

GETTING TO GO

The case for criminal record
expungement in New York State

**Community
Service
Society** | Fighting Poverty
Strengthening
New York

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Community Service Society

Fighting Poverty
Strengthening
New York

The Community Service Society of New York (CSS) is an informed, independent, and unwavering voice for positive action representing low-income New Yorkers. CSS addresses the root causes of economic disparity through research, advocacy, litigation, and innovative program models that strengthen and benefit all New Yorkers.

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About the Author

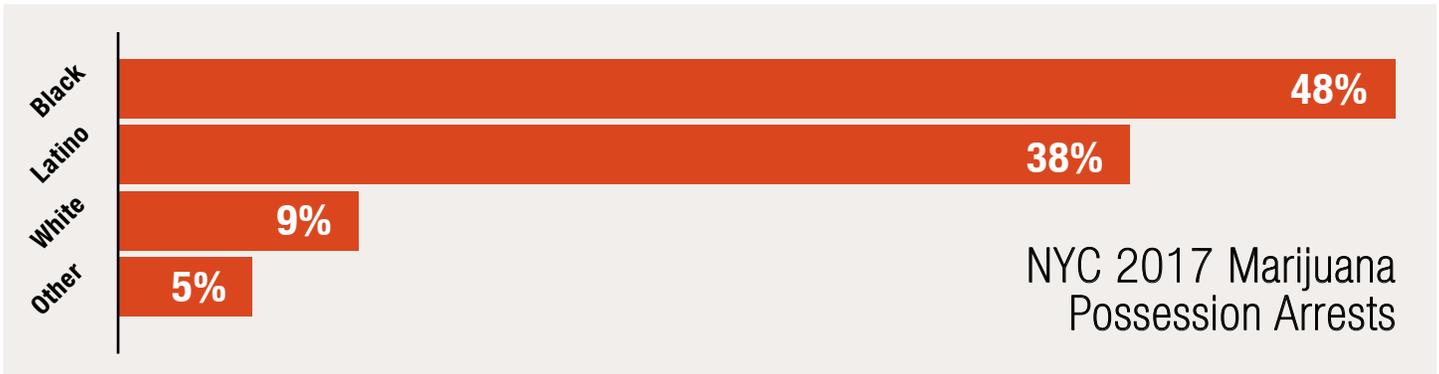
Judith Whiting is General Counsel for CSS and directs CSS's Legal Department and the Next Door Project, which engage in litigation and non-litigation approaches to ending discrimination against people with criminal conviction histories. Before coming to CSS, Judy worked as Senior Staff Attorney at the Legal Action Center, Assistant Attorney General in the Consumer Protection and Antitrust Division of the Massachusetts Attorney General's Office, and staff attorney with the Criminal, Civil and Volunteer Divisions of The Legal Aid Society in New York. She is a graduate of Barnard College, and Cornell Law School, and she received the school's Exemplary Public Service award. Judy serves on the New York City Bar Association's Mass Incarceration Task Force, was past chair of the Corrections and Community Reentry Committee, and received the Association's Legal Services Award in 2008.

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Introduction

New Yorkers take great pride in our state’s history as a progressive leader. From serving as the home of the modern labor movement, to consistently welcoming immigrants, to being one of the first states to enact marriage equality, we see New York as a beacon of liberty and justice.

But that beacon does not shine the same way for all. For tens of thousands of New Yorkers, a criminal conviction—minor or major, old or recent—turns the beacon into a red stoplight. And even when years—decades—separate a person from a past mistake, the light never turns green. Why? Because for most New Yorkers, no matter the positive strides they have made, **their criminal record is their record for the rest of their lives, on view for all to see.** It acts as a permanent red light that can prevent them not only from achieving their dreams, but from getting a job or a place to live.



