The Many Roads to Reintegration

A 50-State Report on Laws Restoring Rights and Opportunities After Arrest or Conviction

By Margaret Love & David Schlussel

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COLLATERAL CONSEQUENCES RESOURCE CENTER

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The Collateral Consequences Resource Center (CCRC) is a non-profit organization established in 2014 to promote public engagement on the myriad issues raised by the collateral consequences of arrest or conviction. Collateral consequences are the legal restrictions and societal stigma that burden people with a criminal record long after their criminal case is closed. The Center provides news and commentary about this dynamic area of the law, and a variety of research and practice materials aimed at legal and policy advocates, courts, scholars, lawmakers, and those most directly affected by criminal justice involvement.

Through our flagship resource, the Restoration of Rights Project (RRP), we describe and analyze the various laws and practices relating to restoration of rights and criminal record relief in each U.S. jurisdiction. In addition to these state-by-state profiles, a series of 50-state comparison charts and periodic reports on new enactments make it possible to see national patterns and emerging trends in formal efforts to mitigate the adverse impact of a criminal record. We consult in support of state law reform efforts, and in 2019 organized a successful effort to develop a model law on access to and use of non-conviction records. In addition, we participate in court cases challenging specific collateral consequences, and engage with social media and journalists on these issues. For more information, visit the CCRC website at http://ccresourcecenter.org.

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INTRODUCTION BY GABRIEL J. CHIN

The problem of reform and relief of collateral consequences calls to mind Supreme Court Justice Oliver Wendell Holmes Jr.'s famous line: "The life of the law has not been logic: it has been experience." U.S. criminal law itself is not theoretically pure. In the area of civil law, in particular commercial law, dozens of uniform laws are on the books, drafted by experts, many of which, such as the Uniform Commercial Code, have been widely or universally adopted. But in a country where scholars, lawyers, policymakers, and citizens evaluate criminal justice polices based on retributivist, utilitarian, economic, religious, pragmatic, intuitive, and emotional principles, or a mélange of them, there is and could be no Uniform Penal Code.[1] Criminal law is often inconsistent across states, and even within states, in terms of its underlying justification or rationale, or the reasons that particular rules or provisions exist.

Disagreement about collateral consequences is, if anything, even more intense. Collateral consequences may be divided into four main types: Loss of civil rights, limits on personal freedom (such as registration or deportation), dissemination of damaging information, and loss of opportunities and benefits, each of which may be justified and criticized for different reasons. Accordingly, defense attorneys, prosecutors, judges, policymakers and legal scholars disagree about the fundamental nature and purpose of collateral consequences; to the extent that the public at large ever thinks about them, they also likely hold a range of views. here is no consensus about whether collateral consequences in general or particular ones constitute further punishment for crime, are mere civil regulation, unconstitutionally or immorally carry forward Jim Crow, or, perhaps, should be understood in some other way. Advocates, analysts, and lawmakers will never be in a position to argue persuasively "because collateral consequences rest on *Principle X*, it follows that they should apply in and only in *Condition Y,* and must be relieved under *Circumstance Z*."

There is intense disagreement about the fundamental nature and purpose of collateral consequences.

Yet, the practical problem of collateral consequences looms large. With the massive expansion of collateral consequences in recent decades, those who experience these

[1] The *Model* Penal Code has been widely influential, but—as designed—states adopted only the pieces they liked, and heavily modified them.

barriers firsthand know that they cannot become fully functioning, equal members of the community without finding a way to overcome them.

Fortunately, agreement on underlying fundamental principles is not required to reach agreement on particular policies.[2] Most Americans agree, for a range and combination of reasons, that people convicted of crime should have second chances, rather than being permanently excluded from society regardless of the passage of time, successful efforts at rehabilitation and restitution, and lack of current risk to fellow Americans. This is a compelling necessity, given the array of collateral consequences, the tens of millions of Americans with criminal records, and the consequences for those individuals, their families and communities, the economy, and public safety itself, if so many people are relegated to a permanent subordinate status. To adapt a line from Justice Anthony Kennedy's 2003 speech on criminal justice to the ABA, too many people are subject to too many collateral consequences for too long. At the same time, even acknowledging the wide range of philosophical and political views Americans hold on these issues, substantial majorities likely agree that public safety requires excluding those convicted of recent criminal conduct from situations where they present a clear and present danger of serious harm.

A relief system should be *accessible*, *effective*, *coordinated*, *fair*, and *administrable*.

Even if it is impossible to identify a single, unadulterated principle explaining why a relief policy is desirable, some characteristics of that policy can be mapped out, particularly in light of experience with various systems over the years.

First, the system should be *accessible*. Every state has pardon or some other restoration policy on the books now, but there is wide variation on whether they are practically available to deserving individuals. In some states, groups of high officials meet to evaluate relief requests, but they have other important duties. Some mechanisms require applicants to have lawyers, a fatal defect in a system aimed at helping people who are often struggling just to support themselves and their families. The system should ordinarily be part of the probation or parole process, and not require a lawyer (or should be part of the public defender's assigned responsibility in every case), should be automatic with regard to as many categories of offenses and

[2] Cass Sunstein's classic exposition remains worth reading. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

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offenders as is sensible, should ordinarily use existing criminal and correctional records rather than requiring new investigations, and should require an in-person hearing only in the most serious or exceptional cases. The particular form of relief must be tailored to the nature of the consequence. Thus, restoring the vote may employ a simpler and more routinized mechanism than relief aimed at avoiding deportation or terminating criminal registration.

The system should be *effective.* Of course, restoration of rights provisions must not create new ways to entangle people in the legal system when they are designed to do the opposite. Relief should not be merely advisory, leaving decisionmakers in doubt about its legal effect or feeling free to ignore the law. Through the statutory text and education of decisionmakers, the consequences of a particular form of relief should be clear. Perhaps the piece of paper evidencing the relief should itself have a section of text addressed to public officials and private actors who control access to employment, licensing, voter registration, and housing, informing them of their responsibilities under the law. In the event of persistent non-compliance, there should be a mechanism for enforcement.

In a mobile, federal society, relief must be *coordinated* across jurisdictions, including within a single state. Most jurisdictions impose collateral consequences based on out-of-jurisdiction convictions, but it is not so clear that they give effect to out-of-jurisdiction relief or open their own relief systems to outsiders. People should not, ideally, be required to seek relief from multiple jurisdictions to avoid collateral consequences flowing from a single conviction.

In a mobile, federal society, relief must be *coordinated* across jurisdictions, including within a single state.

The relief should be *fair* in the broadest sense, striking a balance between the interests of those who seek relief and their families, and those who transact with them. Consumers of relief, people such as landlords and employers, should not fear being subject to liability for discrimination if they do not transact with a person who has received relief, and fear tort liability if they do. The legitimate interests of victims should be considered, as well as the interests of community members—both those who fear being put at risk, and those who want their fellows to be able to live without unreasonable legal impairment.

Finally, the system should be *administrable*. It should not create unmanageable new responsibilities for government employees or officials. This means it must be designed with input from various creators, maintainers, and users of criminal justice records as well as people with criminal records. A cautionary tale comes from another massive dataset: racially restrictive covenants in property deeds. Notwithstanding their invalidity for decades, policymakers still struggle to expunge them from government records. In the criminal justice area as with property records, even in the face of legal mandates, judges will not jail clerks for failing to do what is physically impossible, or what could be achieved only by setting aside all other tasks.

A system might be creative, imaginative, elegant. But it is hard to imagine that a perfect system will make it through the crucible of politics. A workable, effective system, giving relief to a large number of people with a wide range of convictions, while still being attentive to public safety concerns, is likely to be one with the fairest, wisest and most reasonable compromises with the ideal.

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EXECUTIVE SUMMARY

This report sets out to describe the present landscape of laws in the United States aimed at restoring rights and opportunities after an arrest or conviction. This is an update and refresh of our previous national survey, *Forgiving and Forgetting in American Justice*, last revised in 2018.[3] Much of the material in this report is drawn from our flagship resource, the Restoration of Rights Project. We are heartened by the progress that has been made toward neutralizing the effect of a criminal record since the present reform era got underway in a serious fashion less than a decade ago, especially in the last two years.

This report considers remedies for three of the four main types of collateral consequences: loss of civil rights, dissemination of damaging record information, and loss of opportunities and benefits, notably in the workplace.[4]

The trend toward restoring the vote to those living in the community has accelerated in recent years.

Its first chapter finds that the trend toward restoring the vote to those living in the community—a long-time goal of national reform organizations and advocates—has accelerated in recent years. Further reforms may be inspired by the high-profile litigation over Florida's "pay-to-vote" system, which shines a national spotlight on financial barriers to the franchise. This chapter also

[3] MARGARET LOVE, JOSH GAINES & JENNY OSBORNE, COLLATERAL CONSEQUENCES RES. CTR, FORGIVING AND FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS, (rev. Aug. 2018) https://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Aug-2018.pdf.

[4] This report does not cover the fourth main type of consequence: limits on personal freedom—including sex offender registration, civil commitment, and immigration consequences. Relief mechanisms for these are quite complex and built into the law of each issue. We offer a 50-state comparison chart for relief from sex offender registration on our website, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/. For resources on immigration consequences, *see* https://www.ilrc.org/crimes. With respect to the third type of consequence: loss of opportunities and benefits, this report covers laws providing relief for employment and occupational licensing (the two areas most subject to relief under state law), but does not cover housing, government benefits, or other opportunities.

finds that systems for restoring firearms rights are considerably more varied, with many states providing relief through the courts but others requiring a full pardon.

The second chapter deals with laws intended to revise or supplement criminal records, an issue that has attracted the most attention in legislatures but that has benefited the least from national guidance. It is divided into several parts, based on the type of record affected (conviction or non-conviction) and the type of relief offered (e.g. pardon, expungement, set-aside, certificates, diversion, etc.). The wide variety in eligibility, process, and effect of these record relief laws speaks volumes about how far the Nation is from common ground.

Laws regulating the dissemination of damaging criminal record information have benefitted the least from national guidance.

The third chapter concerns the area in which perhaps the most dramatic progress has been made just since 2018: the regulation of how criminal record is considered by public employers and occupational licensing agencies. Legislatures have been guided and encouraged by helpful model laws and policies proposed by two national organizations with differing regulatory philosophies: The Institute for Justice, a libertarian public interest law firm, and the National Employment Law Project, a workers' rights research and advocacy group. Regulation of private employment has also been influenced by national models, although to a lesser extent and more needs to be done in this area.

This report makes clear that substantial progress has been made in the past several years toward devising and implementing an effective and functional system for restoring rights and status after arrest or conviction. The greatest headway has been made in restoring rights of citizenship and broadening workplace opportunities controlled by the state. The area where there is least consensus, and that remains most challenging to reformers, is managing dissemination of damaging criminal record information. Time will tell how the goal of a workable and effective relief system is achieved in our laboratories of democracy.

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Grading and ranking the states

In each section of the report, after our discussion of the type of relief, we assign a grade to each state, D.C., and federal law. In an appendix, we collate these grades to produce a ranking of states and D.C. on the nine categories that we graded.[5] That ranking is reproduced below. Our grading judgments deserve a comment. Gabriel Chin's introduction described the operational features of a desirable relief system: *accessible, effective, coordinated, fair, and administrable*. Because we have not studied how the relief systems described in this report actually operate, we cannot say for certain whether or to what extent any of them deliver on these five features. Our grades are based solely on the text of each state's law, leaving more nuanced judgments to practitioners, researchers, and the law's intended beneficiaries. Hopefully, these grades will challenge, encourage, and inspire additional reforms in the months and years ahead.

National Ranking of Restoration Laws

1	Illinois	12	New Hampshire	22	Arkansas	31	Mississippi	42	Kansas
2	California	12	New Jersey	22	Kentucky	31	N. Carolina	42	W. Virginia
3	Utah	12	Oklahoma	22	Ohio	31	Tennessee	44	S. Dakota
4	Minnesota	15	Massachusetts	25	Rhode Isl.	34	Arizona	45	Iowa
5	Connecticut	15	Nebraska	25	Wisconsin	34	Montana	45	Virginia
5	Nevada	15	New Mexico	27	Michigan	34	Oregon	45	Wyoming
7	Colorado	18	Indiana	28	Missouri	37	Maryland	48	Texas
8	Delaware	19	Louisiana	29	Georgia	37	Maine	49	Alabama
8	New York	19	Vermont	29	Hawaii	39	D.C.	50	Alaska
10	North Dakota	19	Washington			39	Idaho	51	Florida
10	Pennsylvania					39	S. Carolina		

[5] The nine categories graded are: loss and restoration of the vote, pardon, conviction relief (felony and misdemeanor graded separately), judicial certificates, deferred adjudication, non-conviction records, employment, and occupational licensing. In determining these rankings, each of the nine categories was assigned equal weight, except that deferred adjudication and certificates of relief were each assigned 50% weight. We did not grade restoration of firearms rights because the laws were too varied to helpfully compare.

I. LOSS AND RESTORATION OF VOTING AND FIREARMS RIGHTS

A. Voting Rights

The loss and restoration of the right to vote after a conviction depends upon state law, including for people with federal convictions.[6] The Supreme Court has ruled that the Fourteenth Amendment to the Constitution permits states to permanently deny the vote based on a felony conviction.[7]

That said, most states do not go so far. In two states (Vermont and Maine) conviction never results in loss of the right to vote, and the District of Columbia recently repealed its felony disenfranchisement on a temporary basis.[8] In 22 states the vote is lost only if a conviction (usually a felony) results in incarceration.[9] In all but five of those 22 states, the period of disenfranchisement coincides with the period of actual incarceration.[10] In one of the five (Louisiana), reenfranchisement is delayed for a

[6] In states where the right to vote is lost and regained by operation of law, federal and out-of-state convictions are generally subject to the same rules as in-state convictions. Connecticut is a notable exception. *See* Conn. Gen. Stat. Ann. § 9-46a. The handful of states that only provide for discretionary reenfranchisement typically allow those with federal convictions to regain the vote on the same terms as those with in-state convictions. *See infra* note 19.

[7] *See Richardson v. Ramirez*, 418 U.S. 24, 54 (1974); *see also Harvey v. Brewer,* 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) (provisions restoring voting rights lost due to conviction are subject to constitutional challenges).

[8] The District of Columbia enacted emergency legislation effective July 22, 2020, which remains in effect for 90 days, repealing the District of Columbia's felony disenfranchisement law. *See* D.C. Council Bill 23-0825 (July 22, 2020).

[9] In a few of these jurisdictions, people incarcerated for a misdemeanor or election-related misdemeanor may not vote. *See, e.g.,* DC. Code § 1-1001.02(7); Mich. Comp. Laws § 168.758b; Utah Code Ann. § 20A-2-101(2)(b); *see also* S.C. Code Ann. § 7-5-120(B); Ky. Const. § 145(2).

[10] *See* CCRC's report, "Who Must Pay to Regain the Vote? A 50-State Survey" (July 2020), https://ccresourcecenter.org/wp-content/uploads/2020/07/Who-Must-Pay-to-Regain-the-Vote-A-50-State-Survey.pdf, and our amicus brief in *Jones v. DeSantis* (11th Cir.), https://ccresourcecenter.org/wp-content/uploads/2020/07/2020.08.03-Exhibit-A.pdf.

period after release.[11] In the remaining four states (California, Connecticut, Idaho, and New York) disenfranchisement continues through parole—except that parolees in New York have since 2018 been allowed to vote by virtue of executive pardon.[12]

Another 22 states provide for loss of vote for a range of felonies and certain misdemeanors; and restore the vote automatically either upon completion of sentence or discharge from supervision.[13] Nine of these 22 states require a person to pay some or all conviction-related "legal financial obligations" (LFOs) (fines, fees, and restitution) before regaining the franchise.[14] In 12 of the remaining 13 states in this group, discharge from supervision restores the vote, and LFOs may result in a scenario of delayed restoration of rights, depending on a person's ability to pay.[15] The wealth-based

The wealth-based discrimination inherent in conditioning voting on payment of LFOs has been challenged on constitutional grounds in several states

[11] Louisiana restores the franchise automatically for a person who has not been incarcerated in the last five years pursuant to any "order of imprisonment," for a felony, or upon earlier completion of such an order. La. Const. art. I, § 10; La. Stat. Ann. §§ 18:102(A)(1), 18:2(8).

[12] *See* N.Y. Exec. Order 181 (April 18, 2018) (A. Cuomo), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_181.pdf. In June 2020, the California legislature approved a constitutional amendment restoring the vote to parolees for consideration by California voters in November 2020. *See* 2019 Cal. A.C.A. No. 6, chaptered June 25, 2020.

[13] Most of these 22 states explicitly provide for the situation of people with federal and out-of-state convictions. Some states except from automatic re-enfranchisement specific crimes involving serious violence or sexual offenses, others except public corruption or election law crimes, and still others except both. *See, e.g.,* Article V § 2 of the Delaware constitution (excepting from automatic restoration those convicted of murder, bribery or similar public corruption, or a sexual offense).

[14] In addition, Connecticut requires payment of LFOs for out-of-state and federal convictions (but only discharge from prison and parole for in-state convictions). *See supra* note 7.

[15] These 12 states allow nonpayment of LFOs to delay reenfranchisement in certain circumstances, via early discharge for payment, delayed discharge for nonpayment, or both. Oklahoma is the one state in this group of 13 that reenfranchises after a fixed sentence period, regardless of payment of LFOs. *See supra* note 10. Added to this group of 12 "delay" states are four that disenfranchise only upon a sentence of imprisonment and any parole,

discrimination inherent in conditioning voting on payment of LFOs has been challenged on constitutional grounds in several states, notably including Florida.[16]

Since Florida amended its constitution in 2018 to restore the vote automatically upon completion of sentence,[17] only four states (Iowa, Kentucky, Mississippi, Virginia) now rely exclusively on the discretionary exercise of a constitutional power to restore the vote. These states have pursued differing restoration policies in recent years, with three (Iowa, Kentucky, Virginia) restoring rights on an automatic or quasi-automatic basis, and the fourth (Mississippi) disenfranchising fewer people but showing no interest in restoring them to the franchise.[18] All four of these "discretionary" states make provision for restoring the vote to people with federal or out-of-state convictions.[19]

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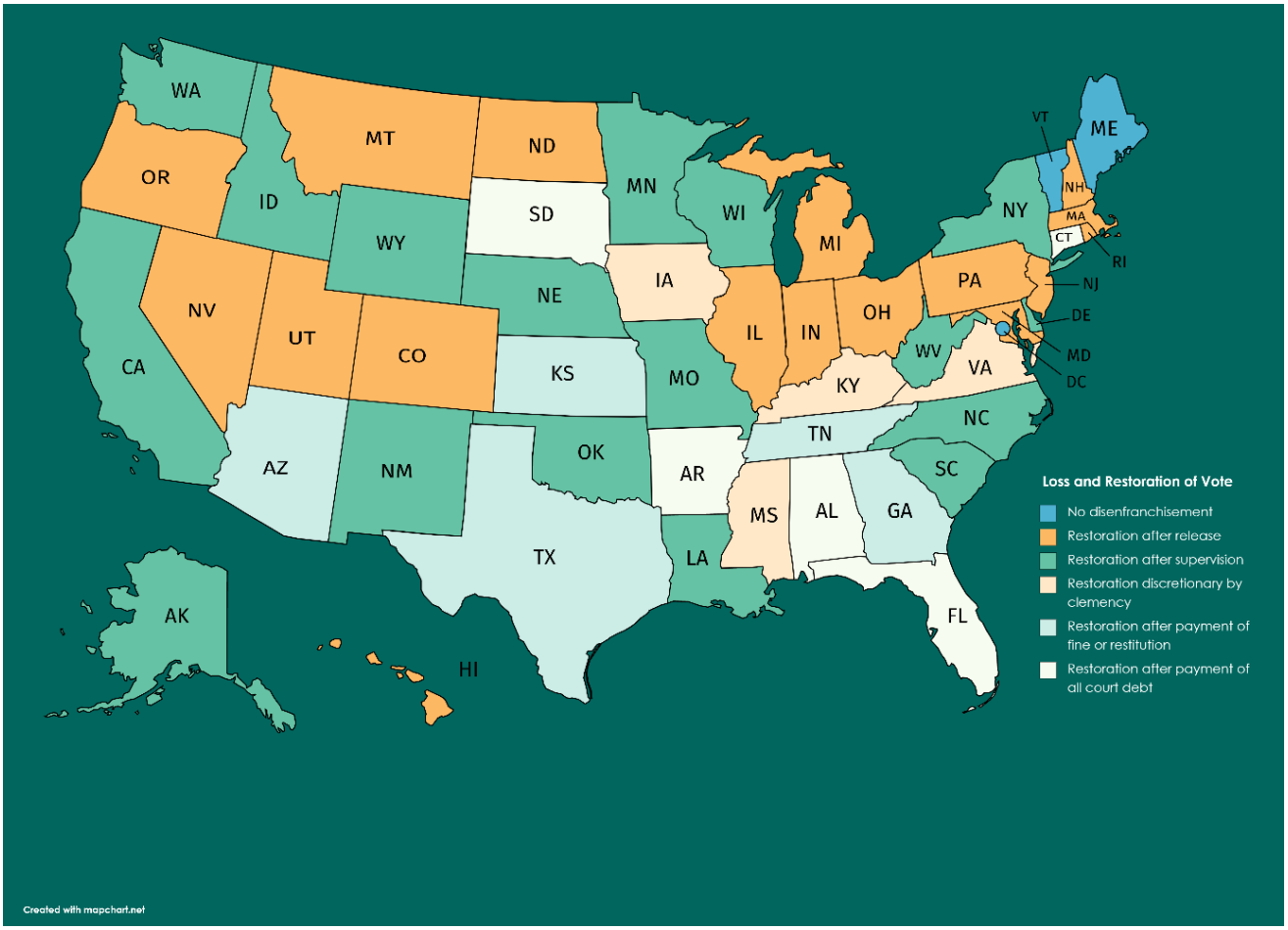
because of the potential for early discharge from parole upon payment of LFOs (Idaho, California, New York, and Louisiana). *Id.*

[16] *See infra* notes 30 and 31.

[17] This provision excludes murder and sex offenses. *See* Fla. Const. art. VI, § 4.

[18] Recent governors of Virginia, Kentucky, and Iowa have issued executive orders making restoration routine for most people in those states who have been discharged from supervision. *See infra* note 28. In May 2020, with gubernatorial encouragement, the Iowa legislature initiated the process of amending the state constitution to make restoration automatic upon completion of sentence, including payment of court debt. *See* Iowa Code §§ 48A.6, 48A.6(A). Mississippi disenfranchises based on state convictions only, and largely for common law crimes. However, Mississippi's governors and legislatures, both of which have authority under the state constitution to restore civil rights, have evidenced no interest in recent years in restoring voting rights to those who lost them. Miss. Const. art. 5, § 124 (executive's power to pardon limited in cases of treason and impeachment); art. 12, § 253 (restoration of civil rights by vote of 2/3 of the legislature).

[19] Iowa, Kentucky, and Virginia give people with federal and out-of-state convictions access to their restoration process, or recognize restoration in the jurisdiction of conviction, while Mississippi allows those with federal and out-of-state convictions to vote without condition. *See Middleton v. Evers,* 515 So.2d 940, 944 (Miss. 1987) (disqualification not applicable if person was convicted in another state); Op. Miss. Atty. Gen. No. 2005-0193 (Wiggins, April 26, 2005). A few states rely on discretionary restoration in cases excluded from automatic restoration. *See, e.g.*, Ariz. Rev. Stat. §13-908 (discretionary judicial restoration for people with more than one felony conviction and people with first felony offenses who have not paid restitution); Wyo. Stat. Ann. §§ 7-13-105(a) (people who are ineligible for automatic



This national landscape reflects a growing consensus that restoration of the vote is an important aspect of criminal justice reform.[20] Since 2015, there has been a national trend toward expanding the franchise through changes in law and policy. During this five-year period, 17 states and the District of Columbia have enacted a total of 26 laws either limiting disenfranchisement or encouraging the newly enfranchised to vote.

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restoration must seek restoration from the governor); and the states that except certain offenses from automatic restoration mentioned in note 13.

[20] For a general overview of reenfranchisement trends prior to 2015, *see* Morgan McLeod, *Expanding the Vote: Two Decades of Felony Disenfranchisement Reform*, The Sentencing Project (2018); *see also* Nick Harpster and Michael S. Vaughn, *Felon Disenfranchisement Laws: A Review of Current Policies, Challenges of Disenfranchisement Laws, and Recent Trends in Legislative and Legal Change*, 52 CRIM. L. BULL. 5 (2016).

Of the 17, eight states revised their restoration laws to remove barriers related to supervision: Colorado, Maryland, Nevada and New Jersey limited disenfranchisement to a period of actual incarceration,[21] Louisiana restored the franchise to anyone who has not been incarcerated in the last five years pursuant to an "order of imprisonment" for a felony,[22] and three additional states (Delaware, Washington, and Arizona) removed an explicit financial payment condition from their restoration laws.[23] Two more states (California and Oklahoma) and the District of Columbia removed barriers to voting related to incarceration or waiting periods,[24] and three additional states (Arkansas, Florida, and Wyoming) ended indefinite

[21] Colo. Rev. Stat. § 1-2-103, *amended by* 2019 Colo. Legis. Serv. Ch. 283 (H.B. 19-1266); Md. Code Ann., Elec. Law § 3-102, *amended by* 2016 Md. Laws Ch. 6 (H.B. 980 (2015)); N.J. Stat. Ann. §19:4-1, *amended by* 2019 NJ Sess. Law Serv. Ch. 270 (A. 5823). Nevada legislated twice during this period, replacing a complex re-enfranchisement system that required people with non-violent first offenses to pay restitution to regain their rights, and all others to seek restoration through discretionary action of a court or pardon board, with the end result that disenfranchisement is now limited to the period of actual incarceration. Nev. Rev. Stat. § 213.157, *amended by* 2017 Nev. Laws Ch. 362 (A.B. 181) (eliminating restitution requirement), 2019 Nev. Laws Ch. 255 (A.B. 431) (limiting disenfranchisement to imprisonment).

[22] La. Stat. Ann. § 18:102, *amended by* 2018 La. Sess. Law Serv. Act 636 (H.B. 265).

[23] Delaware eliminated its requirement to pay LFOs to regain the vote. Del. Code Ann. tit. 15, § 6102, *amended by* 2016 Del. Laws Ch. 311 (S.B. 242). Washington eliminated its requirement that LFOs be paid in order be fully restored to the franchise, if five years have elapsed following completion of all non-financial requirements of the sentence. Wash. Rev. Code § 29A.08.520; *id.* § 9.94A.637, *amended by* 2019 Wash. Legis. Serv. Ch. 331 (S.H.B. 1041). Arizona eliminated its requirement to pay LFOs (other than restitution) to obtain automatic restoration of the vote following discharge for a first felony offense, leaving unpaid restitution a potential source of wealth discrimination. Ariz. Rev. Stat. Ann. § 13-907, *amended by* 2019 Ariz. Legis. Serv. Ch. 149 (H.B. 2080).

[24] California allowed those serving felony sentences in county jail to vote. Cal. Elec. Code § 2101, *amended by* 2016 Cal. Legis. Serv. Ch. 757 (A.B. 2466). Oklahoma clarified that those convicted of a felony may register to vote when they have "fully served their sentence of court-mandated calendar days" with no further waiting period. 26 Okla. Stat. Ann. § 4-101, *amended by* 2019 Okla. Sess. Law Serv. Ch. 112 (H.B. 2253). For D.C.'s recent enactment, see note 8.

disenfranchisement for at least some individuals.[25] Finally, two states passed laws initiating the process of constitutional amendment to enact (Iowa) or expand (California) automatic re-enfranchisement.[26] In addition to measures expanding voter eligibility, five states passed laws requiring corrections officials to educate and inform people in prison or on supervision about their voting rights.[27] More than half of the these new laws were enacted after January 1, 2019, so the trend toward making more convicted individuals eligible to vote appears to be accelerating.

