



The Many Roads From Reentry to Reintegration

**A National Survey of Laws Restoring Rights and
Opportunities After Arrest or Conviction**

By Margaret Colgate Love

March 2022

COLLATERAL CONSEQUENCES RESOURCE CENTER

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 develop and advocate for policy reforms, provide technical support to those working to expand restoration mechanisms, 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 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 adopted. But in a country where we evaluate criminal justice policies based on a melange of principles - retributivist, utilitarian, economic, religious, pragmatic, intuitive, and emotional - there is and could be no Uniform Penal Code.¹ Criminal law is inconsistent across states, and even within states, in its underlying justification or rationale, and the reasons that particular rules or practices exist. The *Model* Penal Code has been widely influential, but—as designed—states adopted only the pieces they liked, and heavily modified them.

Disagreement about how to treat someone who has been arrested or prosecuted after their criminal case is concluded is, if anything, even more intense. The collateral or indirect consequences of their experience 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 deprivation of opportunities and benefits, each of which may be justified and criticized for different reasons. Accordingly, criminal law practitioners and scholars disagree about the fundamental nature and purpose of collateral consequences. To the extent the public at large ever thinks about them, they also hold a range of views.

There is no consensus about whether collateral consequences in general or particular ones should be understood as further punishment for crime or prophylactic civil regulation, as a reasonable effort to control risk or as an unconstitutional and immoral perpetuation of Jim Crow, or, perhaps, 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*."

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

Yet, the practical problem of collateral consequences looms large. With their massive expansion in recent decades, those who experience collateral consequences firsthand know that they cannot become fully functioning members of the community without finding a way to overcome them.

The need for a sensible policy to minimize employer concerns about risk is clear

The economic dislocations caused by the Covid-19 pandemic underscore the practical implications of collateral consequences: With individuals desperate for money and opportunity, and businesses hungry for workers, the need for a sensible policy to minimize employer concerns about risk is clear. And while there remains no compelling necessity for all states to have the same penalties for armed robbery

or cattle rustling, collateral consequences are a national economic problem affecting whole communities that might justify a federal, or at least a uniform, solution.

Fortunately, agreement on underlying principles is not required to agree on particular policies.² Most Americans agree that people arrested or convicted of crime should not be relegated to a permanent subordinate status regardless of the passage of time, successful efforts at rehabilitation and restitution, and lack of current risk to fellow Americans. Finding ways to restore their legal and social status is a compelling necessity, given the array of collateral consequences adversely affecting tens of millions of Americans, their families and communities, the economy, and public safety itself. 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, 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.

Even if it is impossible to identify a single, uncomplicated 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.

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

² Cass Sunstein's classic exposition remains worth reading. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 Harv. L. Rev. 1733 (1995).

First, the system should be *accessible*. Every state has pardon or some other restoration policy on the books now, but there is wide variation in their practical availability to deserving individuals. In some states, groups of high officials meet to evaluate relief requests, in others it is judges, but they have many other important duties. Some mechanisms require applicants to have a lawyer, a fatal defect in a

Requiring applicants to have a lawyer is a fatal defect in a relief scheme

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 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 extreme or exceptional cases. The particular form of relief must be tailored to the nature of the consequence. Thus, for example, perhaps 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 decision makers in doubt about its legal effect or feeling free to ignore the intent of the law. Through the statutory text and education of decision makers, 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 those who control access to employment, licensing, voter registration, and housing, informing them of their responsibilities. 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, within a single state, and among the states. 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

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

relief from multiple jurisdictions to avoid collateral consequences flowing from a single conviction.

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.

A relief system should not create unmanageable new responsibilities for courts or government officials

Finally, the system should be *administrable*. It should not create unmanageable new responsibilities for courts or government 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.

Jurisdictions are experimenting with what commentators have called a dizzying variety of approaches. Now that we are several years into a wave of reform, it is perhaps not too early to begin drawing some conclusions. My experience as a government official participating in the implementation of a new state expungement law convinces me that case-by-case adjudication of claims for relief will take years and cost millions before it makes a dent in the existing massive inventory of criminal records.

The only solution is that certain records should be automatically made unavailable. Records could be sealed based on a variety of objective factors. One category might be offenses that are too old, using the British concept that after the passage of time, a conviction is “spent.” Data of

The only solution is that certain records should be automatically made unavailable.

low probative value might automatically be made confidential, such as non-conviction records. The passage of time since the last conviction might also be accounted for —not impressionistically but based on a rubric. It might be, for example, that after 5 years of crime-free behavior in the community, only specified, serious felonies would show on a criminal background check. A shorter period would warrant nondisclosure of lesser offenses.

How should this be done, and who should do it? Information can be kept off-limits if it is not made public, if it is not circulated, or if it is not considered by a decision-maker. But it will be difficult for past arrests and convictions to be entirely concealed from the public; they are public at the time they occur, often reported in the media, and practical and legal obstacles make it difficult to retroactively make them confidential. And while employers and others can be prohibited from discriminating against people with criminal records, if the information gets into their hands, there are practical and psychological realities stand in the way of preventing them from considering information in their possession or proving that they did so.

Still, the most promising locale for intervention are the courts and administrative entities responsible for storing criminal record information. There should be objective time limits on dissemination of criminal justice information, just as there are in other countries with which we compare ourselves. If decision-makers never get the information in the first place, they cannot use it, or misuse it.

There should be objective time limits on dissemination of criminal justice information.

Overall, the direction of the law is promising. Many of us at the CCRC, including Margaret Love and myself, have been toiling in this domain since the 1990s. Lawmakers and policymakers seem to have come to recognize that collateral consequences are, and must be treated as, part of the criminal justice system. Like criminal sentences themselves, they should be imposed only when and to the extent necessary, there should be opportunities for case-by-case consideration, and there should be an end to them. Otherwise, collateral consequences, designed to promote public safety, risk undermining it.

Gabriel J. Chin is the Edward L. Barrett Jr. Chair at the University of California, Davis School of Law, a co-founder of the Collateral Consequences Resource Center, and a member of its Board of Directors.

EXECUTIVE SUMMARY AND EXPLANATION OF GRADING/RANKING

This report sets out to describe the landscape of laws in the United States aimed at restoring rights and opportunities after an arrest or conviction, as of March 2, 2022. It is necessary to include that precise date because the landscape has been changing so rapidly, as will be evident by comparing this report with the one it revises, published in September 2020.³ Like the earlier report, this one draws on material from CCRC's flagship resource, the [Restoration of Rights Project](#).

We are encouraged 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 three years. The Reintegration Report Card published as a companion to this survey shows that the trend toward more enlightened treatment of criminal records has, if anything, accelerated, with nearly every state and D.C. enacting one or more relevant relief measure in the 18 months since the first issue of this national survey was published. In this period, several new states have joined those previously identified as reform leaders, while half a dozen other states made substantial improvements in their rankings, in two cases (D.C. and Virginia) rising from the bottom ten to the top 20.

The trend toward more enlightened treatment of criminal records has accelerated in the past 18 months

The public commitment to a reintegration agenda seems more grounded in economic imperatives than ever, as pandemic dislocations have brought home the need to support, train, and recruit workers, who are essential to rebuilding the small businesses that are the lifeblood of healthy communities, while supporting themselves and their families. The economics of reintegration are reflected in new

³ See Margaret Love & David Schlusell, *The Many Roads to Reintegration: A 50-State Report on Laws Restoring Rights and Opportunities after Arrest or Conviction*, Collateral Consequences Res. Ctr. (September 2020), <https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf>.

laws to lower bars to occupational and professional licensure, to limit access to criminal records, and to ensure nondiscrimination in hiring.

As Gabriel Chin argues in his introduction to this report, it is economic efficiency (as well as morality) that demands a national solution to the problem of collateral consequences, if not a uniform one:

With individuals desperate for money and opportunity, and businesses hungry for workers, the need for a sensible policy to minimize employer concerns about risk is clear. And while there remains no compelling necessity for all states to have the same penalties for armed robbery or cattle rustling, collateral consequences are a national economic problem affecting whole communities that might justify a federal, or at least a uniform, solution.

But there is still a long way to go before people with a record are treated fairly in getting a job and supporting a family, securing a place to live, and participating fully in civic affairs. A recent federal agency report noted how the criminal justice system conspires at every step to exacerbate the financially precarious situation in which many entering that system already find themselves,⁴ and this extends to the high cost of many if not most of the record relief mechanisms discussed in this report.⁵

Economic efficiency demands a national solution to the problem of collateral consequences

This report considers remedies for three of the four main types of collateral consequences identified in Gabriel Chin’s introduction: loss of civil rights, limits on access to damaging criminal record information, and loss of opportunities and benefits, notably in the workplace.⁶ Its first chapter finds a continuation of the trend toward restricting

⁴ See Consumer Financial Protection Bureau *Justice-Involved Individuals and the Consumer Financial Marketplace* (January 2022).

⁵ See, e.g., Collateral Consequences Resource Center & National Consumer Law Center, *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Bar to Record Clearing* (February 2022).

⁶ This report covers voting and firearms but not the other civil rights featured in the state-by-state profiles from the Restoration of Rights Project (RRP) and in the 50-state comparison chart, “Loss & Restoration of Civil/Firearms Rights,” <https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/>.

felony disenfranchisement to those actually incarcerated, a long-time goal of national reform organizations and advocates. Some of these reforms may have been influenced by the high-profile litigation over Florida’s “pay-to-vote” system, which shined a national spotlight on financial barriers to the franchise and their disproportionate exclusion of Black and Brown individuals. This chapter also 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, supplement, or limit public access to criminal records, relief mechanisms that have attracted the most attention in legislatures thanks to vigorous advocacy efforts, but that have benefited the least

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

from national models. This chapter is divided into several parts, based on the type of relief offered (e.g., pardon, expungement, set-aside, certificates, diversion, etc.), and the type of record affected (conviction or non-conviction). It includes a discussion of recent efforts to make record relief automatic, in light of the barriers in petition-based systems that tend to discourage individuals from taking

advantage of remedies intended to benefit them. The wide variety in eligibility,

It also does not cover the fourth main type of consequence: limits on personal freedom—including sex offender registration, civil commitment, immigration consequences, and family-related consequences. Relief mechanisms for these are quite complex and built into the law governing each area. We collect these laws in our annual legislative reports, <https://ccresourcecenter.org/resources-2/resources-reports-and-studies/>, and 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, occupational licensing, and housing (the areas most likely to be regulated under state law) but it does not access to governmental programs and benefits, or consequences that are specific to juvenile records. These are collected and described in Margaret Colgate Love, Jenny Roberts & Wayne Logan, [COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY & PRACTICE](#), Ch. 2 (West, 4th ed. 2021-2022).

process, and effect of these record relief laws speaks volumes about how far the Nation is from common ground on who should have access to which records.

On the other hand, one issue on which there does appear to be an emerging consensus is that non-conviction records should be automatically sealed on disposition. We are particularly pleased to see how much progress there has been on this issue just since the publication of our [Model Law on Non-Conviction Records](#) in 2019.

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. In enacting these “fair chance” laws, 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 advocacy organization. Regulation of private employment has also been influenced by national models, although to a lesser extent.

This national survey 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 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 criminal record information. Time will tell how the goal of a workable and effective criminal record relief system is achieved in our laboratories of democracy.

Collateral consequences must be treated as part of a punitive criminal law system, as opposed to a separate civil regulatory regime

Most encouraging, as Gabriel Chin’s introduction proposes, many lawmakers and policymakers seem to have come to recognize that collateral consequences are, and must be treated as, part of a punitive criminal law system, as opposed to a separate civil regulatory regime:

Like criminal sentences themselves, [collateral consequences] should be imposed only when and to the extent necessary, there should be opportunities for case-by-case consideration, and there should be an end to them. Otherwise, collateral consequences, designed to promote public safety, risk undermining it.

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 the federal system, and explain the basis for our grading system. In an appendix, we collate these grades to produce a consolidated ranking of states and D.C. in the nine categories that we graded. That ranking is reproduced below.

The nine categories graded for the overall ranking are: loss and restoration of the vote, pardon, conviction relief (felony and misdemeanor graded separately), judicial and administrative certificates of relief, deferred adjudication, non-conviction records, employment, and occupational licensing. We did not separately grade housing because there are only a handful of jurisdictions that have statewide bars to housing discrimination based on criminal record, but the five jurisdictions that do (CO, DC, IL, NJ, NY) were given extra credit in determining their overall ranking.⁷ Grades for deferred adjudication and certificates of relief were given only half the weight as other categories of relief in determining overall ranking. We did not grade restoration of firearms rights because state laws are too varied to helpfully compare.

⁷ New Jersey's Fair Chance in Housing Act enacted in 2021 applies to all rental housing providers except owner-occupied premises of four units or less, and it prohibits consideration of any criminal record at the initial rental application stage, allows only certain records to be considered after a conditional offer is made, and imposes substantive and procedural standards for withdrawal of a conditional offer. Violations may be sanctioned with up to \$10,000 in fines and other compliance measures, civil immunity is provided for landlords from claims based on decisions to rent to individuals with a record, and reporting requirements are included. See David Schlussek, *New Jersey puts "Fair Chance Housing" on the national agenda*, Collateral Consequences Res. Ctr., June 22, 2021 (discussing New Jersey's fair housing law as well as the four other state-wide fair housing laws), <https://ccresourcecenter.org/2021/06/22/new-jersey-puts-fair-chance-housing-on-the-national-agenda/>.

With one exception (voting) the criteria used for grading were subjective, usually involving a judgment about scope and effectiveness, and to a lesser extent accessibility in a few categories are objective (e.g., voting) but most rely on subjective judgments, primarily about scope and effectiveness. For further information about the basis for each state’s grade in a specific category, see the relevant state profile in the Restoration of Rights Project.

The overall rankings have changed somewhat since the first edition of this report was

A number of states have significantly improved their ranking, but most of the states originally in the bottom 10 are still there

published in September 2020. New Jersey and New Mexico moved into the top 10 by virtue of impressive lawmaking in 2021, while the District of Columbia, Michigan, Ohio, and Virginia moved into the top 20 based on laws enacted in the last 18 months. Most encouraging, two of the latter group of movers had been well down toward the bottom of the pack in our earlier report

card, with Virginia making a particularly strong showing, moving from 44th place to 16th, with D.C. moving from 40th place to 19th.⁸ Oregon also improved its rank significantly based on an overhaul of its record-clearing law. Illinois retained its top rank, with Connecticut and California close behind.

Most of the states ranked in the top 10 in the 2020 Report Card are still there, while most of the states ranked in the bottom 10 in the earlier report remained where they were. (Rankings from the 2020 report can be accessed for comparative purposes [here](#).)

The record reforms enacted by the District of Columbia in the past few years are worth a separate comment, for they present a remarkable study in contrasts: On the one hand, D.C. has enacted a series of extraordinarily progressive laws to open opportunities for people with a record in civil areas like voting, employment, housing,

⁸ Arizona, one of our Reintegration Champions for 2021, improved its ranking only slightly despite enacting a broad new record-sealing law, largely because its other now-parallel record relief system (set-aside but no sealing) got relatively high marks in our 2020 report. See Margaret Love & David Schlüssel, *From Reentry to Reintegration, Criminal Record Reforms in 2021* at 3 Collateral Consequences Res. Ctr. (Jan. 2022), https://ccresourcecenter.org/wp-content/uploads/2022/01/2022_CCRC_Annual-Report.pdf.

and occupational licensing. At the same time, D.C.'s laws in every category of criminal

D.C.'s grades in every category of criminal record relief are among the lowest of any U.S. jurisdiction, likely reflecting the heavy hand of federal prosecutors

record relief have not changed in years and are among the lowest of any U.S. jurisdiction, likely reflecting the heavy hand of the federal authorities that control most prosecutions under the D.C. Code, a mortifying record in these important categories that is rivaled only by that of the federal system itself.

The overall rankings in each category are collected in an appendix to this report (p.

109). The companion **Reintegration Report Card** explains how each state rated in the nine graded categories and proposes specific ways in which each state may strengthen or extend its laws and thus improve its ranking. In some cases, a state's law is compared to analogous laws in surrounding states with which the state may compare itself. Hopefully, our grades and rankings will challenge, encourage, and inspire additional reforms in the months and years ahead.

Our grading and ranking judgments deserve one further 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, and so we welcome the more nuanced judgments to practitioners, researchers, and the law's intended beneficiaries.

National Ranking of State Restoration Laws – March 2022			
1 Illinois	15 Michigan	29 Kentucky	43 Kansas
2 Connecticut	16 North Dakota	30 Nebraska	44 Wisconsin
3 California	16 Rhode Island	31 Hawaii	44 Maine
4 Colorado	16 Virginia	31 N. Carolina	44 Texas
4 Delaware	19 D.C.	31 Tennessee	47 Iowa
4 New Jersey	19 N. Hampshire	34 Arizona	48 Montana
7 New York	19 Oklahoma	34 Georgia	49 S. Dakota
8 Minnesota	22 Indiana	34 Maryland	50 Alaska
9 Nevada	22 Louisiana	37 Idaho	51 Florida
10 New Mexico	22 Massachusetts	38 Wisconsin	52 Federal
11 Ohio	25 Arkansas	39 Alabama	
11 Pennsylvania	25 Missouri	39 Mississippi	
11 Utah	25 Oregon	39 S. Carolina	
11 Washington	25 Vermont	42 W. Virginia	

I. LOSS AND RESTORATION OF VOTING AND FIREARMS RIGHTS

A. Voting Rights

1. Overview

The loss and restoration of the right to vote after a conviction depends upon state law, including for people with federal convictions.⁹ The Supreme Court has ruled that the Fourteenth Amendment to the Constitution permits states to permanently deny the vote based on a felony conviction.¹⁰

In 25 states and D.C. almost every citizen living lawfully in the community is automatically eligible to vote despite a felony conviction

That said, few states go so far. In two states (Vermont and Maine) and the District of Columbia, conviction does not result in loss of the right to vote. In another 23 states the vote is lost only if a conviction (usually a felony) results in incarceration,¹¹ and in all but two of the 23 states disenfranchisement lasts only as long as a person is actually incarcerated.¹² In one of those two states (Idaho) disenfranchisement continues through completion of parole, and in the other (Louisiana)

reenfranchisement may be delayed for a person on supervision for a maximum of five

⁹ 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. Until 2021, Connecticut was a notable exception. *See* Conn. Gen. Stat. § 9-46a, as amended by Sections 110-112 of SB 1202. The four states that still provide for discretionary reenfranchisement typically allow those with federal convictions to regain the vote on the same terms as those with in-state convictions and/or recognize restorations in the state of conviction. *See infra* note 19.

¹⁰ *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).

¹¹ In a few of these states, people incarcerated for a misdemeanor or convicted of an election-related misdemeanor may not vote. *See, e.g.*, 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).

¹² *See 50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, Restoration of Rights Project, Collateral Consequences Res. Ctr. (Dec. 2021), <https://ccresourcecenter.org/state-restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privileges/>.

years after release from actual incarceration.¹³ Thus, in 25 states and D.C. almost every citizen living lawfully in the community is automatically eligible to vote despite a felony conviction.

