



Free markets. Real solutions.

R STREET SHORTS NO. 79
November 2019

MICHIGAN'S OPPORTUNITY TO PROMOTE SECOND CHANCES

Nila Bala

INTRODUCTION

Close to one-third of the population has a criminal record, with Michigan courts churning out nearly 300,000 convictions every year.¹ Even a minor record can present an enormous barrier to employment, housing and educational opportunities. Those with criminal records face unemployment numbers that exceed those during the great depression.² Moreover, both public and private housing can be hard to obtain, and the record of one family member can lead to eviction for everyone.³ Given these vast effects, carrying a criminal record has been equated to a life sentence of poverty.⁴

However, expungements or methods to seal records from public view (known as “set-asides” in Michigan) have great potential to ameliorate these effects. Like most states, Michigan has an expungement policy to help ease the barriers reentering individuals face because of their records. But unlike most states, Michigan has a wealth of information and data regarding the current state of set-asides, thanks to a recently published empirical study by J.J. Prescott and Sonja Starr at the University of Michigan Law School.⁵ Notably, their study finds that despite the fact that thousands of

individuals are eligible for expungements, very few—just 6.5 percent of eligible Michiganders—have received relief.

As part of a larger nationwide movement to utilize technology to automatically clear records, a current seven-bill “Clean Slate” package under consideration could change that.⁶ It would also increase the number of eligible offenses, for example, by including driving and marijuana offenses to the list of crimes that can be set-aside, and by forgiving individuals who have had multiple convictions because of one bad night. The bills have already passed the Michigan House with bipartisan support and are now in the hands of the Senate.⁷

Accordingly, this paper examines the current state of set-asides and the implications of expanding expungement relief, including to public safety and the economy, and finds that even considering the short-term costs associated with automation, ultimately the benefits outweigh these costs.

THE POWER OF SET-ASIDES

For many employers, a criminal record—however dated or minor—is grounds enough to deny a job. In fact, they have been found to reduce callbacks from employers by up to 50 percent.⁸ There are many possible reasons this might be the case, including the associated stigma and the fear that employees may be dishonest. But the reality is that many of these employees are hard-working and loyal individuals, whose records do not reflect their abilities or potential work performance.⁹

For these reasons, a set-aside can be incredibly beneficial in providing them with a second chance. Once a record is set-aside, a person has the legal right to respond “no” to an employer, landlord or educational institution’s question about a criminal record. This can make a huge difference: For example, those in Michigan who received a set-aside had their wages go up by 25 percent.¹⁰ Set-asides can also help individuals receive occupational licenses, which are required for about a quarter of Michigan’s workforce.¹¹ Currently occupational licenses shut out many Michiganders from these sought-after jobs because licensing boards consider the “moral character” of the applicant. This requirement equates to a criminal background check, and prevents licensing even when the conviction is not directly related to their occupation.¹² Although such requirements were created in part to ensure public safety, they actually might do the opposite, as one study found that the states with the most occupational licenses also have the highest rates of re-offense.¹³

In contrast, set-asides can be safely provided while preserving public safety and reducing the rate of reoffense. In fact,

re-offense rates among those who have received them are very low—at just 6 percent, which compares favorably to the rate in the general population.¹⁴ This is likely due to two factors. First, individuals who have received set-asides have already proven through a waiting period that they are committed to staying crime-free. Additionally, the set-aside itself likely helps individuals stay that way by opening the doors to more employment opportunities. Employment is one of the key factors that helps to reduce crime, and by improving opportunities for justice-involved individuals to earn money in lawful ways, set-asides reduce the likelihood that a person will reoffend. In the event that an individual does have future contact with the criminal justice system, Michigan (and most other states) permit sealed convictions to be used by law enforcement and the justice system, so set-asides need not be viewed as a free pass.

