

# AUTOMATIC (EXPUNCTIONS) FOR THE PEOPLE: FOR A COURT-INITIATED EXPUNCTION RIGHT IN NORTH CAROLINA FOR CHARGES NOT RESULTING IN CONVICTION\*

## INTRODUCTION

Amid the broader debate over how to reform the criminal justice system, the impact of criminal records has been one area of interest for both reformers and reform-minded public officials.<sup>1</sup> Public records of convictions, as well as charges that do not lead to conviction, can result in detrimental effects for individuals in areas such as employment and housing.<sup>2</sup> Expunction laws vary widely from state to state, particularly with regard to issues such as what types of records are available for expunction, what the actual effect of expunction is (i.e., whether records are sealed or permanently destroyed), how long an individual must wait before obtaining an expunction, whether or not the decision to grant an expunction is subject to a judge's discretion, and what administrative procedure must be followed for a record to be expunged.<sup>3</sup>

North Carolina has twelve types of expunctions available for criminal records,<sup>4</sup> including expunction of non-conviction charges under section 15A-146 of the North Carolina General Statutes. Section 146 allows individuals to expunge records of dismissed charges and charges that resulted in findings of not guilty or not

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1. See, e.g., Ed O'Keefe, *Cory Booker, Rand Paul Team Up on Sentencing Reform Bill*, WASH. POST (July 8, 2014), [https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/?utm\\_term=.3e545e5fab4f](https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/?utm_term=.3e545e5fab4f) [<https://perma.cc/U69L-8YZC>] (discussing the two Senators' REDEEM Act proposal, which sought to incentivize states to make a number of criminal justice reforms, including broadening available expunction relief).

2. See Eisha Jain, *Arrests As Regulation*, 67 STAN. L. REV. 809, 810–11 (2015) (explaining that arrest records are reviewed by “actors outside the criminal justice system” and such records influence decision making in a variety of contexts).

3. See Restoration of Rights Project, *50-State Comparison, Judicial Expungement, Sealing, and Set-aside*, COLLATERAL CONSEQUENCES RES. CTR. (Aug. 2017), <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/> [<http://perma.cc/2F7A-MBRH>] (comparing state expungement, sealing, and set-aside laws).

4. See N.C. GEN. STAT. § 7B-3200 (2015); *id.* §§ 15A-145 to -149.

responsible. The vast majority of expunctions granted in North Carolina in recent years have fallen under the purview of section 146.<sup>5</sup> The language of this statute—unlike that of other types of expunctions in North Carolina—does not permit judges the discretion to deny expunction petitions,<sup>6</sup> subject applicants to a waiting period before they can petition, or—in many situations—even charge a fee.<sup>7</sup> However, these expunctions are not ordered automatically when a charge is dismissed or a not guilty verdict is entered.<sup>8</sup> Instead, under current law, individuals must affirmatively petition for these records to be expunged,<sup>9</sup> and some individuals are barred entirely from seeking relief under section 146.<sup>10</sup>

Two bills recently passed by the North Carolina General Assembly have the potential to significantly improve the ability of North Carolinians to obtain expunctions of non-conviction charges. In 2015, the North Carolina General Assembly passed Senate Bill 233, which expanded section 15A-147—the expunction statute for criminal records resulting from identity theft—to include charges brought and subsequently dismissed due to mistaken identity.<sup>11</sup> Senate Bill 233 also allows an individual to obtain an immediate expunction upon a finding of mistaken identity under this statute.<sup>12</sup> This change to the law, which expedites one type of expunction, is a big step toward establishing an automatic expunction process in North Carolina.

Even more recently, in July 2017, North Carolina Governor Roy Cooper signed into law Senate Bill 445, which removed an important

5. N.C. ADMIN. OFFICE OF THE COURTS, 2016 EXPUNCTIONS REPORT 3 (2016).

6. Expunction attorneys note that—although the statute does not permit judicial discretion in deciding whether to grant expunction petitions properly filed by individuals without felony convictions—in practice, judges do sometimes refuse to order a section 146 expunction based on an assessment of character. Interview with Whitley Carpenter & Laura Holland, Staff Attorneys, Clean Slate Project, S. Coal. for Soc. Justice, in Durham, N.C. (Sept. 29, 2017). Hopefully, the creation of an automatic and immediate expunction right upon dismissal would help to curb this practice that is in contravention of the statute.

7. See § 15A-146; C. DANIEL BOWES, SUMMARY OF NORTH CAROLINA EXPUNCTIONS 11, 14 (2016).

8. § 15A-146.

9. BOWES, *supra* note 7, at 11 (detailing eligibility criteria and filing requirements for petition).

10. § 15A-146(a) (permitting expunction under this section only “upon [a] finding that the person had not previously been convicted of any felony under the laws of the United States, this State, or any other state”).

11. Act of Aug. 6, 2015, ch. 202, sec. 1, § 15A-147, 2015 N.C. Sess. Laws, 520, 520–21 (codified as amended at N.C. GEN. STAT. ANN. § 15A-147 (West 2016)).

12. See *id.* (requiring the prosecutor or the judicial officer who ordered the dismissal to notify the court, which will in turn order the expunction of records relating to the charges that resulted from identity theft or mistaken identity).

barrier to section 146 expunctions.<sup>13</sup> Prior to Senate Bill 445, individuals who had already received expunctions under any of several of North Carolina's expunction statutes, including section 146 itself, were barred from expunging any additional charges through section 146.<sup>14</sup> Senate Bill 445 eliminated this restriction.<sup>15</sup> By passing Senate Bill 445, the legislature demonstrated a commitment to expanding opportunities for North Carolinians to remove non-conviction charges from their criminal records.

This Comment argues that North Carolina should build on this recent legislation by requiring the state to automatically<sup>16</sup> expunge all charges resulting in dismissal or acquittal, rather than requiring individuals to go through the onerous and confusing process of affirmatively petitioning for relief. In order to facilitate this approach, the state should allow all North Carolinians—regardless of whether they have prior felony convictions—the right to have non-conviction charges automatically expunged from their records, thereby eliminating the remaining bar to obtaining a section 146 non-conviction expunction.

Part I provides background information about the impact of non-conviction charges on one's criminal record. This Part also addresses the fact that expunction relief must generally be legislatively created, given that courts have declined to find a judicial right to an expunction in anything but the narrowest of circumstances. Part II provides an overview of the current North Carolina expunction scheme. This includes the various types of expunctions available, recent data about expunctions granted, and North Carolina-specific issues that should inform any reform efforts, including North

13. Act of June 27, 2017, sec. 1, § 15A-146, 2017-4 N.C. Adv. Legis. Serv. 627, 643–45 (LexisNexis).

14. *See id.* at 643 (eliminating the requirement that a petitioner not have “previously received an expungement under [section 15A-146,] 15A-145, 15A-145.1, 15A-145.2, 15A-145.3, 15A-145.4, or 15A-145.5”). A prior expunction for identity theft or mistaken identity under section 147 was not a bar to section 146 relief under the old statute. *See id.* § 15A-147, 2017-4 N.C. Adv. Legis. Serv. at 645–46.

15. *Id.* § 15A-146, 2017-4 N.C. Adv. Legis. Serv. at 643. The other major impact of this bill was a substantial reduction in the waiting period to expunge nonviolent misdemeanor and felony convictions under section 145.5(c). *Id.* § 15A-145.5(c), 2017-4 N.C. Adv. Legis. Serv. at 639.

16. In this Comment, “automatic expunction” refers to the process by which a court or court officer orders an expunction *sua sponte*, without the affected individual having to affirmatively petition for the expunction. This idea is differentiated from a “non-discretionary” expunction, which refers only to the fact that expunction relief under a particular statute may not be denied by the court if the individual meets all of the statutory requirements. Several expunctions in North Carolina, including the current section 146 expunction, are non-discretionary but are not automatic.

Carolina's citizen-initiated warrant procedure and the hurdles involved in securing an expunction in North Carolina. Part III looks at models for a move toward automatic, state-initiated expunctions for non-conviction charges, first with reference to North Carolina's expunction reform in cases of mistaken identity and second with reference to other states' approaches to expunging records of non-conviction charges. Part IV sets out a proposed reform of the state's expunction statutes that would require the state to proactively expunge non-conviction charges under section 146 and thereby opening section 146 relief to individuals who have been convicted of felonies. Finally, Part V concludes by addressing possible arguments against a move to automatic, court-initiated expunctions of non-conviction charges.