THE LIFETIME STIGMA
OF A CRIMINAL RECORD
DISPROPORTIONATELY
AFFECTS PEOPLE
OF COLOR

This is a matter of grave concern in New York State, where estimates are that one in four people has had an encounter with the police. In 2016 alone, almost 450,000 adults were arrested on criminal charges. And these arrests, rooted in New York’s history of over-policing and over-prosecuting communities of color, were racially imbalanced. In New York City, for example, 48 percent of those arrested for marijuana possession in 2017 were black, 38 percent were Latinx, and only 9 percent were white. And recent studies show that by age 23, almost 50 percent of all black men and 44 percent of Latino men across the state have been arrested, as compared to less than 38 percent of white men.¹ As a result, the lifetime stigma of a criminal record disproportionately affects people of color, contributing to an already-present culture of racial discrimination in the workplace, in education, and in civic life.



The results are devastating. Research shows that the simple fact of an **arrest** can cause cascading consequences, such as dropping out of school to family troubles; the likelihood of additional arrests; job instability, lower wages, and longer periods of unemployment; increased family and relationship troubles; and long-term health problems including premature death.²

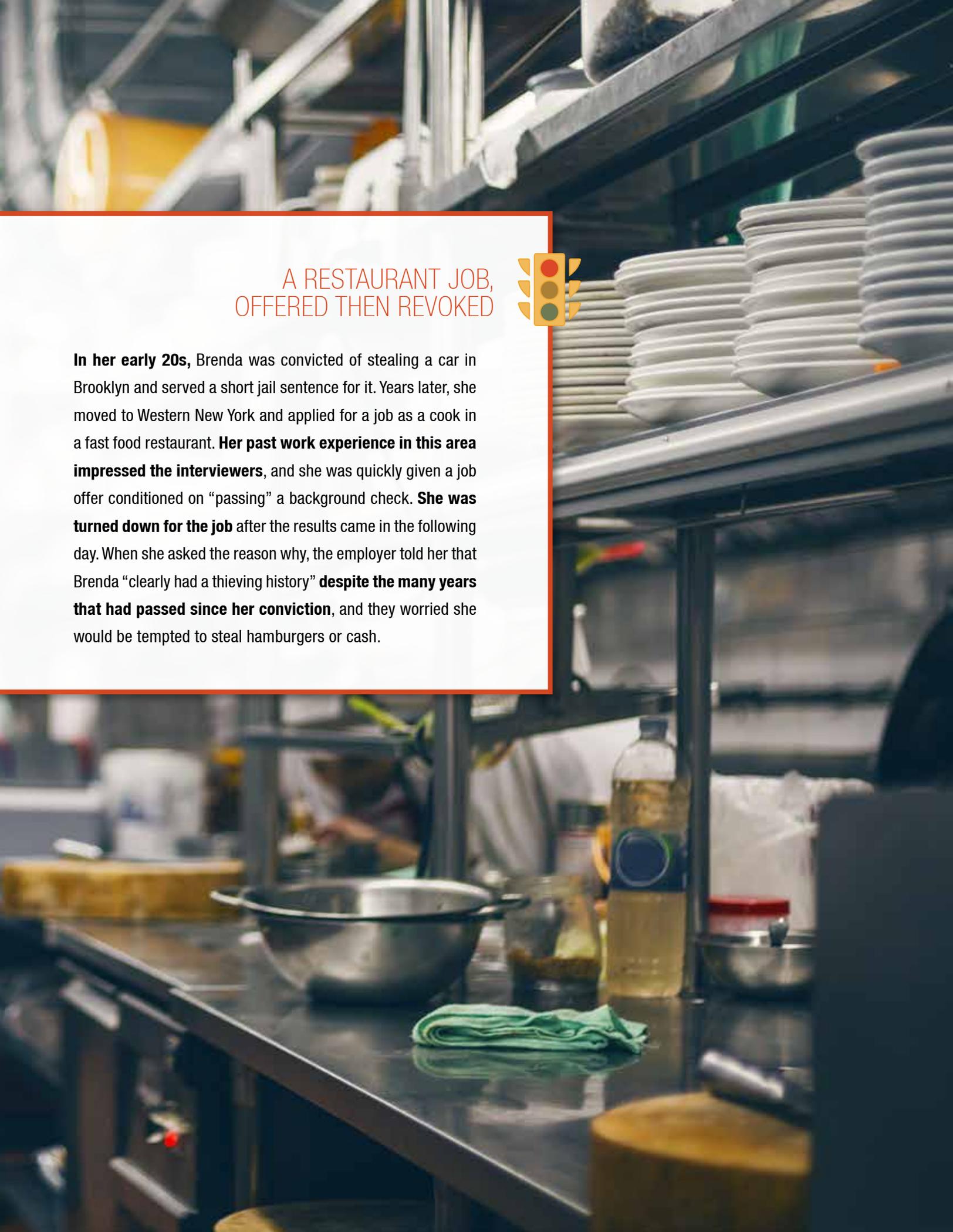
Making matters worse, criminal records information is increasingly there for all to see. Background search companies make records available cheaply and background checks are now routine for practically every job. The accessibility and stigma of records make it nearly impossible for individuals to avoid negative consequences.

