



# Clarifying Collateral Consequences:

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## Moving Forward from Past Mistakes

Alexander Tron | April 2021



Cage-Free  
Repair



Cage-Free  
Cannabis

## *Acknowledgment*

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*I want to take time to acknowledge and thank the people who have helped me on my path so far - Adam for his guidance, Jasmin for her mentorship, my parents for always loving and supporting me, and for my Uncle Bobby who, after 30 years of incarceration, was finally given community release in Fall of 2020. Good exists within all of us, and I honestly believe that, through collective advocacy, we can live in a society that recognizes that truth.*

## *Introduction / Thanks*

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*On behalf of the Cage-Free organizations, I want to extend our deepest thanks to Alexander for his dedication to this report and to Jasmin Mize for her leadership as an attorney and mentor throughout the project. We started repairing harms of the War on Drugs to build on work that had already been done by people and organizations like Susan Burton, Ingrid Archie, A New Way of Life, All of Us or None, Eunisses Hernandez, the young people of the Youth Justice Coalition, and so many others.*

*We are proud to add this report to the growing movement to expand access to, and implementation of, post-conviction relief across the U.S. We hope, most of all, that this report will be useful for the National Expungement Week network and any other community-based organizers seeking to heal their communities*

*- Adam Vine | Co-founder, Cage-Free Cannabis & Cage-Free Repair*

For those who come into contact with the criminal justice system – either through arrest or incarceration - the impact of that contact continues long after the contact ends. Jobs are denied, applications to rent are ignored, and a strong stigma is attached to a justice-involved individual.<sup>1</sup> These post-release impacts - known as a “collateral consequence”<sup>2</sup> - produce no statistically meaningful rehabilitative effect, but continue to exist as a perceived punitive measure that does little to deter criminal behavior.<sup>3</sup> In recognition of the barriers that contact with the criminal justice system places on an individual, states have created various forms of relief from collateral consequence,<sup>4</sup> but no formal relief exists at the federal level.<sup>5</sup>

As the nation seeks to recover following the Covid-19 pandemic and national reckoning on police brutality, expungement and record sealing are uniting issues that have bipartisan support.<sup>6</sup> It is in this moment that we can hopefully recognize the massive untapped potential of those justice-involved individuals who can - and want to - meaningfully contribute to society but are impeded from doing so because of their contact with the criminal justice system. This paper seeks to provide background about the different forms of collateral consequence; discuss and

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<sup>1</sup> See generally Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 140 (2010) (detailing the impact of collateral consequences); Amy P. Meek, STREET VENDORS, TAXICABS, AND EXCLUSION ZONES: THE IMPACT OF COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS AT THE LOCAL LEVEL, 75 Ohio St. L.J. 1, 4 (2014) (describing collateral consequences at the municipal level).

<sup>2</sup> *Id.*

<sup>3</sup> See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 15, 15-16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (recognizing collateral consequences as punishment and its impacts); Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1790 (2012) (arguing that collateral consequences serve as a reemergence of the punishment known as “civil death”).

<sup>4</sup> Depending on the jurisdiction, relief from collateral consequences may be known as erasure, destruction, sealing, setting aside, expunction, and purging.

<sup>5</sup> In spring 2015, Senators Rand Paul and Cory Booker sponsored the “REDEEM Act” which would amend the federal criminal code to provide sealing and expungement remedies for nonviolent criminal and juvenile offenses - it was ultimately unsuccessful. See S. 675, 114th Cong. (2015); See also *infra* note 19-22 (discussing attempts to seal records in federal circuit court).

<sup>6</sup> *Id.* (noting the bipartisan nature of the support behind the REDEEM act). State governments have the ability to legislate collateral consequence relief as it relates to state-charged crimes. The U.S. Congress has the power to create relief for those who have been charged/ convicted of federal crimes.

survey a variety of state laws that provide collateral consequence relief; and evaluate the most effective areas of advocacy that can expand such relief so as to truly give people a second chance at creating a better life for themselves.

