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America's Paper Prisons: The Second Chance Gap

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AMERICA'S PAPER PRISONS:
THE SECOND CHANCE GAP

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Over the last decade, all fifty states and the federal government have enacted "second chance" reforms that increase the eligibility of individuals arrested, charged, or convicted of crimes to shorten their sentences, clear their criminal records, and/or regain the right to vote. While much fanfare has accompanied the increasing availability of "second chances," little attention has been paid to their delivery. This study introduces the concept of the "second chance gap," which it defines as the difference between eligibility and delivery of second chance relief; explores its causes; and approximates the size of the gap in connection with several second chance laws and initiatives. Using administrative and other data, it finds that among a host of petition-based second chance opportunities, to shorten sentences, restore one's vote, and clear one's criminal convictions, only a small fraction (less than 10 percent) of those eligible for relief actually received it. Extrapolating based on a novel analysis of around sixty thousand criminal histories of persons primarily seeking gig-economy work and of the expungement laws governing nonconvictions of all fifty states, this study estimates that at least twenty to thirty million American adults, or 30–40 percent of those with criminal records, fall into the "sec-

ond chance expungement gap," living burdened with criminal records that persist despite appearing to be partially or fully clearable under existing law.

These findings suggest that tens of millions of American are stuck in a paper prison, held back by deficiencies in the administration of second chances that have left them incarcerated, disenfranchised, or burdened by convictions beyond what the law requires. Some of the barriers to relief are structural and related to debt, overburdened bureaucracies, and the contested nature of second chance rules that unwind past judgments and policies. But others are harder to see and stem from administrative failures like unworkable standards, missing and incomplete criminal justice information ("dirty data"), a lack of awareness of second chance opportunities, and costly and complex processes. Addressing them—by moving administrative burdens from the defendant and onto the state and algorithms through automation, standardization, and ruthless iteration—can narrow the second chance relief gap. Leveraging them, "Clean Slate" initiatives to automatically clear eligible criminal records can have the potential to help the millions of Americans in the second chance expungement gap. However, the ability of such second chance initiatives to improve outcomes depends on how they are implemented. Debt-related barriers and dirty data can contribute to incomplete automation, leading to "second second chance gaps." In the realm of expungement, application of the expungement criteria to minor but not major offenses can also have the effect of exacerbating, not narrowing, existing racial disparities within the population of people with records, while improving them within the general population. Further research is needed to understand the impact of automated clearance under different scenarios, such as when the defendant is not notified of the relief received or there is a risk of statistical discrimination making things worse, not better. Overall, however, though other hurdles may remain, automation can remove the unfair collateral punishments, not steel bars, holding back tens of millions of Americans.

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INTRODUCTION

On February 17, 2019, the *Louisiana Times-Picayune* reported that the state of Louisiana routinely keeps people incarcerated, "[w]eeks, months, years after their release dates."[1] According to a state auditor's report, the main culprit was inconsistencies in the application of credits for certified treatment and rehabilitation programs to the calculation of release dates.[2] Similar miscalculations have been reported in California, where taxpayers have paid tens of millions of dollars in overstays because some inmates were given 15 percent rather than 50 percent good-behavior credit.[3] Overincarceration in Hawaii,[4] D.C.,[5] and the federal criminal justice system[6] has also been documented.

Also in February 2019, the *New York Times* reported the death of Steve Cheatham while he was in prison waiting for a court to rule on his compassionate-release application.[7] Created in the 1980s, compassionate-release programs allow federal inmates who no longer pose a threat to be sent home, usually when nearing death.[8] But since 2014, scores of elderly and terminally

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1.   Richard A. Webster & Emily Lane, *Louisiana Routinely Jails People Weeks, Months, Years After Their Release Dates*, TIMES-PICAYUNE (Feb. 21, 2019, 9:24 PM), https://www.nola.com/news/article_988818dd-2971-51c8-82d5-096eef5ffba5.html [https://perma.cc/L9YX-XYQ9].

2.   LA. LEGIS. AUDITOR, DEP'T OF CORR., MANAGEMENT OF OFFENDER DATA: PROCESSES FOR ENSURING ACCURACY 9 (2017), https://app.lla.state.la.us/PublicReports.nsf/1284612EDBDB25E5862581C40056189F/$FILE/0001674C.pdf [https://perma.cc/428L-4RJC] (describing the need to factor into release-date calculations credit for time served, good time-release ratio, credit earned for certified treatment or rehabilitation programs, good-time credit lost due to behavior, and parole-revocation recalculations).

3.   Michael Rothfeld, *Inmates Serve Overtime*, L.A. TIMES (Feb. 17, 2008, 12:00 AM), https://www.latimes.com/archives/la-xpm-2008-feb-17-me-prisons17-story.html [https://perma.cc/6QCS-CFBJ].

4.   Manolo Morales, *Inmates Forced to Stay in Prison Past Their Release Date Cost Taxpayers*, KHON2 (Jan. 5, 2019, 3:35 AM), https://www.khon2.com/local-news/inmates-forced-to-stay-in-prison-past-their-release-date-cost-taxpayers/ [https://perma.cc/ENT8-GGS9].