Another 21 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.¹⁴ Nine of these 21 states also require a person to pay some or all conviction-related court debt (fines, fees, and restitution) before being allowed to register.¹⁵ In most of the remaining states in this group the vote depends on discharge from supervision, which in practice means that court debt may delay restoration of rights, depending on a person's ability to pay.¹⁶ The wealth-based discrimination inherent in conditioning voting on

The wealth-based discrimination inherent in making voting rights dependent on payment of court debt has been challenged on constitutional grounds

¹³ Louisiana restores the franchise automatically to a person who has not been “actually incarcerated” for a 5-year period pursuant to an “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). In 2021 a law interpreted “actual incarceration” not to include a return to custody as a result of a parole or probation violation not resulting in revocation.

¹⁴ See *50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, *supra* note 6. Most of these 21 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).

¹⁵ See Margaret Love & David Schlusel, *Who Must Pay to Regain the Vote: A Fifty-State Survey*, Collateral Consequences Res. Ctr. (rev. Nov. 2020), <https://ccresourcecenter.org/wp-content/uploads/2020/11/Who-Must-Pay.Nov.2020.update.pdf>.

¹⁶ Nonpayment of court debt may delay reenfranchisement by conditioning early discharge on payment, or by delaying discharge for nonpayment, or both. Oklahoma alone of the states in this group reenfranchises after a fixed sentence period, regardless of payment of court debt.

payment of court debt has been challenged on constitutional grounds in several states, to date without success.¹⁷

Since Florida amended its constitution in 2018 to restore the vote automatically in most cases upon completion of sentence, only four states (Iowa, Kentucky, Mississippi, Virginia) now rely exclusively on the governor's 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 to some or all convicted individuals, and the fourth (Mississippi) disenfranchising fewer people but showing no interest in restoring them to the franchise.¹⁸ Three of these "discretionary" states make provision for restoring the vote to people with federal or out-of-state convictions.¹⁹ A few states rely on discretionary restoration for cases they exclude from automatic restoration.²⁰

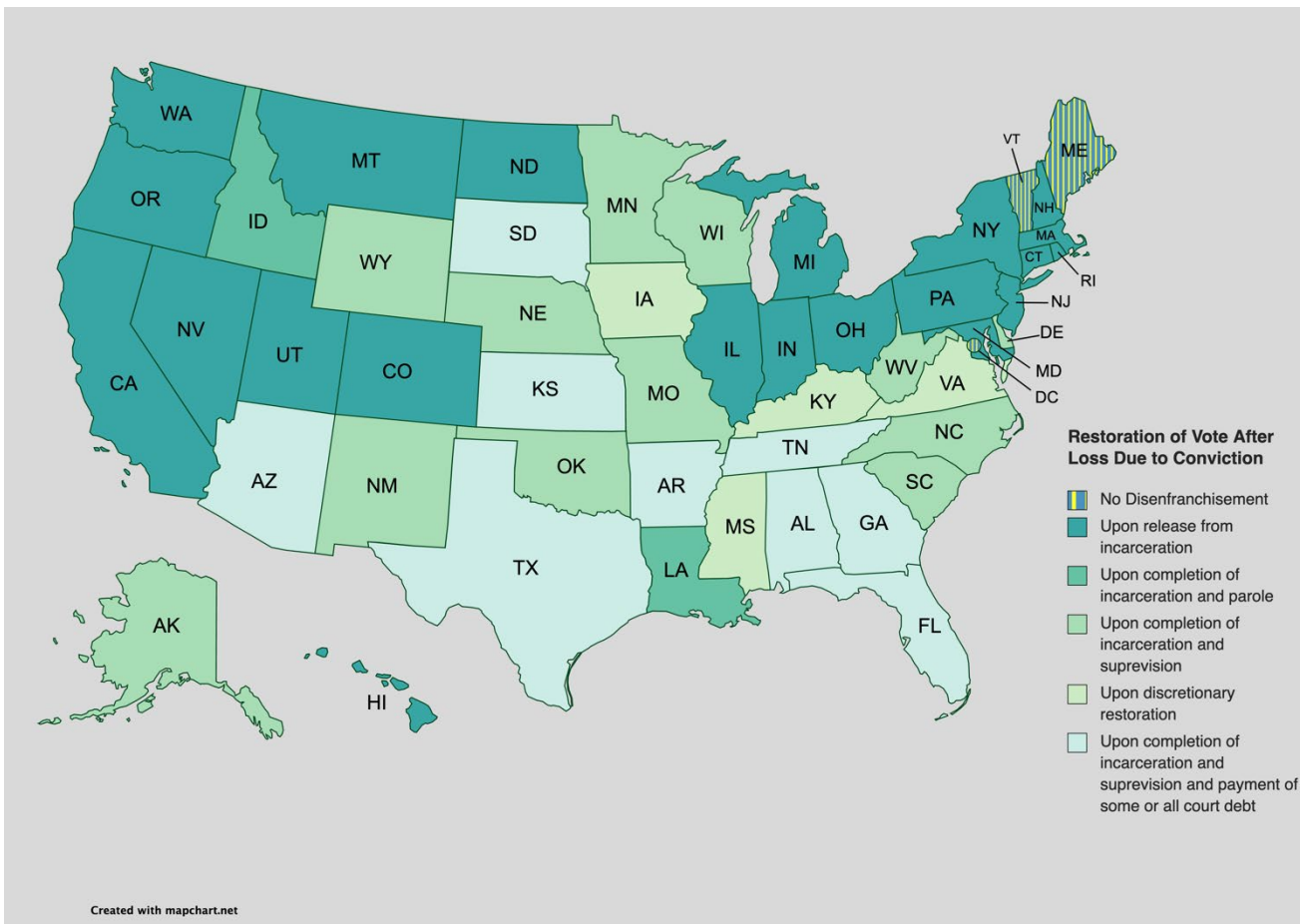
¹⁷ See, e.g., *infra* notes 32, 37.

¹⁸ Recent governors of Virginia have issued broad executive orders restoring the vote automatically to all persons not actually incarcerated, and in 2021 the Virginia legislature began the process of amending the state constitution to conform with this policy. Recent governors of Iowa and Kentucky have issued narrower orders restoring the vote to certain categories of individuals, after completion of their sentences. See *infra* note 29. Mississippi disenfranchises based on state convictions only, and largely for common law crimes. However, Mississippi's governors and legislatures have evidenced no interest in recent years in restoring voting rights to the disenfranchised, though both have authority under the state constitution to restore civil rights. 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).

²⁰ 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); Del. Const. Art. V § 2 (excepting from automatic restoration those convicted of murder, bribery or similar public corruption, or a sexual offense); Wyo. Stat. Ann. §§ 7-13-105(a) (people ineligible for automatic restoration must seek restoration from the governor).

I. LOSS AND RESTORATION OF VOTING AND FIREARMS RIGHTS



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.

2. Reenfranchisement Trends Since 2015

The changing national landscape described in the preceding section reflects a growing consensus that restoration of the vote is an important aspect of criminal justice reform.²¹ During the six-year period between 2015 and 2021, 22 states and the District of Columbia enacted no fewer than 37 laws limiting disenfranchisement

²¹ 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).

or encouraging the newly enfranchised to vote, with additional executive orders and ballot initiatives. More than half of these new laws were enacted after January 1, 2019, so the trend toward making more convicted individuals eligible to vote appears to be accelerating.

There is a growing consensus that restoration of the vote is an important aspect of criminal justice reform

As noted in the previous section, the District of Columbia joined Maine and Vermont in doing away with felony disenfranchisement altogether.²² Eight states limited disenfranchisement to a period of actual incarceration,²³ and 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.²⁴ Six states removed an explicit condition requiring payment of some or all court debt from their restoration laws.²⁵ Two more states

²² By virtue of a law enacted in November 2020, and effective in April 2021, conviction does not result in loss of the right to vote in the District of Columbia. See [DC Council Bill 23-0324, A23-0484](#). Among other things, the law requires the Board of Elections to provide an absentee ballot and voting information to those in the custody of the Department of Corrections and the Bureau of Prisons.

²³ Connecticut and New York enacted laws eliminating disenfranchisement while on parole, and California did so by ballot initiative. Conn. Gen. Stat. § 9-46(a), amended by Public Act 21-2 (SB 1202); NY S830B (2021); Cal. Const. art. II, § 4 (amended Nov. 3, 2020, by Prop. 17. Res.Ch. 24, 2020. Colorado, Maryland, Nevada, New Jersey, and Washington eliminated a requirement to complete the sentence as a condition of reenfranchisement. Colo. Rev. Stat. § 1-2-103(4), *amended by* HB19-1266; Md. Code Ann., Election Law § 3-102(b)(1), amended by 2016 Maryland Laws Ch. 6 (H.B. 980); N.J. Stat. Ann. § 19:4-1(8), amended by P.L.2019, c.270. 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). Washington also legislated twice during this period, eliminating a requirement to pay court debt in 2019, and subsequently restricting disenfranchisement to actual incarceration in 2021. Chapter 331, 2019 Laws (HB 1041); Chapter 10, Laws of 2021 (HB1078)

²⁴ La. Stat. Ann. § 18:102, *amended by* 2018 La. Sess. Law Serv. Act 636 (H.B. 265).

²⁵ Connecticut eliminated its requirement to pay court debt that applied to those with federal and out-of-state convictions. Conn. Gen. Stat. § 9-46a, amended by Public Act 21-2 (SB 1202).

removed barriers to voting related to incarceration or waiting periods,²⁶ and three states ended indefinite disenfranchisement for at least some individuals.²⁷ Finally, California voters approved a ballot initiative approving automatic reenfranchisement upon release from incarceration, and the Virginia legislature initiated the process of constitutional amendment to this same end.²⁸

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.²⁹

Washington eliminated its requirement that court debt be paid in order to 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). (Washington later amended the law to restrict disenfranchisement to actual incarceration.) Nevada eliminated a requirement to pay restitution before registering. 2017 Nev. Laws Ch. 362 (A.B. 181). (Two years later, Nevada amended the law to restrict disenfranchisement to actual incarceration.) Delaware eliminated its requirement to pay court debt to regain the vote. Del. Code Ann. tit. 15, § 6102, *amended by* 2016 Del. Laws Ch. 311 (S.B. 242). Arizona eliminated its requirement to pay court debt (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).

²⁶ 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).

²⁷ 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); 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).

²⁸ 2019 Cal. ACA-6, *supra* note 23; VA CHAP 519 (March 2021).

²⁹ *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.

The move to limit felony 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.³⁰

During this same six-year period since 2015, only one state acted to extend penal disenfranchisement. Florida's June 2019 passage of SB7066, conditioning voting rights on full payment of court debt, 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.³¹ SB7066 was challenged on federal constitutional grounds, along with the ballot initiative, which was later interpreted by the Florida Supreme Court to itself require payment of court debt. In September 2020 the state's requirement that court debt be paid as a condition of reenfranchisement was upheld by the 11th Circuit.³²

³⁰ Since 2016, Virginia's governor has regularly restored the vote upon completion of a term of supervision and currently does not require payment of court debt. See Restoration of Rights, Secretary of the Commonwealth of Virginia, <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 vote automatically upon completion of sentence. Iowa Exec. Order No. 2020-7 (Aug. 5, 2020). New York's governor issued an Executive Order directing that an individual 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). This executive order was replaced in 2021 with a statute limiting disenfranchisement to a period of actual incarceration. See SB830B, <https://www.nysenate.gov/legislation/bills/2021/s830>.

³¹ [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.*

³² The law was challenged on 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. A panel of 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). Upon *en*

The Collateral Consequences Resource Center filed a friend of the court brief in the Florida litigation documenting the nationwide frequency with which unpaid court debt may delay restoration of the vote or deny it indefinitely.³³ The brief documented that in twenty states and the District of Columbia, court debt has no bearing on

Nine states mandate permanent disenfranchisement based on outstanding court debt

eligibility to vote, and in 16 states court debt potentially affects only the *timing* of re-enfranchisement.³⁴ 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 court debt as disqualifying. With Connecticut’s repeal in 2021 of a law requiring people with federal and out-of-state convictions to pay outstanding “fines” before voting,³⁵ there are at present only nine states whose laws mandate permanent disenfranchisement of some or all individuals based on some or all outstanding court debt, regardless of ability to pay. Only three of these states, including Florida, require payment of *all* court debt associated with a disqualifying conviction; the remaining six states require payment of certain financial obligations.³⁶

banc review, the full court of appeals overruled the panel opinion and reversed the district court’s holding, finding that the disenfranchisement statute met the rational basis test of the Equal Protection Clause, and further that it did not violate the 24th Amendment’s prohibition on a poll tax. *See Governor of Florida v. Jones*, 975 F. 3d 1016 (11th Cir. 2020). The court’s majority decision and its several concurring and dissenting opinions are analyzed at 134 Harv. L. Rev. 2291 (Apr. 2021).

³³ See <https://ccresourcecenter.org/wp-content/uploads/2020/07/2020.08.03-Exhibit-A.pdf>. The research in this brief is summarized in Love & Schluskel, *supra* note 15.

³⁴ 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.

³⁵ *See supra* note 25.

³⁶ In addition to Florida, Alabama and Arkansas require all convicted individuals to pay all court debt before voting. South Dakota requires only those convicted after June 30, 2012, to

Challenges have also been brought against laws mandating payment of court debt as a condition of regaining the vote in North Carolina and Alabama. In the fall of 2020, 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.³⁷

It remains to be seen what role the federal government may play in expanding access to the ballot box by justice-involved individuals. In this regard, it is notable that early in his administration President Biden issued an executive order directing every federal agency to promote access to voting, an order that includes an ambitious directive to the Attorney General to provide voter education materials to the hundreds of thousands of individuals in federal custody or under federal supervision who are eligible to vote under state law.

President Biden directed the Attorney General to provide voter education material to all those in federal custody

This represents “the first time the federal government has ever taken action to ensure justice-involved voters can participate equally in our democracy.”³⁸

In summary, at the beginning of 2022 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

pay all court debt, Tennessee requires payment of restitution and costs, Arizona requires payment of restitution, Kansas requires payment of fines and restitution imposed as part of the court’s sentence, and Georgia and Texas require payment of court-imposed fines. See Love & Schlüssel, *supra* note 15.

³⁷ See *Community Success Initiative v. Moore*, No. 19-CVS-15941 (N.C. Gen. Ct. Just., Sept. 4, 2020) (summary judgement and preliminary injunction orders), No. 331P21-1 (N.C., Sept. 10, 2021) (leaving in place the trial court’s preliminary injunction issued on Sept. 4, 2020); see also *Thompson v. Merrill*, No. 2:16-cv-783 (M.D. Ala., filed Sept. 26, 2016).

³⁸ See David Schlüssel, *President Biden orders DOJ to facilitate voting for people in federal custody or under supervision*, Collateral Consequences Resource Center, March 12, 2021, <https://ccresourcecenter.org/2021/03/12/president-biden-orders-doj-to-facilitate-voting-for-people-in-federal-custody-or-under-supervision/>.

to the ballot box based on conviction.³⁹ 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.⁴⁰ 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.

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.⁴¹ 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 prisoners to vote.⁴² This remnant of ancient civil death and Jim Crow should have no place in the modern American polity.

³⁹ 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>.

⁴⁰ Christina Beeler, *Felony Disenfranchisement Laws: Paying and Re-Paying a Debt to Society*, 21 U. Pa. J. Const. L. 1071, 1088 (2019) (internal quotation marks omitted).

⁴¹ 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.”)

⁴² See, e.g., Christopher Uggen & Jeff Manza, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (Oxford U. Press, 2006).

Report Card: Voting Rights

The grades below are based on the following objective scheme: **A**: No felony disenfranchisement; **B**: Disenfranchisement only while incarcerated; **C**: Automatic reenfranchisement after completion of sentence and supervision; **D**: Reenfranchisement by executive action after completion of sentence (in a few cases also payment of court-imposed fines), or reenfranchisement of some but not all convicted persons; **F**: No reenfranchisement until completion of sentence and payment of all court debt.⁴³

AL	F	IL	B	MT	B	RI	B
AK	C	IN	B	NE	C	SC	C
AZ	F	IA	D	NV	B	SD	F
AR	F	KS	F	NH	B	TN	F
CA	B	KY	F	NJ	B	TX	D
CO	B	LA	C	NM	C	UT	B
CT	B	ME	A	NY	B	VT	A
DE	B	MD	B	NC	C	VA	B
DC	A	MA	B	ND	B	WA	B
FL	F	MI	B	OH	B	WV	C
GA	D	MN	C	OK	B	WI	C
HI	B	MS	D	OR	B	WY	C
ID	C	MO	C	PA	B	Fed	n/a

⁴³ A handful of states don't fit neatly into any category: Virginia's "B" is based on the fact that its past two governors have restored the vote upon release from prison by executive order and the state has begun the process of amending its constitution to make this permanent; Louisiana's "C" is based on its disenfranchisement for a period of time after release from prison; Kentucky's "F" is based on the fact that some convictions are excepted from the executive order restoring the vote, including those convicted of violent offenses and out-of-state and federal crimes, and that those excepted must pay court debt before the governor will restore the vote; Arizona's "F" is based on its disenfranchisement of people with one felony conviction until completion of sentence and payment of some court debt (restitution), and disenfranchisement of those with more than one felony permanently until a court restoration.

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

The provisions for regaining firearms rights in each U.S. jurisdiction so disparate as to defy a neat grading and ranking system.

possession as a condition of granting probation.⁴⁴ But the provisions for regaining firearms rights in each U.S. jurisdiction are so disparate as to defy a neat grading and ranking system.

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.⁴⁵ 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.⁴⁶

⁴⁴ 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.

⁴⁵ Restoration of Rights Project, *50-State Comparison: Loss & Restoration of Civil/Firearms Rights*, *supra* note 6.

⁴⁶ 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 conviction 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

I. LOSS AND RESTORATION OF VOTING AND FIREARMS RIGHTS

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 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.⁴⁷

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

In most states, firearms dispossession is indefinite, and everyone who lost rights must petition a court for discretionary relief or ask for a pardon.

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.

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

caselaw regarding interstate recognition); *Love et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at §§ 2:35, 3:22 and 7:24.

⁴⁷ See note 44, *supra*.

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types of convictions, though expungement has a role in only a few (Arkansas, Missouri, Oregon, and Utah). 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.⁴⁸ 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.⁴⁹

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.⁵⁰ 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 firearms under state law), but the effect of specific state relief mechanisms on federal

⁴⁸ 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>.

⁴⁹ See Georgia and Nebraska profiles, Restoration of Rights Project, <https://restoration.ccsresourcecenter.org/>.

⁵⁰ See 18 U.S.C. § 922(g).

firearms rights is varied and complex.⁵¹ In contrast, after a conviction in federal court, the federal ban can only be lifted by a presidential pardon.⁵²

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,"⁵³ 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,"⁵⁴ but some lower courts have characterized this statement as dictum, and scholars have questioned its historical accuracy.⁵⁵ One federal court of appeals has upheld an "as applied" challenge to the categorical firearm ban by two individuals with dated state misdemeanors, although that decision appears to have little precedential value even in the same courthouse.⁵⁶

⁵¹ See 18 U.S.C. § 921(a)(20); see also *Caron v. United States*, 524 U.S. 308 (1998); Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 2:35 ("Restoration of firearms privileges; relationship between state and federal dispossession laws"). See Restoration of Rights Project, *50-state Comparison Chart on Civil/Firearms Rights*, *supra* note 6, Chart #3 ("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.

