

**EMERGENCE FROM CIVIL DEATH:
THE EVOLUTION OF EXPUNGEMENT IN WEST VIRGINIA**

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I. INTRODUCTION

Ninety-two million Americans have a criminal record—nearly one in three adults.¹ This criminal record can include an arrest that did not lead to a conviction, a conviction for which the person did not serve time in prison, or a conviction for a non-violent crime.² All can have a similar impact on an individual's job prospects and on local economies. Incarcerating adult Americans costs a combined \$68 billion annually at the local, state, and federal levels.³ The cost of lost wages and lost financial contributions to society by ex-offenders is even higher.

This financially immobilized population of former offenders may be permanently unemployable. In response, a majority of states have created statutes to permit select offenders a new chance.⁴ These states grant that after a waiting period and good behavior, ex-offenders may apply to have their convictions sealed or “set aside.”⁵ These expungements remove the conviction from public records, lifting the stigma and the resulting barriers to employment.⁶

This Article examines expungement in general, and the expungement statute in West Virginia in particular. Section I considers the historical basis of the West Virginia expungement statute, while Section II explains in detail the current West Virginia statute. Section III describes the collateral consequences of a criminal conviction in West Virginia, leading to incentives for modifying our expungement statute in Section IV. These benefits include supporting local economies and reducing recidivism. Section V concludes by comparing and contrasting West Virginia's statute to other states and then by providing suggestions for modifying the West Virginia expungement statute. Support for reform of the statute comes from data on the impact of expungements on communities, on government fiscal responsibilities and capabilities, and on the ultimate impact on the functioning of our state criminal justice system. In line with the Justice

¹ Meeting Report, U.S. Equal Emp't Opportunity Comm'n, Written Testimony for Amy Solomon Senior Advisor to the Assistant Attorney General Office of Justice Programs, U.S. Department of Justice (July 26, 2011), <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm> (citing DOJ Bureau of Justice Statistics data that over 92 million people have a criminal history on file in state criminal history repositories and comparing that to Census data on the number of adults in the United States); *see also* Robert Brame et al., *Cumulative Prevalence of Arrest from Ages 8 to 23 in a National Sample*, 129 PEDIATRICS 21 (2012), available at <http://pediatrics.aappublications.org/content/early/2011/12/14/peds.2010-3710.full.pdf+html>.

² Written Testimony for Amy Solomon, *supra* note 4.

³ Rebecca Ruiz, *Eyes on the Prize*, THE AM. PROSPECT, Dec. 6, 2010, available at <http://prospect.org/article/eyes-prize>.

⁴ *See infra* Part V.

⁵ LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 15 (2004), available at http://www.lac.org/roadblocks-to-reentry/upload/lacreport/LAC_PrintReport.pdf.

⁶ It should be noted that sealed convictions remain available to law enforcement and prosecutors, should the individual be arrested for another offense. These sealed convictions may be used for sentencing purposes for the new offense.

Reinvestment Act, expungement reform is a next step along our path of broader prison changes in West Virginia.

II. HISTORY AND POLICY OF COLLATERAL CONSEQUENCES

Expungement addresses the vast “web of political, social, and economic obstacles faced by ex-offenders.”⁷ The American Bar Association labels these “legal and regulatory sanctions and restrictions” as the “collateral consequences of a criminal conviction.”⁸ Even the Supreme Court of the United States recognizes that the breadth and the effect of collateral consequences are “often unclear.”⁹

The thicket of collateral consequences facing ex-offenders today is rooted in the medieval doctrine of *civiliter mortuus*, or “civil death.”¹⁰ As Blackstone recognized, “[t]he idea of a felony [wa]s . . . so generally connected with that of capital punishment”¹¹ that a felon, once convicted, “was treated as if already dead.”¹² A convicted felon was thus barred from, for example, entering into contracts,¹³ inheriting property,¹⁴ or engaging in civil litigation.¹⁵ Even a marriage was “automatically dissolved” upon conviction.¹⁶ Because the felon lived in the inescapable shadow of the executioner, allowing him to contract with his neighbors or inherit property was deemed futile.¹⁷ Until the hangman finalized the sentence, civil death served as a “transitional status” between citizenship and the noose.

In the early days of Colonial America, the new continent was a land of “second chances and new beginnings.”¹⁸ The reform of Britain’s harsh felony laws emerged as a

⁷ Lahny R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. CIN. L. REV. 155, 159 (2010).

⁸ *Project Description*, ABA NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/description/> (last visited Apr. 4, 2015).

⁹ See *Padilla v. Kentucky*, 559 U.S. 356, 369 n.10 (2010).

¹⁰ See Harry David Sanders, *Civil Death: A New Look at an Ancient Doctrine*, 11 WM. & MARY L. REV. 988, 988 (1970).

¹¹ 4 WILLIAM M. BLACKSTONE, COMMENTARIES *98.

¹² Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 154 (1999).

¹³ *Id.*

¹⁴ *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 969 (1937).

¹⁵ *Id.* at 972.

¹⁶ *Id.* at 974–75.

¹⁷ Demleitner, *supra* note 15, at 154.

