

PRESERVING THE FUTURES OF YOUNG OFFENDERS: A
PROPOSAL FOR FEDERAL JUVENILE EXPUNGEMENT
LEGISLATION

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INTRODUCTION

Picture a sixteen-year-old named Sam. Perhaps this person reminds you of yourself as a teenager. Now imagine that Sam has made a terrible mistake and is arrested for cocaine possession.¹ Perhaps they got the drugs from another kid at school or from a family member. But now Sam has a federal criminal record, which is likely to stick with them for life.²

Sam is a “juvenile delinquent” in federal court.³ However, the government prosecutes Sam’s case as an adult proceeding because they are older than fifteen and charged with a crime that would be described as a felony if committed by an adult under section 401 of the Controlled Substances Act.⁴ After Sam’s court appointed lawyer walks them through the government’s evidence, Sam chooses to plead guilty and the judge sentences them to one year in prison.⁵

Sam serves their sentence without incident but walks out not knowing how to get back on their feet without the family, financial, or academic support they had before their conviction. Sam starts

1. This hypothetical is a composite of several real juvenile defendants’ stories. “Sam” is sixteen years old and will be prosecuted as an adult under section 401 of the Controlled Substances Act, like David A. *See* *United States v. David A.*, 436 F.3d 1201, 1204 (10th Cir. 2006). Sam pleads guilty to cocaine possession and is sentenced to a term of imprisonment rather than probation, like Jesus Salgueido. *See* *United States v. Salgueido*, 256 F. Supp. 3d 1175, 1177 (D.N.M. 2017). Sam struggles to find a job like “Jay.” Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT’L INST. JUST. J. 42, 42, 49 (2012). Sam petitions a federal district court for expungement, like Salgueido and Thomas Sumner. *See* *Salgueido*, 256 F. Supp. 3d at 1177; *United States v. Sumner*, 226 F.3d 1005, 1008 (9th Cir. 2000). As in *Salgueido* and *Sumner*, Sam’s petition is denied. *See* 226 F.3d at 1008; 256 F. Supp. 3d at 1179.

2. If Sam was convicted under state law, a state statute would probably allow Sam to petition the court to seal or erase their record. *See* *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RTS. PROJECT (Apr. 2023), <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside-2/> [<https://perma.cc/R8SR-6P4S>]. However, federal law provides no such remedy. *Id.*

3. 18 U.S.C. § 5031.

4. *Id.* § 5032.

5. Under 18 U.S.C. § 3607(a), the district court has discretion to sentence an offender to a term of either probation or imprisonment when sentencing them under the Controlled Substances Act. *See id.* § 3607(a); 21 U.S.C. § 844. *See also, e.g.,* *Salgueido*, 256 F. Supp. 3d at 1178 (providing an example of a judge sentencing a juvenile offender to one year imprisonment under § 3607(a)).

applying to jobs but is about 50 percent less likely to receive a callback interview or job offer with their conviction.⁶

Then, everything changes. Sam learns about criminal record “expungement” and petitions the district court in which they were convicted for expungement of their record. However, the court denies the request.⁷ The judge explains that there is no federal legislation guaranteeing a right to criminal record expungement.⁸ Several federal statutes provide narrowly for expungement, but significant gaps remain between these statutory provisions.⁹ One such gap is the lack of comprehensive juvenile expungement legislation at the federal level.¹⁰ Even though Sam was convicted as a teenager, and despite any progress they have made towards rehabilitation, there is nothing a federal court can do to expunge their record.

As of April 2023, forty-six states and the District of Columbia have general authority for expunging, setting aside, or sealing conviction records, signaling a nationwide trend in favor of expungement.¹¹ Further, all fifty states and the District of Columbia provide some form of expungement or record sealing for juvenile offenders, including states which have no general authority for expunging adult convictions.¹² Across the board, states provide more broadly for expungement of juvenile convictions than adult ones.¹³ These expungement laws are powerful tools of criminal justice reform, which mitigate the collateral consequences faced by people with

6. See Solomon, *supra* note 1, at 43. It is also worth noting that this “penalty” is even larger for African American applicants than it is for white applicants. See *id.*

7. “Expungement typically refers to the physical destruction and erasure of a juvenile record, as if it never existed.” Riya Saha Shah & Lauren Fine, *Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement*, JUV. L. CTR. 1, 24 (2014) (emphasis omitted), <https://juvenilerecords.jlc.org/juvenilerecords/documents/publications/national-review.pdf> [<https://perma.cc/4CSZ-MHQ9>]. This can mean that records are physically destroyed, or that files containing expunged juvenile records simply become confidential. See *id.* at 25.

8. See *Doe v. United States*, 833 F.3d 192, 197 (2d Cir. 2016).

9. See 18 U.S.C. § 3607(c), 5083.

10. Cf. *50-State Comparison*, *supra* note 2 (explaining that federal courts have no general authority to expunge criminal records with a narrow statutory exception for first time misdemeanor drug possessors under twenty-one years old who receive deferred adjudication).

11. *Id.*

12. See *id.* See Shah & Fine, *supra* note 7, at 23, 25-26, for a more detailed breakdown of state-by-state juvenile expungement laws.

13. See *50-State Comparison*, *supra* note 2.

criminal records.¹⁴ Had Sam's case been adjudicated in state court, they would very likely benefit—especially as a juvenile offender—from an expungement statute.¹⁵ But Sam's record is federal.

This Note argues that federal courts should have the power to expunge juvenile records in cases like Sam's. It advocates for legislation granting federal courts the power to expunge the criminal records of offenders who were under eighteen at the time of their offenses. Part I describes the history of federal juvenile expungement law, which leaves most juvenile offenders with no possibility of record relief. Part II describes the collateral consequences of a juvenile record and advocates for expungement as a means of reducing recidivism amongst juvenile offenders. Part III proposes a federal statutory framework for expungement of juvenile records. Finally, Part IV addresses likely counterarguments to statutorily guaranteeing expungement for a broader set of juvenile offenses.

I. THE LANDSCAPE OF FEDERAL EXPUNGEMENT LAW

There is a common misconception that juvenile records are always confidential or are destroyed automatically when a former offender becomes an adult.¹⁶ For the most part, state expungement law has trended towards this presumption.¹⁷ However, at the federal level, the opposite is true. There is no general authority allowing federal courts to expunge criminal records, even for juveniles.¹⁸ The Federal Youth Corrections Act formerly provided for expungement of federal juvenile records, but its repeal in 1984 left federal judges with only narrow statutory power to erase juvenile records.¹⁹ This Part will detail the history of the Federal Youth Corrections Act and

14. See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2463 (2020).

15. See *id.* at 2463, 2472-73.

16. See Andrea R. Coleman, *Expunging Juvenile Records: Misconceptions, Collateral Consequences, and Emerging Practices*, U.S. DEP'T OF JUST. 2 (Dec. 2020); Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 369 (2018).

17. See Radice, *supra* note 16, at 383 (explaining how states have enacted protections for juvenile records through confidentiality, partial protection, and expungement statutes).

18. See *50-State Comparison*, *supra* note 2. Throughout this Note, the term "juvenile" will refer to "a person who has not attained [their] eighteenth birthday" as defined in 18 U.S.C. § 5031.