The move to limit penal disenfranchisement is also evident in clemency policy. Since 2015, four governors have used their pardon power systematically to restore the vote and remove financial or supervision requirements.[28]

During this same five-year period only one state acted to extend penal disenfranchisement. Florida's June 2019 passage of SB7066, conditioning voting

[25] Arkansas closed a loophole that had prevented juveniles charged as adults from regaining the vote; Florida amended its constitution to restore the vote to all who have completed their sentences (excluding those with murder and sex offenses); and, Wyoming restored the vote automatically to those convicted of a single nonviolent felony upon "discharge" of sentence, broadening this relief on three different occasions between 2015 and 2018. *See* Ark. Code Ann. § 16-93-622 (2019); Fla. Const. art. VI, §4(a) (2018); Wyo. Stat. Ann. § 7-13-105 (amended in 2015, 2017, and 2018).

[26] *See* Iowa Code §§ 48A.6, 48A.6(A); 2019 Cal. ACA-6, *supra* note 12.

[27] *See, e.g.*, Cal. Elec. Code § 2105.5; Colo. Rev. Stat. § 17-2-102; 730 Ill. Comp. Stat. Ann. 5/3-14-1(a-3); Ill. Pub. Act 101-0441; N.H. Rev. Stat. Ann. § 504-A:12-a; Wash. Rev. Code § 72.09.275.

[28] Since 2016, Virginia's governor has regularly restored the vote upon completion of a term of supervision and currently does not require payment of LFOs. *See* Restoration of Rights, Secretary of the Commonwealth of Virginia (last accessed June 23, 2020 at 7:28pm), https://www.restore.virginia.gov/. Kentucky's governor issued an Executive Order in December 2019 automatically restoring the vote to all those with Kentucky convictions, excluding specified violent offenses, if they have completed probation and parole ("final discharge"), regardless of payment of restitution, fines, or other monetary conditions; those with pending felony charges or arrests are excluded. Ky. Exec. Order No. 2019-003 (Dec. 12, 2019). Iowa's governor issued an executive order in August 2020 restoring the cote automatically upon completion of sentence. Iowa Exec. Order No. 2020-7 (Aug. 5, 2020). New York's governor issued an Executive Order directing that individuals being released onto parole, or currently on parole "will be given consideration for a conditional pardon that will restore voting rights without undue delay." N.Y. Exec. Order No. 181 (2018).

rights on full payment of LFOs, even if they have been converted to a civil lien, severely curtailed the ballot initiative by which 65% of state voters had approved automatic re-enfranchisement of most Floridians with a felony record just six months earlier.[29] SB7066 has been challenged on federal constitutional grounds, along with the ballot initiative, which was later interpreted by the Florida Supreme Court to itself require payment of LFOs.[30]

The Collateral Consequences Resource Center filed a friend of the court brief in the Florida litigation documenting the nationwide frequency with which unpaid LFOs may delay restoration of the vote or deny it indefinitely.[31] The brief documented that in twenty states and the District of Columbia, LFOs have no bearing on eligibility to

[29] SB7066, signed into law by Governor DeSantis in June 2019 and codified at Fla. Stat. § 98.0751(2)(a)(5), defined "completion of sentence to mean "full payment of fines or fees ordered by the court as part of the sentence or that are ordered by the court as a condition of any form of supervision . . . ." The law explicitly requires that the payment requirement "is not deemed completed upon conversion to a civil lien." *Id.*

[30] The governor's signature on SB7066 triggered a legal challenge in federal district court based upon several constitutional theories, including that the new law, as well as the ballot initiative, violate Equal Protection to the extent that they discriminate between those who are able to pay and those who are not. The United States Court of Appeals for the Eleventh Circuit ruled, in affirming the district court's preliminary injunction, that Florida cannot condition voting on payment of an amount a person is genuinely unable to pay. *See Jones v. Governor of Fla.*, 950 F.3d 795 (11th Cir. 2020). While the appeal of the preliminary injunction was pending, the Florida Supreme Court issued an advisory opinion that the ballot initiative requires payment of legal financial obligations to regain the vote. *See Advisory Op. to the Governor Re: Implementation of Amendment 4, the Voting Restoration Amendment*, 288 So. 3d 1070 (Fla. 2020). After trial on the merits, the federal district court held that the State may condition voting on payment of fines and restitution imposed by the court at sentencing that a person is able to pay, but may not, consistent with the Equal Protection Clause, condition voting on payment of amounts a person is unable to pay. Further, the court held that at least some of the financial obligations are taxes that cannot block access to voting consistent with the Twenty-fourth Amendment, whether a person is able to pay or not. *See Jones v. DeSantis*, 2020 WL 2618062 (N.D. Fla., May 24, 2020). On July 2, 2020, the 11th Circuit granted Florida's request for *en banc* review of the district court's decision and stayed its order; on July 16, the Supreme Court declined to lift the stay. Argument in the court of appeals was held on August 18, 2020.

[31] *See supra* note 10.

vote, and in 16 states LFOs potentially affect only the *timing* of re-enfranchisement.[32] In some of these 16 states courts are required to consider ability to pay in setting and enforcing terms of supervision, and in others they have discretion to do so. Of the four states that handle restoration of rights exclusively through the discretionary exercise of constitutional clemency, three currently have governors who evidently do not regard unpaid LFOs as disqualifying.[33] Accordingly, there are at present only ten states whose laws mandate permanent disenfranchisement based on some or all outstanding court debt, regardless of ability to pay. And only three of these states including Florida require payment of *all* LFOs associated with a disqualifying conviction; the remaining seven states require payment of certain financial obligations.[34]

Challenges have also been brought against laws mandating payment of LFOs as a condition of regaining the vote in North Carolina and Alabama. Just before this report was published, a North Carolina three-judge panel held in a 2-1 ruling that conditioning the vote on payment of money violates the state constitution's guarantee of equal protection and ban on property qualifications in voting.[35]

In summary, at mid-2020 the trend in state legislatures to expand opportunities for reenfranchisement rivals the trend toward expanding opportunities for people with a criminal record in the workplace. Excluding Florida's SB 7066, it has been almost a decade since any state passed a law narrowing access to the ballot box based on

[32] In these 16 states the vote is tied to completion of supervision, which may result in a temporary delay in reenfranchisement if a court or supervisory official determines that supervision should be extended to give a defendant some additional incentive to pay, e.g. to make a victim whole. Officials in some of these states must consider a person's ability to pay in connection with fulfilling conditions of supervision, and officials may consider it in others.

[33] *See supra* note 28.

[34] *See supra* note 10. In addition to Florida, Alabama and Arkansas require all convicted individuals to pay all court debt. South Dakota requires those convicted after June 30, 2012 to pay all court debt, and Connecticut requires those with federal and out-of-state convictions to pay all court debt.

[35] *See Community Success Initiative v. Moore*, No. 19-CVS-15941 (N.C. Gen. Ct. Just., Sept. 4, 2020) (summary judgement and preliminary injunction orders); *see also Thompson v. Merrill*, No. 2:16-cv-783 (M.D. Ala., filed Sept. 26, 2016).

conviction.[36] The law in almost half the states now reflects an appreciation of the social and economic value of allowing all those who are living in the community to participate in its governance. Restoring the vote "may facilitate reintegration efforts and perhaps even improve public safety," providing benefits both to individuals with a record and more broadly to their communities.[37] A system linking penal disenfranchisement to actual incarceration is both easier to justify and easier to administer than a system that links the vote to other aspects of the sentence, much less one that makes voting depend upon a person's ability to pay.

A system linking penal disenfranchisement to actual incarceration is both easier to justify and easier to administer

Recognition of the real and symbolic importance of making voting rights part of a reintegration agenda is nothing new. Forty years ago, national law reform organizations like the Uniform Law Commission and the American Bar Association advocated for limiting and even abolishing felony disenfranchisement.[38] Perhaps the country is slowly coming to that view. We agree with those who see no legal rationale or social justification for felony disenfranchisement, and few if any practical obstacles to allowing even

[36] *See* 2012 South Dakota Laws Ch. 82 (HB 1247), amending S.D. Codified Laws § 12-4-18 to disenfranchise individuals convicted after June 30, 2012, and sentenced to probation. Individuals convicted prior to July 1, 2012, remain disenfranchised only if sentenced to a term of imprisonment. In February 2020, the South Dakota legislature voted against limiting disenfranchisement to the term of supervision. *See* HB1247, https://legiscan.com/SD/bill/HB1245/2020.

[37] Christina Beeler, Article, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. Pa. J. Const. L. 1071, 1088 (2019) (internal quotation marks omitted).

[38] *See* American Bar Association, Standards on the Legal Status of Prisoners, Standard 23-8.4 (1983) (hereinafter ABA Standards); National Conference of Commissioners of Uniform State Laws, Model Sentencing and Corrections Act, §§ 4-112, 4-1003 (1979). The commentary to the ABA Standards noted that "little is gained by society" in disenfranchising prisoners while "much is accomplished by retaining and strengthening the ties of offenders with the free community."

prisoners to vote.[39] This remnant of ancient civil death and Jim Crow should have no place in the modern American polity.

The Restoration of Rights Project contains a 50-state summary of loss and restoration of voting, jury service, public offices and firearms rights in each state, with links to specific state profiles that may be consulted for additional detail.

Report Card: Voting Rights

The following report card grades each state and D.C. on their laws that disenfranchise and reenfranchise individuals based on conviction, including the extent to which unpaid legal financial obligations may delay or deny restoration of the vote.

AL	**F**
AK	**C**
AZ	**D**
AR	**F**
CA	**B**
CO	**B**
CT	**D**
DE	**C**
DC	**A**
FL	**F**
GA	**D**
HI	**A**
ID	**C**

IL	**B**
IN	**B**
IA	**D**
KS	**D**
KY	**D**
LA	**C**
ME	**A**
MD	**B**
MA	**B**
MI	**B**
MN	**D**
MS	**D**
MO	**C**

MT	**B**
NE	**C**
NV	**B**
NH	**B**
NJ	**B**
NM	**D**
NY	**B**
NC	**D**
ND	**B**
OH	**B**
OK	**B**
OR	**B**
PA	**B**

RI	**C**
SC	**C**
SD	**D**
TN	**D**
TX	**D**
UT	**B**
VT	**A**
VA	**B**
WA	**C**
WV	**C**
WI	**C**
WY	**C**
Fed	**n/a**

[39] *See, e.g.,* The American Law Institute, Model Penal Code: Sentencing § 7.03; *see also id.* at comment b ("Although disenfranchisement has been justified as a fitting punishment for transgressing the rules of civil society, the legal justification for collateral consequences is that they serve regulatory functions, not punitive ones.")

B. Firearms Rights

In every state except Vermont, the right to possess at least some firearms is lost after conviction of at least some felonies. Even in Vermont, a court may prohibit firearm possession as a condition of granting probation.

The 50-state chart from the Restoration of Rights Project attempts to chart a way through legal terrain that is even more complex and potentially treacherous than the one that governs penal disenfranchisement.[40] It is more complex because federal law superimposes another layer of regulation on firearms possession after conviction, and because the right to possess firearms has a degree of constitutional protection even for people who are dispossessed by virtue of a conviction. It is more treacherous because the risk of criminal prosecution by one or both sovereigns is very real, while prosecutions for mistaken voting are considerably rarer (though even these have increased in recent years). Furthermore, while each state is entitled to enforce its own law on firearms dispossession within its borders, it is uncertain what effect relief granted in one jurisdiction will be given in another.[41]

Each state is entitled to enforce its own law on firearms dispossession within its borders, but it is uncertain what effect relief granted in one jurisdiction will be given in another

Just to sketch the general state law picture, in 28 states a person convicted of any felony loses the right to possess any firearm. A few of these 28 states extend

[40] Restoration of Rights Project, "50-State Comparison: Loss & Restoration of Civil/Firearms Rights," https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/.

[41] *See, e.g., Schoenherr v. Department of State, Div. of Licensing*, 743 So. 2d 536, 537 (Fla. 2d DCA 1998) (deferring to Connecticut's restoration of right to possess firearm); *Blackwell v. Haslam*, 2013 WL 3379364 (Tenn. Ct. App. 2013) (remanding for consideration whether giving effect in Tennessee to a Georgia pardon restoring firearms rights to a person with a drug offenses violates Tennessee's public policy against restoring firearms rights to "violent drug offenders"). *See generally* Wayne A. Logan, "*When Mercy Seasons Justice": Interstate Recognition of Ex-Offender Rights*, 49 U. C. Davis L. Rev. 1 (2015) (surveying caselaw regarding interstate recognition); LOVE, ROBERTS & LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE §§ 2:35, 3:22 and 7:24 (WEST/NACDL, 3d ed., 2018-2019).

dispossession to violent misdemeanors or domestic violence convictions. In 12 other states and the District of Columbia, only people convicted of specific crimes (usually violent, drug or sex crimes) lose any firearms rights. In six states (Alabama, Alaska, Connecticut, Indiana, Oklahoma, and South Carolina) only handgun rights are ever lost. In three states (Louisiana, New Jersey, and Tennessee) there are different rules for dispossession of long guns and handguns. In Vermont conviction does not affect the right to possess a firearm, but a court may prohibit a person from having a firearm as a condition of granting probation.[42]

Provisions for regaining lost firearms rights vary widely, ranging from automatic restoration upon completion of sentence to the requirement of a full pardon. In a minority of states dispossession is time-limited and restoration is automatic for at least some types of convictions. In 11 states, including Kansas, Michigan, Minnesota and Rhode Island, restoration is automatic for many convicted of nonviolent crimes as early as completion of sentence, or after a brief waiting period. In Montana, the only people not allowed to have firearms when they complete their sentences are those who used a dangerous weapon in their crime. In North Dakota, even people whose offense involved "violence or intimidation" automatically regain their firearms rights 10 years after completion of sentence.

Provisions for regaining lost firearms rights range from automatic restoration upon completion of sentence to the requirement of a full pardon

But in most states, firearms dispossession is indefinite, and everyone who lost rights must petition a court for discretionary relief or ask for a pardon. Some states mix and match the two approaches depending either upon the type of conviction or upon the type of firearm. In 11 of the 26 states in which all firearms rights are permanently lost upon conviction of any felony, a pardon is the exclusive restoration mechanism. In the other 15 states judicial relief is also authorized for at least some types of convictions, though expungement has a role in only a few (Arkansas, Missouri, Oregon, and Utah).

[42] *See State v. Kasper*, 566 A.2d 982, 984 (Vt. 1989); *see also* Jay Buckeye, Note, *Firearms for Felons? A Proposal to Prohibit Felons from Possessing Firearms in Vermont*, 35 VT. L. REV. 957 (2011). Persons convicted of a felony under Vermont law who have not been pardoned, or whose convictions have not been sealed or expunged, remain subject to federal firearms restrictions by virtue of the state's failure to restore all three civil rights.

Arizona reorganized its restoration scheme in 2019 so that courts may now grant relief for most felonies subject to differing waiting periods, but only the governor may restore rights to those convicted of "dangerous felonies." In Tennessee, a pardon may restore rights to those who lost only handgun rights, but expungement is the only remedy available to those convicted of a violent or drug crime who lost all firearms rights. A few states (California, New York, Oklahoma) make no provision at all for restoring firearms rights to those convicted of violent crimes or offenses involving a dangerous weapon.

According to a 2011 study by the New York Times of firearms restoration mechanisms across the country, courts in many jurisdictions restored rights with little consideration of an individual's circumstances, while pardon boards and governors were more cautious.[43] Even so, the Georgia Board of Pardons and Parole grants between 200 and 300 pardons every year specifically restoring gun rights, and the Nebraska pardon board has reported dozens of firearms pardons granted each year.[44]

Courts in many jurisdictions restored firearms rights with little consideration of an individual's circumstances, while pardon boards and governors were more cautious

Separate and apart from state dispossession laws, federal criminal law also restricts firearm rights and privileges based on conviction in any U.S. jurisdiction. Under federal law, no one may possess any firearm (other than an antique) after conviction of a felony punishable by more than one year's imprisonment, a misdemeanor punishable by more than two years' imprisonment, or a domestic violence misdemeanor.[45] For people with state-court convictions, the federal prohibition may be lifted by various state law relief mechanisms, including pardon, expungement, and general civil rights restoration (as long as the person is not barred from possessing

[43] Michael Luo, *Felons Finding It Easy to Regain Gun Rights,* N.Y. Times, Nov. 13, 2011, https://www.nytimes.com/2011/11/14/us/felons-finding-it-easy-to-regain-gun-rights.html.

[44] *See* Georgia and Nebraska profiles, Restoration of Rights Project, https://restoration.ccresourcecenter.org/.

[45] *See* 18 U.S.C. § 922(g).

firearms under state law), but the effect of specific state relief mechanisms on federal firearms rights is varied and complex.[46] In contrast, after a conviction in federal court, the federal ban can only be lifted by a presidential pardon.[47]

The Supreme Court's landmark 2008 decision in *District of Columbia v. Heller*, which recognized a federal constitutional right to possess a firearm "in defense of home and hearth,"[48] opened a new avenue of challenge to the application of dispossession statutes. *Heller* itself anticipated and sought to deflect such challenges by declaring them to be "longstanding" and "presumptively lawful,"[49] but some lower courts have characterized this statement as dictum, and scholars have questioned its historical accuracy.[50] One federal court of appeals has upheld an "as applied" challenge to the categorical firearm ban by two individuals with dated state misdemeanors, but another federal appeals court reached the opposite conclusion in the case of a man convicted of felony credit card fraud.[51] At least one state court has relied upon a "right to bear arms" provision of its

The Supreme Court's landmark 2008 decision in *District of Columbia v. Heller* opened a new avenue of challenge to the application of dispossession statutes

[46] *See* 18 U.S.C. § 921(a)(20); *see also Caron v. United States*, 524 U.S. 308 (1998); Love *et al., supra* note 41, § 2:35 ("Restoration of firearms privileges; relationship between state and federal dispossession laws"). *See* Restoration of Rights Project, 50-state comparison chart, *supra* note 40, Chart #2 ("Firearms Rights Under Federal Law"). There has been some disagreement in the federal courts about whether state restoration instruments must address firearms rights to remove the federal firearms bar, a subject that is too complex for treatment in this report.

[47] *See Beecham v. United States*, 511 U.S. 368 (1994), discussed in Love *et al., supra* note 41, § 2:35.

[48] *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008).

[49] *Id.* at 626-27.

[50] *See* Love *et al., supra* note 41, § 2:36 ("Second Amendment challenges to felony dispossession laws"), notes 4 through 6.

[51] *Compare Binderup v. Attorney General*, 836 F.3d 336, 353, 357 (3d Cir. 2016), *cert. denied*, 137 S. Ct. 2323 (2017) (government could not justify applying the bar to persons who had "distinguish[ed their] circumstances from those of persons in the historically barred class," and that the petitioners' crimes were "not serious enough to strip them of their Second

state constitution in refusing to apply a newly enacted categorical dispossession statute to an individual whose conviction was decades old, when his firearm rights had been restored under an earlier law, and he had long since demonstrated rehabilitation.[52]

In summary, in all but the six states that limit dispossession to handguns, conviction of some or all felonies results in loss of all firearms rights for varying periods of time, but usually indefinitely. At the same time, relief appears to be available in most states from the courts. However, in a substantial minority of states, and for all those convicted in federal court, the only way to regain firearms rights is through a pardon. To the extent dispossession is permanent or relief hard to obtain though this political channel, this collateral consequence looks more like punishment than regulation, and should be subject to constitutional challenges on this ground, particularly in light of recent Second Amendment jurisprudence. That courts are reluctant to go there is understandable, however, so it will be up to legislatures to devise acceptable and less complex forms of relief.

To the extent dispossession is permanent or relief hard to obtain, this collateral consequence looks more like punishment than regulation

Amendment rights") with *Hamilton v. Pallozzi*, 848 F.3d 614, 626 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 500 (2017) (holding that a Maryland resident convicted of a felony in Virginia, whose firearms rights had been restored in Virginia and under federal law, remained subject to Maryland's dispossession statute without a Virginia pardon).

[52] *See Britt v. State*, 681 S.E.2d 320 (N.C. 2009). Following the *Britt* decision, North Carolina amended its firearms law to permit individuals who have lived in North Carolina for at least one year, who have a single non-violent felony conviction and no violent misdemeanors, to petition the court in their county of residence twenty years after their civil rights were restored for restoration of firearms rights. N.C. Gen Stat. § 14-415.4.

II. RECORD RELIEF

Introduction

The following sections describe the various legal authorities that revise or supplement a person's criminal record to reduce or eliminate barriers to opportunity in civil society. These remedies include executive pardon, judicial orders and certificates, and legislative mandates.

Pardon is the oldest form of record relief, with deep historical roots. Enshrined in the federal constitution and the constitution of almost every state, it is the ultimate expression of forgiveness and reconciliation from the sovereign that obtained the conviction. Over time, beginning in the early 20th century, analogous judicial and legislative remedies emerged to supplement the institutionally less reliable pardon: expungement, sealing, and set-aside revised a person's criminal record, while certificates of relief removed or mitigated specific barriers to reintegration. In a few states, regular administration allowed pardon to perform this same function. Procedures were devised to divert cases from the system without a conviction.

The spirit of reform that produced many record relief laws in the 1970s was dormant for 30 years until reawakened a decade into the 21st century by a dramatic increase in the severity of collateral consequences and the number of people potentially affected by them. The advent of digitized records systems and a heightened public appetite for access to information about individuals encountered in various settings produced a new commerce in background screening and data aggregation that is virtually unregulated.[53] A digitized criminal record became a sorting mechanism increasingly relied upon by employers, schools, landlords, and other authorities—and a net-widening device for law enforcement.

Since 2013 a revival of earlier reforms has produced a torrent of record relief legislation

CCRC has tracked restoration of rights legislation since 2013 when a revival of the earlier reforms began to produce a torrent of record relief

[53] *See* Love, *et al.*, *supra* note 41 at §§ 5:2 through 5:6.

legislation.[54] In the past seven years, some states have enacted relief schemes for the first time while others have extended or revived laws enacted in the 1970's. States have tailored relief to the specific type of record, and a small but growing number have made relief for some records automatic. Expungement, sealing, or set-aside is now available by statute or court rule for at least some felony convictions in 38 states, for many misdemeanor convictions in 42 states and D.C., and for most non-conviction records in 49 states and D.C. Diversion is available in some form in almost every state, and 12 states now offer judicial certificates of relief. Only Congress has failed to act, leaving those with federal convictions without remedy short of a presidential pardon, and those with federal non-conviction records with no relief at all.

The diverse approaches to record relief across the country reveal the absence of consensus about how to manage dissemination of damaging information while at the same time accommodating the public's interest in maintaining access to records and limiting public safety risks. In approaching a solution, we should start by recognizing that not all records are created equal. At one end of the spectrum, non-conviction arrests and charges seem most suitable to automatic and broad-based restrictions on dissemination and use, with objectors carrying the burden of persuasion. Likewise, individuals who can convince a prosecutor or judge that it is appropriate to divert their case should have a chance to walk away from criminal charges without the burden of a publicly available criminal record. Conviction records, on the other hand, may require a more nuanced approach, with consideration given to limits on use through record-supplementing relief (pardon and judicial certificates), as well as limits on access through record-revising relief (expungement, sealing, and set-aside).

We should start by recognizing that not all records are created equal

[54] *See* CCRC's legislative reports, available at https://ccresourcecenter.org/resources-2/resources-reports-and-studies/. Trends accelerating since 2013 culminated in 2019 in an unprecedented 67 new record relief laws enacted by 31 states and D.C.

While the recent wave of state record reforms is promising, we still have a long way to go to neutralize the malign effect of a criminal record. Blunt exclusions deny many even the opportunity to present their case, no matter how persuasive or redemptive. Even for those eligible, avenues to relief may be mysterious, burdensome, costly, and intimidating. As the introduction to this report cautioned, a system of relief that is inaccessible to its intended beneficiaries and unmanageable by those responsible for administering it is inevitably ineffective and unfair. The sections that follow describe the halting, uneven, but determined progress toward a functional record relief system being made in many states. They underscore the points made in the introduction to this report about the practical importance of accessibility, effectiveness, coordination, fairness, and manageability as essential aspects of a functional relief system.

Blunt exclusions deny many even the opportunity to present their case, no matter how persuasive or redemptive

A. Pardon

Pardon has been described as the patriarch of restoration mechanisms, whose roots in America are directly traceable to the power of the English crown. Just as a power to pardon was assigned to the president in Article II of the U.S. Constitution, the constitutions of every state save two provide for an executive pardoning power.[55] Both in theory and practice, pardon is the ultimate expression of forgiveness and reconciliation from the sovereign that secured the conviction. For almost two centuries, executive pardon played a routine operational role in the criminal justice system throughout the United States, dispensing with court-imposed punishments and restoring rights and status lost because of conviction.

Nowadays, in most U.S. jurisdictions pardon is a shadow of its once-robust self, particularly those in which it is exercised without institutional restraint or encouragement. Since the 1980s, governors and presidents alike have been wary of exposing themselves to criticism from an ill-advised grant, and in many jurisdictions pardoning has stopped being thought of as part of the chief executive's job -- though being labeled "soft on crime" seems thankfully no longer a political kiss of death. It is not surprising that reformers tend to regard pardon with suspicion, dubious about its legitimate operational role in the modern justice system.

Yet pardon fills an important gap in restoration schemes across the country, supplementing judicial record relief mechanisms like sealing and expungement. For example, in 20 states pardon offers the only way to regain firearms rights lost because of conviction, including California, Colorado, Florida, Georgia, Nebraska, Oklahoma, and Wyoming. In 12 states ineligibility for jury service is permanent without a pardon, including Arkansas, Delaware, Oklahoma, Pennsylvania, South Carolina, and Texas. (By comparison, expungement restores firearms

In 20 states pardon offers the only way to regain firearms rights

[55] In both Alabama and Connecticut, the power to pardon is regulated by the legislature. Ala. Const. amend. 38 (amending art. V § 124) (since 1939, power to pardon in all but capital cases in administrative board appointed by governor); Conn. Gen. Stat. § 54-124a(f) (since colonial times, pardoning regulated by the legislature). For an overview of pardoning in the United States, and additional citations, see generally Love, *et al., supra* note 41 § 7:6 ("Executive Pardon: Generally") ; Margaret Colgate Love, *Reinvigorating the Federal Pardon Process: What the President Can Learn from the States*, 9 ST. THOMAS L. REV. 730 (2013).

rights in only five states, and jury rights in only two.) A pardon may be necessary to enable a person to stand for elected office, or to demonstrate the requisite good character to secure a professional or business license.

Perhaps most important for a substantial number of non-citizens, a pardon is the only state relief mechanism recognized by federal immigration law, providing the only way for a non-citizen convicted of an aggravated felony to avoid mandatory deportation and remove the conviction-related bar to citizenship.[56] Sometimes pardon is sought simply as a sign of official forgiveness, not a small matter to some people.

Pardon represents the only potential source of record relief available for felony convictions in the 16 states whose courts have no authority to expunge them

Of greater moment, pardon represents the only potential source of record relief available for felony convictions in the 16 states whose courts have no authority to expunge or set aside more serious convictions.[57] Another 14 states limit judicial record relief to people who have been convicted of a single felony, so in these states too pardon constitutes an important auxiliary remedy for people with a lengthy felony record.[58] It is easy to see why pardon's vitality is or ought to be of considerable public concern to people in at least 30 states.