¹⁸ MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 1:3 (2014) (noting that “[t]he earliest founders of the state of Georgia, for example, had been released from English prisons”).

priority in the “Americanization of the common law.”¹⁹ Nonetheless, civil death survived. The doctrine “played a significant role in the Colonies and survived in many state systems well into the 20th century as an integral part of criminal punishment.”²⁰

Beginning in the 20th century, American courts—including the West Virginia Supreme Court of Appeals—grew increasingly skeptical of civil death as a common law doctrine.²¹ In *Moss v. Hyer*,²² the Supreme Court of Appeals held that the doctrine was implicitly abolished by the ratification of West Virginia’s Constitution, which expressly abolished the analogous doctrine of “corruption of blood” and prohibited the “forfeiture of estate on conviction of a felony.”²³ With *Moss*, the court announced a new rule: “the completion of the term of imprisonment imposed upon a felon restores him to his civil rights, save only as otherwise specifically provided by law.”²⁴

Moss and similar decisions abolished civil death,²⁵ but legislators soon filled the void. Statutory “civil disabilities” proliferated, affecting a broad range of civil, judicial, domestic, and property rights.²⁶ Legislators justified these civil disabilities on preventative grounds.²⁷ However, many of the restrictions were simply reasoned as “just deserts”²⁸ or, in some instances, outright racial animus.²⁹

Moreover, as administrative agencies exercised increased rulemaking authority, collateral consequences were soon scattered throughout different bodies of law.³⁰ Because these consequences existed outside of the traditional sentencing process, they were often not incorporated into the debates over sentencing policies.³¹ Accordingly,

¹⁹ Bradley Chapin, *Felony Law Reform in the Early Republic*, 113 PA. MAG. HIST. & BIO. 163, 164 (1989), available at <https://journals.psu.edu/pmhb/article/download/44421/44142>.

²⁰ LOVE, ROBERTS & KLINGELE, *supra* note 21, § 1:3; see also, e.g., *Holmes v. King*, 113 So. 274 (Ala. 1927) (applying the doctrine of civil death in mortgage redemption proceeding).

²¹ See, e.g., *Moss v. Hyer*, 172 S.E. 795, 796 (W. Va. 1934) (quoting *Avery v. Everett*, 18 N.E. 148, 155 (N.Y. 1888), in remarking that “anyone who takes the pains to explore the ancient and in many respects obsolete learning connected with the doctrine of civil death . . . will find that he has to grope his way along paths marked by uncertain flickering, and sometimes misleading lights; and he cannot feel sure that at some point in his course he has not missed the true road”).

²² 172 S.E. 795 (W. Va. 1934).

²³ *Id.* at 797.

²⁴ *Id.* at 796.

²⁵ See, e.g., *Avery*, 18 N.E. at 155; *Kenyon v. Saunders*, 30 A. 470, 471 (R.I. 1894); *Town of Baltimore v. Town of Chester*, 53 Vt. 315 (1881); *Chesapeake Utils. Corp. v. Hopkins*, 340 A.2d 154 (Del. 1975); *Frazier v. Fulcher*, 17 Ohio 260 (1848) (en banc).

²⁶ LOVE, ROBERTS & KLINGELE, *supra* note 21, § 1:3.

²⁷ Demleitner, *supra* note 15, at 160.

²⁸ *Id.*

²⁹ LOVE, ROBERTS & KLINGELE, *supra* note 21, § 1:3.

³⁰ Demleitner, *supra* note 15, at 154.

³¹ See JEREMY TRAVIS, *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15 (Marc Mauer & Meda Chesney-Lind eds., 2002).

consequences began to lack any coherent policy framework, leading to disproportionate and irrational results.³² Perhaps more insidiously, the diffusion of consequences across a myriad of sources made it impossible for judges, prosecutors, and defense attorneys—let alone defendants themselves—to fully appreciate the consequences of a guilty plea.³³

Even though the 1960s and '70s witnessed a brief ebb in the escalation of collateral consequences, “public attitudes toward ‘convicted felons’ hardened in the 1980s,” and legislatures and regulatory agencies alike imposed “stiff new categorical disqualifications and restrictions.”³⁴ The imposition of collateral consequences became an integral weapon in the “War on Drugs.”³⁵ Civil disabilities began “affect[ing] more people” than ever before and became “more numerous[,] . . . more severe[,] . . . and . . . harder to avoid or mitigate.”³⁶ Meanwhile, use of the executive pardon, once a safety valve on the escalation of collateral consequences,³⁷ drastically declined for a variety of social and political reasons.³⁸

A. Availability of Expungement Before the 2008 Statute

Introduced in 2008, West Virginia Code § 61-11-26 governs expungement.³⁹ Before § 61-11-26, the availability and the scope of expungement were uncertain. Certain isolated code provisions allowed for the expungement of records related to specific offenses.⁴⁰ Other statutes authorized expungement upon exoneration⁴¹ or upon a full and unconditional executive pardon.⁴²

Notwithstanding the Code’s piecemeal approach, former West Virginia Supreme Court Justice Franklin Cleckley, relying primarily on federal case law, concluded in his Handbook on West Virginia Criminal Procedure that West Virginia courts have

³² Demleitner, *supra* note 15, at 160.

³³ See Hanh H. Le, *The “Padilla Advisory” and Its Implications Beyond the Immigration Context*, 20 WM. & MARY BILL RTS. J. 589, 594 (2011). See generally *Padilla v. Kentucky*, 559 U.S. 356 (2010).

³⁴ LOVE, ROBERTS & KLINGELE, *supra* note 21, §§ 1:4–5.

³⁵ See generally Marne L. Lenox, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280 (2011).

³⁶ ABA NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *supra* note 11.

³⁷ See Demleitner, *supra* note 15, at 155.