19. See *infra* Part I.A.

its repeal, as well as describe the narrow statutory avenues for juvenile record expungement that exist today.

A. The Federal Youth Corrections Act and Its Repeal

Between 1950 and 1984, the Federal Youth Corrections Act (FYCA) aimed to rehabilitate youthful offenders by providing a comprehensive sentencing scheme for offenders under the age of twenty-two.²⁰ The Act provided rehabilitative sentencing options for youthful offenders, often probation or treatment rather than traditional incarceration.²¹ Notably, the FYCA also provided for records to be “set aside” upon a youth offender’s discharge from their sentence or placement on probation.²² While this Act was in place, a youthful offender who received a certificate setting aside their conviction had the chance to “begin life anew without the crippling taint of a criminal record.”²³

The FYCA was premised on younger offenders being less “criminally sophisticated” and benefitting more profoundly from rehabilitative programs than older offenders.²⁴ The Act provided many former juvenile offenders the opportunity to have their conviction records expunged.²⁵ In 1976, young offenders incarcerated pursuant to the FYCA peaked at 1,901.²⁶ The year before the Act’s repeal in 1984, there were 601 youth offenders incarcerated under the Act.²⁷ Yet, the FYCA did not result in lower rates of juvenile crime.²⁸

In addition, federal courts interpreted the FYCA differently, resulting in large disparities between federal judges’ sentencing of FYCA offenders.²⁹ Federal judges’ applications of the FYCA also

20. 18 U.S.C. §§ 5005-26 (repealed 1984); Richard S. Harnsberger, *Does the Federal Youth Corrections Act Remove the “Leper’s Bell” From Rehabilitated Offenders?*, 7 FLA. ST. U. L. REV. 395, 395 (1979).

21. See *Dorszynski v. United States*, 418 U.S. 424, 433 (1974).

22. 18 U.S.C. § 5021.

23. See Harnsberger, *supra* note 20, at 396.

24. *Research Review: Impact of the Youth Corrections Act*, FED. BUREAU OF PRISONS 1 (1985).

25. Ed Bruske, *Youth Act Repealed*, WASH. POST, Oct. 13, 1984, at C1.

26. *Id.* at C4.

27. *Id.*

28. Cynthia A. Kelly, *Sentencing Under the Federal Youth Corrections Act: When May a Youth be Treated as an Adult?*, 13 LOY. U. CHI. L.J. 849, 849 (1982).

29. Bruske, *supra* note 25, at C4.

varied with regards to expungement of youth records under the Act: some courts treated the FYCA as an expungement statute, while others found that youth records could be “set aside” under the Act, but not fully expunged.³⁰ This divergence in courts’ application of the FYCA rendered it less effective as a rehabilitative statute before its ultimate repeal.³¹

The FYCA was repealed as part of the Comprehensive Crime Control Act of 1984, which made large scale changes to federal criminal law.³² Officials said the repeal of the FYCA and subsequent changes to youth sentencing were necessary because youthful offenders were committing more serious crimes and because there was a large disparity in youth sentencing between federal judges.³³ The Comprehensive Crime Control Act was passed against the backdrop of President Ronald Reagan’s “war on drugs.”³⁴ This sweeping criminal justice reform package, intended to be tougher on crime, “contributed to a thirty-two percent increase of persons being held in federal custody by 1986.”³⁵

Even with the social backdrop of the “war on drugs,” the FYCA’s repeal was controversial.³⁶ Proponents of the Act cited research suggesting that the juvenile brain really is different than the adult brain.³⁷ This was evidence, they argued, that juvenile offenders should be subject to a different sentencing scheme that—like the FYCA—allowed certain juvenile records to be set aside.³⁸ However, the FYCA was never replaced with a similar federal statute and the

30. See *United States v. McMains*, 540 F.2d 387, 388-90 (8th Cir. 1976) (finding that the Eighth Circuit was not required to expunge the record of a petitioner convicted under the FYCA); Harnsberger, *supra* note 20, at 398-99, 415.

31. See generally Harnsberger, *supra* note 20 (explaining differences in interpretation of the FYCA).

32. 18 U.S.C. §§ 5005-5026 (repealed 1984); see Bruske, *supra* note 25, at C1; Comprehensive Crime Control Act of 1984, S. 1762, 98th Cong. (1984).

33. See Bruske, *supra* note 25, at C1, C4.

34. See Alexandra J. Messmore, Note, *Incarceration Rates and the Evolution of Anti-Drug Policy in the United States: Is Incarceration the Answer?*, 44 AM. J. TRIAL ADVOC. 457, 466 (2021).

35. See *id.* at 466-67.

36. See Bruske, *supra* note 25, at C4 (“It’s an outrage,” said Karen Koskoff.... “There are a lot of young people who benefit from the Youth Act and do not get in trouble again.”).

37. See Emily Graham, *Emerging Adults in the Federal System: A Case for Implementing the Federal Youth Corrections Act*, 11 HARV. L. POL’Y REV. 619, 620-21, 626 (2017).

38. See *id.* at 630.

power it provided federal courts to set aside juvenile records no longer exists.³⁹

B. Gaps in Federal Expungement Law Today

Federal courts do not have subject matter jurisdiction over a civil action unless there is a constitutional or statutory basis for it.⁴⁰ Absent authority from a federal expungement statute, courts have occasionally found a constitutional basis for expunging criminal records.⁴¹ However, not all federal courts find such a constitutional basis.⁴² Furthermore, courts generally hold that there is no basis for expungement in their equitable authority absent extenuating circumstances.⁴³ Courts look to the Constitution or equitable principles for subject matter jurisdiction in these cases because there is no federal legislation guaranteeing a right to criminal record expungement.⁴⁴

1. Ancillary Jurisdiction

Federal district courts have limited “ancillary jurisdiction” to expunge criminal records incidental to their authority over the underlying criminal prosecutions.⁴⁵ Ancillary jurisdiction extends district courts’ power to consider expungement petitions based on “the pleadings, the processes, the records, or the judgment” in a criminal proceeding that the court has jurisdiction over.⁴⁶ For example, in *United States v. Schnitzer*, the Second Circuit held that a

39. *Id.* at 619, 632.

40. *See In re Hunter v. Hunter*, 66 F.3d 1002, 1005 (9th Cir. 1995).

41. *See, e.g., Smith v. Nixon*, 807 F.2d 197, 204 (D.C. Cir. 1986); *Hobson v. Wilson*, 737 F.2d 1, 64-65 (D.C. Cir. 1984); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN’S L. REV. 73, 81 (1992).

42. Diehm, *supra* note 41, at 81-82 (noting that courts more commonly find jurisdiction to expunge records in equitable principles than a constitutional basis, and that some courts find no jurisdiction in the absence of a statute).

43. *Id.* at 81 (explaining that even federal courts that find jurisdiction to grant expungements under equitable principles only do so when it is “necessary and appropriate to preserve basic legal rights”).

44. *See id.* at 81-82.

45. *See United States v. Schnitzer*, 567 F.2d 536, 538 (2d Cir. 1977).