The good news is that the pardon power is neither dead nor fatally compromised in most U.S. jurisdictions. In fact, in a significant number of states (18) the practice of

[56] See 8 U.S.C. § 1227(a)(2)(A)(vi).; *see also Thompson v. Barr*, 959 F.3d 476, 484 (1st Cir. 2020)("A pardon waiver has the effect of automatically canceling removal"), Love *et al., supra* note 41, § 2:61("Immigration Consequences – Pardon Waiver"), collecting cases and executive opinions.

[57] *See* 50-state chart, "Authority for Expunging or Sealing Convictions," Restoration of Rights Project, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[58] *See also infra* note 64, pointing out that five of the states that offer no judicial record relief for felony convictions are ones where pardoning is frequent and leads to expungement.

pardoning still thrives as an integral part of the justice system.[59] In most of these states, the pardon power is either shielded from politics by institutional design or sanctioned by custom. Ordinary people who can demonstrate their rehabilitation have a good chance of official forgiveness, obtaining relief from legal disabilities and certification of their rehabilitation and good character. In more than half of these 18 states, pardon now leads to expungement of the record. In four additional states, the pardon power appears to be in the early stages of a revival.[60]

In a significant number of states (18) the practice of pardoning still thrives as an integral part of the justice system

Not surprisingly, in most of these 18 states, the governor either has little or no involvement in pardoning or is required to seek (and in some cases required to follow) the advice of other officials.[61] In six of the 18 states (Alabama, Connecticut, Georgia, Idaho, South Carolina, Utah) the pardon power is exercised in most or all cases by an independent board of appointed officials. In five of those six states, the power derives from the state constitution. (In Connecticut, the power to pardon has since colonial times remained within the legislature's control, so that pardoning is both authorized and limited by statute.) In all six of these independent board states, standards are clear, pardoning is frequent and regular, administered through a transparent public process. Procedures are regular and relatively accessible, and a high percentage of applications are granted. In Alabama, Connecticut, Georgia, and South Carolina, hundreds of pardons are granted each year to people convicted of garden variety crimes who are seeking to mitigate the harsh lingering consequences of conviction. For example, in 2019 the Alabama board granted 889 pardons, or 80% of eligible applications, and the Connecticut board granted 593, or 80% of applications considered. Idaho gets fewer applications but grants a high percentage

[59] The 18 states are Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Illinois, Louisiana, Minnesota, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, and Virginia.

[60] Colorado, Ohio, Washington, Wisconsin.

[61] For more detail about the organization and authority of the pardoning authority in these 18 states, see the individual state profiles in the Restoration of Rights Project, and Love *et al., supra* note 41, at §§ 7:8 through 7:11.

of them. Utah for many years preferred to rely on a broad expungement remedy, but a recent tightening of the expungement process has produced a demand for reinforcement from the state pardon board.

In another eight of the 18 states where pardons are frequent, the governor sits on a board with other high-level officials (Minnesota, Nebraska,[62] Nevada), or shares power with an appointed "gatekeeper" board whose affirmative recommendation is necessary before the governor may act (Delaware, Louisiana, Oklahoma, Pennsylvania, South Dakota). In these states pardon remains a viable form of relief, and pardoning occurs at regular intervals through a public process: Delaware and Pennsylvania are the stars of this category, but the governors of Oklahoma and South Dakota have traditionally also pardoned generously, and Louisiana's current governor has revived pardoning in that state. The three boards that include the governor as a member hold regular public hearings and grant a substantial percentage of the applications they hear.

In the final four of the 18 states, the governors are less constrained by regulation, but they have authorized advice available to them. The governors of Illinois and Arkansas have customarily relied on a board's recommendations produced by a formal process, though they are not required to do so. The governors of California and Virginia have also pardoned generously in recent years, though without the same degree of structure and transparency in their advisory system. But since the constitutions of both states require the governors to make a formal annual report to the legislature on their pardons, there is at least at least a post-hoc system of accountability in place.

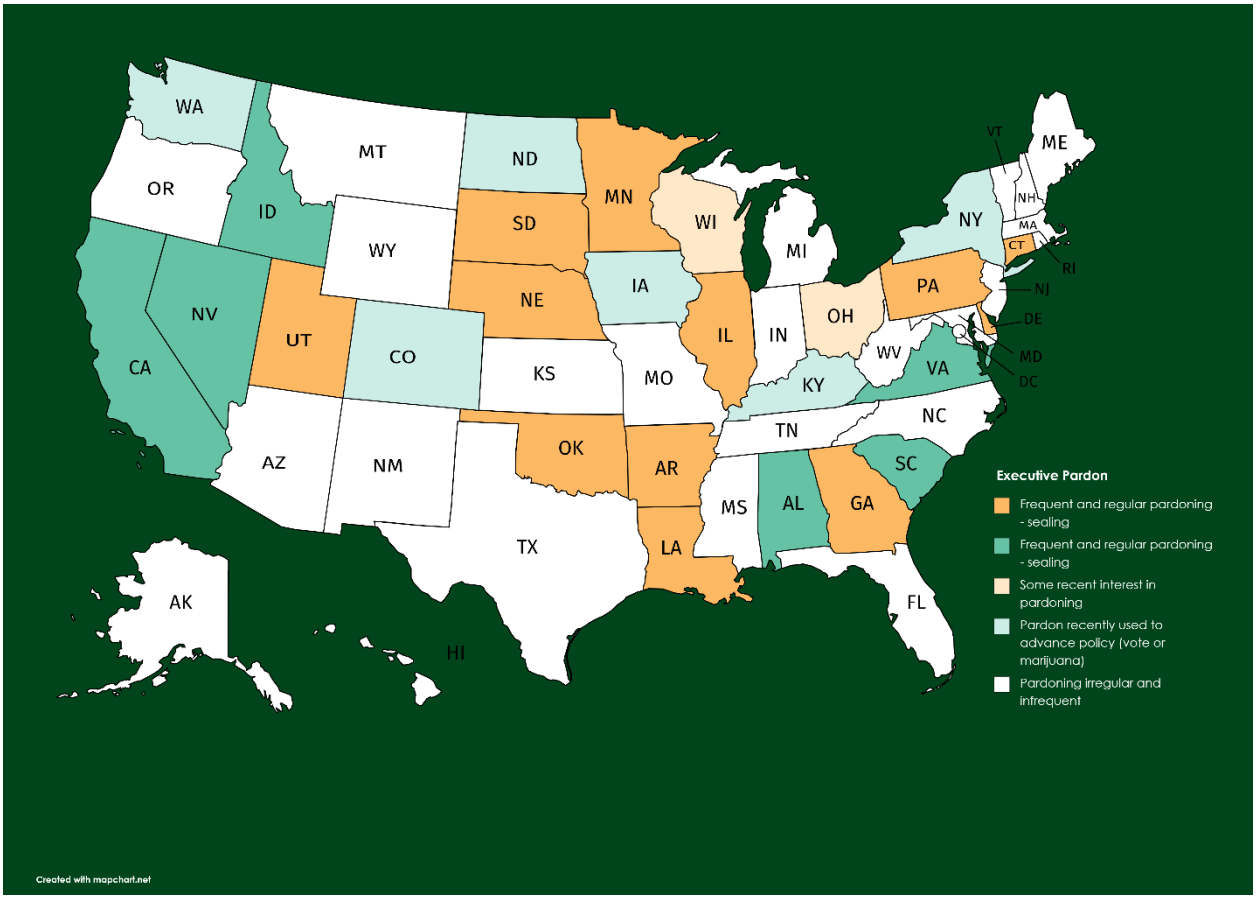
A regular process facilitates regular pardoning, but it does not guarantee it. For example, interest in pardoning in California, Florida, Illinois, Louisiana, Maryland, and

[62] Nebraska's pardon board has in past years been among the most prolific in the country but staffing changes in 2019 led to a reduced hearing schedule and a sharp reduction in the number of grants that year. In early 2020 the legislature considered passing a statute that would require the board to meet more regularly and was told that the board would shortly return to a more regular schedule. *See* Paul Hammel, *Nebraska Pardons Board met only twice last year, denying people 'a fresh start,' senators told*, Omaha World Herald (Jan. 27, 2020), https://www.omaha.com/news/state_and_regional/nebraska-pardons-board-met-only-twice-last-year-denying-people/article_1c1e0fbe-fc5a-579a-81d0-af4a65f7bb02.html. At the time of this report, only a handful of pardons had been issued in 2020.

Ohio has waxed and waned depending upon the predilections of the incumbent governor. The current governors of California, Illinois and Louisiana have been enthusiastic pardoners, but the power is still in a waning phase in Florida, Maryland, and Ohio. Texas and Arizona, both of which have a well-regulated process and "gatekeeper boards" that control who the governors may pardon, have in recent years seen, respectively, very few pardons and no pardons at all.

Beyond the 18 states that pardon on a frequent and regular basis, there are another three where recent efforts to revive the process are promising. Wisconsin's governor has re-established that state's pardon advisory board and began issuing grants in the fall of 2019 after a 9-year hiatus during which his processor expressed disdain for pardons and granted none at all, Colorado's governor has also taken some steps to reinvigorate that state's process, and Ohio's current governor has enlisted two local law schools to supplement state agencies in developing an "expedited pardon project."[63] Washington's recent governors have shown some interest in pardoning, but grants have been irregular and sparing. In the other 28 states, the District of Columbia, and the federal system pardoning takes place, if at all, in an ad hoc and unreliable fashion.

[63] In December 2019, Governor Mike DeWine announced the Expedited Pardon Project, a collaboration between the Governor's Office and the Drug Enforcement Policy Center at Ohio State University and the Reentry Clinic at The University of Akron School of Law. This project aspires to expedite the process by which people apply for a pardon under Ohio's laws, and will enlist law students to assist in preparing pardon applications. The Ohio Department of Corrections will conduct background investigations of applicants referred by the Project, and the Parole Board will then hold a hearing for each applicant, during which victims, judges and prosecutors involved with his or her case can offer their thoughts. The Parole Board will then vote the same day about whether to recommend clemency to the governor. *See* Jeremy Pelzer, *Gov. Mike DeWine creates streamlined pardon process to help Ohio offenders,* Cleveland.com, Dec. 3, 2019, https://www.cleveland.com/open/2019/12/gov-mike-dewine-creates-streamlined-pardon-process-to-help-ohio-ex-offenders.html.



Until relatively recently, the relief offered by a pardon in most states added an executive certification of rehabilitation and good conduct to a person's record, but it did not seal or expunge it.. In this way, pardon functioned to supplement a person's record, not to revise it like sealing or set-aside. But in a growing number of states, a full pardon now entitles the recipient to judicial expungement (either upon application or automatically, depending on the state). Indeed, in 10 of the 18 "frequent and regular" states (Arkansas, Connecticut, Delaware, Georgia, Louisiana, Nebraska, Oklahoma, Pennsylvania, South Dakota, and Utah) a pardoned conviction is either automatically sealed or is presumptively eligible for sealing. In an eleventh state, Illinois, the governor may specifically authorize this additional judicial relief. Pardon is uniquely valuable to people with felony records in five of these 10 states (Connecticut, Georgia, Nebraska,

In a growing number of states, a full pardon now entitles the recipient to expungement

Pennsylvania, and South Dakota), because they otherwise offer no judicial record-sealing for felony-level convictions.[64]

Sealing or expunging the record of a pardoned conviction is authorized in another nine states: Indiana, Kentucky, Maryland (non-violent first offenses), Massachusetts, New Jersey, Oregon, Tennessee, Texas, and West Virginia (one year after pardon and at least five years after discharge, with certain exceptions for violent crimes). In Washington, pardons result in automatic vacatur and nondisclosure of administrative records, but petitions to seal court records are subject to a balancing test. Maine treats pardoned convictions like non-conviction records subject to non-disclosure rules.

In addition to providing record relief to individuals, pardon has in recent years also been enlisted to advance criminal justice reforms on a broader basis in a number of states. The governors of several states, including Colorado, North Dakota, and Washington, have used their pardon power to deliver record relief to people convicted of marijuana possession before its decriminalization, and the Colorado legislature even passed a law authorizing class-wide pardon relief.[65] The Nevada Board of Pardons Commissioners passed a resolution at the request of that state's governor automatically pardoning approximately 15,000 people convicted of possessing one ounce or less of marijuana between 1986 and 2017.[66] The legislature in Illinois also gave the governor's pardon power a part to play in Illinois' marijuana sealing effort.[67] The governors in Iowa, Kentucky, New York, and Virginia have used their power to limit felony disenfranchisement on a class-wide basis.

It seems unfortunate but unsurprising that in more than half the states pardoning has been sporadic or rare since the 1980's. Many of these states have no formal statutory advisory process in place, so the governor has no institutional encouragement to

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[64] *See* 50-state chart, "Authority for Expunging or Sealing Convictions," *supra* note 57.

[65] See Colo. Rev. Stat. § 16-17-102(2).

[66] The form issued by the Board for grantees to apply for documentation evidencing the pardon is at http://pardons.nv.gov/uploadedFiles/pardonsnvgov/draft%20marijuana.pdf.

[67] Illinois established a tiered procedure to deal with marijuana arrests and convictions, with non-conviction records sealed automatically by the State Police, "minor cannabis offenses" made eligible for expungement through a streamlined pardon process, and more serious marijuana offenses required to petition for relief from the court. *See* Ill. Comp. Stat. Ann. 2630/5.2(i)(2).

engage in what may seem a politically risky activity. In two of the states in this category (Mississippi and Kentucky) the pardon power was notoriously abused when out-going governors made hundreds of controversial grants, confirming popular suspicions about the corruptibility of the pardon power. In a few others, notably Rhode Island and New Hampshire, the constitutional limits on the governor's power almost guarantee few pardon grants. But successive governors of Alaska, Kansas, Massachusetts, and North Carolina, who have issued almost no pardons since the mid-1990s, do not have the same excuse. They are not among the few states whose governors have no authority from the legislature to seek official assistance in their pardoning (Maine, Oregon, and Wisconsin). A full thirty states require the pardoning authority to report annually to the legislature on their grants, frequently with reasons, including Oregon and Wisconsin.[68]

The federal pardon process has steadily declined in productivity and reputation over the past thirty years

The governor of Maine is joined only by the president of the United States in having no statutory support for his pardoning and no obligation to account for it. The federal pardon process housed in the Department of Justice has steadily declined in productivity and reputation over the past thirty years,[69] though it has been ignored almost entirely by the current president through no apparent fault of its own. Overall, the number of presidential pardons granted in the past twenty years is small considering the volume of applications filed each year, and there has been only one presidential pardon granted for a D.C. Code conviction during this period.[70]

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[68] See 50-state chart, "Comparison of Pardon Policies," Restoration of Rights Project, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/.

[69] *See generally* Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1193-2000 (2010). *See also* Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT. RPTR 271 (2017).

[70] In 2018 the D.C. City Council authorized an independent pardon advisory process for those convicted of D.C. Code offenses, in an apparent effort to avoid an advisory process at the Justice Department that historically has been unfriendly to D.C. Code petitioners, but nothing appears to have come of it. *See* D.C. Code § 24-481.01 *et seq*.

In summary, in 18 states a person may file a pardon application with a reasonable expectation of success. There are signs that pardoning may revive in another three states, and hope springs eternal that future governors in other states will want to employ this uniquely personal power to help their constituents and advance the cause of criminal justice reform. But it seems premature to count any but the 18 as having a fully functional and reliable pardon process for present purposes. So, there are 32 states in which pardon cannot be counted on to provide record relief for anyone convicted of a felony.

There are 10 jurisdictions in which neither executive nor judicial relief is reliably available to people convicted of a felony.

To be sure, in 24 of these 32 states there is some alternative individualized judicial record relief for felony-level offenses: nine of the 32 offer sealing or expungement for many felonies,[71] another 12 offer relief for a single felony (usually a first felony offense),[72] Arizona offers set-aside for most felonies, and New York and New Jersey restore rights though judicial and administrative certificates. But still and all, that means that there are 10 U.S. jurisdictions – eight states, the District of Columbia, and the federal system – in which neither executive nor judicial record relief is reliably available to people convicted of a felony.[73]

[71] Colorado, Indiana, Kansas, Maryland, Massachusetts, New Mexico, North Dakota, Oregon, and New Hampshire. *See* the first column of the 50-state chart, "Authority for Expunging or Sealing Convictions," *supra* note 57.

[72] *See id*., second column (all listed states except but Delaware and Utah).

[73] The eight states are Alaska, Florida, Hawaii, Iowa, Maine, Montana, Texas, and Wisconsin. Note that a few of these states provide for specialized relief for, *e.g.,* youthful first drug offenses, prostitution convictions by victims of human trafficking.

Report Card: Pardon

The following report card grades each state, D.C., and the federal government on their pardon policy and practice.

AL	**B**
AK	**F**
AZ	**F**
AR	**A**
CA	**B**
CO	**C**
CT	**A**
DE	**A**
DC	**F**
FL	**F**
GA	**A**
HI	**F**
ID	**B**

IL	**A**
IN	**F**
IA	**D**
KS	**F**
KY	**D**
LA	**A**
ME	**F**
MD	**F**
MA	**F**
MI	**F**
MN	**B**
MS	**F**
MO	**F**

MT	**F**
NE	**C**
NV	**B**
NH	**F**
NJ	**F**
NM	**F**
NY	**D**
NC	**F**
ND	**D**
OH	**C**
OK	**A**
OR	**D**
PA	**A**

RI	**F**
SC	**A**
SD	**B**
TN	**F**
TX	**F**
UT	**B**
VT	**F**
VA	**B**
WA	**D**
WV	**F**
WI	**B**
WY	**F**
Fed	**F**

B. Expungement, Sealing & Set-Aside of Convictions

Tens of millions of Americans have been convicted of a felony or misdemeanor.[74] This number has grown substantially in the last four decades as a result of the policies of "mass incarceration" and so-called "war on crime," with disproportionate impacts on black and brown people.[75] The vast network of collateral consequences that can flow from a conviction in the modern era has been described as a new form of "civil death."[76] In addition to formal consequences, widespread dissemination of criminal records online and in background checks operates as a form of "digital punishment."[77]

In the current era of restoration of rights reforms that begin in 2013, advocates and policymakers have been most active in efforts to authorize or improve laws for expunging, sealing, and setting-aside convictions.[78] At a minimum, such remedies promise to alleviate stigma and discrimination produced by a record in social and economic contexts.[79]

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[74] *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461-62 (2020) (estimating between 19 and 24 million Americans have felony convictions and an unknown "but presumably larger" number have misdemeanors), *citing The Economic Impacts of the 2020 Census and Business Uses of Federal Data: Hearing Before the J. Econ. Comm.*, 116th Cong. 12 (2019) (Nicholas Eberstadt); Sarah K.S. Shannon *et al.*, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1806 (2017); Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 746 n.81 (2018).

[75] *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2d ed. 2011); James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21 (2012); Heather Schoenfeld, *The War on Drugs, the Politics of Crime, and Mass Incarceration in the United States*, 15 J. GENDER RACE & JUST. 315 (2012).

[76] Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1811–14.

[77] *See* Sarah Lageson, *The Purgatory of Digital Punishment* (Aug. 17, 2020), https://ccresourcecenter.org/2020/08/17/the-purgatory-of-digital-punishment/.

[78] *See* https://ccresourcecenter.org/resources-2/resources-reports-and-studies/.

[79] It is not clear the extent to which they remove formal consequences such as firearm dispossession and registration. *See* Love, *et al., supra* note 41 § 7:17. Federal law frequently does not accord any legal effect to state expungement or record-sealing. *See infra* note 110.

Expungement and sealing laws restrict access to criminal records and sometimes even provide for their destruction.[80] Set-aside laws authorize a court to "vacate" a conviction in order to signal a person's rehabilitation, relief that may or may not be followed by sealing the record.[81] Studies have shown that people who obtain record-sealing and set-asides experience improved employment outcomes and low recidivism rates.[82] We call these remedies "record-revising" to distinguish them from

[80] States use various other terms to describe restrictions on access to records, including annulment (New Hampshire) and erasure (Connecticut), but for simplicity this report settles on the generic terms expungement and sealing and uses them interchangeably unless a more specific meaning is indicated. The functional effect of these remedies also varies by state. In some, records remain available only to law enforcement, which is sometimes required to obtain a court order. In others, public employers and licensing boards may have access, or private entities authorized by law to conduct a background check (e.g. for working with vulnerable populations). In Indiana, an expungement does not limit access to the record of most felonies, although expunged misdemeanors and non-conviction records are sealed. In some states, "expungement" is indistinguishable from "sealing" (e.g., Louisiana, Kansas, Rhode Island, Vermont), and in others they are functionally distinct remedies (e.g., Illinois, Pennsylvania). In a few states the law directs expunged records to be destroyed (e.g., Connecticut, Illinois Maryland, Montana, Pennsylvania, North Carolina), but even in these states non-public copies are ordinarily retained in a court file.

[81] States have increasingly enacted laws to augment set-aside with sealing (i.e., California, New Hampshire, Oregon, Washington), such that only two states (Arizona and Nebraska) now retain the pure vacatur remedy contemplated by § 306.6 of the Model Penal Code.

[82] *See* Prescott & Starr, *supra* note 74 at 2461, 2510-43 (large empirical study finding that people in Michigan who have their conviction set-aside and sealed have "extremely low" subsequent crime rates; an expungement "quite likely" reduces recidivism risk; and those who obtain it experience higher wages and employment rates); Jeffrey Selbin, Justin McCrary, & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 9 (2018) (finding evidence of improved employment and earnings in a sample of clinic clients who received a California set-aside or felony reduction); *but see* Jennifer Doleac & Sarah Lageson, *The Problem with 'Clean Slate' policies: Could broader sealing of criminal records hurt more people than it helps?*, Niskanen Center (Aug. 31, 2020) (arguing that sealing official records is unlikely to truly hide criminal history because employers can obtain it online; and if records are not available, this may lead employers to use racial stereotypes about who may have a record, as with "ban the box"), https://www.niskanencenter.org/the-problem-with-clean-slate-policies-could-broader-sealing-of-criminal-records-hurt-more-people-than-it-helps/.

the "record-supplementing" remedies of executive pardon and judicial certificates of relief discussed in other sections of this chapter.

States in recent years have passed dozens of laws authorizing record-revising relief, some for the first time. Other states have continued to expand existing eligibility criteria and/or improve procedures.[83] Despite the pace of reform, the law remains uneven. In many states and for many types of convictions, eligibility is restrictive, procedures are burdensome, and effect is uncertain.[84] Moreover, only a small percentage of those who are eligible for relief actually obtain it. Scholars attribute this "second chance gap"[85] to multiple factors, including lack of information, cost and complexity of procedures, absence of counsel, and distrust of the legal system.[86] In addition, people who are made to wait up to a decade or more after finishing their sentence to become eligible to apply may have little or no incentive to do so. Even if people do obtain relief, they

Only a small percentage of those who are eligible for relief actually obtain it.

[83] *See supra* note 78. In 2019 alone, 27 states and D.C. made certain classes of convictions newly eligible for expungement, sealing, or vacatur relief. Five of those states enacted their first general authority for expunging or sealing convictions (North Dakota, New Mexico, West Virginia, Delaware, Iowa), making record relief available for the first time to thousands of people. *See* CCRC, *Pathways to Reintegration: Criminal Record Reforms in 2019*, 11 CCRC (Feb. 2020), https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.

[84] *See id*; *see also* Brian Murray, Retributive Expungement, 169 Pa. Law Rev. ___ (Forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3617875 (arguing that because expungement was originally conceived through a rehabilitative framework, , many procedural hurdles in the law were intentionally designed to channel relief to those with unusual records of achievement; and suggesting that a retributive approach would support the case for broader eligibility, an obligation on the state to prove ineligibility, and automated relief.)

[85] Colleen V. Chien, *America's Paper Prisons: The Second Chance Gap*, Mich. Law. Rev. ___ (Forthcoming 2020).

[86] Prescott & Starr, *supra* note 74 at 2461, 2486-2510 (finding that among those legally eligible for set-aside and sealing in Michigan, only 6.5% obtain it within five years of eligibility; proposing the likely reasons for this low uptake rate).

typically face daunting challenges in trying to make it effective, including trying to have expunged records removed from the internet and commercial databases.[87]

There are few best practices or model laws addressing these forms of relief. While national law reform organizations have endorsed judicial certificates that dispense with mandatory collateral consequences and signal rehabilitation, none has endorsed record-sealing or set-aside.[88] With the lack of national guidance, state laws differ widely. The following discussion is an overview of diverse approaches, with grades assigned at the end of the section for misdemeanor and felony sealing and set-aside provisions in each state. Readers wishing more specific information are invited to consult the appendices and the Restoration of Rights Project.

None of the national law reform organizations has endorsed record-sealing or set-aside

We begin by describing the broad structural categories of record-revising relief currently in effect across the country, then turn to more specific eligibility criteria, procedural requirements (including judicial standards), and legal effect. At the end of the section we grade each jurisdiction's law on its scope, accessibility, and effect. We decided to give separate grades for felonies and misdemeanors, since some states with strong misdemeanor sealing laws did relatively little for felonies.

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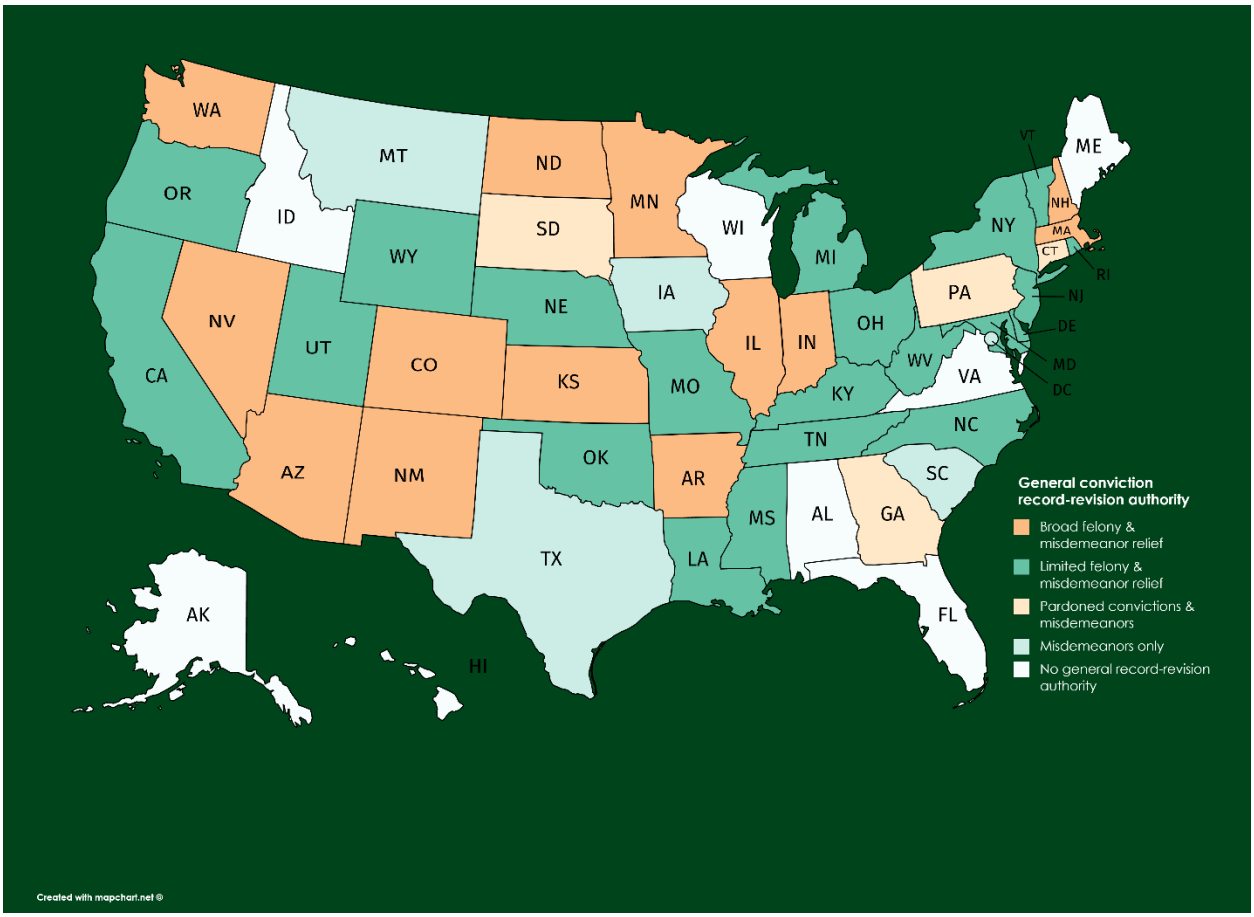
[87] *See, e.g.*, Alessandro Corda and Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 British Journal of Criminology 245–64 (March 2020).

