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Changing the Way Adult Convictions are Vacated in Washington State

Dash DeJarnatt*

But, because they had stars, all the Star-Belly Sneetches
Would brag, “We’re the best kind of Sneetch on the beaches.”
With their snoots in the air, they would sniff and they’d snort
“We’ll have nothing to do with the Plain-Belly sort!”
And, whenever they met some, when they were out walking,
They’d hike right on past them without even talking.

– The Sneetches by Dr. Seuss

ABSTRACT

This article principally focuses on the ability of a convicted person to remove or “vacate” his or her adult criminal records from non-court entities in Washington State. Currently, Washington State prohibits those with criminal records from vacating more than one misdemeanor in his or her lifetime. In contrast, a convicted person in Washington State is theoretically allowed to vacate an unlimited number of felonies in his or her lifetime. However, he or she may not vacate a misdemeanor if any other conviction, misdemeanor or felony, has been vacated in his or her lifetime. I will posit

* Dash DeJarnatt graduated *cum laude* from Seattle University School of Law in May of 2014. He would like to thank his wife most of all for putting up with everything he does and all that law school threw at her. His life would not work without her. He would also like to thank Connie Ritchie for allowing him to help record holders vacate their records at the King County Bar Association’s Volunteer Legal Services, which inspired him to write this paper. He would also like to thank Peter DeMers for being a constructive devil’s advocate throughout the process, Elyne Vaught for being willing to toss around ideas on occasion, and Professor Anna Roberts for letting him tag along on her paper. As a catch all, Dash would like to thank everyone from his past, present, and future who have and will support him in his many endeavors.

that, for the purposes of vacating criminal records in Washington, at minimum, there should be no hard cap for vacating misdemeanors, though other restrictions should still apply. Employment, housing, and public safety factors, among others, tend to favor this prescription.

INTRODUCTION

Criminals are evil.¹ Thieves, murderers, deceivers—the lot of them. Unfortunately, this perception of criminal record holders is an extreme, but existing, stigma in society today.² Those who are associated with the criminal justice system as “criminals” are typically lumped together as drains on society. Those with criminal records have been relegated to de-facto second-class status. We need to seriously reexamine the process and purpose of discriminating against criminal record holders.

Admittedly, there are cogent arguments for publicly identifying those with criminal records. Criminals may bring instability, under-productivity, safety concerns, and tarnished reputations to a business. Furthermore, employers should be entitled to make reasoned and rational decisions for the risks they assume, including risks indicated by a person’s criminal record. However, employers might not always use available information to make rational decisions. Rather, they may make irrational decisions. Just as employers and landlords should be entitled to make informed, rational decisions, prospective employees and tenants should be protected from discriminatory decisions.

¹ Please type the phrase “criminals are evil” into some search engine, such as Google. Take five minutes to skim through the results just on the first page.

² See generally Jim Blascovich et al., *Perceiver Threat in Social Interactions with Stigmatized Others*, 80 J. OF PERSONALITY & SOC. PSYCHOL. 253 (2001) (associating with stigmatized individuals creates anxiety of being discredited by association); AMS. FOR EFFECTIVE LAW ENFORCEMENT, *Association with Known Criminals*, (4) AELE MO. L. J. 201 (2007), available at <http://www.aele.org/law/2007FPAPR/2007-04MLJ201.pdf> (giving examples of rules and laws prohibiting association with known criminals).

The one-vacation cap on misdemeanors should be eliminated. This cap creates arbitrary restraints on judges and provides arbitrary results. Before discarding this proposal, keep in mind there are plenty of other checks on “bad people.”³

In this article, I will explain why Washington State should change its policy of allowing a convicted person to vacate only one misdemeanor in a lifetime to a policy that puts no cap on the number of misdemeanors a person may vacate. In Part I, I will describe the process for vacating a criminal record and how it is different from other post-conviction processes such as expunging, deleting, and sealing conviction records. In Part II, I will focus on some basic crime statistics in Washington and compare them to national statistics. In Part III, I will touch on the many collateral consequences of having a criminal record, focusing in on housing and employment. In Part IV, I will bring everything together and explain the benefits of eliminating the cap on vacateable misdemeanors. In Part V, I will briefly address issues and alternative means of improving the post-sentencing aspect of the criminal justice system.

I. DEFINING THE SCOPE OF THE PAPER AND DEFINING GENERAL CONCEPTS

A. Context of the Paper

It is important to recognize what this paper is and what it is not, both empirically and conceptually. Most of the data relied upon by this article has a wide margin of error due to an over-reliance on self-reporting from local law enforcement agencies. Unfortunately, self-reporting by counties with inconsistent record-keeping procedures is the best data available.

³ See *infra* note 51 and accompanying text.

No arguments will specifically address juvenile criminal records. Generally, juvenile criminal records are easier to expunge.⁴ It should be assumed that any provided statistics do not include juvenile data unless otherwise stated. Additionally, while this paper will briefly touch on the relationship between mental illness and crime, such discussion is peripheral.

Finally, while there are many ways Washington can improve the way it handles criminal records, rather than prescribe a complete overhaul, I suggest, as a first step, that the state legislature remove the cap that limits one vacateable misdemeanor in a person's lifetime. There are many important considerations involved in dealing with criminal records and many different points in the process. Many papers focus on the root of crime in order to reduce social harm.⁵ Other papers focus on how tightly government should regulate private actors in considering criminal records when making employment or housing decisions.⁶ This paper will focus on the area in between: government regulation after the criminal has completed

⁴ See generally WASH. STATE COURTS, A GUIDE TO SEALING AND DESTROYING COURT RECORDS, VACATING CONVICTIONS, AND DELETING CRIMINAL HISTORY RECORDS (2010), available at <http://www.courts.wa.gov/newsinfo/content/GuideToCrimHistoryRecords.pdf> (describing procedures for removing information from both adult and juvenile records).

⁵ E.g., Judge Stephen C. Cooper, *The Carrot and the Stick: How Effective Sanctions and Incentives Succeed in Overcoming Addiction*, 82 MICH. B.J. 20, 21 (2003) ("If, however, you believe it includes trying to change antisocial behavior patterns, then you'll be interested to read about the successes that have been seen across Michigan,"); Richard Lowell Nygaard, *Crime, Pain, and Punishment: A Skeptic's View*, 102 DICK. L. REV. 355, 366 (1998) ("[W]e devote few resources to research the root causes of crime and criminal behavior, and even when we do discover the causes, we do little about them.").

⁶ E.g., Stephen P. Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 147 (2011) (addressing "one aspect of that problem by examining negligent hiring liability and how it affects employers and the rehabilitation and reintegration of ex-offenders"); Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1283 (2002) (addressing the conflicting public policies behind their employment by looking at employer negligent-hiring liability).

his or her sentence and before private actors receive the full criminal record information.

Within the realm of government regulating criminal records, there are many topics that could fill entire libraries, such as racially discriminatory practices⁷ and ambiguous language in relevant statutes,⁸ among others. In my attempt to prove restrictions on vacating misdemeanors should be loosened, this paper will focus more on the economic consequences of criminal records on individuals and our society.

While the current law allowing misdemeanors to be vacated is more generous than what Washingtonians had to work with as of 2000,⁹ the current limitation on the ability to vacate misdemeanors seems to undermine the ability for people to vacate felony records. Because many people with felonies also have misdemeanors, this paper will also discuss the current status of felony record holders whose criminal records are pinned down by non-vacateable misdemeanors. Unfortunately, I could not

⁷ Michael Connett, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1007 (2011) (“Based on the availability of highly probative data on both racial disparities in the criminal justice system and the minimal recidivism risk posed by offenders who remain crime free for many years, this Comment proposes a set of presumptions that would enable FEPAs to limit their attention to complaints provable at trial without resort to costly statistical analyses.”). *Cf., e.g.*, Thomas M. Hruz, *The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Conviction Records*, 85 MARQ. L. REV. 779, 783 (2002) (“This Comment concludes that Wisconsin should eliminate the conviction record basis for an employment discrimination claim. Furthermore, such an alteration of the WFEA would not undermine the most legitimate basis for questioning the use of criminal records in employment decisions—that of a disparate impact on otherwise protected classes, namely racial minorities, which would still retain adequate protection under available federal law.”).

⁸ *See, e.g.*, Kristin K. Henson, *Can You Make This Go Away?: Alabama’s Inconsistent Approach to Expunging Criminal Records*, 35 CUMB. L. REV. 385, 385 (2005) (“The ambiguity of Alabama statutes that govern the practice of expunging adults’ criminal records leads to inconsistent results.”).