Given the massive number of New York residents who had a police encounter, this level of exclusion damages our economy by keeping people from the job market, **hurting productivity and depriving the workforce of crucial talent**. The effect is felt nationwide: in 2017 the ACLU reported that excluding individuals with conviction histories from the workforce costs the U.S. between \$78 and \$87 billion in lost gross domestic product.³ Today, as more and more low-wage jobs require licensing, government clearance, specialized training, or a college degree—credentials that can be off limits to individuals with conviction histories—this drain on productivity has only increased.⁴



A MENTOR'S GIFTS, UNTAPPED

Winston worked hard to move beyond a drug sale conviction 20 years ago and made enviable progress. He **had stellar work experience** with justice-involved young people in a county bordering the New York metropolitan area, a leadership position in the local reentry task force, a master's degree in school counseling, and glowing references from past employers—including one who referred to him as “**the most respected reentry professional**” in the county. But when Winston applied for a job counseling troubled high school students, the New York City Education Department turned him down. The Department claimed that—in spite of everything he had achieved—**his decades-old conviction meant he would not be a fit role model for students.**



A RESTAURANT JOB, OFFERED THEN REVOKED



In her early 20s, Brenda was convicted of stealing a car in Brooklyn and served a short jail sentence for it. Years later, she moved to Western New York and applied for a job as a cook in a fast food restaurant. **Her past work experience in this area impressed the interviewers**, and she was quickly given a job offer conditioned on “passing” a background check. **She was turned down for the job** after the results came in the following day. When she asked the reason why, the employer told her that Brenda “clearly had a thieving history” **despite the many years that had passed since her conviction**, and they worried she would be tempted to steal hamburgers or cash.

Yet economic studies show that **hiring individuals with conviction histories is good for business, because their retention rates are higher and turnover is lower, and employers find them more loyal than other workers.**⁵ Some New York employers recognize this, such as Rochester janitorial services company CleanCraft and the Greyston Bakery in Yonkers—the former company intentionally hires workers with conviction histories; the latter does not conduct background checks and hires anyone who applies.⁶ Other employers, however, continue to balk at hiring people with conviction histories, because myths and stereotypes about what a conviction history conveys about a person continue to cloud business acumen. At a time when New York State is closer to full employment than we have been in recent memory, this exclusion creates a drag on the economy at large.

Limiting opportunities for people based on their past mistakes makes little sense. In most cases, criminal records tell us nothing about a person, including whether that person is likely to be “risky” or “dangerous.” Criminal records don’t reliably predict these things. Research shows that, after a short period of time, people with conviction histories are no more likely than people without them to be arrested for new crimes.⁷ This holds true even for people with convictions classified as “violent”: studies show that they are no more likely than people with any other type of conviction to commit a crime again.⁸

Unsurprisingly, employment reduces recidivism. People who hold jobs are even less likely to have future involvement with the justice system—studies show that employed individuals, particularly those who receive job search assistance, are as much as 20 percent less likely to return to prison than those who are unemployed.⁹ Ironically, however, people with records are often prevented from obtaining employment in the name of safety. Background check companies and others with a stake in the matter frequently claim or insinuate that individuals with conviction histories are more prone to commit workplace crime and acts of violence.¹⁰ But studies debunk this, instead showing that most workplace violence originates from non-employees, individuals not connected with the workforce either currently or in the past.¹¹

