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TO: Act 178 Study Committee Members

FROM: Mairead C. O'Reilly, Esq.

RE: Vermont Legal Aid's Expungement Proposals for the 2019 Legislative Session

DATE: October 31, 2018

## I. Issue Statement

Vermont Legal Aid advises and petitions for criminal record expungements on behalf of low-income Vermonters. Through this work, Vermont Legal Aid attorneys see firsthand the devastating and myriad collateral consequences of criminal charges and convictions.

Over the last 10 months, we have helped over 150 Vermonters clear their criminal records. This count does not include some of our expungement clinic clients and countless quick advice phone calls and emails. A majority of these clients have struggled with substance use disorder in the past, and nearly half have old felony or predicate offense convictions that can never be expunged under Vermont's current expungement law. Legal Aid expungement clients talk regularly about desperately wanting a "second chance." Clients share stories about the many and varied ways in which their old criminal records have crippled their job prospects, kept them out of good housing and discouraged them from pursuing higher education. Many have described their experience of living with an old criminal record as a "second sentence" or a "life sentence."

Vermont Legal Aid takes the position that all criminal offenses should be expungement-eligible for individuals who fulfill their sentence requirements and demonstrate their rehabilitation.<sup>1</sup> Additionally, Vermont Legal Aid advocates for a law that enables routine—and for some convictions, petition-less—expungements, with post-sentence wait periods commensurate with the public safety risk posed by the underlying conviction. Below are just two client stories that illustrate what we hear for low-income Vermonters and inform why we are advocating for the policy changes we have laid out in this memo.

## Client Stories

**Mike from Addison County:** Mike is a father of three pre-teenage children and lives in Addison County. Mike struggled with opioid use disorder through his early twenties, and when his addiction was at its worst, he stole from stores to purchase heroin. When he was 25, Mike was charged and convicted of a felony retail theft. He served his sentence for that felony. He also paid his restitution, completed a treatment program, and has been in recovery from opioid use disorder since. Mike got married, had kids, and has now been stably employed by the same company for years. Both Mike and his wife work full-time, but they are barely making enough to provide for their daily needs—say nothing of their ability to save for their children’s college education. A year ago, Mike applied for another job at a neighboring company—let’s call it Opportunity Inc. The hiring manager at Opportunity Inc. told Mike that he would hire him for a position that pays \$15,000-20,000 more than his current job, and has health and retirement benefits, if he could “take care of his criminal record.” Mike needs that job so he can begin saving to put his kids through college—doing so would make them the first generation college students.

But under Vermont’s current expungement law, Mike will *never* be able to expunge that felony off his record. He cannot even get before a judge to show that he has been completely rehabilitated, that he poses no risk to his community, and that his criminal record is literally immobilizing. He also can’t talk about how greatly his children suffer because of his disease—and the decisions he made when he was actively using drugs—when he was in his early twenties. Unless Vermont’s expungement law changes, Mike is fated to earn wages nearly 20% lower than he is otherwise qualified to earn. His children are unlikely to attend college with any financial support from their father, as their monthly bills absorb all the family income.

**Christine from Windham County:** Christine is a well-known community member and mother from Windham County. In the early 1990s, when she was just 24 years old, she was convicted of a felony possession of stolen property. Christine grew up in a violent home, plagued by substance use. She spent her teenage years in and out of foster care. As a young person, Christine struggled with substance use and mental health issues. Christine found her way to the right treatment services and has had no new criminal justice contacts in over 25 years.

Fortunately for Christine, about a decade ago, her local school district hired her on as a paraprofessional educator. However, securing the position took serious efforts and depended upon her community connections, her social capital, her formal education, and her charisma. Immediately after her interview, Christine was hired by the local school district. They loved her and were excited to have her on board. Yet just one month after she started, her criminal background check was returned,

and the school district summarily fired her. It took months of conversations, and countless supplemental reference letters, but Christine convinced the school district that she was not a public safety threat, despite her felony offense. She showed the administrators that she received the help necessary to move beyond her troubled youth. Christine was uniquely lucky. Not all of our clients are as perseverant or as well connected, not everyone can self-advocate like Christine, and fewer still have a Bachelor of Arts from our flagship university.