## Background

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*Given that each state has their own form of collateral consequence relief, they vary in their approach and procedures. These variations exist in three main areas: the forms of relief (what the relief does in the life of the individual), the extent of the relief (what records the state's relief covers), and the availability of relief (what barriers, discretionary or otherwise, limit the ability for someone to seek relief). This next section describes them, in broad strokes, to give a backdrop to the state-by-state analysis.*

### *a. Forms of relief*

There is a notable distinction between the different forms of relief that are offered in each locality. In some jurisdictions, expungement (or expunction, purging, or destruction) is the offered relief, involving the actual deletion and removal of records relating to a conviction. This form of relief, due to its (perceived)<sup>7</sup> permanence, is the rarest and has largely been replaced with sealing of records or setting aside of convictions.

In other jurisdictions, the record is sealed but not actually destroyed. This involves removing the record from public availability but allowing a copy of the record to be used in a handful of statutorily defined circumstances (usually involving use by agencies within the criminal justice system). Some states, like Minnesota, have statutorily defined causes of action

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<sup>7</sup> Even if the record is deleted from a government database, it may have already been copied to a privately owned database or website, adding technological hurdles to the process of expunging in the digital age. See Jenny Roberts, EXPUNGING AMERICA'S RAP SHEET IN THE INFORMATION AGE, 2015 Wis. L. Rev. 321 (2015).

the disclosure of sealed information in a manner not inconsistent with the statute, and other states impose criminal liability.<sup>8</sup>

Lastly, and arguably most confusing for justice-involved individuals, some states (e.g. California) offer a “setting aside” of a previous conviction. In such jurisdictions, the record of the conviction is neither destroyed nor sealed - the case is reopened, a plea of “Not Guilty” is entered by the individual, and the new plea is not contested by the prosecutor and accepted by the judge.<sup>9</sup> This form of relief allows a justice-involved individual to affirmatively answer “No” when asked if they have ever been convicted of a crime, amongst a long list of other benefits.<sup>10</sup>

*b. Extent of relief*

Each jurisdiction varies on the extent of the relief that is offered as well. Some offer relief from only misdemeanors (or their equivalent), while others have more permissive rules. In Arizona, for example, expungement relief is offered for only a particular set of offenses that have recently been legalized.<sup>11</sup> Given the broad discretion provided to District Attorneys as to the choice of offenses to prosecute, narrow forms of relief for justice-involved individuals ignore the racialized imbalances in conviction rates. Thus, broader forms of relief that involve case-by-case analysis of the facts surrounding the conviction should be adopted. Even further, some states have allowed for the sealing of criminal arrest records, which continue to cause issues for an

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<sup>8</sup> *Infra* note 40 (describing the consequences of violating state relief laws)

<sup>9</sup> See Jeffrey Selbin, et al., UNMARKED? CRIMINAL RECORD CLEARING AND EMPLOYMENT OUTCOMES, 108 J. Crim. L. & Criminology No. 1 at 34 (2017)(“Although the dismissal remedy is often referred to as ‘expungement,’ it does not result in the destruction of the criminal record. Instead, the dismissal releases the person ‘from all penalties and disabilities’ resulting from the conviction.”); See also Cal. Penal § 1203.4(a)(1) (describing the setting aside process) (“[The individual shall] be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; or, if he or she has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and, in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted . . . .”).

<sup>10</sup> In California, individuals are protected from discrimination in employment and housing due to records that have been set aside. See Cal. Gov’t Code § 12952 (added by AB-1008 (2017)); see also Cal. Code Regs. tit. 2 § 11017(d)(1))

<sup>11</sup> *Infra* note 31 (describing the impact of Cannabis legalization in Arizona).

individual who has come into contact with the criminal justice system, but has not even been convicted of a crime. This has been a gap in the traditional offerings of relief, one that has been shown to be increasingly important as records become more and more frequently disseminated online.<sup>12</sup>

#### *c. Availability of relief*

Another major distinction among jurisdictions is the availability of relief. Jurisdictions differ in frequency, judicial discretion, and exclusions. Frequency - how often, and for how much, an individual can seek relief - is one of the biggest differentiators between jurisdictions. Some states, such as California, do not have a cap on the frequency of expungement relief, if it is within the statutory limits. On the other hand, New Jersey has extremely restrictive expungement laws, offering only one expungement in an individual's lifetime.