³⁸ See Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169 (2010) (attributing decline of presidential pardons to the ascendancy of retributivism in punishment theory, the attendant political pressure on officials to be “tough on crime,” and the relegation of clemency decisions to prosecutors in the Justice Department).

³⁹ W. VA. CODE § 61-11-26 (2014).

⁴⁰ See W. VA. CODE § 60A-4-407 (2014) (allowing for expungement of records related to a first offense charge of possession of a controlled substance); see also W. VA. CODE § 61-2-17 (allowing for expungement of prostitution charge upon determination that the offender was a victim of human trafficking).

⁴¹ See W. VA. CODE § 61-11-25 (2014).

⁴² See W. VA. CODE § 5-1-16a (2014).

jurisdiction in equity to “order the expungement of a record in an appropriate case.”⁴³ Although Justice Cleckley acknowledged that expungement should be “confined to ‘exceptional circumstances,’”⁴⁴ such as “flagrant violations of the Constitution”⁴⁵ or a prosecution intended only to harass the accused,⁴⁶ he also noted that a court may consider the “economic hardship” that accompanies a criminal record in considering whether expungement is appropriate.⁴⁷

The Supreme Court of Appeals similarly acknowledged a limited capacity of judges to grant expungements in *State ex rel. Barrick v. Stone*.⁴⁸ In *Barrick*, while the Court ultimately reversed the expungement of a shoplifting conviction, its opinion referenced the circuit court’s inherent capacity to grant an expungement in “extraordinary circumstances and to protect constitutional rights or some other compelling public policy narrative.”⁴⁹

Despite these indicators from the Supreme Court of Appeals, during this time period West Virginia circuit courts only hesitantly considered petitions for expungement. When asked about the availability of expungement before the enactment of § 61-11-26, one senior status circuit judge stated that he “did not believe [he] had the authority” to expunge records.⁵⁰ He added that most of his colleagues, including his predecessor on the bench,⁵¹ believed the same.⁵²

III. RECORD CLEARANCE IN WEST VIRGINIA

West Virginia’s current expungement statute, § 61-11-26, has three general requirements: (1) only misdemeanor offenses may be considered, and the misdemeanor offense cannot be one of those listed in § 61-11-26(i); (2) the petitioner has the burden of showing that the five elements of § 61-11-26(f) are present; and (3) the petitioner must

⁴³ 1 FRANKLIN D. CLECKLEY, HANDBOOK ON WEST VIRGINIA CRIMINAL PROCEDURE I-186 (2d ed. 1993) (citing *United States v. Van Wagner*, 746 F. Supp. 619 (E.D. Va. 1990)).

⁴⁴ *Id.* (quoting *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977)).

⁴⁵ *Id.* (quoting *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977)).

⁴⁶ *Id.* (citing *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969)).

⁴⁷ *Id.* (citing *Van Wagner*, 746 F. Supp. at 619).

⁴⁸ 499 S.E.2d 298 (W. Va. 1997).

⁴⁹ *Id.* at 300. The Court declined to reach whether courts have the inherent authority to grant expungements in the absent of such extraordinary circumstances. *Id.* at 299–300.

⁵⁰ Telephone Interview with Judge Fred L. Fox II, Senior Status Circuit Court Judge, Sixteenth Judicial Circuit of West Virginia (Aug. 7, 2014). Judge Fox holds the distinction of being the state’s longest serving circuit judge (1970–2011). *Id.*

⁵¹ Judge Fox’s predecessor, Judge J. Harper Meredith, was recognized as the longest-serving circuit judge (1945–69) until surpassed by Judge Fox himself in 1994.

⁵² *Id.*

have committed the misdemeanor offense between the ages of 18 and 26.⁵³ Each section will be explained in turn below.

A. Only a Misdemeanor Not Enumerated in § 61-11-26(i) May Be Expunged

First, applicants may be eligible for expungement of a conviction in West Virginia only if the offense is a misdemeanor and the offense is not specifically excluded by § 61-11-26(i). The following crimes are excluded from consideration: crimes involving serious physical injury; exhibition of a deadly weapon; crimes in which the victim was a spouse or mother of the perpetrator's child; a DUI; a crime related to controlled substances; sexual offenses; domestic violence; driving with a suspended license; and animal cruelty.⁵⁴

B. Misdemeanor Applicant Must Meet the Five Elements of § 61-11-26(f)

Second, the applicant has the burden of proving by clear and convincing evidence to the court that (1) the conviction for which expungement is sought is petitioner's only conviction and is not excluded by § 61-11-26(i); (2) the required time period of one year has passed since the conclusion of the sentence or probation; (3) the petitioner has no current criminal charges pending; (4) the expungement is "consistent with the public welfare"; and (5) the petitioner has evidenced during the waiting period that he has been rehabilitated and is law-abiding.⁵⁵

C. Petitioner Must Have Been Between the Ages of 18 and 26 when the Misdemeanor Offense Was Committed

Finally, an applicant in West Virginia must have committed the offense between the ages of 18 and 26.⁵⁶ This requirement is an anomaly. Only Hawaii has a similar age

⁵³ W. VA. CODE § 61-11-26 (2014).