⁵² See *Beecham v. United States*, 511 U.S. 368 (1994), discussed in Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 2:35.

⁵³ *District of Columbia v. Heller*, 554 U.S. 570, 637 (2008).

⁵⁴ *Id.* at 626-27.

⁵⁵ See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 2:36 ("Second Amendment challenges to felony dispossession laws"), notes 4 through 6.

⁵⁶ 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 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). The Third Circuit appears to have regretted its leniency toward people with a criminal record: in two divided panel decisions the court rejected a Second Amendment challenge by a person convicted of misdemeanor drunk driving, and ten months later appeared to slam the door on anyone convicted of a felony. See *Holloway v. U.S. Attorney General*, 948 F.3d 164, 164 (3d Cir. 2020); *Folajtar v. U.S. Attorney General*, 980 F.3d 897, 902-903 (3d Cir. 2020). These cases are

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At least one state court has relied upon a “right to bear arms” provision of its 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.⁵⁷

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 through this political channel, firearms dispossession 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.

instructive for the difficulty of finding firm support in the historical record for *Heller’s* description of felony dispossession as “longstanding.”

⁵⁷ 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. CRIMINAL RECORD RELIEF

Introduction

The following sections describe the various legal authorities that revise, supplement, or limit access to a person’s criminal record to reduce or eliminate barriers to opportunity in civil society. What we term “record relief” is a form of remedy that operates on the criminal record itself to reduce its negative effect, by revising, supplementing, or limiting access to the record. Record relief strategies tend to fall into one of two categories: “concealment” remedies like sealing and expungement, and “contextualization” remedies that include executive pardon, judicial set-asides, and certificates of relief, which present additional favorable information about a person’s suitability and address concerns about risk. The term “record clearing” refers to remedies in the first category that authorize limits on access to the record or in some cases sequestration or even destruction of the record.

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, intended to accomplish the individual’s reintegration into society. Over time, beginning in the early 20th century, analogous judicial and legislative remedies emerged to supplement the institutionally less reliable and politically exposed pardon: expungement, sealing, and set-aside revised or “cleared” a person’s criminal record, while certificates of relief removed or mitigated barriers to benefits and opportunities. In a few states, regular administration allowed pardon to perform this same function. Procedures were devised to divert cases from the criminal law system without a conviction.

The advent of digitized records systems and a heightened public appetite for accessing information produced a new commerce in background screening

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. Perhaps most significant, the advent of digitized records systems and a heightened public appetite for accessing information about individuals encountered in various settings produced a new

commerce in background screening and data aggregation that is virtually unregulated.⁵⁸ Digitized criminal records have become a sorting mechanism increasingly relied upon by employers, schools, landlords, and other authorities—and a net-widening device for law enforcement. These developments produced a new demand for limits on dissemination of records, which in turn produced record-clearing laws in almost every state.

CCRC has tracked record relief legislation since 2013 when a revival of the earlier reforms began to produce a torrent of record relief legislation.⁵⁹ In the past eight years, some states have enacted relief schemes for the first time while others have extended or revived laws enacted in an earlier reform era in the 1970's.⁶⁰ Relief for non-conviction records has been mandatory in some states for decades, but until recently relief applicable to conviction records has invariably been individualized and discretionary. As will be described later in this section, a small but growing number of states have made record relief automatic for some convictions.⁶¹

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

Relief via expungement, sealing, or set-aside is now available by statute or court rule for at least some felony convictions in 41 states, for many misdemeanor convictions in 45 states and the District of Columbia, and for most non-conviction records in all 50 states and D.C. Diversion is available in some form in almost every state, and 14

⁵⁸ See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at §§ 5:2 through 5:6.

⁵⁹ See CCRC's annual legislative reports, linked in note 6, *supra*. Trends accelerating since 2013 culminated in 2021 in an unprecedented 92 new "record relief" laws enacted by 36 states. (What we call "record relief" is a form of remedy that operates on the criminal record itself to reduce its negative effect, by revising, supplementing, or limiting access to the record.) The year before, the first of the pandemic, 34 states enacted 82 laws to authorize, expand, or streamline record clearing (sealing and expungement) or set-aside remedies.

⁶⁰ See generally 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 (2003).

⁶¹ Laws automating record clearing are discussed in section IIB *infra*, and we also count in this "automatic" category the mass pardons designed to benefit those whose convicted conduct has since been decriminalized, notably marijuana possession. See section IIA, *infra*.

states now offer judicial certificates of relief. Only Congress has failed to enact any relief for those arrested or convicted by federal authorities, leaving individuals with federal convictions without remedy short of a presidential pardon, and those with federal non-conviction records with no relief at all.

There is no consensus about how to manage dissemination of damaging criminal record information and no national models

The diverse approaches to record relief across the country reveal the absence of consensus about how to manage access to damaging criminal record information so as to facilitate reentry and encourage reintegration, while at the same time accommodating the public's interest in limiting

public safety risk. It is striking that the major national law reform organizations have offered no models or even a set of workable operational principles for managing access.⁶²

In approaching a solution, it is important to recognize that not all records are created equal, and neither are those claiming an interest in accessing them. At one end of the spectrum, arrests not resulting in charges and charges not resulting in a finding of guilt seem most suitable for 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).

In recent years legislatures have been increasingly called upon to determine conditions of use and levels of access, from law enforcement agencies to nosy neighbors. In each of the past three years, including the first pandemic year, more

⁶² See note 106, *infra*, for a discussion of how the American Law Institute, the Uniform Law Commission, and the American Bar Association have addressed access to criminal records in their models.

than 150 new record relief laws have appeared on the books in literally every corner of the country.⁶³

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 in law or policy still 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 across the country. 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.

Progress toward a functional relief system has been halting, uneven, but determined in many states

⁶³ See reports cited in note 59, *supra*.

A. Executive 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.⁶⁴ 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 or mitigating court-imposed punishments and restoring rights and status lost because of conviction.

Nowadays, in many 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 public 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.

Pardon fills significant gaps in record relief schemes across the country

Yet pardon fills significant gaps in record relief 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 11 states

⁶⁴ 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.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 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).

ineligibility for jury service is permanent without a pardon, including Arkansas, Delaware, Oklahoma, Pennsylvania, South Carolina, and Texas. (By comparison, expungement restores firearms rights in only five states, and jury rights in only two.⁶⁵) 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.⁶⁶ 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 for felony convictions in the 16 states where courts have no authority to clear them

Of greater moment, pardon represents the only potential source of record relief in the 16 U.S. jurisdictions whose courts have no authority to expunge or seal any felony convictions, and in six of those 16 states a pardon is the essential predicate for record clearing.⁶⁷ Of the states that do extend record clearing relief to felonies, 14 limit it to a single felony, and almost all

⁶⁵ See *50-State Comparison: Expungement, Sealing & Set-Aside*, Restoration of Rights Project, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/>

⁶⁶ 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”). Cases and executive opinions are collected in *Love et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 2:61(“Immigration Consequences – Pardon Waiver”).

⁶⁷ See *50-State Comparison: Expungement, Sealing & Set-Aside*, *supra* note 65. The six states that authorize sealing of a felony only if it has been pardoned are Alabama, Georgia, Nebraska, Pennsylvania, South Dakota, and Texas. The other 10 jurisdictions where pardon is the only form of record relief for a felony conviction are Alaska, Florida, Hawaii, Iowa, Maine, Montana, South Carolina, Wisconsin, the District of Columbia, and the Federal system. As will be noted later in this section, pardons are frequently and regularly granted in all but

categorically exclude violent or sexual offenses. Given pardon's role in almost every state as an important auxiliary record relief mechanism, its vitality is or ought to be of considerable public concern.

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 pardoning has continued to thrive over the years as an integral part of the justice system even when it has been severely curtailed in others.⁶⁸ In most of these 18 states, pardoning 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 three or four additional states, the pardon power appears to be in the early stages of a revival.⁶⁹

In a significant number of states 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.⁷⁰ 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

Texas in the first group of six, but in only two of the last-mentioned group of 10 (South Carolina and Wisconsin).

⁶⁸ 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.

⁶⁹ Missouri, Oregon, Wisconsin, and perhaps Ohio. *See* commentary on Oregon and Wisconsin pardoning on the Collateral Consequences Resource Center.

⁷⁰ For more detail about the organization and authority of the pardoning authorities in these 18 states, consult the individual state profiles and the 50-state material on "Pardon Policy & Practice" from the Restoration of Rights Project, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/>.

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, also 80% of applications considered. Idaho gets fewer applications but grants a high percentage 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,⁷¹ 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

⁷¹ 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_1c1e0fbc-fc5a-579a-81d0-af4a65f7bb02.html. At the time of this report, only a handful of pardons had been issued by the Nebraska board in 2020 and 2021.

governor as a member hold regular public hearings and grant a substantial percentage of the applications they hear.⁷²

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 the recommendations of an administrative board 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.⁷³

A regular process facilitates regular pardoning, but it does not guarantee it. For example, interest in pardoning in California, Florida, Illinois, Louisiana, Maryland, Ohio, and Wisconsin 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 states where recent efforts to revive the process are promising. Wisconsin’s governor Tony Evers 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.⁷⁴ Missouri’s governor Mike Parson granted more than 200 pardons in 2021 in an effort to reduce a backlog of

⁷² For additional detail, see the authorities cited in note 70, *supra*.

⁷³ See *id.* A full thirty states (including most of the states where pardon is regular and frequent) require the pardoning authority to report annually to the legislature on its grants, frequently with reasons.

⁷⁴ See Jack Keating, *Tony Evers revives pardoning in Wisconsin*, Collateral Consequences Res. Ctr., Oct. 19, 2021, <https://ccresourcecenter.org/2021/10/19/evers-revives-pardoning-in-wisconsin/>.

petitions that had accumulated under his immediate predecessors.⁷⁵ Oregon's governor Kate Brown has also pardoned more generously than her predecessors.⁷⁶ All three of these states received relatively high marks for their recent pardoning. Ohio's Governor Mike DeWine has taken steps to reinvigorate their state's pardon process, but to date it has produced few grants.⁷⁷ In the other 28 states, the District

⁷⁵ In December 2020, shortly after his reelection, Governor Mike Parson began a regular practice of pardoning, responding to an increase in applications and calls in the press for greater use of the power. Between December 2020 and the end of 2021, he issued 219 pardons and 16 commutations, making grants of clemency a regular monthly occurrence. On September 30 the governor's office issued a [summary of his pardoning](#) to that date, noting that he intended to keep pardoning to reduce the backlog of 3500 applications that existed when he took office. Until these grants, pardoning in Missouri had been irregular and sparing in recent years, despite a dramatic increase in applications as a result of heightened employment restrictions since 9/11 and extension of firearms restrictions to long guns in 2008.

⁷⁶ See Jack Keating, *Oregon ramps up its clemency, record relief, and resentencing programs*, <https://ccresourcecenter.org/2022/01/11/oregon-ramps-up-its-clemency-record-relief-and-resentencing-programs/>.

⁷⁷ In December 2019, Ohio 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, to supplement the existing process through the state parole board required by law. In 2021 additional law schools were added to this effort. This project aspires to expedite the process by which people apply for a pardon under Ohio's laws but judging from the few grants issued to date it (only 16 in two years) it seems to have only complicated it and delayed decision-making. See Governor DeWine's news release dated November 9, 2021, <https://governor.ohio.gov/wps/portal/gov/governor/media/news-and-media/governor-dewine-expands-expedited-pardon-project-to-include-law-partners-in-cleveland-dayton-and-cincinnati-11092021>.

of Columbia, and the federal system pardoning takes place, if at all, in an ad hoc and unreliable fashion.⁷⁸

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

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

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 11 of the 18 "frequent and regular" states (Alabama, 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 two additional states,

Illinois and Ohio, the governor may specifically authorize this additional judicial relief. Pardon is uniquely valuable to people with felony records in five of these 13 states (Alabama, Georgia, Nebraska, Pennsylvania, and South Dakota), because they otherwise offer no judicial record clearing for felony-level convictions.⁷⁹

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 most of these nine states record clearing relief for felony convictions is otherwise limited or nonexistent.⁸⁰

⁷⁸ See, e.g., Margaret Colgate Love, *After Trump: Restoring Legitimacy to the Pardon Power*, 33 Fed. Sent'g Rep. 285 (2021).

⁷⁹ See *50-State Comparison: Expungement, Sealing & Set-Aside*, *supra* note 65. Texas also authorizes sealing for pardoned convictions, but they have been rare in recent years.

⁸⁰ *Id.*

In addition to providing record relief to individuals, the pardon power has in recent years been enlisted to advance criminal justice reforms on a broader basis in a number of states. The governors in Iowa, Kentucky, New York, and Virginia have used their power to limit felony disenfranchisement on a class-wide basis (and in the two last-mentioned states statutory or constitutional reforms have followed.) In addition, 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.⁸¹ 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 2017.⁸² The legislature in Illinois also gave the governor's pardon power a part to play in Illinois' marijuana sealing effort,⁸³ and also authorized the governor to restore civil rights to people convicted of federal offenses.⁸⁴

It seems unfortunate 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 engage in what may still seem a politically risky activity. In two of the states in this category (Mississippi and Kentucky) the pardon power was notoriously abused when outgoing governors made hundreds of controversial grants, confirming popular suspicions about the corruptibility of the pardon power.⁸⁵ In a few others, notably

⁸¹ See Colo. Rev. Stat. § 16-17-102(2).

⁸² 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>.

⁸³ 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). For further detail see the Illinois profile from the Restoration of Rights Project.

⁸⁴ See SB 825, amending [10 Ill Cons. Stat. 5/1-1](#).

⁸⁵ Between his defeat at the polls and his final days in office in December 2019, Kentucky Governor Matt Bevin issued more than 400 pardons and commutations, many of which were controversial. See *AP, Bevin Pardons Include Man Whose Brother Held*

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 handful of states whose governors have no authority from the legislature to seek official assistance in their pardoning (Maine, Oregon, and Wisconsin).

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.⁸⁶ It was ignored almost entirely by President Trump. 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.⁸⁷

Fundraiser, <https://www.nytimes.com/aponline/2019/12/12/us/ap-us-kentucky-governor-pardons.html>. Mississippi Governor Haley Barbour granted no more than a handful of pardons until the very end of his tenure in 2012, when he issued 215 clemency grants, many of which were challenged as having failed to comply with constitutionally-mandated procedures. *See In re Hooker*, 87 So. 3d 401 (Miss. 2012).

⁸⁶ See generally Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 Fed. Sent'g Rep. 271 (2017). The Justice Department's pardon process was bypassed by President Trump, and to date the Biden Administration has shown little interest in reviving its role in advising the president in clemency matters. *See Love, After Trump, supra* note 78.

⁸⁷ 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, and there are signs that pardoning may revive in another three states. Hope springs eternal that governors in other states will want to employ this uniquely personal power to help their constituents and advance the cause of criminal

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

justice reform, but for present purposes it seems premature to count any but the 18 as having a fully functional and reliable pardon program. So, there are 32 states in which pardon cannot be counted on to provide record relief for ordinary people.

To be sure, in 24 of these 32 states there is some alternative individualized judicial record relief for felony-level offenses: ten of the 32 offer sealing or expungement for many felonies,⁸⁸ another 12 offer relief for a single felony (usually a first felony offense),⁸⁹ and New York and New Jersey also restore rights through 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.⁹⁰

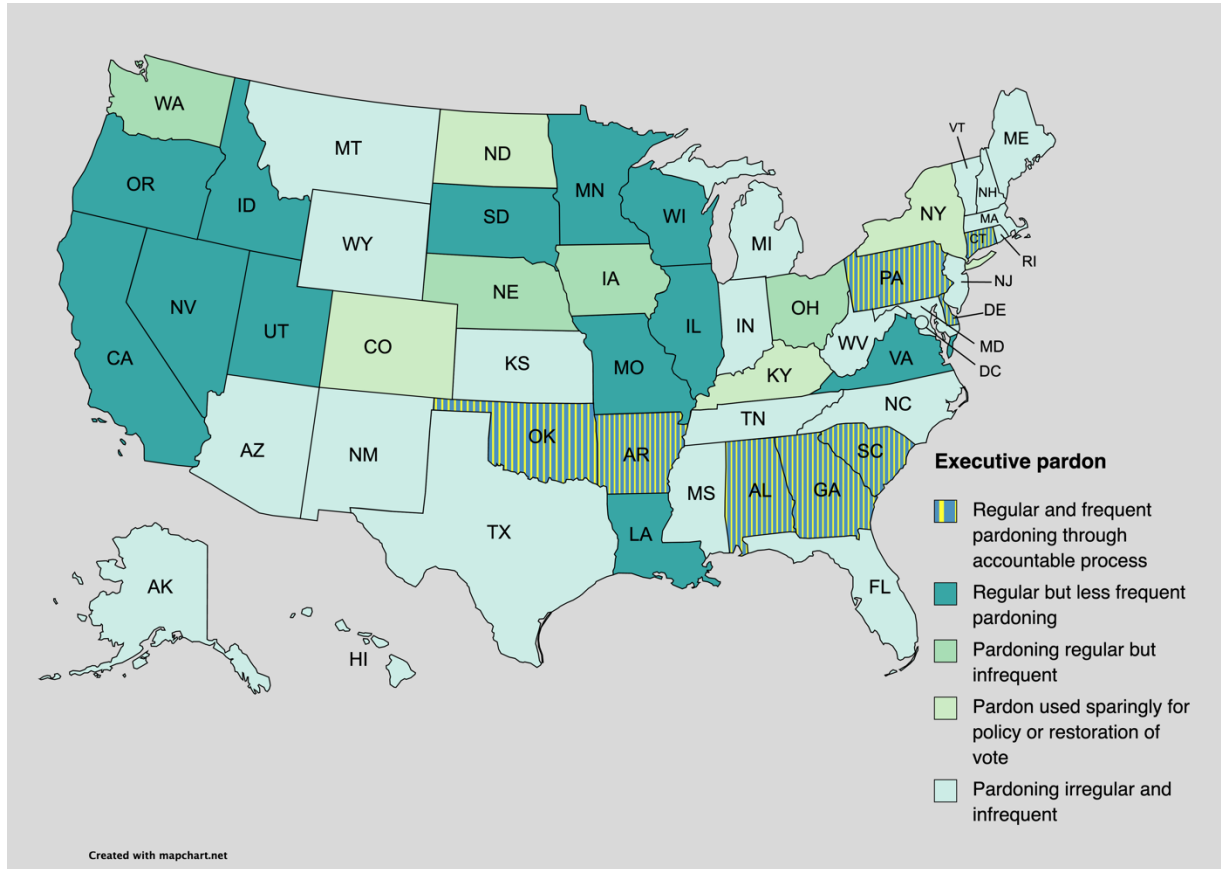
Report Card: Pardon

The following report card grades each state, D.C., and the federal government on their pardon policy and practice during the past several years. The highest mark of “A” goes to jurisdictions whose pardon process is regular and accessible, that has a degree of independence from politics, and produces favorable decisions in a high percentage of applications. In addition to four states with independent boards (Alabama,

⁸⁸ Colorado, Indiana, Kansas, Maryland, Massachusetts, New Mexico, North Dakota, Oregon, and New Hampshire. See the first column of ch. 1 in *50-State Comparison: Expungement, Sealing & Set-Aside*, *supra* note 65.