⁹ *State v. Noel*, 5 P.3d 747 (Wash. Ct. App. 2000) (holding that trial courts did not have authority to vacate misdemeanor and gross misdemeanor convictions).

access data breaking down how many people have multiple charges, let alone isolating felony and misdemeanor convictions. This information potentially exists on JIS-Link, but was not accessible to me.¹⁰

Finally, for the purposes of this paper, I will define “record holders” to mean those persons who have Washington criminal records including arrest or conviction data.

B. General Terminology of Adult Criminal Records

Legal terms for removing or modifying criminal records vary from jurisdiction to jurisdiction. This paper does not intend to provide universally accepted definitions. Rather, terms will be defined within this paper to prevent confusion, and are generally tailored to the understanding held in Washington State. For example, any person who has a criminal record, including non-conviction data, will be considered a record holder for the purposes of this paper. Other legal terms the reader will need to know include expunction, deletion, vacation, and sealment, as described in this section.

1. To Expunge

Expungement, or expunction, is a general term used by virtually all states for clearing criminal records. Expunction is ambiguously used with both broad and narrow meanings. Black’s Law Dictionary defines “expunge” as erasing or destroying.¹¹ “Expungement” is typically misused as merely any form of preventing public access to criminal records.¹² True *expunction*

¹⁰ *JIS-Link Fee Schedule*, WASH. STATE COURTS, <http://www.courts.wa.gov/jislink/?fa=jislink.fees> (last visited Mar. 24, 2013).

¹¹ BLACK’S LAW DICTIONARY (9th ed. 2009).

¹² Again, without pointing out specific bad actors, please type “expungement” into a search engine and notice how many people and businesses conflate “expungement” with more specific methods such as sealing, deleting, vacating, etc.

should only be used for the complete destruction of records.¹³ For simplicity sake, “expunction” will be tentatively used as an umbrella term for any form of removing or redacting criminal data such as the processes of sealing, deleting, and vacating because that is the currently prevailing connotation of the term. To say the least, “expunction law” is catchier than “criminal-record-modification law.”

State reactions to addressing criminal records vary greatly. Most states do not allow the destruction of all related criminal records.¹⁴ Each state has its own particular set of requirements and opportunities.¹⁵ All but three states allow some general form of expunction, including juvenile records, and all but four allow some general form of expunction for adult criminal records.¹⁶ In 12 states, record holders are entitled to some form of automatic expunction after meeting certain criteria, while in 37 states, with overlap, record holders have access to discretionary-expunction procedures.¹⁷

Washington has one of the more progressive discretionary-expunction procedures in the nation. Washington does not allow record holders to expunge their records in the sense of destroying all data related to a criminal record—the court system always maintains copies unless a specific statute authorizes the destruction of the court records.¹⁸ Rather, people holding adult criminal records in Washington may potentially delete, vacate, or seal

¹³ WASH. STATE COURTS, *supra* note 4 (defining “expunge”).

¹⁴ LESLIE MCADOO, ESQ. ET AL., COUNCIL FOR COURT EXCELLENCE, CREATING AN EXPUNGEMENT STATUTE FOR THE DISTRICT OF COLUMBIA: A REPORT AND PROPOSED LEGISLATION, *62–64 (2006), available at http://www.courtexcellence.org/uploads/publications/CCEReportonExpungement_041406new.pdf.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ WASH. CT. GR 15(h) (outlining procedures for destroying, sealing, and redacting of court records).

different types of criminal record data.¹⁹ Record holders must usually make a motion to the court to modify a particular record.²⁰

2. To Delete

“Deleting” is conflated with “expunging” criminal records because there is a similar connotation between the words. Both denote a purging or elimination of the record. However, in Washington, and in this paper’s terminology, deleting a criminal record only allows a record holder to remove any non-conviction data from law enforcement agency databases such as the Washington State Patrol.²¹ 36 states allow record holders to “delete” some types of non-conviction data.²²

Washington allows record holders to delete portions of their criminal record.²³ However, there are a few requirements the record holder must first meet. First, the criminal record eligible for deletion must only contain non-conviction data.²⁴ Non-conviction data is generally defined as any criminal record where there was not an adverse disposition against the defendant.²⁵ An adverse disposition is any decision other than acquittal, dismissal, or deciding not to prosecute.²⁶

Second, a court may, at its discretion, refuse to delete non-conviction data for several reasons. A court may refuse to delete a person’s criminal record if that particular record involves a deferred prosecution or similar diversion.²⁷ Similarly, a court may refuse to delete a record if the record

¹⁹ WASH. CT. GR 15.

²⁰ *Id.*

²¹ *See* WASH. REV. CODE §§ 10.97.030(2), .060 (2012).

²² *See* MCADDOO ET AL., *supra* note 14, at 1.

²³ WASH. REV. CODE § 10.97.060 (2012); WASH. STATE COURTS, *supra* note 4 (describing procedures for dealing with adult and juvenile records, respectively).

²⁴ WASH. REV. CODE § 10.97.060 (2012).

²⁵ WASH. REV. CODE § 10.97.030 (2012).

²⁶ *Id.*

²⁷ WASH. REV. CODE § 10.97.060 (2012).

holder has an unrelated prior conviction for any felony or gross misdemeanor.²⁸ In contrast, prior misdemeanors should not affect deletion of subsequent non-conviction data in the same way.²⁹ Third, the record holder may not have been arrested for or charged with a crime during the intervening period.³⁰ For example, if a record holder has an arrest on his or her record and is subsequently convicted for an unrelated theft charge, a court will bar a record holder from deleting the first arrest until the record holder vacates the subsequent theft conviction. Similarly, if the record holder is arrested in the intervening period, the intervening period resets to the most recent arrest or conviction.³¹

Regardless of whether the record holder wishes to compel or persuade the court to delete non-conviction data, he or she must wait for a set intervening period.³² A misdemeanor record holder must wait at least two years since the record became non-conviction data if there was a favorable disposition.³³ Alternatively, the record holder must wait three years since the arrest, citation, or warrant if a conviction simply wasn't obtained.³⁴ Thus, if a record holder is arrested, then arrested again within the next several years, the record holder might need to wait an additional two to three years to remove the subsequent arrest before removing the original arrest.

²⁸ *Id.*

²⁹ *State v. Breazeale*, 31 P.3d 1155, 1159–60 (Wash. 2001) (finding that the Washington Legislature intended to remove all civil consequences from a vacated conviction).

³⁰ WASH. REV. CODE § 10.97.060 (2012).

³¹ *See id.*

³² WASH. REV. CODE § 9.96.060 (2012).

³³ WASH. REV. CODE § 10.97.060 (2012).

³⁴ *Id.*

3. To Vacate or Set Aside

Vacating criminal records will be the primary subject of this paper. Vacating a criminal record removes the conviction record from all local non-court government agencies, such as the State Patrol, and municipalities.³⁵ However, the records are still kept by the court. Recent non-vacated crimes can easily be viewed online at the court's website.³⁶ In this way, virtually anyone could retrieve another person's criminal record without ever leaving his or her couch. This brings up general privacy concerns, given the ease of access now compared to when public record laws were created.³⁷ However, information available on the court website is not as user-friendly or detailed as a nicely compiled report made by the Washington State Patrol.³⁸

Typically, people vacate their criminal records because they do not want members of the general public seeing their criminal records. People are especially motivated to vacate a criminal record if they are concerned the record will show up in background checks for housing or employment.³⁹ The Washington State Patrol can conduct basic criminal background checks for as little as \$10 by an employer, a neighbor, or even a potential date.⁴⁰

³⁵ See WASH. REV. CODE §§ 9.94A.640, 9.96.060 (2012).

³⁶ *Search Case Records*, WASH. STATE COURTS, <http://dw.courts.wa.gov/> (last visited Mar. 25, 2013).

³⁷ See generally Michael K. McChrystal et al., *Carnivores, Cyber Spies & the Law*, 74 WIS. LAW. 14 (Feb. 2001) ("This article surveys three emerging technologies and the risks they pose to data privacy and security: online criminal investigation tools, private "cyber spying" programs, and online public records.").

³⁸ Compare WASH. STATE COURTS, *supra* note 36 (providing minimal information) with *WATCH Overview*, WASH. STATE PATROL, <https://fortress.wa.gov/wsp/watch/> (last visited Mar. 25, 2013) (providing detailed information once you have paid for it).

³⁹ I personally observed this based on my experience working at King County Bar Association Volunteer Legal Services.

⁴⁰ WASH. STATE PATROL, *supra* note 38.