But now, as a middle-aged woman and mother of two, Christine wants to put her talents to even better use. She dreams of finishing a graduate degree in social work and becoming a counselor.

With the help of Vermont Legal Aid, Christine has petitioned to expunge all of her misdemeanor offenses. Unfortunately, under current law, she will have to live with the old felony record for the rest of her life. Because this record will make it difficult or impossible to obtain her license and secure a job after graduation, and because she does not have financial flexibility to take that risk, she has decided not to pursue higher education and advance her career. Christine is now grappling with the reality that she and her children will continue subsisting on her paraprofessional wages because of this 25+ year old felony offense.

These two stories exemplify the real struggles that Vermonters with old criminal records face, every day, just to provide for their families and to contribute meaningfully to their communities. Below are Vermont Legal Aid's suggestions about how our state can, immediately and concretely, remove the barriers to their successful reintegration.

## **II. Summary of Proposed Amendments**

Vermont Legal Aid has four proposed amendments to Vermont's expungement law for the 2019 legislative session. See Section IV for a detailed explanation and description of the proposals. First, we propose amending two definitions: "qualifying crime" should include several additional non-violent felony offenses, and the definition of "predicate offense" should be clarified and narrowed. Next, we recommend adding a statutory provision that allows an individual to petition for expungement of a non-qualifying crime, upon a showing of rehabilitation, mitigating circumstances, or hardship.<sup>2</sup> Third, we recommend amending the expungement law to create a petition-less process for all "qualifying crimes" and to expedite the process for low-level misdemeanor offenses. Finally, we recommend adding a provision to the expungement law that would expunge every record that is pardoned by the governor.

### III. Brief Policy Rationale

It is unconscionable for any advanced nation to permanently and publicly brand a citizen as a “criminal” for their lifetime after they served their sentence, and without considering their rehabilitation.<sup>3</sup> Yet in Vermont and across the United States, we maintain some criminal records for decades, and in many cases for whole lifetimes. Effectively, our current criminal records laws sentence almost everyone with a felony or predicate offense on their record to a lifetime of economic and social marginalization.

Vermont policymakers understand that substance use and mental health disorders—often precipitated by childhood trauma and poverty—are the root of criminal-legal involvement for many Vermonters.<sup>4</sup> And many understand that the presence of these issues in a person’s life impacts whether that person will be a “repeat player” in the criminal-legal system.<sup>5</sup> The evidence shows that for most people, desistence from criminal activities is possible when they have access to mental health counseling, substance use treatment, education, job training and licensing, and an employment opportunity.<sup>6</sup> This makes intuitive sense and is widely appreciated in Vermont.<sup>7</sup> When people are engaged in meaningful activities—when they are accepted back into society and have a legal way to provide for themselves—they are less likely to reengage in criminal activity.<sup>8</sup>

But there is a troubling disconnect between our understanding of the causes of criminal-legal involvement and our laws related to criminal records. For too many Vermonters with criminal records, the very reintegration opportunities they need to desist from criminal activity are out of reach because of their criminal records. Busy employers, landlords, school administrators, state licensing boards have ready access to criminal background checks,<sup>9</sup> and often premise acceptance of an applicant on that basis.<sup>10</sup> For many decision makers, seeing a single criminal-legal contact on a background check can result in automatic denial or rejection from an opportunity.<sup>11</sup> While the apparent seriousness of the criminal contact often has more weight—most people would weigh a felony more heavily than a misdemeanor—studies continually show that even minor misdemeanor offenses have severe collateral consequences.<sup>12</sup> Ironically, the public safety and liability concerns that underlie or justify criminal records-based denials can actually make our communities less safe, as individuals who are excluded from housing, employment and education are more likely to recidivate.<sup>13</sup>

In addition to the safety issues that arise from maintaining criminal records for too long, Vermont policymakers must pay attention to the harmful economic impacts that dated criminal history records have on individual earnings and our state revenues. The reality is that Vermonters with criminal records struggle to advance their education or careers.<sup>14</sup> The economic impact that a criminal record has on a family’s educational attainment and earnings is intergenerational.<sup>15</sup> Vermont’s

most valuable resource, its human capital, is being wasted by the de facto exclusion of a subset of Vermonters who are able and willing to work—but who happen to have an old criminal record. Furthermore, the exclusion of this population also burdens community and state resources, as people with criminal records earn less income, and therefore contribute less to our tax revenues.<sup>16</sup>