⁵⁴ *See id.* § 61-11-26(i) ("No person shall be eligible for expungement of a conviction and the records associated therewith pursuant to the provisions of subsection (a) of this section for any violation involving the infliction of serious physical injury; involving the provisions of article eight-b of this chapter where the petitioner was eighteen years old, or older, at the time the violation occurred and the victim was twelve years of age, or younger, at the time the violation occurred; involving the use or exhibition of a deadly weapon or dangerous instrument; of the provisions of subsection (b) or (c), section nine, article two of this chapter where the victim was a spouse, a person with whom the person seeking expungement had a child in common or with whom the person seeking expungement ever cohabitated prior to the offense; any violation of the provisions of section twenty-eight of said article; a conviction for driving under the influence of alcohol, controlled substances or a conviction for a violation of section three, article four, chapter seventeen-b of this code or section nineteen, article eight of this chapter.").

⁵⁵ *See id.* § 61-11-26(f).

⁵⁶ *Id.* § 61-11-26(a).

restriction—20 or under⁵⁷—while Pennsylvania allows for applicants over 70 to have their records sealed, provided they have not been arrested or prosecuted in the past 10 years.⁵⁸ In Rhode Island, a designated conviction *shall be expunged* if the applicant is between 18 and 21 years old and the offense is alcohol-related.⁵⁹ The West Virginia statute is unique in denying an individual 27 and over of the opportunity to have his or her record expunged.

Indeed, advanced age may be a reason *to grant* an expungement. Given the other statutory qualifications for expungement, having never been arrested, charged, or convicted appears more meaningful and indicative with respect to a man of 56 than a man of 26. Research on the “point of redemption”—the tipping point at which an ex-offender becomes increasingly less likely to offend after being released from prison—differs for older offenders.⁶⁰ For individuals who commit their first crime while a young adult, the “point of redemption” is about eight years; that same tipping point is only three years for an older offender.⁶¹ Ultimately, these older offenders, along with people who have committed minor offenses, become “indistinguishable” from any other community member in their likelihood of committing a crime.⁶²

IV. CURRENT STATE OF COLLATERAL CONSEQUENCES IN WEST VIRGINIA

According to the American Bar Association’s National Inventory of Collateral Consequences, there are now more than 800 collateral consequences on the books in West Virginia.⁶³ That number more than doubles when federal consequences are included.⁶⁴ Every ex-felon—whether guilty of premeditated murder⁶⁵ or possessing a video gambling machine⁶⁶—is burdened with at least 700 links in “the chain [they] forged in life.”⁶⁷ Even a *nolo contendere* plea to a misdemeanor will saddle an individual

⁵⁷ HAW. REV. STAT. § 712-1256 (2014).

⁵⁸ 18 PA. CONS. STAT. § 9122(b) (2014); *see also* PA. R. CRIM. P. 790.

⁵⁹ RI GEN. LAWS § 3-8-12 (2014); *see also id.* § 12-1.3-2.

⁶⁰ *See* Alfred Blumstein & Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, 263 NAT’L INST. JUST. J. 10, 10–17 (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See* ABA NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *supra* note 11, at “West Virginia,” available at <http://www.abacollateralconsequences.org/search/?jurisdiction=49>.

⁶⁴ When federal consequences are included, the inventory registers 1,986 consequences. *Id.*

⁶⁵ *See* W. VA. CODE § 61-2-2 (2014).

⁶⁶ *See id.* § 29-22B-1705 (2014).

⁶⁷ *See* De Pina v. State, No. PM/04-1402, 2004 WL 1769808, at *8 (R.I. July 28, 2004) (comparing offender to “Marley’s ghost” from Charles Dickens’s *A Christmas Carol* and describing his collateral consequences as “the chain he forged in life”).

with more than 300 collateral consequences.⁶⁸ These consequences permeate nearly every aspect of an offender's life: education,⁶⁹ recreation,⁷⁰ housing,⁷¹ travel,⁷² and domestic life.⁷³

Perhaps most troubling is the economic life sentence of a criminal conviction. Employment is integral to success following incarceration, particularly where access to public aid is restricted.⁷⁴ Empirical studies suggest that “stable employment” is one of two “major turning points in the life course” of ex-offenders who do not recidivate.⁷⁵ The corollary is that exclusion from employment limits access to noncriminal sources of income and makes “criminal alternatives more attractive.”⁷⁶

Ex-offenders are automatically ineligible for even lower-level positions in state and federal government,⁷⁷ and they may be denied a license to practice many private sector professions—ranging from doctor,⁷⁸ accountant,⁷⁹ and lawyer,⁸⁰ to scrap metal dealer,⁸¹ mixed martial arts promoter,⁸² and amusement ride operator.⁸³ Ex-offenders furthermore face entrenched structural barriers. Once convicted, they are “repeatedly rejected, denied, and virtually excluded from the qualified applicant pool based solely on

⁶⁸ ABA NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, *supra* note 11, at “West Virginia.”

⁶⁹ *See, e.g.*, 20 U.S.C. § 1091 (2013) (denying federal student loans to any individual convicted of a substance offense while receiving aid).

⁷⁰ *See, e.g.*, W. VA. CODE ST. R. § 58-23-3 (2014) (revoking hunting and fishing licenses for individuals who obtained them under false pretenses or are found to have made false statements during the application process).

⁷¹ *See, e.g.*, 42 U.S.C. § 13661 (2013) (denying public housing assistance to any individual convicted of a controlled substance violation).

⁷² *See, e.g.*, W. VA. CODE § 17A-3-3 (2014) (requiring revocation of driver's license and vehicle registration upon certain convictions for providing a false statement).

⁷³ *See* W. VA. CODE ST. R. § 78-2-13 (2014) (automatically disqualifying any individual convicted of a misdemeanor other than a minor traffic violation from serving as a foster parent).

⁷⁴ Demleitner, *supra* note 15, at 155–56.