46. *United States v. Sumner*, 226 F.3d 1005, 1013 (9th Cir. 2000) (emphasis omitted) (quoting *Ancillary jurisdiction*, BLACK’S LAW DICTIONARY (6th ed. 1990)).

federal district court had jurisdiction to hear the appellee’s petition for expungement because “[a] court, sitting in a criminal prosecution, has ancillary jurisdiction to issue protective orders regarding dissemination of arrest records.”⁴⁷ Therefore, the district court was within its jurisdiction to hear the civil expungement petition.⁴⁸ However, the court’s denial of Schnitzer’s motion on the merits was affirmed on appeal—indicating the difficulty of obtaining expungement through ancillary jurisdiction.⁴⁹

The “class of cases where expungement has been declared appropriate” is narrow.⁵⁰ In these rare cases where courts exercise ancillary jurisdiction, judges typically grant motions for expungement only in “extreme circumstances” such as unlawful arrest, wrongful conviction, or clerical error.⁵¹

In even rarer cases, federal courts have jurisdiction to expunge criminal records under the Civil Rights Act.⁵² Or, in similarly narrow circumstances, courts may have ancillary jurisdiction to expunge records in habeas corpus proceedings.⁵³ Though typically, without express statutory authority, federal courts do not expunge criminal records.

2. Limited Statutory Provisions

For juvenile offenders specifically, there are two federal statutes that provide narrow grounds for expungement: the Federal Juvenile Delinquency Act and the Federal First Offender Act.⁵⁴ However, a case like Sam’s would not fall under either of these statutes. This landscape of federal expungement law leaves many former offenders

47. 567 F.2d at 538 (citing *Morrow v. District of Columbia*, 417 F.2d 728, 740-41 (D.C. Cir. 1969)).

48. *See id.* at 540.

49. *See id.*

50. *Id.*

51. *Sumner*, 226 F.3d at 1010-11, 1014 (quoting *United States v. Smith*, 940 F.2d 395, 296 (9th Cir. 1991)).

52. *See Smalls v. United States*, No. 19 MC 70 (KAM) (CLP), 2022 WL 2441741, at *1 (E.D.N.Y. June 6, 2022) (citing 43 U.S.C. §§ 1971, 1983, 1985); *see, e.g., Shipp v. Todd*, 568 F.2d 133, 134 (9th Cir. 1978) (quoting *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976)).

53. *See* 28 U.S.C. §§ 2254, 2255(e); *Sumner*, 226 F.3d at 1014; *Woodall v. Pettibone*, 465 F.2d 49, 52-53 (4th Cir. 1972).

54. *See* 18 U.S.C. § 5038; 18 U.S.C. § 3607(c).

seeking rehabilitation and record relief—including juvenile offenders—without a path to expunge their record.⁵⁵

a. Federal Juvenile Delinquency Act

The Federal Juvenile Delinquency Act places boundaries on the use of federal juvenile records. Notably, the Act addresses some of the collateral consequences of a federal conviction for juveniles by “safeguard[ing]” records such that they are generally not disclosed to “unauthorized persons.”⁵⁶ This prevents third parties like lessors, employers, and educational institutions from accessing juvenile records.⁵⁷ However, these “safeguards” apply quite narrowly in practice.⁵⁸

Even though federal law allows for offenders under eighteen to be tried as adults, the Federal Juvenile Delinquency Act only applies to offenders under eighteen years old who are tried as juveniles.⁵⁹ Therefore, the Federal Juvenile Delinquency Act provides no remedy in a situation like Sam’s, because Sam was prosecuted as an adult. Further, this “safeguarding” is not the same as true expungement or record clearing because even “safeguarded” juvenile records can be used in future adjudications and sentencings.⁶⁰

b. Federal First Offender Act

The Federal First Offender Act provides for some offenders under age twenty-one to have their first conviction record expunged upon

55. See, e.g., *Sumner*, 226 F.3d at 1008; *United States v. Salgueido*, 256 F. Supp. 3d 1175, 1177 (D.N.M. 2017); *Doe v. United States*, 964 F. Supp. 1429, 1431 (S.D. Cal. 1997).

56. See 18 U.S.C. § 5038.

57. See *id.*

58. The Act still allows disclosure to law enforcement and use in future court proceedings. *Id.*

59. So long as an offense was committed prior to the offender’s eighteenth birthday, federal courts can proceed against them as a juvenile until the offender turns twenty-one. See *id.* §§ 5037, 5032. Juvenile offenders can be adjudicated as adults at age fifteen if charged with a violent felony or drug trafficking offense, and at age thirteen if charged with a violent offense in possession of a firearm or if “the person had been previously adjudicated [with] a violent felony or drug offense.” John Scalia, *Juvenile Delinquents in the Federal Criminal Justice System*, in U.S. DEP’T OF JUST. BUREAU OF JUS. STATS. SPECIAL REPORT (1997).

60. See 18 U.S.C. § 3607(c).

application.⁶¹ However, this provision of the Act only applies to convictions under section 404 of the Controlled Substances Act.⁶² Therefore, the Act allows offenders under twenty-one to have a first-time federal conviction for simple drug possession expunged.⁶³

The limited scope of the Federal First Offender Act is described well in the case *Smalls v. United States*.⁶⁴ The petitioner, Smalls, was sentenced to a term of three years' probation for possession with the intent to distribute and conspiracy to distribute cocaine.⁶⁵ Citing regret for her crime and difficulty obtaining employment, Smalls petitioned the Eastern District of New York to expunge her conviction.⁶⁶ The court laid out the requirements for expungement under the Federal First Offender Act, explaining that a court must expunge a petitioner's conviction record if that individual was:

(a) ... found guilty of simple drug possession described in Section 404 of the Controlled Substances Act; (b) had no prior convictions under either state or federal law relating to controlled substances; (c) was less than 21 years old at the time of the offense; (d) received a deferred judgement; (e) successfully completed a probationary term and had the proceedings dismissed before a judgment of conviction was entered; and (f) had not previously been subject to a disposition under Section 3607(a).⁶⁷

The court found that Smalls failed to meet these requirements, explaining in a footnote that she was not convicted under section 404 of the Controlled Substances Act.⁶⁸ The court concluded that it lacked jurisdiction to expunge Smalls's record without statutory authorization, despite other "equitable" factors she presented, such as her difficulty finding employment.⁶⁹

61. *Id.*

62. *Id.*; *see generally* 21 U.S.C. § 844.

63. 18 U.S.C. § 3607(c); 21 U.S.C. § 844(a).

64. *See* No. 19 MC 70 (KAM) (CLP), 2022 WL 2441741, at *1 (E.D.N.Y. June 6, 2022).

65. *Id.*

66. *Id.*

67. *Id.* (citation omitted).

68. *See id.* at *1, n.1.

69. *Id.* at *1-2.

c. Congressional Proposals for Expungement Legislation

Given the gaps in current expungement law, lawyers and legal scholars have called for a federal expungement statute for years.⁷⁰ Several congresspeople have proposed expungement bills that ultimately fell short of enactment.⁷¹ These proposals have included youth or juvenile expungement bills, such as the Fair Chance for Youth Act, introduced in the House of Representatives by Texas Representative Sheila Jackson Lee.⁷²

Recently, Congressman Steve Cohen of Tennessee introduced the Fresh Start Act of 2022 in the House of Representatives on February 9, 2022.⁷³ This bill proposed a federal framework for expungement of certain nonviolent criminal records.⁷⁴ However, the bill included no specific provision for youth or juvenile records.⁷⁵ The bill never received a vote⁷⁶—but even if it had passed, there would remain no federal framework specifically addressing expungement of juvenile records.