⁸⁹ See *id.*, second column (all listed states except Delaware and Utah).

⁹⁰ The eight states are Alaska, Florida, Hawaii, Iowa, Maine, Montana, Texas, and Wisconsin. The state profiles from the Restoration of Rights Project indicates that a few of these states provide for specialized record relief for, *e.g.*, youthful first drug offenses, prostitution convictions by victims of human trafficking, and juvenile adjudications.



Connecticut, Georgia, and South Carolina), three states with “gatekeeper” boards (Delaware, Oklahoma, and Pennsylvania) and one state with a tradition of productive and accountable pardoning (Arkansas) earned that grade. Generally, states that received a “B” have a regular process that produces a substantial number (or percentage) of grants, though three states with regular processes (Nebraska, Ohio, and Washington) earned lower marks for the slow recent pace of grants. The governors in three other states (Wisconsin, Missouri, Oregon) earned a “B” grade for their enthusiastic recent revival of pardoning in their states, though in two of those states there is no statutory advisory process to encourage regular pardoning. States where pardoning is irregular or is used primarily to restore voting rights received a “D”, while states where the pardon power is rarely used received an “F.”

AL	A
AK	F
AZ	F

AR	A
CA	B
CO	D

CT	A
DE	A
DC	F

FL	F
GA	A
HI	F

II. CRIMINAL RECORD RELIEF

ID	B
IL	B
IN	F
IA	D
KS	F
KY	D
LA	B
ME	F
MD	F
MA	F

MI	F
MN	B
MS	F
MO	B
MT	F
NE	C
NV	B
NH	F
NJ	F
NM	F

NY	D
NC	F
ND	D
OH	C
OK	A
OR	B
PA	A
RI	F
SC	A
SD	B

TN	F
TX	F
UT	B
VT	F
VA	B
WA	C
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.⁹¹ 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.⁹² 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.”⁹³ In addition to formal consequences imposed by law and rule, widespread dissemination of criminal records online and in background checks operates as a form of continuing “digital punishment.”⁹⁴ In recent years collateral consequences of a less formal variety have extended even to mere arrest records not followed by conviction.⁹⁵ The American way of dealing with a person’s criminal history is

⁹¹ 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).

⁹² 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).

⁹³ Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1811–14.

⁹⁴ See generally Sarah Esther Lageson, *DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE* (Oxford U. Press, 2020); James Jacobs, *THE ETERNAL CRIMINAL RECORD* (Harvard 2015). See also Lageson, *The Purgatory of Digital Punishment* (Aug. 17, 2020), <https://ccresourcecenter.org/2020/08/17/the-purgatory-of-digital-punishment/>; Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 *Brit. J. Criminology* 245 (2020); Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 *Howard L.J.* 1 (2016).

⁹⁵ See, e.g., Wayne A. Logan, *Informal Collateral Consequences*, 88 *Wash. L. Rev.* 1103 (2013). The consequences attaching to a non-conviction record are discussed in Section IIE.

unburdened with the considerations of privacy, utility, and basic fairness that have shaped European systems.⁹⁶

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 extend systems aimed at limiting access to criminal records through individualized expungement, sealing, or set-aside.⁹⁷ We categorize these remedies as “record clearing” to distinguish them from the “record-supplementing” remedies of executive pardon and judicial certificates of relief discussed in other sections of this chapter.

While the functional effect of record-clearing remedies varies from state to state,⁹⁸ at a minimum they promise to alleviate social stigma and economic discrimination that perpetuates second-class citizenship.

⁹⁶ Compare “Fundamental Rights and Legal Consequences of Criminal Conviction,” Sonja Meijer, Harry Annison & Ailbhe O’Loughlin, eds. (Hart, 2019)(essays describing how criminal records are used, managed and exchanged in various European countries and Australia, against a background of fundamental human rights that include protection of privacy) *with* Jacobs, *supra* note 94 (describing how criminal records are used and managed in the United States in the absence of similar conceptual constraints).

⁹⁷ See CCRC annual reports on new restoration of rights laws between 2018 and 2021, linked in note 6, *supra*. 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. Set-aside laws take a different approach, authorizing 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.

⁹⁸ In some states, sealed or expunged records remain available only to law enforcement, which is sometimes required to obtain a court order to access them. In others, public employers and licensing boards will have access, as will 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. It is not clear the extent to which sealing removes formal consequences such as firearm dispossession and sex offender registration. *See* Love et al.,

Studies have shown that people whose records are sealed or set aside experience improved employment outcomes and low recidivism rates.⁹⁹

States in recent years have passed dozens of laws authorizing record-clearing relief, some for the first time. Other states have continued to expand existing eligibility criteria and/or improve procedures.¹⁰⁰ Despite the pace of reform, the law remains

COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 7:17. Federal law frequently does not accord any legal effect to state expungement or record-sealing. *See infra* note 128.

⁹⁹ *See* Prescott & Starr, *supra* note 91 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/>.

¹⁰⁰ *See* CCRC annual reports linked in note 6, *supra*. In 2020 alone, at a time when lawmakers were understandably distracted by the pandemic, 20 states enacted 35 bills expanding or enacting for the first time laws authorizing clearing of conviction and non-conviction records. *See* Margaret Love & David Schlüssel, *The Reintegration Agenda During Pandemic: Criminal Record Reforms in 2020* (January 2021) <https://ccresourcecenter.org/wp-content/uploads/2021/01/CCRC-The-Reintegration-Agenda-During-Pandemic-2020-Reforms.pdf>. Michigan authorized a broad automatic scheme while also expanding petition-based relief, and Georgia, North Carolina, and Nebraska also broadened existing provisions for record relief while six states also authorized relief for marijuana convictions after legalization. The year before, 27 states and D.C. had made certain classes of convictions newly eligible for expungement, sealing, or vacatur relief, five of them enacting their first general authority for expunging or sealing convictions (North Dakota, New Mexico, West Virginia, Delaware, Iowa). *See* Love & Schlüssel, *Pathways to Reintegration: Criminal Record Reforms in 2019*, (Feb. 2020), <https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration-Criminal-Record-Reforms-in-2019.pdf>.

uneven. In many states and for many types of convictions, eligibility is restrictive, procedures are burdensome, and effect is uncertain.¹⁰¹ Moreover, only a small percentage of those who are eligible for relief even try to obtain it. Scholars attribute this so-called “second chance gap”¹⁰² to multiple factors, including lack of information, cost and complexity of application procedures, absence of counsel, and distrust of the legal system.¹⁰³ 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 typically face daunting challenges in trying to make it effective, including trying to have expunged records removed from the internet and commercial databases.¹⁰⁴ For these reasons there has been an increased interest in automating record-clearing relief for convictions, and the year 2021 saw three more

Only a small percentage of those who are eligible for record clearance even try to obtain it

¹⁰¹ See *id*; see also Brian Murray, *Retributive Expungement*, 169 U. Pa. L. Rev. 665 (Forthcoming 2021), 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.)

¹⁰² Colleen V. Chien, *America’s Paper Prisons: The Second Chance Gap*, 119 Mich. Law. Rev. 519 (2020).

¹⁰³ Prescott & Starr, *supra* note 91 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, and suggesting some likely reasons for this low uptake rate). A recent report by CCRC and the National Consumer Law Center documented monetary barriers to record clearing in the form of outstanding court debt and a variety of application-related costs. See *The High Cost of a Fresh Start: A State-by-State Analysis of Court Debt as a Barrier to Record Clearing* (February 2022), <https://www.nclc.org/issues/the-high-cost-of-a-fresh-start.html>.

¹⁰⁴ See, e.g., Corda & Lageson, *supra* note 94 at 245–64.

states (CT, DE, VA) join the four that had enacted so-called “clean slate” laws in 2019 and 2020.¹⁰⁵

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.¹⁰⁶ 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](#).

There are few best practices or model laws on record clearance, so state laws differ widely

We begin by describing the broad structural categories of record-clearing 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 do relatively little for felonies.

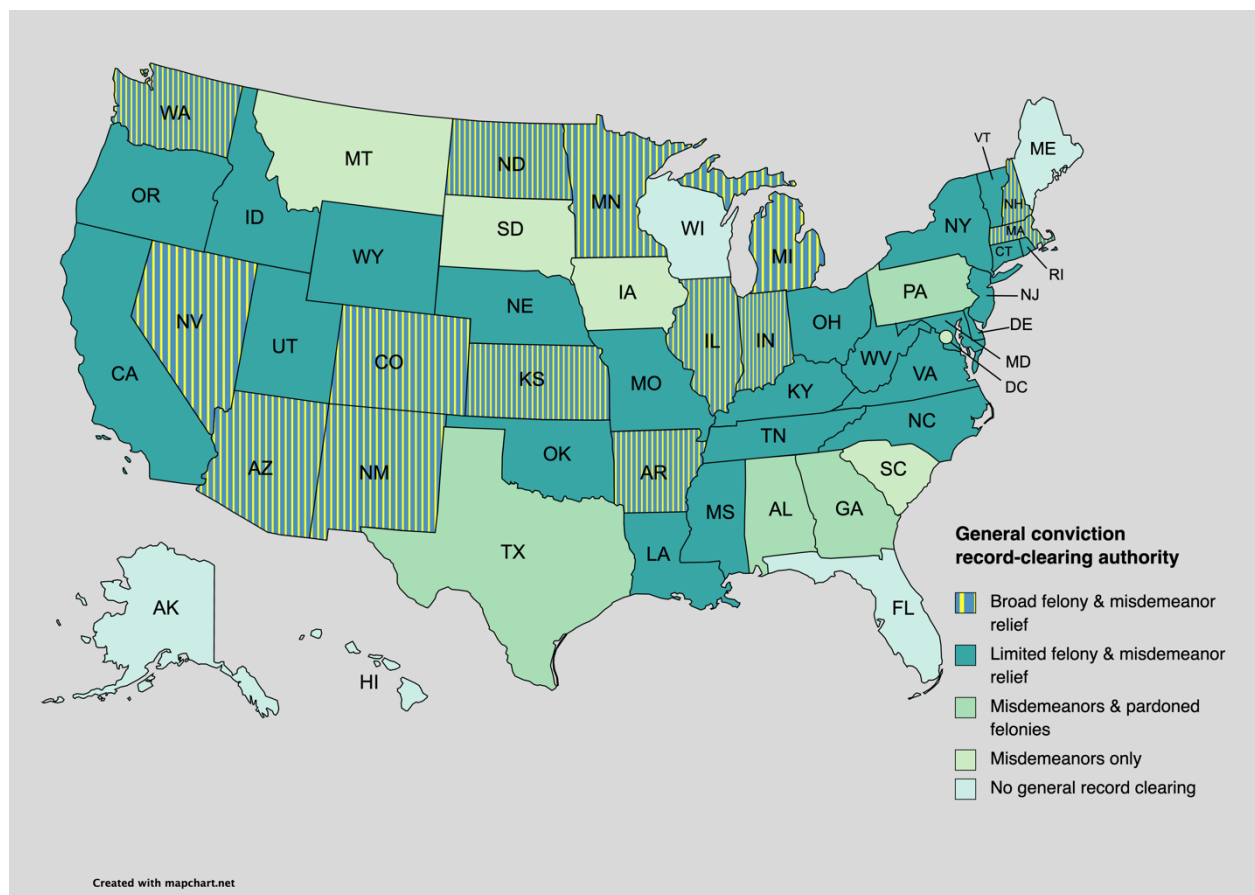
¹⁰⁵ See *50-State Comparison: Expungement, Sealing & Other Record Relief* (chart 2), *supra* note 65.

¹⁰⁶ 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 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. See 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>. In 2021 California seems to have been the first state to enact legislation incorporating all four of these principles. See note 127 *infra*.

Scope of Relief by Category

Looking at general record-clearing relief for convictions,¹⁰⁷ the 50 states, federal system, and District of Columbia can be divided into five categories:

- (1) broader felony and misdemeanor record clearing (14 states)
- (2) limited felony and misdemeanor record clearing or set-aside (23 states)
- (3) record clearing for misdemeanors and pardoned felonies (5 states)
- (4) limited misdemeanor record clearing only (3 states and D.C)
- (5) no general conviction record clearing (5 states and the federal system)



¹⁰⁷ The categories analyzed do not include specialized record-clearing remedies for such sub-groups as victims of human trafficking, people with youthful and juvenile offenses, and participants in so-called “intervention courts,” or specific categories of offenses such as marijuana possession and other conduct subsequently made non-criminal.

The map on the previous page shows that more than two-thirds of the states (37) now have laws that extend eligibility for record clearing or set-aside to at least some felonies as well as misdemeanors. Eight states have joined this list in the last three years alone: Oklahoma and Maryland extended eligibility to some felonies in 2018, and North Dakota, New Mexico, West Virginia, Delaware did so in 2019, and Connecticut and Virginia came on board in 2021 – with Delaware and Connecticut making relief automatic for a range of convictions.

Of this group of 37 states, 14 have broad eligibility standards that encompass a relatively wide range of felony convictions.¹⁰⁸ An additional 23 states have more limited eligibility, typically excluding many offenses, with longer waiting periods, and other requirements (e.g., 14 of the 23 states confine felony eligibility to a single conviction).¹⁰⁹ 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). Two of these 23 states (Nebraska and Idaho) authorize set-aside, a form of record relief that in those states does not include sealing or expungement.¹¹⁰

Illinois' record clearing law is most expansive in the country. It extends eligibility for sealing 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

¹⁰⁸ Arizona, Arkansas, Colorado, Illinois, Indiana, Kansas, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Mexico, North Dakota, and Washington. In 2021, Arizona supplemented its longstanding broad set-aside authority with a separate system of sealing that will come into effect in 2023. Ariz. Rev. Stat. § 13-90.

¹⁰⁹ California, Connecticut, Delaware, Idaho, 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 Idaho and Nebraska. The record relief provisions in these two last-mentioned states are discussed in note 110, *infra*.

¹¹⁰ Idaho and Nebraska both authorize people sentenced to probation to petition the court to set aside the conviction, which has the effect of restoring rights but does not seal the record. Idaho Code § 19-2604(1); Neb. Rev. Stat. § 29-2264. Nebraska and Idaho are the only two states remaining with a traditional set-aside authority proposed by the 1962 Model Penal Code, although a 2018 Nebraska law authorizes any person who has received a pardon to file a motion with the sentencing court for an order to seal the record. *See* Sec. 2, SB 1132 (2018), codified at Neb. Rev. Stat. § 29-3523(5).

North Dakota also offer sealing for most felonies after slightly longer waiting periods. Arizona, which has long permitted its courts to “set-aside” or “vacate” most convictions upon successful completion of sentence and discharge, enacted its first law authorizing restricted public access in 2021. Among the states that extend record-revision to felonies, Maryland is at the other end of the spectrum,¹¹¹ authorizing expungement for only three specific felonies (theft, burglary, and drug possession with intent to distribute), after a 15-year conviction-free waiting period.¹¹² 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, are examined in detail in the state profiles from the [Restoration of Rights Project](#).

The next group of five states (Alabama, Georgia, Pennsylvania, South Dakota, and Texas) authorize courts to clear misdemeanors but limit clearance for felonies to those that have been pardoned.¹¹³ All but South Dakota extend relief to a fairly broad range of misdemeanors, though Pennsylvania makes even those convicted of third degree misdemeanors wait for 10 years before they become eligible for an “order of limited access.” In contrast, Georgia authorizes “record restriction” and sealing for a range of non-violent misdemeanor offenses after four conviction-free years, South Dakota authorizes sealing of less serious misdemeanors after five years, and Alabama

¹¹¹ The D.C. sealing law’s coverage of one felony (failure to appear) is too unique to be an appropriate bookend.

¹¹² 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). A bill was pending in the Maryland legislature at the time this report went to press to shorten this waiting period.

¹¹³ Relief for pardoned convictions is automatic in Pennsylvania and South Dakota and by court petition in Alabama, Georgia, and Texas. 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.

authorizes clearance of non-violent misdemeanors and violations three years after conviction if all terms of the sentence have been satisfied.”

The fourth group of three states (Iowa, Montana, South Carolina) and the District of Columbia authorize sealing for misdemeanors only, although their authorities are relatively limited.¹¹⁴ 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.¹¹⁵ D.C.’s law excludes many offenses and has a long waiting period and other conditions on eligibility, and South Carolina makes prior conviction or diversion disqualifying. Montana alone in this group 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.¹¹⁶

The final group of five states (Alaska, Florida, Hawaii, Maine, and Wisconsin) and the federal system lack any general conviction relief, although several of them have narrow, specialized laws, applicable to minor marijuana convictions (Hawaii¹¹⁷) or to victims of human trafficking (Hawaii, Florida, and Wisconsin).

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 convictions 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 and other decriminalized conduct, including automatic relief in eight states (California, Connecticut, Illinois, New Jersey, New Mexico, New York, Vermont, and Virginia).¹¹⁸

¹¹⁴ D.C. does make a single felony offense eligible for sealing: felony failure to appear. D.C. Code § 16-803.

¹¹⁵ Iowa Code § 901C.3.

¹¹⁶ Mont. Code Ann. § 46-18-1102, *et seq.*

¹¹⁷ Hawaii also authorizes expungement of first or second drug possession violations. Haw. Rev. Stat. § 706-622.5.

¹¹⁸ 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/>.

At least 35 states have a specialized relief law for victims of human trafficking—sometimes covering prostitution offenses only and sometimes covering any offenses that are linked to the victim’s trafficked status.

Just to round out the picture of conviction record relief at the end of 2021, several states, including California, Idaho, Indiana, Oklahoma, and North Dakota, authorize their courts to reduce certain felony convictions to a misdemeanor, thereby avoiding the most severe consequences of conviction.

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.¹¹⁹ In addition, many states require payment of some or all court debt (fines, fees, and restitution) as a prerequisite to expungement, and all but one of the rest allow the expungement court to take outstanding court debt

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

¹¹⁹ 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. See Margaret Love & David Schlüssel, *Waiting for Relief: A National Survey of Waiting Periods for Record Clearance*, Collateral Consequences Res. Ctr. (February 2022), <https://ccresourcecenter.org/2022/02/23/waiting-for-relief-a-national-survey-of-waiting-periods-for-record-clearing/>.

into account.¹²⁰ 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.

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.¹²¹ It is not surprising that among the cleanest and broadest sealing laws in

¹²⁰ See National Consumer Law Center & Collateral Consequences Resource Center, *The High Cost of a Fresh Start*, *supra* note 103. Recognizing the unfairness of restricting relief to those with means to pay financial obligations, several states have enacted laws since 2018 to partially alleviate these requirements (e.g., Illinois, New Jersey, Pennsylvania, Washington), but Louisiana is the only state that does not contemplate consideration of outstanding court debt in connection with expungement. 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. In 2020, 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), *rev’d on appeal by Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020).

¹²¹ 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 misdemeanor 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 fewer than 2 misdemeanors in New York, or fewer than 3 in Michigan).

the country are the top-to-bottom schemes enacted in 2019 by New Mexico and North Dakota.¹²²

Procedural barriers to access

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 orders on courts, agencies, and private parties, etc.¹²³ These challenges have been compounded during Covid-19 by limits on and dangers of physical access to courthouses and agencies. 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.¹²⁴

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 (\$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. In December 2021, the

¹²² For a description of the broad record-clearing schemes enacted from scratch by these two states in 2019, see their state profiles in the Restoration of Rights Project.