Judicial discretion is a major area that can impact the collateral consequence relief process, especially those that have adopted permissive relief. In certain jurisdictions - or even for different convictions within the same jurisdiction - relief is mandatory if the individual has satisfied the statutory requirements, and thus there is no issue of judicial discretion. However, some states have permissive relief, which means that the judge has discretion in providing the order for expungement (or sealing / setting aside).<sup>13</sup> Again, the justice-involved individual is left without certainty as to the possibility of their collateral consequence relief.

Lastly, exclusions are important to consider when analyzing collateral consequence relief. Some crimes and convictions are excluded from collateral consequence relief, and in some

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<sup>12</sup> Lageson, S. (2020, June 24). *Online Criminal Records Trap Americans in a Purgatory of Digital Punishment*. Retrieved November 18, 2020, from <https://slate.com/technology/2020/06/criminal-justice-records-online-digitalpunishment.html>.

<sup>13</sup> Such discretionary systems, while better than having no form of relief, open up the possibility for discriminatory results. *See e.g.*, Bushway, S., & Piehl, A. (2001). JUDGING JUDICIAL DISCRETION: LEGAL FACTORS AND RACIAL DISCRIMINATION IN SENTENCING. *Law & Society Review*, 35(4), 733-764. doi:10.2307/3185415 (describing the impact that racial discrimination can have in the decision making of judges).

instances certain convictions bar an individual from seeking collateral consequence relief entirely.

## Jurisdictional Analysis

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*This section will analyze the extent to which collateral consequence relief is available in a select group of jurisdictions that display the variety of approaches that have been taken. By surveying existing laws, areas for improvement can be more readily identified and points of advocacy clarified.*

### Georgia

Georgia has a limited scope of relief available. In almost every category, relief is limited, and offered in a discretionary manner.<sup>14</sup> It will only be granted if “the harm otherwise resulting to the privacy of the individual clearly outweighs the public interest in the criminal history record information being publicly available.”<sup>15</sup> However, demographic shifts and polling data from the last election indicate that Georgia could potentially be a candidate for expanded relief moving forward due to changing community standards,<sup>16</sup> and recent litigation shows continued support for the importance of the concept of collateral consequence relief.<sup>17</sup>

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<sup>14</sup> See *infra* note 21 (describing the discretionary standard in Georgia courts for the sealing of misdemeanors, first time drug possession, and other eligible offense); *But see* Ga. Code Ann. § 15-11-701 (describing the right to have juvenile records sealed).

<sup>15</sup> Ga. Code Ann. § 35-3-37(m)

<sup>16</sup> Cohn, N., Conlen, M., & Smart, C. (2020, November 17). Detailed Turnout Data Shows How Georgia Turned Blue. Retrieved November 12, 2020, from <https://www.nytimes.com/interactive/2020/11/17/upshot/georgiaprecinct-shift-suburbs.html>.

<sup>17</sup> In *Doe v. State*, 819 S.E.2d 58 (Ga. Ct. App. 2018), the Georgia Supreme Court found that the trial court had abused its discretion in refused to apply the statutorily defined balancing test in determining if a request for sealingshould be granted. The Supreme Court found that the “views expressed by the trial judge from the bench . . . clearly show that the trial court was disinclined to weigh the public’s interest in access to Doe’s court record in particular against the harm to his privacy, because the trial judge favored the transparency of criminal records in general, while acknowledging that the court’s views were ‘not the law.’”