Certain types of crimes, such as violent crimes, crimes against persons, DUIs, and, just recently added, prostitution, may not be vacated.⁴¹

Washington has one of the most progressive vacating policies in the nation. Only 24 states allow record holders to “vacate” misdemeanors and gross misdemeanors in some circumstances, while 14 of those states allow record holders to “vacate” felonies as well.⁴² On paper, Washington State has a more relaxed policy towards vacating felonies than misdemeanors.⁴³ There is no hard limit on the number of felonies that may be vacated, but only one misdemeanor may be vacated in a lifetime, assuming no prior vacations exist.⁴⁴

The vacation process can be a long and complicated road, especially for the uninformed record holder. After a sentence is handed down, the record holder must complete all the terms of his or her sentence, including incarceration, probation, and paying any court-imposed fines.⁴⁵ From the point the sentence is completed, a tolling period begins.⁴⁶ The tolling period varies from three years for a misdemeanor,⁴⁷ five years for a gross misdemeanor or misdemeanor where the presiding court determines domestic violence was present,⁴⁸ five years for Class C felonies,⁴⁹ and ten years for Class B felonies.⁵⁰ After the necessary time has run, an offender may make a motion to vacate the record; however, the judge still has

⁴¹ See WASH. REV. CODE §§ 9.94A.640, 9.96.060 (2012).

⁴² MCADOO ET AL., *supra* note 14.

⁴³ Compare WASH. REV. CODE § 9.94A.640 (2012) (putting no limit on the number of felonies that can be vacated) with WASH. REV. CODE § 9.96.060 (2012) (allowing only one misdemeanor to be vacated in record holder’s lifetime).

⁴⁴ *Id.*

⁴⁵ WASH. REV. CODE §§ 9.94A.640, 9.96.060 (2012).

⁴⁶ *Id.*

⁴⁷ WASH. REV. CODE § 9.96.060(1)(f) (2012).

⁴⁸ *Id.* at (1)(e)(iv).

⁴⁹ WASH. REV. CODE § 9.94A.640(2)(f) (2012).

⁵⁰ *Id.* at (2)(e).

discretion to reject facially “perfect” motions.⁵¹ Furthermore, an offender is not allowed to vacate the criminal record if the crime was a violent offense, the record holder has been convicted of a new crime, there are pending criminal charges, or the record holder has had a restraining order enforced against him or her in the last five years.⁵²

A record holder wishing to vacate a conviction must consider important timing considerations. A record holder must vacate the most recent conviction first.⁵³ Therefore, if a non-vacateable conviction is the most recent conviction, prior convictions may never be vacated. If a non-vacateable conviction is the second most recent, then a record holder may vacate the most recent conviction, but nothing before that. Adding nuance to this process, only one misdemeanor can be vacated in a person’s lifetime.⁵⁴ Further, if a person has ever vacated a conviction before, they cannot vacate a subsequent misdemeanor.⁵⁵ In contrast, vacating any conviction will not bar the record holder from vacating a felony.⁵⁶

Finally, combining these limitations, the system creates some interesting results that transcend logic. Consider the following examples. Person X can vacate a Class B felony, while Person Y cannot vacate two petty theft charges. Person V can vacate three Class B felonies, but Person W cannot vacate a Class C felony and subsequently vacate a petty theft charge. Person T can vacate an unlimited number of eligible felonies, while Person U cannot vacate any of their records because the most recent conviction is not

⁵¹ WASH. REV. CODE §§ 9.94A.640 (“the court may clear”), 9.96.060(1) (“may in its discretion”) (2012).

⁵² WASH. REV. CODE §§ 9.94A.640(2), 9.96.060(2) (2012).

⁵³ See WASH. REV. CODE §§ 9.94A.640(2)(d), 9.96.060(2)(g) (2012).

⁵⁴ WASH. REV. CODE § 9.96.060(4) (2012).

⁵⁵ *Id.*

⁵⁶ WASH. REV. CODE § 9.94A.640 (2012); *State v. Smith*, 246 P.3d 812 (Wash. Ct. App. 2010) (finding that a prior vacation of a misdemeanor conviction did not subsequently bar vacating a prior felony).

eligible because, for example, it was a DUI or for prostitution. These results do not define justice.

Successfully vacating a conviction in Washington State removes all subsequent civil penalties of that conviction.⁵⁷ For example, a vacated record cannot be used in a subsequent trial in order to determine sentencing, such as in a “three-strikes” case.⁵⁸ Also, vacated convictions cannot prohibit further vacations, unless statutorily prohibited.⁵⁹ But licensing commissions, including the Washington State Bar Association, may still use the vacated record.⁶⁰ However, only law enforcement agencies, not courts, remove criminal records from their databases.⁶¹ In fact, anyone can obtain case dockets from a court clerk or access less comprehensive information online.⁶²

After successfully vacating a criminal record, record holders still run into difficulties. Once a record is vacated, the court is required to send an order to all Washington law enforcement agencies to immediately remove the vacated record from their databases.⁶³ Due to clerical errors, these orders are not always sent.⁶⁴ If a client vacates a record to remove it from law

⁵⁷ *State v. Breazeale*, 31 P.3d 1155, 1159–60 (Wash. 2001) (finding that the Washington Legislature intended to remove all civil consequences from a vacated conviction).

⁵⁸ *In re Carrier*, 272 P.3d 209, 222 (Wash. 2012) (finding “dismissed” records cannot count towards a strike in a subsequent conviction).

⁵⁹ *See State v. Smith*, 246 P.3d 812, 813 (finding vacated misdemeanor conviction could not be used to prohibit a record holder from vacating a prior felony conviction).

⁶⁰ *See In re Disciplinary Proceedings Against Perez-Pena*, 168 P.3d 408, 413 (Wash. 2007) (holding that vacated records could still be used in disciplinary proceedings against lawyers by a state bar).

⁶¹ WASH. REV. CODE § 9.96.060(6) (2012). *But see* WASH. REV. CODE § 9.94A.640 (not containing same explicit directive to eliminate law enforcement record).

⁶² *Electronic Court Records (ECR) Online*, KING CNTY. SUPERIOR COURT CLERK’S OFFICE, <http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx> (last visited Mar. 25, 2013).

⁶³ WASH. REV. CODE §§ 9.94A.640(3), 9.96.060(6) (2012).

⁶⁴ I personally experienced this with clients at Volunteer Legal Services through the King County Bar Association.

enforcement databases and the record is not removed, the client has gone to a lot of trouble for little benefit.

4. To Seal

Sealing a criminal record does not destroy the record, unlike truly expunging or deleting records; rather, it prevents access to the detailed record unless there is a subsequent adjudication where the sealed record is relevant.⁶⁵ An ordinary employer or landlord could still search for a person's name and find a message indicating the record is sealed along with some basic information.⁶⁶

Sealing criminal records is allowed in virtually all states, but the standards wildly differ.⁶⁷ Further, 26 states, including Washington, allow law enforcement agencies to access "sealed" information even though the public may not.⁶⁸ 16 states, including Washington, allow some licensing boards, such as state bars, and employers, such as law enforcement, to access sealed records.⁶⁹

To seal a criminal record in Washington, a person must show that having the criminal record remain public creates significant hardship, typically due to loss of employment or housing opportunities.⁷⁰ Because it is hard to

⁶⁵ WASH. CT. GR 15.

⁶⁶ LEGAL VOICE, CAN I CLEAR MY CRIMINAL RECORD?, 7 (2010) ("Evidence of the existence of a sealed file, unless protected by statute, is available for viewing by the public on court indices, but is limited to the case number, names of the parties, the notation "case sealed," the case type in civil cases and the cause of action or charge in criminal cases."), available at http://www.legalvoice.org/pdf/self_help/Can_I_Clear_My_Criminal_Record.pdf.

⁶⁷ MCADOO ET AL., *supra* note 14.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Seattle Times Co. v. Ishikawa, 640 P.2d 716, 720–22 (Wash. 1982) (describing the five factors in determining whether a record should be sealed, boiling down to whether the open records create a substantial hardship that outweighs the public benefit for keeping the records open).

prove that a court record, as opposed to a law enforcement record, caused an employment or housing opportunity to be lost, a record holder should have the law enforcement record vacated before the court record is sealed.⁷¹ Also, if there are other non-vacated records, it will be hard to prove that sealing the record will effectively protect the record holder's interest.⁷²

II. CURRENT STATE OF CRIME IN WASHINGTON STATE

Overall, roughly 1,569,000⁷³ or 23 percent⁷⁴ of Washingtonians have criminal records as of 2010. In 2009, over 17,000 people were released from prisons in Washington State.⁷⁵ Many of these people will struggle to find housing and employment.