II. JUVENILE EXPUNGEMENT LEGISLATION WILL LOWER
RECIDIVISM, PROMOTE REHABILITATION, AND REDUCE
COLLATERAL CONSEQUENCES

While the push for a federal expungement statute has continued, many state legislatures have enacted expungement statutes.⁷⁷ These state statutes operate as a powerful tool for criminal justice reform.⁷⁸ In fact, expungement “for those who do obtain it, offers ... significant relief from the consequences of criminal convictions,

70. Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 12-13, 36 (2008).

71. See, e.g., Nonviolent Drug Crime Expungement Act of 2020, H.R. 8980, 116th Cong. (2020); Expungement Act of 2017, H.R. 3578, 115th Cong. (2017).

72. Fair Chance for Youth Act of 2017, H.R. 61, 115th Cong. (2017).

73. Fresh Start Act of 2022, H.R. 6667, 117th Cong. (2022).

74. See *id.*

75. See *id.*

76. See *HR 6667—Fresh Start Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/6667?q=%7B%22search%22%3A%22Fresh+Start+Act%22%7D&s=3&r=1> [<https://perma.cc/97LR-F4TA>].

77. See *supra* notes 12-13 and accompanying text.

78. See Prescott & Starr, *supra* note 14, at 2461-62, 2475, 2512-14, 2520-22.

cutting across different domains of life.”⁷⁹ Former offenders whose records are expunged achieve better educational, employment, and housing outcomes.⁸⁰ These benefits exemplify how expungement combats the collateral consequences associated with a criminal conviction.

A. Collateral Consequences Harm Former Offenders Far Beyond Their Sentences

Collateral consequences are penalties faced by individuals with criminal records beyond court-imposed sentences, and they impact many aspects of former offenders’ lives.⁸¹ As juvenile offenders move into adulthood, they are burdened by barriers in accessing educational services, employment, and housing.⁸²

At the educational level, research suggests that more than half of universities elicit information about an applicant’s criminal history as part of the application process.⁸³ In fact, the common application to colleges and the Free Application for Federal Student Aid (FAFSA) both ask applicants about their criminal history.⁸⁴ This means that a criminal record can significantly inhibit a former juvenile offender from seeking admission or funding for higher education, barring them from the many benefits higher education provides.⁸⁵ For example, a 2014 study found that the addition of a question about criminal records to the FAFSA application reduced

79. *Id.* at 2475.

80. See Eve Rips, *A Fresh Start: The Evolving Use of Juvenile Records in College Admissions*, 54 U. MICH. J. L. REFORM 217, 223, 232-35, 237-38 (2020), for a discussion of how a criminal record negatively impacts students pursuing higher education, and Solomon, *supra* note 1, for a discussion of difficulty obtaining a job for individuals with a criminal record.

81. See generally Coleman, *supra* note 16.

82. *Id.* at 5-8.

83. *Id.* at 5.

84. Judith Scott-Clayton, *Thinking “Beyond the Box”: The Use of Criminal Records in College Admissions*, BROOKINGS (Sept. 28, 2017), <https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/> [<https://perma.cc/XVV7-RHME>].

85. For one example of the benefits of higher education, see Michael T. Nietzel, *New Evidence for the Broad Benefits of Higher Education*, FORBES (June 17, 2019, 6:40 AM), <https://www.forbes.com/sites/michaelnietzel/2019/06/17/new-evidence-for-the-broad-benefits-of-higher-education/?sh=51c7ef754c5c> [<https://perma.cc/VG78-ZMRS>], explaining that a “greater sense of well-being, self-efficacy and financial well-being [is] reported by those with college degrees.”

college enrollment rates for high school graduates with a recent drug conviction by twelve to twenty-two percentage points.⁸⁶ Similarly, a study comparing four-year college applicants with felony convictions to those without found that rejection rates were twelve to thirteen percentage points higher for those with convictions.⁸⁷

Even for jobs not requiring a college degree, over 40 percent of employers surveyed indicated that they would “definitely not” or “probably not” hire an applicant with a criminal record.⁸⁸ This trend of employers’ unwillingness to hire candidates with criminal records is exemplified by Jay’s story.⁸⁹ Amy L. Solomon—while serving as co-chair of the staff working group of the Attorney General’s Reentry Council—describes a letter she received from Jay, an individual with a prior conviction record struggling to find a job.⁹⁰ In his letter, Jay reported submitting over 200 applications to jobs for which he was qualified and experiencing “denial after denial.”⁹¹ Many former offenders also face exclusion from serving in the military.⁹²

Finding and maintaining stable housing is also a challenge for individuals with juvenile records.⁹³ Private landlords have broad discretion to consider criminal records and can use this information

86. See Scott-Clayton, *supra* note 84 (citing Michael F. Lovenheim & Emily G. Owens, *Does Federal Financial Aid Affect College Enrollment? Evidence From Drug Offenders and the Higher Education Act of 1998*, 81 J. URB. ECON. 1 (2014)).

87. See *id.* (citing Robert Stewart & Christopher Uggen, *Criminal Records in College Admissions: A National Experimental Audit*, Presentation at American Sociological Association Annual Meetings (Aug. 11, 2017)).

88. Harry J. Holzer, Steven Raphael & Michael A. Stoll, *The Effect of an Applicant’s Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles*, in *BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA* 117, 122-23 (Shawn Bushway, Michael A. Stoll & David F. Weiman eds., 2007).

89. See Solomon, *supra* note 1, at 42, 49.

90. Solomon, along with the other members of the working group, developed public education materials for the Reentry Council. *Id.* at 46.

91. *Id.*

92. See Coleman, *supra* note 16, at 7; Riya Saha Shah & Jean Strout, *Future Interrupted: The Collateral Damage Caused by Proliferation of Juvenile Records*, JUV. L. CTR. 9 (Feb. 2016), https://jlc.org/sites/default/files/publication_pdfs/Future%20Interrupted%20-%20final%20for%20web_0.pdf [<https://perma.cc/492M-ZPVH>] (“Because the U.S. armed services have a ‘moral’ qualification for admission, even records that have been expunged must be reported when youth enlist.”).

93. Coleman, *supra* note 16, at 8.

to evict or refuse housing to former offenders.⁹⁴ Even public housing authorities can use criminal records, including juvenile records, to “foreclose [an] entire family from seeking public housing.”⁹⁵

B. The Role of Expungement in Reducing Recidivism

Though the FYCA did not result in lower rates of juvenile crime, more contemporary expungement statutes implemented at the state level reduce recidivism amongst former offenders.⁹⁶ For example, a state-wide empirical study in Michigan suggests that expungement recipients reoffend at a lower rate than counterparts who did not receive expungement.⁹⁷

“[S]wift and certain” punishment is a significant deterrent to reoffending.⁹⁸ Therefore, the FYCA may have been ineffective in part because it provided for juvenile offenders to be placed on probation or receive alternative treatment rather than traditional sentencing.⁹⁹ A true expungement statute that does not affect the certainty or severity of punishment may be able to reduce recidivism in the way state expungement statutes do, but the FYCA did not.