5.   Spencer S. Hsu, *D.C. Jail Held Man for 77 Days After His Case Was Dropped Until Another Inmate Flagged an Attorney*, WASH. POST (Oct. 1, 2017, 6:38 PM), https://www.washingtonpost.com/local/public-safety/dc-jail-held-man-for-77-days-after-his-case-was-dropped-until-another-inmate-flagged-an-attorney/2017/10/01/61235af2-9f0a-11e7-8ea1-ed975285475e_story.html [https://perma.cc/W8GE-UAUE] (describing the payment by Washington beginning in 2017 of $6 million in connection with a detention settlement).

6.   *See infra* Sections II.A.1, II.A.2 (discussing the shortcomings of the federal Clemency Initiative and compassionate-release policy).

7.   Mitch Smith, *A New Law Made Him a 'Free Man on Paper,' but He Died Behind Bars*, N.Y. TIMES (Feb. 15, 2019), https://www.nytimes.com/2019/02/15/us/criminal-justice-reform-steve-cheatham.html [https://perma.cc/49PZ-Z9DL].

8.   *See* HUM. RTS. WATCH & FAMS. AGAINST MANDATORY MINIMUMS, THE ANSWER IS NO: TOO LITTLE COMPASSIONATE RELEASE IN US FEDERAL PRISONS 2, 26–27 (2012), https://www.hrw.org/sites/default/files/reports/us1112ForUploadSm.pdf [https://perma.cc/48F2-4QJG].

ill federal prisoners have died while waiting for the Bureau of Prisons (BOP) to rule on their applications.[9] A Department of Justice Office of the Inspector General report found that less than 4 percent of federal inmates who submitted compassionate-release requests were released, in part because of eligibility provisions that were unclear and difficult to apply.[10] The same report estimated that 19 percent of the federal-prison budget was spent to incarcerate aging inmates.[11]

Over the summer of 2020, tens of millions of Americans joined demonstrations to protest the killings of George Floyd and Breonna Taylor by police officers.[12] Over ten thousand people were arrested,[13] including eighty-seven unarmed demonstrators who were each charged with a felony and two misdemeanors for sitting on the lawn of the Kentucky attorney general to protest the lack of charges following Breonna Taylor's death.[14] Even if ultimately dismissed without prejudice,[15] the charges will remain on each person's record unless and until the person, after a waiting period of one to three years, petitions for expungement and the court grants the petition.[16]

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9. *New Data Reveals BOP Still Neglecting Compassionate Release*, FAMS. AGAINST MANDATORY MINIMUMS (Feb. 8, 2018), https://famm.org/new-data-reveals-bop-still-neglecting-compassionate-release/ [https://perma.cc/45HG-4AFV] (describing Bureau of Prisons letter indicating that eighty-one prisoners died while awaiting review of their petitions between 2014 and 2018).

10. OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., EVALUATION AND INSPECTIONS DIV. 15-05, THE IMPACT OF AN AGING INMATE POPULATION ON THE FEDERAL BUREAU OF PRISONS 45 (2016), https://oig.justice.gov/reports/2015/e1505.pdf [https://perma.cc/P5CB-RW9G].

11. *Id.* at 48 ("Based on BOP cost data, we estimate that the BOP spent approximately $881 million, or 19 percent of its total budget, to incarcerate aging inmates in FY 2013.").

12. Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html [https://perma.cc/RR2Q-RZQZ] (reviewing estimates of how many Americans participated in the protests, proposing an aggregate range from fifteen to twenty-six million).

13. Anita Snow, *Arrests at Widespread U.S. Protests Hit 10,000*, ASSOCIATED PRESS (June 4, 2020, 7:16 AM), https://www.dailyherald.com/news/20200604/arrests-at-widespread-us-protests-hit-10000 [https://perma.cc/EBG9-ZLK4].

14. Jacey Fortin & Allyson Waller, *87 Face Felony Charges After Protesting Breonna Taylor's Death*, N.Y. TIMES (July 15, 2020), https://www.nytimes.com/2020/07/15/us/protesters-arrested-breonna-taylor-kentucky.html [https://perma.cc/SV37-92TG].

15. This is typical; however, if the charges are dismissed with prejudice, the charges will be automatically removed following a law change in 2020. *Kentucky Restoration of Rights & Record Relief*, RESTORATION RTS. PROJECT (Aug. 12, 2020), https://ccresourcecenter.org/state-restoration-profiles/kentucky-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/5Y8E-NLMB] ("For cases disposed after March 27, 2020, expungement of misdemeanor or felony charges resulting in acquittal or dismissal with prejudice ('and not in exchange for a guilty plea to another offense') is automatic upon disposition ('The order expunging the records shall not require any action by the person.').").

16. KY. REV. STAT. ANN. § 431.076(1)(a) (2020).

Many people do not take advantage of this option. As reported in this Article, I find, applying the records-clearance policies of fifty states to criminal histories from each state, that an estimated 30–40 percent of people with records, or twenty to thirty million of the eighty million adult Americans with records,[17] are eligible to clear their criminal records partially or fully on the basis of nonconvictions expungement policies but have not done so.