⁷⁵ John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 20 (2001).

⁷⁶ Ted Chiricos, Kelle Barrick, William Bales & Stephanie Bontrager, *The Labeling of Convicted Felons and Its Consequences for Recidivism*, 45 CRIMINOLOGY 547, 548 (2007).

⁷⁷ *See, e.g.*, 5 U.S.C. § 3113 (2013) (any federal employment); W. VA. CODE § 17-19-4 (2014) (any position in Division of Highways); *id.* § 50-1-9 (magistrate's assistant); W. VA. CODE ST. R. § 143-1-21 (2014) (state officers).

⁷⁸ *See* W. VA. CODE § 30-3-14 (2014).

⁷⁹ *Id.* § 30-9-7.

⁸⁰ *Id.* § 30-2-6.

⁸¹ *Id.* § 11-12-5a.

⁸² W. VA. CODE ST. R. § 177-2-4 (2014).

⁸³ W. VA. CODE § 21A-10-5 (2014).

their previous conviction.”⁸⁴ Current economic conditions—high unemployment generally and the specific decline of low-skill jobs—worsen the situation.⁸⁵ The *Moss* Court’s restoration of the right to contract rings hollow when opportunities for employment are so limited.

Severe psychological consequences also accompany carrying a criminal record. A conviction results in nothing short of a “transformation of identity.”⁸⁶ The shame of a conviction is compounded by difficulties in securing employment. This transformation has prudential considerations, as well: empirical evidence suggests that the very act of labeling an offender as a felon “significantly and substantially increases the likelihood of recidivism,” even when data are controlled for other legal or structural impediments to reintegration.⁸⁷

V. POSSIBILITIES AND INCENTIVES FOR MODIFYING EXPUNGEMENT

A. *Local Economies: Costs and Benefits of Expungement*

Although few studies have tracked the impact of expungement directly, the barriers facing ex-felons are well documented. These are barriers that would be lifted if the conviction were expunged and the criminal record sealed. First, the exclusion from public housing based on a conviction leads to a high rate of ex-offenders being homeless.⁸⁸ Second, as noted above, a criminal record raises serious employment barriers, higher than those facing any other disadvantaged group; employers take affirmative steps to avoid hiring former offenders.⁸⁹

A criminal record puts an individual at a greater risk of unemployment than the general population.⁹⁰ A study from New York showed that serving time in prison “decreased hourly wages for ex-offenders by 11%, decreased annual employment by nine

⁸⁴ Silva, *supra* note 10, at 165.

⁸⁵ See Demleitner, *supra* note 15, at 156.

⁸⁶ Chiricos, *supra* note 79, at 547–48.

⁸⁷ *Id.*

⁸⁸ In 1997, the California Department of Corrections estimated that 10% of its parolees were homeless. JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 36 (2001), available at http://www.urban.org/pdfs/from_prison_to_home.pdf.

⁸⁹ See HARRY HOLZER ET AL., URBAN INST., EMPLOYMENT BARRIERS FACING EX-OFFENDERS 9–11 (2003), available at http://www.urban.org/UploadedPDF/410855_holzer.pdf. See generally Devah Pager, *The Mark of a Criminal Record*, 108 AM. JUDICATURE SOC’Y 937, (2003), available at http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf.

⁹⁰ See HOLZER ET AL., *supra* note 92, at 6–7; DEBBIE MUKAMAL, U.S. DEP’T OF LABOR, FROM HARD TIME TO FULL TIME: STRATEGIES TO HELP MOVE EX-OFFENDERS FROM WELFARE TO WORK § III.B. (2001), available at <http://www.hirenetwork.org/sites/default/files/From%20Hard%20Time%20to%20Full%20Time.pdf> (noting employers are directed by “bias and stigma”).

weeks, and decreased annual earnings by 40% as compared to the general population.”⁹¹ A 2002 study showed that between two like-candidates applying for a job, a criminal record reduced job offers by half for Caucasian applicants, and by two-thirds for African-American applicants.⁹² In the intervening years, criminal records have become more accessible to employers through Internet-based searches.⁹³ Background checks are now standard protocol,⁹⁴ with a blanket no-hire policy for individuals with any sort of criminal record.⁹⁵

1. San Jose State University Record Clearing Project

One completed study weighs the localized impact of expungement against carrying a conviction on one’s record. San Jose State University created the Record Clearing Project (“RCP”) to track the costs of expungement in Santa Clara County, California, over the course of five years.⁹⁶ At its conclusion, the RCP found increased income for the recipients of expungement, as well as increased economic return for the local government.⁹⁷

According to the RCP, “the average [recipient] reported an increase in yearly income of \$6,190 after” having his record cleared.⁹⁸ Also, 93% of recipients “felt confident about their future job prospects, and 69% believed that earlier expungement would have made a difference in their previous income.”⁹⁹

Finally, the individual costs of unemployment also affect local and state government. Formerly incarcerated men lower national overall employment rates by up

⁹¹ See MEYLI CHAPIN ET AL., SAN JOSE STATE UNIV. RECORD CLEARANCE PROJECT, A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 15 (2014), available at <https://publicpolicy.stanford.edu/publications/cost-benefit-analysis-criminal-record-expungement-santa-clara-county>.

⁹² Pager, *supra* note 92, at 960–61.

⁹³ See Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1200 (2006) (describing states that place criminal records on the internet); see also Blumstein & Nakamura, *supra* note 63.

