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THE CASE FOR CLEAN SLATE IN LOUISIANA

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INTRODUCTION

Louisiana has the highest rate of incarceration in the country, and quite possibly the world.¹ As a result, a significant number of individuals are burdened by criminal records that hinder their ability to participate in society. Barriers these records create include difficulties finding employment, education and housing. With over 1,400 laws that create collateral consequences of a record, Louisiana currently has the second-longest list of restrictions in the entire United States,² and this means that even a minor record can sentence individuals to lifelong poverty.

To address this problem, expungements are a powerful remedy that shield records from the general public and ameliorate most collateral consequences. And, although Louisiana does have an expungement process in place, it is cumbersome and incredibly expensive at a price tag of \$550—one of the highest in the country.

Luckily, Louisiana currently has an opportunity to pass Second Chance policies, which will be more important than ever in a post-pandemic world. Indeed, the Pelican State has been one of the hardest hit by COVID-19 and, not surprisingly, people of color have especially suffered.³ This is particularly

true in places like New Orleans where tourism, oil and gas extraction, transportation and warehousing have taken a significant hit.⁴ Most economists are predicting a significant recession, while the International Monetary Fund suggests the economy could hit the lowest point since the Great Depression.⁵ This is of paramount concern with respect to unemployment among justice-involved individuals who, even before the pandemic, already faced unemployment rates of 27 percent—a figure that already rivaled statistics from the 1930s.⁶ Accordingly, if the pandemic’s unemployment projections come to fruition in the general population, justice-involved individuals will be even harder hit. In light of this, the adoption of Clean Slate policies—like automated expungement processes and the expansion of eligibility requirements—is necessary to meet this challenge head on. Such policies can improve access to justice, enhance public safety, and ultimately save Louisiana money if enacted.

Accordingly, the present brief examines the current state of expungement law in Louisiana and the myriad benefits it provides to individuals and the community. It then evaluates a number of bills that were under consideration in the 2020 legislative session to argue that Louisiana should pass Clean Slate legislation.

EXPUNGEMENT LAW IN LOUISIANA

Whereas no method had previously existed, in 2014, Louisiana enacted legislation so that certain types of criminal convictions could be expunged and sealed from public view. Many offenses are eligible, with the exception of sex crimes, crimes of violence, distribution of a controlled dangerous substance, misdemeanor domestic abuse battery and misdemeanor stalking.⁷ Expunging a record makes it inaccessible to employers, landlords and the general public.⁸ However, it remains available to law enforcement and government agencies—and can still affect state professional licenses.⁹

The current process for expungement has multiple steps. Before expunging a conviction, the Code of Criminal Procedure instructs that a “motion to set aside and dismiss the prosecution” must first occur.¹⁰ Filing such a motion is an action that must be undertaken in the court and, although individuals have the right to represent themselves, the procedure is often cumbersome and difficult to navigate without legal representation. Next, the individual must gather a significant deal of paperwork including a bill of information, a minute entry showing the final disposition of the case, and a certification letter from the district attorney’s office.¹¹ They must also correctly fill out the expungement paperwork, which gets sent to the arresting agency, the Louisiana State Police and the applicable district attorney’s office, with each agency having an opportunity to object. Finally, the individu-

al receives a court date for a judge to consider the request—all of which is exceedingly difficult without assistance and, in any event, takes at least six months.¹²

In addition to the problems of accessibility and delay, cost is an enormous barrier. Even without an attorney, charges can range from \$550 to \$700; with legal representation that figure climbs closer to \$2,500.¹³ Moreover, these numbers do not account for the cost of travel, which is often additional, as all steps must occur in the Parish in which the offense occurred—irrespective of where the individual now resides. Worse, no fee waiver is available based on ability to pay.¹⁴ Each fee covers only a “single record event” (just that conviction), is non-refundable and will not be returned if an individual is deemed ineligible or if the application is rejected for any other reason.¹⁵ Indeed these various costs are so high in Louisiana that a federal lawsuit was filed last year demanding a fee waiver process for indigent clients.¹⁶

Determining eligibility makes the process even more difficult, as time limits before expungement becomes available can range from immediately to ten years after a sentence is completed.¹⁷ For example, if a prosecutor dismisses the charge, a person may be eligible for an immediate expungement. Such expungements are also available for those who received a deferred sentence for a misdemeanor or felony (wherein after successful completion of probation, the conviction is cleared). For convictions, the waiting period is five years for a misdemeanor conviction to ten years for a felony, and is calculated from completion of the sentence. Additionally, you can only expunge a misdemeanor every five years, and one felony every fifteen years, with some exceptions.