But it is important to understand that aggregated criminal records data from states are particularly tricky.⁷⁶ States do not keep perfect records, and their records keeping practices vary.⁷⁷ Records are kept at various levels of

⁷¹ See WASH. CT. GR 15(c)(2)(C) (one of several factors, but a more accessible factor than a catch-all "compelling circumstance" category).

⁷² See Ishikawa, 640 P.2d at 720–21 ("The court, the proponents and the objectors should carefully analyze whether the requested method for curtailing access would be . . . effective in protecting the interests threatened.").

⁷³ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008: A CRIMINAL JUSTICE INFORMATION POLICY, *25–26 (2009), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/228661.pdf>.

⁷⁴ OFFICE OF FINANCIAL MGMT., STATE OF WASH., FORECAST OF THE STATE POPULATION: NOVEMBER 2011 FORECAST, 26 (2011), available at http://www.ofm.wa.gov/pop/stfc/stfc2011/stfc_2011.pdf.

⁷⁵ SEATTLE HUMAN RIGHTS COMM'N, ELIMINATING BARRIERS TO JOBS AND HOUSING: ADDRESSING THE IMPACTS OF ARRESTS AND CONVICTION RECORDS 3 (2011), available at http://www.seattle.gov/humanrights/documents/Background_FactSheet_March2011.pdf.

⁷⁶ See William F. Hauswirth, *Criminal Records: Dissecting the Data*, ISO REVIEW Feb. 2009, <http://www.iso.com/Research-and-Analyses/ISO-Review/Criminal-Records-Dissecting-the-Data.html>.

⁷⁷ *Id.*

state authorities including municipalities and counties.⁷⁸ Data collectors do not receive perfectly accurate information from state authorities.⁷⁹ That being said, this paper will assume the data is essentially correct. Criminal records contain a broad array of criminal data, including arrests, final dispositions, sentencing, and trial proceedings.⁸⁰ To have a criminal record, a person could have anything from a DUI to petty theft, a first-degree homicide, or merely being arrested for questioning.⁸¹

It is also important to understand what types of crimes are committed and how many of them would be eligible for vacating in Washington. In Washington, there were 258,996 crimes reported with 153,092 reported arrests in 2011.⁸² During 2011, 19,568 violent crimes were committed in Washington State,⁸³ none of which should be eligible for vacation. Additionally, over 47,000 domestic violence crimes were reported, which have heightened restrictions for vacation.⁸⁴ Between 239,428–244,146 property crimes were reported in Washington, most of which would be eligible for vacation.⁸⁵ Many reported crimes involve multiple categories.

Another important factor in post-sentencing discussions is the procedural history of the conviction. For the vast majority of convictions, record holders plead guilty.⁸⁶ Police have been trained to elicit confessions,

⁷⁸ *Id.*

⁷⁹ *See generally id.*

⁸⁰ *See* WASH. REV. CODE §§ 10.97.030 (2012).

⁸¹ *See id.*

⁸² WASH. ASS'N OF SHERIFFS & POLICE CHIEFS, CRIME IN WASHINGTON: 2011 ANNUAL REPORT 9 (2011), *available at* www.waspc.org/files.php?bfid=2626.

⁸³ *Id.* at 43.

⁸⁴ *Id.* at 9.

⁸⁵ *Id.*

⁸⁶ Alexandra Natapoff, *Gideon's Silence: Whatever Happened to the Right to Counsel?*, SLATE (May 31, 2006, 5:35 PM), *available at* http://www.slate.com/articles/news_and_politics/jurisprudence/2006/05/gideons_silence.single.html (“And so people plead guilty at a rate of 90 to 95 percent.”).

highlighted by luring suspects into an interview that then turns into an interrogation where the police pressure confessions.⁸⁷ While there are no exact estimates of the proportion of cases that are resolved through plea-bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.⁸⁸

The total number of criminal convictions is also affected by the quality of legal representation. Although all citizens are guaranteed legal representation at criminal trials,⁸⁹ many courts highly incentivize foregoing that right for “assembly-line justice” by having defendants waive their right to counsel.⁹⁰ The current hyper-criminalization movement has led to increased caseloads to the point where public defenders average only a few hours per case, at best.⁹¹

The National Advisory Commission on Criminal Justice Standards and Goals set caseload limits for full-time public defenders at 150 felonies, 400 misdemeanors, 200 juvenile, 200 mental health, or 25 appeals per year.⁹² These standards have remained constant for over 20 years. Similarly, in 2007, the American Council of Chief Defenders (“ACCD”) issued a “Statement on Caseloads and Workloads,” recommending that defenders handle no more than 400 misdemeanors per year.⁹³ For comparison, Grant

⁸⁷ See Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979, 988–990 (1997).

⁸⁸ THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 5 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrusts.org/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf.

⁸⁹ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁹⁰ ROBERT C. BORUCHOWITZ ET AL., NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 12, 15 (2009), available at <https://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808>.

⁹¹ *Id.*

⁹² *Id.* at 21.

⁹³ *Id.*

County, Washington, defenders typically handle over 900 misdemeanors a year, averaging less than four hours per case.⁹⁴

III. COLLATERAL CONSEQUENCES

A. Generally

The American Bar Association has found, once convicted, a person may incur collateral consequences from over 38,000 statutes nationwide.⁹⁵ These collateral consequences include loss of rights to firearms, voting, certain employment opportunities; many others rights are also lost.⁹⁶ The amount of potential loss for someone convicted of a crime extends far beyond bars. Many critics attack the collateral consequences acquired simultaneously with a criminal record for being unjust and disproportionate.⁹⁷

Probably the most important hurdle preventing record holders from vacating their records are Legal Financial Obligations (“LFOs”). LFOs are incurred as a criminal penalty.⁹⁸ LFOs impose harsh barriers to finding

⁹⁴ *Id.* at 21–22. Data for other Washington counties were not immediately available.

⁹⁵ Amy Soloman, Senior Advisor to the Assistant Attorney General, U.S. Dep’t of Justice, Written Testimony at EEOC Meeting to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011) (transcript available at <http://www1.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm?renderforprint=1>); NAT’L LAW EMP’T PROJECT, ET AL., STATE REFORMS PROMOTING EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS: 2011-2012 LEGISLATIVE ROUND-UP 8 (2012), available at <http://www.nelp.org/page/SCLP/2012/StateCollateralConsequencesLegislativeRoundupSept2012.pdf?nocdn=1>.

⁹⁶ Soloman, *supra* note 95; NAT’L LAW EMP’T PROJECT, ET AL., *supra* note 95.

⁹⁷ Accord Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153 (1999) (explaining impact of different types of collateral consequences); Gabriel J. Chin, *What Are Defense Lawyers for? Links Between Collateral Consequences and the Criminal Process*, 45 TEX. TECH L. REV. 151 (2012) (advocating for defense attorneys in particular to understand the implications of collateral consequences when plea bargaining); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119 (2009) (advocating for full disclosure of collateral consequences before defendants’ guilty pleas can be accepted).

⁹⁸ WASH. REV. CODE § 9.94A.760 (2012).

housing or employment and also to maintaining good credit.⁹⁹ The maximum, non-mandatory fine that a person can receive for class A felonies is \$50,000; for class B felonies, \$20,000; for class C felonies, \$10,000; for gross misdemeanors, \$5,000; and for misdemeanors, \$1,000.¹⁰⁰ Someone hit by even a fraction of these limits may not be able to ever pay off the fines. If they cannot pay off the fines, they will never be able to vacate the criminal record. If they cannot vacate the criminal record, they will face difficult challenges when searching for housing or employment. If they cannot find stable housing or employment, they will not be able to pay off their LFOs. And so the cycle continues for many.

Record holders are denied more than housing and employment opportunities. Besides a loss of employment and housing opportunities, record holders may be directly denied educational opportunities by secondary educational institutions admissions or indirectly denied by not being allowed to take out federal student loans.¹⁰¹ A record holder may not be able to legally own a firearm¹⁰² or receive welfare benefits.¹⁰³ Driver's licenses may be restricted, which further decreases employability.¹⁰⁴ Criminal records may even restrict military service and traveling abroad.¹⁰⁵

Record holders could also lose civil rights due to their criminal records.¹⁰⁶ Record holders in at least nine states may lose the right to vote

⁹⁹ Travis Stearns, *Intimately Related to the Criminal Process: Examining the Consequences of a Conviction After Padilla v. Kentucky and State v. Sandoval*, 9 SEATTLE J. FOR SOC. JUST. 855, 874 (2011).

¹⁰⁰ *Id.* at 875.