There are multiple theories as to why expungement reduces recidivism.¹⁰⁰ One explanation is that an individual is actually less likely to reoffend after receiving expungement.¹⁰¹ Because criminal records hinder access to resources like employment, housing, and education, expungement may prevent recidivism by “mitigating ... these socioeconomic contributors to criminal behavior.”¹⁰²

In removing these barriers, other scholars suggest that expungement also removes the practical and psychological damage of a label

94. *Id.*

95. Shah & Strout, *supra* note 92, at 9.

96. See Prescott & Starr, *supra* note 14, at 2465-66 for a description of the Michigan study.

97. *See id.* at 2511-18.

98. *See generally Five Things About Deterrence*, NAT'L INST. JUST. (June 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence> [<https://perma.cc/72A4-3PAT>] (explaining that the likelihood of being punished for a crime is a stronger deterrent of future offenses than the severity of punishment).

99. *See* Harnsberger, *supra* note 20, at 395-96.

100. *See* Prescott & Starr, *supra* note 14, at 2521.

101. *Id.*

102. *Id.*

like “ex-convict.”¹⁰³ This “labeling theory” proposes that a person who has been convicted of a criminal offense “acquire[s] a criminal identity.”¹⁰⁴ Criminology research suggests that this labeling affects first-time offenders particularly profoundly.¹⁰⁵ The label itself negatively impacts self-esteem and can lead to depression in addition to the practical barriers to employment and housing former offenders encounter.¹⁰⁶ From a labeling theorist’s perspective, expungement reduces the likelihood of recidivism simply because people who do not see themselves as labeled “criminal” are less likely to commit criminal behavior in the future.¹⁰⁷

A more pragmatic explanation is that people who are eligible to have their records expunged under state statutes are simply less likely to reoffend in the first place.¹⁰⁸ Starr and Prescott suggest in their empirical study of expungement legislation that those who are eligible for expungement under most statutes—often offenders who have committed less serious crimes—start out with a lower “baseline risk” of reoffending than others.¹⁰⁹ Moreover, those who receive expungement typically choose to petition a court, have reason to believe that a court will grant their petition, and have the resources to go through this process.¹¹⁰

Whatever the explanation is, however, former offenders who receive expungement of their records are less likely to reoffend.¹¹¹ Therefore, federal expungement legislation is consistent with the policy goal of reducing recidivism amongst former juvenile offenders as they move into adulthood. At the very least, a federal expungement statute could provide relief and a chance at better educational, employment, and housing outcomes to the former offenders already least likely to reoffend.

103. See Amy Shlosberg, Evan J. Mandery, Valerie West & Bennett Callaghan, *Expungement and Post-Exoneration Offending*, 104 J. CRIM. L. & CRIMINOLOGY 353, 381 (2014).

104. *Id.* at 380-81.

105. *Id.* at 384-85 (proposing that labeling effects tend to be strongest for first-time offenders and that the effect lessens with subsequent offenses).

106. *Id.* at 381-83.

107. See *id.* at 380-81.

108. See Prescott & Starr, *supra* note 14, at 2518-19.

109. See *id.*

110. *Id.* at 2518.

111. See *id.* at 2512-14, 2517-21.

C. Trends in Existing Expungement Legislation

Despite Congress's lack of success in passing expungement legislation for federal records, it has indicated support for state expungement laws. For example, in September 2021, the House Judiciary Committee voted to advance a bill creating a grant program to support states in implementing automatic record sealing or expungement laws.¹¹² This program would contribute to an existing movement towards more expansive state expungement legislation. At the state level, expungement is broader and more accessible now than ever before.¹¹³

In drafting expungement legislation, Congress can look to this trend in state expungement law as an indication of what type of criminal record relief is generally considered appropriate. Across the states, expungement legislation has expanded rapidly in recent years.¹¹⁴ For example, the Collateral Consequences Resource Center reported sixty-seven laws enacted across thirty-one states and the District of Columbia "creating, expanding, or streamlining record-clearing" in 2019 alone.¹¹⁵ And this trend has continued, with states like California, Connecticut, and Nebraska enacting expansions to their expungement laws that came into effect throughout 2023.¹¹⁶ These laws represent a trend towards automatic expungement, most commonly for specific lower-level offenses.¹¹⁷ However, new expungement laws have also expanded the range of offenses eligible for expungement in many states, even extending record relief to some felonies.¹¹⁸

112. See *supra* Part I.B.2.c.; Fresh Start Act of 2021, H.R. 5651, 117th Cong. (2021); *Congressman Cohen Votes to Advance Fresh Start Act*, CONGRESSMAN STEVE COHEN (Sept. 21, 2022), <https://cohen.house.gov/media-center/press-releases/congressman-cohen-votes-advance-fresh-start-act> [<https://perma.cc/NSG5-NXUF>].

113. See, e.g., Prescott & Starr, *supra* note 14, at 2463-65 (explaining recently adopted state expungement legislation).

114. *Id.* at 2462-65.

115. Margaret Love & David Schlüssel, *Pathways to Reintegration: Criminal Record Reforms in 2019*, COLLATERAL CONSEQUENCES RES. CTR. 2 (Feb. 2020), https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf [<https://perma.cc/XWD8-Z625>].

116. See *50-State Comparison*, *supra* note 2.

117. See Prescott & Starr, *supra* note 14, at 2464-65.

118. See *id.*

Expungement for juvenile offenders is at the center of this trend towards broader record relief. Enacting juvenile expungement statutes is one of the most common measures states have taken to provide record relief.¹¹⁹ Moreover, juvenile records are one of the most common categories of records that new state laws make eligible for automatic expungement.¹²⁰ The fact that juvenile record expungement is favored so strongly by state legislatures can be viewed by federal congresspeople as a sign that their constituents largely support expunging juvenile records.

III. PROPOSAL FOR A FEDERAL JUVENILE EXPUNGEMENT FRAMEWORK

This Part proposes a federal statute establishing a framework for juvenile offenders to receive expungement of their federal criminal records as a first step to filling the legislative gap left by the FYCA's repeal.¹²¹ The widespread and growing approval for juvenile expungement in state legislation—coupled with the noted benefits of expungement statutes on recidivism, employment, education, and housing outcomes—should inform Congress in passing a statute giving federal courts explicit power to expunge the criminal records of federal juvenile offenders.¹²²

The proposed statute would provide relief in the form of record expungement to former offenders who were under eighteen at the time of their offense.¹²³ A federal expungement statute could better address concerns about high rates of juvenile crime and serious offenses committed by young offenders than the FYCA did by allowing judges significant discretion in more serious cases. This Part will lay out which offenses should be eligible for automatic expungement under a federal statute, and which should require petition and evaluation by a judge. It will then apply the proposed

119. *See id.* at 2472-73.

120. *See* Love & Schlusel, *supra* note 115, at 3 (“Six additional states made relief automatic for specific offenses or dispositions, including ... juvenile adjudications.”).

121. *See* 18 U.S.C. §§ 5005-5026 (repealed 1984).

122. *See supra* Part II.