BENEFITS OF EXPUNGEMENT

For those who are able to successfully obtain an expungement, there are significant benefits, mainly to employment, as 90 percent of employers run a background check and a criminal record—however minor—can cut callback rates by half.¹⁸ Shielding convictions that no longer reflect upon the capacity of the applying individual provides a second chance at gainful employment and economic stability. In fact, one study found that, on average, wages increase by 25 percent after an expungement.¹⁹

Expungements also benefit public safety. In fact, those who have received them have an even lower risk of crime than the average for the general population (which includes those who have never offended).²⁰ Moreover, those individuals who receive an expungement after a waiting period have already demonstrated their dedication to staying crime-free, since one of the requirements is that a person can have no pending cases. Expungement also increases the odds of gainful employment, which itself reduces the likelihood of future offense. Benefits also reach beyond the individual to

their family and community. For example, children are disproportionately harmed when a parent has a criminal record, as it can affect their own mental health, their access to housing and future economic wellbeing.²¹ For these reasons, expungement of a parent’s record can help restore stability to children, families and the community at large.

Communities also benefit when justice-involved folks are truly reintegrated. Unemployment and underemployment hurt Louisiana’s economy, and will have a more pronounced effect in the coming recession. In fact, at least \$78 billion is lost annually nationwide due to the unemployment and underemployment of those with criminal records.²² In addition, expected public benefits likely include an increase in Louisiana’s GDP, tax revenue from additional employment and a reduction in government assistance benefits.²³

THE IMPORTANCE OF AUTOMATION

Given these myriad benefits, it is a shame that so few individuals ever see them, simply because they do not apply. Although thousands of individuals could have their records cleared under current law, one study estimates that only 6.5 percent of those who are eligible have received relief.²⁴ Lack of knowledge about expungements generally is a barrier, but the most significant challenges are caused by cost and a complicated, slow and bureaucratic process.²⁵ This is why automation is so powerful.

Automating expungements creates an infrastructure so that eligible records can be identified and automatically cleared without the necessity of an application process. Doing so promotes access to justice by making it accessible to everyone automatically rather than only to the well-educated and well-resourced. Additionally, it streamlines government processes, allowing court time and resources to be used on other, more pressing needs. For example, currently, many individuals in Louisiana wait in prison for their court date, and public defenders in New Orleans carry a caseload far above the recommendation by the National Advisory Commission on Criminal Justice Standards and Goals, which has meant a general backlog in the system.²⁶ Clean Slate policies will help the court and its officers allocate their time more effectively and efficiently to help address this issue.

The pandemic has also made the need for an automated process more urgent. As courts have been forced to close or severely reduce operations to ‘emergency only,’ applications for expungement in states without automation often sit waiting—merely increasing an already burdensome wait time. By comparison, Pennsylvania—one of the states that has already passed Clean Slate legislation—has been able to continue clearing records even during the pandemic.²⁷ And, for as long as risk of contagion persists, automating can also curb the spread of virus, by limiting in-person trips to the

courthouse to file expungement papers, pay fees, obtain forms and attend hearings.

Weighing the Costs and Benefits

While it's true that automation does have short-term costs, an evaluation demonstrates that this alone is not reason to abandon Clean Slate initiatives. For example, because Louisiana does not currently automate any expungements—including acquittals—computer programming and application development are likely to be necessary to put a system to identify eligible records in place, which would carry some initial investment.

