

AMERICAN BAR ASSOCIATION

CRIMINAL JUSTICE SECTION

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

- 1 RESOLVED, That the American Bar Association urges federal, state, local, territorial and
- 2 tribal legislatures to define criminal arrests, charges, and dispositions that are eligible for
- 3 expungement or removal from public view by sealing, and set out procedures for
- 4 individuals to apply for the same.

REPORT

Summary

This resolution urges federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

I. Introduction¹

Background

The general trend within criminal justice reform has been toward facilitating productive reentry into the social fabric for ex-offenders. The numerous collateral consequences associated with a criminal conviction lead to recidivism by perpetuating a cycle of unemployment and disenfranchisement through discrimination in hiring, promotion, and professional licensure.² It is especially striking when 1 in 3 American adults are estimated to have a criminal record.³

As of January 2018, 41 states have some form of record sealing or expungement law in place.⁴ Although these laws vary from state to state,⁵ generally, the expungement of a criminal record involves a legal process in which the record or existence of an arrest, charge, or in some cases, the conviction, is removed from public view.⁶ “Public view” means only police records and court records, not news or social media, or in some cases private background check software.⁷ But while most states now recognize the need for “second chance” legislation for ex-offenders, there is no federal law that permits those convicted of non-violent federal crimes to seek the expungement or sealing of their

¹ Portions of this Report are taken from ABA House of Delegates Resolution 112F, which urged governments to enact laws allowing individuals to petition to expunge all criminal justice records pertaining to charges or arrests that did not result in a conviction. The arguments, research, and positions expressed within Resolution 112F are nearly identical to those made in support of expunging non-violent federal convictions and have been incorporated into this Report.
https://www.americanbar.org/news/reporter_resources/annual-meeting-2017/house-of-delegates-resolutions/112f.html

² Selbin, McCrary & Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes. *Journal of Criminal Law and Criminology*, Vol. 108, No. 1, 2017.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867

³ *Id.*

⁴ See <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf>

⁵ Anna Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 *Temp. L. Rev.* 403 (2015)

⁶ Kele Onyejekwe, Erasing the Past: How to Expunge a Client's Criminal Record, TYL, <http://www.americanbar.org/publications/tyl/topics/client-development/erasing-past-how-expunge-clients-criminal-record.html>

⁷ What is Expungement? Insights on Law and Society, American Bar Association, http://www.americanbar.org/publications/insights_on_law_and_society/16/winter2016/expungement.html

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criminal records and some states still do not provide such a remedy (Alabama, Alaska, Arizona, Florida, Idaho, Iowa, Nebraska, New Mexico and Virginia⁸).

President Trump called for criminal justice reform in the State of the Union address to Congress on January 30, 2018. This sentiment creates an opportunity for the ABA to gather support from across the political divide for a federal law that would expunge or seal non-violent federal convictions, and for the remaining states to adopt similar laws.

The ABA House of Delegates previously adopted two resolutions regarding expungement (they were approved by the Criminal Justice Section in Spring, 2017, and adopted by the House of Delegates in August 2017)⁹:

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing for the expungement of convictions, including judgments of guilt of violations, for carrying out otherwise non-criminal life sustaining practices or acts in public spaces associated with homelessness.

RESOLVED, That the American Bar Association urges Federal, State, Local, Territorial and Tribal Governments to adopt laws allowing individuals to petition to expunge criminal justice records of charges or arrests that did not result in a conviction.

The currently proposed resolution seeks to broaden ABA policy on expungement law by calling for federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

II. The Problem

One third of Americans have a criminal record resulting from a felony or misdemeanor conviction on a criminal offense.¹⁰ These marks on their criminal record can lead to negative impacts on their employment prospects, housing, and professional licensure.¹¹ Despite the nationwide popularity of “ban the box” legislation, which prohibits employers from asking whether applicants have a criminal record early into the recruitment process,

⁸ Restoration of Rights Project, 50 State Comparison, Updated August 2018, available at <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/>

⁹ ABA Criminal Justice Section Policy Bulletin Summer 2017, available at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/policy_bulletin_summer2017.pdf

¹⁰ Selbin, McCrary & Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes. *Journal of Criminal Law and Criminology*, Vol. 108, No. 1, 2017.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867

¹¹ *Id.*

recent research suggests that in the absence of the ability to screen based on criminal record, such policies may actually increase discrimination against minority applicants.¹²

The definition of “expungement” varies from state to state.¹³ For the purposes of this resolution, “expungement” refers to the complete removal from public view of an individual’s criminal records including arrests, charges, and convictions. Expungement is different from record sealing. Many states have policies that allow for the “sealing” of criminal records. The key difference is that after sealing, these criminal records may still be available to law enforcement and some professional licensure agencies, and may be “unsealed” with a court order.¹⁴ While the sealing of a non-violent conviction would benefit many, the expungement of these convictions more appropriately allows individuals to truthfully say “no” if asked whether they have ever been arrested, charged, or convicted of a crime in jurisdictions that have not embraced “ban the box” style legislation.¹⁵ Regardless of the name for the remedy, preventing public disclosure while preserving appropriate access to law enforcement for the purposes of subsequent arrests serves the overall interests of society.