¹²³ Prescott and Starr found that only 6.5% of those eligible for relief in the years they studied were successful in navigating the application process. See Prescott & Starr, *supra* note 91 at 2466, 2489 through 2492. For in-depth studies of access barriers in two states, see Noella Sudbury, Collateral Consequences Resource Center, [Access Barriers to Felony Expungement in Utah](#) (2021); Beth Johnson *et al.*, Collateral Consequences Resource Center, [Access Barriers to Felony Expungement: The Case of Illinois](#) (2021).

¹²⁴ 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/>.

Kentucky Supreme Court ruled that courts must waive both the initial filing fee and the “expungement fee” for those who cannot afford to pay them.¹²⁵

Once a petition is filed, the court may be required to hold a hearing in all cases (e.g., Michigan), for felony offenses only (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 or rehabilitation. 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.”

Since 2018, more than a dozen states have enacted laws providing for automatic sealing of certain conviction records

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 gap.”¹²⁶ Since 2018, more than a dozen states have enacted laws providing for automatic sealing of certain conviction records, five of them (California, Connecticut, Delaware,

Michigan, New Jersey) for a range of felonies and misdemeanors.¹²⁷ None of the five

¹²⁵ See *Jones v. Commonwealth*, Docket 2019-SC-0651-DG (Dec. 16, 2021) (“We can identify no other situation in our Commonwealth where a judge renders a judgment that a litigant is entitled to a benefit under the law, but that litigant cannot obtain the benefit of that judgment unless and until he pays a fee.”)

¹²⁶ See *supra* notes 102 and 103.

¹²⁷ In addition to the five states with broader automatic authorities to seal conviction records, Pennsylvania and Utah authorize automatic relief for a most less serious misdemeanors, while South Dakota and Virginia authorize automatic relief for certain minor misdemeanors. Eight states now authorize automatic relief for certain marijuana convictions (California, Connecticut, Illinois, New Jersey, New Mexico, New York, Vermont, and Virginia). See *50-State Comparison: Expungement, Sealing & Other Record Relief*, Chart #2, note 65

broad systems is yet fully operational, largely because all of them promise full (or nearly full) retroactivity. Most significantly, beginning in mid-2022 California is required to 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 convictions eligible for this relief. There have been efforts in other states to streamline the sealing process short of automation through simplified administrative procedures.

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

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

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 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).

supra. 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/>.

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.”¹²⁸

**State record relief orders
are given inconsistent
effect in federal law**

Recipients of relief face also significant challenges with the proliferation of records on the internet and in commercial databases.¹²⁹ Certain companies, including those that conduct background checks, are regulated by the federal Fair Credit Reporting

¹²⁸ See generally Part III(E) of the Federal profile from the Restoration of Rights Project (“Federal laws that give effect to state relief mechanisms”), https://ccresourcecenter.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/#III_Expungement_sealing_other_record_relief. 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). See also note 167, *infra*, for how federal law treats diversionary dispositions.

¹²⁹ See Sharon Dietrich, *Ants Under the Refrigerator: Removing Expunged Cases from Commercial Background Checks*, Criminal Justice (Winter 2016), <http://ccresourcecenter.org/wp-content/uploads/2017/03/Ants-under-the-Refrigerator-published.pdf>.

Act (FCRA), whose provisions would seem to prohibit reporting of expunged or sealed convictions.¹³⁰ 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.”¹³¹

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.”¹³² Some states have additional protections that supplement FCRA, notably including California’s Investigative Consumer Reporting Agencies Act, which antedates the federal statute.¹³³ 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.¹³⁴ 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.¹³⁵

¹³⁰ 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.

¹³¹ Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 Fed. Sent’g Rep. 241, 243 (2018).

¹³² *Id.*

¹³³ See Cal. Civ. C. § 1786 *et seq.*

¹³⁴ 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/>.

¹³⁵ See Dietrich, *supra* note 129.

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.¹³⁶ 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.¹³⁷

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.¹³⁸

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 cover misdemeanors expansively and effectively. Our grades were somewhat subjective, but in general considered the law’s scope, accessibility (additional eligibility criteria and procedural barriers), and effect. Where an improved law has not yet taken effect, we credit the improvement.

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.

¹³⁶ See Lageson, *Purgatory*, *supra* note 94.

¹³⁷ *Id.*

¹³⁸ See *50-State Comparison: Expungement, Sealing & Set-Aside*, note 65 *supra*.

II. CRIMINAL RECORD RELIEF

	Felonies	Misdos.		Felonies	Misdos.		Felonies	Misdos.
AL	C	C	LA	B	C	OK	C	C
AK	F	F	ME	F	F	OR	C	B
AZ	B	B	MD	D	D	PA	D	C
AR	C	A	MA	A	A	RI	D	B
CA	C	A	MI	A	A	SC	F	D
CO	B	B	MN	C	A	SD	F	C
CT	B	A	MS	D	D	TN	C	C
DE	C	B	MO	C	C	TX	F	D
DC	F	D	MT	F	B	UT	C	B
FL	F	F	NE	D	C	VT	D	D
GA	C	C	NV	A	A	VA	C	B
HI	F	F	NH	B	A	WA	B	B
ID	D	C	NJ	B	A	WV	D	C
IL	A	B	NM	A	A	WI	F	F
IN	B	B	NY	D	D	WY	D	D
IA	F	D	NC	D	C	Fed	F	F
KS	A	B	ND	A	A			
KY	D	B	OH	B	B			

C. Certificates of Restoration of Rights

A growing number of states authorize courts or an administrative board to issue orders or “certificates” to convicted individuals to avoid or mitigate mandatory bars to employment, licensing, or housing. These certificates are also intended to evidence the person's present reliability and rehabilitation to help overcome discretionary disqualification.¹³⁹ Influenced by the forgiving or dispensing function traditionally performed by executive pardon, these certificates do not remove information from a person’s criminal history or limit public access to the record. Rather, generally, they support reintegration by supplementing the record with an official mark of approbation.¹⁴⁰ Thus they not only have the force of law in certain areas but are also intended to persuade and reassure discretionary decisionmakers like employers and landlords.

Judicial or administrative certificates of restoration (variously styled certificates of rehabilitation or good conduct, or certificates of relief) are among the significant criminal record reforms adopted across the country in the past half dozen years, many modeled on the venerable New York certificate law discussed below. Certificates are an important supplement to record clearing remedies since they are usually available to more people at an earlier point in time. In addition, certificates are frequently the only form of record relief available to people whose

Certificates are an important supplement to record clearing remedies since they are usually available to more people at an earlier point in time.

¹³⁹ In some states certificates are issued by courts (as in North Carolina, Ohio, Vermont, and Washington), in others they are issued by parole or pardon boards (as in Connecticut and Rhode Island) or correctional authorities (Maryland), and in still others they are issued by both (as in New York and Illinois). In some states certificates have general effect (as in North Carolina and New York) and in others they are specifically intended to enhance employment or licensing prospects (Maryland, Ohio, and Washington). Illinois has a certificate in each category. State laws authorizing certificates of restoration, variously denominated, are collected in § 7:23 of Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6.

¹⁴⁰ See Love, *Starting Over with a Clean Slate*, *supra* note 60 at 1713 (judicial certificates do not propose to “rewrite history” but aim instead to “confront history squarely with evidence of change”).

convictions are from jurisdictions other than the one where they are residing or doing business, who are seemingly ineligible by definition for judicial or executive record clearing, set aside, or pardon.

Certificates of restoration 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.¹⁴¹ 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

“We need to find concrete ways to reaccept and reembrace offenders who have paid their debt for their offense.” - Jeremy Travis

relief to signify rehabilitation is available after a further waiting period to promote reintegration. 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.”¹⁴²

¹⁴¹ 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).

¹⁴² *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.”).

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.¹⁴³ 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 record.¹⁴⁴ A study of the same certificates the following year in the context of applications for rental housing found a similar result.¹⁴⁵ 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.

¹⁴³ 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>.

¹⁴⁴ 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). This study involved individuals with a single year-old felony drug offense who had received a "Certificate of Qualification for Employment" (CQE) from an Ohio court. A later study of Ohio CQEs found that they had no effect on call-back rate where subjects had a more significant criminal record, including a recent release from prison. See Peter Leasure & Robert Kaminski, *The Effectiveness of Certificates of Relief: A Correspondence Audit of Hiring Outcomes*, 18 J. Empirical Stud., Issue 4 (Dec. 2021). Both studies found that Black applicants received significantly fewer callbacks than white applicants in all criminal record categories.

¹⁴⁵ 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).

The value of certificates may 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.”¹⁴⁶

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 15 states where they are available (Arizona, California, Colorado, Connecticut, Illinois, Maryland, New Jersey, New Mexico, 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 and early reintegration. In many states, including Maryland and Ohio, certificates are intended to facilitate licensure for trades learned in prison.

Eligibility for and effect of certificates vary from state to state, but they should be distinguished from more limited executive or judicial orders restoring voting and other civil rights, or from certificates from prison authorities certifying only training received or conduct while in prison. In some states these certificates have the effect of removing mandatory legal restrictions, and in others they are intended to be persuasive to licensing authorities or other discretionary decision-makers. Unlike record-sealing, certificates are frequently available to those with federal and out-of-state convictions who reside or do business in the state. Certificates have also made a cameo appearance in the federal system.¹⁴⁷

¹⁴⁶ 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>.

¹⁴⁷ 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

The certificate schemes in Connecticut, New Mexico, and Vermont contemplate the same bifurcation between early and late-stage remedies, or partial and complete relief, as the national law reform proposals described earlier in this section. Vermont adopted the scheme proposed by the Uniform Law Commission, authorizing 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. New Mexico adopted the first part of the Uniform Law certificate scheme that offers targeted relief from collateral consequences as early as sentencing, but then shifts to record clearance via sealing after a waiting period, for which most (though not all) convictions are eligible. 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 or has the additional benefit of expunging or “erasing” the record. All three of these 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 or record clearance).¹⁴⁸

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” (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.¹⁴⁹ Unlike sealing with its lengthy eligibility waiting period and limit to a single felony, New York certificates are

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.” *Id.*

¹⁴⁸ See the Vermont, New Mexico, and Connecticut profiles from the Restoration of Rights Project for further details on these laws.

¹⁴⁹ N.Y. Crim. Proc. Law § 160.59(9) (sealed convictions remain available to state entities responsible for issuing firearm licenses).

available to those with no prior record from the sentencing court 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.¹⁵⁰ 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.

The certificates described above operate to convert mandatory disqualifications into discretionary ones, extending opportunities and benefits to individuals who would otherwise be barred from them by law. They also have a weighty influence in connection with discretionary decision-making. Certificates in other states have targeted the employment or licensing 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."¹⁵¹ Washington's "Certificate of Restoration of Opportunity" has a potent effect in many occupational licensing schemes, and it 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, but Arizona's "Certificate of Second Chance" removes "all barriers and

¹⁵⁰ N.Y. Correct. Law §§ 703-b(1), (3).

¹⁵¹ 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" (CQE) that will provide relief from mandatory legal bars and allow him to be considered on the merits. Ohio Rev. Code Ann. § 2953.25. Studies of the effect of Ohio's certificates for those convicted of less serious offenses showed them to be effective. *See* notes 145 and 146, *supra*. *See also* Ohio Rev. Code Ann. §§ 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).

disabilities in obtaining an occupational license” (though it is also “not a recommendation or sponsorship for or a promotion of the person who possesses [it]”). California’s “Certificate of Rehabilitation” limits consideration of felony convictions by licensing boards and constitutes the first step in the executive pardon process.¹⁵² Alabama’s certificate has limited effect to lift a specific mandatory bar to licensure that applies to the applicant.

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 Arizona, Ohio, North Carolina, and Vermont, for example, reliance on a certificate creates a presumption of due care in hiring or licensing; 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.¹⁵³

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

Certificates are typically available for a broader range of offenses than sealing or expungement and may be granted earlier. Of the 15 states that offer certificates, eight (California, Connecticut, New Jersey, New Mexico, New York, Ohio, Tennessee, and Vermont) impose no categorical limits on who can obtain relief (though they may preclude relief from certain collateral consequences, such as firearms dispossession or sex offense registration). Illinois excludes from eligibility individuals convicted of specified crimes involving serious violence, Maryland’s certificates are available only to those convicted of non-violent offenses, and Washington makes CROP certificates available only to individuals who have not been convicted at any time of a Class A

¹⁵²Until January 1, 2021, a COR was the basis for relief from sex offender registration obligations for less severe offenses, Cal. Penal §§ 4852.03, 290.5, but after 2021 relief from registration obligations under a new three-tiered system is the responsibility of the superior court in the county in which the person is registered. See [AB 2845](#) (amending Cal. Penal §§ 4852.03 and Cal. Penal § 290.5).

¹⁵³ See the discussion of state laws protecting against negligent hiring suits see Part IIIA.

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 limit certificate relief 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.

In eight states certain individuals may apply for certificates as early as sentencing (Colorado, Connecticut, Illinois, New Jersey, New Mexico, 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.¹⁵⁴

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.” New Mexico also tracks the Uniform Act model with its limited relief” order, but substitutes sealing for the second “restoration of rights” certificate. 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 apparently 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 eight states (Connecticut, Illinois, New Mexico, New York, Rhode Island, Tennessee, Vermont, and perhaps New Jersey), but not in six (Arizona, California, Colorado,

¹⁵⁴ See articles cited at note 144, *supra*.

Maryland, 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 where the applicant resides.

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 certificates of restoration of rights will grow in popularity. Certainly, most of the advocacy around relieving collateral consequences has been in support of record clearing, not the more transparent certificates that rely on the discretion of employers, licensing boards, and landlords to 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.”¹⁵⁵ 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 as popular as some of the other tools in the record relief arsenal.

¹⁵⁵ See *supra* note 147; see also Samuel DeWitt & Megan Denver, *Criminal Records, Positive Employment Credentials and Race*, 57 *J. Research in Crime & Delinquency*, 333 (2019) (“Among those with criminal records, respondents viewed applicants with positive credentials more favorably than those without credentials”); Doleac & Lageson, *supra* note 99 (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).

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: Certificates of Restoration of Rights

The grades for certificates are based primarily on scope of eligibility, effect of relief granted, and reputation of issuing authority. Certificates that have legal effect (e.g., Illinois, New York) received higher grades than those issued by corrections authorities that are intended solely to recognize program completion or good behavior (Maryland, Rhode Island). States that have no certificates received an F grade.

AL	D
AK	F
AZ	C
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	C
MA	F
MI	F
MN	F
MS	F
MO	F
MT	F
NE	F
NV	F
NH	F
NJ	B
NM	B
NY	A
NC	C
ND	F
OH	B

OK	F
OR	F
PA	F
RI	C
SC	F
SD	F
TN	B
TX	F
UT	F
VT	A
VA	F
WA	C
WV	F
WI	F
WY	F
Fed	F

D. Judicial Diversion and Deferred Adjudication

An increasingly desirable strategy for facilitating reintegration through avoiding collateral consequences is to divert individuals away from a conviction at the front end of a criminal case. Diversion in its various forms offers a less adversarial means of resolving an investigation or prosecution through compliance with agreed-upon community-based conditions leading to dismissal of charges and 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.”¹⁵⁶ In this understanding, diversion functions as a mechanism for ensuring accountability and facilitating rehabilitation, rather than as retribution for its own sake.¹⁵⁷ The effectiveness of diversionary dispositions in furthering these goals has not been

¹⁵⁶ 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.”).

¹⁵⁷ See Love, et al., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 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).

studied in depth, and they are not without their controversial aspects, but existing research suggests their promise.¹⁵⁸ Diversion may allow for a mutually-acceptable outcome for the prosecutor and defendant in cases where the extent of culpability is not clear, where a treatment intervention seems appropriate, or where the defendant otherwise fits within some category considered deserving of leniency (e.g., human trafficking victims, veterans, “youthful offenders”).

While terminology and program characteristics vary, there are two primary types of diversion: deferred prosecution or diversion is typically managed by the prosecutor and may or may not be regulated by law, while deferred adjudication is managed by the court after charges have been filed and is typically regulated by statute or court rule. Diversion may also be judicially managed, notably in treatment and other specialized “intervention” courts for those suffering from substance abuse or mental illness, and for special populations like veterans. One or both of these dispositions is authorized in every jurisdiction, and eligibility may range from narrowly-defined categories of offenses or individuals to any probation-eligible crime.¹⁵⁹

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.

¹⁵⁸ 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>.

¹⁵⁹ 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 49 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 any statutory diversion authority, North Dakota, provides for diversion by court rule. See N.D. R. Crim. P. 32.2. Many of these states also have specialized treatment courts to which prosecutors may refer individuals pursuant to a deferred prosecution agreement. Courts whose diversion authority is limited to treatment courts are listed at note 172, *infra*.

While a court may be involved in approving the terms of a deferred prosecution 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 for limiting public access to uncharged arrest records in a state repository and law enforcement agency.¹⁶⁰

Deferred adjudication is most saliently distinguished from pure diversion by the more formal authority of the court to manage the criminal case, usually after charges have been filed. It is designated variously in state codes,¹⁶¹ and varies also in how it is administered from state to state. It often requires a plea, admission, or finding of guilt, and almost invariably 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.

¹⁶⁰ See Collateral Consequences Res. Ctr., Model Law on Non-Conviction Records § 2(a)(Dec. 2019), <https://ccresourcecenter.org/model-law-on-non-conviction-records/>.

¹⁶¹ 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”).

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 beyond placing a post-charge 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 way of encouraging compliance and making the record eligible for expungement, but that do not have the advantage of avoiding a record of conviction.¹⁶²

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 defendants could be steered out of the justice system entirely so as to avoid the collateral consequences of a conviction.¹⁶³ (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.¹⁶⁴ At the same time, the long-term benefits for the community of this

¹⁶² See, e.g., Cal. Penal Code § 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).

¹⁶³ 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 157, at 6.

¹⁶⁴ 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

sort of conviction-avoidance setup for at least some defendants have been established in the research literature.¹⁶⁵

While every state offers some form of prosecutor-directed diversion, and many also have specialized treatment courts to which individuals may be referred on a county-

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

by-county basis, in the past three or four years states have taken advantage of expanded court-managed diversionary dispositions to lower incarceration rates across the board, and they have made sealing more generally available after successful completion. Eligibility criteria and standards for participation in a deferred adjudication

program have been broadened, and several states have enhanced their courts' ability to offer deferred dispositions by authorizing admission of a defendant notwithstanding a prosecutor's objection.¹⁶⁶ 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

<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 to one of the authors of this report 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 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.”

¹⁶⁵ See research reports cited in note 158, *supra*.