There are legitimate public safety reasons to maintain some criminal records for some amount of time. But the data contained in each record is different, and the predictive value of a criminal record varies with the crime committed and the length of time since the date of the offense.<sup>17</sup> Therefore, not all records need to be maintained for the same amount of time.<sup>18</sup> A criminal record can alert the public of potential danger, and it may, for a period of time, help predict whether an individual will commit a new crime based on their past behavior. But with every year that a person stays out of the criminal-legal system, the predictive value of their record decreases.<sup>19</sup> For an individual who has had no criminal activity for 5-7 years, the predictive value of their old record is minimal—and the likelihood that they will commit a new crime approximates the likelihood that someone without a conviction would commit a crime.<sup>20</sup> For individuals who remained crime-free for that time—except in the most serious of cases—there is no evidence-based justification to maintain their criminal record.

For more than a decade, our state has been committed to helping Vermonters access treatment and recovery supports for substance use disorder, making significant investments to our nationally-recognized Hub and Spoke system. But the returns on our investment are lost when Vermonters in long-term recovery cannot find decent housing and employment or access opportunities for educational advancement, as it jeopardizes their recovery and desistance from criminal activity.

#### **IV. Proposed Amendments**

Vermont Legal Aid proposes the following amendments to our expungement law. If passed, these amendments will help Vermonters—many of whom are in recovery from substance use disorder, have served their sentences, and do not pose a public safety threat—fully integrate into our community and formal economy.

1. **Expand the list of “qualifying crimes,” defined in 13 V.S.A. § 7601(4) and amend 13 V.S.A. § 7601(3) to redefine predicate offenses.**

Vermont Legal Aid advocates expanding the list of “qualifying crimes” that a person can petition to expunge, pursuant to 13 V.S.A. § 7601(4), to include several additional non-violent felony offenses. Additionally, Vermont Legal Aid supports a revision of “predicate offenses,” narrowed to include Title 23, Chapter 13 offenses. (Specifics listed below.)

**The Issue:** Right now, only 4 felony offenses are expungement-eligible in Vermont.<sup>21</sup> Those 4 offenses are listed as “qualifying crimes” in 13 V.S.A. § 7601(4) and are criminal mischief, grand larceny, burglary (not in an occupied dwelling), and prescription fraud. Additionally, countless misdemeanor offense are not expungement-eligible because they are considered “predicate offenses.”

In 2018, when “passing” a background check is a prerequisite for almost any move—into a new home or apartment, into an educational program or a new job—Vermont’s policy of perpetually retaining felony records and many misdemeanor records is harmful and outdated.<sup>22</sup>

**The Opportunity:** As a state, we must do more to help Vermonters break the cycles of criminal-legal involvement and poverty that is exacerbated by a criminal record—and we can accomplish this, in large part, by allowing more people to expunge their criminal records. As a legal remedy, expungement has demonstrated positive impacts on employment opportunities and individual earnings,<sup>23</sup> which translates into higher tax revenues.

### **Specifics of Proposal 1, Part A.**

The following list are the crimes that Vermont Legal Aid sees most frequently in the course of representing Vermonters in recovery from substance use disorder. These are non-violent, property and drug offenses. We propose adding the following to the 13 V.S.A. § 7601(4) list of “qualifying crimes.”

#### **Title 13**

##### **Chapter 29 (Conspiracy)**

- § 1404(c)(4) Conspiracy to receive stolen property
- § 1404(c)(5) Conspiracy related to trafficking substances

##### **Chapter 43 (Forgery and Counterfeiting)**

- § 1801 Forgery and Counterfeiting of Papers, Documents, Etc.
- § 1802 Uttering Forged or Counterfeited Instrument

##### **Chapter 47 (Frauds)**

- § 2001 False Personation
- § 2002 False Pretenses or Tokens
- § 2022 Bad Checks
- § 2030 Identity Theft

##### **Chapter 57 (Larceny and Embezzlement)**

- § 2531 Embezzlement
- § 2561 Receiving Stolen Property
- § 2575 Offense of Retail Theft
- § 2582 Theft of Services
- § 2591 Theft of Rented Property