## I. BACKGROUND

### A. *The Impact of Criminal Records*

The number of people arrested in the United States is staggering. Over 250 million Americans have been arrested in the past two decades, and around one third of American adults have records stemming from their arrests—with or without an accompanying conviction—in the Federal Bureau of Investigation's (FBI) master criminal database.<sup>17</sup> The FBI reports that there were nearly 12.2 million arrests made by law enforcement nationwide in 2012 alone.<sup>18</sup> Records stemming from these arrests are found in such diverse formats as rap sheets, court records, and commercialized databases, and the internet continues to make these records easier to disseminate and access.<sup>19</sup> Data shows the percentage of employers conducting background checks has increased over the past twenty years.<sup>20</sup> In 1996, according to one study, almost half of employers surveyed did not conduct criminal background checks for any

17. Gary Fields & John R. Emshwiller, *America Busted: As Arrest Records Mount, Consequences Last a Lifetime*, WALL ST. J., Aug. 19, 2014, at A1.

18. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2012 at 1–2 (2013), <https://ucr.fbi.gov/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/arrestmain.pdf> [https://perma.cc/R9FJ-7X6H].

19. JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 9–11 (2015). Other “criminal record” databases used by law enforcement agencies include information on individuals who have not been arrested but who are suspected of past criminal activity or thought to be present risks of future criminal conduct. *Id.* at 13.

20. *See id.* at 5–6 (describing the increased use of criminal background checks by employers).

employees; by 2009, ninety-two percent of employers reported that they conducted background checks on some potential employees, and seventy-three percent said that *every* new hire was required to undergo a background check.<sup>21</sup>

The Fair Credit Reporting Act (FCRA), a federal statute that places restrictions on what information can be included in background checks, only prohibits the dissemination of arrest records that did not result in conviction when those records are over seven years old.<sup>22</sup> A criminal history report showing an individual's arrest record may not include the disposition of any charges at court, and a charge that was later dismissed can still negatively impact a person's chances of being offered a job, finding a home, or obtaining a loan.<sup>23</sup> Records of arrests, regardless of ultimate disposition, are likely to negatively influence hiring decisions.<sup>24</sup> Frequently, individuals who are arrested lose their employment shortly following arrest, and even those whose charges are ultimately dismissed must contend with squeamish employers who are wary of the stain of criminal justice involvement when they try to return to work or seek new positions.<sup>25</sup> Although the Equal Employment Opportunity Commission has disallowed per se denial of employment due to arrest records, employers may initiate their own investigations based on information contained in arrest records.<sup>26</sup>

*B. Sealing of Non-Conviction Records as a Statutory—Rather Than a Constitutional—Right*

It may surprise many people to learn that there is no broad constitutional right to prevent criminal charges that did not result in conviction from showing up on a background check. When a charge gets dismissed or a jury acquits a defendant, that record generally does not get sealed or destroyed, unless a specific statute affirmatively authorizes expunction.

Courts have generally declined to place upon custodians of criminal records a constitutional duty to refrain from reporting or

21. *Id.*

22. See 15 U.S.C. § 1681c(a)(2), (5) (2012).

23. Fields & Emshwiller, *supra* note 17.

24. See, e.g., Andrew D. Leipold, *The Problem of the Innocent, Acquitted Defendant*, 94 NW. U. L. REV. 1297, 1308–10 (2000) (discussing ramifications of an arrest on employment).

25. *Id.* at 1308–09.

26. Jain, *supra* note 2, at 825 n.85.

disseminating records that are not supported by a finding of guilt.<sup>27</sup> The United States Supreme Court set the tone for courts' handling of non-conviction criminal records when it decided *Paul v. Davis*<sup>28</sup> in 1976. Edward Charles Davis III had been arrested on a shoplifting charge that was ultimately dismissed.<sup>29</sup> After the arrest, but before the dismissal, the local police department included the respondent in a flyer of "active shoplifters" that was circulated to around 800 merchants in the metropolitan area of Louisville, Kentucky.<sup>30</sup> A majority of the justices declined to recognize a valid constitutional claim arising out of the distribution of information classifying Davis as a shoplifter based solely on his arrest, which did not ultimately result in conviction.<sup>31</sup> In overturning the Sixth Circuit, the Supreme Court held that "reputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause."<sup>32</sup>

Though *Paul* dealt specifically with the reputational injury from disseminating information about an arrest, courts have generally taken a similar hands-off approach to criminal records when considering whether an individual should be granted an expunction as a constitutional or judicial remedy. Over the years, courts have upheld a constitutional right to expunction only in limited circumstances, and the resulting common law patchwork has fallen far short of a broad precedent interpreting the U.S. Constitution to require expunction of charges not resulting in conviction.<sup>33</sup> While multiple federal circuit courts have claimed the "inherent power to expunge criminal records when necessary to preserve basic legal rights,"<sup>34</sup> they have also made it clear that "expunction of criminal

27. See SEARCH GROUP, INC., SEALING AND PURGING OF CRIMINAL HISTORY RECORD INFORMATION 5–6 (1981), <http://www.bjs.gov/content/pub/pdf/spchri.pdf> [<https://perma.cc/YG5L-75LV>] (discussing courts' reluctance to order the sealing or purging of records even in cases involving a non-conviction).

28. 424 U.S. 693 (1976).

29. *Id.* at 695–96.

30. *Id.* at 694–96.

31. *Id.* at 712–14; see also Jain, *supra* note 2, at 823–24 (discussing the precedent set in *Paul* in the context of the broad impacts of arrests on arrested individuals).

32. *Paul*, 424 U.S. at 701, 714.

33. See SEARCH GROUP, INC., *supra* note 27, at 5–7 (providing an overview of caselaw addressing records relating to charges resulting in non-conviction).

34. *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976); see also *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974); *United States v. McLeod*, 385 F.2d 734, 749–50 (5th Cir. 1967).

court records is an extraordinary remedy”<sup>35</sup> to be “confined to extreme circumstances.”<sup>36</sup> In other words, something more than the mere fact that charges did not result in conviction is required for courts to mandate expunction of arrest records outside of the framework of a statutory scheme. For example, courts that have ordered the sealing or erasure of arrest records often have done so in cases where probable cause for the arrest was clearly absent.<sup>37</sup> Considering a petition to prohibit the dissemination of information about charges that had resulted in acquittal in a North Carolina state court, the Fourth Circuit, in *Allen v. Webster*,<sup>38</sup> gave several specific examples of “extreme circumstances” that had previously been deemed sufficient for courts to order a judicial expunction, including arrests effected solely to harass civil rights workers and a valid arrest under a statute that was subsequently held unconstitutional.<sup>39</sup> However, on the facts before it—where the request was based merely on the fact that Allen was acquitted of the charges—the Fourth Circuit affirmed the district court in declining to bar the dissemination of Allen’s criminal records.<sup>40</sup>

Because successful judicial challenges to the maintenance of non-conviction criminal records have been few in number and narrow in scope, most expunction law remains within the purview of state legislatures.<sup>41</sup> All fifty states have laws that govern when and whether criminal records can be sealed or destroyed,<sup>42</sup> but the mechanisms and opportunities for expunctions that states have adopted vary widely.<sup>43</sup> State expunction schemes diverge on such matters as what charges or

35. *United States v. Noonan*, 906 F.2d 952, 956 (3d Cir. 1990).

36. *Id.* at 957.

37. *See United States v. Rowlands*, 451 F.3d 173, 177 & n.1 (3d Cir. 2006) (citing *Menard*, 498 F.2d at 1019; *Sullivan v. Murphy*, 478 F.2d 938, 971 (D.C. Cir. 1973); *McLeod*, 385 F.2d at 744, 750) (listing several circuit court cases granting expunctions and noting that each turned on facts that undermined the validity of the initial arrest).

38. 742 F.2d 153 (4th Cir. 1984).

39. *Id.* at 155 (quoting *United States v. Schnitzer*, 567 F.2d 536, 540 (2d Cir. 1977)) (“Such extreme circumstances have been found and records ordered to be expunged where procedures of mass arrests rendered judicial determination of probable cause impossible, where the court determined the sole purpose of the arrests was to harass civil rights workers, where the police misused the police records to the detriment of the defendant, or where the arrest was proper but was based on a statute later declared unconstitutional.”).

40. *Id.* at 154–55.

41. *See SEARCH GROUP, INC.*, *supra* note 27, at 5 (“[T]he trend in recent decisions, including a Supreme Court decision, is to reject constitutional sealing or purging arguments and instead emphasize the need for legislation.”).

42. *See Restoration of Rights Project*, *supra* note 3 (comparing state expungement, sealing, and set-aside laws).

43. *See id.*

offenses may be expunged, the requirement and length of any waiting period prior to expunction, whether expunged records are merely sealed from view or permanently destroyed, and even whether or not a pardon has the effect of expunging records.<sup>44</sup>

This substantial state-by-state variance applies not only to expunction of convictions but also to expunction of non-conviction charges.<sup>45</sup> On the one hand, this lack of national uniformity is confusing, especially for anyone who must navigate the expunction laws of more than one state. On the other hand, the lack of a consensus may be encouraging states to pioneer expunction reforms without fear of upending national norms. In just the past few years, states as diverse as Maryland, Minnesota, Louisiana, and Indiana have all enacted substantive (and unique) reforms to broaden the expunction relief available to their residents.<sup>46</sup> North Carolina, fresh from enacting a series of reforms of its own, has already demonstrated a willingness to rethink its expunction framework to improve the lives of residents.