¹⁰¹ *Id.* at 891.

¹⁰² *Id.* at 877.

¹⁰³ *Id.* at 884–87.

¹⁰⁴ *Id.* at 888–90.

¹⁰⁵ *Id.* at 892–94.

¹⁰⁶ *Id.* at 890–91.

permanently or for the period of incarceration for misdemeanors.¹⁰⁷ Depending on the crime committed, felons may permanently lose voting rights in 11 states; lose it for a long period of time even post-incarceration

¹⁰⁷ IDAHO CONST. art. VI, § 3 (“No person is permitted to vote, serve as a juror, or hold any civil office who has, at any place, been convicted of a felony, and who has not been restored to the rights of citizenship, or who, at the time of such election, is confined in prison on conviction of a criminal offense.”); ILL. CONST. art. III, § 2 (“A person convicted of a felony, or otherwise under sentence in a correctional institution or jail, shall lose the right to vote, which right shall be restored not later than upon completion of his sentence.”); KY. CONST. § 145(1) (“Persons convicted in any court of competent jurisdiction of treason, or felony, or bribery in an election, or of such high misdemeanor as the General Assembly may declare shall operate as an exclusion from the right of suffrage, but persons hereby excluded may be restored to their civil rights by executive pardon.”); IND. CODE § 3-7-13-4 (2003) (“A person who is: (1) convicted of a crime; and (2) imprisoned following conviction; is deprived of the right of suffrage by the general assembly pursuant to Article 2, Section 8 of the Constitution of the State of Indiana. (b) A person described in subsection (a) is ineligible to register under this article during the period that the person is: (1) imprisoned; or (2) otherwise subject to lawful detention.”); MO. REV. STAT. § 115.133(2) (2013) (“2. No person who is adjudged incapacitated shall be entitled to register or vote. No person shall be entitled to vote: (1) While confined under a sentence of imprisonment; . . . (3) After conviction of a felony or misdemeanor connected with the right of suffrage.”); IOWA CODE § 48A.6(1) (2002) (“A person who has been convicted of a felony as defined in section 701.7, or convicted of an offense classified as a felony under federal law. If the person’s rights are later restored by the governor, or by the president of the United States, the person may register to vote.”); MICH. COMP. LAWS § 168.758b (2014) (“A person who, in a court of this or another state or in a federal court, has been legally convicted and sentenced for a crime for which the penalty imposed is confinement in jail or prison shall not vote, offer to vote, attempt to vote, or be permitted to vote at an election while confined.”); S.C. CODE ANN. § 7-5-120(B) (2013) (“A person is disqualified from being registered or voting if he: . . . (2) is serving a term of imprisonment resulting from a conviction of a crime; or (3) is convicted of a felony or offenses against the election laws, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.”); W. VA. CODE 3-3-1 (b)(1)(C) (2012) (“Incarceration or home detention: *Provided*, That the underlying conviction is not for a crime which is a felony or a violation of section twelve, thirteen, or sixteen, article nine of this chapter involving bribery in an election” (emphasis in original)); D.C. CODE § 1-1001.02(7) (2012) (“The term ‘felony’ includes any crime committed in the District of Columbia referred to in § 1-1001.14 [corrupt election practices], § 1-1162.32 [lobbying], and § 1-1163.35 [campaign finance].”).

in 20 states; and only for the period of incarceration in 13 states and Washington, D.C.¹⁰⁸ Only two states, Maine and Vermont, will not restrict a felon from voting.¹⁰⁹ In particular, Washington disenfranchises felons, but allows for re-registration after completion of the sentence.¹¹⁰

B. Employment

One of the biggest obstacles for record holders is finding employment. It is difficult to measure the direct effects of records on employability because numerous factors are involved. It is also difficult to identify causality and the necessary mechanisms to give a definitive answer.¹¹¹ Over 90 percent of businesses nationwide have policies to expressly consider criminal records in the hiring process.¹¹² These employers typically use criminal records to assess risk levels brought by current or prospective employees by focusing on safety, stability, conformity, and obedience.¹¹³ Theoretically, denying people economic opportunities based on their criminal records decreases societal stability and increases crime rates.¹¹⁴

Overall, our economy would be better off if criminal records did not impact employment opportunities. Currently, our economy suffers a deadweight loss from barriers to employment for record holders by reducing the output of goods and services between 57 and 65 billion dollars

¹⁰⁸ *State Felon Voting Laws*, PROCON.ORG, <http://felonvoting.procon.org/view.resource.php?resourceID=286#misdemeanor> (last updated Feb. 12, 2014, 9:40AM).

¹⁰⁹ *Id.*

¹¹⁰ WASH. REV. CODE § 29A.08.520 (2012).

¹¹¹ Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 939–40 (2003), available at https://www.princeton.edu/~pager/pager_ajs.pdf.

¹¹² MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSSELLEM, THE NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1.

¹¹³ *Id.* at 3.

¹¹⁴ *Id.*

between 1982 and 2006.¹¹⁵ In 2008, there were roughly 12 million people of working age in the United States who were ex-offenders.¹¹⁶ Studies estimate that the effects of criminal records lowered the male employment rate by 1.5 to 1.7 percent and the overall employment rate by roughly 0.9 percent.¹¹⁷ If unemployment was lowered by almost a full percentage point in places, there is no better way of saying, it would be a big deal. If current unemployment rates in King or Ferry counties, holding at 5.6 percent and 15.1 percent respectively,¹¹⁸ were to subtract an additional 0.9 percent, the results would be dramatic.

Increased employment is associated with positive public safety outcomes. Researchers have found that from 1992 to 1997, a time when the national unemployment rate dropped 33 percent, “slightly more than 40 percent of the decline [in the overall property crime rate] can be attributed to the decline in unemployment.”¹¹⁹ Consider the safety implications when half of all offenders entering the Washington state prison system were unemployed at the time the offense was committed.¹²⁰

Generally, incarceration can lead to loss in human capital and networking, and employability.¹²¹ Those who have been incarcerated suffer a decrease between 10 and 30 percent for subsequent employment when

¹¹⁵ *Id.* at 1. See JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. POLICY & RESEARCH, EX-OFFENDERS AND THE LABOR MARKET (2010), available at <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf> (providing detailed statistical data regarding the effect of conviction records on employability).

¹¹⁶ SCHMITT & WARNER, *supra* note 115, at 1.

¹¹⁷ *Id.*

¹¹⁸ King, *Snohomish Have State’s Lowest Unemployment*, THE SEATTLE TIMES (last updated Mar. 26, 2013, 12:28 PM), http://seattletimes.com/html/business/technology/2020643415_countyunemploymentxml.html.

¹¹⁹ SEATTLE HUMAN RIGHTS COMM’N, *supra* note 75, at 3 (alteration in original) (internal quotation marks omitted).

¹²⁰ *Id.*

¹²¹ SCHMITT & WARNER, *supra* note 115, at 8.

compared to the general population.¹²² 40 percent of private employers among a sample population of 3,000 said they would probably not hire someone with a criminal record.¹²³

The private sector allows criminal records to greatly influence employment decisions. Without some form of protection, some record holders will continually be denied employment, with little hope of improving their situations. Most employers include a box in their application asking for criminal history information. While most jurisdictions allow employers to use knowledge of applicants' criminal records as the employers see fit, seven states and 40 local jurisdictions have adopted policies that prevent employers from using some forms of criminal data in employment decisions.¹²⁴ Because these laws typically prevent employers from asking questions relating to criminal histories that applicants must answer, the laws are considered to "ban the box."¹²⁵ Ban the box statutes prevent employers from using certain criminal history information such as conviction histories.¹²⁶ Ban the box statutes were introduced in seven states in 2012, none of which were passed.¹²⁷ If ban the box statutes cannot gain enough political support, legislatures should find other ways of protecting record holders' chances of fully rejoining society.

Though employer interests should not be entirely discounted, record holders would be better off if employers could not be held negligent simply for hiring record holders. Currently, employers are discouraged from hiring employees with criminal records partially because they can be held liable for employee actions if the employer knew, based on the employee's

¹²² *Id.* at 6.

¹²³ *Id.* at 10.

¹²⁴ NAT'L LAW EMP'T PROJECT ET AL., *supra* note 95, at 2.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

criminal history, that the employee was predisposed towards crime.¹²⁸ Only six states have limited employer liability for hiring applicants known to have relevant criminal records, including one state that passed a related law in 2012.¹²⁹ Related bills were introduced in seven other states, but none passed.¹³⁰ Washington does not currently limit any employer liability for negligently hiring someone with a criminal record.