## **Title 9**

### **Chapter 105 (Credit Cards)**

- § 4043 Credit Card Fraud
- § 4045(a) Illegal Possession of Credit Card

## **Title 18**

### **Chapter 84 (Possession and Control of Regulated Drugs)**

- §4230(a) Marijuana Possession & Cultivation
- §4231(a) Cocaine Possession
- §4231(b) Cocaine Selling or Dispensing
- §4232(a) LSD Possession
- §4232(b) LSD Selling or Dispensing
- §4233(a) Heroin Possession
- §4233(b) Heroin Selling or Dispensing
- §4234(a) Depressant, Stimulant, & Narcotic Drugs Possession
- §4234(b) Depressant, Stimulant, & Narcotic Drugs Selling or Dispensing
- §4234a(a) Methamphetamine Possession
- §4234a(b) Methamphetamine Selling or dispensing
- §4234b(a) Ephedrine and Psuedophedrine, Possession
- §4234b(b) Ephedrine and Psuedophedrine, Sale
- §4235(b) Hallucinogenic drugs, Possession
- §4235(c) Hallucinogenic drugs, Selling or dispensing
- §4235a(a) Ecstasy, Possession
- §4235a(b) Ecstasy, Selling or dispensing

### **Specifics of Proposal 1, Part B.**

VLA also seeks a revision of the “predicate offense” exception in 13 V.S.A. § 7601(3). The list of offenses that can be considered predicate offenses is long, overbroad, and not well understood by attorneys or judges. The list should be narrowed to include just Title 23, Chapter 13 offenses. These should be expungement-eligible after 10 years, if the person has no subsequent DUI offense.

### **2. Amend 13 V.S.A. § 7602 to include a provision allowing for petitions to expunge any crime, not just “qualifying crimes,” after a showing of “rehabilitation, mitigating circumstances, or hardship.”**

**The Issue:** As addressed above, many crimes in Vermont are never expungement-eligible. Along with most felony offenses, misdemeanors that are violent or “predicate offenses” cannot be expunged. The ostensible policy justification is that certain crimes are so violent and severe that either (1) people should have to live with the consequences of having committed them forever, or (2) the person will always be a public safety threat. But reality is not so black and white, and few people can be reduced to “good” or “bad,” or perpetually “dangerous” or “safe.”

People commit violent crimes for a variety of reasons—sometimes for self-protection,<sup>24</sup> sometimes because of substance use that alters a person’s perception about the appropriateness of using violence to resolve conflict.<sup>25</sup>

Thoughtful research out of Massachusetts highlights that most “violent” offenders have suffered through severe trauma and poverty.<sup>26</sup> The author suggests that the policy solutions should focus more on compassion and forgiveness—along with treatment—rather than lifelong punishment.<sup>27</sup> Applying those findings here would translate into a policy that acknowledges and rewards rehabilitation and healing, rather than continues to define someone by their worst moments.

While serious violent crimes perhaps should not be automatically removed from a person’s record without oversight, due to public safety concerns, there is a better balance to be struck. Vermont Legal Aid attorneys have worked with countless Vermonters who have old, aberrant, violent crimes on their records, and who have shown their rehabilitation through treatment, and desistence from criminal activity for decades. Nonetheless, these individuals will be branded a “violent offender” for their lives—with absolutely no recourse—despite the crime having been committed due to exceptional circumstances or conditions that no longer exist (i.e., a severe addiction that is now in remission).

**The Opportunity:** Vermonters should have a legal process to petition for expungement of any crime, and Vermont policymakers should support that change. Specifically, if a person serves their sentence, and demonstrates rehabilitation, mitigating circumstances warranting expungement, or that continued maintenance of their criminal record will result in (further) economic hardship or other injustice, they deserve the opportunity to petition the court and make a case for expungement. The judge can hear the evidence, weigh the risks and benefits, and determine whether expungement serves the interest of justice. Stipulation by the State’s Attorney should not be required to file a petition with the court.