## II. NORTH CAROLINA'S CURRENT EXPUNCTION SCHEME

### A. Overview of North Carolina Expunction Statutes

North Carolina allows for expunctions of criminal records in twelve different circumstances, which can be divided roughly into four categories.<sup>47</sup> Six expunction types pertain to records of juvenile delinquency or crimes committed or charged before a certain age.<sup>48</sup>

44. See *id.* (providing an overview of each state's eligibility requirements and the type of relief granted).

45. See *id.* (detailing each state's requirements and procedures for expungement, sealing, and set-aside of both conviction and non-conviction records).

46. 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, 370–73 (2016) (discussing the progress made by recent expungement legislation in each state, as well as each enactment's limitations).

47. BOWES, *supra* note 7, at 4–12. For certain crimes that do not fall under any of these statutes, state law also provides another mechanism called a Certificate of Relief, which is designed to encourage more favorable treatment for individuals by employers, landlords, or decision-making bodies with the power to impose discretionary, but not mandatory, collateral consequences based on an individual's criminal record. *Id.* at 13. The UNC School of Government's Collateral Consequences Assessment Tool (C-CAT), an online tool that can be used to determine the collateral consequences that might result from being convicted of a particular crime, also addresses whether a specific collateral consequence is mandatory or discretionary. See *Collateral Consequences Assessment Tool*, UNC SCH. OF GOV'T, <https://ccat.sog.unc.edu/> [<https://perma.cc/UG9L-4UQ6>].

48. See N.C. GEN. STAT. § 15A-145 (2015) (misdemeanors committed before age eighteen, misdemeanor alcohol possession under age twenty-one); § 15A-145.1 (gang



Two statutes allow for expunctions of certain types of crimes.<sup>49</sup> Three expunction provisions fall into a catch-all category based on very specific circumstances—charges or convictions resulting from identity theft or mistaken identity,<sup>50</sup> crimes for which an individual received a pardon of innocence,<sup>51</sup> and a provision requiring the destruction of DNA samples stored in the State DNA Databank following a pardon of innocence or dismissal of charges on appeal.<sup>52</sup> Finally, North Carolina has a specific expunction provision for non-conviction charges—either dismissed charges or not guilty findings—that do not meet the narrow requirements of the mistaken identity expunction.<sup>53</sup>

The expunction process is multi-faceted and complex. In addition to confirming what expunction statute, if any, applies to the records of a particular charge or offense, an individual seeking an expunction in North Carolina must also identify what other requirements and procedures are implicated by that specific statute.<sup>54</sup> Several other factors, including judicial discretion, waiting periods, and filing fees apply non-uniformly to the various North Carolina expunction statutes.<sup>55</sup> In addition, the statutes vary as to whether and when a prior conviction or a prior expunction bars an individual from receiving relief.<sup>56</sup> Some of the expunction statutes grant judges the discretion to deny an expunction due to a negative character assessment, even if the applicant otherwise meets the statutory requirements.<sup>57</sup> Individuals seeking an expunction under a

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offenses committed before age eighteen); § 15A-145.2 (drug offenses committed before age twenty-two); § 15A-145.3 (toxic vapor offenses committed before age twenty-two); § 15A-145.4 (non-violent felonies committed before age eighteen); § 7B-3200 (juveniles alleged or adjudicated delinquent or undisciplined).

49. See § 15A-145.5 (nonviolent misdemeanors or felonies committed at any age); § 15A-146 (prostitution offenses).

50. See § 15A-147.

51. See § 15A-149.

52. See § 15A-148.

53. § 15A-146. There are many reasons why an arrest might not result in a conviction without any mistake as to the identity of a suspect (e.g., charges that are not supported by sufficient evidence). Even in situations where charges were brought against an individual due to an identification error, there is no guarantee that a defendant will be able to clearly demonstrate that the charges were specifically intended for a different person.

54. See BOWES, *supra* note 7, at 24–25.

55. See *id.* (providing an overview of the eligibility criteria for each type of expunction in North Carolina).

56. See *id.*

57. See, e.g., § 15A-145.5 (“The presiding judge is authorized to call upon a probation officer for any *additional investigation or verification of the petitioner’s conduct since the conviction*. The court shall review *any other information the court deems relevant*, including, but not limited to, affidavits or other testimony provided by law enforcement officers, district attorneys, and victims of crimes committed by the petitioner. If the court,

discretionary statute are often required to submit character affidavits with their petitions,<sup>58</sup> and district attorneys are sometimes afforded a window of time to oppose the grant of an expunction.<sup>59</sup> Some expunctions may be applied for immediately after an individual becomes eligible,<sup>60</sup> while others impose waiting periods varying from one year to ten years following a conviction or the completion of a sentence.<sup>61</sup> For certain types of expunctions, applicants must submit a \$175 fee with their application, while others require no fee.<sup>62</sup>

Other provisions of North Carolina's expunction scheme disqualify individuals from obtaining certain types of expunctions based upon: (1) having committed crimes prior to the charge or conviction to be expunged, (2) having committed crimes *after* the charge or conviction to be expunged, or (3) having already been granted a prior expunction. All expunctions except those for juvenile records, identity theft and mistaken identity, and pardons of

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after hearing, finds that the petitioner has not previously been granted an expunction under this section, G.S. 15A-145, 15A-145.1, 15A-145.2, 15A-145.3, or 15A-145.4; *the petitioner has remained of good moral character*; the petitioner has no outstanding warrants or pending criminal cases; the petitioner has no other felony or misdemeanor convictions other than a traffic violation; the petitioner has no outstanding restitution orders or civil judgments representing amounts ordered for restitution entered against the petitioner; and the petitioner was convicted of an offense eligible for expunction under this section and was convicted of, and completed any sentence received for, the nonviolent misdemeanor or nonviolent felony at least 15 years prior to the filing of the petition, *it may order* that such person be restored, in the contemplation of the law, to the status the person occupied before such arrest or indictment or information. If the court denies the petition, the order shall include a finding as to the reason for the denial." (emphasis added)).

58. See, e.g., § 15A-145.4(c)(2) (stating that a petition for expunction under this statute must include "[v]erified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, *that they know the character and reputation of the petitioner in the community in which the petitioner lives and that the petitioner's character and reputation are good*" (emphasis added)).

59. See, e.g., § 15A-145.4(c)(7) ("The district attorney shall have 30 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition. The district attorney shall make his or her best efforts to contact the victim, if any, to notify the victim of the request for expunction prior to the date of the hearing.").

60. See, e.g., § 15A-147(a) (identity theft).

61. See § 15A-145.5(c) (ten-year waiting period for nonviolent felonies committed at any age; five-year waiting period for nonviolent misdemeanors); § 15A-145.4 (four-year waiting period for non-violent felonies committed under age eighteen); § 15A-145.6(b)(2) (three-year waiting period for prostitution offenses, where the individual convicted was not a trafficking victim and did not receive a conditional discharge); § 15A-145.2(c) (one-year waiting period for certain drug offenses committed by first offenders before reaching age twenty-one).

62. See BOWES, *supra* note 7, at 4–13 (including information about which types of expunctions require filing fees). A fee waiver for indigent filers is generally available for those petitions that do have a filing fee. *Id.*

innocence can be denied based on criminal convictions prior to the charge or crime to be expunged.<sup>63</sup> For most expunctions where this bar exists, it does not matter whether or not the prior crime was a misdemeanor or felony.<sup>64</sup> Subsequent convictions similarly can bar relief under all of the expunction statutes except for identity theft, mistaken identity, and pardons of innocence, subject sometimes to limitations on the type of crime or whether or not the subsequent offense occurred during the required waiting period.<sup>65</sup> Finally, around half of the expunction statutes deny relief to someone who has had a prior expunction, although only certain previous statutory expunctions are disqualifying.<sup>66</sup>

### B. *Procedures for Expunging Non-Conviction Charges*

Expunctions under section 146 allow eligible individuals to erase records of criminal charges that were dismissed or otherwise did not result in conviction.<sup>67</sup> Section 146 offers several advantages that are not present in many of the statutes permitting the expunction of prior convictions. First, the section 146 expunction scheme is non-discretionary. In other words, if an individual meets all of the requirements, nothing in the statute allows a judge to deny the petition based on a subjective criterion such as the petitioner's moral character.<sup>68</sup> Another feature of the statute is that the \$175 filing fee applies only to petitioners whose charges were dismissed subject to a deferred prosecution agreement or subject to a conditional discharge.<sup>69</sup> Thus, applicants seeking to expunge charges that culminated in other types of dismissals or in acquittals are not

63. See, e.g., § 15A-145 to -145.6; see also BOWES, *supra* note 7, at 14. Expunction relief under Section 146, as discussed in the following section, can only be denied due to a prior *felony* conviction.