⁹⁴ As of 2005, 68% of large employers surveyed indicated that they always perform criminal background checks on job applicants. See Harry Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49.2 J.L. & ECON 451, 453–54 (2006). See generally MARY ELIZABETH BURKE, SOC’Y FOR HUMAN RES. MGMT. 2004 REFERENCE AND BACKGROUND CHECKING (2005), available at <http://www.shrm.org/Research/SurveyFindings/Documents/Reference%20and%20Background%20Checking%20Survey%20Report.pdf>.

⁹⁵ See generally MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT (2011), available at http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1.

⁹⁶ See MEYLI CHAPIN ET AL., *supra* note 94.

⁹⁷ See *id.* at 4–5.

⁹⁸ *Id.* at 15.

⁹⁹ *Id.*

to .8–.9 percentage points, costing the U.S. economy the equivalent of 1.5 million workers and reducing the U.S. gross domestic product by \$57–65 billion.¹⁰⁰ Based on an average tax rate, the RCP found that the estimated percent of total income paid for taxes by RCP recipients of expungement was 12.1%.¹⁰¹ “If the average increase in income for an RCP client after expungement [was] \$6,190, then the additional average total income taxes paid per person equal[ed] \$750.”¹⁰² In conjunction with the increase in revenue to the government, the savings in reduction in government assistance programs was approximately \$1,380 per RCP client in the year after the expungement.¹⁰³

B. Courts: Recidivism

Although identifying criminal offenders provides a clear safety function, expungement may likewise protect the public by reducing recidivism.¹⁰⁴ Recidivism, the return of a former inmate to prison, is inherently the result of criminal activity and in that way negatively impacts society. The risk of recidivism is increased by unemployment.¹⁰⁵ A University of Cincinnati study determined that inmates who arranged for post-release employment were only half as likely to re-offend as those who did not.¹⁰⁶ As an individual gains more weekly wages, the likelihood of returning to prison decreases.¹⁰⁷

The converse may also be true. Among women, poverty increases the odds of re-arrest by a factor of 4.6.¹⁰⁸ One study found that a year after release from prison, only

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 16.

¹⁰² *Id.*

¹⁰³ *Id.* at 17.

¹⁰⁴ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 13 (3d ed. 2004), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_collateralsanctionwithcommentary.authcheckdam.pdf; Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 605 (1997); Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527–30 (2006).

¹⁰⁵ TRAVIS ET AL., *supra* note 91, at 31–34; CHICAGO MAYORAL POLICY CAUCUS ON PRISONER REENTRY, FINAL REPORT 15 (2006), available at <http://www.nelp.org/page/-/SCLP/2011/ChicagoReportofMayoralCaucusonReentry.pdf?nocdn=1>; Nicholas Freudenberg et al., *Coming Home From Jail: The Social and Health Consequences of Community Reentry for Women, Male Adolescents, and Their Families and Communities*, 98 AM. J. PUB. HEALTH 191 (2008).

¹⁰⁶ See MEYLI CHAPIN ET AL., *supra* note 94, at 18 (27.6% v. 53.9%).

¹⁰⁷ Samuel L. Myers, Jr., *Estimating the Economic Model of Crime: Employment Versus Punishment Effects*, 99 Q.J. ECON. 157, 163 (1983).

¹⁰⁸ See Kristy Holtfreter et al., *Poverty, State Capital, and Recidivism Among Women Offenders*, 3 CRIMINOLOGY & PUB. POL’Y 185, 189, 198 (2004), available at <http://olms1.cte.jhu.edu/olms/data/resource/6080/HOLTFRETER-POVERTY%20AND%20RECIDIVISM.pdf>.

40% of women had found employment.¹⁰⁹ Likewise, homelessness raises the risk of recidivism among ex-offenders.¹¹⁰ With employers unlikely to hire an applicant with a criminal record and with a conviction forcing that individual out of public housing, a return to crime and to prison becomes increasingly more likely.

Finally, it should be noted that social stigma and exclusion can contribute to recidivism, particularly when public records may be easily available online.¹¹¹ An expungement can lift the social stigma associated with having a criminal record, allowing the individual to rejoin society.

VI. COMPARING AND CONTRASTING STATE EXPUNGEMENT STATUTES

Thirty-eight U.S. jurisdictions allow for expungement of a conviction. Expungement statutes vary nationally in the crimes they cover and in the waiting period required of an applicant. Some states allow expungements for felonies and violent felonies; very few follow the West Virginia model of denying expungement based on an age limitation. The overwhelming majority of states with expungement statutes for adult offenders neither have an age limit on eligibility, nor specifically take into account the offender's age at the time of the offense.¹¹² Likewise, the trend toward creating and expanding statutes for expungement has grown over the past decade. For example, from 2010–2011, 13 states enacted expungement statutes.¹¹³ Last year, Indiana and Vermont implemented new and more expansive expungement statutes,¹¹⁴ and one in Minnesota went into effect in January, 2015.¹¹⁵ None of these newly enacted statutes has the age limitation present in West Virginia.¹¹⁶

¹⁰⁹ THE SENTENCING PROJECT, WOMEN IN THE CRIMINAL JUSTICE SYSTEM: BARRIERS TO REENTERING THE COMMUNITY 2 (2007), available at www.sentencingproject.org/doc/File/Women%20in%20CJ/women_barriers.pdf.

¹¹⁰ See generally Stephen Metraux & Dennis P. Culhane, *Recent Incarceration History Among a Sheltered Homeless Population*, 52 CRIME & DELINQ. 504 (2004), available at http://repository.upenn.edu/cgi/viewcontent.cgi?article=1063&context=spp_papers.

