

A Criminal Record is its Own Criminal Sentence



The Case for Automatic Expungement in Virginia

One of every three adults in the United States has a criminal record. These records, however, are more than just files stowed away in a database—they have living, breathing consequences that last far beyond a judge’s ruling or the end of a jail or prison sentence. A criminal record can stand in the way of renting an apartment, securing a job or a work credential, gaining admission to or paying for college, keeping custody of children, leaning on public benefits programs when needed, and voting in elections.

These barriers are built into state and federal law, such that they can no longer credibly be called “collateral consequences”; instead they function as explicit policy choices that extend the reach of a punitive criminal legal system into the basic daily needs of individuals and families across the nation. Compounded with this country’s legacy of disproportionate targeting of Black, brown, indigenous, and other traditionally marginalized people and communities by the criminal legal system, criminal records serve as a cornerstone of structural racism in our society.

There are numerous policy opportunities to address the negative impacts of the criminal legal system both before and while an individual is moving through it, but there is one clear, necessary reform that should be enacted once an individual’s case has resolved: **criminal record expungement**—a process to clear a person’s criminal records at a point certain, whether through record sealing or destruction. At an individual level, people must be able to meaningfully move past their case files and start fresh. At a structural level, expungement provides an unparalleled opportunity to redress the racial, economic, and social harms and havoc wreaked by an unjust system.

PEOPLE MUST BE ABLE TO MEANINGFULLY MOVE PAST THEIR CASE FILES AND START FRESH

Virginia Must Reform Its Current Expungement System

Virginia has some of the most restrictive criminal record laws in the country. It is one of only seven states that do not allow expungement of any criminal convictions, and currently limits expungement only to non-conviction records (prosecutions that did not result in conviction).ⁱ Even further, Virginia demands that a person navigate a costly and complicated petition-based court process—which often requires the help of a lawyer, a luxury many people cannot afford.

The Commonwealth’s limited system is a policy choice—first enacted in 1977 and never significantly changed in the 43 years since—but it can and

should be reformed and expanded. Individuals and communities need it, and public safety goals even demand it: despite fears about spikes in crime if expungements are granted, a recent study indicates “expungement recipients pose a lower crime risk than the general population” as a whole.ⁱⁱ

Virginia should not remain stuck in the past, and neither should those with criminal records. Expungement in the Commonwealth should be equitable, far-reaching, automatic, and free.

The Current System Is Flawed:

Expungement in Virginia Is Inaccessible

Even though Virginia has the 16th highest incarceration rate in the United States,ⁱⁱⁱ expungement of criminal records here is rare. According to the Virginia State Crime Commission, Virginia averages just 4,000 expungements each year.^{iv} Contrast this with Pennsylvania, which has expunged 47 million criminal records since June 2019, benefiting an estimated 1.1 million individuals.^v In Virginia, a person with a criminal record can only ask a court to expunge the record when:

- The person is found not guilty after a trial;
- The charge is dropped by the prosecutor or otherwise dismissed;
- The person’s identity was used without their consent; or
- The governor issues an absolute pardon because the person was wrongfully convicted.^{vi}

Virginia’s expungement laws are so limited that prosecutors can ensure a charge stays on a person’s record simply by offering a plea to a lesser offense. In a 2011 Virginia case, police arrested a man for two felonies. He pleaded guilty to two misdemeanors when the charges were reduced to secure his plea and served no active jail time. He later petitioned a court for expungement of the two felonies but was denied because he had pleaded guilty to lesser crimes.^{vii}

A PERSON CAN EASILY BE DERAILED, FRUSTRATED, INTIMIDATED, LACKING RESOURCES AND TIME TO COMPLETE THE PROCESS, OR JUST SIMPLY DENIED.