¹⁶⁶ See, e.g., Ariz. Rev. Stat. § 11-361, amended in 2021 by HB 2186 to strike a series of restrictions on the availability of this disposition based on an individual's prior record, and to authorize sealing; Cal. Penal Code §§ 1001.21 through 1001.29, amended in 2020 by AB3234 to permit a court to defer judgment over the objections of the prosecutor.

diversionary pleas as convictions, even if no judgment of conviction is ever entered by the court.¹⁶⁷

The map accompanying this section shows that 17 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 to determine the appropriateness of the disposition on a case-by-case basis (frequently in consultation with the prosecutor).¹⁶⁸ States whose diversion authority is connected to specialized treatment courts are not included in this category. All but one of these 17 states authorize sealing upon successful completion of supervision, though Texas requires a 2-to-5-year waiting period in some cases before the court will issue an “Order of Nondisclosure.”¹⁶⁹

¹⁶⁷ 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 withdrawn 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 convictions without regard to a guilty plea, see 15 U.S.C. § 1892(a)(1)(A), but the FDIC has recently amended 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), and note 128, *supra*.

¹⁶⁸ The 17 states whose courts have broad deferred adjudication authority leading to expungement or sealing of the record are Alabama, Arkansas, Colorado, Massachusetts, Missouri, Nebraska, New Jersey, New Mexico, North Dakota, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. Details of these laws and statutory citations are available in the relevant state profiles from the Restoration of Rights Project.

¹⁶⁹ 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.

The next category of 18 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.¹⁷⁰ Florida and Louisiana alone in this group allow someone with a prior felony conviction to participate, but both restrict sealing in these cases (Florida for almost any prior record and Louisiana by a 10-year waiting period for felonies and 5 for misdemeanors). Illinois has a 5-year wait to expunge for its “Second Chance Probation” and other diversionary programs, and Idaho, Iowa, and Wyoming do not allow sealing at all. Delaware, Pennsylvania, and Oregon still restrict eligibility for their “probation before judgment” programs to misdemeanor-level cases, and Connecticut’s “Accelerated Pretrial Rehabilitation” program is reserved for individuals whose crimes were “not of a serious nature.” Some of these states also have specialized programs that defer accused individuals out of the criminal system.

A third group of 7 states offer deferred dispositions leading to expungement exclusively for participation in specialized court programs, including but not limited to substance abuse treatment, or in other defined circumstances. In many of these states a court-managed drug treatment program has existed for years, although statewide statutory programs have been established in Georgia, Mississippi, and Wisconsin to target additional populations like veterans and individuals with mental health needs.¹⁷¹ Many of these programs have been expanded in recent years to reach people charged with felonies who have a prior felony record.¹⁷²

¹⁷⁰ The 18 states in this category are Alaska, Connecticut, Delaware, Florida, Hawaii, Illinois, Idaho, Iowa, Kentucky, Louisiana, Maine, Maryland, Montana, Oklahoma, Pennsylvania, South Carolina, South Dakota, and Wyoming.

¹⁷¹ The seven states in this category are Arizona, Georgia, Indiana, Mississippi, New Hampshire, New York, and Wisconsin. States in other categories may also have systems of problem-solving courts offering deferred dispositions.

¹⁷² Compare, e.g., Ind. Code §§ 12-23-5-1 et seq. (deferral with prosecutor’s permission of individual charged with non-violent misdemeanor with no prior felony)(1992) with Ind. Code §§ 12-23-7.1-1, 12-23-6.1 (deferral of individual charged with non-violent felony who self-identifies as drug abuser or alcoholic who has no more than one prior felony)(2015).

A fourth group of 8 states restrict the court's statutory deferral authority to narrow categories (e.g., first drug offenses or first misdemeanors).¹⁷³ In these states, treatment courts operate in some counties, with informal state-wide coordination.

The statute authorizing deferred adjudication in federal cases was enacted in 1984 and adheres to the narrowest eligibility model, with relief narrowly targeted to youthful offenses.¹⁷⁴ In recent years federal courts have implemented informally various programs to divert and defer criminal defendants,¹⁷⁵ but there is little authority for these programs in federal statutes and no evidence of Congressional interest even in expanding the limited statutory authority that does exist.

There have been only a few research studies of these programs, but those that do exist have generally found them effective in promoting desistance, employment, and earning outcomes at least for some populations.¹⁷⁶ Criticism of these

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

¹⁷³ The eight states in this category are California, Kansas, Michigan, Minnesota, Nevada, North Carolina, Ohio, and Oregon. They are joined by the District of Columbia, whose courts have authority to defer sentencing independent of the prosecutor only in first drug possession cases.

¹⁷⁴ See 18 U.S.C. § 3607 (deferred adjudication if a person charged with drug possession has no prior drug conviction; expungement only if offense committed under the age of 21).

¹⁷⁵ 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.usc.gov/sites/default/files/pdf/research-and-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.

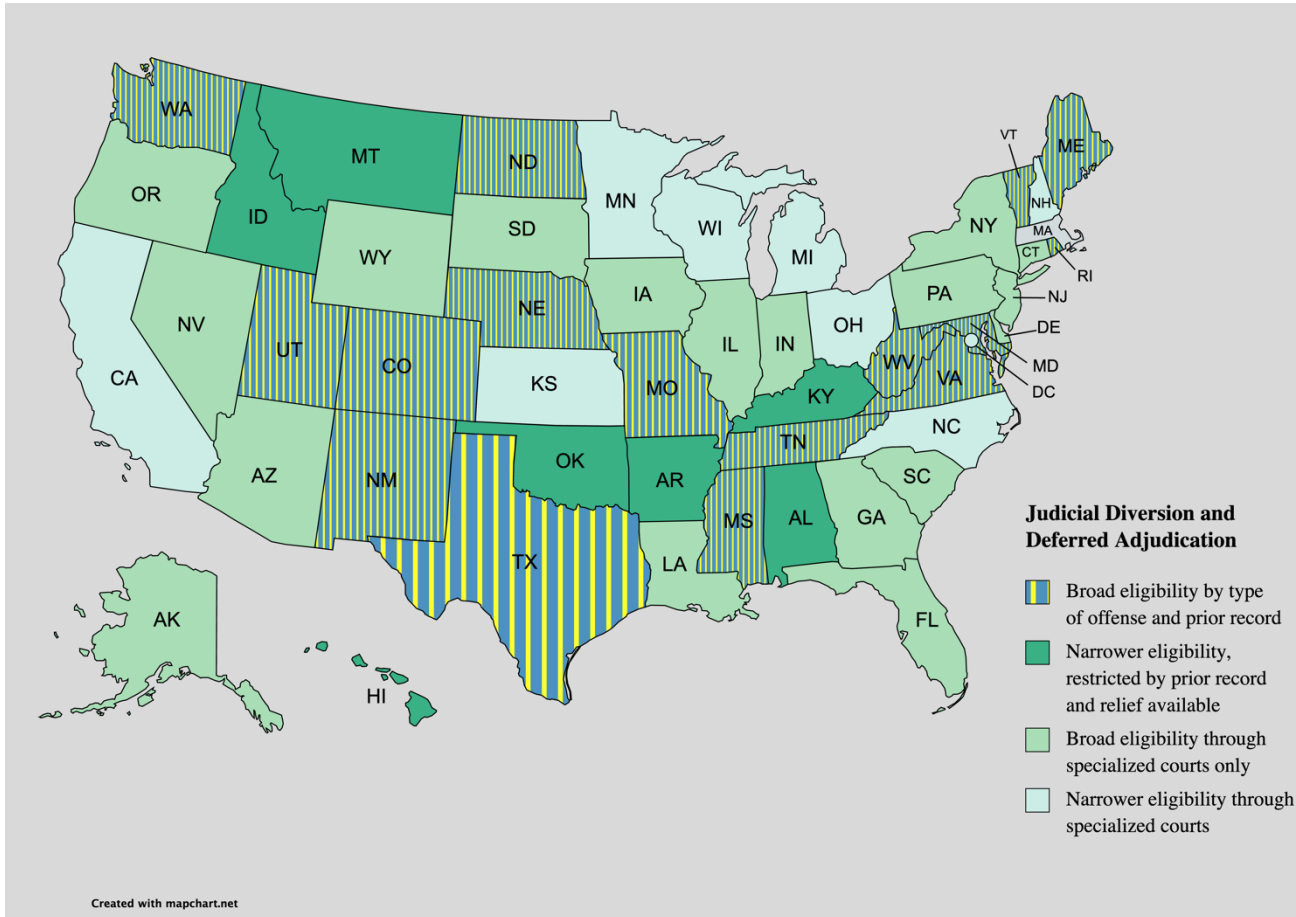
¹⁷⁶ See *supra* note 158.

programs generally involves their potential for coercion at the front end and intrusive supervisory regimes that many individuals will predictably fail. As the adverse consequences of a conviction record show no signs of abating, studying conviction-avoidance mechanisms like diversion and deferred adjudication should be a research priority for the academy.¹⁷⁷

In the end, as the public appetite for punitive prosecution and incarceration policies fades in the states, and a public commitment to rehabilitation and clean slate outcomes grows stronger, it is likely that governments will focus more resources on community-based accountability and treatment programs as opposed to custodial punishments. In this environment we can expect jurisdictions to expand reliance on court-managed diversionary programs, with additional states joining the 17 whose programs we determined to be “broadly inclusionary.”

¹⁷⁷ A collection of social science research into “strategies to improve reentry outcomes” judged diversion from incarceration and cognitive therapy a productive strategy, though intensive supervision was judged among the least effective. See Jennifer Doleac, *Strategies to productively reincorporate the formerly-incarcerated into communities: A review of the literature*. IZA Discussion Paper No. 11646 (2018).

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



Report Card: Judicial Diversion and Deferred Adjudication

The grading categories for diversion and deferred adjudication are as follows: **A.** broad eligibility for deferred adjudication by type of offense and record of defendant, with sealing upon disposition. **B.** Less broad eligibility, including no prior felonies, and less favorable relief. **C.** Broad eligibility through treatment and other specialized intervention courts. **D.** Narrow eligibility through treatment and other specialized intervention courts.

II. CRIMINAL RECORD RELIEF

AL	B
AK	C
AZ	C
AR	B
CA	D
CO	A
CT	C
DE	C
DC	D
FL	C
GA	C
HI	B
ID	B
IL	C
IN	C
IA	C
KS	D
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	C
NM	A
NY	C
NC	D
ND	A
OH	D

OK	B
OR	C
PA	C
RI	A
SC	C
SD	C
TN	A
TX	A
UT	A
VT	A
VA	A
WA	A
WV	A
WI	D
WY	C
Fed	D

E. Clearing of 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. Less frequently, 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.¹⁷⁸ 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.¹⁷⁹

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.¹⁸⁰

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

¹⁷⁸ 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).

¹⁷⁹ 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.

¹⁸⁰ Margaret Love & David Schlusell, *Protesting Should Not Result in a Lifelong Criminal Record*, Wash. Post (June 15, 2020),

In 2019, CCRC published a [Model on Law on Non-Conviction Records](#).¹⁸¹ 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.

Eighteen states now authorize automatic expungement or sealing of most or all non-conviction records (counting Delaware and Virginia, where non-conviction relief will not become automatic until 2024 and 2025, respectively).¹⁸² Of these 18 states, 12 enacted automatic sealing in the last four years alone:

18 states now automatically expunge or seal most non-conviction records, and another 10 mandate sealing upon request

Delaware, Maryland, and Virginia (2021), Kentucky and North Carolina (2020); California, Colorado, New Jersey, and Utah (2019); New Hampshire, Pennsylvania, and Vermont (2018); The other six states are Alaska, Connecticut, Michigan, Nebraska, New York, and South Carolina.¹⁸³

Many of these laws provide relief at the time of disposition but others require a waiting period. Some exclude certain dispositions

<https://www.washingtonpost.com/opinions/2020/06/15/protesters-should-not-get-lifelong-criminal-record/>.

¹⁸¹ See Model Law on Non-Conviction Records. *supra* note 160.

¹⁸² See *50-State Comparison: Expungement, Sealing & Set-Aside*, ch.#3, *supra* note 65.

¹⁸³ In Massachusetts, records must be sealed if the defendant is found not guilty, or a no bill has been returned by the grand jury, or a finding of no probable cause has been made by the court, but cases involving dismissal of charges (including deferred dispositions) may be sealed only if “it appears to the court that substantial justice would best be served.” See Mass. Gen. Laws ch. 276, § 100C. In South Carolina, 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.

(notably diversionary dispositions) or categories of offenses (notably sex offenses), and a few require a waiting period.¹⁸⁴ In several of these states uncharged arrests are not covered and require the filing of a court petition to obtain relief.

In addition to the 18 states that now seal most non-conviction records automatically, another 10 states mandate sealing of non-convictions after disposition, with the filing of a motion or request.¹⁸⁵ Many of these states have also enacted this authority in the past several years.

While these reforms are promising, some of the states where relief is available at or shortly after sentencing do not cover dispositions like uncharged arrests or dismissals without prejudice, and others require the filing of a court petition for some types of non-conviction records (e.g., South Carolina). 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 matter would not proceed.¹⁸⁶ In 2019, New York made undisposed cases confidential after five years, providing relief for people with uncharged arrests and other matters stuck in limbo.¹⁸⁷

¹⁸⁴ For example, Maryland's 2021 law includes a three-year waiting period from final action on charges, or completion of treatment, unless the person files a petition with a written general waiver and release of all the petitioner's tort claims arising from the charge. See Md. Code Ann., Crim. Proc. § 10-105(c)(1). In addition, a petition must still be filed seeking expungement in the case of nolle prosequis conditioned on treatment and records of probation before judgment ("PBJ").

¹⁸⁵ See *50-State Comparison: Expungement, Sealing & Set-Aside*, ch.#3, *supra* note 65 (showing these ten states with mandatory expungement: Hawaii, Idaho, Indiana, Louisiana, Mississippi, New Mexico, Rhode Island, Tennessee, Texas, and Wyoming).

¹⁸⁶ See N.Y. Crim. Proc. Law § 160.50.

¹⁸⁷ *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

In 19 of the remaining 22 states and the District of Columbia, non-conviction dispositions may be sealed or expunged only if the affected individual files a petition in court in a separate civil proceeding, and a court makes a discretionary decision to grant the request, an approach increasingly seen as inappropriate and unnecessary for this category of records.

The last three states (Maine, Montana, and Wisconsin) limit public access to law enforcement non-conviction records but make no provision for sealing court records. The federal system has no general provision for sealing non-conviction records.¹⁸⁸

Many of the 20 jurisdictions that allow sealing upon petition and a discretionary decision restrict eligibility and impose burdensome procedural hurdles such as filing fees and contested hearings, pursuant to a process that can seem as daunting as the process that applies to sealing a felony conviction, and in a few cases is essentially the same.¹⁸⁹ In these jurisdictions, 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

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](https://ccresourcecenter.org/model-law-on-non-conviction-records/) n. 25 (Collateral Consequences Res. Ctr. 2019), <https://ccresourcecenter.org/model-law-on-non-conviction-records/>.

¹⁸⁸ Federal law has a narrow expungement authority that applies to first-offense drug possession for which adjudication was deferred, but only for persons under 21, 18 U.S.C. § 3607(a), and there is caselaw finding 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).

¹⁸⁹ See, e.g., Mo. Rev. Stat. § 610.140 (non-conviction records may be expunged on petition, subject to the same eligibility rules and procedures that apply to convictions); N.D. Sup. Ct. Admin. R. 41 (6)(a)(on petition, court must decide whether there is an “overriding interest” to “overcome the presumption of openness of court records,” and the court must articulate this interest along with specific findings that allow a reviewing court to determine whether the order was proper).

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 sealing or expunging dismissed charged or an acquittal, as does a prior sealing or expungement of any kind.¹⁹⁰ The District of Columbia has one of the most restrictive schemes in the Nation, applying similar complex eligibility criteria to conviction and non-conviction records alike, including variable waiting periods depending upon prior arrests and convictions, ending with a discretionary decision by a judge.¹⁹¹

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.¹⁹² 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,” and in 2021 the legislature included

¹⁹⁰ Fla. Stat. Ann. § 943.0585. Other states that disqualify based on prior felony conviction are Oklahoma, 22 Okla. Stat. Ann. § 18(A)(7), and West Virginia. W. Va. Code §§ 61-11-25(b). A similar requirement was recently repealed in Missouri and Rhode Island.

¹⁹¹ 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).

¹⁹² See Miss. Code Ann. §§ 99-15-59; Ala. Code §§ 15-27-1, 15-27-2.

relevant amendments in its broader expungement law.¹⁹³ A few states, including Idaho and Wyoming, do not permit deferred adjudication cases to be expunged, no matter the offense.

Some of the petition-based jurisdictions require satisfaction of court debt, such as costs and fees, as a prerequisite to expungement, despite the lack of a conviction in the case.¹⁹⁴ This requirement in Iowa was challenged by a woman who could not afford to pay the \$718 court-appointed attorney fee imposed when her case was diverted and later dismissed.¹⁹⁵ After the Iowa Supreme Court rejected her argument that this represented unfair wealth discrimination, she sought review at the U.S. Supreme Court where CCRC filed an amicus brief encouraging the Court to take up the case, but her petition was denied.¹⁹⁶

Some of the petition-based jurisdictions have waiting periods, notably for charges dismissed without prejudice, during which an otherwise-eligible person must remain conviction-free. 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). The petition process itself may be costly as a result of filing fees, background check fees, the demanding production of law enforcement and court records, collection of evidence of good character, and/or formal service on prosecutors, etc.¹⁹⁷ A formal court hearing may

¹⁹³ See Ala. Code § 15-27-2, as amended by [Act No. 2021-286](#) (SB117). See also 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>.

¹⁹⁴ See, e.g., Iowa Code § 901C.2(a)(2).

¹⁹⁵ See *State v. Doe*, 927 N.W.2d 656 (Iowa, 2019).

¹⁹⁶ 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).

¹⁹⁷ See, e.g., 22 Okla. Stat. Ann. § 18(A)(7).

even be required at which the prosecutor and alleged victims may 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,¹⁹⁸ and Nevada applies a rebuttable presumption in favor of sealing¹⁹⁹). But other states apply a broad discretionary standard more commonly found in the conviction context.