Set-asides also have positive effects beyond the individual. Criminal records can lead to instability within the family unit, and children’s future physical and mental well-being is threatened.¹⁵ By helping parents get jobs and lifting families out of poverty, set-asides can improve children’s prospects as well. Once well-employed, parents are less likely to rely on government assistance to support their families, and their children go on to have better future earnings themselves.¹⁶

And, these effects extend beyond the family unit: Perpetual unemployment and underemployment are a drag on Michigan’s economy. Between \$78 and \$87 billion annually is lost in the United States due to the unemployment and underemployment of those with criminal records.¹⁷ For this reason, expected public benefits after expungement include an increase in GDP, an increase in tax revenue and a reduction in government assistance benefits.¹⁸ One study in California found that the benefits of expungement outweighed costs by about \$5,800 per person in one year.¹⁹ This estimate factored in the cost of the governmental process in the first year, a cost that could be considerably reduced through automation.

AUTOMATING SET-ASIDES

A version of a set-aside policy has been in effect in Michigan since the 1960s, but expungements were very rare until a change to the law in 1983.²⁰ Despite the change, however, it is unfortunate how few eligible individuals receive set-asides. There are a number of reasons this could be the case, including a lack of knowledge, a difficult process, high costs and lack of access to counsel to assist individuals in filing for one. On top of these barriers is an information gap, as many individuals do not know about set-asides, whether they are eligible or how to apply. And, even those who are fortunate enough to know about the process must sort out whether or not they qualify for one.

Moreover, eligibility in Michigan has thus far been fairly narrow; the law severely restricts the number and type of con-

victions that are eligible. Only those with one felony or two-or-fewer misdemeanors are eligible, even if more than two charges originated from one incident.²¹ Additionally, only certain convictions are eligible for relief. For example, even though recreational marijuana has recently been legalized, marijuana convictions are not currently eligible for expungement (this affects up to 235,000 Michigan residents who have marijuana convictions).²²

Assuming an individual qualifies, he or she must endure multiple steps and administrative hurdles, including tracking down the application form, interpreting the fairly long and complicated instructions, getting fingerprinted, finding a notary and making multiple trips to the courthouse to turn in forms and attend hearings.²³ There is also a \$50 fee that cannot be waived, with a total cost that is even higher (including the notary fees and payment for a certified record). And, while the process can be completed pro se, it is difficult and is therefore made easier with an attorney, which can also increase the cost.

These processes are the antithesis of a limited and effective government, as they take up valuable court time and resources for relief that the law has already made available. They also perpetuate inequality in the system, as individuals who are well-resourced and educated are more likely to be able to navigate them and receive an expungement. At the root of all of these barriers is the fact that the individual must be the one to activate and carry out the process. If expungements were automated, a lack of knowledge about the process or difficulty in navigating the court system would no longer be hurdles. This is the core idea behind the Clean Slate initiative.

Automation does carry initial costs. In Michigan, records are maintained in individual courts throughout the state that are not yet set up for automation, and official criminal histories will likely have to be obtained from the Michigan State Police.²⁴ Accordingly, there will be start-up costs—and they may be significant—with creating the infrastructure to identify who is eligible for automated relief, and then ensuring that relevant agencies set-aside the record.²⁵ In the long run, however, investing in automation will be worthwhile. Other states, such as Pennsylvania, have already found that automation leads to long-term cost savings. One study found that after automation, the cost-per-clearance is around 5 cents, as compared to costs-per-application, which can be in the thousands in a petition-based model (this includes the court’s and the petitioner’s time).²⁶ Additionally, these cost comparisons do not even take into account all the public and individual economic benefits that will be incurred as more people gain set-asides. Finally, organizations like Code for America have already piloted core technology to help read criminal records and determine eligibility, and this technology can be implemented to make Michigan’s Clean Slate vision a reality.²⁷

Another concern is whether automation will threaten public safety, since set-asides would occur without a hearing. However, on this account, it is important to consider that the proposed legislation would create a ten-year waiting period, and would not include assaultive crimes, serious misdemeanors or offenses punishable by ten or more years. Some more serious offenses are eligible for set-asides, but only by application and by review of a judge. Set-asides can therefore be safely granted to eligible individuals, and in fact, are likely to ultimately improve public safety since overall set-asides are associated with lowered recidivism.²⁸ This increases individuals' chances for successful reintegration with their community.