## Kentucky

Kentucky has a narrow scope of relief, but the accessibility of the relief is improving, and there is an avenue for a complete form of expungement. Misdemeanors and Class D felonies are the only forms of convictions that can be expunged, and expungement is discretionary.<sup>18</sup> However, the availability for expungement was expanded in 2019. Previously there had been a limit of relief of only once in an individual's lifetime after a 5-year waiting period, but now relief can be sought every 5 years.<sup>19</sup>

## Minnesota

Minnesota offers a comprehensive form and extent of relief, but the barrier to access is extremely high. A Minnesota court is authorized to seal a record, but only as an “extraordinary remedy” that is to be granted only upon “clear and convincing evidence that it would yield a benefit to the petitioner commensurate with the disadvantages to the public and public safety of: (1) sealing the record; and (2) burdening the court and public authorities to issue, enforce, and monitor an expungement order.”<sup>20</sup> This is a notably high barrier as compared to other states that provide mandatory relief, and for those states that offer discretionary relief there is a lower burden of proof on the individual seeking relief.<sup>21</sup> Once that relief is granted, however, Minnesota has created a unique cause of action that allows an individual to seek remedy if the sealed records are ever revealed in an improper fashion.<sup>22</sup>

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<sup>18</sup> See Ky. Rev. Stat. Ann. § 431.073.

<sup>19</sup> *Id.*

<sup>20</sup> Minn. Stat. §§ 609A.03, subd. 5(a).

<sup>21</sup> For example, in Georgia, the standard does not take into consideration the burden in maintaining the record sealing, creating an easier bar for relief to be granted: “The court shall hear evidence and shall grant an order restricting such criminal history record information if it determines that the harm otherwise resulting to the individual clearly outweighs the public’s interest in the criminal history record information being publicly available.” Ga. Code Ann. § 35-3-37(j)(6)

<sup>22</sup> *Infra* note 40 (describing Minnesota’s inclusion of a cause of action as a part of their expungement statute).

## New York

New York, in 2017, finally allowed for the sealing of adult convictions; however, the relief is limited and the accessibility to such relief is restrictive. New York allows for an individual with up to two convictions to seal the records of those convictions (barring some exceptions) after a 10-year waiting period.<sup>23</sup> Sealing of records is also discretionary, and can only occur once.<sup>24</sup> This is an incredibly restrictive form of relief, and, for the nation's second most populated state, it is an extreme detriment to its citizens. Pushing for expanded legislation to amend the 2017 bill will be necessary to meaningfully provide relief.

## New Jersey

New Jersey has a complete form, and extent, of collateral relief, but accessibility is severely lacking. One of the particularities of collateral consequence relief in New Jersey is its availability - until recent clean slate and cannabis legalization efforts, the state had a policy of one expungement per lifetime. This limited availability of relief correlates to the complete form of the relief - in New Jersey, "the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the [person] may answer any questions related to their occurrence accordingly,"<sup>25</sup> Promises for reform are in the pipeline, but the system seems largely gridlocked.<sup>26</sup> The complexity of the process is a severe limiting factor to accessibility, discouraging *pro se* individuals from seeking relief and necessitating the assistance of attorneys.

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<sup>23</sup> See N.Y. Crim. Proc. Law § 160.59.

<sup>24</sup> See N.Y. Crim. Proc. sec. 160.59(7):

<sup>25</sup> N.J. Stat. Ann. § 2C:52-27; *see also* § 2C:52-1(a).

<sup>26</sup> *Infra* note 42 (expressing hesitance at believing in expungement reform in New Jersey).

## South Carolina

Collateral consequence relief has been recently expanded in South Carolina, but it is still lacking in accessibility and extent. In 2018, the South Carolina legislature overrode a governor's veto to expand expungement availability to first-time drug possession and distribution convictions.<sup>27</sup> The limited scope and availability of this relief is definitely lacking, but the willingness of the legislature to challenge executive authority shows that South Carolina may be a potentially viable candidate for collateral consequence relief expansion moving forward.