[88] The collateral consequence relief proposals of the American Bar Association (2003), Uniform Law Commission (2010), and American Law Institute (2017), are discussed in the section on judicial certificates. The 1962 Model Penal Code endorsed set-aside, and the 1983 ABA Standards endorsed expungement, but neither organization included this relief in their more contemporary proposals. The only model policies on sealing convictions were published in 2019 by a California nonprofit, suggesting four principles: relief should (1) include an automatic relief mechanism; (2) come at or soon after the end of sentence; (3) be focused to maximize safety; and (4) extend to a wide spectrum of offenses. LENORE ANDERSON ET. AL, CREATING MODEL LEGISLATIVE RELIEF FOR PEOPLE WITH PAST CONVICTIONS, ALLIANCE FOR SAFETY AND JUSTICE (2019), https://allianceforsafetyandjustice.org/wp-content/uploads/2019/09/Model-Policies-Brief.pdf.

Scope of relief by category

Looking at record-revising relief for convictions, the 50 states, federal system, and District of Columbia can be divided into five categories:

(1) broader felony and misdemeanor relief (13 states)
(2) limited felony and misdemeanor relief (21 states)
(3) relief for pardoned convictions and for misdemeanors (4 states)
(4) misdemeanor relief only (4 states and D.C)
(5) no general conviction record-revising relief (8 states, federal system)



More than two-thirds of the states (34) now have laws that extend eligibility for record-revision to both misdemeanor and felony convictions, apart from the pardon process. Six states have joined this list in the last two years alone: Oklahoma and Maryland extended sealing eligibility to felonies in 2018, and four of the five states

that enacted their first general sealing laws in 2019 extended relief to felonies (North Dakota, New Mexico, West Virginia, Delaware).

Of this group of 34 states, 13 have broad eligibility standards that encompass a relatively wide range of convictions.[89] An additional 21 states have more limited eligibility, typically excluding many offenses, with longer waiting periods, and other requirements (e.g., 14 of the 21 states confine felony eligibility to a single conviction).[90] States often apply different standards for felonies and misdemeanors so that some with restrictive felony expungement have quite generous misdemeanor relief (e.g., Kentucky, New Jersey).

The next group of four states allows felonies to be expunged, but only if they have first been pardoned.[91] Connecticut relies exclusively on the pardon power to seal conviction records, but the other three states (Georgia, Pennsylvania, and South Dakota) also have misdemeanor expungement laws that do not require a pardon. South Dakota's 2016 law was the nation's first automatic conviction-sealing law, although it applies only to Class 2 misdemeanors after a 10-year waiting period.[92] Pennsylvania's more expansive Clean Slate Act of 2018 put automatic sealing on the map, making a wide range of misdemeanor convictions eligible, also after a ten-year waiting period, and a somewhat broader set of misdemeanors may be sealed by petition. A 2020 Georgia law—in addition to allowing pardoned convictions to be

[89] Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Massachusetts, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, and Washington. All seal convictions except Arizona, which has a broad set-aside authority that releases the person from "all penalties and disabilities" resulting from the conviction but does not limit public access to the record. Ariz. Rev. Stat. § 13-90.

[90] California, Delaware, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, West Virginia, and Wyoming. All seal convictions except Nebraska, which authorizes people sentenced to probation to petition for the conviction to be set-aside, removing "all civil disabilities and disqualifications." Neb. Rev. Stat. § 29-2264.

[91] Relief for pardoned convictions is automatic in three states (Connecticut, Pennsylvania and South Dakota) and by court petition in Georgia. As noted in the previous section on pardon, about a dozen additional states make pardon grounds for expungement. Those states all have separate laws allowing at least some felony and misdemeanor convictions to be expunged or set-aside even if they have not been pardoned.

[92] It also covers petty offense and municipal code violations. S.D. Codified Laws § 23A-3-34

sealed—authorizes "record restriction" and sealing for a range of non-violent misdemeanor offenses after four conviction-free years, allowing up to two such convictions to be sealed in a lifetime.

The next group of jurisdictions allows some misdemeanors but no felony convictions to be expunged (Iowa, Montana, South Carolina, Texas, and D.C.).[93] Even for misdemeanors, all but one of these authorities are relatively limited. Most restrictive is Iowa's 2019 law, which makes only a single misdemeanor eligible if 8 years have passed since completion of sentence, if the person has no other convictions, and if additional requirements are satisfied.[94] D.C.'s law excludes many offenses and has a long waiting period, and Texas and South Carolina make prior convictions or diversion disqualifying. More favorably, Montana allows multiple misdemeanors to be expunged, with a presumption in favor of relief for most offenses, although only one expungement is allowed in a lifetime.[95]

The last group of eight states and the federal system lack any general conviction relief, although (like other states) most have narrow, specialized laws, applicable to minor marijuana convictions (Hawaii[96] and Virginia) or to victims of human trafficking (Alabama, Hawaii, Idaho, Florida, and Wisconsin).[97]

Illinois' sealing law is most expansive in the country. It extends eligibility to all but a few very serious felonies without regard to an applicant's prior record, after a uniformly brief three-year waiting period. Massachusetts, Nevada and North Dakota also offer sealing for most felonies after slightly longer waiting periods, and Arizona permits its courts to "set-aside" or "vacate" most convictions upon successful completion of sentence and discharge, but it does not restrict public access to the

Illinois' sealing law is the most expansive in the country

[93] D.C. does make a single felony offense eligible for sealing: felony failure to appear. D.C. Code § 16-803.

[94] Iowa Code § 901C.3.

[95] Mont. Code Ann. § 46-18-1102, *et seq.*

[96] Hawaii also authorizes expungement of first or second drug possession violations. Haw. Rev. Stat. § 706-622.5.

[97] Alabama, Alaska, Florida, Hawaii, Idaho, Maine, Virginia, and Wisconsin.

record. Among the states that extend record-revision to felonies, Maryland is at the other end of the spectrum,[98] authorizing expungement for only three specific felonies (theft, burglary, and drug possession with intent to distribute), after a 15-year conviction-free waiting period.[99] Between these extremes, there are as many differing approaches as there are states, with scope generally dependent on seriousness of the offense, and eligibility often dependent on prior record and the passage of time. These differing approaches, captured in the grading system that follows this section, can be seen in the state-by-state summaries appended to this report. They are examined in detail in the state profiles from the Restoration of Rights Project.

Beyond the general expungement, sealing, and set-aside laws that are the subject of the report cards that conclude this chapter, many states have enacted specialized authorities, often for the two categories already discussed: marijuana offenses and convictions of victims of human trafficking, as well as for youthful offenses. A total of 18 states and D.C. have enacted relief specifically for marijuana, decriminalized, and legalized offenses, including automatic relief in California, Illinois, New Jersey, New York, and Virginia.[100] At least 35 states have a specialized relief law for victims of human trafficking—sometimes covering prostitution offenses only and sometimes covering any offenses resulting from victim status.

Several states also authorize their courts to reduce certain felony convictions to a misdemeanor, thereby avoiding the most severe consequences of conviction (e.g., California, Idaho, Indiana, Oklahoma, and North Dakota).

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[98] The D.C. sealing law's coverage of one felony (failure to appear) is too unique to be an appropriate bookend.

[99] Many misdemeanors can also be expunged, but a 10- or 15-year conviction-free waiting period applies (marijuana possession sealing has a 4-year period and certain nuisance crimes have a 3-year period). Md. Code Ann., Crim. Proc. § 10-105. "If the person is convicted of a new crime during [the applicable waiting period], the original conviction or convictions are not eligible for expungement unless the new conviction becomes eligible for expungement." *Id.* § 10-110(D)(1).

[100] *See 50-State Comparison: Marijuana Legalization, Decriminalization, Expungement, and Clemency*, Restoration of Rights Project, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-marijuana-legalization-expungement/.

Additional eligibility requirements

In addition to basic limits on coverage, state laws impose a variety of more specific eligibility requirements, especially for felonies. Typically, certain categories of offenses will be excluded (i.e. higher classes of offenses, DUI, violence, sex, weapons, etc.), or certain people will be excluded based on their past or subsequent criminal record, including prior sealings, pending charges, probation violations, or sex offender registration requirements. Some states make record-closing a one-bite affair, including states with broad and sophisticated schemes like Indiana and Illinois. A number of states have waiting periods of a decade or more, which would seem at odds with stated legislative goals of reducing recidivism.[101] We considered these and other more specific eligibility requirements in deciding how to grade each state's law in the report card at the end of this section.

Waiting periods of a decade or more would seem at odds with legislative goals of reducing recidivism

Most states require the satisfaction of various forms of court debt, such as fines, fees, restitution, and costs, as a prerequisite to expungement.[102] Recognizing the unfairness of restricting relief to those with means to pay financial obligations, three

[101] For example, by the time someone has satisfied the ten crime-free years after completion of sentence required by both New York and Louisiana, and the 15 years required by Maryland, they would appear to be in little jeopardy of subsequent conviction.

[102] Recent advocacy has highlighted the extent to which many people lack the ability to pay these obligations. *See, e.g.*, Fines and Fees Justice Center, https://finesandfeesjusticecenter.org/. A 2018 study of California residents with convictions found that 45% struggle to pay fines and fees. REPAIRING THE ROAD TO REDEMPTION IN CALIFORNIA, CALIFORNIANS FOR SAFETY AND JUSTICE (2018), https://safeandjust.org/wp-content/uploads/CSJ_SecondChances-ONLINE-May14.pdf. Earlier this year, the federal district court in a major Florida voting rights case found that—of hundreds of thousands of people with a felony conviction who had served all their custody and supervision time, but still owed financial obligations—the "overwhelming majority" were "genuinely unable to pay" the owed amounts. *Jones v. DeSantis*, Case No. 4:19cv300-RH/MJF, 2020 WL 2618062, at *15 (N.D. Fla. 2020).

states have enacted laws since 2018 to alleviate these requirements in the expungement process (Illinois, New Jersey, Washington).[103]

In state after state, eligibility criteria are curiously complex, the evident result of expansion and contraction through the legislative bargaining process over a period of years.[104] It is not surprising that among the cleanest and broadest sealing laws in the country are the top-to-bottom schemes enacted in 2019 by New Mexico and North Dakota.[105]

Procedural barriers

Expungement petitions are frequently difficult, time-consuming, and expensive to prepare, especially without a lawyer. Typically, they require collection of various criminal history records and character evidence, formal service on multiple parties, filing fees, responses to objections, appearances at hearings, service of expungement

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[103] In 2018, Illinois prohibited courts from denying sealing or expungement petition because the petitioner had not satisfied an outstanding financial obligation by a court or local government, except that restitution to victims may be considered unless it was converted to a civil judgment. Ill. Comp. Stat. Ann. 2630/5.2(e)(6)(C). In 2019, Washington state modified its laws so that a person need not have satisfied financial obligations to obtain a certificate of discharge (a prerequisite for sealing), as long as all other requirements of the sentence are satisfied and five years have passed since completion of supervision. Wash. Rev. Code § § 9.94A.637(4). In 2019, New Jersey allowed courts, when considering expungement petitions, to waive financial obligations or convert them to civil judgments. N.J. Stat. Ann. § 2C:52-2(a)(1).

[104] For example, Minnesota limits felony sealing to a list of 50 offenses ranging from aggravated forgery to livestock theft. Maryland has a long list of crimes eligible for expungement, and another list eligible for "shielding" (sealing) at an earlier date. In Oregon closure is available for many non-violent misdemeanors and less serious felonies, but only if the individual has not been convicted in the previous 10 years (or ever, if the record for which closure is sought is a Class B felony) nor arrested within the previous three years. Missouri's 2017 sealing law permits closure of a significant number of felony and misdemeanor offenses, with seven years conviction-free waiting periods after completion of sentence for felonies and three years for misdemeanors; only one felony and two misdemeanors convictions are eligible for closure in a person's lifetime. In New York and Michigan, many felony offenses may be sealed, but each applicant may only seal one felony conviction, and only if the person has no prior felonies (as well as less than 2 misdemeanors in New York, or less than 3 in Michigan).

[105] *See supra* note 83.

orders on courts, agencies, and private parties, etc. These challenges have been compounded by limits on and dangers of physical access to courthouse and agencies during Covid-19. Ironically, the governor of Washington vetoed a bill calling for automatic relief precisely because of pandemic-related budgetary challenges, although such a measure would have reduced the need for in-person procedures.[106]

Expungement petitions are difficult, time-consuming, and expensive

Even aside from fees charged to obtain criminal records and run fingerprint checks, filing fees in a number of states may be prohibitively high and unwaivable petitions are frequently ($300 in Kentucky and Alabama), while in other states fees have been reduced (from $450 to $280 to $100 in Tennessee) or may be waived. Some courts and agencies have made efforts to assist persons of limited means: Illinois courts and the Office of the State Appellate Defender, for example, publish model forms and instructions for different types of cases and provide guidance for those seeking relief.

Once a petition is filed, the court may be required to hold a hearing in all cases (e.g. Michigan), for felony offenses (e.g. Arkansas), if the prosecutor or victim objects (e.g. Maryland), or at the court's discretion (e.g. Delaware). Relief for eligible applicants may be mandatory, presumed, dependent on the court's discretion, or require a strong showing of need. In some cases, the law specifies criteria to guide a court's decision (e.g., Georgia: "the harm otherwise resulting to the individual clearly outweighs the public's interest in the criminal history record information being publicly available"). In others the court's discretion is unlimited (e.g., New Jersey), and in still others sealing is mandatory if statutory eligibility criteria are met (e.g., Indiana, Kentucky, Louisiana). In Utah, where most felonies may be expunged after a graduated waiting period, an order must issue unless the court finds that this would be "contrary to the public interest."

The enactment of laws requiring officials to automatically seal some convictions would obviate the need for individuals to apply for relief and thereby avoid the many access barriers that currently depress grant rates and produce the "second chance

[106] Rachel M. Cohen, *Washington Governor Vetoes Bill That Would Have Automatically Cleared Criminal Records*, The Appeal (May 19, 2020), https://theappeal.org/politicalreport/washington-governor-vetoes-clean-slate-bill/.

gap."[107] Since 2018, eight states have enacted laws providing for automatic sealing of certain convictions (usually misdemeanors).[108] Most significantly, beginning in early 2021 California will automatically seal all convictions previously granted relief under the state's longstanding set-aside authority for misdemeanors and certain low-level felonies, as well as similar convictions going forward. There have been efforts in other states to streamline the sealing process short of automation through simplified administrative procedures. For example, Delaware mandates relief for people with eligible misdemeanors who present themselves to the state record repository with a set of fingerprints and a copy of their record.[109]

Effect of relief

The effect of sealing or expungement orders on opportunities restricted by law is unclear in many states. Some sealing laws specify that they do not relieve firearms dispossession or sex offender registration, but many leave a recipient in doubt about their rights and responsibilities where mandatory restrictions are concerned. It is also true that many record-closing laws purport to authorize a person to deny having been convicted, but this is perilous advice when dealing with entities required by law to conduct a background check or governed by federal law. A few states make clear that expunged or sealed convictions must be disclosed for employment requiring a background check (e.g., Illinois, Indiana, Missouri). Kansas

The effect of expungement orders on opportunities restricted by law is unclear in many states

[107] *See supra* notes 85 and 86.

[108] California (certain misdemeanors and low-level felonies; marijuana offenses); Illinois (certain marijuana offenses); New Jersey (certain misdemeanors and low-level felonies, including for marijuana); New York (minor marijuana offenses); Pennsylvania (a range of misdemeanors); South Dakota (minor misdemeanors); Utah (a range of misdemeanors); and Virginia (minor marijuana offenses). *See 50-State Comparison: Expungement, Sealing & Other Record Relief*, Collateral Consequences Resource Center, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/. The Clean Slate Initiative has been a leader in advocating for automatic relief. *See* https://ccresourcecenter.org/2020/08/03/the-clean-slate-initiative-a-national-bipartisan-coalition/.

[109] Del. Code tit. 11, § 4373(a).

specifically requires disclosure of expunged convictions in certain licensing and public employment applications (health, security, gaming, commercial driver or guide, investment adviser, law enforcement), and Missouri has a similar disclosure requirement for professional licenses, or any employment relating to alcoholic beverages, the state-operated lottery, or provision of emergency services. Missouri's law is one of the few that makes clear that "an expunged offense shall not be grounds for automatic disqualification of an application, but may be a factor for denying employment, or a professional license, certificate, or permit." Some states require that even non-conviction records that have been expunged must be disclosed in some contexts (e.g., Alabama, Kansas, Louisiana).

State record relief orders are given inconsistent effect in federal law. Some areas of law give effect to one form of relief (e.g., expungement) but not to another (pardon), and vice-versa. Further, whether a specific type of state relief is given effect may differ depending on how the federal rule defines the requisite elements of relief, and whether they apply a federal definition of a term like "expungement."[110]

Recipients of relief face also significant challenges with the proliferation of records on the internet and in commercial databases.[111] Certain companies, including those

[110] For example, in the immigration context, a non-citizen may avoid deportation based on conviction with a "full and unconditional" pardon, but state judicial relief is only recognized if granted "because of a procedural or substantive defect in the criminal proceedings," and not if granted "for equitable, rehabilitation, or immigration hardship reasons." *See* 8 U.S.C. § 1227(a)(2)(A)(vi); *Prado v. Barr*, No. 17-72914, 2020 WL 596877, at *3 (9th Cir. Feb. 3, 2020); *Resendiz-Alcaraz v. U.S. Att'y Gen.*, 383 F.3d 1262 (11th Cir. 2004). There have been exceptions made to this non-recognition of expungement, including eliminating conviction as an absolute bar to obtaining Deferred Action for Childhood Arrivals (DACA) status. *See* https://www.ilrc.org/sites/default/files/resources/definition_conviction-kb-20180307.pdf. The FDIC, in regulating banking employment, until recently only recognized expungements that were "complete" (meaning the record can never be used for any subsequent purpose) but new regulations effective September 21, 2020, will give effect to any expungement or record-sealing. *See* https://www.govinfo.gov/content/pkg/FR-2020-08-20/pdf/2020-16464.pdf. On the other hand, the Small Business Administration requires loans applicants to disclose convictions even if they have been expunged or sealed. *See, e.g.*, SBA Standard Operating Procedures 50 10 5(K), pp. 110, 293 (eff. April 1, 2019).

[111] *See* Sharon Dietrich, *Ants Under the Refrigerator: Removing Expunged Cases from Commercial Background Checks*, Criminal Justice (Winter 2016),

that conduct background checks, are regulated by the federal Fair Credit Reporting Act (FCRA), whose provisions would seem to prohibit reporting of expunged or sealed convictions.[112] Despite efforts to compel compliance, "[d]eficiencies of enforcement mechanisms, a certain degree of ambiguity in regulatory guidance, and practical difficulties in constantly keeping databases up to date make the problem of inaccurate and outdated criminal records hard to eradicate."[113]

Online "people search" services, which collect criminal records and make them available for a fee, have thus far successfully argued they are "mere information aggregators" not subject to FCRA by providing disclaimers that users are not to use the information for decision-making but only "in an information-gathering spirit."[114] Some states have additional protections that supplement FCRA, notably including California's Investigative Consumer Reporting Agencies Act, which antedates the federal statute.[115] Indiana's 2013 expungement law, which post-dates federal FCRA, prohibits commercial record providers from reporting any expunged convictions even if they have not also been sealed.[116] The Pennsylvania Courts provide a data file each month listing expunged cases that must be removed from private databases under the contract for purchasing court records.[117]

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http://ccresourcecenter.org/wp-content/uploads/2017/03/Ants-under-the-Refrigerator-published.pdf.

[112] This law requires "reasonable procedures to ensure maximum possible accuracy"—and in the employment context, unless contemporaneous notice is provide to the person being screened, the use of "strict procedures" to ensure data is up to date. 15 U.S.C. §§ 1681e(b), 1681k.

[113] Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 FED. SENT'G REP. 241, 243 (2018).

[114] *Id.*

[115] *See* Cal. Civ. C. § 1786 *et seq*.

[116] In Indiana, an expungement does not limit access to the record of most felonies, although misdemeanors and non-conviction records, as well as the records of the least serious felonies, are sealed following expungement. *See* Indiana profile, Restoration of Rights Project; *see also* CCRC Staff, *Indiana's new expungement law the product of "many, many compromises,"* Dec. 15, 2014, https://ccresourcecenter.org/2014/12/15/indianas-new-expungement-law-product-many-many-compromises/.

[117] *See* Dietrich, *supra* note 111.

The proliferation of records on the internet means that most expunged convictions will continue to appear in Google searches

With little regulation, the proliferation of records on the internet means that most sealed and expunged convictions will continue to appear in Google searches and persist on websites and databases.[118] People lack the time and resources to track down each place where a record appears on the internet, or the legal skills "to negotiate with, pay off, or sue every company" that profits from it.[119]

The Restoration of Rights Project contains a 50-state summary of expungement, sealing, and other record relief in each state, with links to specific state profiles that may be consulted for additional detail.

A note on juvenile delinquency records:

All states provide for sealing or expungement of at least some juvenile delinquency records, applying procedures and standards that tend to be more favorable to affected individuals than those applicable to adult records. For example, juvenile records are more likely to be subject to destruction in many states, as opposed to just sealing or sequestration, if relief is obtained. Many states also place general limits on public disclosure of juvenile records apart from any expungement or sealing relief that may be available.

As with adult conviction records, there is significant variation from state to state on how expungement and sealing of juvenile records is handled. Some states make expungement or sealing relief automatic or mandatory, but most make relief discretionary with the court. Some states require a crime-free waiting period, and a few require the court to make a finding of rehabilitation. This variation is evident even among neighboring states. For example, while Montana and Nevada automatically seal most juvenile records when the person reaches age 18 or 21, respectively, South Dakota and Wyoming permit sealing/expungement only upon petition, and only after the court makes a finding of rehabilitation. Similarly, Illinois, Maryland, Virginia, and

[118] See Lageson, *supra* note 77.

[119] *Id.*

West Virginia make expungement of most juvenile records automatic, while South Carolina and Georgia require the court to make a finding of rehabilitation.

The individual state profiles from the Restoration of Rights Project includes a brief discussion of juvenile record relief laws. In addition, the Juvenile Law Center has published two reports analyzing juvenile record laws in each state.[120]

Report Card: Expungement, Sealing, and Set-Aside of Convictions

The following report card grades each state, D.C. and the federal system on their laws providing for sealing or set-aside of felony and misdemeanor convictions. We provide a separate grade for each type of record, since states that provide little if any remedy for felony convictions may be expansive toward misdemeanors. Our grades were somewhat subjective, but in general considered the law's scope, accessibility (additional eligibility criteria and procedural barriers), and effect. Note that these grades may not correspond exactly with the categories in the map earlier in this section, which were based on structural coverage only. We stress that we have not studied how each of these laws operates in practice, including how difficult it may be to apply without a lawyer or how many people apply for and obtain relief, and our grades therefore may or may not reflect whether and to what extent a particular law actually delivers on its promise.

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[120] *See* Riya Saha Shah, Lauren Fine & Jamie Gullen, *Juvenile Law Center, Juvenile Records: A National Review of State Laws on Confidentiality, Sealing and Expungement* (2014); Riya Saha Shah, Lauren Fine, Juvenile Law Center, *Failed Policies, Forfeited Futures: A Nationwide Scorecard on Juvenile Records* (2014). Both reports are available at http://juvenilerecords.jlc.org/juvenilerecords/#!/map. *See also* Joy Radice, *The Juvenile Record Myth*, 106 GEO. L. J. 365 (2018) (providing analysis and charts of state laws for sealing juvenile records). Some recent state-specific resources are collected in Love, *et al., supra* note 41 §§ 2:68 through 2:77.

	Felonies	Misdemeanors
AL	**F**	**F**
AK	**F**	**F**
AZ	**B**	**B**
AR	**C**	**A**
CA	**C**	**A**
CO	**C**	**B**
CT	**B**	**C**
DE	**C**	**B**
DC	**F**	**D**
FL	**F**	**F**
GA	**C**	**D**
HI	**F**	**F**
ID	**F**	**F**
IL	**A**	**A**
IN	**B**	**B**
IA	**F**	**D**
KS	**B**	**A**
KY	**D**	**B**
LA	**C**	**C**
ME	**F**	**F**
MD	**D**	**C**
MA	**A**	**A**
MI	**D**	**B**
MN	**C**	**A**
MS	**D**	**B**
MO	**C**	**B**

	Felonies	Misdemeanors
MT	**F**	**B**
NE	**C**	**B**
NV	**A**	**A**
NH	**B**	**A**
NJ	**D**	**A**
NM	**A**	**A**
NY	**D**	**D**
NC	**D**	**C**
ND	**A**	**A**
OH	**C**	**B**
OK	**C**	**C**
OR	**D**	**B**
PA	**F**	**B**
RI	**D**	**B**
SC	**F**	**D**
SD	**C**	**C**
TN	**D**	**D**
TX	**F**	**D**
UT	**C**	**B**
VT	**D**	**C**
VA	**F**	**F**
WA	**B**	**B**
WV	**D**	**C**
WI	**F**	**F**
WY	**D**	**D**
Fed	**F**	**F**

C. Judicial Certificates of Relief

A growing number of states authorize their courts or parole boards to issue orders or "certificates" to convicted individuals with the dual purpose of avoiding or mitigating mandatory bars to employment, licensing, or housing, and providing some reassurance about the person's rehabilitation to help with discretionary ones.[121] Influenced by the forgiving or dispensing tradition of executive pardon, judicial certificates do not remove information from a person's criminal history or limit public access to the record.[122] Rather, generally, they relieve mandatory collateral consequences and may influence discretionary decision-making through an official judgment about a person's reliability and good character. They are frequently available to individuals who may otherwise not qualify for expungement or sealing, or at an earlier point in time.

Judicial certificates of relief have been proposed by the American Law Institute in the revised sentencing articles of the Model Penal Code, by the Uniform Law Commission, and by the American Bar Association.[123] Under the two-step schemes advocated by these national law reform organizations, limited relief is available at sentencing to remove specific economic barriers to promote reentry, while more comprehensive

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[121] For ease of reference, we include under the general rubric of "judicial certificates" some that are issued by parole or pardon boards, as in Connecticut, New York, and Rhode Island, so long as they have some specific legal effect, including but not limited to dispensing with legal restrictions. State laws authorizing courts to issue certificates of restoration of rights, variously denominated, are collected and described in § 7:23 of Love, *et al., supra* note 41. We have not included certificates issued by prison authorities that signify completion of training or good behavior while incarcerated because these rarely have the force of law.

[122] *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1713 (2003) (judicial certificates do not propose to "rewrite history" but aim instead to "confront history squarely with evidence of change").