¹¹¹ See Megan C. Kurlychek et al., *Enduring Risk?: Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 66–68 (2007), available at http://www.albany.edu/bushway_research/publications/Kurlycheck_et_al_2007.pdf. See generally Charles R. Tittle, *Deterrents or Labeling*, 53 SOC. FORCES 399 (1975).

¹¹² 36 states allow expungement without age limitation: Virginia, Illinois, California, Idaho, Minnesota, Montana, New York, Oklahoma, Oregon, Puerto Rico, Alaska, Utah, Vermont, Washington, Iowa, New Jersey, Kentucky, Rhode Island, Mississippi, Maryland, Florida, North Carolina, Arkansas, the District of Columbia, Arizona, Indiana, Kansas, Michigan, Missouri, Nebraska, Nevada, New Hampshire, Ohio, South Carolina, Tennessee, and Wyoming.

¹¹³ See Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT'L INST. JUST. 42, 48 (2012), available at <http://www.nij.gov/journals/270/Pages/criminal-records.aspx#note34>.

¹¹⁴ IND. CODE §§ 35-38-9-1 to -11 (2014); VT. STAT. ANN. tit. 13 §§ 7601-7608 (2014).

¹¹⁵ MINN. STAT. § 609A.01-.04 (2014).

¹¹⁶ See *supra* notes 119–20 and accompanying text.

A. Eligibility: Waiting Period

Most state statutes require a waiting period—a time during which the applicant must be free of arrests and must provide other evidence of rehabilitation. Some states, like Nevada and New Hampshire, have a graduated time frame for eligibility, depending on the severity of the crime. The misdemeanors at the bottom of the scale require a three-year waiting period after completion of sentence; for felonies, the waiting period of good behavior spans from 10 years to 15 years.¹¹⁷ Michigan allows application for any conviction after a five-year waiting period of good behavior, excepting criminal sexual offenses and any offenses for which the penalty is life imprisonment.¹¹⁸ New Jersey and New Hampshire both allow expungement of the initial offense even if the applicant has been arrested and convicted of up to two minor offenses during the waiting period.¹¹⁹

B. Eligibility: Particular Offenses and Mandatory Expungement

In Arizona, the record of a petitioner who meets the requirements of the statute will be set aside automatically if he or she is a first offender.¹²⁰ Likewise, Delaware has mandatory expungement of some crimes and discretionary expungement of other crimes.¹²¹ As noted earlier, Rhode Island provides mandatory expungement for alcohol-related offenses if the applicant was between the ages of 18 and 21.¹²² Colorado has a separate statute for expungement of convictions involving controlled substances.¹²³

Many states exclude the possibility of expungement for particular offenses, such as crimes of sexual violence, domestic violence, or child abuse. Iowa does not allow expungement if the applicant previously has committed a violent felony.¹²⁴

C. Expungement Statutes in Neighboring States

The states neighboring West Virginia each approach expungements differently. In Kentucky, expungement applies to any misdemeanor or any series of misdemeanors

¹¹⁷ See NEV. REV. STAT. §§ 179.245, 179.259, 453.3365 (2014) (providing that for E felonies, there is a 7 year waiting period, C or D felonies, 12 years, and A or B felonies can be expunged 15 years from the date of release from custody or discharge from parole or probation, whichever is later); see also N.H. REV. STAT. ANN. § 651:5 (2014).

¹¹⁸ See MICH. COMP. LAWS § 780.621 (2014) (likewise, petitioner may have been convicted of two minor offenses in addition to the offense for which the person files an application).

¹¹⁹ See N.H. REV. STAT. ANN. § 651:5 (2014); see also N.J. STAT. ANN. § 2C:52-2 (West 2014).

¹²⁰ See ARIZ. REV. STAT. ANN § 13-912 (2014). For exceptions, and the statute itself, see ARIZ. REV. STAT. ANN § 13-907 (2011).

¹²¹ See DEL. CODE ANN. tit. 11 §§ 4373–4374 (2015).

¹²² See R.I. GEN. LAWS §§ 3-8-12, 12-1.3-2 (2014).

¹²³ See COLO. REV. STAT. § 24-72-704 (2014).

¹²⁴ See IOWA CODE § 907.9 (2014).

arising from a single incident, and the waiting period to apply is five years from completion of the sentence or of probation (whichever is later).¹²⁵ Maryland allows for expungement of misdemeanors not involving crimes of violence.¹²⁶ Ohio permits expungement of a felony offense three years after discharge, and expungement of a misdemeanor offense one year after discharge.¹²⁷ Conversely, both Pennsylvania and Virginia have statutes similar to the old West Virginia statute. Virginia provides that an applicant's criminal record be cleared only if the person is acquitted, not prosecuted by the state, pardoned, or exonerated.¹²⁸ Pennsylvania allows the sealing of criminal records for offenses where there has been an arrest but no prosecution.¹²⁹

As is apparent, specifics vary between state statutes in terms of the crimes possible for expungement, the waiting time period, and the number of offenses one can have expunged. Notably, some states also have laws prohibiting employment discrimination based on a set-aside conviction, should the employer become aware of it.¹³⁰

D. Drug Courts and Expungement

Mississippi, a state with a similar drug court system to that of West Virginia, has structured its expungement statute to work in tandem with the drug courts. The applicant can have a misdemeanor or nonviolent felony expunged provided it is the first offense and provided the applicant abides a waiting period after successful completion of all requirements imposed upon him by the drug court, including any fines.¹³¹ An applicant may apply for only one felony expungement, and no public official is eligible for expungement of a crime related to official duties.¹³² Because the West Virginia Justice Reinvestment Act of 2013 has led to a growth in drug courts in West Virginia, an expungement statute that works with our drug courts may be beneficial to our state.¹³³ These partnerships can bring people back into the community, while providing treatment to remedy the underlying causes of offending.