**Specifics of Proposal 2:**

- a. Five years after the date on which a person completes their sentence for a non-qualifying crime, the person may petition the court for an expungement, provided they (1) have not been convicted of any new crime; (2) have paid their restitution; (3) have been “rehabilitated,”<sup>28</sup> or can make a showing that there are mitigating circumstances,<sup>29</sup> or can show that the maintenance of their record could create a significant hardship.<sup>30</sup>
- b. The State’s Attorney may object;
- c. The court will grant a hearing for petitioner whose motion meets basic threshold requirements. Court shall grant petition if doing so would serve the interests of justice.



**3. Create an automatic (i.e., petition-less) expungement process for all qualifying crimes.**

**The Issue:** As is the case for all legal remedies, premising the attainment of an expungement on a person’s ability to navigate any court process raises “access to justice” concerns, even when that process is relatively administrative. While the expungement process is one that can be completed by a self-represented person, that person still needs the competency, time and money to draft and file a petition with the court, negotiate with the prosecutor, attend a hearing—if necessary—and pay the \$90 filing fee. This process, like all legal processes in the United States, privileges those with certain cognitive, social and economic resources.

**The Opportunity:** Creating a petition-less expungement process for every eligible conviction would be an achievement for equal access to justice and would save judicial resources. Doing so would enable all eligible Vermonters to clear their records without having to call an attorney, file the petition, or pay the filing fee, which is prohibitive for some.

**Specifics of Proposal 3:**

- a. Low-level misdemeanor convictions with ordered sentences of probation and/or fines, should be expunged by the court 2 years from the date sentence is finished.<sup>31</sup>
  - b. For all other qualifying crimes, records would be expunged 4 years from date on which the individual completed their sentence, if they have not committed a new crime since that date and have paid all restitution. <sup>32</sup>
  - c. No hearing unless the State’s Attorney objects or the Court needs it for some other reason.
  - d. No filing fee.
4. **Pardoned offenses are immediately expunged by the Courts** (See, e.g., Massachusetts’ law on this topic.<sup>33</sup>)

**Brief Policy Rationale:** Currently, a pardon from a sitting Vermont governor does not necessarily address the collateral consequences of a criminal conviction. Each applicant completes a lengthy pardon application, but that person’s record does not get sealed or expunged if the pardon is granted. The effect is that decision-makers like landlords, employers, licensing agencies, and educational institutions will still see a person’s entire criminal record. A pardon, then, is largely a symbolic remedy.

#### Specifics of Proposal 4:

- a. When the governor approves a pardon application, the governor's staff will send the pardon to the court clerk's office, who will then process it as though it were an order to expunge/seal.
- b. The legal effect of a pardon shall be the same as an expungement.

## V. Conclusion

Working with hundreds of Vermonters with criminal records-related issues over the last year has reinforced for Vermont Legal Aid the wisdom of expanding access to the expungement remedy, as our neighbors in New Hampshire and Massachusetts have done. We believe that failure to expand access meaningfully will result in lost revenues for the state, an increase in recidivism and a decrease in public safety through the continued economic and social marginalization of tens of thousands of Vermonters. The collateral consequences of criminal records keep otherwise qualified community members from accessing educational and employment opportunities necessary to support their families, create meaningful and dignified lives, and help community leaders build the best possible Vermont—even after they have been rehabilitated and their records no longer retain any predictive value. Simply put, removing the unnecessary barriers to income-generating opportunities that many Vermonters face—such as stale criminal records—is an *investment* in our people and our communities that will undoubtedly pay off.

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<sup>1</sup> For a discussion on metrics to gauge rehabilitation, *see generally*, Jeffrey A. Butts and Vincent Schiraldi, *Recidivism Reconsidered: Preserving the Community Justice Mission of Community Corrections*, HARVARD KENNEDY SCHOOL, EXECUTIVE SESSION ON COMMUNITY CORRECTIONS (2018) (the authors suggest that policymakers considering justice interventions should focus on desistance from crime as a more accurate measure of individual and programmatic success, rather than recidivism. They assert that “recidivism is inherently a measure of person-bureaucracy interactions. It is not simply an indicator of individual failure. Thus, it would be inappropriate to place the onus for recidivism entirely and exclusively on the individual.”).

<sup>2</sup> When individuals with certain convictions are broadly unable to access expungement relief, ever, this raises 8<sup>th</sup> amendment concerns, as these individuals are effectively sentenced to a “civil death.” For a discussion on the 8<sup>th</sup> amendment concerns and the history of civil death in the United States, *see generally*, Gabriel J. Chin *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. Pa. L. Rev. 1789 (2012).