Moreover, compared to other states contemplating Clean Slate, Louisiana may have some unique challenges. Since the government is underfunded, it depends on fines and fees to keep the justice system running, and certainly automating would reduce the revenue received from the current \$550 fee.²⁸ However, far from a drawback, this is merely an opportunity to alter a system that is sorely in need of change. The past few years have already revealed problems in a system dependent upon fines and fees from poor defendants, as the revenue from traffic tickets has declined, leaving vital agencies like the public defender's office without adequate resources despite overwhelming client need.²⁹ Further, tying justice to the ability to pay is of dubious constitutionality, and civil rights lawsuits have pointed out that the practice is likely illegal and poses a conflict of interest, since those assessing the fees are the same who gain from them.³⁰ Louisiana Supreme Court Chief Justice Bernette Johnson chaired an advisory committee last year to recommend revising the way the legal system sustains itself.³¹ All of these signs indicate that Louisiana is reassessing fines and fees as a funding source anyway, and thus investing in Clean Slate technology is a proactive way to prepare for the eventuality of such changes.

In the long run, investing in automation is also likely to save money for cash-strapped Louisiana. For example, one study found that, after automation, the cost to clear each record is around 5 cents, as compared to thousands per application in a petition-based system—and these estimations only include savings to the court system.³² The benefits to the individuals affected will be even greater. Finally, organizations like Code for America have piloted core automating technology that is already successfully in use in Pennsylvania and will soon be implemented in Utah.³³ These systems mean that Louisiana would not have to reinvent the wheel, but that it could have a system that is uniquely tailored to its existing infrastructure and allows coordination with all the different agencies involved in the process.³⁴

RECENT LEGISLATION

In recent years, Louisiana's legislature has affirmed an interest in criminal justice reform. In June 2017, the state passed a package of ten Justice Reinvestment bills in response to a large prison population and high recidivism numbers.³⁵ The package has been beneficial, but more could be done, as the prison population has thus far reduced by only 8 percent.³⁶

A number of bills passed in 2019 directly related to expungement. SB 98 expanded eligibility so that an individual entitled to a first-offender pardon could apply for an expungement with a few exceptions.³⁷ Second, with HB 9, the legislature provided that only one filing fee is required in an application to expunge multiple offenses resulting from the same arrest.³⁸ The passage of this bill also closed a loophole where an underlying offense might be expunged, but an associated failure to appear or arrest remained on someone's record. Finally, Louisiana passed legislation requesting the Louisiana District Attorneys' Association to study and evaluate the process and procedure for automatic criminal record-clearing.³⁹

Although Louisiana's legislative session was suspended due to COVID-19, they recently returned and considered a number of expungement and Clean Slate bills. Most recently, three bills passed off the House and Senate floor and are on their way to the Governor's desk:

- HB 178, which would extend expungement eligibility to individuals who receive incarceration alternatives, such as recovery treatment programs;⁴⁰
- HB 179, which would remove the requirement to show proof of employment for ten years for certain offenses;⁴¹
- HB 241, which would eliminate secondary waiting periods for those eligible for multiple expungements (allowing more than one otherwise eligible misdemeanor to be expunged in a five-year time frame, for example).⁴²

While two additional clean slate-related bills did not pass this session,⁴³ a substitute bill, HR 67 did pass, continuing the Clean Slate study group.⁴⁴

Even amidst the pandemic, Louisiana's movement on these bills is to be applauded. However, there will be much to do to assist the state in its recovery. At first glance, expungement policies and Clean Slate bills may not appear to be vital to a COVID-recovery package, but they should be considered a method of economic stimulus since expungement helps increase the financial stability of individuals, families and communities. The proposed 2020 bills would also do much

to expand eligibility and facilitate data-sharing for an eventual broader Clean Slate policy.

CONCLUSION

Criminal records are costing Louisiana: higher unemployment, increased future crime, more individuals on government assistance and fewer taxpayer dollars. Those with records who have paid their debt to society and have remained crime-free are eager to work, but without legal relief, they will likely remain un- or under-employed, as the stigma of their record keeps them from the workforce. In light of this reality, Clean Slate policies and associated expansions of expungement relief, will be enormously beneficial, particularly as the state tackles the challenges of the impending economic downturn. Further, with the necessity for social distancing, and courts likely restricting their activity to only the most necessary hearings, automation is more vital than ever, as it supports access to justice, and the principles of a limited and effective government. Until these policies are passed, we are unlikely to see the full benefits of expungements.

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