64. BOWES, *supra* note 7, at 14. One important exception to this rule is section 146, which only disqualifies section 146 relief if the prior crime was a felony. *Id.* Also, traffic violation convictions do not impact expunction eligibility either. *Id.*

65. *Id.*

66. *Id.* Logically, applicants seeking relief under the two statutes covering first-offense drug offenses and first-offense toxic vapor offenses cannot receive expunctions twice under either of those statutes. However, other expunction statutes are broader, disqualifying individuals who have previously received expunctions under any of several statutes. See, e.g., § 15A-145.5(c) (barring relief to individuals who have previously received an expunction not only under section 145.5 but also under sections 145, 145.1, 145.2, 145.3, or 145.4).

67. § 15A-146.

68. § 15A-146(a). But see Interview with Carpenter & Holland, *supra* note 6 (discussing the fact that, in practice, judges have been known to deny section 146 expunctions based on character judgments in contravention of the statute).

69. § 15A-146(d).

required to pay anything, even if they are not eligible for the indigent fee waiver. Finally, as of December 1, 2017,<sup>70</sup> section 146 no longer bars individuals who have received prior expunctions—confidential records of which are maintained by the Administrative Office of the Courts (“AOC”) for limited purposes only—from obtaining relief under the statute.<sup>71</sup> Prior to this important change, a person who had previously obtained an expunction under one of several other North Carolina expunction statutes—including section 146 itself—was ineligible to seek a section 146 expunction.<sup>72</sup> Under the old system, multiple non-conviction charges could only be expunged under section 146 “if the offenses occurred within the same 12-month period of time or if the charges [were] dismissed or findings [were] made at the same term of court.”<sup>73</sup> Thus, until 2017, North Carolina had no mechanism under section 146 to expunge two criminal charges that occurred more than a year apart, even if an individual had never been convicted of a crime. The elimination of this barrier is a tremendous positive step for North Carolinians.

However, section 146 still imposes hurdles upon individuals seeking to have non-conviction records expunged. First, individuals who have been convicted of felonies are prohibited from expunging a non-conviction record under this statute.<sup>74</sup> Second, like almost all other expunctions available in North Carolina, the only means by which to obtain an expunction of a non-conviction charge under section 146 is to affirmatively file a petition in the court where the charge was disposed.<sup>75</sup> Eliminating these two hurdles would be a commonsense step toward ensuring that North Carolinians do not experience lingering harms from non-conviction charges on their records.

70. Act of June 27, 2017, sec. 1, § 15A-146, 2017-4 N.C. Adv. Legis. Serv. 627, 643–45 (LexisNexis) (stating that the changes in the law apply to expunction petitions filed on or after December 1, 2017).

71. *See id.* § 15A-146(a), 2017-4 N.C. Adv. Legis. Serv. at 643.

72. *See id.*, 2017-4 N.C. Adv. Legis. Serv. at 627–49.

73. § 15A-146(a1) (defining a “term of court” as “one week for superior court and one day for district court”) (superseded by §§ 15A-145 to 151.5).

74. § 15A-146(a)–(a1). Unlike under several other expunction statutes, prior misdemeanors are not a bar to expunction under section 146. *See supra* notes 64–66 and accompanying text.

75. *See* Petition and Order of Expunction under G.S. 15A-145(a) and G.S. 15A-146, AOC-CR-264, N.C. ADMIN. OF THE COURTS (2015), <http://www.nccourts.org/Forms/Documents/1202.pdf> [<https://perma.cc/UXE5-BXHL>].

C. *Administration of Expunctions in North Carolina*

The expunction process in North Carolina is a fairly cumbersome one that begins, in most cases,<sup>76</sup> with a petition filed by the individual seeking expunction and requires the participation of the specific county court that disposed of the charge or offense for which an expunction is sought, as well as the AOC and the State Bureau of Investigation (“SBI”).<sup>77</sup> First, an individual must complete the particular AOC petition form that corresponds with the type of expunction they are seeking.<sup>78</sup> These forms are not always intuitive. For example, the form to petition for a section 146 expunction is the same form used to petition for an expunction under N.C. Gen. Stat. § 15A-145(a) (expunction of misdemeanors committed by those under eighteen), and inadvertently checking the box corresponding with the wrong statutory provision would result in denial of the petition.<sup>79</sup> Further, petition forms require a judge’s signature from the court where the criminal case in question was disposed<sup>80</sup> and must then be delivered to the AOC and the SBI for processing before being returned *once again* to a local judge to formally order the expunction.<sup>81</sup>

Each year the AOC, SBI, and the North Carolina Department of Justice publish a report quantifying the expunctions granted during that year in each category.<sup>82</sup> Recent data from that report is striking. Despite the availability of multiple statutory avenues to expunge records of criminal convictions, 94.7 percent of expunctions granted over the past several years were for non-conviction charges under section 146.<sup>83</sup> Comparatively, only an average of 3.1 percent of expunctions in the 2013–2014, 2014–2015, and 2015–2016 fiscal years fell under section 145.5, which was created in 2012 to expand the expunction right to certain nonviolent felonies and misdemeanors that were more than fifteen-years old<sup>84</sup> and was broadened in 2017 to reduce the waiting period to ten years for certain nonviolent felonies

76. See *infra* Part III.A (discussing the one North Carolina expunction statute that now permits expunction during the same session of court in which a charge is dismissed, rather than requiring a separate petition process).

77. BOWES, *supra* note 7, at 25.

78. *Id.* at 24.

79. See Petition and Order of Expunction under G.S. 15A-145(a) and G.S. 15A-146, *supra* note 75.

80. See *id.*

81. See *id.*

82. N.C. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 1.

83. *Id.* at 3.

84. *Id.*

and five years for certain nonviolent misdemeanors.<sup>85</sup> Even four years after the enactment of section 145.5, section 146's share of the successful expunction total remained at 90 percent for 2015–2016, while section 145.5 expunctions made up only 3.7 percent of the total for that year.<sup>86</sup> It is likely that nonviolent felony and misdemeanor expunctions will continue to increase given the reduced wait times implemented in 2017. Interestingly, expunctions granted under section 147—the identity theft expunction statute which received a legislative makeover in 2015 to expand its scope and move toward the first automatic expunction right in North Carolina—spiked in 2015–2016, jumping from an average of fifty-eight expunctions per year for the previous five years to 412 in 2015–2016 alone.<sup>87</sup> This jump is at least partially attributable to the fact that individuals are now able to obtain immediate expunctions under this statute rather than going through the full affirmative petition process.

### III. MODELS FOR A MOVE TO AUTOMATIC EXPUNCTION IN NORTH CAROLINA

#### A. *North Carolina's Reforms to Section 147—Identity Theft and Mistaken Identity*

Until recently, all types of expunctions in North Carolina required a potential candidate for an expunction to affirmatively petition for relief under the applicable statute. However, the North Carolina General Assembly created the state's first expunction right that is not dependent on the standard petition process when it amended section 147 at the end of 2015.<sup>88</sup> Effective December 1, 2015, Session Law 2015-202 amended section 15A-147 (formerly the “identity theft” expunction statute) to call for automatic expunction of charges or convictions due to identity theft or mistaken identity (as defined later on in the statute):

If any person is named in a charge for an infraction or a crime, either a misdemeanor or a felony, as a result of another person using the identifying information of the named person or

85. See Act of June 27, 2017, sec. 1, § 15A-145.5, 2017-4 N.C. Adv. Legis. Serv. 627, 638–41 (LexisNexis).

86. *Id.* In raw numbers, fiscal years 2013-2014, 2014-2015, and 2015-2016 saw 311, 292, and 411 section 145.5 expunctions, respectively, compared with 12,886, 7,407, and 9,929 expunctions ordered in those years under section 146. *Id.*

87. N.C. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 3.

88. See Act of Aug. 6, 2015, ch. 202, § 15A-147(a1), 2015 N.C. Sess. Laws 520, 520–21 (codified at N.C. GEN. STAT. ANN. § 15A-147(a1) (West 2016)).

mistaken identity, and the charge against the named person is dismissed, *the prosecutor or other judicial officer who ordered the dismissal shall provide notice to the court of the dismissal, and the court shall order the expunction of all official records containing any entries relating to the person's apprehension, charge, or trial.*<sup>89</sup>

Curiously, findings of not guilty and convictions that are set aside due to identity theft or mistaken identity still require an affirmative petition or motion from the individual impacted under this statute.<sup>90</sup> However, the form provided for dismissed charges under the new provision is in the form of an order, rather than a petition like the older form, demonstrating the change toward a court-initiated process.<sup>91</sup>

In amending the language of section 147, the legislature not only set out a more user-friendly expunction process but also expanded the number of situations in which such a right would apply. The same bill expanded section 147 to include charges dismissed due to “mistaken identity,” defined as

the erroneous arrest of a person for a crime as a result of misidentification by a witness or law enforcement, confusion on the part of a witness or law enforcement as to the identity of the person who committed the crime, misinformation provided to law enforcement as to the identity of the person who committed the crime, or some other mistake on the part of a witness or law enforcement as to the identity of the person who committed the crime.<sup>92</sup>

The language of the statute appears to place the onus of section 147 expunctions squarely on judges and prosecutors, but expunction attorneys note that, in practice, expunctions under this section do not generally take place on the court's own motion when a dismissal is entered.<sup>93</sup> The new section 147 language has, however, allowed individuals to seek and obtain orders of expunction relief from judges in the same session of court as their charge dismissals without having

89. *See id.* (emphasis added).