Some states restrict background checks to only occur at the end of the hiring process so applicants can be evaluated based on their positive qualifications. Background checks can be frustrating for applicants, especially when supposedly expunged crimes pop up. In 42 states in 2010, over 17.7 million name-based noncriminal background checks were performed, presumably by prospective employers and landlords.¹³¹ Roughly ten percent of those were requested from Washington State, 99 percent of which were from Internet-based requests.¹³²

Most employers in Washington cannot legally consider criminal records if the record is over ten years old or unless they are directly related to the job.¹³³ However, employers can ask about arrests, even if those arrests do not lead to convictions.¹³⁴ Job applicants in Washington who have had a criminal record vacated are legally allowed to say that they have never been convicted of a crime.¹³⁵ But, practically speaking, employers can still

¹²⁸ *Id.* at 6.

¹²⁹ *Id.*

¹³⁰ *Id.* at 2.

¹³¹ BUREAU OF JUSTICE STATISTICS, *supra* note 73, at 9.

¹³² *Id.* at *59–60.

¹³³ WASH. REV. CODE § 9.96A.020 (2012).

¹³⁴ See AM. CIVIL LIBERTIES UNION, GUIDE TO CRIMINAL RECORDS AND EMPLOYMENT IN WASHINGTON STATE 3 (2013), available at https://aclu-wa.org/sites/default/files/attachments/SC_EMPLOY_GUIDE_032013.pdf.

¹³⁵ *Id.*

technically look up records and may not consider someone who says they have never been convicted when, in fact, they have. Issues of trust arise.

When employers have knowledge of criminal records, they are rarely empathetic. Nationally, over 90 percent of employers expressly consider criminal records in the hiring process.¹³⁶ According to a 2007 survey, “roughly 40 percent of employers would ‘definitely’ or ‘probably’ hire applicants with criminal records, whereas much higher percentages (i.e., 80 to 90 percent) would hire former welfare recipients, workers with little recent work experience or lengthy unemployment, and other stigmatizing characteristics.”¹³⁷

Assuming companies don’t hire because of a fear of recidivism, employer calculus may not be completely based in reality. Some studies show the propensity to re-commit a crime diminishes over time.¹³⁸ After four to seven years of not committing other crimes, ex-offenders and non-offenders are equally likely to commit a crime.¹³⁹ Furthermore, those who have been employed for even a year or less also are far less likely to recidivize than those who remain unemployed.¹⁴⁰ According to an Illinois study with a sample size of 1,600 individuals recently released from state prison, only eight percent of those who were employed for a year recidivized, compared to the Illinois’s 54 percent average recidivism rate.¹⁴¹

¹³⁶ RODRIGUEZ & EMSELLEM, *supra* note 112, at 1.

¹³⁷ HARRY J. HOLZER, COLLATERAL COSTS: THE EFFECTS OF INCARCERATION ON THE EMPLOYMENT AND EARNINGS OF YOUNG WORKERS 14 (2007), available at <http://ftp.iza.org/dp3118.pdf>.

¹³⁸ See SEATTLE HUMAN RIGHTS COMM’N, *supra* note 75.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

C. Record Holders in our Economy

Criminal records drastically reduce a person's economic prospects. Record holders have a long-term reduced prospect of stable employment and earnings.¹⁴² After having some time to adjust to life out of prison, record holders have up to 20 percent lower earnings, reduced wage growth, and lower employment compared to the period of time before they were incarcerated.¹⁴³

In 2008, 1 in 33 working-age adults were ex-prisoners while 1 in 15 working-age adults were ex-felons. About 1 in 17 adult men of working-age were ex-prisoners and about 1 in 8 were ex-felons.¹⁴⁴ Even at the "relatively low" productivity rates of ex-offenders, accounting for less overall education and job-skills training, the resulting loss of output in 2008 was between roughly \$57 billion and \$65 billion.¹⁴⁵

Also, the cost of corrections at each level of government has increased by over 600 percent each year from \$9 billion in 1982 to \$68 billion in 2006.¹⁴⁶ "Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole."¹⁴⁷ Pennsylvania estimates that, on average, it spends \$80 a day per prisoner.¹⁴⁸

¹⁴² John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 134 (1999).

¹⁴³ HOLZER, *supra* note 137, at 18 n. 17.

¹⁴⁴ SCHMITT & WARNER, *supra* note 115, at 1.

¹⁴⁵ *Id.*

¹⁴⁶ RODRIGUEZ & EMSELLEM, *supra* note 116, at 3.

¹⁴⁷ Press Release, Lina Garcia & Mike Trupo, U.S. Dep't of Labor, US Department of Labor Announces Grant Competition to Help Former Offenders Gain Career Skills and Rejoin Community Life (Feb. 10, 2011), available at <http://www.dol.gov/opa/media/press/eta/ETA20110185.htm> (internal quotations marks omitted).

¹⁴⁸ *Human Rights at Home: Mental Illness in U.S. Prisons and Jails: Hearing Before the Subcomm. on Human Rights and the Law*, 111th Cong. 1 n.1 (Sep. 15, 2009) (statement of the Am. Civil Liberties Union), available at http://www.aclu.org/files/images/asset_upload_file299_41188.pdf.

Studies show that only 30 to 40 percent of people with criminal records are employed in any given quarter, with quarterly earnings for those who are averaging \$2,000 a quarter, or roughly \$8,000 a year.¹⁴⁹ The poverty level for a single household in the 48 contiguous states at the time of that study, 2007, was \$10,210;¹⁵⁰ the 2014 poverty level is below \$11,670.¹⁵¹

In all surveys of employers that asked about their willingness to hire people with criminal records, employer responses reveal a strong aversion to hiring applicants with criminal records, stronger than their aversion to hiring other groups of stigmatized workers such as welfare recipients and those with GEDs.¹⁵² Over 60 percent of employers who have recently hired low-skilled workers indicate they would “probably not” or “definitely not” be willing to hire an applicant with a criminal record.¹⁵³ Employers have legitimate concerns about problems such as danger, reputation, and reliability.¹⁵⁴

D. Economics 2013

Unemployment numbers are hard to decipher because there are so many different measures of unemployment. There are six levels of unemployment officially tracked by the government, labeled U-1 through U-6, all of which

¹⁴⁹ AMY RYNELL, THE HEATRLAND ALLIANCE MID-AM. INST. ON POVERTY, CAUSES OF POVERTY: FINDINGS FROM RECENT RESEARCH, 16–18 (2008), available at http://www.woodsfund.org/site/files/735/69201/260704/363127/causes-of-poverty_report_by_Heartland_Alliance.pdf; HOLZER, *supra* note 137.

¹⁵⁰ *The 2007 HHS Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/07poverty.shtml> (last visited Mar. 26, 2013).

¹⁵¹ *The 2014 HHS Poverty Guidelines*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/poverty/14poverty.cfm> (last visited Mar. 19, 2014).

¹⁵² Stephen Raphael, THE SOCIOECONOMIC STATUS OF BLACK MALES: THE INCREASING IMPORTANCE OF INCARCERATION 23 (2004), available at <http://gsppi.berkeley.edu/faculty/sraphael/the-socioeconomic-status-of-black-males-march2004.pdf>.

¹⁵³ Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J.L. & ECON. 451, 476 (2009).

¹⁵⁴ RODRIGUEZ & EMSELLEM, *supra* note 112, at 2.

indicate employment levels as a percent of the total civilian workforce.¹⁵⁵ U-1 measures people who are unemployed for over 15 weeks.¹⁵⁶ U-2 measures job losers and those removed from temporary jobs.¹⁵⁷ U-3, the official unemployment rate typically discussed on the news, measures the total number of unemployed people as measured by those who successfully apply for unemployment benefits.¹⁵⁸ U-4 is the U-3 number plus discouraged workers who no longer seek unemployment benefits.¹⁵⁹ U-5 is the U-4 number plus all other marginally attached¹⁶⁰ workers.¹⁶¹ U-6 is the U-5 number plus those who are underemployed for economic reasons.¹⁶² The unemployment levels for the United States and Washington State are shown in Table A, below.¹⁶³

¹⁵⁵ *Local Area Unemployment Statistics: Alternative Measures of Labor Underutilization for States, 2013 Annual Averages*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/lau/stalt.htm> (last visited Oct. 10, 2012) (refer to the Third Quarter of 2011 through the Second Quarter of 2012).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Marginally attached workers are “[p]ersons not in the labor force who want and are available for work, and who have looked for a job sometime in the prior 12 months (or since the end of their last job if they held one within the past 12 months), but were not counted as unemployed because they had not searched for work in the 4 weeks preceding the survey. Discouraged workers are a subset of the marginally attached.” *Glossary*, U.S. BUREAU OF LABOR STATISTICS, <http://www.bls.gov/bls/glossary.htm> (last updated Jan. 31, 2014).

