("expunge") could get it more nearly right than the case-by-case judgments of people trying to evaluate an individual's promise or qualifications. The best argument for keeping expungement laws seems to be that they flatter the vanity of those who embrace them. That is not a good enough reason.

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