123. *See* Shah & Fine, *supra* note 7, at 24.

statutory framework to Sam's case as presented in the Introduction.¹²⁴

A. A Federal Statute Should Offer Expungement to Offenders Under Eighteen

In his analysis of Indiana's expungement law, Joseph Dugan points out that juvenile offenders are among the most seriously impacted by the effects of a criminal record.¹²⁵ Juvenile offenders commit their crimes before they have reached cognitive maturity, but are treated as adults in some courts.¹²⁶ Furthermore, children and teenagers who end up engaging in criminal behavior have often grown up in poverty, with a lack of family support or access to education.¹²⁷ Juvenile offenders are a particularly vulnerable group and one that commonly benefits from state expungement laws.¹²⁸ Former juvenile offenders should be eligible for similar relief at the federal level.

A federal juvenile expungement statute necessitates a definition of "juvenile offenders." Title 18 U.S.C. § 5031 defines "juvenile" as "a person who has not attained his eighteenth birthday," while an act of "juvenile delinquency" is defined as "the violation of a law of the United States committed by a person prior to his eighteenth birthday."¹²⁹ These definitions give a good indication of who Congress has considered a juvenile offender in the past. Capping "juvenile offender" status at eighteen for expungement is the most straightforward approach based on this current statutory definition.¹³⁰ A statute defining a "juvenile offender" as someone under

124. See *supra* Introduction.

125. See Joseph C. Dugan, *I Did My Time: The Transformation of Indiana's Expungement Law*, 90 IND. L. J. 1321, 1324 (2015).

126. See *id.* at 1326; Patrick Griffin, Sean Addie, Benjamin Adams & Kathy Firestone, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, U.S. DEP'T JUST. (Sept. 2011).

127. Dugan, *supra* note 125, at 1327 (quoting Richard Delgado, *The Wretched of the Earth*, 4 ALA. C.R. & C.L.L. REV. 1, 19 (2011)).

128. See Shah & Fine, *supra* note 7.

129. 18 U.S.C. § 5031.

130. See *id.*

eighteen at the time of offense may also be less controversial and make a new statute easier to pass.¹³¹

A federal juvenile expungement statute should apply not only to offenders under eighteen who were tried as juveniles, but also to offenders under eighteen at the time of their offense who were tried as adults. This is because being tried as an adult is not the only or best proxy for the seriousness of a juvenile offender's crime. Although transfer of a defendant under eighteen for adult prosecution can result from a violent or forcible crime, it can also occur in certain drug cases, such as Sam's.¹³² Therefore, distinguishing between types of juvenile offenders tried as adults will be better addressed by denying automatic expungement to violent offenders and requiring a petition in these more serious cases, as discussed below.

A statute specifically targeting former juvenile offenders for expungement only addresses one part of the total absence of federal expungement law.¹³³ However, it is a valuable first step that would change the trajectories of lives like Sam's. The proposed statute would apply to Sam upon completion of their sentence, as they were only sixteen at the time of their arrest.

B. Expungement Should Be Automatic for First-Time Non-Violent Juvenile Offenses

Courts should be required to expunge the first non-violent offense of a juvenile offender upon petition, without further judicial review. There are a couple of reasons to make expungement automatic for non-violent offenders.¹³⁴ First of all, automatic expungement can

131. This narrower definition of "juvenile" may make it easier to get votes from congresspeople who do not support broad record relief for former offenders. *See supra* Part I.B.2.c.

132. Title 18 U.S.C. § 5032 provides a mechanism to transfer certain juvenile offenders' cases to adult proceedings at age fifteen if their crime would be an adult felony that is a crime of violence and at age thirteen for certain assault with a firearm or murder charges. *See* 18 U.S.C. § 5032. However, juveniles can also be transferred to adult court at age fifteen if they commit an offense covered by section 401 of the Controlled Substances Act, which includes distribution and intent to distribute several controlled substances. *See id.*; 21 U.S.C. § 841.

133. *See supra* Part I.B.

134. The word "automatic" in Part III.B. of this Note means that if a juvenile offender petitions a district court for expungement, the court is required to grant that petition if it is

help prevent an “uptake gap” in eligible individuals receiving expungement.¹³⁵

As scholar Brian Murray explains in his article *Retributive Expungement*, expungement statutes are often undermined by what he terms an “uptake gap.”¹³⁶ Many people who are eligible to have their criminal records expunged never successfully petition courts for expungement.¹³⁷ Many state statutes impose fines, fees, and other court costs on petitioners, without taking into account the large overlap between those with criminal records and those who experience poverty.¹³⁸ Further, in many states, petitioners for expungement are required to file complex paperwork or undergo a waiting period.¹³⁹ These barriers operate to deter even those eligible for expungement from obtaining it, contributing to the “uptake gap.”¹⁴⁰

Clearing records automatically for first-time, non-violent, juvenile offenders would help ensure that procedural barriers or a lack of resources do not prevent eligible individuals from receiving record relief and the associated benefits. Additionally, automatic expungement could help prevent petitions from overwhelming district courts’ dockets as a result of Congress passing new federal expungement legislation.¹⁴¹

However, expungement should not be automatic for all former juvenile offenders. A federal juvenile expungement statute should provide automatic expungement of first-time, non-violent, juvenile offenses when an offender turns eighteen or upon completion of their sentence. Other proposed expungement statutes, such as the Fresh Start Act of 2022, have included provisions distinguishing

a first offense and meets the definition of a crime of violence from the Fresh Start Act of 2022. See Fresh Start Act of 2022, H.R. 6667, 117th Cong. (2022).

135. See Brian M. Murray, *Retributive Expungement*, 169 U. PA. L. REV. 665, 668-69 (2021), for a definition of an “uptake gap”: the issue that those eligible for expungement may not receive it because the process of petitioning for expungement is inaccessible due to cost, complex paperwork, or excessive waiting periods.

136. *Id.* at 668.

137. *See id.*

138. *See id.* at 693-94.

139. *See id.* at 694-95.

140. *See id.* at 668-69.

141. See Alena A. Simon, *Expanding the Extraordinary: Expungements in Minnesota*, 39 MINN. J.L. & INEQ. 411, 428 (2021).

non-violent crimes.¹⁴² The Fresh Start Act specifically defines a “crime of violence” as a crime that:

- (1) has as an element the use, attempted use, or threatened use of physical force against the person or property of another;
- (2) involves the unlawful possession, sale, transfer, or use of a firearm, explosive, or other deadly weapon, or the attempt thereof; or
- (3) causes the petitioner to be required to register under the Sex Offender Registration and Notification Act.¹⁴³

Though the Fresh Start Act did not address juvenile offenses specifically, this standard for violent crimes presents a logical group of crimes to exclude from automatic expungement based on safety concerns.¹⁴⁴ Many state expungement statutes limit eligibility to an individual’s first offense, and this requirement has been supported by lawmakers and legal scholars.¹⁴⁵ However, in order to provide the broadest possible relief to former juvenile offenders while also addressing relevant public policy concerns, federal juvenile expungement legislation should provide automatic expungement of first-time, non-violent offenses.¹⁴⁶ This policy would allow someone like Sam to move forward into adulthood, to go to school, to work, and to find a place to live without the burden of a criminal record.

C. Federal Legislation Should Provide a Path to Expunging More Serious Offenses by Judicial Review

Young people sometimes commit very serious crimes involving harm against others, such as robbery, assault, rape, and homicide.¹⁴⁷

142. See Fresh Start Act of 2022, H.R. 6667, 117th Cong. (2022).

143. *Id.* § 3641(c); see also 34 U.S.C. § 20901 (establishing the Sex Offender Registration and Notification Act referenced in subsection (3) of § 3641 of the Fresh Start Act).