90. *See* N.C. GEN. STAT. § 15A-147(a) (2015).

91. *See* BOWES, *supra* note 7, at 11 (noting that the form AOC-CR-263 is to be used “for dispositions requiring defendant to petition,” whereas form AOC-CR-283 is “for dispositions triggering automatic expunctions”); *see also* Petition and Order of Expunction under G.S. 15A-147(a) (Identity Theft), AOC-CR-263 (2015); Order of Expunction under G.S. 15A-147(a)(1) (Identity Theft or Mistaken Identification), AOC-CR-283 (2017).

92. Act of Aug. 6, 2015, § 15A-147(g), 2015 N.C. Sess. Laws at 521.

93. Interview with Carpenter & Holland, *supra* note 6.

to re-prove the facts of the identity theft or mistaken identity as part of a separate petition process.<sup>94</sup> Thus, even if not precisely automatic, the revision to section 147 does create an opportunity to obtain an *immediate* expunction and moves the state closer to its first automatic expunction right.

The new mistaken identity language of section 147 recognizes the possibility that someone who is charged with a crime but who is factually innocent might be harmed in just the same way as someone whose identity was stolen and used to commit a crime. However, all people whose arrests did not result in a conviction should arguably be treated as innocent under the law, even if they are not able to prove that a witness or law enforcement officer mistakenly identified them as the culprit in a crime committed by someone else. The expansion of section 147 helps one type of individual who would previously have been eligible for relief only under section 146, and its move toward automatic effect should be further applied to those who are still eligible for relief only under section 146.

The requirement that an individual affirmatively petition for relief is logical for expunctions of legitimate convictions where a judge has the discretion to deny relief<sup>95</sup> and, to a lesser extent, for non-discretionary expunctions that may be granted only after a statutory waiting period.<sup>96</sup> However, situations where the court has overseen the vacation of a conviction, the dismissal of a charge, or a trial resulting in an acquittal merit and facilitate more immediate action on the part of the court. Thus, the affirmative expunction procedure now set out in North Carolina's identity theft and mistaken identity statute serves as a guide for how the legislature could effectively revise section 146 to ease the burdens on those charged with, but never convicted of, crimes.

#### *B. Automatic Expunction of Non-Conviction Records in Other States*

While North Carolina has moved closer to providing an automatic expunction right through its revisions of section 147, other states have already adopted automatic destruction or sealing of non-conviction criminal records.

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94. *Id.*

95. *See, e.g.*, N.C. GEN. STAT. § 15A-145.5(c) (2015).

96. *See, e.g.*, § 15A-145.2(c). While any discretionary expunction would necessitate some sort of review by the court before it is granted, it is possible to imagine a system of automatic expunction of records based on the applicable statutory waiting period for a particular offense. However, the administrative feasibility arguments against such a plan would be substantial.



Connecticut has had such a process on the books for decades, demonstrating the long-term feasibility of automatic expunctions. Connecticut law is clear about the final disposition of criminal charges that do not ultimately result in conviction:

Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge *shall be erased* upon the expiration of the time to file a writ of error or take an appeal, if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken.<sup>97</sup>

This statutory language does not merely indicate that expunctions are non-discretionary; rather it places a burden on the court to expunge non-conviction records themselves.<sup>98</sup>

In addition to creating an automatic expunction right when a charge is disposed, the Connecticut statute also sets a thirteen-month time limit during which a charge can be brought; after that time, the charge is moot and subject to automatic expunction.<sup>99</sup>

Similarly, New York has had in place an analogous provision providing for the automatic sealing of non-conviction records since 1991.<sup>100</sup> The relevant text of New York's statute reads as follows:

97. CONN. GEN. STAT. ANN. § 54-142a (West, Westlaw through Jan. 2017 Reg. Sess.) (emphasis added).

98. See Chris Skall, *Journey Out of Neverland: Cori Reform*, Commonwealth v. Peter Pon, and *Massachusetts's Emergence as a National Exemplar For Criminal Record Sealing*, 57 B.C. L. REV. 337, 350 n.66 (2016) (comparing the automatic expunction of records set out in Connecticut's non-conviction records expunction law and one provision of Massachusetts' expunction law for non-conviction records with the Massachusetts' petition-based framework for other types of charges not resulting in conviction).

99. CONN. GEN. STAT. § 54-142a(c)(1)–(2) (“Whenever any charge in a criminal case has been nolle in the Superior Court, or in the Court of Common Pleas, if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased[.] . . . Whenever any charge in a criminal case has been continued at the request of the prosecuting attorney, and a period of thirteen months has elapsed since the granting of such continuance during which period there has been no prosecution or other disposition of the matter, the charge shall be nolle upon motion of the arrested person and such erasure may thereafter be effected or a petition filed therefor, as the case may be, as provided in this subsection for nolle cases.”).

100. See N.Y. CRIM. PROC. LAW § 160.50 (McKinney 2015); LEGAL ACTION CTR., LOWERING CRIMINAL RECORD BARRIERS 8 (2015), [https://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers\\_rev3.pdf](https://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers_rev3.pdf) [<https://perma.cc/Q34X-7HMB>] (“As of November 1991, most cases that can be sealed should be sealed *automatically*. Before November 1991, sealing was not always automatic, so many cases that should have been sealed were not. Since November 1991, the court only has to notify DCJS about the

Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision three of this section, unless the district attorney upon motion with not less than five days notice to such person or his or her attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, or the court on its own motion with not less than five days notice to such person or his or her attorney determines that the interests of justice require otherwise and states the reasons for such determination on the record, the record of such action or proceeding *shall be sealed*.<sup>101</sup>

While New York does not *erase* any of its criminal records,<sup>102</sup> allows prosecutors to object to the sealing of non-conviction records “in the interest of justice,”<sup>103</sup> and has a number of carve-outs in its sealing provision to permit limited access to sealed records in several specific circumstances,<sup>104</sup> New York, like Connecticut, has empowered its courts to take automatic and immediate action to limit the real-life impact of non-conviction criminal records on its residents.

Rather than creating a non-discretionary expunction right pertaining to non-conviction records for their residents and then requiring each affected person to submit a petition, Connecticut and New York have both taken on the burden of providing relief for their residents who are never convicted of the offenses with which they are charged.<sup>105</sup> North Carolina should follow their example.

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disposition of the case, which it does routinely anyway. If the case was dismissed or otherwise terminated in your favor . . . DCJS will automatically seal the case unless there is a ‘do not seal’ order.”(emphasis in original)).

101. N.Y. CRIM. PROC. LAW § 160.50(1)(emphasis added).

102. LEGAL ACTION CTR., *supra* note 100, at 2.

103. N.Y. CRIM. PROC. LAW § 160.50(1).

104. LEGAL ACTION CTR., *supra* note 100, at 7.

105. Like North Carolina’s statutory prohibition on judges discretionarily denying section 146 petitions, Connecticut’s automatic expunction rule is not always perfectly executed. See CONNECTICUT LEGAL SERVICES ET AL., IS YOUR CRIMINAL RECORD KEEPING YOU FROM WORKING? 4 (May 2015), [https://ctlawhelp.org/files/pamphlets/benefits\\_work/criminal\\_record\\_pamphlet.pdf](https://ctlawhelp.org/files/pamphlets/benefits_work/criminal_record_pamphlet.pdf) [https://perma.cc/TSP5-SP8D] (“Records are usually erased automatically, but sometimes that does not happen. If your record was not erased, you should contact the court.”). However, the fact that a system is not error-free should not discourage its adoption if it promises a substantial improvement over the status quo.

#### IV. REFORMING EXPUNCTION RELIEF FOR CHARGES NOT RESULTING IN CONVICTION

##### A. *Making Section 146 Expunctions Automatic*

Instead of requiring individuals to affirmatively petition for their non-conviction charges to be expunged, as currently required under section 146, the North Carolina General Assembly should mandate that North Carolina courts initiate the expunction process immediately upon a disposition in which a defendant's charges are dismissed or in which a finding of not guilty or not responsible is entered. This change would serve as a natural extension of the current section 146 provisions, ensuring that all eligible North Carolinians—rather than only those with a working knowledge of the ins and outs of the state's expunction procedures—are equally able to obtain relief. It would also limit the time window during which records regarding non-conviction charges could proliferate and would help reduce the impact of the racial disparities that permeate the criminal justice system. In addition, a number of specific circumstances present in North Carolina weigh heavily in favor of a change to a court-initiated expunction right.