INDIVIDUALS
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We've known since the 1970s that criminal convictions result in discrimination that costs people jobs, prosperity, and the ability to make positive change for themselves and their families. Laws banning criminal records discrimination in employment and licensing have been on the books for decades. More recently, "ban the box" laws—by prohibiting questions about conviction history on initial job applications—have allowed some people to compete on their merits and find employment. These are extremely helpful tools, but they have limited reach. Ban the box laws apply only to specific locales, and many exclude private employers. And none of the laws prohibit criminal records-based discrimination in housing or higher education or do anything to shield records from public view. Criminal records remain accessible and available for use and abuse in almost every circumstance.

How can we stop New York State from continuing to punish people through discrimination and disenfranchisement long after they've already been held accountable? How do we stop New York from turning a conviction into a permanent red light, a barrier to prosperity and full economic and civic participation for generations?

The answer is simple: **New York must pass laws expunging criminal records for individuals who have left criminal activity behind.** By "expunge" we mean rendering these records totally inaccessible or destroying them.

This is not an impossible dream. Just this past year, New York took a step forward by passing C.P.L. §160.59, a law allowing limited sealing of criminal conviction records. "Sealing" means that records are kept from public view, but are not destroyed. And they can still be accessed by certain groups of people, including variety of government employers, the police, the FBI, and other law enforcement actors. This exemption causes problems even for people whose last conviction was decades ago, as explained below.



AN ASPIRING OFFICER, STUCK BEHIND THE SECURITY DESK

Emmett's childhood dream of being a police officer, like his favorite uncle, **was derailed** when he dropped out of school, made the wrong friends and was convicted of selling drugs to an undercover officer **when he was 16 years old**. The conviction meant an end to his plans to join the police force. But he obtained appropriate training and licenses—as well as a Certificate of Relief from Disabilities for his conviction issued by the sentencing judge—and became a security guard, still retaining a faint hope that if he did well enough, one day he could have a career in law enforcement.

Decades later, working as a peace officer for a government agency seemed within reach. **Emmett took and passed the civil service test** for this position and was put on a hiring list. But time and again his conviction kept him from being hired. Shortly after C.P.L. §160.59 was passed Emmett successfully moved to seal his conviction. Days later, he was called to apply for a position with a government agency. C.P.L. §160.59 allows government employers hiring for peace officer positions to see and consider sealed records. Despite glowing references from security employers, **Emmett was denied**. When asked why, **the agency readily admitted that his conviction was the reason**: even though it took place decades ago—when he was 16 years old—it meant that to this day he “could not be trusted to maintain safe surroundings.”



A Good Start, but We Need More



C.P.L. §160.59 may be less a step forward than a toe in the water, however. Eligibility is extremely limited: no one with more than two convictions in their lifetime (only one can be a felony; none can be a violent felony) can apply, and at least ten years must have passed since the applicant was convicted or—if sentenced to a jail or prison term—released from incarceration. The lifetime conviction cap excludes hundreds of thousands of New Yorkers who have more than two convictions, including those who committed repeated petty crimes while disabled by alcoholism or other substance abuse they have since conquered, as well as the formerly homeless who committed crimes of poverty (such as trespass, petit larceny, or “theft of services,” a.k.a. subway fare evasion). Individuals who made one mistake, but did so less than ten years ago, are also barred, as is any individual with a conviction deemed by law to be “violent,” regardless of whether the crime itself involved violence and even when the conviction took place decades ago.

While initial estimates were that hundreds of thousands might be eligible for relief, **shockingly few New Yorkers have had their convictions sealed under C.P.L. §160.59 since the law became effective in October 2017.** As of September 1, 2018, only 549 petitions had been granted. More than half the counties across the state saw no more than two petitions granted; in one quarter of the counties, none were granted. While we don’t yet know the reasons behind this incredible justice gap, these low numbers suggest that New Yorkers are in the main ineligible for relief under the law; and that those who are eligible may not know about the law or be able to proceed without assistance.