<sup>3</sup> *See generally*, G. J. Chin, *Collateral consequences*. In E. Luna (Ed.), *Reforming Criminal Justice: A Report of the Academy for Justice on Bridging the Gap between Scholarship and Reform* ACADEMY FOR JUSTICE 4, 371–395, (2017) (discussing potential constitutional concerns for people who have lifetime criminal records); *See generally*, James B. Jacobs, *The Eternal Criminal Record*, Harvard University Press (2015) (contrasting the United States’ and the European Union’s policies on criminal records and highlighting that in EU member countries, criminal record information is confidential and therefore inaccessible to the general public because of individual privacy concerns and the severe harm that a public-facing record would have on an individual’s reputation and life).

<sup>4</sup> *See generally*, James A. Reavis, PsyD, Jan Looman, PhD, Kristina A Franco, and Briana Rojas, *Adverse Childhood Experiences and Adult Criminality: How Long Must We Live Before We Possess Our Own Lives?* THE PERMANENTE JOURNAL (2013); RH Peters, HK Wexler, AJ Lurigio, *Co-occurring*

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*substance use and mental disorders in the criminal justice system: A new frontier of clinical practice and research.* *PSYCHIATRIC REHABILITATION JOURNAL*, 38(1), 1-6, at 1 (2015)(discussing the prevalence of mental health and substance use issues within the “offender population” as compared to the general population); *See also, Behind Bars II: Substance Abuse and America’s Prison Population* THE NAT’L CENTER ON ADDICTION AND SUBSTANCE USE AT COLUMBIA UNIV., (2010)(discussing the prevalence of mental health and substance use in offender population); *See generally, David Lebowitz, “Proper Subjects for Medical Treatment?”* *Addiction, Prison-Based Drug Treatment, and the Eighth Amendment*, 14 DePaul J. Health Care L. 271 at 274 (2012) (asserting that 70-85% of inmates need some form of substance use treatment because of underlying disorders).<sup>5</sup>“First contact” is the first contact with the criminal legal system, which is typically by arrest or citation.

<sup>6</sup> *See generally, Mark T. Berg and Beth M. Buebner, Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, *JUSTICE QUARTERLY* (2011); *See also, An Overview of Offender Reentry*, NATIONAL INSTITUTE OF JUSTICE, (2018).

<sup>7</sup> *See, e.g., Attorney General Donovan Touts Progress on Criminal Justice Reform Initiatives* (August 2, 2018), <http://ago.vermont.gov/blog/2018/08/02/attorney-general-donovan-touts-progress-on-criminal-justice-reform-initiatives/>; *See also, Ban the Box Bill Becomes Law*, *Vermont Business Journal* (May 3, 2016, 1:30 pm), <https://vermontbiz.com/news/may/%E2%80%98ban-box-%E2%80%99-bill-becomes-law-vermont>

<sup>8</sup> *Id.*; *See also, Andrew von Hirsch & Martin Wasik, Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 *CAMBRIDGE L.J.* 599, 605(1997) (asserting that “[t]he more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.”).

<sup>9</sup> *See, e.g., Michelle Rodriguez and Maurice Emsellem, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment.* NATIONAL EMPLOYMENT LAW PROJECT (2011) (Citing a study that found 90% of employers today use criminal background checks to screen employees).

<sup>10</sup> They rely on the results of these checks to decide whether an applicant will be a “good” tenant, student or employee. *See generally, David Thacher, The Rise of Criminal Background Screening in Rental Housing*, *LAW & SOCIAL INQUIRY* 33 (1) (2008); *See also, CENTER FOR COMMUNITY ALTERNATIVES, The Use of Criminal History Records in College Admissions Reconsidered* at 2 (citing a survey that found 66.4% of colleges collect criminal justice data on applicants, and discussing implications); *See, Rodriguez et al., supra* note 9 at 1.