[123] *See* Model Penal Code: Sentencing, Final Draft, §§ 7.01 through 7.06 (April 2017), available at http://ccresourcecenter.org/wp-content/uploads/2015/10/article-6x.pdf; Uniform Collateral Consequences of Conviction Act, §§ 10 and 11 (2010), http://www.uniformlaws.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act; ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-2.5 ("Waiver, Modification, Relief") (3d ed. 2004).

relief to signify rehabilitation is available after a further waiting period. The three model schemes do not propose to seal or otherwise limit public access to the record. Instead, they aim to provide individuals both incentive and reward for law-abiding conduct and might be said to satisfy the community's need for a ritual of reconciliation. As Jeremy Travis has observed, "[w]e need to find concrete ways to reaccept and reembrace offenders who have paid their debt for their offense."[124]

"We need to find concrete ways to reaccept and reembrace offenders who have paid their debt for their offense."

Some advocates and practitioners are skeptical about the efficacy of a judicial certificate in the context of discretionary hiring decisions, including the vaunted New York certificates that have provided a model for similar certificate relief in other states.[125] Yet a 2016 study of certificates issued by courts in Ohio found that individuals who had been issued certificates were more likely to get an invitation to interview than those without, and at a rate not far removed from the call-back rate for those without a criminal

[124] *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT 36 (Meda Chesney-Lind & Marc Mauer eds., 2002). *See also* Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 162 (1999) ("ex-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation."); Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 378, 390 (1970) ("We solemnize the offender's induction into the system. When he successfully concludes the program, though, we fail to institutionalize his departure correspondingly. It's fun to catch the fish but hard to let him go.").

[125] *See* Heather Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U.PUB. INT. L. J. 1 (2016); Alec Ewald, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief,"* LAW & SOC. INQUIRY, Winter 2016. Both articles, which rely on interviews and anecdotal evidence, are discussed in *New York certificates fall short in practice*, Collateral Consequences Resource Center, Feb. 29, 2016, http://ccresourcecenter.org/2016/02/29/new-york-certificates-of-relief-fall-short-in-practice/#more-7753.

record.[126] A study of the same certificates the following year in the context of applications for rental housing found a similar result.[127] The authors of these studies theorized that court-issued certificates provide valuable information about work-readiness and/or reliability, and that in addition they may be perceived as protection against lawsuits claiming negligence. Or their value might be less tangible: in a survey of certificate programs published by The Marshall Project in 2015, the chief judge of the Cook County Criminal Court in Illinois called his state's certificates "a tool for redeeming people," and a legal aid lawyer in North Carolina noted that a court's certification "makes what has happened *since* the crime a fully official part of that person's record, for all employers to see." A dissenting voice about the value of certificates came from a legal aid attorney in Pennsylvania, a state that does not authorize judicial certificates, who considered them a "weak compromise" because they "rely on employers to do the right thing."[128]

In the recent wave of reform, legislatures have been slow to enact judicial certificate laws, possibly because the advocacy community strongly favors relief that limits public access to the record. But in the 12 states where they are available (California, Colorado, Connecticut, Illinois, New Jersey, New York, North Carolina, Ohio, Rhode Island, Vermont, Washington, and Tennessee), they extend to a broader range of offenses than sealing or expungement, and may be obtained after a shorter waiting period, making them potentially a more valuable aid to reentry.

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[126] Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study,* YALE L. & POL'Y REV. Inter Alia, Vol. 35 (2016).

[127] Peter Leasure and Tara Martin, *Criminal records and housing: an experimental study*, 13 J. of Experimental Criminology 527 (2017). A collection of social science research into "strategies to improve reentry outcomes" judged court ordered certificates of rehabilitation "promising and worth further study" just based on this study and the one in note 125, along with diversion from incarceration and cognitive therapy. (Ban-the-box, intensive supervision, and transitional jobs were judged among the least effective by researchers.) See Jennifer Doleac, *Strategies to productively reincorporate the formerly-incarcerated into communities: A review of the literature*. IZA Discussion Paper No. 11646 (2018).

[128] Eli Hager, *Forgiving v. Forgetting: For offenders seeking a new life, a new redemption tool*, The Marshall Project (Mar. 17, 2015), https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting.

Eligibility for and effect of certificates vary from state to state, and they should be distinguished from more limited executive or judicial orders restoring voting and other civil rights, including firearms rights. Unlike record-sealing, certificates are frequently available to those with federal and out-of-state convictions who reside or do business in the state. In some states, a variety of certificate is available from correctional authorities when individuals complete a prison term, but these certificates do not have the same legal effect in removing mandatory restrictions as the certificates issued by the 12 states discussed in this section. Certificates have also made a cameo appearance in the federal system.[129]

The certificate schemes in Connecticut and Vermont are the only ones that contemplate the same sort of bifurcation between early and late-stage remedies, or partial and complete relief, as the national law reform proposals described in the first paragraph. Vermont law authorizes the court to issue targeted relief from mandatory collateral consequences at sentencing (Order of Limited Relief), and more thorough relief after five years (Certificate of Restoration of Rights), and these certificates are available for a much greater range of convictions than record-sealing in that state. In Connecticut, the pardon board or court supervisory agency may issue certificates of rehabilitation in cases that do not yet qualify for a full pardon, to give relief from legal barriers to employment and/or licensure. Late-stage relief in the form of a pardon has the additional benefit of expunging or "erasing" the record. Both states make their certificates available to those with federal and out-of-state convictions (though only those with in-state offenses may qualify for a pardon).

New York's certificate scheme is the oldest, dating from the 1940s, and its "Certificates of Relief from Disabilities" (CRD) and "Certificates of Good Conduct"

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[129] *See Jane Doe v. United States*, 168 F. Supp. 3d 427, 446 (E.D.N.Y. 2016) (Gleeson, J.) (granting a "certificate of rehabilitation" in recognition of "Doe's good conduct following completion of her sentence").

> I evaluated Doe's character when I sentenced her 13 years ago. I have done so again now, focusing not on her long-ago criminal acts but on her efforts to rebuild herself. Considering those efforts along with her life circumstances generally, I conclude that Doe is fit not only be hired by a nursing agency in need of a qualified employee, but she to also be relieved of the long list of collateral consequences she faces under state and federal law. Doe's only important conviction today is her conviction to abstain from criminal conduct and to be a productive member of society. That conviction is most emblematic of who she is today.

(CGC) have far-reaching legal effect when coupled with the state's nondiscrimination laws. Until the recent enactment of a limited sealing law, these certificates were the only individualized relief New York offered for convictions, and they remain the only mechanism for overriding mandatory legal disabilities, including firearms disabilities, since sealing does not appear to have that effect.[130] Unlike sealing with its lengthy eligibility waiting period and limit to a single felony, New York certificates are available for first felony offenses from the court as early as sentencing and to all others from the parole board after a brief waiting period, and they are not limited to people with a single felony conviction.[131] They are also offered to anyone with a federal or out-of-state conviction who lives or does business in the state. New Jersey's certificate scheme also extends relief at sentencing to persons with first felony offenses who are not sentenced to prison, and three years after completion of supervision for those who go to prison and have no other felony conviction within 10 years. It is not clear whether New Jersey's certificates are available to those with federal and out-of-state convictions, as New York's are.

In contrast to New York and New Jersey, whose certificates differ according to a person's record, Illinois' two certificates perform different functions: a "Certificate of Relief from Disabilities" addresses occupational licensing restrictions and creates an enforceable "presumption of rehabilitation" that must be given effect by a licensing board. A "Certificate of Good Conduct" lifts mandatory bars to employment, occupational licensure, and housing. In Illinois, certificates may be issued by the sentencing court, either at the time of sentencing or after completion of sentence, or by the circuit court to those convicted of federal and out-of-state offenses, after a brief waiting period.[132]

Certificates generally operate to convert mandatory disqualifications into discretionary ones, extending opportunities and benefits to individuals who would

[130] N.Y. Crim. Proc. Law § 160.59(9) (sealed convictions remain available to state entities responsible for issuing firearm licenses).

[131] N.Y. Correct. Law §§ 703-b(1), (3).

[132] The Illinois certificate scheme was originally proposed by a freshman member of the Illinois legislature named Barack Obama eager to make his mark during his short-lived stint in state office. It is described in Margaret Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act,*, 54 How. L. J. 753, 761-62, 789-91 (2011); *see also* the Illinois profile from the Restoration of Rights Project.

otherwise be barred from them by law. Some states go further to require that certificates be given weight in the discretionary decision-making process. In Ohio, for example, a "Certificate of Qualification for Employment" creates a "rebuttable presumption that the person's criminal convictions are insufficient evidence that the person is unfit for the license, employment opportunity, or certification in question."[133] Certificates in New York and Illinois have a similar weighty influence in connection with discretionary decision-making. Certificates in Ohio and Washington are specifically directed at employment barriers, but certificates in other states have a more general application and effect on any mandatory collateral consequences.

Some certificates carve out exceptions for specific consequences, particularly those that relate to licensing and employment in sensitive occupations. For example, Washington's "Certificate of Restoration of Opportunity" has a potent effect in many occupational licensing schemes, and is the only way a person with a felony record may be considered for employment by the school system, but it has no effect on licensing relief for nurses and physicians, private investigators, teachers, or law enforcement personnel. Illinois' "Certificate of Relief from Disabilities" authorizes relief only in specified licensed fields. California's "Certificate of Rehabilitation" limits consideration of felony convictions by licensing boards, relieves the obligation to register as a sex offender, and constitutes the first step in the executive pardon process.

[133] A person who has fully discharged the sentence after a short eligibility waiting period (one year after completion of sentence for felonies, six months for misdemeanors) from the court of common pleas in the county of his residence (if a state resident), or in the court where he was convicted (if not a resident), for a "certificate of qualification for employment" (CEQ) that will provide relief from mandatory legal bars and allow him to be considered on the merits. *See* Ohio Rev. Code Ann. §§ 2953.25, 2961.21 through 2961.24 (authorizing the corrections authority and parole board to issue "certificates of achievement and employability" for certain DRC prisoners and parolees to be used by the recipient to generally obtain relief from "mandatory civil impacts" that would affect a potential job for which the person trained while in prison).

Certificates may provide relief from informal consequences imposed by private actors by evidencing rehabilitation

Certificates may also provide relief from informal consequences imposed by private actors by evidencing rehabilitation or, in the case of New York, creating an enforceable presumption of rehabilitation under the state's Human Rights Law. Some certificates accomplish this by limiting an employer's liability in negligent hiring actions. In Ohio, North Carolina, and Vermont, for example, reliance on a certificate creates a presumption of due care in hiring; in Illinois and Tennessee, reliance on a certificate is a complete defense to liability. In Ohio, protections may also extend to other similar forms of liability like negligence in connection with renting or admission to an educational program.

Certificates are typically available for a broader range of offenses than sealing or expungement and may be granted earlier. Of the 12 states that offer certificates, seven (California, Connecticut, New Jersey, New York, Ohio, Tennessee, and Vermont) impose no categorical limits on who can approach the court for relief. Illinois excludes from eligibility individuals convicted of specified crimes involving serious violence, and Washington makes CROP certificates available only to individuals who have not been convicted at any time of a Class A felony, certain sex offenses, and a handful of other serious felonies. Colorado initially limited its "collateral relief" to individuals sentenced to community corrections, but later extended this relief to all but convictions involving serious violence or a requirement of registration. Only North Carolina and Rhode Island extend certificate relief only to those convicted of minor nonviolent crimes, and only Rhode Island and New Jersey limit eligibility to persons with no more than one felony conviction.

Individuals may apply for certificates as early as sentencing in seven states (Colorado, Connecticut, Illinois, New Jersey, New York, Tennessee, and Vermont). In North Carolina, a certificate is available for more felony offenses after a significantly shorter waiting period than expungement (one year for a certificate vs. five to ten years for expungement). In Ohio, Certificates of Qualification for Employment are also available one year after completion of sentence.

In some of these states, certificates somewhat anomalously purport to evidence rehabilitation even when issued as early as sentencing, which anecdotally has

sometimes made courts wary of issuing them.[134] But in other states (notably Connecticut and Vermont) beneficiaries of an early order are required to return for more complete relief after a further waiting period. The Vermont scheme is modeled on the Uniform Act, including an early "Order of Limited Relief" and a later "Certificate of Restoration of Rights." Connecticut also offers an early Certificate of Employability and a later full pardon. In Tennessee, individuals may regain their civil rights from the sentencing court upon completion of their sentence, and simultaneously petition the court for a "certificate of employability" that lifts most licensing barriers and protects employers from negligent hiring liability. At this second stage, the court makes findings after a hearing about character, need for relief (including for employment or licensing) and public safety. People with federal and out-of-state convictions are eligible for this more potent certificate and may obtain it from the court in their county of residence.

State residents with federal and out-of-state convictions are eligible for certificates in Connecticut, Illinois, New York, Rhode Island, Tennessee, Vermont, and perhaps New Jersey, but not California, Colorado, North Carolina, Ohio, or Washington. Some states require applicants convicted in more than one county to file multiple applications, but others (notably Ohio) permit consolidation of all convictions in one court.

Issuance of a certificate is entirely discretionary in all states except Washington, and an otherwise eligible petitioner may be denied relief if the court is unable to make the necessary findings, sometimes weighing the applicant's need for relief against the public welfare. Moreover, the scope of relief granted in any specific case is generally up to the court: a certificate may be unlimited in scope (subject only to legally established limits), or it may provide relief only from those consequences specified in the certificate itself. This allows the court to tailor the scope of relief to each petitioner and his or her specific circumstances, including employment, licensing, or other objectives. Most states authorize revocation of the certificate if the person has a subsequent conviction.

It remains to be seen if judicial certificates of relief or restoration of rights will grow in popularity. Certainly, most of the advocacy around relieving collateral consequences has been in support of record-sealing, not the more transparent certificates that rely on the good will of employers, licensing boards, and landlords to

[134] *See* articles cited at note 123.

give them effect. Like a pardon, a certificate "makes what has happened *since* the crime a fully official part of that person's record, for all employers to see."[135] As it becomes apparent that record relief must explore a variety of forms particularly where felony convictions are concerned, and as certificates are given broader eligibility and more specific and substantial legal effect, this form of relief may become more popular than some of the other tools in the arsenal.

The Restoration of Rights Project contains a 50-state summary of expungement, sealing, and other record relief in each state, with links to specific state profiles that may be consulted for additional detail.

Report Card: Judicial Certificates of Relief

AL	**B**
AK	**F**
AZ	**F**
AR	**F**
CA	**B**
CO	**B**
CT	**B**
DE	**F**
DC	**F**
FL	**F**
GA	**F**
HI	**F**
ID	**F**

IL	**A**
IN	**F**
IA	**F**
KS	**F**
KY	**F**
LA	**F**
ME	**F**
MD	**F**
MA	**F**
MI	**F**
MN	**F**
MS	**F**
MO	**F**

MT	**F**
NE	**F**
NV	**F**
NH	**F**
NJ	**A**
NM	**F**
NY	**A**
NC	**C**
ND	**F**
OH	**B**
OK	**F**
OR	**F**
PA	**F**

RI	**C**
SC	**D**
SD	**F**
TN	**A**
TX	**F**
UT	**F**
VT	**A**
VA	**F**
WA	**C**
WV	**F**
WI	**F**
WY	**F**
Fed	**F**

[135] *See supra* notes 126-27; *see also* Doleac & Lageson, *supra* note 82 (arguing that the expansion of record-sealing is "premature" and that policymakers should, among other things, experiment with policies that "increase the information available to employers about individuals' rehabilitation and job-readiness," like judicial certificates of relief).

D. Diversion and Deferred Adjudication

An increasingly popular record relief strategy involves diverting individuals away from a conviction at the front end of a criminal case. Diversion offers a less adversarial means of resolving an investigation or prosecution through compliance with agreed-upon community-based conditions leading to termination of the matter without conviction. Diversionary dispositions are described in the Model Penal Code: Sentencing as a way to "hold the individual accountable for criminal conduct when justice and public safety do not require that the individual be subjected to the stigma and collateral consequences associated with conviction."[136] In this understanding, diversion can function as a means to accountability and rehabilitation, rather than as retribution for its own sake.[137] The effectiveness of diversionary dispositions in furthering these goals has not been studied in depth, but existing research suggests

[136] *See* American Law Institute, Model Penal Code: Sentencing (2017) §§ 6.06(2) ("Deferred Adjudication"), 6.04(2) ("Deferred Prosecution") (same quoted phrase except "charge and" are inserted before conviction). Because one goal of this model law is to introduce more transparency and structure into a prosecutor's administration of pure diversion, the section on deferred prosecution is considerably more detailed than the one dealing with court-managed diversion. These schemes may have been modeled on Section 301.5 of the 1962 Model Penal Code, which provides that upon successful completion of a period of probation, the court may order that the judgment "shall not constitute a conviction for the purpose of any disqualification or disability imposed by law upon conviction." Diversionary schemes have antecedents even in the early 20th century. *See, e.g., Marks v. Wentworth*, 85 N.E. 81, 82 (Mass. 1908) (if "the object of the probation seems to the court to have been accomplished, in such a way as not to require any punishment of the defendant, either for his own reformation or in the interests of the public, the court may finally dispose of the case by a dismissal of it"); C. S. Potts, *The Suspended Sentence and Adult Probation*, 1 TEX. L. REV. 188, 190 (1923) (discussing 1913 law; "[i]f defendant is not convicted of another felony during the time assessed as punishment by the jury, he may make application for a new trial and have the case dismissed."); *Report of Committee C of the American Institute of Criminal Law and Criminology*: *Adult Probation Parole and Suspended Sentence*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 438, 443 (1910) ("we strongly recommend that after successful probation the indictment or complaint should be dismissed of record.").

[137] *See* Love, *et al., supra* note 41 § 7:22 ("Deferred adjudication and other diversionary dispositions"); Margaret Love, *Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences,* 22 FED. SENT'G REP. 6 (2009).

their promise.[138] Diversion may also be employed in cases where the extent of culpability is not clear, to allow for a mutually-acceptable outcome for the prosecutor and individual.

While terminology and program characteristics vary, there are two primary types of diversion: pure diversion (prosecutor-managed) and deferred adjudication (court-managed). One or both of these dispositions are authorized in every jurisdiction.[139]

Pure diversion, sometimes also called deferred prosecution, is controlled by the prosecutor and may commence before or after the filing of criminal charges. Typically, it involves an agreement between the prosecutor and an arrested or charged individual that successful completion of a community-based program will terminate the criminal investigation or prosecution. While a court may be involved in approving the terms of a diversion agreement, particularly if it involves use of court supervisory or treatment resources, the prosecutor decides whether a person may participate in diversion and has complied with conditions of the agreement, so as to avoid further prosecution. Pure diversion may result in a formal decision not to prosecute ("nolle prosequi"), and the record of the defendant's arrest and any charges may be subject to court-ordered dismissal and sealing. If the person was never charged, there may be no court record to seal, and state laws may or may not provide

[138] *See, e.g.,* Michael Mueller-Smith and Kevin Schnepel, *Diversion in the Criminal Justice System* (January 17, 2019) (studying short- and long-term outcomes of deferred adjudication in Harris County, Texas, and finding notable benefits for young Black men with no previous involvement in the justice system), https://sites.lsa.umich.edu/mgms/wp-content/uploads/sites/283/2019/01/Diversion.pdf; Ted Chiricos *et al., The labeling of convicted felons and its consequences for recidivism* (17 Sept., 2007) (studying recidivism outcomes of withheld adjudications in Florida), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1745-9125.2007.00089.x.

[139] *See Pretrial Diversion*, National Conference of State Legislatures (September 28, 2017), *available at* http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx (providing statutes for 48 states and the District of Columbia); S.D. Codified Laws §§ 23A-3-35, 23A-3-36, 23A-27-12.2, 23A-27-13. The one state that apparently lacks diversion by statute, North Dakota, provides for diversion by court rule. *See* N.D. R. Crim. P. 32.2.

for limiting public access to uncharged arrest records in a state repository and law enforcement agency.[140]

Deferred adjudication is designated variously in state codes,[141] and varies also in how it is administered from state to state. But it is most saliently distinguished from pure diversion by the more formal involvement of the court in managing the criminal case after charges have been filed. It often requires a plea, admission, or finding of guilt, and always includes a period of probation and/or other conditions administered by the court, with the court deferring entry of a judgment of conviction. The prosecutor may have a say in which defendants are given the option of a deferred disposition, and in a few states even a dispositive one, but the key legal difference between the two dispositions is that the court determines whether the defendant has complied with conditions when adjudication or sentencing has been deferred, so to warrant vacating any plea and dismissing the charges. Nowadays, dismissal of the charges generally includes sealing of the record, frequently but not always at disposition.

The discussion that follows focuses on deferred adjudication rather than prosecutor-controlled diversion, as the latter frequently operates informally in accordance with the policies of a specific prosecutor's office and typically does not involve a formal court proceeding, other than placing the diversion agreement on the record. This section also does not discuss record relief mechanisms by which courts are authorized to reduce felony convictions to misdemeanors after completion of conditions, dispositions that resemble deferred adjudication in offering an alternative

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[140] *See* Collateral Consequences Res. Ctr., Model Law on Non-Conviction Records § 2(a)(Dec. 2019), https://ccresourcecenter.org/model-law-on-non-conviction-records/.

[141] *See, e.g.,* Ark. Code § 16-93-1206 ("suspended imposition of sentence"); Cal. Penal Code §§ 1000 & 1000.8 ("deferred entry of judgment"); Colo. Rev. Code § 18-1.3-102 ("deferred sentencing"); 11 Del. Cod. § 4218 ("probation before judgment"); Conn. Gen. Stat. § 54-56e ("accelerated pretrial rehabilitation"); Hawaii Rev. Stat. § 853-1 ("deferred acceptance of guilty plea"); Maryland Code, Criminal Procedure § 6-220 ("probation before judgment"); Mass. Gen. Laws ch. 278, § 18 ("continuance without a finding"); N.Y. Crim. Proc. Law § 170.55 ("adjournment in contemplation of dismissal"); N.D. Cent. Code § 12.1-32-02(4) ("deferred imposition of sentence"); Ohio Rev. Code § 2951.041 ("intervention in lieu of conviction); Tex. Code Crim. Proc. art. 42A.102 ("deferred adjudication community supervision"); Utah Code Ann. 77-40-104 ("plea in abeyance"); 18 U.S.C.A. § 3607 ("pre-judgment probation").

way of encouraging compliance and making the record eligible for expungement, but that do not have the advantage of avoiding a record of conviction.[142]

Deferred adjudication first became popular in the 1970s as an efficient case management tool for prosecutors reluctant to divert entirely, and a way of maximizing the possibility that salvageable defendants could be steered out of the justice system entirely so as to avoid the collateral consequences of a conviction.[143] (Avoidance of collateral consequences was of course considerably easier in the days before digitization of criminal records and the near-universal practice of background checking.) There are pluses and minuses both for criminal defendants and for the prosecution in these types of dispositions: for defendants there is the prospect of a "clean slate" if they can manage to comply with sometimes-onerous conditions, which may include substantial financial costs for supervision or required programs, and for prosecutors there is the prospect of swift and potentially harsh consequences if a defendant fails.[144] At the same time, the long-term benefits for the community of this

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[142] *See, e.g.*, Cal. Penal § 17(b) ("wobbler" charged as a felony may be reduced to a misdemeanor); Idaho Code. Ann § 19-2601(3) (reduction of felony to misdemeanor); Minn. Stat. § 609.13, subd. 1 (same); N.D. Cent. Code § 12.1-32-02(9) (same).

[143] *See, e.g., Yale v. City of Independence*, 846 S.W.2d 193 (Mo. 1993) ("The obvious legislative purpose of the sentencing alternative of suspended imposition of sentence is to allow a defendant to avoid the stigma of a lifetime conviction and the punitive collateral consequences that follow."); *State v. Schempp*, 498 N.W.2d 618, 620 (S.D. 1993) (noting that the purpose of suspended imposition of sentence is "to allow first-time offender to rehabilitate himself without the trauma of imprisonment or the stigma of conviction record"). *See generally* Love, *Alternatives to Conviction, supra* note 136, at 6.

[144] *See, e.g.,* Amy Yurkanin, *Leniency for sale? Alabama offers first offenders a second chance -- at a price*, AL.com (Oct. 9, 2017, updated Mar. 7, 2019), https://www.al.com/news/2017/10/dismissal_for_sale_programs_of.html; *see generally* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM 11 (2009), *available at* http://www.nacdl.org/criminaldefense.aspx?id=20191 ("Although procedures vary, the hoops through which participants must jump result in dismissals for relatively few defendants. Profound consequences flow from every failure."). Commenting on the perils of exposing ill-equipped defendants to the high cost of failure under the Texas deferred adjudication law, a practitioner in that state recalled that

> prosecutors value it as an option because it is available to a broader group of offenses than regular probation (and they have lobbied to keep it that way), and particularly because the defendant retains their full exposure to the underlying penalty. So a

sort of conviction-avoidance setup for at least some defendants have been established in the research literature.[145]

While every state offers some form of diversion,[146] only two states (Kansas and Wisconsin) do not authorize their courts to defer adjudication in any cases involving criminal charges. This appears to represent a significant expansion of an important record remedy just in the two years since an earlier prior version of this report was published in 2018, when we identified 13 states that made no provision for deferred adjudication.[147] In those two years, states have expanded eligibility for court-managed diversionary dispositions and made sealing more generally available after successful completion. Some states have also eliminated the requirement of a guilty plea to avoid having this disposition trigger federal collateral consequences, as some federal laws and policies—including immigration law—treat diversionary pleas as convictions, even if no judgment of conviction is ever entered by the court.[148]

States have expanded eligibility for court-managed diversionary dispositions and made sealing more generally available

deferred for burglary (a first degree felony) can be violated with limited due process and get the 50 years the prosecutor wanted in the first place. They tell the baby DAs that deferred is the easy way to send someone to prison "because you know they're going to screw up."

[145] *See supra* note 137.

[146] *See supra* note 138.

[147] *See* Love, Gaines & Osborne, *supra* note 3 at 13. It is likely that several of the 13 states reported as having no deferred adjudication authority in fact had such a program through a drug or other intervention court.

[148] *See, e.g.,* Or. Rev. Stat. § 475.245 (eliminating the requirement of a plea or admission to avoid triggering deportation under 8 U.S.C. § 1101(a)(48)); Colo. Rev. Stat. § 18-1-410.5 (authorizing vacating guilty pleas in diversion cases on grounds that they were entered without adequate advice of counsel). Among the other federal laws and policies that treat diversionary dispositions as a conviction if the person was required to plead guilty or admit facts sufficient to establish guilt, even if the plea has been withdraw and the case dismissed, are federal sentencing guidelines, U.S.S.G. § 4A1.2(f) and the federal Fair Credit Reporting Act, 15 U.S.C. § 1681c(a), *as construed by Aldaco v. RentGrow, Inc.*, 921 F. 3d 685 (7th Cir. 2019). The federal banking laws independently consider diversionary dispositions to be

The map accompanying this section shows that 20 states now make deferred adjudication broadly available, in many cases for any offense eligible for a probationary sentence and without regard to prior record, leaving it up to the court (and in some states also the prosecutor) to determine the appropriateness of the disposition on a case-by-case basis.[149] Alabama and Georgia are included in this category because of their extensive system of intervention courts that are administered on a county-by-county basis.[150] All but one of these 20 states (Idaho) authorize sealing upon successful completion, though Texas requires a 2-to-5-year waiting period in some cases before the court will issue an Order of Nondisclosure.[151] In many of the 20 states, a court-managed diversion program has existed for years,

convictions without regard to a guilty plea, *see* 15 U.S.C. § 1892(a)(1)(A), but the FDIC has recently proposed to amend its interpretive policy document to give effect to expungement and sealing, which should provide states with incentive to amend some of the deferred adjudication provisions that require waiting periods before sealing or do not provide for sealing at all. *See* Federal profile, Restoration of Rights Project, Section III(B)(3)(b).