For individuals that are convicted, formal sentences are only part of the punishment. According to the National Institute of Justice, forty-four thousand private- and civil-sector limitations on employment, housing, civic participation, and many other realms continue to burden those with criminal records long after they have served their time.[18] But while every state offers ways to "expunge" or otherwise improve one's record of criminal convictions to avoid such "collateral consequences,"[19] only a small fraction of those eligible for relief get it. Among the dozen or so states analyzed or reported in this study, uptake rates of convictions relief below 10–20 percent were the norm.[20]

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17. STAT. TRENDING, ANALYSIS, & REPORTING GRP., FBI, SEPTEMBER 2020 NEXT GENERATION IDENTIFICATION (NGI) SYSTEM FACT SHEET 1 (2020), https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view [https://perma.cc/4G9V-V4H7] (reporting 78.3 million records pertaining to unique individuals based on fingerprints); *QuickFacts United States*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/fact/table/US /PST045218 [https://perma.cc/2QBN-Z3Y6] (reporting that as of July 2019, there were 328 million people living in the US, 77.5 percent of whom were 18 years or older, or 254 million adults); *see also* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012, at 14 tbl.1, 83 tbl.25 (2014), https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf [https://perma.cc/CD6S-DG8P] (reporting 100 million criminal records based on a summation of the amount of records each state keeps, which does not account for those with multiple records in multiple states, and seventy-nine million unique criminal records based on the Interstate Identification Index).

18. U.S. COMM'N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1–2 (2019), https://www .usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf [https://perma.cc/QA8H-92CZ] ("[I]ndividuals with criminal histories can face barriers to voting, serving on a jury, holding public office, securing employment, obtaining housing, receiving public assistance, owning a firearm, getting a driver's license, qualifying for financial aid and college admission, qualifying for military service, and deportation (for noncitizens)." (footnotes omitted)).

19. Through expungement, sealing, vacatur, set-aside, or related records-rehabilitation remedy, interchangeably referred to in this Article as "expungement" or records "clearing." *See* Margaret Colgate Love, *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION RTS. PROJECT (Dec. 2019), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside/ [https://perma.cc /6XR3-RRZR] (showing that while relief varies considerably by state, all states offer pathways to some type of records rehabilitation, but also showing that at the federal level there remains, as of December 2019, no general statutory authority to seal or expunge even nonconviction records).

20. *See infra* Table 4-1

"Second chance" laws, passed by nearly every state over the last decade,[21] are an important pillar of what the late Joan Petersilia has called the current "transformative moment in criminal justice reform . . . away from . . . harsh punishment policies" and toward rehabilitation.[22] These laws allow individuals charged with or convicted of crimes to have their sentences shortened, crimes downgraded (e.g., from a felony to a misdemeanor), criminal records cleared, licenses restored, and/or voting rights reinstated, but often only on petition. They reflect the sentiment—behind Kim Kardashian West's successful bid for presidential clemency for Alice Johnson (a sixty-three-year-old grandma given a life sentence for a drug-related crime),[23] the 2018 midterm passage of Florida's "Amendment 4" to restore the vote to over a million persons with felony convictions, [24] and the surprise enactment of the bipartisan First Step Act in 2019, which grants early release to qualifying federal prisoners[25]—that everyone deserves a second chance, and many punishments deserve a second look.

But while much fanfare has accompanied the increasing availability of second chances, little attention has been paid to their delivery. [26] For example, in the fall of 2018, Florida voters approved Amendment 4, to allow indi-

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21.   *See infra* Section I.A.

22.   Joan Petersilia, Preface, *Realigning Corrections, California Style*, ANNALS AM. ACAD. POL. & SOC. SCI., March 2016, at 8, 8. See also, for example, the formation of the Law Enforcement Leaders to Reduce Crime and Incarceration group, comprised of nearly 200 police chiefs, prosecutors, sheriffs, and attorneys general committed to "changes to laws and practices that more effectively fight crime while reducing unnecessary imprisonment." LAW ENF'T LEADERS, http://lawenforcementleaders.org/ [https://perma.cc/7KBV-NVWZ].

23.   Peter Baker, *Alice Marie Johnson Is Granted Clemency by Trump After Push by Kim Kardashian West*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/06/us /politics/trump-alice-johnson-sentence-commuted-kim-kardashian-west.html [https://perma.cc/W4M7-A8TF].

24.   Though whether it will remains to be seen. *See* Lori Rozsa, '*A Joyous Day' Ahead as 1.4 Million Florida Ex-Felons Have Voting Rights Restored*, WASH. POST (Jan. 5, 2019, 6:40 PM), https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898adc28fa2 _story.html [https://perma.cc/9LRK-E8F2] (citing as one of the barriers to restoration the requirement that all fines first be paid, including that of one individual who owed $52 million in restitution).

25.   Through, for example, the retroactive application of good time credits and the Fair Sentencing Act. First Step Act of 2018, Pub. L. No. 115-391, sec. 101(a), §§ 3631–3635, sec. 404, 132 Stat. 5194, 5195–208, 5222.

26.   *But see* Tony Calero, Open Juvenile Records in Washington State: Process, Effects, and Costs of Protective Mechanisms (2013) (unpublished M.P.A. thesis, University of Washington), http://www.juvjustice.org/sites/default/files/ckfinder/files/Examining%20Open %20Juvenile%20Records%20in%20Washington%20State.pdf [https://perma.cc/H7JY-RFTZ] (considering the uptake of clearance remedies among eligible juveniles in Washington State). *See also* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2467 (2020).

viduals with felony records to regain their vote without a petition.[27] But confusion about who had outstanding fines and fees, which the Florida legislature ruled would disqualify potential voters, created an "administrative nightmare" that added "confusion and anxiety to people . . . trying to exercise their first amendment right."[28] Estimates of the number of people registering and voting pursuant to the measure were "well below what was anticipated when Amendment 4 passed."[29] This Article discusses how, in "second chance" contexts like the ones described—resentencing, compassionate release, reenfranchisement, and expungement—millions of American are stuck in a paper prison, held back by deficiencies in the administration of second chances that have left them unable to vote, drive, serve on a jury, or do one of the tens of thousands of other activities restricted for those with criminal records.[30] Some of the barriers to relief are structural, and related to debt and overburdened bureaucracies. But others are harder to see and stem from administrative factors like unworkable standards, missing and incomplete criminal justice information ("dirty data"), a lack of awareness of second chance opportunities, and the nature of second chance rules that unwind past judgments and policies and reflect contested renegotiations about how to best strike the balance between public safety and equity.