## Texas

Texas has a limited number of avenues for relief, and unfortunately shows less promise of change especially compared to Georgia.<sup>28</sup> An “order of non-disclosure” (effectively sealing the conviction record) is available for first-time misdemeanor convictions<sup>29</sup> as well as first-time driving while intoxicated, as long as no accident has occurred.<sup>30</sup> Expansion of collateral consequence relief may be possible in Texas, but it seems more likely to occur in the near future in other jurisdictions.

## California

California has extensive availability and extent of relief but is somewhat lacking in the form of the relief available. Mandatory relief is available, but the records are only “put aside,” as of present.<sup>31</sup> AB 1076 promises to automatically seal all records that have been set aside in

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<sup>27</sup> See S.C. Code Ann. § 22-5-930(A).

<sup>28</sup> See Hixenbaugh, M. (2020, November 05). Democrats' hopes fell far short in Texas. Here's why the state remains a Republican stronghold. Retrieved November 11, 2020, from <https://www.nbcnews.com/politics/2020-election/democrats-hopes-fell-far-short-texas-here-s-why-state-n1246413>.

<sup>29</sup> See Tex. Gov't Code §§ 411.073, 411.0735.

<sup>30</sup> See Tex. Gov't Code §§ 411.0731, 411.0736.

<sup>31</sup> Cal. Penal § 1203.4.

California, but that program is still being rolled out.<sup>32</sup> Additionally, Prop 47, Prop 64 and AB 1793 – all pieces of legislation expanding collateral consequence relief - show strong legislative support for expanding and automating collateral consequence relief moving forward. California is a good example of a state that has an expansive set of collateral consequence relief, but still has room for improvement in terms of expanding the meaningful impact that the relief provides.

## Areas For Advocacy

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*This section will detail potential areas for advocacy that have been identified, based on what other states have done and gaps that exist in current relief.*

### **The potential for Arizona**

Arizona poses an interesting avenue for potential advocacy and could be a promising area for improvement in collateral consequence relief moving forward. Arizona has only had limited “set aside” relief until recently. However, in November of 2020 Arizona passed a law legalizing the adult use of cannabis, which included a process for actual expungement of previous convictions.<sup>33</sup> This system exclusively applies to cannabis convictions, and exclusively for amounts that are deemed by the prosecutor to be for personal consumption.<sup>34</sup> This leaves the status of convictions involving an amount more than what Arizona prosecutors define as

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<sup>32</sup> 2019 California Assembly Bill No. 1076, California 2019-2020 Regular Session, 2019 California Assembly Bill No. 1076, California 2019-2020 Regular Session.

<sup>33</sup> See Wasu, S. (2020, November 13). Prop 207 promises to clear felony convictions for those with pot for personal consumption. Retrieved November 11, 2020, from <https://www.abc15.com/news/state/prop-207-promises-to-clearfelony-convictions-for-those-with-pot-for-personal-consumption> (“there will be a process put in place where people who have been convicted of personal possession of marijuana will be able to have those convictions essentially removed from their records”).

<sup>34</sup> *Id.*

“personal use” in a state of uncertainty, as well as any convictions involving any associated felonies.<sup>35</sup>

This uncertainty and discretion creates a two-pronged opportunity for advocacy. Firstly, the amenability of voters in Arizona to the legalization of cannabis shows the potential for expungement reform to be placed on future ballot measures - 60% of citizens voted to legalize,<sup>36</sup> which surpassed even the most optimistic polling figures entering Election Day.<sup>37</sup> With a recognition of the lack of harm that cannabis actually causes, voters could be amenable to more broadly focused forms of automated or mandatory collateral consequence relief for non-violent offenses.