##### 1. Putting All North Carolinians on Equal Footing

In its 2012 report recommending the addition of a new expunction category for certain non-violent felonies and misdemeanors, which would later form the basis for the original section 145.5 expunction statute,<sup>106</sup> the North Carolina General Assembly's Criminal Record Expunction Committee noted that "[e]xpunction is a process that can and should be used to give people who have committed minor crimes a clean slate and a fresh start, especially when a significant amount of time has passed without further trouble."<sup>107</sup> This statement not only notes the value of providing a "fresh start" to people with criminal records but also highlights the belief that relief should be provided to those individuals who have avoided "*further* trouble."<sup>108</sup> Arrest records, absent conviction, often stigmatize the arrested individual, who, many in the public believe, is likely guilty of the crime charged even if the charge

106. N.C. Gen. Stat. § 15A-145.5 (2015).

107. N.C. GEN. ASSEMB. CRIMINAL REC. EXPUNCTIONS COMM., REP. TO THE 2012 SESS. OF THE 2011 GEN. ASSEMB. OF N.C., at 12 (2012).

108. *Id.* (emphasis added).

was later dismissed or resulted in an acquittal.<sup>109</sup> Given that prosecutors trying criminal cases have the burden of proving defendants' guilt beyond a reasonable doubt, members of the public might believe that individuals who were charged but not convicted merely "got off on a technicality" and therefore do not deserve full vindication under the law.<sup>110</sup>

While it would be simple to conflate interaction with the criminal justice system with criminality, North Carolina's expunction statute for non-convictions should be rooted in the premise that all individuals are innocent until proven guilty. Under this premise, records of charges that do not result in conviction should always be expunged because these charges have not withstood the rigorous adversarial inquiry that our system requires before a finder of fact may pronounce a defendant guilty. While section 146 permits all those meeting the statutory preconditions to get their non-conviction charges expunged, it does not currently provide expunction relief for all people with non-conviction records.<sup>111</sup> For many, a lack of knowledge surrounding the availability and procedures of expunctions under section 146 might be the only thing preventing them from obtaining relief. Upgrading North Carolinians' right to petition for expunction of non-conviction criminal records to a requirement that the state automatically expunge these records would ensure that similarly situated individuals are afforded equal relief under the section 146 expunction statute, regardless of their knowledge (or lack thereof) of the specific procedures surrounding expunctions.

There are several reasons why making North Carolina's non-conviction records expunction statute self-executing is a natural next

109. See Leipold, *supra* note 24 at 1305–08.

110. To assist those factually innocent defendants who are saddled with the stigma of contact with the criminal justice system, Leipold proposes a two-pronged solution in which innocent defendants would be allowed to petition the judge upon dismissal of a charge for an additional finding of innocence or, if the case went to trial, in which jurors could render one of three verdicts—guilty, not guilty, or innocent. *Id.* at 1300. Under this proposal, those defendants whom either the judge or jury declared innocent, as opposed to merely not guilty, would be entitled to automatic expunction of all records associated with the charged offense. *Id.* While attractive in theory, such a process of bifurcating acquittals and dismissals into two camps would inevitably result in an "indeterminate" category, composed of criminal defendants whose indictments were not sufficiently supported by evidence that could ensure conviction but that also were not so laughably devoid of an evidentiary basis as to demand a declaration of innocence. Thus, although the class of possibly guilty/possibly innocent defendants might shrink, it would ultimately remain, and those defendants who were able to achieve only "not guilty" status would be stigmatized even more than they are today.

111. See § 15A-146.

step from the current section 146 process. First is the fact that section 146 does not give judges any discretion to reject properly filed petitions.<sup>112</sup> Other types of expunctions, under North Carolina's current scheme, require a judge not only to ascertain that all required elements of the expunction statute are met but also to review affidavits in support of the applicant and gather information from prosecutors, probation officers, and others in order to determine whether the applicant merits an expunction.<sup>113</sup> While some judges have been known to refuse to grant non-conviction expunctions based on their personal views of particular applicants,<sup>114</sup> such refusals ignore the plain text of the statute. Section 146 is, as written, completely objective. An applicant either does or does not meet the criteria established for expunctions under the statute and, based on that determination, either does or does not receive an expunction.

Second, unlike several other statutes, section 146 also has no waiting period before a person can petition for their non-conviction charge to be expunged.<sup>115</sup> Thus, under the current law, someone who meets the requirements—and is aware of the process—can *immediately* petition to have a non-conviction charge expunged as soon as a charge is dismissed.

Third, for all petitioners under section 146 whose criminal charges ended in acquittals, voluntary dismissals, or anything other than a conditional discharge or a deferred prosecution agreement, the application process is free.<sup>116</sup> Even those who are not exempt from the \$175 fee will not be required to pay it if they meet the standards for the indigent fee waiver.<sup>117</sup> Because judicial discretion, waiting periods, and—for many petitioners—a filing fee are all absent from the text of section 146, all people who qualify for this type of expunction have the right under today's law to petition for expunction relief at any time.

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112. *See id.* (stating that upon receiving a properly filed application for expunction “[t]he court *shall* hold a hearing on the application, and upon finding that the person had not previously received an expunction under this section . . . and that the person had not previously been convicted of a felony . . . the court *shall* order an expunction” (emphasis added)).

113. *See, e.g.*, § 15A-145.4(c)–(d) (requiring that first offenders who are under 18 years of age at the time of the commission of a nonviolent felony present materials requiring the cooperation of a court clerk or possibly a state official).

114. Interview with Carpenter & Holland, *supra* note 6.

115. *See* BOWES, *supra* note 7, at 14.

116. *Id.* at 11.

117. *Id.*

The only thing preventing people with non-conviction charges from filing en masse to have those charges expunged might be a lack of awareness about the opportunity for expunction relief provided under the law or an inability to access the resources necessary to initiate and monitor the complex expunction process. Making section 146 expunctions automatic would ensure that all similarly situated individuals have the same opportunity to clear their criminal records.

## 2. The Positive Timing Impact of Immediate Expunctions

In addition to ensuring that all eligible individuals receive the same non-discretionary relief under section 146, a court-initiated automatic expunction process would limit the time during which these records could proliferate and, by extension, would limit the impact of one of the thorniest problems surrounding criminal records. Although private companies that disseminate criminal records that have been expunged can theoretically be liable for damages under N.C. Gen. Stat. § 15A-152, often the sale and transfer of records between multiple levels of private data companies prevents records from being deleted from all reporting databases, leaving individuals whose expunged records still show up in background checks in a difficult position.<sup>118</sup> However, if expunctions under section 146 were ordered automatically in the same court session in which a charge was dismissed or a not guilty verdict was entered, private databases would have less time to collect North Carolinians' arrest data and, by extension, less time to sell that data to additional companies that would send it to employers and landlords and post it on the internet. Some companies might still disseminate arrest data before charges are disposed, but an expunction at the time of disposition would be much more effective than the current process.

## 3. Automatic Expunctions as a Way to Combat Racial Disparities

Racial disparities permeate nearly every facet of America's criminal justice system. Across the nation, people of color—particularly African-Americans—are significantly more likely to be arrested than whites.<sup>119</sup> While there are many systemic causes of this disparity,<sup>120</sup> one clear effect is that people of color continue to be

118. *Id.* at 29.

119. See, e.g., Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering disparity'*, USA TODAY (Nov. 18, 2014), <https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/> [<https://perma.cc/L8A2-XMJL>].

120. See generally, MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010) (discussing the pervasiveness of institutional racism in the American criminal justice system).

burdened with significantly more criminal records than whites—including records of arrests that did not result in conviction. The data shows that North Carolina follows the national trend of racially disparate policing. A study of 13 million traffic stops that took place in North Carolina between 2000 and 2011 found that black and Hispanic motorists were much more likely than similarly situated whites to be searched or arrested.<sup>121</sup> Studies of specific North Carolina municipalities have also revealed notable discrepancies. An analysis of Greensboro policing data published in 2015 by *The New York Times* found that Greensboro police searched black drivers or their vehicles during traffic stops at more than twice the rate of white drivers, despite the fact that officers were much more likely to find drugs and weapons in searches of white motorists.<sup>122</sup> The same analysis found that over four times as many blacks were arrested “on the *sole* charge of resisting, obstructing or delaying an officer” as whites.<sup>123</sup> Greater numbers of stops, searches, arrests, and charges directed at racial minorities in North Carolina translate to more criminal records lingering in background check results of North Carolinians of color—records that include disproportionate numbers of non-conviction charges. Granting expunctions automatically to all individuals who have their charges dismissed or who are found not guilty would, therefore, provide a particular benefit to North Carolina’s racial minorities, helping to level the playing field by reducing the attendant racial disparities in employment, housing, and financial opportunities.