[149] The 20 states whose courts have broad deferred adjudication authority are: Alabama, Colorado, Georgia, Idaho, Massachusetts, Maryland, Maine, Mississippi, Missouri, Nebraska, New Mexico, New York, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Washington, and West Virginia. Details of these laws and statutory citations are available in the relevant state profiles from the Restoration of Rights Project.

[150] Alabama diversion courts are established and administered county-by-county under a general state-wide authority, and eligibility criteria and conditions are established locally. The courts have reportedly had broad participation and, in many cases, considerable success both for defendants and for the government. But participation in deferred programs may come at a high price, both literally and figuratively, and lead to more severe punishments for those who are unable to pay. *See* Yurkanin, *supra* note 143. Georgia's system of "Accountability Courts," authorizing diversion in non-property and drug crimes, is similarly structured. https://cjcc.georgia.gov/accountability-court-program. *See* Ga. Code Ann. §§ 35-3-37(h)(2)(C), 15-1-20(b). In contrast, the administration of Mississippi's intervention courts is centralized and governed by state statute.

[151] In Texas, people charged with non-violent misdemeanors who are discharged following "deferred adjudication community supervision" are eligible for an automatic OND, although the court may deny relief in specific cases. Those denied automatic relief, along with those charged with felonies and serious and repeat misdemeanors, may seek relief after a waiting period, two years for misdemeanants and five years for felonies. *See* Tex. Code Crim. Proc. art. 42A.102; Tex. Gov't Code § 411.0725.

though programs have recently been expanded or reorganized to target certain populations, like veterans and individuals with mentally health needs.[152]

The next category of 13 states is distinguishable from the first by varying restrictions on eligibility based on offense charged or prior record and, for many, limits on record relief.[153] Florida and Louisiana alone in this group allow someone with a prior felony conviction to participate, but both restrict sealing (Florida for almost any prior record and Louisiana by a 10-year waiting period). Illinois has a 5-year wait to seal, and Iowa and Wyoming do not allow sealing. Pennsylvania and Delaware restrict eligibility for their "probation before judgment" programs to misdemeanor-level cases. Another group of 16 states, D.C. and the federal system offer deferred adjudication only in specialized types of cases, typically drug cases where the person has no prior record. As noted, only Kansas and Wisconsin make no provision for court-managed diversion.

The only federal statute authorizing deferred adjudication was enacted in 1984 and adheres to the narrowest eligibility model, with relief narrowly targeted to youthful offenses.[154] In recent years federal courts have implemented various programs to divert and defer criminal defendants,[155] but there is little authority for these

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[152] Our report on laws enacted in 2019 stated:

> In 2019, 18 states enacted 26 laws creating, expanding, reorganizing, or otherwise supporting diversionary and deferred dispositions, to enable individuals charged with crimes to avoid a conviction record . . . . extend[ing] this favorable treatment to juveniles, military service personnel and veterans, persons with mental illness, drug and alcohol users, human trafficking victims, caregivers of children, and even certain persons charged with sex offenses.

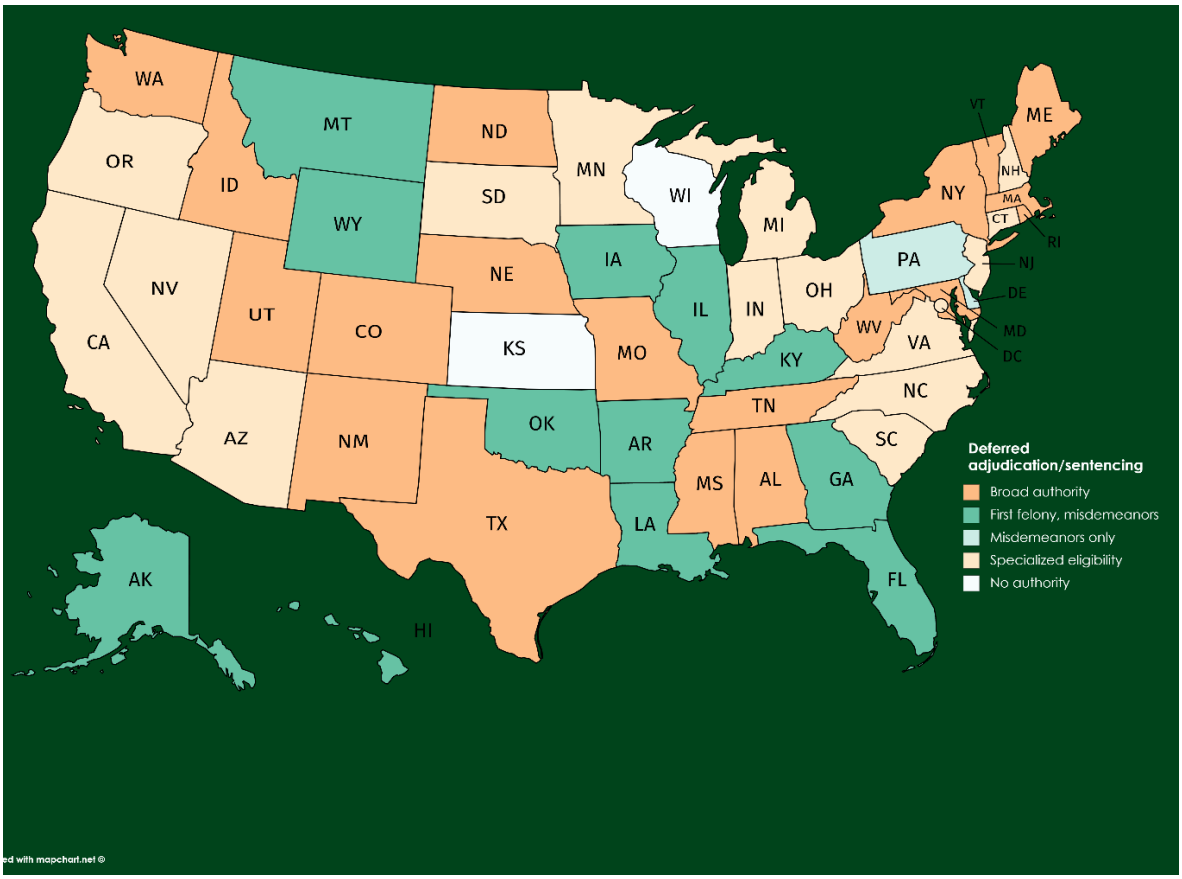
See CCRC, *Pathways to Reintegration: Criminal Record Reforms in 2019* at 21, https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.

[153] States in this category are Alaska, Arkansas, Delaware, Florida, Hawaii, Iowa, Kentucky, Louisiana, Montana, Oklahoma, Pennsylvania, and Wyoming.

[154] *See* 18 U.S.C.§ 3607 (deferred adjudication if a person charged with drug possession has no prior drug conviction, with expungement only if the offense was committed under the age of 21).

[155] A 2017 report from the United States Sentencing Commission (USSC) catalogues various programs managed by federal courts that are geared to avoiding a prison sentence, though perhaps not always a criminal record. *See Federal Alternative-to-Incarceration Court Programs* (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-

programs in federal statutes and no evidence of Congressional interest even in expanding the limited statutory authority that does exist.



In the end, as the public appetite for punitive justice policies fades in the states, and a public commitment to clean slate outcomes grows stronger, it is likely that governments will focus more resources on community-based accountability and rehabilitative programs as opposed to punitive custodial penalties.

publications/research-publications/2017/20170928_alternatives.pdf. That report describes generally analogous state problem-solving court programs but does not focus on statutory deferred adjudication options aimed at avoiding conviction and generally leading to expungement of the record. Perhaps because federal law contains only one narrow authority for deferred adjudication (18 U.S.C. § 3607, sometimes referred to as the Federal First Offender Act), the USSC report does not address non-incarceration outcomes that avoid a conviction record. Curiously, it does not suggest the potential usefulness of such outcomes in reducing recidivism or proposed further study of these issues. Such a study has been suggested on several occasions by the Practitioner's Advisory Group to the USSC.

In this environment we can expect that jurisdictions will expand reliance on court-managed diversionary programs, and that we can expect to see additional states joining the 20 whose programs are "broadly inclusionary." There have been only a few research studies of these programs, but those that do exist have found them effective in promoting desistance, employment, and earning outcomes at least for some populations.[156] As the adverse consequences of a conviction record show no signs of abating, studying conviction-avoidance mechanisms like deferred adjudication should be a research priority for the academy.

The few research studies that exist have found diversion effective in promoting desistance, employment, and earning

Further information about deferred adjudication procedures and eligibility can be found in in the state-by-state profiles in the Restoration of Rights Project (http://restoration.ccresourcecenter.org).

Report Card: Deferred Adjudication

AL	**B**
AK	**C**
AZ	**D**
AR	**B**
CA	**D**
CO	**A**
CT	**D**
DE	**C**
DC	**D**
FL	**C**
GA	**B**
HI	**B**
ID	**B**

IL	**C**
IN	**D**
IA	**C**
KS	**F**
KY	**B**
LA	**C**
ME	**A**
MD	**A**
MA	**A**
MI	**D**
MN	**D**
MS	**A**
MO	**A**

MT	**B**
NE	**A**
NV	**C**
NH	**D**
NJ	**D**
NM	**A**
NY	**C**
NC	**F**
ND	**A**
OH	**C**
OK	**B**
OR	**D**
PA	**C**

RI	**A**
SC	**F**
SD	**D**
TN	**A**
TX	**B**
UT	**A**
VT	**A**
VA	**F**
WA	**A**
WV	**A**
WI	**F**
WY	**C**
Fed	**D**

[156] *See supra* note 137.

E. Non-Conviction Records

When a person is arrested, the police generate a record and send it to a state's central repository. Many arrests do not lead to charges. If charges are filed, they may be dismissed by the prosecutor or by the court. Increasingly, people are placed in diversion programs, with or without a plea, where completion of specified requirements results in dismissal. Occasionally, the accused goes to trial and is acquitted, or prevails on appeal. These are all scenarios that do not result in conviction, yet each produces a criminal record that may result in a litany of adverse consequences for its subject.[157] Sometimes there is no indication in the official court or repository files of whether or how an arrest or charge was resolved, but the record remains open, the matter apparently still pending, which may seem to an employer or landlord more ominous than a closed case.[158]

The mere fact of an arrest will leave a person with a criminal record that is hard to erase

It is particularly disturbing, at a time when so many Americans have taken to the streets to protest police violence and racism, that in most states the mere fact of an arrest will leave a person with a criminal record that is hard to erase, creating long-term barriers to employment and housing, and in other areas of daily life. Protesters should not wind up with a lifelong criminal record.[159]

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[157] Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–1000 (2019); Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions,* 20 U. PA. J. L. & SOC. CHANGE 81 (2017); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 821–844 (2015).

[158] The FBI's Interstate Identification Index system, compiled from state repository submissions, was "missing final disposition information for approximately 50 percent of its records" as of 2006. U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (June 2006), https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

[159] Margaret Love & David Schlussel, *Protesting Should Not Result in a Lifelong Criminal Record*, Wash. Post (June 15, 2020), https://www.washingtonpost.com/opinions/2020/06/15/protesters-should-not-get-lifelong-criminal-record/.

In 2019, we published a Model on Law on Non-Conviction Records.[160] Drafted in consultation with an advisory group of lawyers, judges, lawmakers, academics, policy experts, and advocates, the model law provides policy guidance on limiting access to and use of non-convictions. The conventional expungement or sealing process requires a burdensome and expensive court procedure that only a small percentage of those who are eligible will ever complete. Instead, our model recommends automatic expungement of all non-conviction records, including records with no final disposition, except for pending matters. The model also sets out recommended restrictions on accessing, inquiring about, and commercially disseminating non-conviction records.

Consistent with these recommendations, 15 states now automatically expunge or seal most non-conviction records. California and North Carolina will join this group when their recently enacted laws go into effect in 2021.[161] Of these 17 laws, 10 were enacted in the last five years alone: Kentucky and North Carolina (2020); California, New Jersey, and Utah (2019); New Hampshire, Pennsylvania, and Vermont (2018); Montana (2017); and Nebraska (2016). The other seven states are Alaska, Connecticut, Maine, Michigan, New York, South Carolina[162], and Wisconsin. Some of these laws provide relief at the time of disposition and others after a waiting period. While these reforms are promising, some states do not cover dispositions like uncharged arrests or dismissals without prejudice, or relief may be prospective only (i.e. California), requiring affected individuals to file a court petition to obtain relief. Those gaps can be filled through subsequent lawmaking. For example, in New York, a progressive 1970s-era law provided for sealing of non-convictions at disposition by the court, but uncharged arrests frequently languished in the state records repository because the police or prosecutor neglected to indicate that the

15 states now automatically expunge or seal most non-conviction records

[160] *See* note 140, *supra*.

[161] *See* 50-State Comparison: Expungement, Sealing & Other Record Relief, Collateral Consequences Resource Center, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/.

[162] Expungement is automatic for non-convictions disposed in Magistrate or Municipal Court, but a petition is required if disposed in other courts. *See* S.C. Code Ann. § 17-22-950.

matter would not proceed.[163] In 2019, New York made undisposed cases confidential after five years, providing relief for people with uncharged arrests and other matters stuck in limbo.[164]

In addition to the 17 states that have automatic sealing, 7 states expedite non-conviction relief through motions filed at the time of dismissal or acquittal without any waiting period (Colorado, Illinois, Massachusetts, Mississippi) or through a simplified administrative procedure (Delaware, Hawaii, Idaho).[165]

26 states and D.C. still require a court petition process before they will seal or expunge non-convictions

But 26 states and D.C. still require a court petition process before they will seal or expunge non-convictions, an approach increasingly seen as inappropriate and unnecessary for this category of records. Many of these jurisdictions unreasonably restrict eligibility and impose burdensome procedural hurdles such as filing fees and contested hearings.[166] The federal system and Arizona completely lack a non-conviction expungement law, though Arizona

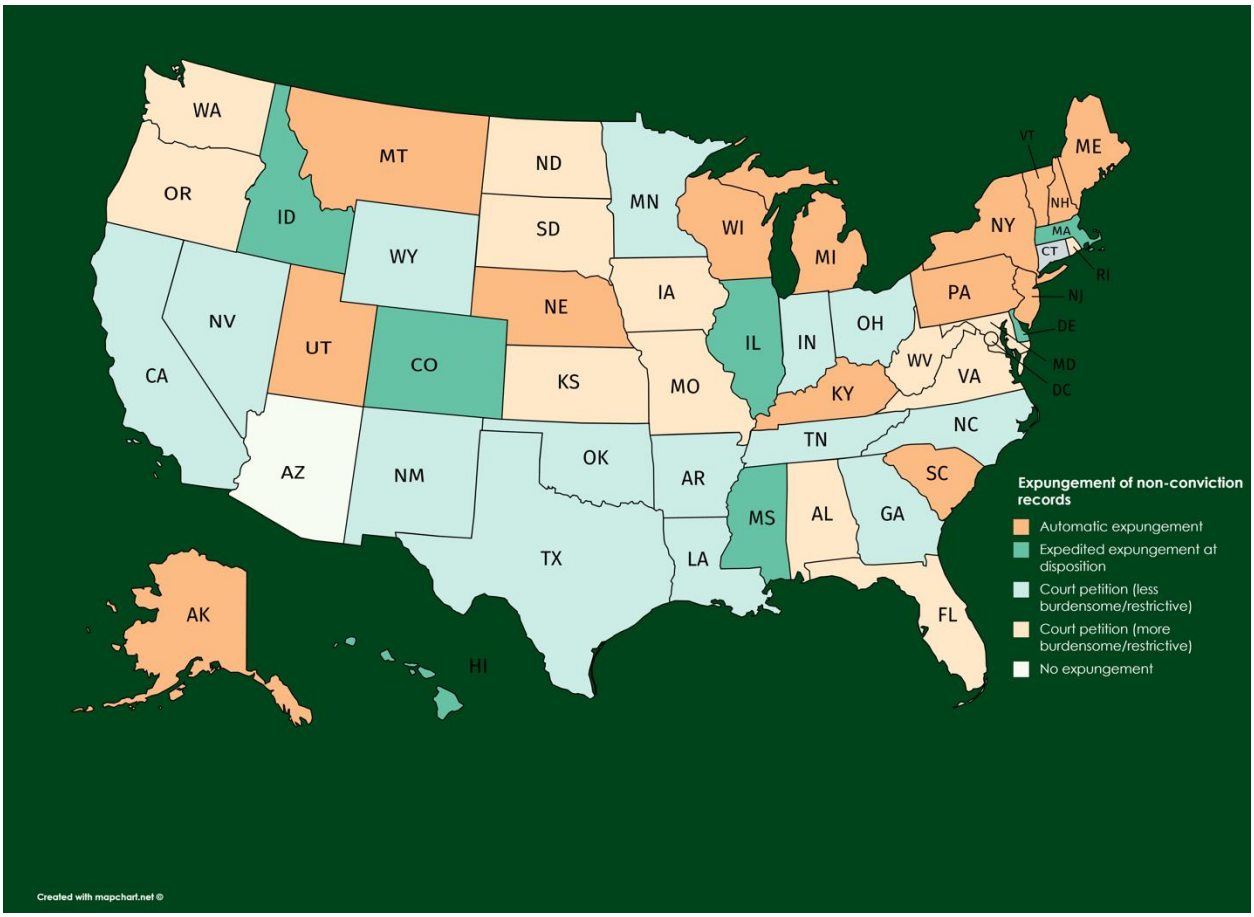
[163] *See* N.Y. Crim. Proc. Law § 160.50.

[164] *Id.* § 845-C. New York lawyers who served as Advisors to the model law project explained the high percentage of undisposed cases in repository and court records systems in that state as the product of reporting requirements that are unclear and/or unenforced, mistakes made along the way by various actors in the criminal justice system, and the vagaries of official record-keeping that make it look as though the individual has an open, pending case or undisposed charge, when that is not true. Just as one example, multiple charges in a criminal case may be resolved by a plea to one of them, or to a charge added to the docket for purposes of disposition, while charges other than the pled-to charge may remain on court records as "not disposed yet," although in fact they have been covered by a plea. This can have serious consequences for the subjects of these records if they are asked to list their criminal convictions, since they would likely and understandably leave these non-conviction records out. Once a background check is run they may be accused of lying or falsifying applications, be denied the jobs, licenses, employment clearance, apartments, college or law school admission they seek, and be branded as not credible. *See* Model on Law on Non-Conviction Records n. 25 (Collateral Consequences Res. Ctr. 2019), https://ccresourcecenter.org/model-law-on-non-conviction-records/.

[165] *See supra* note 159.

[166] *Id.*

allows non-convictions to be notated as "cleared" if the subject can show that the charge was "wrongful."[167] Federal law provides no relief at all.[168]



For these 26 petition-based states, restrictive eligibility criteria may include disqualifications based on some unrelated record, such as a prior conviction or prior record-sealing, a current registration obligation, or a bare arrest during a waiting period. For example, in Florida, a prior conviction in a Florida court for any felony or a list of specified misdemeanors, including as a minor, disqualifies a person from

[167] Ariz. Rev. Stat. § 13-4051(A).

[168] Federal law has a narrow expungement authority that applies to first-offense drug deferred adjudication for persons under 21, 18 U.S.C. § 3607(a), and some courts have held that federal courts have inherent ancillary authority to expunge records where an arrest or conviction is found to be invalid or a clerical error is made. *See, e.g., United States v. Jane Doe,* 833 F.3d 192 (2d Cir. 2016), *vacating* 110 F. Supp. 3d 448 (E.D.N.Y. 2015) (collecting cases)*; United States v. Crowell*, 374 F.3d 790, 792-93 (9th Cir. 2004), *cert. denied*, 543 U.S. 1070 (2005).

sealing or expungement, as does a prior sealing or expungement of any kind.[169] The District of Columbia has one of the most restrictive schemes, applying similar complex eligibility criteria to conviction and non-conviction records alike, including multiple waiting periods and disqualifying arrests and convictions, ending with a discretionary decision by a judge.[170]

D.C. has one of the most restrictive schemes, applying similar complex eligibility criteria to conviction and non-conviction records alike

Other states limit eligibility based on the type of offense or nature of the non-conviction disposition. For example, Alabama does not allow violent felony charges to be expunged unless the person was acquitted after trial.[171] In one high profile 2019 case, the state dropped capital murder charges before trial after surveillance footage exonerated the accused, but the record was categorically ineligible for expungement because the now-failed charges were violent felonies. Alabama's attorney general acknowledged that the case "may draw light to a situation in which the [expungement] statute could be amended," but no steps have apparently been taken to do this. [172] A few states, including Idaho, Virginia, and Wyoming, do not permit deferred adjudication cases to be expunged, no matter the offense.

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[169] Fla. Stat. Ann. §§ 943.0585.

[170] *See* D.C. Code §§ 16-801, 16-803 (waiting period of two to four years; various prior or subsequent criminal records are disqualifying or extend the waiting period by 5 or 10 years; waiting periods for all of a person's arrests and convictions must be satisfied unless a person waives right to seal the arrests and convictions; court must find that sealing is "in the interests of justice" under a multi-factor balancing test). For example, in what may be a unique concession to the power of the prosecutor's office in criminal cases, and D.C.'s federal prosecutors in particular, ineligibility for sealing of a non-conviction record based on a prior disqualifying offense may be waived "except when the case terminated without a conviction as a result of the successful completion of a deferred sentencing agreement." D.C. Code § 16-803(2)(A), (B).

[171] *See* Miss. Code Ann. §§ 99-15-59; Ala. Code §§ 15-27-1, 15-27-2.

[172] Steven Dilsizian, "I-Team: Attorney General Steve Marshall Addresses Alabama Expungement Law," WAA31 ABC (May 7, 2019), https://www.waaytv.com/content/news/Alabama-Attorney-General-Steve-Marshall-addresses-state-expungement-law-509604601.html.

Some of the 26 petition states require satisfaction of court debt, such as costs and fees, as a prerequisite to expungement, despite the lack of a conviction in the case.[173] Iowa's requirement to pay all court debt as a precondition to expungement was challenged by a woman who could not afford to pay the $718 court-appointed attorney fee imposed when her case was dismissed.[174] After the Iowa Supreme Court rejected her argument that this represented unfair wealth discrimination, we filed an amicus brief encouraging the U.S. Supreme Court to take up the case, but the petition was declined.[175]

Unlike states that expunge non-convictions at the time of disposition on an automatic basis (i.e. New Jersey) or upon request (i.e. Colorado), the petition-based states usually have waiting periods—during which, in some states such as Missouri, an otherwise-eligible person must remain conviction-free or the waiting period begins anew. The length of time varies from days (180 in Wyoming) to a year (Indiana) to multiple years (3 in Missouri). Sometimes a state's regular waiting period is extended for serious charges (D.C.), uncharged arrests (Nevada), or charges dismissed without prejudice or following diversion or deferred adjudication (Alabama). In a few cases, the person may not even be arrested during a recent period (i.e. Oregon requires a three-year arrest-free period, excluding the arrest sought to be expunged).

The petition process itself is usually costly as a result of filing fees, background fees, the demanding production of law enforcement and court records, collection of evidence of good character, and/or formal service on prosecutors, etc.[176] A formal court hearing may even be required at which the prosecutor and alleged victims may

[173] *See, e.g.* Iowa Code § 901C.2(a)(2).

[174] *See State v. Doe*, 927 N.W.2d 656 (Iowa, 2019).

[175] *See id.*; Amicus Brief of Collateral Consequences Resource Center et. al in Support of Petition for Certiorari, No. 19-169 (U.S. 2019), available at https://www.supremecourt.gov/DocketPDF/19/19-169/115174/20190909162439215_190903%20for%20E-Filing.pdf. In a subsequent case, the Iowa Supreme Court rejected the state's argument that the court debt requirement extends to any debt owed in any case, holding that a person only need to pay off the debt in the case sought to be expunged in order to be eligible. *See Doe v. State*, No. 19–1402 (Iowa, May 22, 2020).

[176] *See, e.g.*, Ohio Rev. Code Ann. §§ 2953.52; 22 Okla. Stat. Ann. § 18(A)(7).

oppose relief—either in every case or if an objection is filed. Sometimes the requirement of a hearing is left entirely up to the court.

Some petition states have a generous standard of review for those petitioning to expunge non-convictions (Indiana, for example, requires the court to grant relief to eligible applicants unless charges are pending against them,[177] and Nevada applies a rebuttable presumption in favor of sealing[178]). But other states apply a broad discretionary standard more commonly found in the conviction context. Oregon, for instance, requires the court to determine "that the circumstances and behavior of the applicant…warrant setting aside" and sealing the non-conviction record—the same discretionary standard that Oregon applies to conviction records.[179]

It is disturbing, particularly at a time when large-scale protests have produced thousands of arrests, that more than half the states retain antiquated petition systems in urgent need of reform.

The end result of all these barriers is not only exclusion but also deterrence. The unreasonable call for completion of costly, intimidating, and time-intensive procedural tasks, such as document production and service of process, means that many thousands will resign themselves to simply living with the fact of an arrest record. Years after charges were dismissed, very few will want to have to hire a lawyer again and make a trip back to the police station and courthouse, especially if they have since moved out of town or to another state. It is encouraging that so many additional states have moved towards automatic or streamlined expungement of non-convictions in recent years, a trend that will hopefully continue to accelerate. But it is disturbing, particularly at a time when large-scale protests have produced thousands of arrests, that more than half the states retain antiquated petition systems in need of reform.

The Restoration of Rights Project contains a 50-state summary of expungement, sealing, and other record relief in each state, with links to specific state profiles that may be consulted for additional detail.

[177] Ind. Code § 35-38-9-1.

[178] Nev. Rev. Stat. § 179.2445.

[179] Or. Rev. Stat. § 137.225(3).

Report Card: Non-Conviction Records

AL	**D**
AK	**B**
AZ	**F**
AR	**C**
CA	**C**
CO	**B**
CT	**A**
DE	**B**
DC	**D**
FL	**D**
GA	**C**
HI	**B**
ID	**B**

IL	**B**
IN	**C**
IA	**D**
KS	**D**
KY	**A**
LA	**C**
ME	**B**
MD	**D**
MA	**B**
MI	**A**
MN	**B**
MS	**B**
MO	**D**

MT	**A**
NE	**A**
NV	**C**
NH	**A**
NJ	**A**
NM	**C**
NY	**A**
NC	**C**
ND	**D**
OH	**C**
OK	**C**
OR	**D**
PA	**A**

RI	**D**
SC	**A**
SD	**D**
TN	**C**
TX	**C**
UT	**A**
VT	**A**
VA	**D**
WA	**D**
WV	**D**
WI	**A**
WY	**C**
Fed	**F**

III. FAIR EMPLOYMENT & OCCUPATIONAL LICENSING

Introduction

There is perhaps no more critical aspect of a reintegration agenda than removing the many unjustified and unjustifiable barriers faced by people with a criminal record in the workplace.[180] In an era of near-universal background checking and search engines, the "Mark of Cain" they bear will sooner or later be known to potential employers and licensing boards even if it is not called for on an initial application. Some barriers take the form of laws formally disqualifying people with certain types of convictions from certain types of jobs.

More frequently barriers result from informal employer or agency discrimination grounded in an aversion to risk and, too frequently, racial stereotypes. Whether it is securing an entry level job, moving up to management responsibilities, or being certified in a skilled occupation, people with a criminal record are at a disadvantage, if they are even able to compete. As between two individuals with hypothetically equal qualifications, it is easy to justify breaking the tie in favor of the person who has never been arrested.

As between two individuals with hypothetically equal qualifications, it is easy to justify breaking the tie in favor of the person who has never been arrested.