EXPANDING ELIGIBILITY

Along with the fact that many eligible individuals do not take advantage of expungements, Prescott and Starr found that the rigid limits placed by the law also exclude many deserving individuals.²⁹ For example, anyone with two felonies is excluded, even when those felonies arose out of the same incident. For example, despite doing all the right things since coming home from prison, Jarret Ruffin, a Detroit native, has experienced this barrier firsthand. Mr. Ruffin grew up with drug use in his family and was very young when he started selling drugs. His first and only encounter with the police was in 1994 and resulted in two felony drug charges. While he has been home from prison since 2003 and has remained crime free, he is not eligible for a set-aside, since the current law is limited to records with just one felony.

Ruffin says an expungement for him would change everything: "It would allow me to get a better paying job. I have a master's degree—I went to school because no one would give me a job. I figured I'd be a more attractive candidate afterwards, but nothing has really happened since then. I've put in over 200 job applications and have over 200 rejections."³⁰

Thankfully, the Michigan Clean Slate bill package would address this issue in a number of ways, helping many deserving individuals like Mr. Ruffin find a path forward. Other than automation, the changes proposed by the bill package would:³¹

1. Make most traffic offenses eligible for expungement (currently none can be set-aside from a criminal record).
2. Allow a person to petition to set aside one or more marijuana offenses (if the offense is now legal under the new marijuana laws passed in 2018).
3. Expand the number of eligible felonies and misdemeanors.

4. Treat multiple felonies arising from the same time period as one felony, with certain conditions.
5. Shorten the waiting period before a person may apply to have certain convictions set aside.

These bills are a vital component to fully implement the Clean Slate initiative. Automation and shortened waiting periods procedurally expand set-asides, while the remaining bills substantively change who is eligible. Criminological research supports expanding the currently stringent rules, and there is a good chance doing so will lower crime rates as more individuals become eligible.³²

Additionally, automation—the first component of Clean Slate—applies only to a small subset of offenses, and only after ten years. Expanding eligibility fills in the gaps for cases in which a shorter wait time is appropriate or consideration of a more serious offense is in order. These cases can be reviewed by a judge, and based on the applicant's behavior after conviction and the "public's general welfare," these set-asides can be approved.³³ These bills allow motivated individuals to receive expungements with reduced waiting times—three years for most misdemeanors and up to seven years if an individual has had more than one felony.³⁴ What's more, research supports these changes: When individuals remain crime-free for some period of time, they reach a point of redemption, and are no more likely than anyone in the general population to commit future crimes.³⁵ Thus, *not* granting these individuals expungements actually carries the many costs of a criminal record without any commensurate benefit.

CONCLUSION

Long after Michiganders have served their time and paid their debts to society, they continue to struggle with the aftermath of having a criminal record. The challenges they face with regard to obtaining employment, education and housing impact not only them, but their families and communities. Mr. Ruffin reflects that with an expungement, he'd be "way further along" in meeting his goal of obtaining a job, where he could help others who are trying to reenter society. Perhaps more than any other policy solution, then, set-asides have the potential to better reintegrate individuals.

As Michigan legislators consider automating and expanding expungement laws, they have the benefit of empirical research conducted directly in the Wolverine State, and Prescott and Starr's study makes clear the tremendous amount of relief a set-aside can provide, and how few individuals currently take advantage. Until they are broadly and easily available, we are unlikely to see the full potential they offer, and the Clean Slate bill package offers such an opportunity.