Second, the discretion that is given to individual prosecutors could be an avenue for supporting a progressive prosecutor in enacting reform at a local level. Maricopa County (home of the infamous Sheriff Joe Arpaio, “America’s Toughest Sheriff”)<sup>38</sup> had a significantly closer race for prosecutor in 2020.<sup>39</sup> The challenger was a progressive prosecutor who was ultimately unsuccessful, but her significant narrowing of the margin of defeat by two thirds (from the

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<sup>35</sup> Stern, R. (2020, November 02). *How the Prosecutor's Race Will Affect Legalized Marijuana in Maricopa County*. Retrieved November 5, 2020, from <https://www.phoenixnewtimes.com/marijuana/marijuana-arizona-legalize-prop-207-county-attorney-gunnigle-adel-11504748>.

<sup>36</sup> Ballotpedia. (2020). Arizona Proposition 207, Marijuana Legalization Initiative (2020). Retrieved November 18, 2020, from [https://ballotpedia.org/Arizona\\_Proposition\\_207,\\_Marijuana\\_Legalization\\_Initiative\\_\(2020\)](https://ballotpedia.org/Arizona_Proposition_207,_Marijuana_Legalization_Initiative_(2020)).

<sup>37</sup> Jaeger, K. (2020, October 15). Support For Marijuana Legalization In Arizona Has Grown Significantly, Two New Polls Show. Retrieved November 18, 2020, from <https://www.marijuanamoment.net/support-for-marijuanalegalization-in-arizona-has-grown-significantly-two-new-polls-show/>.

<sup>38</sup> Davis, Z. (2020, August 08). 'America's Toughest Sheriff' Joe Arpaio Defeated in Bid To Get His Old Job Back. Retrieved November 8, 2020, from <https://reason.com/2020/08/07/americas-toughest-sheriff-joe-arpaio-defeated-inbid-to-get-his-old-job-back/>.

<sup>39</sup> *Supra* note 33. (describing the progressive prosecutor who ran for city attorney of Maricopa county, Julie Gunnigle).

previous Republican incumbent's victory margin of 5.4% in 2016 to 1.8% in 2020) may represent a broader trend that could prove to be useful for advocacy.<sup>40</sup>

### **Creating Remedies for Violations**

Within states that already have expungement statutes, providing an actual cause of action for a violation of collateral consequence relief provides a compelling way to increase the enforcement capabilities of such statutes. In providing a unique cause of action for a violation of the expungement statute, Minnesota has created an avenue for individuals to hold the recordkeeping bodies in their state accountable. However, the increased proliferation of digital databases and content-scraping services have left some wondering about the efficacy of expungements entirely in a modern age.<sup>41</sup> In light of these concerns, expanding the statutory enforcement capabilities of expungement laws, as Minnesota has, will be a necessary step in ensuring expungements continue to provide a source of relief. Some states have already taken steps to accomplish this goal, but efforts are not universal.<sup>42</sup> Inclusion of such discrete causes of action should be a priority for future collateral consequence relief reform efforts, as they create the kind of enforcement impact necessary to make the relief meaningful in the life of the individual.

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<sup>40</sup> *Compare* Ballotpedia. (2016). Bill Montgomery. Retrieved November 1, 2020, from [https://ballotpedia.org/Bill\\_Montgomery](https://ballotpedia.org/Bill_Montgomery) (showing the results of the 2016 election in Maricopa County) *with* Ballotpedia. (2020). Julie Gunnigle. Retrieved November 1, 2020, from [https://ballotpedia.org/Julie\\_Gunnigle](https://ballotpedia.org/Julie_Gunnigle).

<sup>41</sup> *See* The Editorial Bd., *Job Hunting with a Criminal Record*, N.Y. Times (Mar. 19, 2015), [http://www.nytimes.com/2015/03/19/opinion/job-hunting-with-a-criminal-record.html?ref=opinion&\\_r=1](http://www.nytimes.com/2015/03/19/opinion/job-hunting-with-a-criminal-record.html?ref=opinion&_r=1) [<https://perma.cc/WRU9-RELC>] (arguing that expungement as concept may be outdated in a digital age).