This Article introduces the concept of the "second chance gap"—the difference between eligibility and delivery of second chances—to draw attention to and quantify the impact of these largely invisible and underappreciated structural and red-tape barriers, not steel bars, holding Americans back. As states continue to pass and administer second chance laws, it is worth taking stock of the gaps between eligibility and delivery, the reasons they exist, various options for narrowing them, and the open research questions that surround the administration of effective and impactful second chance relief. This Article is an initial effort to do so, drawing upon and extending several literatures.

First, in its focus on the administrative, rather than substantive, aspects of second chance relief, such as who carries the information burden, it builds upon the awareness in law and policy circles that, as Richard Thaler and Cass Sunstein have observed, "small and apparently insignificant details can have

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27. Lawrence Mower & Langston Taylor, *Florida Ruled Felons Must Pay to Vote. Now, It Doesn't Know How Many Can*, TAMPA BAY TIMES (Oct. 7, 2020), https://www.tampabay.com/news/florida-politics/elections/2020/10/07/florida-ruled-felons-must-pay-to-vote-now-it-doesnt-know-how-many-can/ [https://perma.cc/T83E-NBUR] (describing the requirement that fines and fees be repaid, in combination with a lack of a central database of court fees or fines, as causing an "administrative nightmare," in the words of U.S. District Judge Robert Hinkle).

28. *Id.*

29. *Id.*

30. U.S. COMM'N ON CIV. RTS., *supra* note 18, at 1–2

major impacts . . . . '[E]verything matters.'" [31] Joining other studies that consider mechanisms for influencing the impact of the law other than by changing its substance,[32] it finds small design choices—for example, those regarding how eligibility criteria are articulated[33]—to have outsized impacts when laws are applied at scale.

Next, by discussing and modeling uptake gaps in second chances across a number of domains and ways for narrowing them, this Article makes theoretical and empirical contributions to the existing literature on what has been called the "nonparticipation problem," or the failure or inability of individuals eligible for government benefits to access them.[34] Although "second chances" that remove government punishments are analytically distinct from programs that provide government benefits (like food stamps), cumbersome administrative processes are common to both. By considering the use of government-initiated automation, not applicant-based petitions, to award second chance relief, this Article confronts some of the novel issues being raised by automated and algorithmic decisionmaking systems (ADS), like notification, (the lack of an) explanation, and the reliance on incomplete and imperfect data.[35]

Finally, this Article contributes to the ongoing discourse about the use of data and high-tech tools to sort individuals in a number of contexts, including pretrial detention,[36] loan qualification,[37] and recruitment,[38] and the at-

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31.   RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 3 (2008) (describing how using defaults, prompts, and other "nudges" can change public policy outcomes).

32.   For a brief overview of the related literatures of behavioral economics, regulatory design, and administrative mechanisms, see Ryan Calo, *Code, Nudge, or Notice?*, 99 IOWA L. REV. 773 (2014).

33.   For an explanation of why, for example, it is far easier to automate eligibility measured from "disposition date" plus a waiting period, instead of "sentence completion" and other examples, see *infra* Table 5 and associated discussion.

34.   *See, e.g.*, Francisca Alba, *The Nonparticipation Problem: Behavioral Economics and the Take-Up of Social Benefits*, POL'Y PERSPS., Spring 2018, at 1 (discussing uptake issues in the context of the Earned Income Tax Credit (EITC) and Supplemental Nutrition Assistance Program (SNAP) programs). For a review of the long literature on take-up, see Janet Currie, *The Take Up of Social Benefits*, *in* PUBLIC POLICY AND THE INCOME DISTRIBUTION 80 (Alan J. Auerbach, David Card & John M. Quigley eds., 2006).

35.   As discussed in RASHIDA RICHARDSON, JASON M. SCHULTZ & VINCENT M. SOUTHERLAND, AI NOW INST., LITIGATING ALGORITHMS 2019 US REPORT: NEW CHALLENGES TO GOVERNMENT USE OF ALGORITHMIC DECISION SYSTEMS (2019), https://ainowinstitute .org/litigatingalgorithms-2019-us.pdf [https://perma.cc/47TV-EDLF].

36.   *See, e.g.*, Julia Angwin, Jeff Larson, Surya Mattu & Lauren Kirchner, *Machine Bias*, PROPUBLICA (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing [https://perma.cc/BM4E-AEXE] (finding that pretrial risk-assessment tools are biased against Black people).

37.   *See, e.g.*, Solon Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CALIF. L. REV. 671, 679 (2016).

38.   *See, e.g.*, *id.* at 685.

tendant risk that existing biases against the poor and disenfranchised will be reinforced or amplified through the use of algorithmic processes. Though second chances automation presents the potential for algorithms to reduce, rather than exacerbate, existing disparities for at least the reasons described in this Article, much depends on how it is implemented.