<sup>11</sup>*See, Eisha Jain, Proportionality and Other Misdemeanor Myths*, *B.U. L. REV.* 98, 953 at 958 (2018); *But see, 21 V.S.A. § 459j* (The Vermont legislature passed a Ban the Box law in 2016—it went into effect July 2017. This law helps address the issue of “legal discrimination” of people with criminal records from employment opportunities, by prohibiting employers from asking about applicants’ criminal history on an initial application. While this is an important start, the protections of the law are limited. First, the law only applies to employers—it does not extend to colleges or training programs, or to private landlords or non-profit housing agencies. Second, applicants can be—and reportedly, are—asked the “criminal record question” early in their first interviews. Many low income applicants feel that their answer to that question is dispositive, even if the interview went exceedingly well until that point.)

<sup>12</sup> Jenny Roberts, *Informed Misdemeanor Sentencing*, *HOFSTRA L. REV.* 46, 171 (2018); Jain, *supra* note 11; Alexandra Natapoff, *Misdemeanors in ACADEMY FOR JUSTICE, A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM* (Erik Luna ed. 2017); UC Irvine School of Law Research Paper No. 2017-41 at 87.

<sup>13</sup> Rodriguez et al., *supra* note 9.

<sup>14</sup> *See, Cherrie Bucknor and Alan Barber, The Price We Pay: Economic Costs of Barriers to Employment for Former Prisoners and People Convicted of Felonies*, CENTER FOR ECONOMIC AND POLICY RESEARCH (June 2016)(finding that men who were former prisoners or who had felony convictions, their employment rate was 1.6-1.8 percentage points lower than their non-criminally involved counterparts). Vermont Legal Aid advocates regularly hear from clients with 10, 15, 20,

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even 30 year old convictions that they cannot get into a college program or that they still get denied by employers solely due to their old record.

<sup>15</sup> See, e.g. Rebecca Vallas, Melissa Boteach, Rachel West, & Jackie Odum, *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children: A Two Generational Approach*, CENTER FOR AMERICAN PROGRESS (2015)(discussing the intergenerational harms caused by a parent’s criminal involvement and subsequent criminal record); See also, Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, THE PRISON POLICY INSTITUTE (2016).

<sup>16</sup> See generally, Rebecca Vallas and Shannon Dietrich, *One Strike and You’re Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, at 9-10, CENTER FOR AMERICAN PROGRESS, (December 2014). (Discussing reduced earnings for people who have criminal records: “a history of incarceration is associated with a substantial reduction in earnings. Formerly incarcerated men work nine fewer weeks per year and take home 40 percent less pay annually, resulting in an average earnings loss of nearly \$179,000 by age 48.) See also, Vallas et al., *supra* note 15, at 4 (citing a National Institute of Justice study that found “having any arrest during one’s life diminishes job prospects more than any other employment-related stigma, such as long-term unemployment, receipt of public assistance, or having a GED certificate instead of a high school diploma.”)

<sup>17</sup> See generally, Alfred Blumstein and Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, CRIMINOLOGY 47 (2) (2009): 331

<sup>18</sup> Consider, by contrast, the fluidity of a credit report.

<sup>19</sup> See, Megan C. Kurlycheck, Robert Brame and Shawn D. Bushway, *Scarlet Letters and Recidivism: Does Old Criminal Record Predict Future Offending?*, CRIMINOLOGY & PUBLIC POLICY 483-504 (2006); See also, Merf Ehman & Anna Reosti, *Tenant Screening in an Era of Mass Incarceration: A Criminal Record is No Crystal Ball*, NYU J. LEGIS. & PUB. POL’Y., March 3, 2015 (for discussion on use of criminal records, and for a review of studies demonstrating the predictive ability of records on future dangerousness).

<sup>20</sup> Kurlychek *supra* note 19 at 499.

<sup>21</sup> 33 V.S.A. § 5119(g) provides that when a person commits any crime before turning 21 years old, they can petition to seal it, 2 years after they were discharged from their sentence, if they were not subsequently convicted of a listed crime under 13 V.S.A. § 5301(7).

<sup>22</sup> It is also worth noting that the threshold for when someone commits a felony offense—considering that it creates a life-long record—is low and arbitrary. E.g., a person is guilty of committing a felony offense for marijuana possession if they possess 2 ounces or more. 18 V.S.A. § 4230(A)(1)(2). A person is guilty of committing a felony retail theft if they stole merchandise with a retail value of over \$900. 13 V.S.A. § 2577.