<sup>42</sup> *See*, e.g., Cal. Lab. Code § 432.7(a)(1) (West 2020) (prohibiting employment discrimination); *see also* Cal. Gov't Code § 12952 (West 2020) (prohibiting disclosure). In Michigan, using information about an expunged record is a misdemeanor. Mich. Comp. Laws Ann. § 780.623(5) (West 2020) ("Except as provided in subsection (2), a person, other than the applicant ..., who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than \$500.00, or both."). In Minnesota, the statute creates a cause of action for individuals when a government entity "knowingly improperly opens or exchanges the expunged record." (Minn. Stat. § 609A.04).

## **Developing an Automated Expungement Process**

Automating the expungement process is something that would have a drastic impact on the number of individuals given relief<sup>43</sup> but is only being made available in a handful of states. In years prior, the task of automating such a task could have been perceived as burdensome and cost prohibitive. In the digital age, the task of identifying and automating the application of collateral consequence relief has been significantly streamlined. However, the hurdles encountered by New Jersey show the complications in attempting to implement such a system<sup>44</sup> and thus consideration must be taken when advocating for their implementation. Recent efforts by Code For America in California give a good roadmap for the ways in which a system could be effectively automated in the future.<sup>45</sup>

## **Supporting a Federal Expungement Process**

One area that is critical to the advancement of collateral consequence relief, but is largely unaddressed by the analysis in this paper, is federal expungement relief. There has been support for such measures in Congress in the past,<sup>46</sup> but it has largely languished since then. There exists hope for expungement at the federal level as a part of the Marijuana Opportunity Reinvestment and Expungement Act of 2019 (the “MORE Act”),<sup>47</sup> but the legislation has stalled in the Senate.

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<sup>43</sup> Staff, C. (2020, August 03). The Clean Slate Initiative works to advance automated record clearance. Retrieved November 18, 2020, from <https://ccresourcecenter.org/2020/08/03/the-clean-slate-initiative-a-national-bipartisancoalition/> (“In just one year of implementation in Pennsylvania, nearly 35 million cases and 47.3 million offenses have been sealed from public view — helping more than 1.15 million Pennsylvanians get relief.”).

<sup>44</sup> See Lassiter, J. (2019, March 13). *Legalized Marijuana in NJ, WE DEMAND BETTER!* Retrieved November 8, 2020, from <https://www.insidernj.com/marijuana-legalization-nj-fair-wins-expungement/> (“Unfortunately, the so-called “automatic expungement” part of this legislation is, practically speaking, impossible to deliver.”).

<sup>45</sup> Code for America. (2020, February 13). Los Angeles County DA & Code for America Announce Dismissals of 66,000 Marijuana Convictions, Marking Completion of Five-County Clear My Record Pilot. Retrieved December 03, 2020, from <https://www.codeforamerica.org/news/los-angeles-county-da-code-for-america-announce-dismissal-of-66-000-marijuana-convictions-marking-completion-of-five-county-clear-my-record-pilot>

<sup>46</sup> *Supra* note 5 (describing legislative efforts at the federal level to pass the REDEEM act).

<sup>47</sup> Nadler, J. (2019, November 21). H.R.3884 - 116th Congress (2019-2020): Marijuana Opportunity Reinvestment and Expungement Act of 2019. Retrieved November 10, 2020, from <https://www.congress.gov/bill/116thcongress/house-bill/3884>.