#### 4. Other North Carolina-Specific Issues that Tip the Scales Toward Reform

In addition to principles of justice and efficiency, there are specific factors present in North Carolina that suggest that the courts, rather than individuals, should have the burden to automatically expunge non-conviction charges.

121. FRANK R. BAUMGARTNER & DEREK EPP, NORTH CAROLINA TRAFFIC STOP STATISTICS ANALYSIS, FINAL REPORT TO THE NORTH CAROLINA ADVOCATES FOR JUSTICE TASK FORCE ON RACIAL AND ETHNIC BIAS 1 (2012), <https://www.unc.edu/~fbaum/papers/Baumgartner-Traffic-Stops-Statistics-1-Feb-2012.pdf> [https://perma.cc/87Q8-FT7N].

122. Sharon LaFraniere and Andrew W. Lehren, *The Disproportionate Risks of Driving While Black*, N.Y. TIMES (Oct. 24, 2015), <https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html?mcubz=0> [https://perma.cc/Y29Z-YJ9N].

123. *Id.* (emphasis added).

*a. North Carolina's Citizen-Initiated Warrant Procedure*

One important factor figuring into how some charges come about that do not ultimately result in conviction is North Carolina's traditionally liberal citizen-initiated warrant procedure. North Carolina has long permitted a citizen to swear out a warrant against another person before a magistrate, leading to that person's arrest (and the accompanying records of arrest and charge) without a formal law enforcement investigation ever taking place.<sup>124</sup> This means that not all arrests in North Carolina have been the result of equal levels of scrutiny. Citizen-initiated warrants, on the one hand, have provided citizens with a tool to obtain justice if law enforcement fails to act in a particular situation. However, this tool could also be abused. Citizen-initiated warrants are especially relevant to domestic violence victims, because abusers have sometimes initiated charges against their victims as a form of intimidation, often as retribution for victims' attempts to end the abuse by involving law enforcement through filing domestic violence protective orders.<sup>125</sup> These warrants have led to the arrest of the victim on a retaliatory charge by the abuser, a charge that, even if dismissed, leaves behind a criminal record.<sup>126</sup>

*b. Lack of County Uniformity*

The process of obtaining an expunction in North Carolina is even more complicated by the fact that the state's one hundred counties do

124. See Act of July 21, 2017, sec. 5(a), § 15A-304(b), 2017-4 N.C. Adv. Legis. Serv. 404, 408-09 (LexisNexis). Changes to the citizen warrant statute passed by the North Carolina General Assembly in the summer of 2017 appear to be designed to add procedural safeguards to the citizen warrant process. See *id.* However, even if these changes are effective going forward, many individuals will continue to bear the burden of trying to expunge dismissed citizen-initiated charges under the prior regime. For a lively discussion of issues surrounding the citizen-initiated warrant process, see also Jeff Welty, *Private Citizens Initiating Criminal Charges*, NC CRIMINAL LAW: A UNC SCHOOL OF GOVERNMENT BLOG (Apr. 9, 2015), <http://nccriminallaw.sog.unc.edu/private-citizens-initiating-criminal-charges/> [https://perma.cc/C32V-CTY9].

125. See Tolu Adewale, Kari L. Hamel, & Joseph Laizure, *Removing Barriers and Restoring Hope for Domestic Violence Victim-Defendants: Post-Arrest and Post-Conviction Tools of Relief & Discussion on How to Approach the Gaps in Legal Relief in North Carolina*, N.C. COAL. AGAINST DOMESTIC VIOLENCE (May 19, 2016), <http://nccadv.org/images/pdfs/conf/2016-Removing-Barriers-Restoring-Hope-for-Domestic-Violence-Victims-Defendants-Kari-Hamel-Joseph-Laizure-Tolu-Adewale.pdf> [https://perma.cc/FGW8-U8CU].

126. *Id.* A related issue affecting victims of domestic violence is the cross-warrant, in which law enforcement responds to a domestic dispute, is unable to determine which party is the "predominant aggressor," and, thus, charges both parties with crimes related to the incident. In this situation, both charges generally end up being dismissed. *Id.*



not have uniform procedures for how to begin the expunction process. Before a petition even reaches the AOC and the SBI, an individual must deliver the petition to the court where the charge was disposed and must jump through the hoops prescribed by that particular county. These hoops vary widely from county to county, and often the only way to find out a particular court's procedures is to call the courthouse directly.<sup>127</sup> Counties differ on such points as whether applicants can simply entrust their petitions to the court clerk, who will make sure the judge signs them, or whether applicants must approach a judge directly for a signature; whether the applicant or the clerk is responsible for mailing the signed petition to the SBI; and whether or not the clerk informs the petitioner once the petition returns from the AOC and the expunction is granted. Complicating matters further, counties generally do not publish lists of their quirky practices to guide petitioners.<sup>128</sup> Thus, a process that might seem to be no more complicated than completing a form is in actuality not very intuitive, thereby requiring expenditures of additional time and resources to ensure that the correct procedures are followed.

*c. Re-deploying Pro Bono Resources*

Finally, as issues surrounding collateral consequences stemming from contact with the criminal justice system generally, and opportunities for expunction relief in particular, have gained more visibility in North Carolina, attorneys in the state have stepped up in a huge way to provide pro bono representation to individuals seeking to navigate the state's labyrinthine expunction framework. A number of prominent law firms and legal departments at high-profile organizations have made expunction relief a key part of their pro

127. See BOWES, *supra* note 7, at 25 (“[S]ome counties allow a petitioner to submit a petition to the Clerk of Court’s Office once the petitioner has completed the sections requiring biographical information, arresting agency, offense description, and motion to expunge. In those counties, the Clerk of Court will then provide notice to the District Attorney (having them complete the ‘certificate of service’ section of the petition form), obtain the presiding judge’s signature, and mail the completed petition form and any accompanying affidavits to the SBI/AOC. However, in other counties, the petitioner is expected to not only complete the[se] . . . sections, but is also expected to provide notice to the District Attorney (having them complete the certificate of service), obtain the presiding judge’s signature, and mail the petition and any affidavits directly to the SBI/AOC. Similarly, a few counties require a certified copy of petitioner’s criminal record to be submitted with the petition for expunction[.] That is all to say, whether a petitioner or a petitioner’s attorney, one must learn from the Clerk of Court’s Office the specific procedures for filing a petition for expunction.”).

128. Interview with Carpenter & Holland, *supra* note 6.

bono activities.<sup>129</sup> A few years ago, lawyers at Hunton & Williams, TIAA-CREF, Duke Energy, and Parker Poe began lending their support to the expunction work at nonprofit organizations such as Legal Aid of North Carolina and Legal Services of the Southern Piedmont.<sup>130</sup> By 2014, there were over 150 attorneys in the state—as well as paralegals and other legal staff—providing pro bono services in support of these expunction initiatives.<sup>131</sup>

Private attorneys' enthusiasm for and commitment to "second chance" work continues to make a huge difference in the lives of individuals across the state who want to move beyond prior criminal charges or convictions. But a change in North Carolina's law to require automatic expunction of non-conviction records could help to better allocate the state's pro bono resources. Today, expunctions obtained under section 146 still hover around ninety percent of the total number of expunctions granted annually in North Carolina.<sup>132</sup> It is certainly possible, or even likely, that individuals who receive pro bono representation to complete their expunctions are more likely than the expunction-seeking public as a whole to be seeking more complex expunctions. For example, this may include expunctions that fall under statutes requiring judges to make discretionary determinations based on affidavits. However, given the sheer volume of expunctions that are for non-conviction records, it is almost certain that a significant portion of pro bono attorney resources are dedicated to obtaining an expunction under section 146. If, instead, courts were required to automatically expunge non-conviction records, substantial pro bono resources could be shifted away from this one category of expunction. Those resources could then be used to provide legal assistance in more complex expunctions or could be reallocated to any of the many other substantive areas in which North Carolina residents continue to lack needed legal representation.

*B. Removing the Bar to Section 146 Relief for Those with Felony Convictions*

While the current language of section 146—including Senate Bill 445's elimination of the prior-expunction bar—makes the provision particularly ripe for conversion into an automatic, court-initiated

129. See Evelyn Pursley, *Expunction Projects: Second Chances Benefit Individuals and Our State*, N.C. INTEREST ON LAWYERS' TRUST ACCTS. (2014), <http://www.nciolta.org/publications/journal-columns/archives/spring-2014/> [https://perma.cc/F9DF-LM4T].