Individualized record relief mechanisms like expungement or pardon are intended to improve employment opportunities, and they are helpful on a case-by-case basis to

[180] Studies have shown that having a well-paying job has a demonstrable impact on recidivism rates for those released from prison. *See, e.g.,* Crystal Yang, *Local labor markets and criminal recidivism*, 147 J. PUB. ECONOMICS 16 (2017). Recent years have produced an extraordinary literature on the public policy importance of removing barriers to employment and licensure for those with criminal records, as a matter of economic efficiency, public safety, and fairness. *See, e.g.,* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2461 (2020). The chapter on "Consequences for Employment and Earnings" from the report of the National Research Council of the National Academy of Sciences, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 211-259 (Jeremy Travis and Bruce Western, eds.), remains the most thorough scientific treatment of the impact of incarceration on the life prospects of those who experience it.

those who are eligible and able to access them.[181] But equally important are systemic fair employment and licensing laws that impose general standards and provide for their enforcement, offering class-wide relief to individuals with a record. States have enacted an impressive number of this sort of "clean slate" law just since 2015, some building on laws enacted in an earlier period of reform in the 1970s, and others breaking new ground in regulating how employers and licensing agencies consider an applicant's criminal record.[182]

In employment, one of the most striking legislative trends in the past decade is the embrace of limits on inquiry into criminal history in the early stages of the hiring process, particularly for public employment. The so-called "ban-the-box" campaign that began modestly more than 15 years ago in California has now produced new laws or executive orders in two-thirds of the states and over one hundred cities and counties. More efficient and broadly effective than after-the-fact lawsuits, ban-the-box laws now represent the primary tool for eliminating unwarranted record-based employment discrimination on a system-wide basis. They are premised on an expectation that getting to know applicants before learning about this aspect of their background is likely to lead to a fairer and more defensible hiring decision. This should be particularly true when a records check comes only after a conditional offer is made, so if it is withdrawn there is little doubt about the reason.[183]

Occupational licensing has also seen an acceleration of legislative efforts to limit the arbitrary rejection of qualified workers. Significant procedural and substantive reforms have been enacted in more than half the states in the last five years, making licensing authorities newly accountable for their actions and individuals newly able to obtain and practice a skill with enhanced career prospects. Following suggestions

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[181] Recent reforms in a few states call for automatic sealing of records on a categorical basis, legislative relief that is described in Part II of this report on Record Relief.

[182] The term "clean slate" is frequently used to describe the desired effect of record-sealing laws, but its definition as "an absence of existing restraints or commitments" makes it equally apt in connection with regulation imposition of unwarranted record-related restrictions in employment and occupational licensing. *See* OXFORD DICTIONARY OF IDIOMS 65 (John Ayto, ed., 2020), https://www.lexico.com/definition/clean_slate.

[183] One caveat that has been raised by researchers about ban-the-box strategies is that barring early inquiry into criminal record may lead employers to rely on stereotypes about which applicants are likely to have one. *See generally infra* note 202.

proposed in model laws endorsed by organizations from across the political spectrum, states have substituted objective standards for vague "good moral character" criteria, prohibited consideration of irrelevant minor offenses unrelated to job performance, required licensing agencies to justify their decisions in terms of public safety, and imposed oversight requirements to hold licensing agencies accountable for their performance.

States have substituted objective standards for vague "good moral character" criteria and required licensing agencies to justify their decisions in terms of public safety

As shown in the following discussion and in the "Report Card" maps that follow the section, almost every state now has at least some law aimed at limiting record-based discrimination in employment or licensure, or both. Enforcement of these new laws may in many cases depend on education and persuasion rather than on lawsuits and executive orders, but this may make change come sooner and have a more lasting effect. The very exercise of repeatedly having to decide the relevance of an individual's past conduct through a transparent and accountable process is likely to result in more reliable decision-making, and a better understanding of those relatively few instances when it is legitimate to deny someone an opportunity to work based on their criminal record. We discuss the state of the law in greater detail in the following sections.

Note: Color-coded maps and a side-by-side Report Card for both employment and occupational licensing are at the end of the section.

A. Employment

Few states have adopted general rules prohibiting employment discrimination based on criminal record, and the only relevant federal law depends upon being able to establish disparate impact based on race or some other protected classification.[184] In

[184] The only national standards for employment of people with a criminal record, the 2012 EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 tests the validity of employment policies affecting people with a criminal record in terms of their adverse effect on groups that are otherwise protected from discrimination. The EEOC has taken the position that employers may not reject applicants based on an arrest record alone and may

fact, until this century, only three states had incorporated provisions relating to a record of arrest or conviction into their general FEP law: New York (1976), Wisconsin (1981), and Hawaii (1998).[185] Article 23-A of New York's Corrections Law prohibits "unfair discrimination" against a convicted person by public and private employers and licensing entities. The law imposes a "direct relationship" standard defined by a multifactor test limited only by public safety considerations, which may be enforced through the courts or through the State Human Rights Law. Certificates issued by a court or the parole board may lift mandatory employment or licensing bars and are evidence of rehabilitation in discretionary decisions. Rejected applicants must be given reasons in writing.[186] Wisconsin's fair employment law also covers arrest or

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not impose an across-the-board exclusion of people with a conviction record. The Guidance requires individualized consideration using a multifaceted screening test that considers the nature of the person's offense, the time elapsed since it occurred, and the nature of the position. *See* Love, *et al., supra* note 41 § 6:5. In 2019 the Fifth Circuit invalidated the Guidance, so its legal status is no longer clear. *See Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 451 (5th Cir. 2019) (finding that the EEOC overstepped its statutory authority in promulgating guidance on employers' use of criminal records in hiring).

[185] A fourth state, Connecticut, included as early as 1980 provisions addressing discrimination based on criminal record in public employment in its human rights code. *See* CONN. GEN. STAT. § 46a-80 (citing the former Sec. 4-61o which was transferred to Sec. 46a-80 in 1981). However, the state Commission on Human Rights and Opportunities evidently never regarded enforcement of these provisions as within its mandate. *See* 1994 memorandum from the Office of Legislative Research on Employment Discrimination Based on Prior Conviction of a Crime to the Connecticut General Assembly (Jan. 19, 1999), https://www.cga.ct.gov/PS94/rpt/olr/htm/94-R-0201.htm.

[186] *Compare Boone v. New York City Department of Education,* 38 N.Y.S.3d 711, 721 (N.Y. Sup. Ct. 2016) (holding that denial of security clearance for a position as a School Bus Attendant to petitioner convicted of shoplifting from her employer, without due regard to the factors set forth in Article 23-A, or petitioner's CRD, was arbitrary and capricious) *with Arrocha v. Bd. of Educ. Of City of N.Y.*, 93 N.Y.2d 361, 366 (1999) (holding that the Board of Education's determination that teaching license applicant's prior conviction for sale of cocaine came within statutory "unreasonable risk" exception to general rule that prior conviction should not place person under disability, was neither arbitrary nor capricious, where Board properly considered all statutory factors and determined that those weighing against granting license outweighed those in favor; age of conviction, applicant's positive references and educational achievements, and presumption of rehabilitation were outweighed by teacher's responsibility as role model and nature and seriousness of applicant's offense.).

conviction record, and has been broadly interpreted by the administrative agency responsible for its enforcement and the courts to require a conclusion that "a specific job provides an unacceptably high risk of recidivism for a particular employee."[187]

Many other states adopted laws in the last years of the 20th century providing that a conviction could not be the "sole" reason for refusing to employ someone, and enjoined employers to consider whether a criminal record was related in some fashion to the job. Some even set out detailed criteria for determining when a "direct relationship" (or, variously, "substantial" or "reasonable" relationship) exists between a person's criminal record and the position. These standards were sometimes sufficiently precise as to encourage rejected applicants to go to court, but the employer usually won.[188] Individuals rejected for employment because of a

[187] *See e.g. Palmer v. Cree, Inc.,* ERD Case No. CR201502651 (LIRC, Dec. 3, 2018) (finding that lighting products company could not show that a job applicant's convictions—for felony strangulation and suffocation, and misdemeanor battery, fourth degree sexual assault, and damage to property—were substantially related to employment as a lighting applications specialist who would have contact with the public; "Whether the crime is an upsetting one may have nothing to do with whether it is substantially related to a particular job*."); Staten v. Holton Manor, supra, ER*D Case No. CR201303113 (LIRC, Jan. 30, 2018) (holding that skilled nursing facility could not refuse to hire based on misdemeanor theft conviction that had been expunged; permitting the employer to do so would conflict with the purpose of the statute permitting expungement, which is to permit certain persons to "wipe the slate clean of their offenses and to present themselves to the world—including future employers—unmarked by past wrongdoing.").

[188] For example, Minnesota's Criminal Rehabilitation Act of 1974 prohibits discrimination in public employment and licensing and sets out a detailed set of standards for determining whether a criminal record is "directly related" to a specific job so that it justifies adverse employment action. *See* MINN. STAT. § 364.03, subd. 2. Even where a crime is found to be directly related, a person may not be disqualified if the person can show "competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought." § 364.03, subd. 3. Rehabilitation may be established by a record of law-abiding conduct for one year after release from confinement, and compliance with all terms of probation or parole. The problem is that, unlike the laws enacted in Wisconsin and New York, the Minnesota law contains no enforcement mechanism, leaving aggrieved individuals to seek relief in the courts, which have tended to interpret the standard in favor of the employer. *See, e.g.*, *Peterson v. Minneapolis City Council*, 274 N.W.2d 918 (Minn. 1979) (finding that conviction for attempted theft by trick directly related to the operation of a massage parlor); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987) (holding that embezzlement

criminal record had somewhat better luck under federal civil rights law if they could establish a correlation between criminal record and another independently prohibited basis for adverse treatment such as race.[189] But for all intents and purposes until 1998 Wisconsin and New York were the only states that provided administrative remedies for record-based employment discrimination without also requiring a nexus with race or some other illegal ground.

When Hawaii extended its Fair Employment Practices law to criminal records in 1998, it was the first state to identify and address a concern about threshold disqualification based on criminal background checks. Its prohibition on inquiries into an applicant's criminal record until after a conditional offer of employment has been made served as an inspiration for the "ban-the-box" campaign that began several years later in California. In Hawaii, a conditional offer may be withdrawn only if a conviction within the most recent 10 years bears a "rational relationship to the duties and responsibilities of the position."[190] Its four-part enforcement mechanism is still a model for other states:

Hawaii's 1998 fair employment law with its four-part enforcement mechanism is still a model for other states

- To prohibit application-stage inquiries about criminal history
- After inquiry is made, to prohibit consideration of non-convictions and certain other records that are categorically deemed "unrelated" to qualifications
- To apply detailed standards to consideration of potentially relevant records, and

directly related to fitness to teach; teacher with 20 years of service terminated in spite of efforts to make restitution); *In re Shelton*, 408 N.W.2d 594 (Minn. Ct. App. 1987).

[189] *See, e.g., Green v. Missouri Pacific Railroad Co.*, 523 Fed. 2d 1158 (8th Cir. 1975), and discussion of early EEOC practice and policies in Love *et al. supra* note 41 at § 6:4 ("Title VII – Applied to criminal records – Judicial interpretations").

[190] *See* HAW. REV. STAT. §§ 378-2.5(b), (c) (an employer may withdraw a conditional offer of employment only if a conviction within the previous 10 years "bears a rational relationship to the duties and responsibilities of the position."); Sheri-Ann S.L. Lau, *Recent Development: Employment Discrimination Because of One's Arrest and Court Record in Hawaii*, 22 U. HAW. L. REV. 709, 714-15 (2000).

- ❖ To enforce these standards and procedures through the general fair employment law.

While the ban-the-box approach pioneered by Hawaii has taken hold across the country, only three additional jurisdictions have built a comprehensive approach to "fair chance employment" around the same four-part mechanism, and of these three only two applied it to private as well as public employment. The District of Columbia was the first in this century to enact what has come to be called a "fair chance" approach to hiring people with a criminal record, regulating public employment in 2010 and a few years later extending similar rules to private organizations employing more than 10 people.[191] California and Nevada followed suit with similar laws in 2017, although Nevada's extends only to public employment.

California's Fair Employment and Housing Act (FEHA) is discussed first because it is the most extensive of the three, extending criminal history protections to both public and most private employers, delaying a background check until after an offer of conditional employment is made, and thereafter prohibiting consideration of non-conviction records, as well as convictions that have been dismissed or set aside, pardoned, or been the subject of a judicial Certificate of Rehabilitation. In all cases, employers must conduct individualized assessments to determine whether a conviction has a "direct and adverse relationship with the specific duties of the job," notify an applicant in the event of denial and of the record relied upon (though no further reasons need be given), and allow the applicant to respond. Violations constitute an "unlawful employment practice" that may lead to administrative enforcement by the Department of Fair Employment and Housing and ultimately to court.[192]

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[191] *See* D.C. CODE §§ 1-620.42, 1-620.43. Public employers and private employers with 10 or more employees may not inquire into an applicant's criminal record until after the employer has extended a conditional offer of employment, may not consider arrests or charges that are not pending and that did not result in a conviction, and may withdraw a conditional offer of employment based on an applicant's conviction history only for a "legitimate business reason" that is "reasonable" in light of a multifactor test. The applicant may also file a complaint with the D.C. Office of Human Rights, which can bring administrative proceedings against an employer that it believes has violated the law and levy fines.

[192] *See* CAL. GOV'T CODE § 12952. It is unclear what effect the enactment of § 12952 will have on DFEH regulations, also promulgated in 2017, providing that consideration of criminal

Nevada and the District of Columbia employ essentially the same four-part approach as California and Hawaii before it, including enforcement through their general fair employment or human rights laws. While Nevada prohibits discrimination in public employment only and permits inquiry into criminal record after the first interview, it categorically prohibits consideration not only of non-conviction and sealed records, but also of misdemeanors that did not carry a prison sentence. Nevada law provides that failure to comply with its procedures is an unlawful employment practice and authorizes complaints to be filed with the Nevada Equal Rights Commission. The District's law prohibits inquiry until after a conditional offer has been made, which may be withdrawn only for a "legitimate business reason" that is "reasonable" under a multifactor test and accompanied by written reasons. The applicant may file a complaint with the D.C. Office of Human Rights (OHR), though the law does not contemplate an appeal from its Human Rights Office to the courts.

Two additional states provide for limited record-elated protections through their human rights laws: Illinois[193] prohibits inquiries about or consideration of non-conviction records, juvenile records, or expunged or sealed records; and

history may violate FEHA if it has "an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin." CAL. CODE REGS. tit. 2 § 11017.1(d)–(g). Because the regulations are not coextensive with § 12952 and because they are rooted in a theory of liability not based *directly* on criminal history discrimination, it is possible that they may provide an alternate path to relief for some applicants disqualified due to criminal history.

[193] Effective January 1, 2020, the Illinois Human Rights Act prohibits inquiries about, or discrimination in employment and real estate transactions, based on "arrest record," defined as "an arrest not leading to a conviction, a juvenile record, or criminal history record information ordered expunged, sealed, or impounded." 775 ILL. COMP. STAT. ANN. 5/1-103 - 5/3-103, as amended by SB1780 (explaining how previously the law covered only employment, and only discrimination based on "the fact of an arrest" and expunged and sealed records). A claim of racial discrimination has also been sustained under this law where a criminal conviction was the articulated basis for a refusal to hire. *See Bd. of Trs. v. Knight*, 516 N.E.2d 991, 996-97 (Ill. App. Ct. 1987) (stating that no business necessity justified denial of employment as university police position to person convicted of single misdemeanor weapons charge; mitigating circumstances existed including time passed since conviction and record of responsible employment).

Massachusetts[194] prohibits consideration of non-convictions and some misdemeanors.

Some advocates have looked to federal civil rights law for reinforcement, but many are wary of relying on a vehicle for challenging record-based employment bars that is necessarily tethered to otherwise-prohibited discrimination based, inter alia, on race or ethnicity.[195]

A large number of states have now adopted the first step of Hawaii's comprehensive approach to hiring by adopting "ban-the-box" laws

A large number of states have now adopted the first step of Hawaii's comprehensive approach to hiring by adopting "ban-the-box" laws, and rely primarily on limiting the amount of information employers have about an applicant's criminal record until the later stages of the hiring process. These laws are premised on a hopeful expectation that if applicants are given a chance to demonstrate their job-related qualifications before their past record is revealed, employers will be willing to take a more considered look at them. By the beginning of 2020, laws or ordinances prohibiting application-stage inquiries applied to public employment in 36 states, the District of Columbia, and over 150 cities and counties, and in many cases limited record checks until after a

[194] *See* MASS. GEN. LAWS ch. 151B, § 4(9) (It shall be an unlawful practice for an employer "to request any information . . . regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information"). The law is enforced by the Massachusetts Commission against Discrimination, and procedures are set forth in MASS. GEN. LAWS ch. 151B, § 5.

[195] *See supra* note 183.

conditional offer of employment.[196] In 14 states and D.C., and 18 cities and counties, private sector employment was also affected.[197]

Even Congress acted in late 2019 to postpone inquiries into criminal record, until after a conditional offer is made, for federal agency employment in all three branches of government and private contractor hiring.[198] Effective January 2021, the federal Fair Chance Act also prohibits agency procurement officials from asking persons seeking federal contracts and grants about their criminal history, until an "apparent award" has been made.[199]

Many of these states also enjoin employers to base hiring decisions involving a person with a criminal record on criteria related in some fashion to the job, and in some cases set out detailed criteria for determining when a "direct relationship" (or, variously, "substantial" or "reasonable" relationship) exists between a person's criminal record and the position.[200] Some also prohibit employer consideration of non-conviction records and convictions that have been expunged or sealed, or ask employers to consider "certificates of relief" issued by courts or parole boards. Colorado has built an extensive set of standards around a "ban-the-box" core, requiring justification for withdrawing a conditional offer, prohibiting consideration of non-convictions or sealed or pardoned convictions, and giving effect to judicial or administrative

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[196] Beth Avery, *Ban-the-Box, U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (July 2019), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/ Since this study was published, in 2020 the Virginia legislature swelled the roll of states that prohibit inquiry in public employment. *See* HB 757, 2020 Leg., (VI. 2020), https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB757&201+sum+HB757.

[197] Avery *supra* note 195. In early 2020, the Maryland legislature overrode a veto by its governor to extend its ban-the-box law to private employers. *See* Guy Brenner and Caroline Guensberg, *Maryland Legislature Overrides Governor's Veto of "Ban the Box" Legislation*, X NAT'L L. REV. 214 (Feb. 2020) https://www.natlawreview.com/article/maryland-legislature-overrides-governor-s-veto-ban-box-legislation.

[198] *See* CCRC Staff, *Fair Chance Act advances in Congress*, (Dec. 16, 2019), http://ccresourcecenter.org/2019/12/16/fair-chance-act-advances-in-congress/.

[199] *Id.*

[200] *See* Restoration of Rights Project, *50-State Comparison: Criminal Record in Employment & Licensing,* https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/.

certificates of relief.[201] The limited information available to date on the practical effect of ban-the-box schemes suggests that they do improve job opportunities for people with a criminal record.[202] However, their effectiveness depends to some extent upon a willingness on the part of decision-makers to forego, at least temporarily, information about a candidate for employment that might be highly relevant to a hiring decision. In this regard, some research has indicated that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes about who may have a criminal record.[203]

Some research has indicated that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes

[201] *See* COLO. REV. STAT. § 24-5-101(3)(c), retaining exclusions for non-conviction records, and convictions that have been sealed, expunged or pardoned, and including for the first time convictions where "a court has issued an order of collateral relief specific to the employment sought by the applicant." If none of the exclusions in (3)(c) apply, the agency "shall consider" the following factors in deciding whether to disqualify an applicant based on criminal record: (1) the nature of the conviction; (2) whether the conviction is "directly related" to the job; (3) the applicant's rehabilitation and good conduct; and (4) time elapsed since conviction. *Id.* § 24-5-101(4).

[202] *See* Anastasia Christman & Michelle Rodriguez, *Research Supports Fair-Chance Laws*, National Employment Law Project (Aug. 2016), https://www.nelp.org/publication/research-supports-fair-chance-policies/; Washington Lawyers Committee for Civil Rights and Urban Affairs, *The Collateral Consequences of Arrests and Convictions under D.C., Maryland, and Virginia Law* (2014), http://www.washlaw.org/pdf/wlc_collateral_consequences_report.pdf; D.C. Council Comm. on the Judiciary and Public Safety, Report on Bill 20-642, the 'Fair Criminal Records Screening Amendment Act of 2014' at 3 (May 28, 2014); Council for Court Excellence, *Unlocking Employment Opportunities for Previously Incarcerated Persons in the District of Columbia* (2011), http://www.courtexcellence.org/uploads/publications/CCE_Reentry.pdf.

[203] Researchers have found that ban-the-box policies may increase racial discrimination due to employers' exaggerated impressions of racial differences in conviction outcomes, thereby artificially decreasing the number of qualified minority applicants who are given a second look. *See, e.g.*, Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 QUART. J. ECON. 1, 195-235 (2018); Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden*, 38 J. LAB. ECON. 2, 321-74 (2020),

Some states protect employers from negligent hiring liability, the primary reason cited by employers for not hiring someone with a criminal record.[204] Frequently such protections are triggered when an employee or applicant for employment receives some form of individualized restoration of rights, such as a pardon or judicial sealing. But some states, like Colorado, Minnesota, and New York, absolutely prohibit the use of conviction evidence in a negligent hiring civil suit. Texas prohibits negligent hiring suits except when the employer knew or should have known that an employee committed certain high-risk offenses.[205] Massachusetts protects employers so long as they relied on information from the state's Criminal Offender Record Information System (CORI) and reached a decision within 90 days of receiving that information.

While ban-the-box laws generally exclude specific types of employment, including employment where a background check is required by law, and are essentially toothless without standards and an enforcement mechanism, collectively they represent the single most significant advance for people with a record in the workplace in thirty years. In requiring potential employers to evaluate each applicant's circumstances as opposed to reflexively rejecting anyone who reports a record, and in some cases potentially making it expensive to withdraw an offer conditionally extended, these laws are to a considerable extent self-enforcing. In this sense, they depend for their effectiveness not so much on the threat of lawsuits to compel compliance as on marketplace efficiency.

As we will see in the following discussion, comprehensive occupational licensing reforms enacted by more than a dozen states since 2018, and partial reforms enacted by another dozen, are an equally encouraging development.

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https://www.journals.uchicago.edu/doi/abs/10.1086/705880?af=R&mobileUi=0&; *see also* Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, The Atlantic (Aug. 4, 2016), https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/.

[204] *See Love, et al. supra* note 41 at §§ 6:18 through 6:29.

[205] *See* Texas profile Part IV, Restoration of Rights Project. Texas also relies on strict regulation of background screeners. Screeners are required to obtain records only from a criminal justice agency and must give individuals the right to challenge their accuracy. Screeners may not publish records whose disclosure is prohibited under another state law (*e.g.*, records that have been expunged, or which are subject to an "order of nondisclosure"), and there is a civil remedy for violations.

B. Occupational Licensing

Recent studies have shown that close to 20% of all jobs in the United States are available only to people who have been approved to compete for them by a government licensing agency.[206] It is therefore of obvious importance to the reintegration agenda to remove record-based barriers that unfairly and inefficiently restrict access to the licenses and certificates that people need to work in regulated occupations and professions.

In addition to the burdens imposed in time and money by engaging in the licensing process, applicants face regulatory agencies that may be inhospitable to people with a criminal record even if they are fully qualified by skill and training. Sometimes this is because the law mandates a heightened standard for those who have been convicted of a crime (if they are not excluded entirely). More frequently it is because of vague "good moral character" standards arbitrarily enforced by those with a guild mentality or moral scruples untethered to public safety or actual occupational requirements.[207]

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[206] *See* Morris M. Kleiner & Evgeny F. Vorotnikov, *At What Cost, State and National Estimates of the Economic Costs of Occupational Licensing, Institute for Justice* (Nov. 2018), https://ij.org/wp-content/uploads/2018/11/Licensure_Report_WEB.pdf; Stephen Slivinski, Center for the Study of Economic Liberty at Arizona State University, *Turning Shackles into Bootstraps: Why Occupational Licensing Reform Is the Missing Piece of Criminal Justice Reform* (Nov. 7, 2016), https://research.wpcarey.asu.edu/economic-liberty/wp-content/uploads/2016/11/CSEL-Policy-Report-2016-01-Turning-Shackles-into-Bootstraps.pdf.

[207] The White House issued a report in July 2015 on occupational licensing, which noted that 25 states have standards requiring some kind of relationship between a license and an applicant's criminal history, 25 states and the District of Columbia "have no standards in place." *See* White House, *Occupational Licensing: A Framework for Policymakers*, 35–36 (July 2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf. In April 2016, President Obama directed federal departments and agencies to ensure that federally-issued occupational licenses are not presumptively denied on the basis of a criminal record, and the Department of Justice announced support for technical assistance to states pursuing similar initiatives, as part of $5 million grant solicitation focused on reentry. *See* White House Press Secretary, Fact Sheet: New Steps to Reduce Unnecessary Occupation Licenses that are Limiting Worker Mobility and Reducing Wages (June 17, 2016), https://obamawhitehouse.archives.gov/the-press-

In an earlier era of reform in the 1970s, many states enacted laws intended to soften the rough edge of what had been complete exclusion of people with a criminal record from trades and professions.[208] Several states regulated public employers and licensing agencies together, requiring them to consider whether a conviction was "directly related" to a job or license, and whether the person was "rehabilitated."[209] Some states that enacted detailed regulation of public employment and licensing prior to the 1980s have not made major changes to their licensing rules since that time.[210]

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office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting. The extent to which reforms have been successful in the intervening two years is reflected by the fact that by mid-2020 only six states had no standards in place: Alaska, Alabama, Massachusetts, South Carolina, South Dakota, and Vermont.

[208] In the 1970s, with public policy favoring encouraging employment opportunities for people with a criminal record, states began to enact laws that limit denial of licenses (and public employment) due to criminal convictions. Notable enactments included those in New Jersey (1968), Colorado (1973), Washington (1973), Hawaii (1974), Minnesota (1974), New York (1976), North Dakota (1977), Pennsylvania (1979), and Wisconsin (1981). *See* Love *et al*. *supra* note 41 at § 6:16. Many of these laws did little more than prohibit outright exclusion. Colorado's law, for example, provides that a conviction for a felony or moral turpitude offense does not "in and of itself" prevent public employment or licensure (stating that with exceptions for certain sensitive positions), but may be considered in determining a person's "good moral character." COLO. REV. STAT. § 24-5-101(2). Others are stronger. For example, North Dakota's provisions prohibit denial of licensure unless there is a determination, considering a number of factors that a person is not sufficiently rehabilitated (with presumption of rehabilitation five years after completion of sentence) or the offense has a "direct bearing" on ability to serve. N.D. CENT. CODE § 12.1-33-02.1. Minnesota has not substantially amended its law since it was enacted in 1974, and it was among the five top scorers in the ratings published in 2020 by the Institute for Justice. *See infra* notes 211 and 221.

[209] *See, e.g.,* New Jersey's Rehabilitated Convicted Offenders Act of 1968, N.J. STAT. ANN. § 2A:168A-1; Minnesota's Criminal Rehabilitation Act (1974), MINN. STAT § 364.01 et seq.; New Mexico's Criminal Offender Employment Act of 1974, N.M. STAT. ANN. §§ 28-2-1 *et seq*.