¹⁶¹ U.S. BUREAU OF LABOR STATISTICS, *supra* note 155.

¹⁶² *Id.*

¹⁶³ *Id.*

Table A:
Comparing Unemployment Measures For Washington and the Rest of the Country

Unemployment, United States	Unemployment, Washington State
U-1: 4.9 percent	U-1: 4.8 percent
U-2: 4.8 percent	U-2: 5.0 percent
U-3: 8.5 percent	U-3: 8.7 percent
U-4: 9.1 percent	U-4: 9.2 percent
U-5: 10.0 percent	U-5: 10.4 percent
U-6: 15.3 percent	U-6: 17.0 percent

Unfortunately, these numbers are flawed. These numbers exclude public sector jobs, self-employment, and informal work for cash. Part-time and casual employment combined likely characterizes much work among offenders and ex-offenders, both before and after incarceration.¹⁶⁴ Many factors affect unemployment.¹⁶⁵ Thus, it is difficult to truly gauge how much criminal records affect unemployment in the aggregate.

Individually, record holders deal with greater concentrations of long-term unemployment. Long-term unemployment is defined as being unemployed for 27 consecutive weeks.¹⁶⁶ The percentage of unemployed persons that were in long-term unemployment rose from 17.5 percent in 2007 to 43

¹⁶⁴ HOLZER, *supra* note 137.

¹⁶⁵ Ben S. Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Remarks at the National Association of Business Economists in Arlington, Virginia (Mar. 26, 2012), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20120326a.pdf> (last visited Jan. 8, 2013).

¹⁶⁶ News Release, U.S. Dep't of Labor, The Employment Situation—February 2014 2, available at <http://www.bls.gov/news.release/pdf/empst.pdf> (last visited Mar. 18, 2014)

percent in 2010.¹⁶⁷ Seven percent of all working age adults are enduring long-term hardship.¹⁶⁸ Of those dealing with long-term unemployment in 2010, 7.2 percent had less than a high school education; 5.6 percent had finished high school; 4 percent had some college education; and only 2.2 percent had finished or gone beyond their college education.¹⁶⁹

National employment numbers after the Great Recession were dismal, especially for record holders. U-3 unemployment numbers, as low as four percent before the Great Recession, ballooned to over ten percent at the worst.¹⁷⁰ In Washington, U-3 unemployment was at its local minimum before the housing bubble burst around the end of 2007, and peaked in early 2010.¹⁷¹

Record holders are substantially affected by unemployment. Half of all offenders entering the Washington State prison system were unemployed at the time the offense was committed.¹⁷² Half. Those with criminal records may be denied the opportunity to gain skills needed to successfully fit a role in the local or national economy. With fewer legal opportunities, record holders may feel that they have little choice but to take or create illegal opportunities.

¹⁶⁷ *Id.*

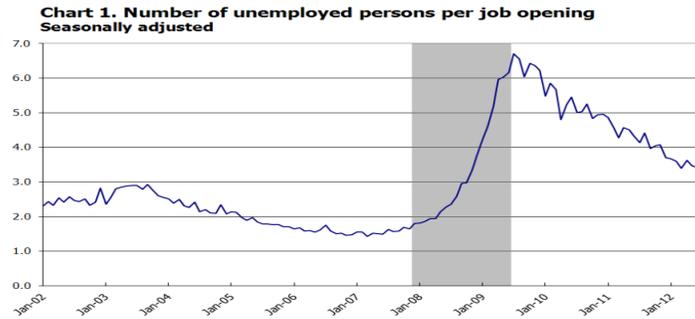
¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ U.S. BUREAU OF LABOR STATISTICS, *supra* note 155.

¹⁷¹ *Washington Unemployment*, DEP'T OF NUMBERS, <http://www.deptofnumbers.com/unemployment/washington/> (last visited Mar. 18, 2014).

¹⁷² SEATTLE HUMAN RIGHTS COMM'N, *supra* note 75, at 3.



Source: Bureau of Labor Statistics, Current Population Survey and Job Openings and Labor Turnover Survey, October 10, 2012. (Note: Shaded area represents recession as determined by the National Bureau of Economic Research (NBER).)

Record holders are greatly disadvantaged in the hiring process, even if the criminal record is relatively minor. Both wage levels and wage growth are significantly lower among those with criminal records than those without them.¹⁷³ Employers are reluctant to consider the declared offender for a job, even if it is to their own economic detriment.¹⁷⁴ Job prospects for criminal offenders are only expected to worsen as employers continue to gain easier and cheaper access to criminal records.¹⁷⁵ Even before the

¹⁷³ HOLZER, *supra* note 137, at 17.

¹⁷⁴ Leavitt, *supra* note 6, at 1282 n.17; Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 520 (1996) (noting that an employer may pay a higher wage rather than hire a criminal).

¹⁷⁵ Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR. AM. L. & POL'Y 2, 2 n.12 (2012); Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders*, in STUDIES OF LABOR MARKET INTERMEDIATION (David H. Autor, ed. 2009) (finding that online access to state criminal history records reduced the employment of ex-offenders but did not improve employment outcomes for non-offenders); James Jacobs & Tamara Crepet, *The Expanding Scope*,

current recession, it was estimated that between 25 and 40 percent of ex-offenders were unemployed.¹⁷⁶

Some believe “ban the box” statutes and other similar remedies take away an employer’s right to rationally decide what risks to take.¹⁷⁷ It is argued that criminal records are manifests of mutable characteristics, the choices of the criminals, and should not be protected like immutable characteristics such as race or gender.¹⁷⁸ “There are currently over 12 million ex-felons in the United States, representing roughly 8 percent of the working-age population.”¹⁷⁹ According to a 1994 Department of Justice (“DOJ”) study, nearly two-thirds of parolees will be charged with new crimes and over 40 percent will return to prison within three years.¹⁸⁰ In fact, murder is the third largest cause of on-the-job death overall, and first for on-the-job death for women.¹⁸¹ Co-workers and ex co-workers commit

Use, and Availability of Criminal Records, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177 (2008).

¹⁷⁶ Harwin, *supra* note 175, at 2; PETER FINN, U.S. DEP’T OF JUSTICE ET AL., SUCCESSFUL JOB PLACEMENT FOR EX-OFFENDERS, THE CENTER FOR EMPLOYMENT OPPORTUNITIES 4 (1998), available at <https://www.ncjrs.gov/pdffiles/168102.pdf>; JEREMY TRAVIS ET AL., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 31–32 (2001), available at http://www.urban.org/pdfs/from_prison_to_home.pdf.

¹⁷⁷ Dermot Sullivan, *Note: Employment Violence, Negligent Hiring, and Criminal Records Checks: New York’s Need to Reevaluate its Priorities to Promote Public Safety*, 72 ST. JOHN’S L. REV. 581 (1998); Hruz, *supra* note 7.

¹⁷⁸ Thomas M. Hruz, Comment, *The Unwisdom of the Wisconsin Fair Employment Act’s Ban of Employment Discrimination on the Basis of Criminal Records*, 85 MARQ. L. REV. 779, 820-27 (2002).

¹⁷⁹ Pager, *supra* note 111, at 938 (citing Christopher Uggen, et al., Am. Soc’y of Criminology, Paper Presented at American Society of Criminology Meeting, San Francisco, CA: *Crime, Class, and Reintegration: The Socioeconomic, Familial, and Civic Lives of Offenders* (Nov. 18, 2000)).

¹⁸⁰ PATRICK A. LANGAN & DAVID J. LEVIN, U.S. BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, 1 (2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

¹⁸¹ Sullivan, *supra* note 177, at 584 nn.16–17.

14 percent of all workplace violence, committing 1,500 violent assaults each year.¹⁸²

However, focusing on the superficial statistics from the DOJ study creates a straw man argument for two main reasons. First, the statistic focuses on ex-felons and not all record holders. Unfortunately, non-felon record holders typically get lumped in with felons. This further illustrates the need for misdemeanants to acquire additional protection. Second, not all felons are able to find stable employment or housing, which makes them more likely to re-offend. Those who find stable employment and housing are much less likely to re-offend. Providing more jobs will help reduce overall crime rates.