<sup>23</sup> For a discussion of the employment benefits of expungements, see generally, Jeffery Selbin, Justin McCrary and Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, J. CRIM. L. & CRIMINOLOGY 1 (2018); Meyli Chapin, Alon Elhanan, Matthew Rillera, Audrey Solomon, Tyler Woods, *A Cost Benefit Analysis of Criminal-Record Expungement in Santa Clara County*, STAMFORD UNIVERSITY, PUBLIC POLICY SENIOR PRACTICUM at 15 (2014) (finding that respondents whose records were expunged earned, on average, \$6,190 more annually after obtaining an expungement).

<sup>24</sup> See generally, Leigh Goodmark, *When is a Battered Woman Not a Battered Woman? When She Fights Back*. Yale J.L. & Feminism 20, 1 (2008).

<sup>25</sup> Aaron A. Duke, Kathryn M. Z. Smith, Lindsay M.S. Oberleitner, Alexander Westphal, Sherry A. McKee, *Alcohol, Drugs, and Violence: A Meta-Meta Analysis*, PSYCHOLOGY OF VIOLENCE, 238-249 (2018).

<sup>26</sup> Bruce Western, *Violent offenders, often victims themselves, need more compassion and less punishment*, USA Today, August 9, 2018 at 4:57 pm (citing author’s study showing that in study population of men reentering society after prison, “half of the 122 people we interviewed told us they had been beaten by their parents; 40 percent had witnessed someone being killed; 30 percent grew up with other family violence; and 16 percent reported being sexually abused. Nine out of ten of the people we interviewed got in fights throughout adolescence. An additional 50 percent said they were

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seriously injured in assaults or accidents as children...Violence is as much a characteristic of places as of people. Poor and chaotic homes, disorderly and low-income neighborhoods, and the prisons and jails that lie, in some cases, in close proximity to them, are places where violence frequently happens.”)

<sup>27</sup> *Id.*

<sup>28</sup> For example, if the petitioner’s crime was related to their substance use disorder, they could show that they were or are engaged in treatment, or have been working to positively contribute to their community either formally or informally.

<sup>29</sup> E.g., petitioner may have been a victim of domestic violence who was dually arrested with the abusive party, or petitioner may have been arrested for finally “fighting back.”

<sup>30</sup> E.g., petitioner might make a showing that they are not a threat to the public safety. They could also show how their record poses a barrier to employment or other important opportunities for personal/professional development.

<sup>31</sup> Several states have shorter wait-times for misdemeanors, sometimes as short as one year, see, e.g., New Hampshire (Waiting periods range from one year for a violation, three years for misdemeanors, five years for a class B felony and ten years for a Class A felony and sexual assault, indecent exposure, and lewdness. NH. STAT. ANN. § 651:5(III)); Nevada (eligibility waiting period varies depending on the seriousness of the offense—for felonies, 2-10 years after the date of conviction or release from actual custody, whichever is later; for misdemeanors, 1-7 years, Nev. Rev. Stat. § 179.245(1)); Massachusetts (effective October 2018, waiting periods for sealing records are 3 years for misdemeanor offenses and 7 years for felony offenses, <https://malegislature.gov/Laws/SessionLaws/Acts/2018/Chapter69>).

<sup>32</sup> Currently, all qualifying crimes are non-violent property and drug-related misdemeanors and 4 felonies. Even if Vermont expanded the qualifying crimes definition to include more felony offenses, these would still be non-violent felony offenses. A person would serve their sentence—which is commensurate with the severity of the crime—and then have to wait an additional 4 years.

<sup>33</sup> MASS. GEN. LAWS CH. 127, § 152. “Upon approval of a petition for pardon, the governor shall direct all proper officers to seal all records relating to the offense for which the person received the pardon. Such sealed records shall not disqualify a person in any examination, appointment or application for employment or other benefit, public or private, including, but not limited to, licenses, credit or housing, nor shall such sealed record be admissible in evidence or used in any way in any court proceeding or hearing before any board, commission or other agency except in imposing sentence in subsequent criminal proceeding.... On any application or in an interview for employment, or in any other circumstances, where a person is asked whether he has been convicted of an offense, a person who has received a pardon for such offense may answer in the negative. The attorney general and the person so pardoned may enforce the provisions of this paragraph by an action commenced in the superior court department of the trial court.”