144. See T. Markus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287 (1998), for a description of public policy concerns associated with “aggressive” expungement statutes that do not set aside categories of juvenile crimes not eligible for expungement.

145. See Second Chance for Ex-Offenders Act of 2007, H.R. 623, 110th Cong. (2007) (proposing federal expungement of first offenses); Mouzon, *supra* note 70, at 45 (proposing expungement for first-time offenses); *50-State Comparison*, *supra* note 2.

146. See Funk, *supra* note 144, at 289.

147. See *id.* at 293 (“In 1991, youths between the ages of twelve and eighteen were responsible for approximately [28 percent] of all personal crimes against victims aged twelve and

Certainly their age alone cannot ameliorate the harm of these serious offenses.¹⁴⁸ As such, more serious or repeat juvenile offenses would not qualify for automatic expungement. However, in such cases, former juvenile offenders should be able to petition the court in which they were convicted for expungement after successful completion of their sentence and any period of supervised release. A federal statute should provide a formal process for individuals with juvenile convictions to file an expungement petition with the district court in which they were convicted.¹⁴⁹ Filing the petition should trigger a hearing, giving the petitioner a chance to explain how their record impacts their life and why expungement may be appropriate, while also giving the government a chance to oppose the petition.¹⁵⁰ Then, a district court could exercise discretion in weighing public policy concerns and determining whether expungement is appropriate in the petitioner's case.¹⁵¹

For more serious offenses, a waiting period can address heightened safety concerns and equitable considerations surrounding a former offender's rehabilitation.¹⁵² Therefore, for petition-based expungement under the proposed statute, Congress should create graduated waiting periods based on the nature and severity of the crime.¹⁵³ A graduated system of waiting periods to petition for expungement would promote the goal of ensuring law-abiding conduct and discouraging recidivism.¹⁵⁴ Most state expungement statutes utilize some form of waiting periods.¹⁵⁵ One example is D.C. Code

older such as rape, robbery, aggravated and simple assault, and theft from a person."); T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J. L. REFORM 885, 902 (1996) (detailing an increase in violent crime rates by juveniles).

148. See generally Funk, *supra* note 144 (arguing that "aggressive" state expungement statutes should be reformed to provide less broadly for juvenile expungement).

149. See *supra* Parts III.B, III.C.

150. See Mouzon, *supra* note 70, at 40 n.155, 41 n.156, for examples of state expungement processes that allow prosecutors to object to the petition.

151. This would provide district courts an ability to grant expungement petitions based on equitable considerations that they currently lack. See *supra* Part I.B.1 for a more detailed discussion of courts' limited power to expunge records absent a federal statute.

152. See generally Funk, *supra* note 144 (addressing the serious issue of juvenile crime).

153. See Mouzon, *supra* note 70, at 39.

154. See *id.* at 37, 39.

155. See *id.* at 39 n.154.

§ 16-803, which provides a graduated system of waiting periods for misdemeanor arrests, felony arrests, and conviction records.¹⁵⁶

Finally, in order to address the issue of an “uptake gap” even for juvenile offenders whose records would not be eligible for automatic expungement under the proposed framework, the statute should provide notification of eligibility.¹⁵⁷ Keeping records on the successful completion of juvenile offenders’ sentences would facilitate timely notification when their records become eligible for expungement.¹⁵⁸ The content of this notification should be similar to state laws like Nebraska’s and Illinois’s, which guarantee detailed written notification of expungement eligibility to juvenile offenders.¹⁵⁹ If expungement is going to provide a meaningful second chance for juvenile offenders, it must be readily available, accessible, and advertised to eligible individuals.

IV. ADDRESSING POTENTIAL COUNTERARGUMENTS

This Note proposes legislation that would grant federal courts significantly greater ability to expunge the criminal records of former juvenile offenders. Though support for such legislation has increased alongside the nationwide criminal justice reform movement, this support is certainly not universal.¹⁶⁰ There are valid concerns regarding the frequency and danger of juvenile crime to consider, especially given that prior federal legislation allowing the expungement of juvenile records has not succeeded in reducing rates of juvenile delinquency.¹⁶¹

156. D.C. Code § 16-803(a)-(c) (2015). The D.C. statute provides for the sealing of misdemeanor arrests after two years, felony arrests after five years, and certain convictions after ten. *Id.* The specific waiting periods could certainly be adjusted for a juvenile expungement law.

157. See *supra* note 135 and accompanying text for a more detailed description of the “uptake gap” issue with expungement laws.

158. See generally Riya Saha Shah & Lourdes M. Rosado, *Overcoming Obstacles to Success: Notifying Youth of Their Juvenile Record Expungement Rights and Eligibility*, 2 CRIM. L. PRAC. 59 (2015) (advocating the importance of timely notifying former juvenile offenders when they become eligible for expungement).

159. See *id.* at 64; NEB. REV. STAT. § 43-2, 108.02 (2019); 705 ILL. COMP. STAT. § 405/5-915(2.5) (2023).

160. See Prescott & Starr, *supra* note 14, at 2543-44, 2548.

161. See Kelly, *supra* note 28, at 849.

Furthermore, there is a danger that a federal juvenile expungement statute will not be effective in granting more young people relief from the burden of a criminal record.¹⁶² These counterpoints offer valuable insights into potential downfalls to a federal juvenile expungement statute. However, the drawbacks that opponents point out can be addressed through careful drafting of legislation and do not outweigh the equitable benefits of providing juvenile expungement.

A. New Legislation Can Address the Drawbacks of the Federal Youth Corrections Act

The FYCA offers an example of how juvenile expungement legislation has operated in the past.¹⁶³ However, scholars have noted that the Act did not function entirely as intended. The FYCA did not result in lower rates of juvenile crime.¹⁶⁴ As Cynthia Kelly argued, “[t]he Youth Corrections Act certainly has not solved the juvenile crime problem. In fact, juveniles are committing more violent crimes than ever before.”¹⁶⁵ The fact that juvenile crime rates remained high, even while juvenile offenders were sentenced under the FYCA and could have their sentences “set aside,” could suggest that providing special sentencing and record relief under the FYCA was ineffective at addressing the issue of juvenile crime.¹⁶⁶

In addition, the Federal Bureau of Prisons published data on the behavior of inmates incarcerated under the FYCA in 1985, shortly before the Act’s repeal. This data revealed that inmates sentenced under the FYCA were more likely to have been involved in “violent instant offense[s]” and required more treatment programs than other inmates.¹⁶⁷ Therefore, there is an argument that juvenile

162. *See id.* at 873, 873 n.111.

163. 18 U.S.C. §§ 5005-5026 (repealed 1984).

164. *See id.*; Kelly, *supra* note 28, at 849.

165. *See* Kelly, *supra* note 28, at 849. In making this argument, Kelly referred to the 1975 and 1980 F.B.I. Uniform Crime Reports, indicating that offenders under age eighteen accounted for almost one-third of felony offenses, a percentage that had increased by almost 200 percent in the period between 1960 and 1974. *Id.* at 849 n.4; *see also* *Uniform Crime Reports, FED. BUREAU INVESTIGATIONS* 202 (Sept. 10, 1981), <https://www.ojp.gov/pdffiles1/Digitization/81134NCJRS.pdf> [<https://perma.cc/PFT7-Q8KH>].