E. Housing Issues

Criminal records disadvantage people seeking housing as well as employment. The general issues people with criminal records endure are compounded by housing issues they are typically forced to face.¹⁸³ Adequate housing provides stability. A study in New York reported that a person without stable housing was seven times more likely to re-offend after returning from prison.¹⁸⁴ However, landlords often deny housing to record holders because they perceive certain records indicate undesirable risks. Two-thirds of ex-offenders who lacked appropriate housing recommitted crimes within the first 12 months of being released, while one-fourth of those with appropriate housing re-offended in the same time

¹⁸² *Id.* at 584 nn. 18–19.

¹⁸³ Eric Dunn & Marina Grabchuk, *Background Checks and Social Effects: Contemporary Residential Tenant-Screening Problems in Washington State*, 9 SEATTLE J. FOR SOC. JUST. 319, 325 nn.34–44 (2010); Stearns, *supra* note 99, at 879–84 nn.270–330.

¹⁸⁴ SEATTLE HUMAN RIGHTS COMM'N, *supra* note 75.

frame.¹⁸⁵ A 2009 Seattle-based study revealed that a criminal history alone does not predict if a person will be a successful housing resident.¹⁸⁶ Further, landlords typically wish to know a tenant has stable income that can be used to pay rent when it is due.¹⁸⁷ Income screening can require income that is two to three times higher than rent.¹⁸⁸ The cycle continues.

IV. THE PROPOSAL

A. My Plan

Expunction law in Washington is not just inequitable, it is erecting barriers to employment and housing for 18 percent of Washingtonians. While many record holders are able to find some form of work, many are casually employed, underemployed, or unemployed.

Disallowing certain heinous crimes from being expunged is understandable. If the criminals are the ones conducting the crimes, then they should squarely shoulder the burden rather than shifting externalities onto employers or landlords. But people must come to terms with the fact that in doing so, those “very bad” people have no chance to rehabilitate and have few, if any, non-criminal alternatives.

WASH. REV. CODE § 9.96.060, which allows for misdemeanors to be vacated, all but abrogates the purpose of WASH. REV. CODE § 9.94A.640, which allows felonies to be vacated. By greatly limiting people from vacating some petty misdemeanors, record holders are prevented from utilizing WASH. REV. CODE § 9.94A.640.

¹⁸⁵ Stearns, *supra* note 99, at 881 n.300; Lornet Turnbull, *Few Rentals for Freed Felons*, SEATTLE TIMES, Nov. 29, 2010, available at http://seattletimes.com/html/localnews/2013552561_housing30m.html.

¹⁸⁶ SEATTLE HUMAN RIGHTS COMM’N, *supra* note 75.

¹⁸⁷ *Tenant Services*, SOLID GROUND, <http://www.solid-ground.org/Tenant/Pages/HousingSearch.aspx#TenantScreening5> (last visited Jan. 8, 2014).

¹⁸⁸ *Id.*

Finally, even if the law was modified, critics could take solace in the fact that judges would ultimately have the discretion to vacate a criminal record or not. The prosecutor's office typically reviews every motion to vacate order and decides whether or not to protest. From there, even if a record holder has dotted every i and crossed every t, a judge may still decide that public policy would be best served by denying the motion.

B. 2013 House Bill 1087

Recently, Representative Sherry Appleton and a few other sponsors attempted to push a bill¹⁸⁹ through the House Committee on Public Safety that happened to propose a similar prescription as this paper. It attempted to raise the cap from allowing a record holder to vacate only one misdemeanor in a lifetime to four.¹⁹⁰ The cost of such a bill to the Washington taxpayer in incidental court costs is estimated to be \$34,000 at most, with record holders picking up the tab when they file the motion to vacate.¹⁹¹

The highest estimates assume there would be double the number of vacation hearings every year should a similar bill pass. Doubling would put the number of hearings in district and superior courts at around 1,300 a year.¹⁹² But if 1,300 of the 1,459,700 people with criminal records in Washington¹⁹³ vacated their records, then we would have progress. 1,300 people would be able to build lives for themselves and their families. Fewer would be relegated to an "untouchable-like" status.

¹⁸⁹ Substitute H.B. 1087, 63rd Leg., Reg. Sess. (Wash. 2013), available at <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/House%20Bills/1087-S.pdf>.

¹⁹⁰ Substitute Wash. H.B. 1087.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ BUREAU OF JUSTICE STATISTICS, *supra* note 73.

V. REMAINING PROBLEMS

First, law enforcement agencies and courts should continue to improve their data collection practices. There is very little data available from state or national databases regarding criminal records. It would be nice if agencies could collect data on final dispositions. Agencies should also gather more information on misdemeanors, especially if misdemeanors are the bulk of crimes courts and law enforcement agencies deal with. Scholars cannot really provide insightful comments unless there are actual statistics to provide insight on. The more knowledge we have of how our justice system works, the more likely we can create a more accurate and equitable approach to criminal justice reform.

Washington needs to better educate individuals regarding their rights in dealing with criminal records. To give credit where credit is due, educational brochures are posted on the Washington Court website.¹⁹⁴ However, many will have no reason to go to a website if they did not initially believe there was a purpose in going to the website. Jurisdictions like King County need to do a better job of educating record holders. Before they exit the courthouse, each record holder should be told he or she can possibly limit access to their criminal records, and be provided with helpful materials.

In my short time helping people vacate their records with the King County Bar Association's Volunteer Legal Program, I discovered an astounding number of clients lack knowledge of their expunction rights. Time after time I have turned away otherwise eligible clients because they did not understand the relationship between paying the court fines and the tolling period. Some only heard about a possibility of expunction a decade or more after completing their sentences. Others heard there was a

¹⁹⁴ WASH. STATE COURTS, *supra* note 3.

possibility of expunging their records, only to find that a \$100 court-imposed fine was preventing them from expunging the record for another term of years. People frequently have problems understanding the specific type of expunction for which they are eligible.

Further, fines should not determine the tolling period. When the term of years qualification is phrased as beginning at the completion of all terms of sentencing, the condition makes sense. A record holder should complete all the terms of his or her sentence as proof of both rehabilitating and paying his or her debt to society. But court-imposed fines have virtually no weight on rehabilitation. Court-imposed fines factor into retribution and just deserts.

It should not matter when a record holder pays the fine so long as it is paid before the motion to vacate can be granted. A record holder should be allowed to start the clock even if the fines have not been paid. Start it after any jail or probation sentence is over. Add some reasonable interest. But absolutely do not punish good faith people who genuinely want to do better and be better.

If nothing else, the law should strive for a modicum of logical consistency. Washington could switch from capping misdemeanors to capping felonies. It was admirable that the Washington State Legislature tried to correct the logical inconsistency of allowing the vacation of felonies and not misdemeanors by passing WASH. REV. CODE § 9.96.060. They tried in the initial House Bill to make it parallel, but modified it along with the domestic violence restrictions. The current system does not make sense. If nothing else, switch the cap from misdemeanors to felonies. While felonies provide more of a stigma, there are many more misdemeanors due to the increasing criminalization of our society.

VI. CONCLUSION

I love that Representative Appleton presented a helpful bill, but that bill does not go far enough. She claimed “kids can be dumb,” “make mistakes,” and “need to have a way to be forgiven their childish trespasses.”¹⁹⁵ But sometimes, crimes can come in more than clumps of four, especially when people can be charged with multiple convictions for the same criminal conduct.

Criminal records significantly impact job seekers and prospective tenants. Record holders have drastically increased problems of housing instability and unemployment. If we were able to provide more stable housing and employment opportunities, we might come closer to full employment and increase the size of the economy. Fairness and justice aside, the economic benefits alone can justify a policy shift towards more lenient treatment of criminal records. Higher employment means higher household budgets. Higher household budgets mean higher household demand. Higher demand leads to higher supply. Higher supply leads to lower prices and a more robust demand-based consumer economy.

By removing the illogical cap on vacating misdemeanors, we could allow more people greater opportunities. While much more can and should be done, this is merely one important step. For far too long, criminal records have been tools for separating “desirable” members of society from “undesirables.” While there is no known solution to perfectly balance the interests of record holders and the general principles of punishment, the currently one-sided balance needs to be corrected. Hopefully, eliminating the cap on vacation-eligible misdemeanors will provide a more equitable balance.

¹⁹⁵ Substitute H.B. 1087, 63rd Leg., Reg. Sess. (Wash. 2013), *available at* <http://apps.leg.wa.gov/documents/billdocs/2013-14/Pdf/Bills/House%20Bills/1087-S.pdf>.

I'm quite happy to say.
That the Sneetches got really quite smart on that day.
The day they decided that Sneetches are Sneetches.
And no kind of Sneetch is the best on the beaches.
That day, all the Sneetches forgot about stars and whether
They had one, or not, upon thars.

—The Sneetches by Dr. Seuss