Expungement or record sealing also recognizes those individuals who have lived a life free from further contact with the criminal justice system, be it state or federal. Studies suggest that this “point of redemption” is between 3 and 8 years, depending on the age at the time the crime was committed.¹⁶ Expunging or sealing non-violent federal convictions is an acknowledgement that people who have paid their debt to society and reformed their ways do not need to be permanently branded with the scarlet letter of a criminal conviction that they can never hope to shield from public view.

III. Positive Outcomes Related to Expungement

More permissive expungement laws allow people to obtain jobs and housing that can lift them out of poverty.¹⁷ Securing meaningful employment has been shown to be one of the most predictive factors of criminal recidivism.¹⁸ For individuals with criminal convictions who have previously served time in prison, the employment prospects are grim.¹⁹

¹² *Id.*

¹³ Anna Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 Temp. L. Rev. 403 (2015)

¹⁴ See N.Y. Crim. Proc. sec. 160.59(7)

¹⁵ Kessler, Excavating Expungement Law: A Comprehensive Approach, 87 Temp. L. Rev. 403 (2015)

¹⁶ Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment <https://www.ncjrs.gov/pdffiles1/nij/238488.pdf>

¹⁷ Jon Geffen & Stefanie Letze, Chained to the Past: An Overview of Criminal Expungement Law in Minnesota-State v. Schultz, 31 Wm. Mitchell L. Rev. 1331 (2005)

¹⁸ Lahny R. Silva, Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders, 79 U. Cin. L. Rev. 155 (2010).

¹⁹ Amy L. Solomon, In Search of a Job: Criminal Records as Barriers to Employment, National Institute of Justice, <https://www.nij.gov/journals/270/pages/criminal-records.aspx>

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Studies conducted on the topic of record clearing suggest that record clearing increases both employment rates and earnings.²⁰ In one study, participants who had their record cleared experienced a 5 to 10 percent increase in employment rate after having their records cleared.²¹ Additionally, these participants also experienced an increase in earnings after having their records cleared.²² In the three years after record clearing, participant earnings increased by roughly \$6,000, which equates to roughly one third of the sample's average earnings of \$18,000 annually.²³ While more data is needed on the topic of record expungement, these results point towards a net positive impact on employment prospects for individuals who have successfully cleared their criminal records, and a net benefit to society as a whole.

In addition to poor employment prospects, individuals with a criminal record experience discrimination in housing.²⁴ This type of discrimination is not limited to simply denying individuals housing who have a criminal record.²⁵ Poor credit histories and a lack of rental history also contribute negatively to housing prospects.²⁶ Expungement of criminal records can lead to better housing outcomes, and thus, more stability and likelihood for economic success.²⁷ Family unification is also a major concern. In many cases, public housing regulations prohibit those with criminal records to live in public housing.²⁸ This causes the breakup of family units, and unfairly penalizes primary caregivers by removing their partners from the household and prevents them from meaningfully sharing household responsibilities.²⁹

The societal and economic benefits of a federal expungement or sealing law are numerous, and on a human level, securing meaningful employment leads to lower

²⁰ Selbin, McCrary & Epstein, Unmarked? Criminal Record Clearing and Employment Outcomes. Journal of Criminal Law and Criminology, Vol. 108, No. 1, 2017.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2486867

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Rebecca Oyama, Do not (Re)Enter): The Rise of Criminal Background Tenant Screening as a Violation of the Fair Housing Act, Michigan Journal of Race and Law, (Fall 2009).

²⁵ Economic Perspectives on Incarceration and the Criminal Justice System, The White House, (April 2016),

https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf

²⁶ *Id.*

²⁷ Kathryn E. McCollister, Michael T. French, and Hai Fang, The Cost of Crime to Society: New Crime-Specific Estimates for Policy and Program Evaluation, (January 13, 2010),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2835847/>

²⁸ *Id.*

²⁹ *Id.*

incidences of drug and alcohol abuse³⁰, lower levels of depression³¹, and more healthy family relationships.³²

IV. Legislative Proposals

There were currently several bills in the 115th Congress, each with the goal of making federal criminal record sealing a reality. The REDEEM Act (Record Expungement Designed to Enhance Employment), introduced in the Senate by Sen. Rand Paul (R, KY) and Sen. Cory Booker (D, NJ) and in the House by Rep. Elijah Cummings (D, MD), is the most expansive.³³ This bill would permit those convicted of nonviolent federal crimes to petition the court to have their records sealed. Under this bill, someone sentenced to imprisonment, probation, or supervised release is eligible to have his or her record sealed 1 year after completion of their sentence. Otherwise, eligibility begins on the date when the case is disposed of.