166. *See generally* Kelly, *supra* note 28.

167. *See Research Review, supra* note 24, at 3-5.

offenders sentenced under the FYCA should not have been subject to reduced sentencing or record expungement as they posed a greater potential risk.

Yet the juvenile expungement legislation proposed in this Note does not address sentencing of juvenile offenders like the FYCA did. This means the certainty and severity of punishment would remain the same for young people who tend to commit crimes at a high rate.¹⁶⁸ Given that severity and certainty of punishment are strong deterrents against recidivism, eliminating this aspect of the FYCA could go a long way in addressing identified issues with the Act.¹⁶⁹ The expungement statute proposed in this Note would simply provide an easier path for former juvenile offenders to clear their records *after* serving their sentences.

It is also worth noting that Congress was aware when it enacted the FYCA that youth aged sixteen to twenty-three are a “focal source of crime.”¹⁷⁰ There is an argument that juvenile crime tends to be high across the board, so the best Congress can do is to help rehabilitate those individuals who were convicted as juveniles.¹⁷¹ In fact, evidence suggests that crime rates naturally decrease as individuals get older.¹⁷² Therefore, the law should make it easier—not more difficult—to move forward out of those younger, more crime-prone years without the substantial burden of a criminal record.

B. The Policy Benefits of Expunging Juvenile Records Outweigh Potential Harms

The most intuitive, and perhaps the most significant, counter-argument to providing for juvenile expungement is that expunging juvenile records will itself cause harm and that the rehabilitative benefits to juvenile offenders will not outweigh that harm. Some

168. See *Five Things About Deterrence*, *supra* note 98.

169. See *id.*

170. See Kelly, *supra* note 28, at 851.

171. See *id.* at 850-51; *Arrest Rates by Offense and Age Group, 2020*, OFF. JUV. JUST. & DELINQ. PREVENTION (July 8, 2022), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1&selYrs=2020&rdoGroups=1&rdoData=r [<https://perma.cc/BP4V-7DW6>].

172. See *Arrest Rates by Offense and Age Group*, *supra* note 171; *Uniform Crime Report*, *supra* note 165, at 202; see also *Five Things About Deterrence*, *supra* note 98 (“[I]ncapacitation is a costly way to deter future crimes by aging individuals who already are less likely to commit those crimes by virtue of age.”).

scholars argue that in allowing for juvenile records to be sealed or expunged, states do not adequately address the “very ‘adult’ crimes” committed by juveniles.¹⁷³ These opponents argue that juvenile expungement will result in a high rate of recidivism amongst former juvenile offenders and, ultimately, an increase in violent crime.¹⁷⁴

While juvenile offenders are responsible for a relatively large proportion of all crimes committed, there is evidence that allowing former juvenile offenders to expunge their records will help them move productively into adulthood. The Michigan study discussed in Part II.B. of this Note indicates that former offenders who receive expungement are less likely to commit future offenses.¹⁷⁵

Further, the most heinous crimes would certainly not be expunged automatically under the proposed federal legislation. Judges would retain discretion to deny applications in more serious “adult” types of cases or those with particularly gruesome facts.¹⁷⁶ However, the proposed legislation would provide relief to juveniles who committed less serious offenses and would allow broader judicial discretion in determining whether a particular set of facts warrants expungement.

C. Expungement Legislation Must Address the Issue of an “Uptake Gap”

Another important concern with enacting federal juvenile expungement legislation is the fact that creating eligibility for expungement does not guarantee that former juvenile offenders will benefit from record expungement. Petitioners still face many logistical and procedural obstacles in seeking expungement, even in states with expansive legislation.¹⁷⁷

173. T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 166 (1997).

174. *Id.* at 168 (“[A]s today’s violent and recidivistic juveniles enter into adulthood, it is entirely reasonable to predict that the overall crime rate for both violent and non-violent crime will rise dramatically.”).

175. See Prescott & Starr, *supra* note 14, at 2465, 2511-13; *supra* Part II.B.

176. See Funk & Polsby, *supra* note 173, at 166-67 (detailing increased rates of juvenile arrests for murder, rape, aggravated and simple assault, and robbery).

177. See Murray, *supra* note 135, at 668-69.

Due to the risk of an “uptake gap,” a federal statutory scheme should provide automatic expungement of less serious juvenile offenses.¹⁷⁸ Simply passing more expansive or inclusive expungement laws is not enough on its own to address the problem of eligible individuals not benefitting from expungement.¹⁷⁹ Therefore, federal juvenile expungement legislation must incorporate automatic relief for non-violent, first-time offenses. More serious offenses should be subject to expungement only after application; however, the statute should limit waiting periods and base them on the severity of the offense, and should also provide for notification of eligible individuals.¹⁸⁰

CONCLUSION

It is intuitive that juveniles who commit crimes should be treated differently than adults who do. However, federal law provides little more opportunity for former juvenile offenders to have their criminal records erased through expungement than adult offenders. The statutory gaps left after the repeal of the Federal Youth Corrections Act and between narrow federal statutes like the Federal Juvenile Delinquency Act and the Federal First Offender Act leave federal juvenile offenders with almost no hope for expungement. This means that individuals with federal convictions—even for offenses committed as juveniles—live the rest of their lives burdened by the stigma and collateral consequences of a criminal record.

A large number of offenders under eighteen are arrested, charged, and convicted with federal offenses. It is crucial to the rehabilitation of these individuals and their productive contributions to society as adults that we allow them a path to criminal record expungement. Federal courts’ ancillary jurisdiction to expunge criminal records is far too narrow, so the obvious solution for juvenile offenders is

178. See generally *id.*, for an explanation of the “uptake gap” issue.

179. See generally Katherine Ganick, Note, *Increasing Access to Expungements: Expungement Statutes Are Intended for the Greater Good. But Are They Working?*, 98 U. DET. MERCY L. REV. 1 (2020) (highlighting a “second chance gap” and proposing increased availability of low-cost legal services to promote access to expungement).

180. See Murray, *supra* note 135, at 714-15, for a description of Murray’s recommendations for legislatures adopting expungement statutes, including state-initiated expungement proceedings for eligible former offenders and ensuring waiting periods are reasonable in length.

federal legislation. Congress should enact a statute granting federal courts general authority to expunge the records of offenders whose crimes occurred before their eighteenth birthday. This statute should provide automatic expungement for minor offenses such as simple drug possession.

The benefits of a federal juvenile expungement statute would be twofold. First, statutory expungement would benefit former offenders in the rehabilitation process by reducing the collateral consequences they face in obtaining housing, education, and employment. Furthermore, juvenile expungement legislation would serve an important social purpose in reducing recidivism. It is crucial that Congress statutorily guarantee expungement for people like Sam—young people who are some of the most vulnerable members of our society and, unfortunately, some of the most likely to commit criminal offenses. Allowing former juvenile offenders to move forward without the burden of a criminal record is a second chance that would pay dividends in improving the lives of former juvenile offenders and preventing them from becoming adult offenders.

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