Part I introduces the concept of a "second chance gap" (the difference between eligibility for and receipt of a given second chance), theorizes why it exists, and describes empirical approaches to estimating the gap. After tracing the remarkable growth in second chance *eligibility* and its potential to break the cycle of mass criminalization and mass incarceration by reducing recidivism, it considers the substantive, administrative, and structural barriers to second chance *delivery*. Distinguishing between them is important because it highlights the importance of transsubstantive administrative and design considerations in the development and implementation of second chance law. This Part describes two analytically distinct types of gaps: "the uptake gap," or share or number of those eligible for relief over time who have not applied for or received it; and the "current gap," or share or number of impacted individuals who, at a given point in time, appear eligible for but have not received relief. While the "uptake gap" measures take-up over time, and therefore requires comprehensive data, the "current gap" uses available data to estimate the share and number of people that appear to be currently in the gap.

Part II applies the concepts and methods outlined in Part I to several novel data sources to roughly size several second chance gaps. In the first Section, drawing upon administrative data, it reports on novel analyses of the "second chance gaps" associated with several resentencing and expungement contexts, including the Obama Clemency Initiative, California's Propositions 47 and 64 (Prop 47 and Prop 64), and the laws governing the expungement of criminal convictions in several states. It also reviews the track record of "compassionate release" laws that allow prisoners to serve shorter sentences for humanitarian or medical reasons. Part II also uses data collected by the Sentencing Project to offer estimates of the "felony reenfranchisement gap"—the estimated share and number of people with felony records that remain disenfranchised—in thirteen states. Finally, Part II reports on the analyses of convictions-clearance laws, both juvenile and adult, of about ten states and their uptake. Among the majority of these programs, chosen due to the availability of administrative or primary data, uptake rates by eligible individuals are low, in most cases less than 10 percent, leaving 90 percent or more of those eligible for relief in the second chance gap.

The second Section of Part II uses the "current gap" methodology laid out in Part I to estimate the number of American adults with criminal records that could clear them under the laws governing the expungement of nonconviction records. Applying the laws of all fifty states to around sixty thousand criminal histories from across the country and balancing the results nationally, it estimates that around 30–40 percent of adults with rec-

ords, or twenty to thirty million individuals, could clear their criminal records, partially or fully, but have not done so.

Do second chance gaps hurt or advance social welfare? Part III addresses this question and the case for allowing second chance gaps to persist before ultimately arguing in favor of narrowing second chance gaps on moral, policy, and economic grounds. Based on comparing programs with relatively larger and relatively smaller gaps, it identifies three ways to do so, taking into account the high informational and evaluation costs and high volume of eligible individuals implicated by second chances. Currently, in the majority of cases, second chance rights (to a cleaned record, to vote) are provided only after individuals petitions are filed, evaluated case by case, and approved—processes that cannot readily scale to meet the enormous volume of eligible individuals. Ruthless iteration and, where possible, simplification are needed to develop workable standards that can be applied and administered in imperfect data environments. Burden shifting, from the individual to the state, and from decentralized to coordinated processes for identifying and administering relief, can also dramatically reduce the gap. Finally, using automation (as in Clean Slate), rather than petitions, can avoid the need for applicant awareness and wherewithal to determine eligibility and apply for relief—however, what is lost when processes become automatic deserves greater study.

Part IV concludes by discussing open research and policy questions in the broader context of second chance relief, with a focus on expungement. It starts by acknowledging that automating existing laws, without more, is no panacea, as many statutory criteria were not written to be implemented at scale, and certain policies themselves embed biases against those who may most need a second chance—for example, poor people whose outstanding fines and fees make them ineligible, or individuals whose more severe records disqualify them from relief. First, even when persons are likely eligible, missing or "dirty" (incomplete or ambiguous) data on grades, sentence completion, or dispositions, for example, may make it impossible to confirm their eligibility, leaving them in the "second second chance gap," unreachable through automation. Second, even when official versions of criminal records are expunged, the risk of outdated records remains, due to the persistence of digital criminal records (the "Google problem") and growth of the largely unregulated "people search" industry.[39] Finally, even when effective clearance is accomplished through automation, there is a risk that other, non-red-tape factors including statistical discrimination and within-group disparities stemming from the selective application of the law will result in mixed or even negative outcomes. All of these factors underscore the need for studies about the impact of second chance policies. While automated delivery of second chances can remove the bureaucratic hurdles, not steel bars,

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39.   SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE 74, 149–55 (2020).

that prevent individuals from getting their second chance, other hurdles may remain.

I. Defining the Second Chance Gap

A staggering number of Americans live with curtailed freedoms due to contact with the criminal justice system: 2.3 million Americans are currently incarcerated,[40] 5.2 million Americans are barred from voting due to felony disenfranchisement,[41] and close to 80 million people—or one in three adults—live with criminal records.[42] An additional 11 million Americans are estimated to have had their license suspended for reasons unrelated to driving.[43] The burdens of mass incarceration and criminalization are not evenly distributed: African Americans, for example, are 5 times more likely to be incarcerated than whites;[44] a substantial share of the variance, studies have

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40. Peter Wagner & Wendy Sawyer, *How Many People Are Locked Up in the United States?*, Prison Pol'y Initiative (2020), www.prisonpolicy.org/graphs/pie2020.html [https://perma.cc/2V6J-ZXKM].