Expungement in Virginia Is Difficult to Navigate

Virginia’s cumbersome expungement process is rooted in a court-based petition process. Many of the steps are best accomplished with the help of a lawyer; many steps take considerable time (weeks and even months); and many steps require navigating multiple systems in difficult ways, some of which cost money and all of which must be successfully completed before moving on to the next requirement. There are minor differences depending on the court, but ultimately, if otherwise eligible, a person seeking expungement must:

1. Determine where in Virginia the court records are located.
2. Determine whether any of the charges are eligible.
3. Obtain certified copies of the necessary court records from the court.
4. Complete a petition for expungement, a cover sheet, and a request for a hearing.
5. Pay a filing fee or successfully receive a discretionary fee waiver.
6. Ask the court clerk to direct the sheriff to serve the Commonwealth’s Attorney a copy of the expungement petition.
7. Obtain a set of fingerprints.
8. Attend a court hearing for a judge to consider the petition.
9. Obtain a court order approving the expungement.

At any point on this complicated path, a person can easily be derailed, frustrated, intimidated, lacking resources and time to complete the process, or just simply denied.

The Current System Is Flawed:

Expungement in Virginia Is Costly

In practical terms, for most people, a successful expungement petition requires a lawyer. Legal representation is often expensive and out of reach for many people. Roughly 80 percent of people charged with a crime require a court-appointed counsel because they cannot afford to hire a lawyer on their own.^{viii} And even so, filing a petition for expungement is a civil—as opposed to a criminal—process, so Virginia is not required to provide a lawyer if a person cannot afford one.

Expungement in Virginia Is Too Discretionary

Even if a person is eligible for expungement, has obtained a lawyer, and has successfully completed all the complicated steps needed to apply, their petition may still be denied. Virginia law gives courts broad discretion to deny expungement, even when that charge qualifies. The law provides that a court can deny a person expungement unless continued dissemination of the record would create a “manifest injustice” to the person.^{ix}

The Expungement System Virginia Needs

Make expungement equitable: Virginia’s criminal legal system has disproportionately affected Black, brown, and indigenous people and other traditionally marginalized groups. Expungement laws should recognize that Virginia incarcerates Black people at three times the rate of white people, and that Black people are arrested at higher rates for certain offenses, such as marijuana possession. Through expungement reform, Virginia can begin to acknowledge that our criminal legal system has applied and continues to apply differently and more harshly to Black, brown, and indigenous people and communities.

Make expungement far-reaching: Current Virginia law makes all criminal convictions permanent and public, no matter how many years have passed. A recent Michigan study showed that individuals with criminal records who have access to expungement are actually less likely to reoffend than a person with no criminal record at all. No criminal record should permanently deprive a person of access to housing or gainful employment. “Public safety” is better served when people and communities can truly benefit from the second chances that expungement provides.

Make expungement automatic: Virginia’s current petition-based system, which requires a lawyer to successfully navigate, means only a fraction of eligible records will ever be expunged. In other states like Pennsylvania, Michigan, and Utah, the courts determine when criminal records are eligible and expunge them automatically on a monthly basis. If an eligible charge is missed, a person can still petition a court to see if it qualifies for expungement. Systems should not be challenges for people to overcome, but rather services that make people’s lives better.

Make expungement free: Automatic expungement does not eliminate the costly and time-consuming petition-based system, but it makes that process necessary only in a few cases. A far-reaching automatic expungement system would remove cost barriers for most people, and the Commonwealth could eliminate or waive fees for any remaining petition-based alternatives. Fines and fees should not prevent anyone from expunging a criminal record. Justice should not be provided only to those who can afford it.

An Equitable, Far-Reaching, Automatic, Free Expungement System in Virginia Will Strengthen Communities and Help Eliminate Barriers to Meeting Basic Needs

The Barriers of a Criminal Record Reach Deep into People’s Lives

A criminal record can relocate a person to the margins of society, preventing them from reentering as a full community member. In 2011, then-Attorney General Eric Holder said criminal records “impose additional burdens on people who have served their sentences, including denial of employment and housing opportunities, without increasing public safety.”^x In addition to housing and employment barriers, a criminal record creates barriers to educational opportunities, family reunification, public benefits, transportation, and acts of citizenship like voting and running for office. These barriers remain long after a person’s criminal case has ended.