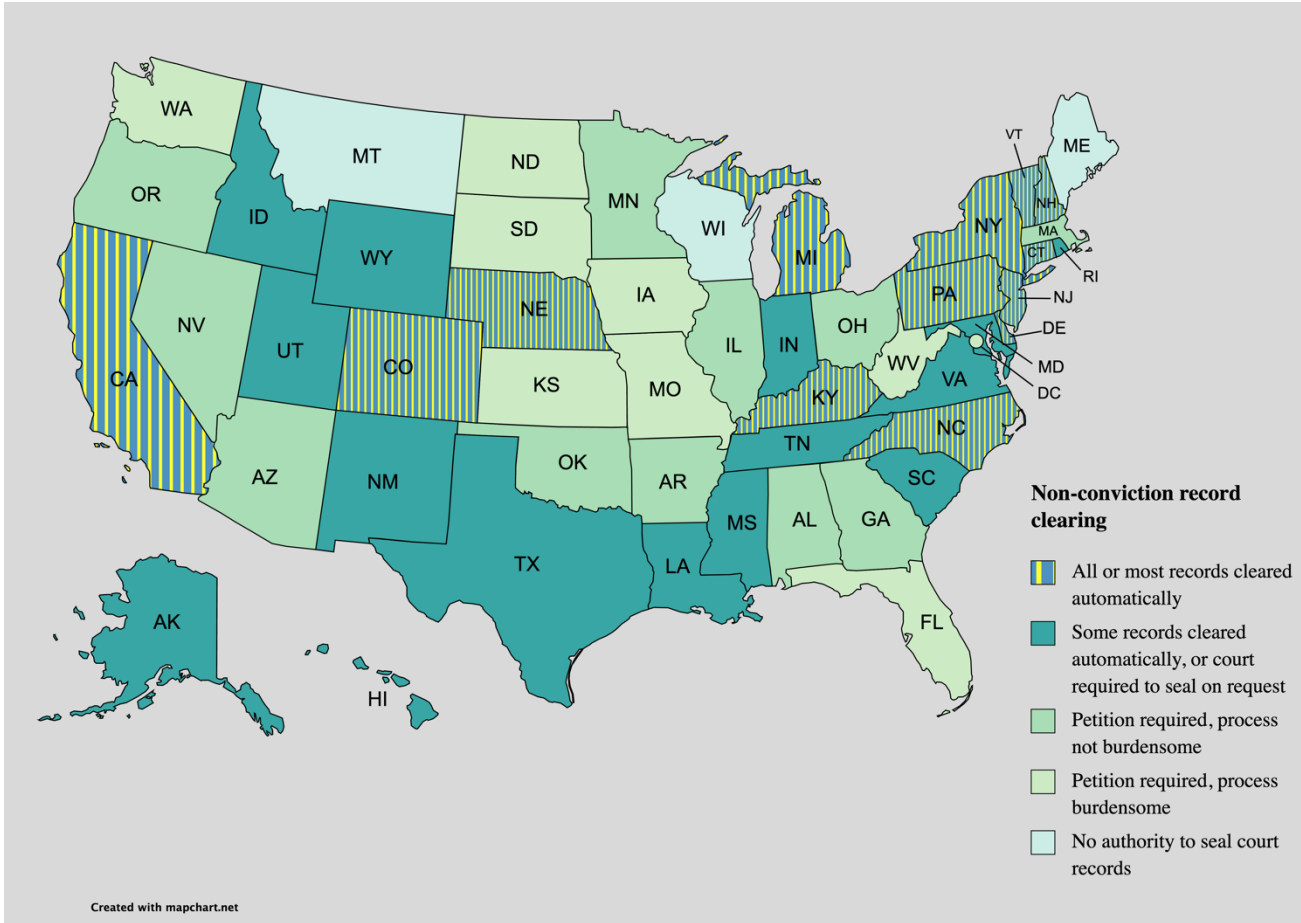
It is disturbing, particularly at a time when large-scale protests have produced thousands of arrests, that more than half the states retain antiquated petition systems for clearance of non-convictions

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 almost half the states retain antiquated petition systems in need of reform.

¹⁹⁸ Ind. Code § 35-38-9-1.

¹⁹⁹ Nev. Rev. Stat. § 179.2445.



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: Non-Conviction Records

The grading system for non-conviction records roughly follows the categories of the 50-state comparison chart, with some exceptions. **A:** States that seal all or most non-conviction records automatically. **B:** States that seal some non-conviction records automatically, and states that are required to seal upon request. **C:** States that require a petition and a discretionary decision whose process is not burdensome/restrictive. **D:** States that require a petition and a discretionary decision whose process is burdensome/restrictive. **F:** States that make no provision for sealing non-conviction court records.

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

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

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

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

III. FAIR CHANCE 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.²⁰⁰ In an era of near-universal background checking and search engines, the “Mark of Cain” these individuals bear will sooner or later be known to potential employers and licensing boards even if criminal record information is not requested on an initial application.

Some barriers take the form of laws formally disqualifying people with certain types of convictions from certain types of jobs or licenses. More frequently, barriers result

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

from informal 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 competitive disadvantage, if they are even allowed to compete. As between two individuals with hypothetically equal qualifications, it is easy for a risk-averse

²⁰⁰ 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*, *supra* note 91. 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 treatment of the impact of incarceration in the social science literature on the life prospects of those who experience it.

prospective employer or licensing agency 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 can be helpful on a case-by-case basis to those who are eligible and able to access them.²⁰¹ But equally important are fair employment and licensing laws that impose general standards limiting consideration of criminal record and provide for their enforcement, offering class-wide relief to all similarly situated individuals. States have enacted an impressive number of this sort of systemic “clean slate” law²⁰² just since 2015, some building on laws enacted in an earlier period of reform half a century ago in the 1960s and 1970s,²⁰³ and others breaking new ground in regulating how employers and licensing agencies consider an applicant’s criminal record.

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 20 years ago in Hawaii and took off nationwide after it was adopted in California, has now produced new laws or executive orders in more than two-thirds of the states and in 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 adverse information in their background is likely to lead to a fairer and more defensible hiring decision. This should be particularly true when a records check is permitted only after a conditional offer of employment has been made, so there is little doubt about the reason in the

²⁰¹ 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.

²⁰² 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.

²⁰³ See Love, *Clean Slate*, *supra* note 60 at 1707-1717.

event of a later withdrawal.²⁰⁴ A few states (though still too few) have coupled ban-the-box strategies with standards for considering a person's record after inquiry is permitted.

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 two thirds of the states in the last five years, in some cases building on reforms originally adopted in the 1970s, and in others following models recently proposed by policy advocacy organizations from across the political spectrum whose model laws aim to make licensing authorities newly accountable for their actions and individuals newly able to obtain and practice a skill with enhanced career prospects. Following these models, states have

- substituted objective standards related to the specific occupation for vague “good moral character” criteria;
- afforded individuals a preliminary decision about whether their record will be disqualifying before they invest in education or training;
- prohibited consideration of certain records considered unrelated to job performance, including based on their minor or dated nature;
- required licensing agencies to justify negative decisions, frequently in terms of public safety, and to afford disappointed applicants an opportunity to appeal;
- imposed legislative 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, and most have both. Enforcement of these new laws may in many cases depend on education and persuasion rather than on

²⁰⁴ 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 infra* note 225.

lawsuits and executive orders, but this may make systemic 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 denial of opportunity is justifiable. 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

Only a handful of 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 classification protected under the civil rights laws.²⁰⁵ In 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).²⁰⁶ Article 23-A of New York's Corrections Law prohibits "unfair

²⁰⁵ 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 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., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, supra* note 6 at § 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).

²⁰⁶ 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

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 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.²⁰⁷ Wisconsin’s fair employment law also covers arrest or 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.”²⁰⁸

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>.

²⁰⁷ 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.).

²⁰⁸ 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*, ERD 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.”).

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 in a government position and directing public employers and licensing agencies 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.²⁰⁹ Individuals rejected for employment because of a 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.²¹⁰ But for all intents and purposes until 1998 Wisconsin and New York were the only states that provided administrative remedies for criminal record-based employment discrimination without also requiring a nexus with race or some other characteristic protected under the civil rights laws.

²⁰⁹ 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 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).

²¹⁰ *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.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at § 6:4 (“Title VII – Applied to criminal records – Judicial interpretations”).

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

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 felony conviction within the most recent 7 years or a misdemeanor within 5 bears a "rational relationship to the duties and responsibilities of the position."²¹¹ 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
- ❖ 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 have applied it to private as well as public employment. The District of

²¹¹ See Haw. Rev. Stat. §§ 378-2.5(b), (c) (an employer may withdraw a conditional offer of employment only if a felony conviction within the most recent 7 years or a misdemeanor within 5 years "bears a rational relationship to the duties and responsibilities of the position."). The look-back periods for both felonies and misdemeanors were reduced from 10 years in 2021 by SB2193. See also 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).

III. FAIR CHANCE EMPLOYMENT & OCCUPATIONAL LICENSING

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.²¹² D.C. employs essentially the same four-part approach as Hawaii, including enforcement through its general fair employment law. It 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 multi-factor test and accompanied by written reasons.

More recently California and Illinois have joined the small group of states that make discrimination based on criminal record a civil rights violation. California’s 2017 extension of its Fair Employment and Housing Act (FEHA) to both public and private employers is the more extensive, combining ban-the-box with later prohibitions on 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.²¹³

²¹² 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 multi-factor 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.

²¹³ 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 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,

In 2021, Illinois expanded its Human Rights Act to add a new section prohibiting discrimination in employment based on “conviction record,” making it a civil rights violation for any employer, employment agency or labor organization to use a prior conviction record as a basis to refuse to hire or to take any other adverse action unless: 1) there is a substantial relationship between one or more of the previous criminal offenses and the employment sought or held, or 2) the granting or continuation of the employment would involve a public safety risk. The employer must consider various factors, including the time since conviction and evidence of rehabilitation, and afford due process rights in connection with an adverse action.²¹⁴

It does not take much to complete the meagre catalogue of state laws limiting discrimination based on criminal record in private employment, Massachusetts makes it an unlawful employment practice to take adverse action based on non-convictions and some misdemeanors after five years,²¹⁵ and Louisiana enacted a law

it is possible that they may provide an alternate path to relief for some applicants disqualified due to criminal history.

²¹⁴ 775 Ill. Comp. Stat. Ann. 5/1-103, 5/2-103.1. By virtue of amendments made the year before, the Act already prohibited inquiries about or consideration of non-conviction records, juvenile records, or expunged or sealed records. *Id.* at 5/3-103. 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).

²¹⁵ *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.

in 2021 that has broad substantive standards but few procedural protections and no enforcement mechanism.²¹⁶

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

Nevada's 2017 law also deserves mention although it applies only to public employers, because it categorically prohibits consideration not only of non-conviction and sealed records, but also of misdemeanors that did not carry a prison sentence.²¹⁷ A public employer must consider a variety of factors before denying employment on the basis of criminal record and must give a written explanation of the reasons for rejection. Failure to comply with applicable procedures is an unlawful employment practice and complaints may be filed with the Nevada Equal Rights Commission. A large number of

states have now adopted the first step of Hawaii's comprehensive approach to hiring by enacting "ban-the-box" laws, relying 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 2022, laws or ordinances prohibiting application-stage inquiries applied to public employment in 37 states, the District of Columbia, and over 150 cities and counties, and in many cases limited record checks until after a

²¹⁶ La. Rev. Stat. Ann. § 23:291.2 prohibits discrimination in hiring by public and private employers based on criminal history records and provides criteria for considering criminal records. Specifically, unless otherwise provided by law, an employer may not request or consider an arrest record or charge that did not result in a conviction if such information is received in the course of a background check. The statute further provides that when considering other types of criminal history records, an employer can make an individual assessment of whether an applicant's criminal history record has a "direct and adverse relationship" with the specific duties of the job that may justify denying the applicant the position. To make that assessment, the employer must consider various factors. The statute requires the employer to make available to the applicant any background check information used during the hiring process, but there are no other procedural protections written into the bill, and no provisions for enforcement.

²¹⁷ See Nev. Rev. Stat. §§ 245.046, 268.402.

conditional offer of employment.²¹⁸ In 15 states and D.C., and 22 cities and counties, private sector employment is also affected.²¹⁹

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.²²⁰ Effective January 2021, the federal Fair Chance Act also now prohibits an agency's procurement officials from asking persons seeking federal contracts and grants about their criminal history, until an "apparent award" has been made.²²¹

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.²²² 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

²¹⁸ Beth Avery & Han Lu, *Ban-the-Box, U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, National Employment Law Project (October, 2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>

²¹⁹ *Id.* According to this report, the states that have mandated the removal of conviction history questions from job applications for private employers are California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

²²⁰ On December 17, 2019, The National Employment Law Project published a summary of the law's provisions and a set of FAQs. <https://www.nelp.org/publication/faq-fair-chance-to-compete-for-jobs-act-of-2019/>. See also CCRC Staff, *Fair Chance Act advances in Congress*, (Dec. 16, 2019), <http://ccresourcecenter.org/2019/12/16/fair-chance-act-advances-in-congress/>. As of the date of this report's publication, the Office of Personnel Management had not issued the required regulations implementing the law's provisions.

²²¹ *Id.* As of February 2022, the Office of Personnel Management had not issued regulations implementing this statute on the schedule required.

²²² See Restoration of Rights Project, *50-State Comparison: Criminal Record in Employment & Licensing*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/>.

sealed or pardoned convictions, and giving effect to judicial or administrative certificates of relief, though its law contains

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

no procedural protections for applicants or mechanism for enforcement.²²³ 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.²²⁴ 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 suggested that limiting inquiry into criminal history may lead to employer reliance on racial or other stereotypes about who may have a criminal record.²²⁵

²²³ 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).

²²⁴ 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.

²²⁵ Researchers have proposed 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 &

Some state laws protect employers from negligent hiring liability, the primary reason cited by employers for not hiring someone with a criminal record.²²⁶ 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.²²⁷ 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.

Some state laws protect employers from negligent hiring liability, the primary reason cited for not hiring a person with a criminal record

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

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),

<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/>.

²²⁶ See *Love et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 at §§ 6:18 through 6:29.

²²⁷ 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.

III. FAIR CHANCE EMPLOYMENT & OCCUPATIONAL LICENSING

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.

B. Occupational Licensing

Recent studies have shown that close to 25% 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.²²⁸ 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 sensibilities untethered to established occupational standards or actual public safety risk.²²⁹

²²⁸ 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>.

²²⁹ 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_no_nembargo.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 1960s and 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 professions²³⁰ 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.”²³¹ 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.²³²

[office/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting](https://www.restorationofrights.org/2016/06/17/fact-sheet-new-steps-reduce-unnecessary-occupation-licenses-are-limiting). The extent to which reforms have been successful in the intervening five years is reflected by the fact that by the end of 2021 only five states had no general standards in place: Alaska, Alabama, Massachusetts, South Carolina, and South Dakota. In 2020 and 2021, Vermont enacted two measures regulating occupational licenses in dozens of professions for the first time, providing general standards for consideration of criminal records, and providing for a preliminary decision on whether a record would be disqualifying. See Vt. Stat. Ann. § 129a (10), as amended by H289 (2021); see also Vermont profile, Restoration of Rights Project.

²³⁰ Notable enactments included those in New Jersey (1968), Colorado (1973), Washington (1973), Hawaii (1974), New Mexico (1974), Minnesota (1974), New York (1976), North Dakota (1977), Pennsylvania (1979), and Wisconsin (1981). See Love *et al.*, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, *supra* note 6 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* note 235.

²³¹ See, e.g., New Jersey’s Rehabilitated Convicted Offenders Act of 1968 (as amended in 2021), 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 (as amended in 2021), N.M. Stat. Ann. §§ 28-2-1 *et seq.*

²³² Connecticut, Kentucky, Minnesota, New Hampshire, New Jersey, New Mexico, New York, and Washington still retain the structure of regulating public employment and licensing

Beginning in 2013, a new era of occupational licensing reform took shape, transforming the policy landscape.²³³ 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.²³⁴ 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,²³⁵ and

together that prevailed during the 1960s and 1970s. While most of these states have since amended their laws, the licensing law adopted almost half a century ago in Minnesota has changed little since 1974, and it still gets high marks in the Institute for Justice’s 2020 report. *See infra* note 235. North Dakota and Virginia also still operate under detailed licensing regulations dating from the 1980s or earlier. Pennsylvania recently 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/>.

²³³ While occupational licensing was not the most well-publicized type of reform during the period of 2013-2016, reforms during these years set the stage for the burst of legislative activity around licensing that began in 2018. New laws during this period 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/>.

²³⁴ 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/>. This report has been updated as new laws are enacted.

²³⁵ 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->

the National Employment Law Project (NELP), a workers' rights research and advocacy group.²³⁶ Both of these model law proposals address 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 should not be considered at all.
2. **What are proper criteria for denial of licensure based on conviction?** Both of these proposals require a “direct relationship” between a conviction and the occupation. IJ’s proposal also permits denial based on public safety risk, and the NELP proposal permits denial based on 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

[content/uploads/2019/11/10-31-2019-Model-Collateral-Consequences-in-Occupational-Licensing-Act-2.pdf](https://www.nelp.org/content/uploads/2019/11/10-31-2019-Model-Collateral-Consequences-in-Occupational-Licensing-Act-2.pdf).

²³⁶ 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/>.

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 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 2021, 39 states and the District of Columbia enacted a total of 66 laws imposing new generally applicable obligations and limitations on licensing agencies, several states enacting multiple laws in successive years.²³⁷

Since 2016, 39 states have enacted 66 laws regulating occupational licensing

²³⁷ Arizona (2017, 2018, 2019, 2021), Arkansas (2019, 2021), California (2018), Colorado (2018), Connecticut (2017), Delaware (2018), District of Columbia (2021), Florida (2019), Georgia (2016, 2021), Idaho (2020), Illinois (2016, 2017, 2021), Indiana (2018, 2019), Iowa (2019, 2020), Kansas (2018), Kentucky (2017), Louisiana (2017), Maryland (2018, 2019), Massachusetts (2018), Michigan (2021), Mississippi (2019), Missouri (2020, 2021), Nebraska (2018), Nevada (2019), New Hampshire (2018), New Jersey (2021), New Mexico (2019, 2021), New York (2019), North Carolina (2019), Ohio (2019, 2021), Oklahoma (2019), Pennsylvania (2020), Rhode Island (2020, 2021) Tennessee (2016, 2018, 2021), Texas (2019), Utah (2019, 2020), Vermont (2020, 2021), Washington (2021), West Virginia (2019, 2020), Wisconsin (2018), and Wyoming (2018).

Citations and descriptions of these laws can be found in the relevant state profiles from the Restoration of Rights Project. They are summarized in *50-State Comparison: Criminal Record in Employment & Licensing, supra* note 222., which links to a longer description of each state’s law.

Some of these states regulated licensing decisions state-wide for the first time,²³⁸ while others expanded on recent enactments, and a few states updated and improved licensing regulations enacted during the earlier reform era in the 1960s and 70s.²³⁹ Many required agencies to publish lists of disqualifying convictions and limit disqualification to convictions “directly related” to the occupation, abolished vague “moral character” criteria and emphasized public safety instead, barred consideration of non-convictions, sealed or expunged records 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.²⁴⁰ The Institute for Justice keeps a running tab of the reforms broken down by feature.²⁴¹

²³⁸ The regulatory schemes enacted by Kansas and Nebraska in 2018, Mississippi, Nevada, and West Virginia in 2019, Iowa and Idaho in 2020, and Vermont in 2021, 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.

²³⁹ For example, the laws enacted by New Jersey, New Mexico, and Washington in 2021, and by Missouri and Pennsylvania in 2020, represented those states’ first significant regulation of occupational licensing in more than 40 years. In 2019, Arkansas, Kentucky, Maryland, North Carolina, Oklahoma, and Texas did the same.

²⁴⁰ The provisions of each state’s law are in *50-State Comparison: Criminal Record in Employment & Licensing*, *supra* note 222.

²⁴¹ As of December 2021, 19 states allowed individuals to petition a licensing board at any time to determine if their criminal record would be disqualifying; 22 states had done away with vague criteria like “good moral character” for some or all licenses; 19 states had prohibited consideration of non-conviction records and 18 states prohibited consideration of sealed or expunged convictions; 18 states had blocked licensing boards from denying people a license unless their record is “directly related” to the license; and 10 states instituted new reporting requirements. See Institute for Justice, *State Occupational Licensing Reforms for Workers with Criminal Records* (last visited Dec. 27, 2021), <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). The District of Columbia falls into all of these categories.