41. Christopher Uggen, Ryan Larson, Sarah Shannon & Arleth Pulido-Nava, Sent'g Project, Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction (2020), https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/ [https://perma.cc/7KLC-ZJLB]; *see also* Christopher Uggen, Ryan Larson & Sarah Shannon, Sent'g Project, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016, at 3 (2016) [hereinafter Uggen 2016], https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf [https://perma.cc/J7D3-MG52] (providing 2016 estimates).

42. Stat. Trending, Analysis, & Reporting Grp., FBI, *supra* note 17.

43. Meghan Keneally, '*It's Not America': 11 Million Go Without a License Because of Unpaid Fines*, ABC News (Oct. 25, 2019, 5:11 AM), https://abcnews.go.com/US/vicious-cycle-11-million-live-driverslicense-unpaid/story?id=66504966 [https://perma.cc/DT6G-JYRV]. Other research supports the proposition that at least ten million licenses have been suspended for debt nationwide. *See* Carson Whitelemons, Ashley Thomas & Sarah Couture, Fines & Fees Just. Ctr., Driving on Empty: Florida's Counterproductive and Costly Driver's License Suspension Practices 4 (2019), https://finesandfeesjusticecenter.org/content/uploads/2019/11/florida-fines-fees-drivers-license-suspension-driving-on-empty.pdf [https://perma.cc/5F5J-YQMQ] (finding two million Floridian licenses suspended for debts); Andrea M. Marsh, *Rethinking Driver's License Suspensions for Nonpayment of Fines and Fees*, in Nat'l Ctr. on State Cts., Trends in State Courts 20, 21 (Deborah W. Smith, Charles F. Campbell & Blake P. Campbell eds., 2017) (finding over four million Californians' licenses suspended for debts); Mario Salas & Angela Ciolfi, Legal Aid Justice Ctr., Driven By Dollars: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt 1 (2017), https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf [https://perma.cc/JN92-QEG6] (stating that over 4.2 million licenses have been suspended for debts between Texas, North Carolina, Virginia, Tennessee, and Michigan); *see also* Peter Edelman, *The Criminalization of Poverty and the People Who Fight Back*, 26 Geo. J. on Poverty L. & Pol'y 213, 218 (2019) (stating at least ten million individuals owe fines and fees debts nationwide, with at least seven million licenses suspended).

44. *See* Ashley Nellis, Sent'g Project, The Color of Justice: Racial and Ethnic Disparity in State Prisons (2016), https://www.sentencingproject.org/publications/color-of-

independently found, cannot be explained by differences in levels of criminal offending,[45] which itself can reflect biased decisionmaking.[46] Hispanic Americans are 1.4 times more likely to be incarcerated than whites.[47] As a result, not only do the collateral consequences of contact with the criminal justice system disproportionately fall on Black and brown people, but because of historically determined levels of poverty and imprisonment in particular jurisdictions, "it is now the case that entire communities experience these negative effects."[48]

Over the last few decades, states and the federal government have passed "second chance" laws that—by allowing for sentences to be shortened, voting rights to be restored, and records to be cleared—have the potential to alleviate some of the excesses and disparities of the American criminal justice system. In theory, second chance laws restore human dignity and personal liberty, save incarceration costs, lower recidivism rates, and lead to the more efficient allocation of talent through society. But only to the extent they are successfully implemented.

This Article defines the "second chance gap" for any particular second chance initiative or law as the difference between eligibility and delivery of a given second chance and describes and applies ways of measuring the gap over a variety of second chance initiatives. It offers two measures of the second chance gap: "the uptake gap," or share or number of those eligible for relief over time who have not applied for or received it; and the "current gap," or share or number of impacted individuals who, at a given point in time, are presently apparently eligible for but have not received relief. While the "uptake gap" measures take-up over time, and therefore requires comprehensive data that includes, for example, counts of people whose expunged records are no longer available to the public, the "current gap" can be calculated using available data to estimate the second chance gap at a particular point in time and the policy opportunity presented by it.

A. *The Expansion and Promise of Second Chances*

Since 2007, at least twenty-seven states have made it easier to qualify for early release or parole,[49] at least thirty states have passed laws to reclassify or

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justice-racial-and-ethnic-disparity-in-state-prisons/ [https://perma.cc/J564-PAM4] (providing data about state prisons).

45.   *See id.* at 9 (literature review).

46.   *See infra* Section I.A (discussing the Black-white drug sentencing disparities that led to the Fair Sentencing Act).

47.   NELLIS, *supra* note 44.

48.   *Id.*

49.   *35 States Reform Criminal Justice Policies Through Justice Reinvestment*, PEW CHARITABLE TRS. (July 2018) [hereinafter *35 States*], https://www.pewtrusts.org/-/media/assets /2018/07/pspp_reform_matrix.pdf [https://perma.cc/9XA2-HEKS]. According to the Collateral Consequences Research Center, in 2018 alone, thirty-one states enacted "restoration" laws

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downgrade charges associated with nonviolent property or drug crimes,[50] and all fifty states and the District of Columbia have passed laws to reduce the collateral consequences of criminal records and convictions.[51] Since 2013, over forty states and the District of Columbia have enacted laws that increase the scope of expungement and sealing remedies.[52] During this period, several federal initiatives including the Fair Sentencing Act Guideline Amendment (Amendment 750),[53] "Drugs Minus 2" (Amendment 782),[54] the Obama Administration Clemency Initiative,[55] the *Johnson v. United States* case,[56] and the First Step Act of 2019[57] have offered resentencing options for

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aimed at reducing barriers faced by people with criminal records. MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., REDUCING BARRIERS TO REINTEGRATION 21–47 (2019), https://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf [https://perma.cc/U99B-9DRK].