[210] Connecticut, Minnesota, New Mexico, New Jersey, and New York still retain the earlier structure of regulating public employment and licensing together. While several of these states have since amended their laws, the licensing law adopted almost half a century ago in Minnesota has changed little since its adoption, and it got high marks in the Institute for Justice's 2020 report. *See infra* note 211. North Dakota and Virginia also still operate under detailed licensing regulations dating from the 1980s or earlier. Pennsylvania recently

Beginning in 2013, a new era of occupational licensing reform took shape, transforming the policy landscape.[211] By mid-2020, more than 30 states had enacted legislation to make it easier for qualified individuals with a criminal record to obtain occupational and professional licensure and the foothold in the middle class that this promises.[212] The modern reforms were heavily influenced by model occupational licensing laws proposed by two national organizations with differing regulatory philosophies: The Institute for Justice (IJ), a libertarian public interest law firm,[213] and the National Employment Law Project (NELP), a workers' rights research and

abandoned that structure in enacting a new chapter 31 of Title 68 to impose detailed substantive standards on its licensing agencies, though its new law still offers little by way of procedural protection for applicants with a record. *See* CCRC Staff, *Pennsylvania expands access to 255 licensed occupations for people with a record*, (July 14, 2020), https://ccresourcecenter.org/2020/07/14/pennsylvania-expands-access-to-255-licensed-occupations-for-people-with-a-record/.

[211] While licensing was not the most well-publicized type of reform during the period of 2013-2016, new laws addressed licensing in four different ways: (1) seven states excluded certain records from consideration in licensing; (2) four states expanded the benefits of certificates of relief in licensing; (3) five states imposed new standards for license denials based on criminal record; and (4) one state provided greater oversight of licensing boards. *See* Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013-2016* (2017), https://ccresourcecenter.org/2017/02/08/round-up-of-recent-second-chance-legislation-2013-2016/.

[212] See NICK SIBILLA, *Barred from Working: A Nationwide Study of Occupational Licensing Barriers for Ex-Offenders*," INSTITUTE FOR JUSTICE (May 2020), https://ij.org/report/barred-from-working/. At the time this report was published, three additional states had major reform bills awaiting their governor's signature, all of which were later enacted. *See* CCRC Staff, *supra* note 209.

[213] The Institute for Justice initially released its model law as part of its Occupational Licensing Review Act (OLRA). *See* Institute for Justice, Model Occupational Licensing Review Law: *Reforming Occupational Licensing Boards following NC Dental Board v. FTC*, (2018), https://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1/. Later, the provisions of OLRA relating to criminal records were revised and extended as its Collateral Consequences in Occupational Licensing Act (CCOLA) (2019), https://ij.org/wp-content/uploads/2019/11/10-31-2019-Model-Collateral-Consequences-in-Occupational-Licensing-Act-2.pdf.

advocacy group.[214] Both of these model law proposals addressed the following five key issues:

1. **What records should be considered?** Both proposals limit the kinds of records that may be considered, recommending that only recent serious convictions should be the basis of denial or other adverse action, and that non-convictions and sealed or pardoned convictions not be considered at all.

2. **What are proper criteria for denial of licensure?** Under IJ's proposal, denials must be based on evidence of public safety risk; under NELP's proposal, denials must be based on a record's "direct relationship" to the occupation, coupled with a lack of rehabilitation. Both proposals would eliminate mandatory bars to licensure and vague standards like "good moral character."

3. **At what point in the process should criminal record be considered?** The timing for considering whether a criminal record should be disqualifying differs significantly in the two proposals. Under IJ's proposal, a person may at any time petition for a "preliminary determination" whether a criminal record will be disqualifying, before investing in any training or special education, the agency must promptly respond and charge a minimal fee, and its determination is binding upon later application. Under NELP's proposal the order of decision is reversed: consideration of the record should occur only after determining the person is otherwise qualified, a variation on its "ban-the-box" approach.

4. **What procedural protections should apply in licensing decisions?** Under both proposals, procedures for decision-making are well-defined, and both

[214] NELP released its Model State Law as part of a report on barriers to licensing for people with a record. *See* Michelle Rodriguez and Beth Avery, *Unlicensed and Untapped: Removing Barriers to State Occupational Licenses for People with Criminal Records*, National Employment Law Project (2016), http://www.nelp.org/publication/unlicensed-untapped-removing-barriers-state-occupational-licenses. NELP issued a report on its progress in 2018: Maurice Emsellem, Beth Avery, & Phil Hernandez, *Fair Chance Licensing Reform Takes Hold in the States*, National Employment Law Project (May 15, 2018), https://www.nelp.org/publication/fair-chance-licensing-reform-takes-hold-states/.

require agencies to bear the burden of showing unfitness, to issue written decisions defending denials, and to allow for appeals.

5. **How should licensing agencies be held accountable?** Both proposals require agencies to make periodic reports that will allow monitoring of compliance by the legislature or responsible executive agency.

The most ambitious and extensive licensing schemes enacted during the current reform period address each of these questions, while other states have been more selective in deciding which approaches to adopt. Between 2016 and mid-2020, 30 states enacted a total of 39 laws imposing new generally applicable obligations and limitations on licensing agencies, some states enacting multiple laws in successive years:[215] Arizona (2017, 2018, 2019), Arkansas (2019), California (2018), Colorado (2018), Georgia (2016), Idaho (2020), Illinois (2016, 2017), Indiana (2018, 2019), Iowa (2019, 2020), Kansas (2018), Kentucky (2017), Louisiana (2017), Maryland (2018, 2019), Massachusetts (2018), Mississippi (2019), Missouri (2020), Nebraska (2018), Nevada (2019), New Hampshire (2018), North Carolina (2019), Ohio (2019), Oklahoma (2019), Pennsylvania (2020), Rhode Island (2020) Tennessee (2016, 2018), Texas (2019), Utah (2019, 2020), West Virginia (2019, 2020), Wisconsin (2018), and Wyoming (2018).

Some of these states regulated licensing decisions state-wide for the first time,[216] while others expanded laws enacted during the earlier reform era in the 1970s and 80s.[217] Many required agencies to publish lists of disqualifying convictions and limit

[215] Citations and descriptions of these laws can be found in the relevant state profiles from the Restoration of Rights Project. They are summarized in the RRP's 50-state comparison chart on employment of licensing, https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/, which links to a longer description of each state's law.

[216] The regulatory schemes enacted by Kansas and Nebraska in 2018, Mississippi, Nevada, and West Virginia in 2019, and Iowa and Idaho in 2020, fall into this first-time category. Alabama's 2019 law, modeled on the Uniform Collateral Consequences of Conviction Act, was also that state's first regulation of licensing decisions.

[217] For example, the laws enacted by Missouri and Pennsylvania in 2020 represented those states' first regulation of occupational licensing since 1980 and 1979, respectively. In 2019, Arkansas, Kentucky, Maryland, North Carolina, Ohio, Oklahoma, and Texas also augmented licensing laws originally enacted in the 1970s.

disqualification to convictions "directly related" to the occupation, abolished vague "moral character" criteria and emphasized public safety instead, barred consideration of non-convictions and certain other records, and required agencies to justify denials in writing and defend them on appeal. Many states also required agencies to report periodically to the legislature.[218] The Institute for Justice keeps a running tab of the reforms.[219]

The most ambitious of the new laws was the comprehensive scheme enacted by Indiana, which is strong both substantively and procedurally, and its requirements apply not only to state agencies but also to county and municipal governments that issue occupational and professional licenses and permits.[220] New Hampshire and Rhode Island come in a close second.[221] The most surprising were the

The most surprising were the extensive new schemes put in place in North Carolina and Mississippi

[218] The provisions of each state's law are in the Restoration of Rights Project. https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/.

[219] As of August 2020, 17 states allowed individuals to petition a licensing board at any time to determine if their criminal record would be disqualifying, 20 states had done away with vague criteria like "good moral character" for some or all licenses, 16 states had prohibited consideration of non-conviction records, 16 states had blocked licensing boards from denying people a license unless their record is "directly related" to the license, and eight states instituted new reporting requirements. *See* Institute for Justice, *State Occupational Licensing Reforms for Workers with Criminal Records* (last visited Aug. 1, 2020) https://ij.org/activism/legislation/state-occupational-licensing-reforms-for-people-with-criminal-records/ (also collecting information on which states prohibit consideration of certain convictions after a stated period of time).

[220] Indiana's licensing law is described at CCRC Staff, *Indiana enacts progressive new licensing law*, (April 3, 2018), https://ccresourcecenter.org/2018/04/03/indiana-enacts-progressive-new-licensing-law/. Indiana was the only state to achieve an "A" rating in the Institute for Justice's May 2020 "Barred from Working" grading of state laws. *See supra* note 211. The significance of extending regulation to licenses and permits issued by counties and municipalities is underscored in Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level,* 75 OHIO ST. L.J. 1 (2014).

[221] N.H. Rev. Stat. Ann. § 332-G, R.I. Gen. Laws § 28-5.1-14. Both states apply a "substantial relationship" standard to licensing boards under most departments of state government, and

extensive new schemes put in place in two Southern states, North Carolina and Mississippi, the first an expansion of a scheme from an earlier reform era, and the second a brand new effort by a state that previously had no law at all.[222] Minnesota evidently saw no need to modify a progressive set-up first enacted in 1974 and virtually unchanged since that time,[223] but Pennsylvania completely reworked the substantive standards intended to guide 29 licensing agencies controlling 255 licenses.[224] Pennsylvania, along with Nebraska, also imposed new reporting requirements on occupational licensing boards, perhaps a prelude to more extensive procedural regulation. Alabama and Washington authorized their courts to grant exemptions from many barriers to licensure.[225]

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define it in detail. New Hampshire provides for a preliminary determination for an aspiring applicant, while Rhode Island excludes certain records from consideration (including non-convictions, misdemeanors, and felonies that are "substantially related"). Both allow applicants to establish rehabilitation by detailed standards, provides detailed procedures in the event of denial, suspension or revocation, and includes accountability standards.

[222] CCRC Staff, *Two southern states enact impressive licensing reforms*, (Sept. 18, 2019), https://ccresourcecenter.org/2019/09/18/two-southern-states-enact-impressive-occupational-licensing-reforms/. The laws enacted by these two states were rated among the five strongest by the Institute for Justice in its May 2020 *Barred from Working* study. *See supra* note 211.

[223] The Minnesota Criminal Rehabilitation Act (1974), Minn. Stat § 364.01 *et seq*., prohibits discrimination in public employment and licensing. It has only been amended once since its enactment, in 2013 to add text recognizing the special circumstances of veterans. The virtues of this half-century-old law were affirmed when Minnesota was judged among the top five states in the Institute for Justice's May 2020 "Barred from Working" grading of state laws. *See supra* note 211.

[224] *See* CCRC Staff, *supra* note 209. Pennsylvania's licensing law, like its employment law, has strong substantive standards but almost no procedures to ensure these standards are complied with, remitting disappointed applicants to the courts. The law does require agencies to report their progress to the legislature in two years, so perhaps this will encourage compliance.

[225] *See* ALA. CODE § 12-26-5 (Occupational Licensing Order of Limited Relief); WASH. REV. CODE § 9.97.010 (Certificates of Restoration of Opportunity). Both these judicial certificates may result in removing a mandatory bar to licensure, but without a standard to guide discretionary decision-making thereafter, Alabama's certificate appears toothless. Washington's law otherwise imposes a "direct relationship" standard and allows only convictions within 10 years to be considered.

In addition to these general reforms, several additional states enacted laws regulating specific occupations or addressing narrower aspects of licensure. Five states (Connecticut, Delaware, Florida, Idaho, and Iowa) loosened restrictions on barbers and cosmetologists, and Florida and Iowa facilitated licensing in construction trades taught in their prisons. Wisconsin added discrimination by occupational licensing boards to its venerable fair employment law, and Alabama passed a law allowing individuals to petition a court to remove mandatory bars to specific occupational licenses so that applicants may be considered on the merits. Texas opened health care occupations to people who may have been barred from them earlier in life.[226] At the time this report went to press, Michigan had pending seven bills addressing different aspects of the licensing process.

Licensing agencies play a key part in any reintegration strategy

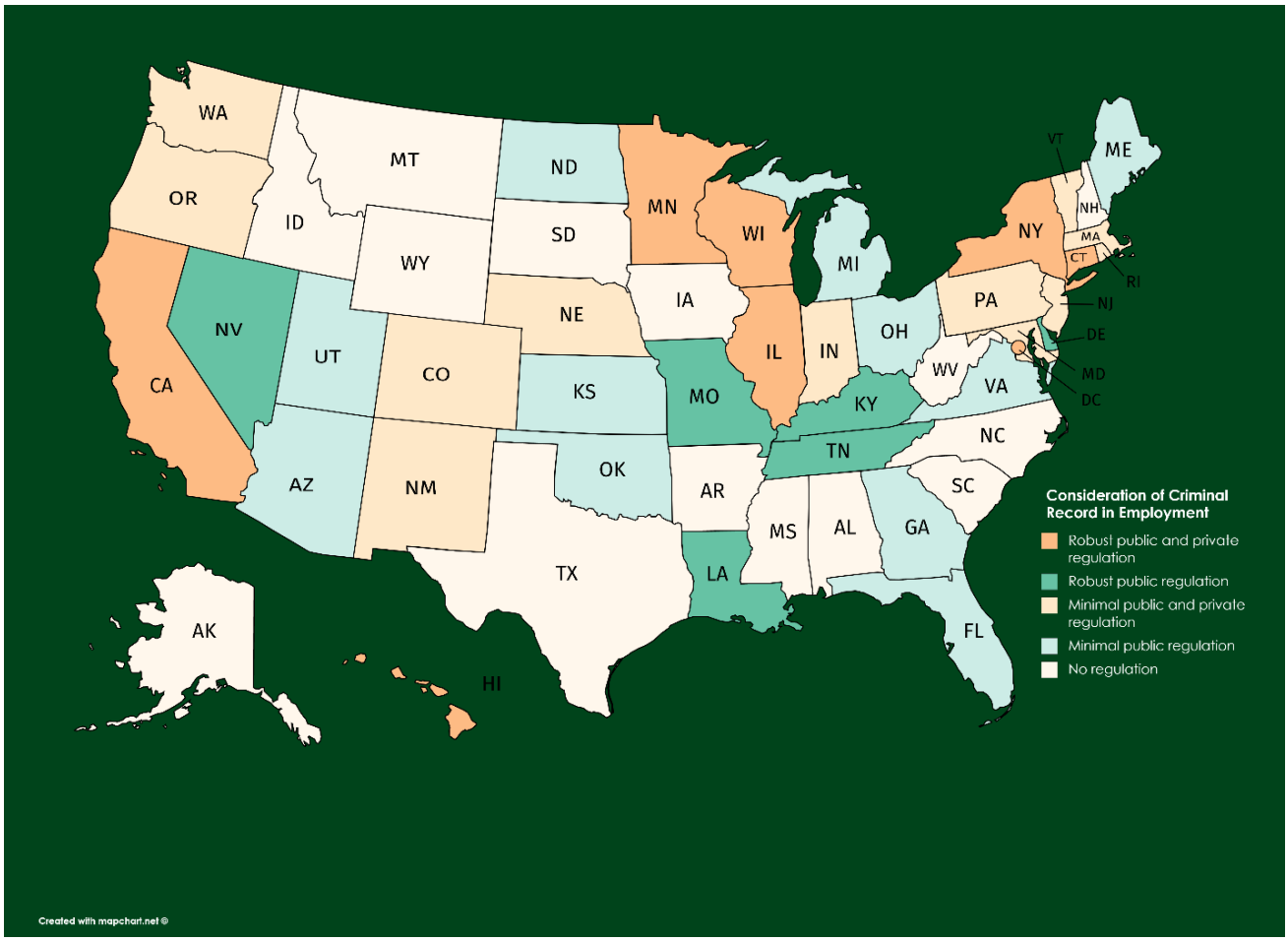
In summary, given the number of work opportunities they control, licensing agencies play a key part in any reintegration strategy aimed at giving people with a criminal record a fresh start. While the philosophies behind the bipartisan advocacy for licensing reform may vary, the practical value of its guidance to the many individuals who stand to benefit cannot be overestimated. If a "clean slate" means "an absence of existing restraints,"[227] lifting legal and societal barriers to licensure seems an essential part of a clean slate agenda.

[226] *See* Collateral Consequences Resource Center, *Pathways to Reintegration: Criminal Record Reforms in 2019*, at 24, 60-61 (2020), http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf.

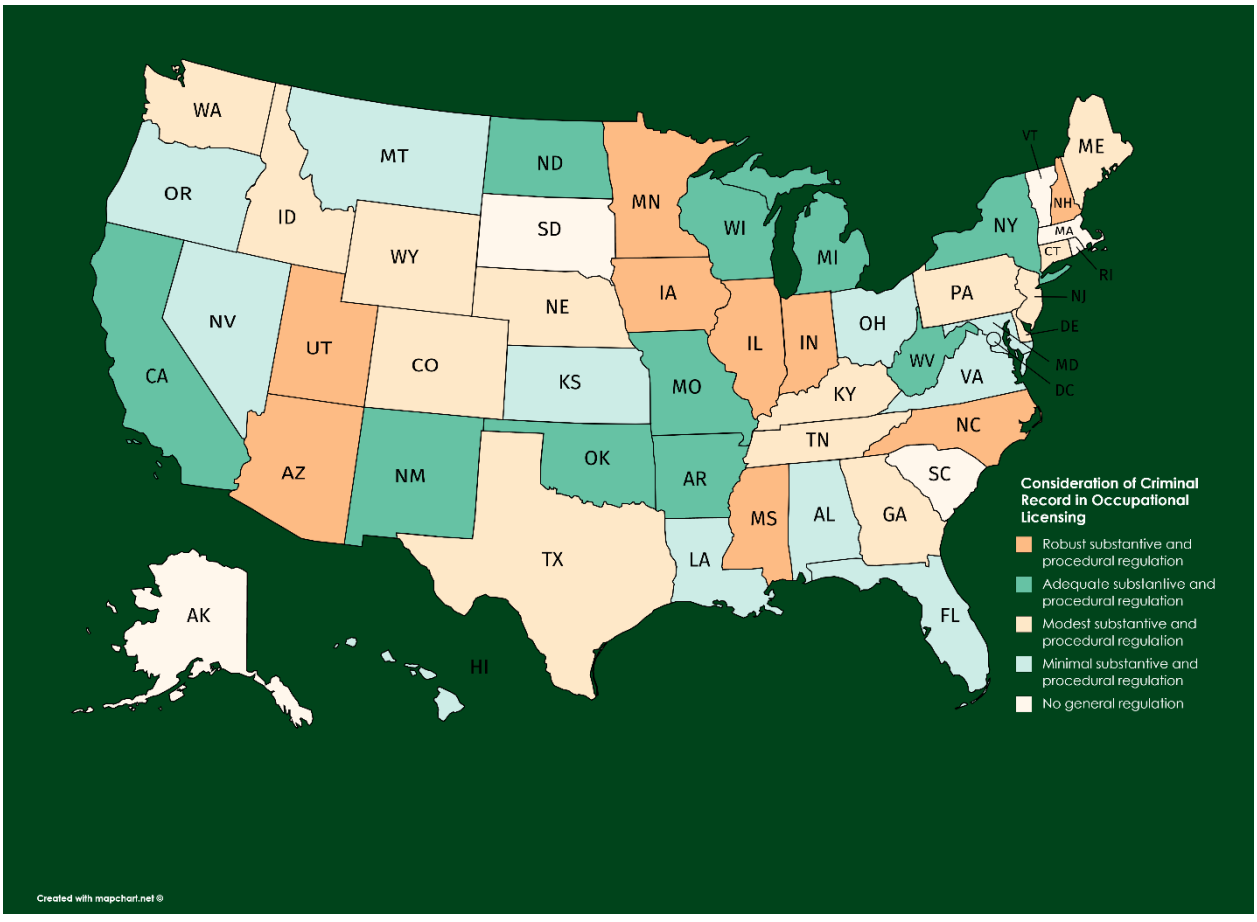
[227] *See supra* note 181.

Report Card: Employment & Occupational Licensing

The following employment map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating how criminal record is taken account of in the employment application process. (We cannot and do not comment on how these laws operate or how they are enforced.) Grades below are based on these categories. The five categories are: 1) Orange: robust regulation of both public and private employment; 2) Green: robust regulation of public employment only; 3) Light orange: minimal regulation of both public and private employment; 4) Light green: minimal regulation of public employment only; and 5) White: no regulation of either public or private employment. In determining which laws were robust and which were minimal, consideration was given to whether a state's fair employment law extends to discrimination based on criminal record; whether a "ban-the-box" law prohibits inquiry until after a conditional offer has been made; whether clear standards determine how employers should consider a record in the employment application process; and, whether the law provides for administrative enforcement.



The following occupational licensing map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating consideration of criminal record by licensing agencies. Grades on the following page are based on these categories. Orange designates a robust regulatory scheme, green an adequate one, light orange a modest one, light green a minimally acceptable one, and states colored white have no general licensing scheme at all. Rankings were determined by: 1) whether clear and specific standards apply to test the relevance of an applicant's criminal record to the occupation, by reference to public safety rather than character; 2) whether certain categories of records (notably non-conviction records) are excluded as irrelevant to licensure; 3) whether the law provides an opportunity for aspiring applicants to get an early read on their likelihood of success, and whether that early read is binding on a later determination; 4) whether procedural protections are available through written reasons for denial and opportunities to appeal; 5) whether there is an external accountability mechanism to monitor agency performance, such as periodic reporting requirements; 6) and whether there is provision for enforcement. Even licensing schemes deemed "robust" may not have gotten that high mark in all six categories.



	Employment	Licensing
AL	**F**	**F**
AK	**F**	**F**
AZ	**D**	**A**
AR	**F**	**B**
CA	**A**	**B**
CO	**C**	**C**
CT	**B**	**C**
DE	**B**	**C**
DC	**A**	**D**
FL	**D**	**D**
GA	**D**	**C**
HI	**A**	**C**
ID	**F**	**C**
IL	**A**	**A**
IN	**C**	**A**
IA	**F**	**A**
KS	**D**	**D**
KY	**B**	**C**
LA	**B**	**D**
ME	**D**	**C**
MD	**C**	**D**
MA	**C**	**F**
MI	**D**	**B**
MN	**A**	**A**
MS	**F**	**A**
MO	**B**	**C**

	Employment	Licensing
MT	**F**	**D**
NE	**D**	**C**
NV	**B**	**D**
NH	**F**	**A**
NJ	**C**	**C**
NM	**C**	**B**
NY	**A**	**B**
NC	**B**	**A**
ND	**D**	**B**
OH	**D**	**D**
OK	**D**	**B**
OR	**C**	**D**
PA	**C**	**C**
RI	**C**	**A**
SC	**F**	**F**
SD	**F**	**F**
TN	**B**	**C**
TX	**D**	**C**
UT	**D**	**A**
VT	**C**	**F**
VA	**D**	**D**
WA	**C**	**C**
WV	**F**	**B**
WI	**A**	**B**
WY	**F**	**C**
Fed	**B**	**F**

Comparison of State Grades Between Employment and Licensing

Looking at how states performed on the two report cards, it is interesting that there is not a particularly strong correlation between their rankings. That is, states that have a robust system for regulating consideration of conviction in employment may not and frequently do not have similarly strong systems for regulating occupational licensing agencies. In fact, only two states (Illinois and Minnesota) scored at the top of both categories. Three other states that scored well on employment also scored well on occupational licensing (California, New York, and Wisconsin), but the last two jurisdictions in the top employment category (Hawaii and the District of Columbia) scored poorly on occupational licensing. Four of the six states that have robust regulation of public employment scored in the middle tier of occupational licensing (Delaware, Kentucky, Missouri, and Tennessee), but the other two with good scores on public employment scored poorly on occupational licensing (Louisiana and Nevada).

There is not a particularly strong correlation between how states rank in employment and licensing

Conversely, four states that ranked in the top tier for occupational licensing had no law at all regulating employment (Iowa, Mississippi, New Hampshire, and North Carolina) and two others had only minimal regulation of public employment (Indiana and Utah). Three states had no regulation at all governing either employment or occupational licensing (Alaska, South Carolina, and South Dakota).

The Restoration of Rights Project contains 50-state summaries of the relief mechanisms analyzed in this report: consideration of criminal records in employment & licensing; loss and restoration of civil & firearms rights; pardon policy & practice; and expungement, sealing, & other record relief. Each of these summaries has links to state profiles that may be consulted for additional detail.

APPENDIX: OVERALL REPORT CARD & STATE RANKINGS

The following table shows the grades for each issue as reflected on the report cards in this report. The final column assigns an overall ranking of the restoration laws of state (and D.C), assigning equal weight to the different relief mechanisms, except that deferred adjudication and certificates of relief were each assigned 50% weight. (The state rankings are displayed in order in the Executive Summary, at p. 7, *supra*.)

	Voting	*Pardon*	*Felony relief*	*Misdo. relief*	*Non-convict.*	*Deferred adjud.*	*Cert. of relief*	*Employment*	*Licensing*	*Rank*
AL	F	B	F	F	D	B	B	F	F	49
AK	C	F	F	F	B	C	F	F	F	50
AZ	D	F	B	B	F	D	F	D	A	34
AR	F	A	C	A	C	B	F	F	B	22
CA	B	B	C	A	C	D	B	A	B	2
CO	B	C	C	B	B	A	B	C	C	7
CT	D	A	B	C	A	D	B	B	C	5
DE	C	A	C	B	B	C	F	B	C	8
DC	A	F	F	D	D	D	F	A	D	39
FL	F	F	F	F	D	C	F	D	D	51
GA	D	A	C	D	C	B	F	D	C	29
HI	A	F	F	F	B	B	F	A	C	29
ID	C	B	F	F	B	B	F	F	C	39
IL	B	A	A	A	B	C	A	A	A	1
IN	B	F	B	B	C	D	F	C	A	18
IA	D	D	F	D	D	C	F	F	A	45
KS	D	F	B	A	D	F	F	D	D	42
KY	D	D	D	B	A	B	F	B	C	22
LA	C	A	C	C	C	C	F	B	D	19
ME	A	F	F	F	B	A	F	D	C	37
MD	B	F	D	C	D	A	F	C	D	37
MA	B	F	A	A	B	A	F	C	F	15
MI	B	F	D	B	A	D	F	D	B	27

	Voting	*Pardon*	*Felony relief*	*Misdo. relief*	*Non-convict.*	*Deferred adjud.*	*Cert. of relief*	*Employment*	*Licensing*	*Rank*
MN	D	B	C	A	B	D	F	A	A	5
MS	D	F	D	B	B	A	F	F	A	31
MO	C	F	C	B	D	A	F	B	C	28
MT	B	F	F	B	A	B	F	F	D	34
NE	C	C	C	B	A	A	F	D	C	15
NV	B	B	A	A	C	C	F	B	D	5
NH	B	F	B	A	A	D	F	F	A	12
NJ	B	F	D	A	A	D	A	C	C	12
NM	D	F	A	A	C	A	F	C	B	15
NY	B	D	D	D	A	C	A	A	B	8
NC	D	F	D	C	C	F	C	B	A	31
ND	B	D	A	A	D	A	F	D	B	10
OH	B	C	C	B	C	C	B	D	D	22
OK	B	A	C	C	C	B	F	D	B	12
OR	B	D	D	B	D	D	F	C	D	34
PA	B	A	F	B	A	C	F	C	C	10
RI	C	F	D	B	D	A	C	C	A	25
SC	C	A	F	D	A	F	D	F	F	39
SD	D	B	C	C	D	D	F	F	F	44
TN	D	F	D	D	C	A	A	B	C	31
TX	D	F	F	D	C	B	F	D	C	48
UT	B	B	C	B	A	A	F	D	A	3
VT	A	F	D	C	A	A	A	C	F	19
VA	B	B	F	F	D	F	F	D	D	45
WA	C	D	B	B	D	A	C	C	C	19
WV	C	F	D	C	D	A	F	F	B	42
WI	C	B	F	F	A	F	F	A	B	25
WY	C	F	D	D	C	C	F	F	C	45
Fed	n/a	F	F	F	F	D	F	B	F	n/a