Also pending in the Senate is the Clean Start Act. This bill, sponsored by Sen. Joe Manchin (D, WV) with no co-sponsors and no corresponding bill in the House, would allow the sealing of nonviolent federal convictions committed as a result of a substance disorder.³⁴ This bill requires completion of a treatment program as a condition of eligibility and has a 3-year waiting period.

Pending in the House is the Renew Act, introduced by Rep. Hakeem Jeffries (D, NY) and co-sponsored by both Republican and Democratic representatives, which would allow for record expungement to first-time offenders convicted of nonviolent drug possession.³⁵ To qualify, those convicted must be under 25 years old and successfully complete a sentence of probation. There is no corresponding bill pending in the Senate.

V. Conclusion

The stigma associated with a criminal conviction in jurisdictions without a sealing or expungement remedy currently follows a person throughout their entire life. Affording these individuals a way to expunge or seal their non-violent convictions recognizes both the accomplishments of the individual in building a life free from further contact with the

³⁰ Alejandro Badel , Brian Greaney, Exploring the Link between Drug Use and Job Status in the U.S., The Regional Economist, (July 2013), See also Ioana Popovici and Michael T. French, Does Unemployment Lead to Greater Alcohol Consumption? Industrial Relations: A Journal of Economy & Society (18 March 2013), <https://www.stlouisfed.org/Publications/Regional-Economist/July-2013/Exploring-the-Link-between-Drug-Use-and-Job-Status-in-the-US>;

³¹ Susan Adams, How Unemployment And Depression Fit Together, Forbes, (June 9, 2014 12:15 PM) <http://www.forbes.com/sites/susanadams/2014/06/09/how-unemployment-and-depression-fit-together/#52d0f97a3fa1>

³² Andrea Kay, At Work: Job, self-esteem tied tightly together, USA Today (Aug. 31, 2013), <http://www.usatoday.com/story/money/columnist/kay/2013/08/31/at-work-self-esteem-depression/2736083/>

³³ <https://www.congress.gov/bill/115th-congress/senate-bill/8271>

³⁴ <https://www.congress.gov/bill/115th-congress/senate-bill/511>

³⁵ <https://www.congress.gov/bill/115th-congress/house-bill/2617>

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criminal justice system and the need to reduce the collateral consequences of a conviction. The ABA can help move this important initiative forward by urging federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

Respectfully submitted,

Lucian Dervan,
Chair, Criminal Justice Section
January 2019

GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Lucien Dervan, Chair

1. Summary of Resolution(s).

The proposed resolution seeks to broaden ABA policy on expungement law by urging federal, state, local, territorial and tribal legislatures to define criminal arrests, charges and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

2. Approval by Submitting Entity.

This resolution was passed by the Criminal Justice Council at the Fall Meeting in Washington, DC, on November 3, 2018.

3. Has this or a similar resolution been submitted to the House or Board previously? No

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption?

The ABA House of Delegates previously adopted two resolutions regarding expungement (they were approved by the Criminal Justice Section in Spring, 2017, and adopted by the House of Delegates in August 2017):

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5. If this is a late report, what urgency exists which requires action at this meeting of the House?

Not applicable.

6. Status of Legislation. (If applicable)

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7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

This resolution will be used to advocate for federal, state, local, territorial and tribal legislation.

8. Cost to the Association. (Both direct and indirect costs)

No cost to the Association.

9. Disclosure of Interest. (If applicable)

Not applicable

10. Referrals. Concurrent with the filing of this resolution and Report with the House of Delegates, the Criminal Justice Section is sending the resolution and report to the following entities and/or interested groups:

Business Law

Center for Human Rights

Civil Rights and Social Justice

Commission on Disability Rights

Commission on Homelessness and Poverty

Commission on Immigration

Commission on Youth at Risk

Federal Trial Judges

Government and Public Sector Lawyers

Health Law

Hispanic Legal Rights and Responsibilities

International Law

Law Practice Division

Legal Aid & Indigent Defense

Litigation

Racial & Ethnic Diversity

Racial & Ethnic Justice

Science & Technology

State Trial Judges

Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges federal, state, local, territorial and tribal legislatures to define criminal arrests, charges, and dispositions eligible for expungement or removal from public view via sealing, and set out procedures for individuals to apply for the same.

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the effort to reduce the consequences of federal, state, local, territorial and tribal criminal convictions on a person's ability to work via expungement or sealing of these records.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Record expungement and/or sealing allows individuals to not be burdened by the judgment and discrimination that occurs when they must disclose criminal arrests, records, and convictions to potential employers.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified. None