50.   *35 States*, *supra* note 49. As described below, California has also passed Propositions 47 and 64 to downgrade crimes. *See* MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., PATHWAYS TO REINTEGRATION 45–63 (2020), https://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Crim inal-Record-Reforms-in-2019.pdf [https://perma.cc/22Y6-F264]; LOVE & SCHLUSSEL, *supra* note 49, at 21–47.

51.   COLLATERAL CONSEQUENCES RES. CTR., FOUR YEARS OF SECOND CHANCE REFORMS, 2013–2016, at 2 (2017), https://ccresourcecenter.org/2017/02/08/round-up-of-recent-second-chance-legislation-2013-2016/ [https://perma.cc/GV2V-FA6J] (noting that all states but eight—Arizona, Florida, Hawaii, North Dakota, South Carolina, Utah, Kansas, and Nevada—and Washington, D.C. made changes from 2013–2016); LOVE & SCHLUSSEL, *supra* note 50, at 44 (noting that of these eight states, all but one made changes in 2019); LOVE & SCHLUSSEL, *supra* note 49, at 31 (noting that the last one, Kansas, made changes in 2018).

52.   RAM SUBRAMANIAN, REBECKA MORENO & SOPHIA GEBRESELASSIE, VERA INST. OF JUST., RELIEF IN SIGHT? STATES RETHINK THE COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION, 2009–2014, at 13 (2014), https://www.vera.org/downloads/Publications/relief-in-sight-states-rethink-the-collateral-consequences-of-criminal-conviction-2009-2014/legacy _downloads/states-rethink-collateral-consequences-report-v4.pdf [https://perma.cc/MCE7-7R47]; Margaret Love, *Marijuana Decriminalization Drives Expungement Reform*, COLLATERAL CONSEQUENCES RES. CTR. (Oct. 29, 2018), http://ccresourcecenter.org /2018/10/29/marijuana-decriminalization-drives-expungement-reform/ [https://perma.cc /YV7T-WNUB] (reporting that thirty-one states have broadened existing second chance laws or enacted entirely new ones); *see also* LOVE & SCHLUSSEL, *supra* note 50, at 45–63; LOVE & SCHLUSSEL, *supra* note 49, at 2–47.

53.   *See* First Step Act of 2018, Pub. L. No. 115-391, sec. 101(a), §§ 3631–3635, sec. 404, 132 Stat. 5194, 5195–208, 5222 (2018).

54.   *See* Caryn Devins, *Lessons Learned from Retroactive Resentencing After* Johnson *and Amendment 782*, 10 FED. CTS. L. REV. 39, 42–50 (2018).

55.   *See infra* Section II.A.1.

56.   Devins, *supra* note 54, at 42–50.

57.   *An Overview of the First Step Act*, FED. BUREAU PRISONS, https://www.bop.gov /inmates/fsa/overview.jsp [https://perma.cc/H426-WC7G].

federal inmates. From 1997 to mid-2019, at least twenty-five states expanded voter eligibility for people with felony records.[58]

The potential scope and reach of second chance reforms is extensive. For example, in the context of expungement, nationwide, tens of thousands of collateral consequences prevent individuals with records from full participation and reintegration into society.[59] These consequences are both cumulative—as more people are added each year to the list of persons with criminal records[60]—and enduring, as a person's criminal record, if not cleared, continues to follow them throughout their lives and constrain their options and liberties. While the number of people incarcerated per year in the United States is in decline,[61] the number of people with criminal records continues to grow.

Even before release, there are opportunities for second chance relief. As people get older, they present less of a criminal risk: the 3-year rearrest rate among aging inmates is 15 percent, versus 41 percent in general.[62] Older inmates are more expensive to care for, due in particular to their need for catastrophic medical services to treat, for example, heart and lung conditions.[63] While the number of inmates in general is going down, the number of aging inmates continues to grow. As Casey Ferri has documented,

> Elderly prisoners represent the fastest growing segment of both federal and state prisons, and the number of prisoners over fifty-five is growing at a rate that is six times that of the normal prison population. Between 1995 and 2010, the number of state and federal prisoners who were fifty-five years old and older nearly quadrupled (282% increase), while the overall prison population grew by less than half (42% increase).[64]

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58.   Jean Chung, Sent'g Project, Felony Disenfranchisement: A Primer (2019), https://www.sentencingproject.org/publications/felony-disenfranchisement-a-primer/ [https:// perma.cc/5785-UBSP] (tracking changes from 1997 to mid-2019). The most famous recent example is Florida's Amendment 4. *See* Rozsa, *supra* note 24.

59.   U.S. Comm'n on Civ. Rts., *supra* note 18, at 1–2 ("[I]ndividuals with criminal histories can face barriers to voting, serving on a jury, holding public office, securing employment, obtaining housing, receiving public assistance, owning a firearm, getting a driver's license, qualifying for financial aid and college admission, qualifying for military service, and deportation (for noncitizens)." (footnotes omitted)).