J.H. • Not Convicted but Punished Anyway

J.H. had just left an abusive ex-boyfriend when he falsely accused her of two misdemeanor offenses. She called the Commonwealth’s Attorney to explain the situation and was told they did not intend to pursue the charges. Three months later, the prosecutor did, in fact, tell the court the case would not go forward. Relieved, J.H. thought she could put these events in her past, but she soon learned that even charges that do not result in conviction can wreak havoc on people’s lives.

Twice her application for an apartment was denied because of her “criminal record,” without any further explanation. J.H. paid for a background check on herself and discovered the charges she thought were dropped still appeared on her record. Unable to find housing, J.H. was forced to sleep on the street for a time. Eventually, she was accepted for an apartment, but only because she was able to explain the charges to a landlord who understood. Reliving the painful details of her abusive relationship and recounting them to a complete stranger was the only way for J.H. to find a safe, stable place to live.

Whitmore • Basic Needs And Parenting Responsibilities Out of Reach

Whitmore was convicted of distributing marijuana in 2012. A circuit court sentenced him to jail and he was released about a year later. But jail wasn’t the full price he paid for his crime: as soon as he was convicted, he—like thousands of other Virginians—lost his right to vote, serve on a jury, run for elected office, and possess a firearm. Finding housing was virtually impossible. With a conviction, federal law prevents him from obtaining public housing, and many private landlords saw his conviction and closed the door. He now pays \$575 a month for a single room, where rain sometimes drips through the ceiling onto his bed.

Three years later, after he was released from prison, Whitmore was told his criminal record meant he couldn’t even chaperone his child on a field trip. And just recently, even with more than five years of professional driving experience under his belt, and even though he had been out of jail for eight years, a limousine service company denied him employment because of his conviction. “When you open your eyes in the morning, it’s exhausting,” Whitmore says. “The state of mind of being a convicted felon is very hopeless and depressing.”

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Endnotes

- i) A recent report by the Collateral Consequences Resource Center, which tracks expungement laws across the country, ranks Virginia 44th in its report card for laws relating to restoration of rights and criminal record relief. The report gives Virginia an F for felony record relief and another F for misdemeanor record relief. Margaret Love & David Schlusel, *The Many Roads to Reintegration*, Collateral Consequences Resource Center (Sept. 2020) at 42, <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf>.
- ii) J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460, 2514 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
- iii) The Sentencing Project, *State-by-State Data*, <https://www.sentencingproject.org/the-facts/#rankings> (last visited Jan. 2, 2021) (showing Virginia incarcerated 422 people per 100,000 residents in 2019, the last year for which data are available).
- iv) Virginia State Crime Commission, *Automatic Expungement at 2* (Aug. 31, 2020), <http://vscc.virginia.gov/2020/VSCC%20Presentation%20-%20Automatic%20Expungement.pdf>.
- v) <https://www.mcall.com/news/breaking/mc-nws-pennsylvania-clean-slate-law-one-year-20200630-ges77qb3ffahhizn-bjzjtelq7q-story.html>.
- vi) See Va. Code § 19.2-392.2.
- vii) *Necoise v. Commonwealth*, 281 Va. 666 (2011).
- viii) Caroline Wolf Harlow, *Defense Counsel in Criminal Cases* (Washington: Bureau of Justice Statistics, 2000), <http://www.bjs.gov/content/pub/pdf/dccc.pdf>; Alexandra Natapoff, *Gideon's Silence*, *Slate* (May 31, 2006), <https://slate.com/news-and-politics/2006/05/gideon-s-silence.html>; Rebecca Buckwalter-Poza, *Making Justice Equal*, Center for American Progress (Dec. 8, 2016), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/12/08/294479/making-justice-equal/#:~:text=Other%20estimates%20for%20the%20percentage,as%20high%20as%2090%20percent>.
- ix) The “manifest injustice” standard of the expungement law was recently described by the chief justice of the Virginia Supreme Court as “a statutory scheme that somewhat muddles legislative intent.” *A.R.A. v. Commonwealth*, 295 Va. 153, 165 (2018) (Lemons, C.J., concurring).
- x) Letter from Eric Holder, U.S. Attorney Gen., to State Attorneys Gen. (April 18, 2011), https://csgjusticecenter.org/wp-content/uploads/2014/02/Reentry_Council_AG_Letter.pdf.