Even among those who have had their convictions sealed under C.P.L. §160.59, some may find that the sealing does them no good. People applying for civilian jobs with law enforcement agencies, for example, will find their convictions are still available for review. And the law does not expressly permit an individual whose convictions are sealed to answer “no” if asked whether they have ever been convicted of a crime. The result is confusion, with over- and under-disclosure during crucial points in the employment application process.



AN ACCOMPLISHED ADVOCATE, TURNED DOWN

Decades ago, **Vincent found himself in extreme financial distress** and stole money from his boss. He was mortified: this was not a way of life he had ever envisioned, and he was ashamed of having harmed someone who trusted him. While serving his short jail sentence, he connected with a group that helps individuals reenter through making positive changes in their lives. He immediately took the group's mission to heart. He paid restitution as soon as he was able, in the process earning his boss's forgiveness. He then began work toward obtaining a college education, but did not stop once he earned his B.A.—**he went on to enroll in a Master's degree program**, and undertook specific social work training in the field of gang violence prevention. But Vincent's conviction was a barrier to moving ahead and obtaining steady employment. He immediately sought legal assistance when C.P.L. §160.59 became effective. His motion to seal his theft-related convictions was granted with no delay. When he applied to a local law enforcement agency to be a youth advocate, however, **the conviction was disclosed in a background check** and he was required to discuss it. The tenor of the interview immediately changed, and though fully qualified for the position, **Vincent was turned down.**

Despite C.P.L. §160.59, millions of New Yorkers—predominantly persons of color—continue to be held back from full participation in the workforce and society at large due to the mark of a criminal record. This perpetuates discrimination and relegates large numbers of people to second class citizenship no matter their efforts to move forward.

Time for Change

To allow for full participation in our economy, we must improve our laws. There is hunger for change here in New York, and compelling precedent for it across the country. States that might not generally be considered “progressive” have decided that keeping people out of the workforce based on stale convictions is both unfair and a drag on the states’ economies. For example, Pennsylvania recently passed Clean Slate legislation which allows for automatic sealing of certain convictions, with others sealable on motion. The law was supported by police chiefs and prosecutors across the state.¹² Closer to home, the Brooklyn District Attorney announced a program in September 2018 to vacate and dismiss misdemeanor marijuana convictions, which will result in expungement of associated criminal records.¹³

A criminal conviction should not be a lifetime burden. As a first step toward changing this state of affairs, New York’s sealing law should be amended as follows to ensure that it provides real relief for the hundreds of thousands—indeed millions—of New Yorkers who have not had contact with the criminal system for years, but still suffer from its effects.

CHANGES TO THE CURRENT LAW SHOULD INCLUDE:

- Changing the relief granted from sealing to **full expungement**
- **Removing** the lifetime conviction qualification barrier, so that many more people are eligible for relief;
- Making the passage of a specified amount of time since a person's most recent conviction the **only** eligibility requirement, and reducing that period from 10 years to 3 years;
- Making relief **automatic** at the expiration of this time period as long as the eligibility requirements are met;
- In the alternative, allowing people to apply to an administrative agency using a simple, standardized, and widely distributed form, with **no** supplemental records or sworn statements required, and ensuring that this process is confidential; and
- Expressly allowing individuals whose convictions have been expunged to **deny** having had those convictions.

Conclusion

New York can make lasting, positive change for families and communities. By taking the first step to make changes to C.P.L. §160.59, we can provide people across New York State with a real opportunity to move beyond past mistakes, while building our state's workforce and strengthening its economy. It's time for all New Yorkers to have a green light to full participation.

How can you help? The Community Service Society and a statewide group of advocates, community organizations, and faith leaders, is joining together to end the era of perpetual punishment by working to pass expungement legislation that will benefit all New Yorkers. Learn more about our statewide effort and sign on to our platform at www.cssny.org/expungement.