However, recent litigation has challenged the concept of federal expungement in the Second Circuit, and shows the way that a circuit split could be challenged in the future.<sup>48</sup> In *Doe v. United States*, an individual sought to have federal records of their involvement in health care fraud sealed in an attempt to seek employment.<sup>49</sup> The district court judge, in balancing the equities of the case, found that “the government's need to maintain arrest records ... [did not outweigh] the harm’ that the maintenance of arrest records can cause citizens” and thus “that the public's interest in Doe being an employed, contributing member of society so far outweighs its interest in her conviction being a matter of public record that the motion is granted and her conviction is expunged.”<sup>50</sup> The decision was ultimately reversed on appeal,<sup>51</sup> but it shows the ways in which the traditional conceptions of the limits of collateral consequence relief can be explored and challenged to enact change in other jurisdictions that allow for expungement on equity grounds, like the 10th Circuit.<sup>52</sup> The identification of a client (or class of clients) that could be a potential source of impact litigation may be a useful form of advocacy in expanding expungement access. If the MORE Act passes, it may represent the kind of legislative intent in support of federal expungements that the judiciary will look to when making decisions regarding providing that relief.

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<sup>48</sup> *Doe v. United States*, 110 F. Supp. 3d 448 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016).

<sup>49</sup> *See id.*

<sup>50</sup> *Doe v. United States*, 110 F. Supp. 3d 448, 449, 445 (E.D.N.Y. 2015), *vacated*, 833 F.3d 192 (2d Cir. 2016).

<sup>51</sup> *Doe v. United States*, 833 F.3d 192 (2d Cir. 2016) (“held that: 1) Federal Rules of Criminal Procedure did not give district court subject matter jurisdiction over petitioner's motion; 2) district court's exercise of ancillary jurisdiction over petitioner's motion to expunge was not necessary for court to function successfully; and 3) district court's exercise of ancillary jurisdiction over petitioner's motion to expunge was not necessary to permit a single court to dispose of factually interdependent claims.”).

<sup>52</sup> *Camfield v. City of Oklahoma City*, 248 F.3d 1214, 1234 (10th Cir. 2001) (“It is well settled in this circuit that courts have inherent equitable authority to order the expungement of an arrest record or a conviction in rare or extreme instances. *See United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir.1993); *United States v. Linn*, 513 F.2d 925, 927 (10th Cir.1975)”).



## Conclusion

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With 77 million people in the U.S. having some kind of involvement with the justice system, collateral consequence relief continues to be an area of focus. As more states consider the legalization of cannabis, every indication is that it will only continue to stay in focus.<sup>53</sup> It has been mentioned as a priority for the incoming administration<sup>54</sup>, and hopefully states that have been reticent to offer expungement will soon have the impetus placed upon them to expand their options for collateral consequence relief. Cannabis legalization at the federal level (whenever that occurs)<sup>55</sup> will invariably carry with it a discussion of expungement. Undoubtedly, it will take the dedication of advocates across the nation to ensure that the momentum behind the cannabis legalization movement is furthered to those who have been most impacted by this nation's unnecessarily punitive approach to cannabis regulation. More states are legalizing cannabis and decriminalizing plant medicine, showing a strong cultural shift against the policies and practices of the past. Collateral consequence relief laws should mirror this shift. Americans who have been in contact with the criminal justice system deserve a second chance. They deserve the opportunity to meaningfully reintegrate into society.

<sup>53</sup> The Collateral Consequence Resource Center has documented how an: “extraordinary number of laws passed [by thirty-two states, the District of Columbia, and the U.S. Virgin Islands] in 2018 aimed at reducing barriers to successful reintegration for individuals with a criminal record,” saying it was the “most productive legislative year since a wave of ‘fair chance’ reforms began in 2013.” Press Release, Collateral Consequences Resource Center, New Report on 2018 Fair Chance and Expungement Reforms (Updated) (Jan. 10, 2019), <https://ccresourcecenter.org/2019/01/10/press-release-new-report-on-2018-fair-chance-and-expungementreforms/#more-18004> [<https://perma.cc/4AGU-6CH5>].

<sup>54</sup> Biden, J. (2020, October 02). Joe Biden's Criminal Justice Policy. Retrieved November 16, 2020, from <https://joebiden.com/justice/>.

<sup>55</sup> *Supra* note 44 (describing recent attempts at cannabis legalization).



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