¹²⁵ See KY. REV. STAT. ANN. §§ 431.076, 431.078 (West 2014).

¹²⁶ See MD. CODE ANN., CRIM. PROC § 10-105 (West 2014).

¹²⁷ See OHIO REV. CODE ANN. § 2953.32 (West 2014).

¹²⁸ See VA. CODE ANN. § 19.2-392.2 (West 2014).

¹²⁹ See PA. R. CRIM. P. 790.

¹³⁰ See MICH. COMP. LAWS ANN. §§ 780.621–623 (West 2014). Expungement bills are supported by the American Bar Association (ABA Standards 1981, Standard 23-8.2) and by the National Employment Law Project. NAT'L EMP'T LAW PROJECT, STATE REFORMS PROMOTING EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS: 2010-11 LEGISLATIVE ROUND-UP 8–12 (2011), available at <http://www.nelp.org/page/-/sclp/2011/promotingemploymentofpeoplewithcriminalrecords.pdf?nocdn=1>.

¹³¹ See MISS. CODE ANN. §§ 9-23-23, 99-19-71 (2014).

¹³² See *id.* § 99-19-71.

¹³³ See generally *Adult Drug Courts*, W. VA. JUDICIARY, <http://www.courtswwv.gov/lower-courts/adult-drug-courts/adult-drug-courts.html> (last visited Apr. 4, 2015).

E. Suggested Changes to the Current Expungement Statute

The following are suggestions for amending our expungement statute. First, the age limitation should be removed because it is arbitrary, with no rational basis for the distinction between offenders based on age. Indeed, as remarked earlier, a 56-year-old who has not been otherwise arrested in his entire lifetime and who has shown his contribution to society may be more worthy of expungement than an applicant in his twenties. Yet as our statute currently stands, no one over the age of 26 may obtain an expungement.

Second, misdemeanor and felony drug possession convictions should be considered for expungement. The majority of people incarcerated in West Virginia are in prison for non-violent property and drug offenses.¹³⁴ If expungement encompasses misdemeanor and felony possession of drugs, these individuals can prove themselves capable of recovery and of rejoining society. Women convicted of drug offenses are often the sole providers for their families. When these women cannot gain employment because of a drug conviction, the disruption to families can be devastating. This harsh repercussion unnecessarily punishes women who were often not the primary players in drug offenses, but were instead assisting a boyfriend. If women are provided an opportunity to earn an expungement, their recovery can assist their families and the community at large.

Recent legislation has been introduced to revise the limited expungement remedy currently available to citizens of West Virginia. In 2014, Senators Cookman, Miller, and Edgell introduced Senate Bill 423 to modify the expungement statute.¹³⁵ Senate Bill 423 would have covered misdemeanors and non-violent felonies, eliminated the age limitation, and created a West Virginia State Police Criminal Justice Information Services Fund, where the petitioner would pay \$250 into a fund for the state police.¹³⁶ Expungement would still have been available only for first-time offenders, and the petitioner would still need to prove all the requirements of § 61-11-26, such as consistency with public welfare and rehabilitation.¹³⁷ In 2015, House Bill 2604, the Second Chance for Employment Act, was introduced with the same goals and revisions while Senators Kessler, Laird, Yost, and Miller introduced Senate Bill 526 to likewise revise the West Virginia expungement statute.¹³⁸ These bills provide a strong guidepost

¹³⁴ SIMON BAUER-LEFFLER & STEPHEN M. HAAS, W. VA. DIV. OF JUSTICE & CMTY. SERV., West Virginia Correctional Population Forecast 2010-2020, at 6 (2011), available at http://www.djcs.wv.gov/SAC/Documents/ORSP_2010-2020_Correctional_Population_Forecast-FINAL.pdf.

¹³⁵ S.B. 423, 81st Leg., Reg. Sess. (W. Va. 2014), available at http://www.legis.state.wv.us/Bill_Status/bills_text.cfm?billdoc=sb423%20intr.htm&yr=2014&sesstype=RS&i=423.

¹³⁶ *Id.*

¹³⁷ *Id.* Although Senate Bill 423 expanded the statute to cover misdemeanor and non-violent felonies, possession of a controlled substance remained ineligible—a component we see as vital for inclusion.

¹³⁸ H.B. 2604, 82d Leg., Reg. Sess. (W. Va. 2015), available at http://www.legis.state.wv.us/bill_status/bills_history.cfm?INPUT=2604&year=2015&sessiontype=RS; S.B. 526, 82d Leg., Reg. Sess. (W. Va. 2015),

for how to amend our expungement statute to benefit both the criminal justice system and West Virginians.

VII. CONCLUSION

Reforming our expungement statute does not require a drastic change of course. To the contrary, it is the next logical step in West Virginia's ongoing initiative to rehabilitate ex-offenders and strengthen communities—an initiative that began with the Justice Reinvestment Act of 2013. A more inclusive expungement statute would be an effective companion to the Justice Reinvestment Act's successful drug court and early release programs. What value is there in early release or graduation from drug court if we merely turn out participants into a world without opportunity, without promise, and without hope?