Endnotes

1. Robert Brame, Shawn Bushway, Ray Paternoster and Michael Turner, "Demographic Patterns of Cumulative Arrest Prevalence By Ages 18 and 23," *Crime Delinq.* 2014 Apr; 60(3): 471-486.
2. Paul Nieuwebeerta and Alex Piquero, Mortality Rates and Causes of Death of Convicted Dutch Criminals 25 Years Later, *Journal of Research in Crime and Delinquency* 2008 (45)/3, 256-286.
3. Back to Business: How Hiring Formerly Incarcerated Job Seekers Benefits Your Company, Trone Private Sector and Education Advisory Council to the ACLU, 2017, p. 10.
4. Simone Ispa-Landa, Charles Loehffler, "Indefinite Punishment and the Criminal Record: Stigma Reports Among Expungement Seekers in Illinois," *Criminology* 2016, 54(3), 387-412.
5. Back to Business, supra, at 4 (citing Daryl Atkinson, "The Benefits of Ban the Box," The Southern Coalition for Social Justice, 2014, http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf).
6. "This Company Hired Anyone Who Applied. Now It's Starting a Movement," *Fast Company*, August 17, 2018.
7. Alfred Blumstein, Kiminori Nakamura, "Redemption in the Presence of Widespread Criminal Background Checks," *Criminology* 2009, 47(2), 327-359
8. Matthew DuRose, Alexia Cooper, Howard Snyder, Recidivism of Prisoners Released in 30 States in 2005: Patterns From 2005 to 2010 – Update, Bureau of Justice Statistics, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=4986>
9. Aaron Yelowich, Christopher Bolinger, Prison-to-Work: The Benefits of Intensive Job-Search Assistance for Former Inmates, Manhattan Institute 96 March 2015 (finding that training designed to quickly place individuals in jobs significantly reduces recidivism, particularly among individuals with non-violent convictions).
10. See, e.g., "April is Workplace Violence Awareness Month: Employment Background Checks are More Important Than Ever," available at: <https://refcheck.com/2018/04/09/workplace-violence-awareness-month-employment-background-checks/>, last visited September 15, 2018; "Latest Workplace Violence Statistics Reveal Importance of Background Checking," available at: <http://www.hireright.com/blog/background-checks/latest-workplace-violence-statistics-reveal-importance-of-background-checking#sthash.ipqtGiYd.dpbs>, last visited September 15, 2018.
11. AFL-CIO: "Death on the Job: A National and State by State Profile of Worker Safety and Health in the United States," 2015.
12. Other states and jurisdictions with compelling sealing and expungement legislation include:
 - **Illinois**, where people with several kinds of felony convictions are eligible for sealing relief three years after the completion of their sentence. They may continue to get misdemeanor convictions sealed as long as they are not convicted of another felony.
 - **Indiana, Kansas, and Kentucky**, where people with most misdemeanor convictions and a wide variety of felony convictions are eligible for sealing relief within five years after the completion of their sentence.
 - **Puerto Rico**, where people with nearly every type of felony conviction, including those deemed to be "violent," can get their convictions sealed within 5 years after the completion of their sentence. People with every type of misdemeanor conviction can get their convictions sealed within 6 months after the completion of their sentence.
 - **Nevada**, where people with a wide variety of felony convictions, including those deemed to be "violent," can get their convictions sealed within 5 years after the completion of their sentence. Misdemeanor convictions can be sealed after one year.
 - **Massachusetts**, where people with a wide variety of felony convictions, including those classified as "violent," can get their convictions sealed within 10 years after the completion of their sentence. Sealing keeps records out of view of nearly all persons and agencies and is granted without any hearing or judicial analysis as long as the person meets all statutory requirements.

With the exception of Pennsylvania, none of these states places a limit on the total number of convictions in an eligible applicant's history.

13. Brooklyn District Attorney Announces New Program to Erase Misdemeanor Marijuana Convictions," press release, The Brooklyn District Attorney's Office, <http://34.223.251.16/2018/09/07/brooklyn-district-attorney-announces-new-program-to-erase-misdemeanor-marijuana-convictions/>, last visited September 15, 2018.

Learn More

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