ABOUT THE AUTHOR

Nila Bala is the Associate Director of Criminal Justice and Civil Liberties and a senior fellow at the R Street Institute, where she helps lead criminal justice policy areas generally, and specifically develops policy to advance reforms in juvenile and economic justice. Nila previously served as an assistant public defender in Baltimore, Maryland. In addition to handling more than 1,000 cases in her tenure, she also helped lead a bail reform project to address problems in the city's money bail system. Earlier in her career, Nila clerked for Judge Keith P. Ellison of the U.S. District Court for the Southern District of Texas. She was also a recipient of the Yale Public Interest Law Fellowship. As part of that program, she assisted juveniles with sealing their records, particularly those with sex offenses, while serving the Public Defender Office of Santa Clara County, California.

ENDNOTES

1. J.J. Prescott and Sonja B. Starr, "Expungement of Criminal Convictions: An Empirical Study," *Harvard Law Review* (Forthcoming, 2019), p. 34. <https://ssrn.com/abstract=3353620>.
2. Lucius Couloute and Daniel Kopf, "Out of Prison & Out of Work: Unemployment among formerly incarcerated people," Prison Policy Initiative, July 2018. <https://www.prisonpolicy.org/reports/outofwork.html>.
3. Camila Domonoske, "Denying Housing Over Criminal Record May Be Discrimination, Fed's Say," *NPR*, April 4, 2016. <https://www.npr.org/sections/thetwo-way/2016/04/04/472878724/denying-housing-over-criminal-record-may-be-discrimination-feds-say>.
4. Hannah Knowles, "Criminal records can be a 'life sentence to poverty.' This state is automatically sealing some," *The Washington Post*, July 1, 2019. <https://www.washingtonpost.com/nation/2019/07/01/criminal-records-can-be-life-sentence-poverty-this-state-is-automatically-sealing-some>.
5. See, e.g., Prescott and Starr. <https://ssrn.com/abstract=3353620>.
6. Angie Jackson and Kathleen Gray, "Bills to expand criminal record expungement pass Michigan House," *Detroit Free Press*, Nov. 5, 2019. <https://www.freep.com/story/news/local/michigan/2019/11/05/criminal-record-expungement-michigan-house-approves-bills/4167338002>.
7. *Ibid.*
8. Madeline Neighly and Ashleigh Fryer, "Clearing a Path, from Conviction to Employment," The National Reentry Resource Center, Oct. 1, 2016. <https://csgjusticecenter.org/nrrc/posts/clearing-a-path-from-conviction-to-employment>.
9. Jennifer Hickes Lundquist et al., "Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers," *Social Forces* 96:3 (March 2018), pp. 1039-68. <https://doi.org/10.1093/sf/sox092>.
10. Prescott and Starr, p. 1. <https://ssrn.com/abstract=3353620>.
11. Patrick McLaughlin et al., "The State of Occupational Licensure in Michigan," Mercatus Center, Feb. 28, 2018. <https://www.mercatus.org/publications/corporate-welfare/state-occupational-licensure-michigan>.
12. See, e.g., Editorial Board, "Ex-felons hit hard by occupational licensing," *The Detroit News*, Aug. 9, 2018. <https://www.detroitnews.com/story/opinion/editorials/2018/08/10/recovering-felons-hit-hard-occupational-licensing/938494002>; Elizabeth Raczkowski, "Occupational Licensing in Michigan," Michigan Senate Fiscal Agency, Summer 2019, p. 4. <https://www.senate.michigan.gov/sfa/Publications/Notes/2019Notes/NotesSum19er.pdf>.
13. Stephen Slivinski, "Turning Shackles into Bootstraps: Why Occupational Licensing Reform is the Missing Piece of Criminal Justice Reform," Center for the Study of Economic Liberty at Arizona State University, Nov. 7, 2016, p. 2. <https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf>.
14. Prescott and Starr, p. 13. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
15. Joshua Gaines, "How a parent's criminal record limits children," Collateral Consequences Resource Center, Jan. 6, 2016. <https://ccresourcecenter.org/2016/01/06/6767>.