The most ambitious of the new laws were the comprehensive schemes enacted by Indiana in 2018, Iowa in 2020, and the District of Columbia in 2021. All three are strong both substantively and procedurally, incorporating many features of the Institute for Justice’s model law. Indiana’s requirements apply not only to state agencies but also to county and municipal governments that issue occupational and professional licenses and permits.²⁴² The broad laws adopted in recent years by New Hampshire, Ohio, and Rhode Island are also commendable.²⁴³ The most surprising

The most ambitious licensing schemes are those enacted by Indiana, Iowa, and the District of Columbia

²⁴² The District of Columbia’s comprehensive 2021 law is described in the D.C. profile from the Restoration of Rights Project, and in a summary of new 2021 occupational licensing laws published on the CCRC website on June 10, 2021, <https://ccresourcecenter.org/2021/06/10/new-occupational-licensing-laws-in-2021/#more-38007>. Iowa enacted a general licensing law for the first time in 2020, with a direct relationship standard, a broad definition of rehabilitation (presumed after 5 years for most crimes), a preliminary determination, and strong due process protections. See the new Chapter 272C of the Iowa Code, added by [HF2627](#). The law applies to all licenses save for a few in health care. Previously, the only licenses that were related were in trades taught in the state’s prisons (e.g., electrician, plumber, mechanical, contractor, and barbering licenses). 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 (though it has since been downgraded slightly to an A-, joining Iowa, D.C., New Hampshire, and Ohio). See *supra* note 235. 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).

²⁴³ N.H. Rev. Stat. Ann. § 332-G; Ohio Rev. Code Ann. § 9.78(C); R.I. Gen. Laws § 28-5.1-14. The first two states apply a “direct relationship” standard to licensing boards, while Rhode Island’s standard is “substantial relationship,” and all three define it in detail. New Hampshire and Ohio provide for a preliminary determination for an aspiring applicant, while Rhode Island excludes certain records from consideration (including non-convictions, misdemeanors, and felonies that are not “substantially related”). All three states allow applicants to establish rehabilitation by detailed standards; provide detailed procedures in the event of denial, suspension, or revocation; and include accountability standards.

new laws were the extensive 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.²⁴⁴

Several states, including New Jersey, New Mexico, and Washington have recently undertaken to modernize licensing schemes originally enacted in the 1960s and 1970s and virtually unchanged since that time,²⁴⁵ but Minnesota has evidently seen no need to modify a progressive scheme first enacted in 1974 that still gets high marks.²⁴⁶ Pennsylvania completely reworked the substantive standards intended to guide 29 licensing agencies controlling 255 licenses,²⁴⁷ and along with Maryland and Nebraska also imposed new reporting requirements on licensing boards, perhaps a prelude to more extensive procedural regulation. Alabama and Washington authorized their courts to grant exemptions from many mandatory barriers to licensure.²⁴⁸ Arizona enacted no fewer than six separate laws over a four-year period, each building upon the last to expand licensing opportunities.

²⁴⁴ 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 note 235, *supra*.

²⁴⁵ See note 231, *supra*.

²⁴⁶ 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 235.

²⁴⁷ See CCRC Staff, *Pennsylvania expands access to 255 licensed occupations for people with a criminal record* (July 14, 2020), <https://ccresourcecenter.org/2020/07/14/pennsylvania-expands-access-to-255-licensed-occupations-for-people-with-a-record/>. 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.

²⁴⁸ 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

The extraordinary number and variety of laws in this category adopted between 2018 and 2021 can be surveyed in the annual reports of new legislation published by CCRC and posted on the CCRC website. There are now only three states (Alaska, Massachusetts, and South Dakota) that have no general law or regulations setting limits on how licensing boards may consider an applicant’s criminal record.

In addition to these general reforms, states also 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 and Washington opened health care occupations to people who may have been barred from them earlier in life.²⁴⁹

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 this advocacy to the many individuals who stand to benefit cannot be overestimated. If a “clean slate” means “an absence of existing restraints,”²⁵⁰ lifting legal and societal barriers to licensure seems an essential part of a clean slate agenda.

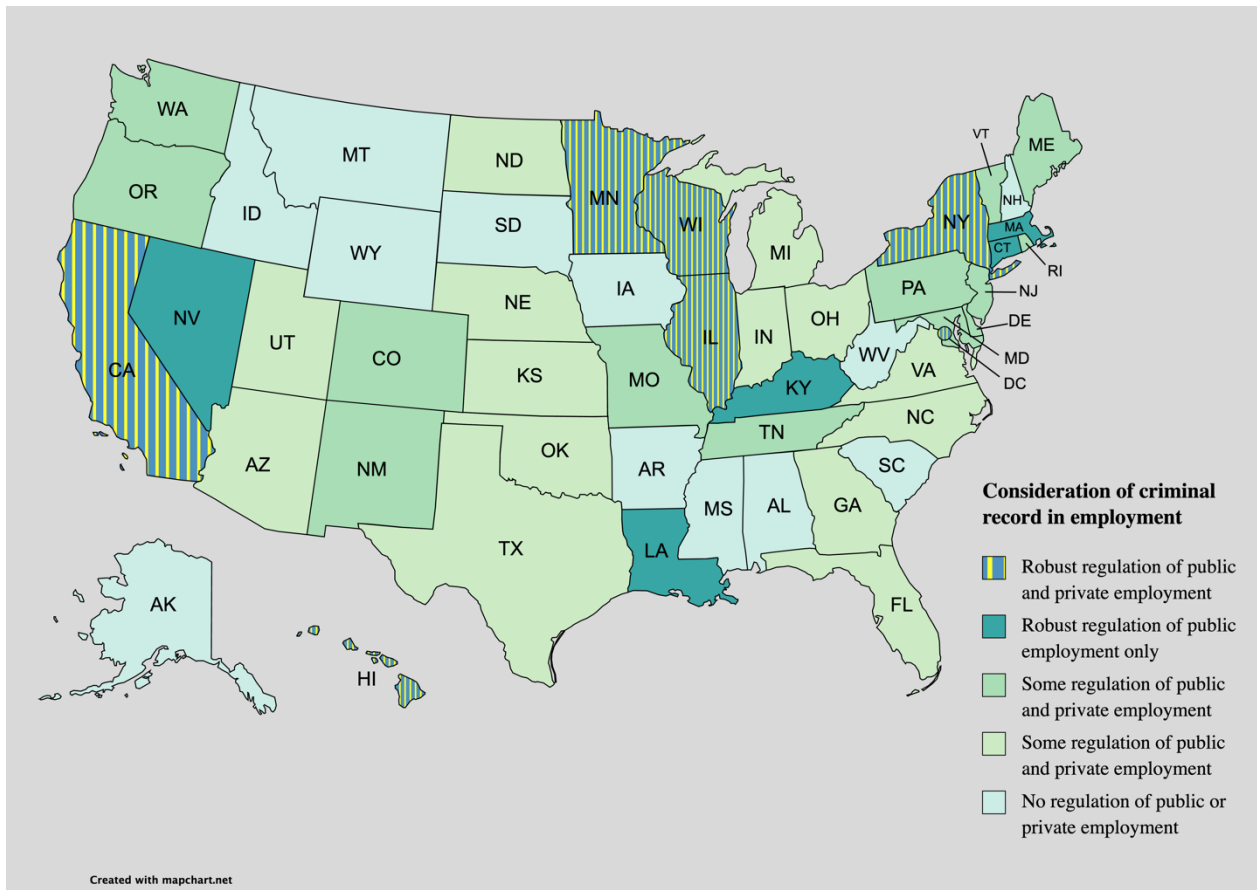
discretionary decision-making thereafter, Alabama’s certificate appears toothless. Washington’s law otherwise imposes a “direct relationship” standard and allows only convictions within 10 years to be considered.

²⁴⁹ 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>.

²⁵⁰ See *supra* note 202 for a discussion of the term “clean slate.”

Report Card: Employment & Occupational Licensing

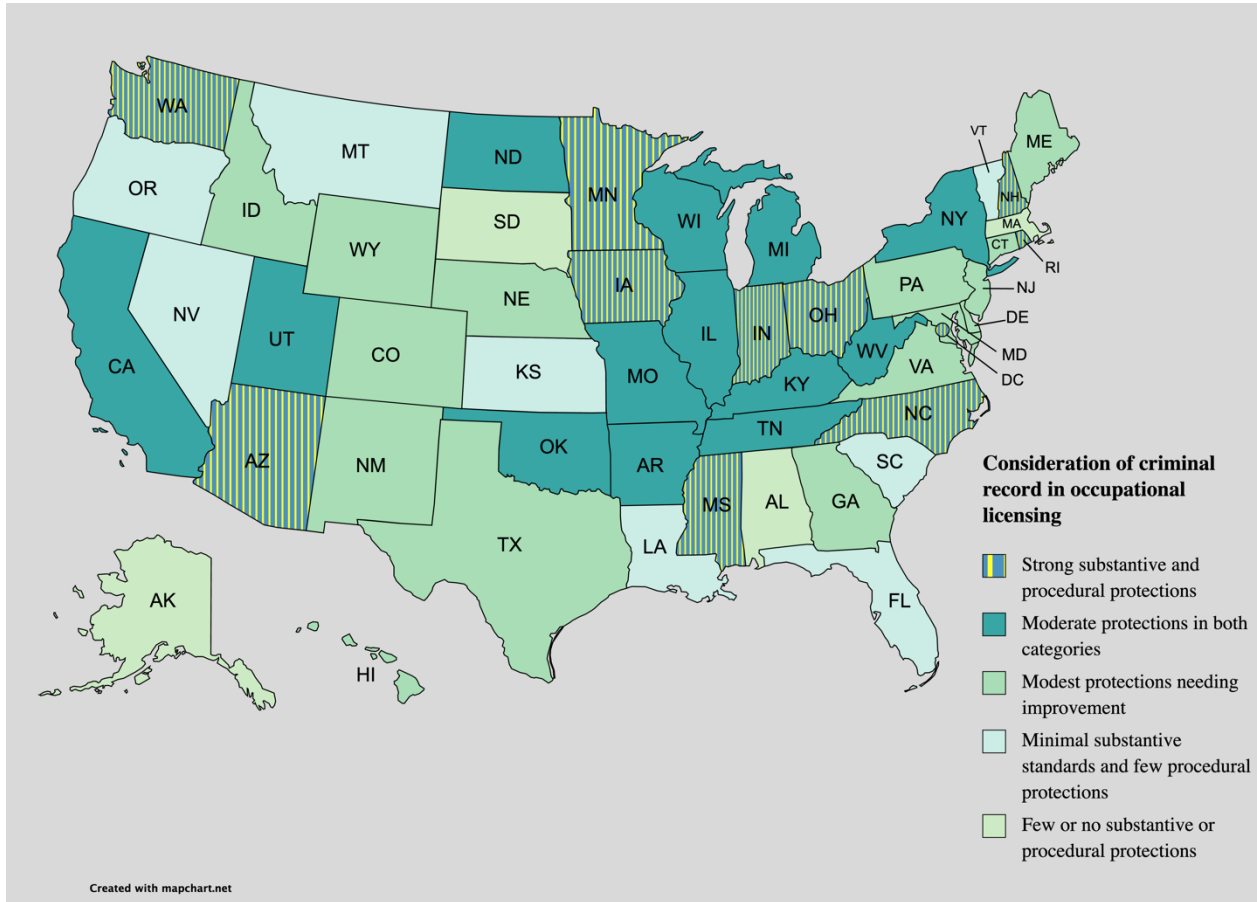
Employment: The following map assigns each state to one of five color-coded categories reflecting the textual strength of the law regulating how criminal record is taken account of in the employment application process. (We cannot comment on how these laws operate or how they are enforced.) Grades below are based on these categories. The five categories are: 1) Orange: robust regulation of both public and private employment with provision for enforcement; 2) Green: robust regulation of public employment only; 3) Light orange: some regulation of both public and private employment, no systematic enforcement; 4) Light green: some regulation of public employment only; and 5) White: no meaningful 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 or allows it earlier in the process; whether the law provides clear standards for how employers should consider a criminal record in the employment application process; and, whether the law provides for administrative enforcement.



Occupational licensing: A similar color-coded map describes the strength of each state’s regulation of how criminal record is considered in the occupational licensing context, with grades assigned correspondingly. The five categories are 1) Orange: Strong substantive and procedural protections; 2) Green: Moderate protections in both categories with room for improvement; 3) Light orange: Modest protections needing improvement; 4) Light green: Minimal substantive standards leaving room for disqualification based on vague standards and few procedural protections; and 5) Few or no protections for those with criminal records in the licensing process. Categories assigned considering the following criteria:

- 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;
- whether certain categories of records (notably non-conviction records, sealed records, and misdemeanors) are deemed irrelevant to licensure and therefore may not be considered;
- 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 the agency at a later point;
- whether procedural protections are available through written reasons for denial and opportunities to appeal, including provision for external review of an adverse decision;
- whether there is an external accountability mechanism to monitor agency performance, such as periodic legislative reporting requirements.

III. FAIR CHANCE EMPLOYMENT & OCCUPATIONAL LICENSING



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

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

	Employment	Licensing
MT	F	D
NE	D	C
NV	B	D
NH	F	A
NJ	C	C
NM	C	C
NY	A	B
NC	D	A
ND	D	B
OH	D	A
OK	D	B
OR	C	D
PA	C	C
RI	C	A
SC	F	D
SD	F	F
TN	C	B
TX	D	C
UT	D	B
VT	C	D
VA	D	C
WA	C	A
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, we found it interesting that there is not a particularly strong correlation between their rankings for employment and for occupational licensing. That is, a state that has a robust system for regulating consideration of criminal record in employment may not and frequently does not have a similarly strong system for regulating occupational licensing agencies. In fact, only two jurisdictions (Minnesota and the District of Columbia) scored at the top of both categories. Four other states that scored well on employment also scored well on occupational licensing (California, Illinois, New York, and Wisconsin), but the last jurisdiction in the top employment category (Hawaii) 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 fair employment and licensing

Conversely, three states that ranked in the top tier for occupational licensing had no law at all regulating employment (Iowa, Mississippi, and New Hampshire) and five that scored well on licensing fared poorly in regulating public employment and had no law at all governing private employment (Arizona, Indiana, North Carolina, Ohio, 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 comparison charts of each 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 RANKING

The following table shows the grades for each issue as reflected on the report cards in this report. Scores were calculated by assigning grades A-1 through F-5 and adding up the nine columns to get the total score, with lower scores determining higher rank. The final column assigns an overall ranking of the restoration laws of each state (D.C. and the federal system), assigning equal weight to each relief mechanism, except that deferred adjudication and certificates of relief were each assigned 50% weight. States that have strong statewide fair housing laws were given “extra credit” according to the strength of their laws (subtracting either one or two points). Laws restoring firearms rights and juvenile relief mechanisms, and specialized relief mechanisms like those applicable to victims of human trafficking or to those convicted of offenses that are no longer a crime (e.g., marijuana possession) were not considered in determining each state’s overall ranking.

In some cases, states got the same score and so were assigned the same rank, and subsequent rankings skipped ahead omitting intervening rankings. Thus, for example, three states tied for 4th place, so the next state after those three is ranked 7th. (The state rankings are displayed at p.3, *supra*.)

	Voting	Pardon	Felony relief	Misdo. relief	Non-convict.	Deferred adjud.	Cert. of relief	Employm't	Licensing	Rank
AL	F	A	C	C	C	B	D	F	F	39
AK	C	F	F	F	B	C	F	F	F	50
AZ	F	F	B	B	C	C	C	D	A	34
AR	F	A	C	A	C	B	F	F	B	25
CA	B	B	C	A	A	D	B	A	B	3
CO	B	D	B	B	A	A	B	C	C	4
CT	B	A	B	A	A	C	B	B	C	2
DE	B	A	C	B	A	C	F	C	C	4
DC	A	F	F	D	D	D	F	A	A	19
FL	F	F	F	F	D	C	F	D	D	51
GA	D	A	C	C	C	C	F	D	C	34
HI	B	F	F	F	B	B	F	A	C	31

	<i>Voting</i>	<i>Pardon</i>	<i>Felony relief</i>	<i>Misdo. relief</i>	<i>Non-convict.</i>	<i>Deferred adjud.</i>	<i>Cert. of relief</i>	<i>Employment</i>	<i>Licensing</i>	<i>Rank</i>
<i>ID</i>	C	B	D	C	B	B	F	F	C	37
<i>IL</i>	B	B	A	B	C	C	A	A	B	1
<i>IN</i>	B	F	B	B	B	C	F	D	A	22
<i>IA</i>	D	D	F	D	D	C	F	F	A	47
<i>KS</i>	F	F	A	B	D	D	F	D	D	43
<i>KY</i>	F	D	D	B	A	B	F	B	B	29
<i>LA</i>	C	B	B	C	B	C	F	B	D	22
<i>ME</i>	A	F	F	F	F	A	F	C	C	44
<i>MD</i>	B	F	D	D	B	A	C	C	C	34
<i>MA</i>	B	F	A	A	C	A	F	B	F	22
<i>MI</i>	B	F	A	A	A	A	F	D	B	15
<i>MN</i>	C	B	C	A	C	D	F	A	A	8
<i>MS</i>	D	F	D	D	B	A	F	F	A	39
<i>MO</i>	C	B	C	C	D	A	F	B	C	25
<i>MT</i>	B	F	F	B	F	B	F	F	D	48
<i>NE</i>	C	C	D	C	A	A	F	D	C	31
<i>NV</i>	B	B	A	A	C	C	F	B	D	9
<i>NH</i>	B	F	B	A	A	D	F	F	A	19
<i>NJ</i>	B	F	B	A	A	C	B	C	C	4
<i>NM</i>	C	F	A	A	B	A	B	C	C	10
<i>NY</i>	B	D	D	D	A	C	A	A	B	7
<i>NC</i>	C	F	D	C	A	D	C	D	A	31
<i>ND</i>	B	D	A	A	D	A	F	D	B	16
<i>OH</i>	B	C	B	B	C	D	B	D	A	11
<i>OK</i>	B	A	C	C	C	C	F	D	B	19
<i>OR</i>	B	B	C	B	C	C	F	C	D	25
<i>PA</i>	B	A	D	C	A	C	F	C	C	11
<i>RI</i>	B	F	D	B	B	A	C	C	A	16
<i>SC</i>	C	A	F	D	B	C	F	F	D	39

	<i>Voting</i>	<i>Pardon</i>	<i>Felony relief</i>	<i>Misdo. relief</i>	<i>Non-convict.</i>	<i>Deferred adjud.</i>	<i>Cert. of relief</i>	<i>Employm't</i>	<i>Licensing</i>	<i>Rank</i>
<i>SD</i>	F	B	F	C	D	C	F	F	F	49
<i>TN</i>	F	F	C	C	B	A	B	C	B	31
<i>TX</i>	D	F	F	D	B	A	F	D	C	44
<i>UT</i>	B	B	C	B	B	A	F	D	B	11
<i>VT</i>	A	F	D	D	A	A	A	C	D	25
<i>VA</i>	B	B	C	B	B	A	F	D	C	15
<i>WA</i>	B	C	B	B	D	A	C	C	B	11
<i>WV</i>	C	F	D	C	D	A	F	F	B	42
<i>WI</i>	C	B	F	F	F	D	F	A	B	38
<i>WY</i>	C	F	D	D	B	C	F	F	C	44
<i>Fed</i>	n/a	F	F	F	F	D	F	B	F	52