130. *Id.*

131. *Id.*

132. See BOWES, *supra* note 7, at 25.

expunction right, the remaining bar on individuals with felony convictions would impede the reach and efficiency of an otherwise forward-looking move toward automatic expunction. Reasons of fairness and administrative convenience urge that this bar to relief should also be removed as part of a legislative plan to place the burden on the courts to automatically expunge charges that do not result in conviction. Other expunction statutes speak to whether or not a felony conviction can be expunged from someone's record.<sup>133</sup> But the fact that an entirely different charge did result in a conviction, presumably establishing the person's guilt in that instance, should not impact an individual's ability to remove from their record a charge that has not been similarly vetted by the gauntlet of the criminal justice system.<sup>134</sup> Denying expunction of a non-conviction charge to someone because of a felony conviction risks offending the "innocent-until-proven-guilty" notion of our justice system.

Beyond philosophical notions of justice, removing the felony conviction bar to section 146 relief would make the expunction process more efficient, helping to make an automatic expunction mandate achievable. Cost can certainly be a factor in a jurisdiction's decision to implement an expunction reform.<sup>135</sup> Even if automatic non-conviction expunctions were implemented gradually, beginning with all current dispositions and working backward to steadily apply the plan to older records, the added step of expunging records for each case that does not end in a conviction would inevitably create additional costs. However, eliminating the current bar to section 146 relief for those with felony convictions would also relieve the state of significant, tangible costs involved in executing the expunction process. After the judge at the local courthouse signs the petition, it must be sent to the SBI for the criminal record check.<sup>136</sup> Until the recent change in the law, the SBI then forwarded section 146 petitions

133. See, e.g., N.C. GEN. STAT. § 15A-145.4 (2015) ("Expunction of records for first offenders who are under 18 years of age at the time of the commission of a nonviolent felony.").

134. One might analogize this situation to FED. R. EVID. 404(b), which precludes—in most circumstances—the introduction of prior bad acts to prove that a person acted in conformity with those earlier acts on the occasion in question. While it is possible that someone who committed a crime before might do so again, the spirit of our justice system demands that we evaluate each new allegation on its own merits, rather than in the shadow of a prior conviction.

135. See, e.g., Stacey Barchenger, *Criminal Expungement for 128K Under Fire for Potential Cost*, THE TENNESSEAN (Nov. 6, 2015), <http://www.tennessean.com/story/news/crime/2015/11/06/nashville-criminal-charges-expungement-law/75318642/> [<https://perma.cc/G9QT-254N>].

136. N.C. ADMIN. OFFICE OF THE COURTS, *supra* note 5, at 2.

on to the AOC, which would check its confidential database of prior expunctions to ensure that the applicant has not already received one.<sup>137</sup> For those expunctions that are subject to the \$175 fee, as of September 2016 only \$52.50 of that money was kept by the AOC for its processing, while the remaining \$122.50 of the fee—seventy percent of the total—was sent to the Department of Public Safety “for the costs of criminal record checks performed in connection with processing petitions for expunctions.”<sup>138</sup> Presumably, at least part of this cost is incurred in the process of searching for prior felony convictions that would deny relief to the applicant. Removing this step from the required review process for every section 146 expunction should help to limit any increase in processing costs brought about by the enactment of an automatic expunction right, and it would provide more North Carolinians with the opportunity to purge from their criminal reports non-conviction charges that might limit their housing and employment opportunities.

#### V. ADDRESSING ARGUMENTS AGAINST AN AUTOMATIC EXPUNCTION RIGHT

While the reasons discussed above demonstrate why a court-initiated right to expunction under section 146 would be a logical and just step forward for North Carolina’s residents, it is conceivable that some might find flaws in such a major change to the state’s expunction procedures. This Part will address two possible counterarguments that could come up in a debate on the merits of an automatic expunction right.

##### *A. Losing Data that Would Help Fight Crime*

Every time an expunction is ordered, a little bit of data about a criminal investigation becomes less available or disappears entirely. Those who believe that expunctions should be permitted only sparingly and under only the narrowest of conditions might be concerned that the more expunctions are allowed, the less data will be available to those seeking to catch and punish people who commit crimes. Based on the belief that many arrestees—though never convicted—must have been guilty of something to find themselves in the law enforcement dragnet, some might be wary about a process that affirmatively expunges every dismissed charge immediately at the time it is dismissed and erases it forever. However, not every

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137. *Id.*

138. *Id.*

expunction scheme requires that records immediately go up in a puff of smoke. A number of states have applied different approaches to expunction that might assuage critics of across-the-board erasure of records,<sup>139</sup> and North Carolina has recently joined their number. Some states seal criminal records from the public but make them available to the individual charged or law enforcement agencies.<sup>140</sup> For example, a provision in Missouri makes non-conviction records available to victims of sex crimes, seeking to give them the tools to bring subsequent civil cases against alleged perpetrators.<sup>141</sup>

Prior to Senate Bill 445, North Carolina destroyed all records of an expunged charge or offense, except for the confidential file of expunction orders maintained by the AOC for very limited purposes.<sup>142</sup> However, as a counterpart to its provisions expanding access to expunctions, Senate Bill 445 also made a significant change to what happens to criminal records following an expunction. The new law provides that, beginning in July 2018, all prosecutors in the state will have access to the AOC file of ordered expunctions, including records of all dismissed charges expunged under section 146.<sup>143</sup> If an individual is convicted of a subsequent offense after getting a conviction expunged, prosecutors can use that expunged conviction to calculate prior record level for sentencing purposes.<sup>144</sup> Records expunged under section 146 are not used to calculate sentencing,<sup>145</sup> but prosecutors likely would use this information to make decisions about when and how aggressively to pursue a case against a defendant.

There is certainly a strong argument that utilizing expunged charges in any way in subsequent prosecutions violates the basic premise of an expunction: to wipe an individual's slate clean. However, for anyone concerned that automatically expunging all non-conviction charges would impede prosecutors' ability to hold accountable criminals who repeatedly avoid conviction only on "technicalities," the prosecutor-access provision included in Senate Bill 445 should provide reassurance that the state would not lose vital

139. See Restoration of Rights Project, *supra* note 3.

140. *Id.*

141. See MO. ANN. STAT. § 610.105(2) (West, Westlaw through 2017 First Reg. Sess.).

142. See BOWES, *supra* note 7, at 29.

143. Act of June 27, 2017, sec. 1, § 15A-146, 2017-4 N.C. Adv. Legis. Serv. 627, 643–45 (LexisNexis). Notably, records expunged under the identity theft/mistaken identity statute—as well as those expunged following pardons—are still not available to prosecutors under section 151.5. *Id.* at 648–49.

144. *Id.*

145. See *id.*

data by permitting wide-scale, automatic expunctions. The fact that these expunged non-conviction records would be available to prosecutors should make skeptics more willing to allow these records to fall outside of the reach of potential landlords and employers.

*B. Rewarding Only Those with Initiative*

Some might argue that the existing petition-based process is sufficient or is even preferable to an automatic expunction right because it rewards only those people who show initiative, i.e., those who “really want” an expunction. Under this premise, it would be worthless to waste time and energy to clear the criminal records of people who would not have taken such a step themselves, despite the availability of a process for them to petition for relief. However, as is the case in many areas of the law, people are not always aware of their legal right to obtain an expunction. In fact, individuals may have an even harder time vindicating their statutory right to an expunction than, say, enforcing an implied warranty of their apartment’s habitability. This is because even a tenant who is unaware that there is a right to seek repairs to their dwelling is generally at least aware that the roof leaks or the stove doesn’t light. By contrast, individuals in need of expunctions of their non-conviction charges may not even realize they have a problem in need of a legal remedy. If they went to court to see their charges dismissed and never checked their own background check reports, they might logically assume that their criminal records were taken care of and that no further action was required, all the while not knowing that they were losing out on potential opportunities because of prior arrests. Because it is not intuitive that dismissed charges or not guilty verdicts would have lingering negative effects, it makes sense to provide automatic relief to all impacted individuals.

CONCLUSION

Being charged with a crime is an inherently disruptive experience. Some people are detained pending the outcome of their case, leading to a range of adverse consequences. Even those who never see the inside of a jail cell must expend time and money to appear in court and defend against their charges. For anyone charged with a crime, there is also the possibility of a more subtle reputational injury, the fact that—whether fair or not—some people may never view an individual the same way after contact with the criminal justice system.

While some of these immediate consequences of an arrest or criminal charge may be difficult to avoid, North Carolinians who are not adjudicated guilty of a crime in a court of law should not have to bear negative collateral consequences for years to come simply because they once stood accused of violating the law. North Carolina deserves credit for recognizing the impact that non-conviction charges can have on opportunity and providing a process to have these charges expunged. However, by requiring that individuals affirmatively petition for non-conviction expunctions, the state's current process effectively denies relief to many people who would otherwise be immediately eligible to have these charges removed from their records. The creation of an automatic, court-initiated expunction right under section 146 would follow logically from the recent series of positive changes to North Carolina's expunction laws, and it would be a profound step toward fairness and opportunity for all North Carolinians.

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