16. Greg Duncan et al., "Early-Childhood Poverty and Adult Attainment, Behavior, and Health," *Child Development* 81:1 (2010): pp. 306-25. <http://www.ncbi.nlm.nih.gov/pubmed/20331669>.
17. 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. <http://cepr.net/publications/reports/the-price-we-pay-economic-costs-of-barriers-to-employment-for-former-prisoners-and-people-convicted-of-felonies>.
18. Meyli Chapin et al., "A Cost-Benefit Analysis of Criminal Record Expungement in Santa Clara County," *Stanford University Undergraduate Public Policy Senior Practicum*, March 2014, pp. 15-16. <https://legallaidresearch.org/wp-content/uploads/Chapin-Cost-Benefit-Analysis-Expungement-2014.pdf>.
19. *Ibid.*, p. 4.
20. Prescott and Starr, p. 14. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
21. Mich. Comp. Laws Ann. § 780.621 (a) and (b). [http://www.legislature.mi.gov/\(S\(5v132ng0nzfakbh40xxhepej\)\)/mleg.aspx?page=getobject&objectname=mc1-780-621](http://www.legislature.mi.gov/(S(5v132ng0nzfakbh40xxhepej))/mleg.aspx?page=getobject&objectname=mc1-780-621).
22. Steve Neavling, "Expunging marijuana convictions would be easy under new Michigan bill," *Detroit Metro Times*, Oct. 17, 2019. <https://www.metrotimes.com/detroit/expunging-marijuana-convictions-would-be-easy-under-new-michigan-bill/Content?oid=22892782>.
23. Michigan Courts, "MC 227, Application to Set Aside Conviction," State of Michigan, June 2018. <https://courts.michigan.gov/administration/scao/forms/courtforms/mc227.pdf>.
24. Susan Stutzky et al., "Legislative Analysis: Expungement of Criminal Convictions," House Fiscal Analysis, Oct. 1, 2019, p. 6. <https://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-4980-A953E7E3.pdf>.
25. *Ibid.*, pp. 5-7.
26. Colleen V. Chien, "The Second Chance Gap," *Michigan Law Review* (Forthcoming, 2019), p. 1. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265335.
27. "Clear My Record," Code for America, last accessed Nov. 25, 2019. <https://www.codeforamerica.org/programs/clear-my-record>.
28. Prescott and Starr, p. 13. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
29. Prescott and Starr, p. 33. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
30. Jarret Ruffin, "Interview by Nila Bala: Clean Slate Michigan," Interview on file with author, Nov. 22, 2019.
31. Stutzky et al., p. 1. <https://www.legislature.mi.gov/documents/2019-2020/billanalysis/House/pdf/2019-HLA-4980-A953E7E3.pdf>.
32. Prescott and Starr, p. 40. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620.
33. "Setting aside adjudications," Mich. Comp. Laws Ann. § 712A.18e. [http://www.legislature.mi.gov/\(S\(vboupesshmidyl0nxxOzryxv\)\)/mleg.aspx?page=GetObject&objectname=mcl-712A-18e](http://www.legislature.mi.gov/(S(vboupesshmidyl0nxxOzryxv))/mleg.aspx?page=GetObject&objectname=mcl-712A-18e).
34. See, e.g., House Bill 4983, "An act to provide for setting aside the conviction in certain criminal cases; to provide for the effect of such action; to provide for the retention of certain nonpublic records and their use; to prescribe the powers and duties of certain public agencies and officers; and to prescribe penalties." <http://legislature.mi.gov/doc.aspx?2019-HB-4983>; House Bill 4984, "An act to provide for setting aside the conviction in certain criminal cases; to provide for the effect of such action; to provide for the retention of certain nonpublic records and their use; to prescribe the powers and duties of certain public agencies and officers; and to prescribe penalties." <http://legislature.mi.gov/doc.aspx?2019-HB-4984>.
35. Alfred Blumstein and Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 47:2 (May 2009), p. 11. <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.