60.   *See* sources cited *supra* note 17 (tracking the accumulation of yearly criminal history records at the state and federal level).

61.   Sent'g Project, Fact Sheet: Trends in U.S. Corrections 1 (2020), https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf [https://perma.cc/6FDW-4UZ4].

62.   Off. of the Inspector Gen., U.S. Dep't of Just., *supra* note 10, at 38–39; *see also id.* at 6 (documenting a recidivism rate of 3.5 percent among compassionate-release inmates).

63.   *See id.* at 16.

64.   Casey N. Ferri, *A Stuck Safety Valve: The Inadequacy of Compassionate Release for Elderly Inmates*, 43 Stetson L. Rev. 197, 200 (2013) (footnotes omitted).

FIGURE 1: U.S. STATE PRISONERS, ARRESTS, AND CRIMINAL HISTORY FILE
SUBJECTS (1998–2014)[65]

■ ■ State Prisoners   ▬▬▬ State Arrests   ▬ Subjects in the State Criminal History File (starting from 1998)
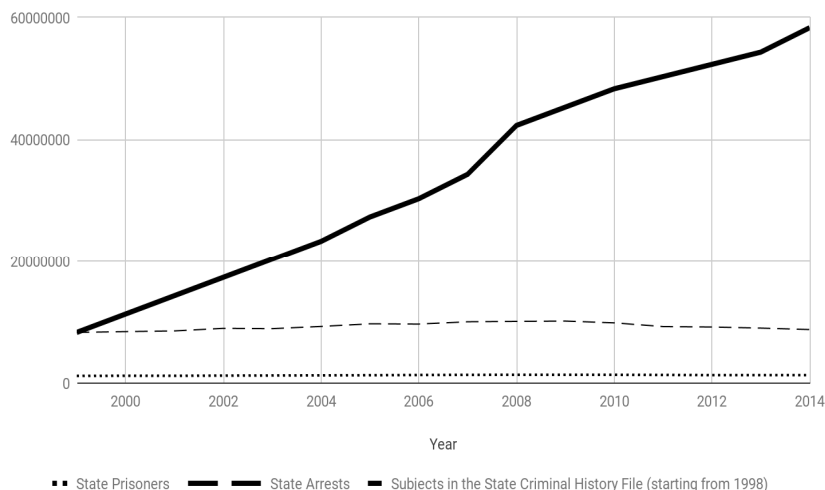
As such, second chance reforms seek not only to restore what the carceral state takes away—personal liberties, equity, dignity—but to do so in a way consistent with public safety and fiscal goals. Confinement only furthers public safety (as compared to, for example, furthering deterrence goals) when the detainee poses an above-baseline risk. Incarceration is expensive,[66] and so is downstream rearrest, reprosecution, and reincarceration. To the extent that clearing one's criminal record increases their ability to find appropriate work and housing and decreases the risk of reoffending, second chance reforms save money.

Second chance reforms are part of the broader "smart on crime"[67] and "justice reinvestment"[68] movements that include front-end reforms in areas

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65. *See* E. Ann Carson & Joseph Mulako-Wangota, *Corrections Statistical Analysis Tool (CSAT) - Prisoners,* BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=nps (state prisoner data); *Ten-Year Arrest Trends*, FBI: UCR, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-33 [https://perma.cc/7TSH-RDUX] (state arrests); BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT (2018), https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf [https://perma.cc/S83P-DGB8] (criminal history file subjects).

66. Annual Determination of Average Cost of Incarceration Fee (COIF), 84 Fed. Reg. 63,891 (Nov. 19, 2019) (determining that the average cost of incarceration for federal inmates was $37,449.00 ($102.60 per day) for fiscal year 2018).

67. *E.g.*, Barbara McQuade & Sally Q. Yates, *Prosecutors and Voters Are Becoming Smart on Crime*, LITIGATION, Fall 2019, at 22.

68. *35 States*, *supra* note 49, at 1 (describing the Justice Reinvestment Initiative, a public-private partnership that includes the U.S. Justice Department's Bureau of Justice Assistance,

like pretrial and drug-free school zones[69] to keep people out of prison, as well as alternatives to incarceration that reduce the odds of recidivism.[70] Launched in 2007, justice reinvestment reforms in thirty-five states have been credited with an 11 percent decrease in state imprisonment rates without an increase in crime rates, which are in the midst of a long-term decline.[71] As such, the momentum of "second chances" reforms sounds not only in dignity and morality but also in pragmatism and fiscal responsibility.

1. Avoided Incarceration Costs

It costs approximately $37,500 to incarcerate a person for a year in federal prison.[72] State incarceration costs vary substantially, and in 2015 ranged from less than $15,000 per Alabama prisoner, on average, to close to $65,000 per California prisoner yearly.[73] When a person is released early from prison, the state saves money. Described in detail below, Obama's Clemency Initiative, for example, resulted in an average sentence reduction of 140 months per federal inmate that received a commutation.[74] Avoiding 140 months of federal incarceration translates, mechanically, into about $437,000 per inmate in 2018 dollars.[75] In July 2019, 1,691 prisoners were released early as part of the First Step Act's retroactive application of the Fair Sentencing Act

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the Pew Charitable Trusts, the Council of State Governments Justice Center, the Crime and Justice Institute, and others and that has worked with thirty-five states "to improve public safety and control taxpayer costs by prioritizing prison space for people convicted of serious offenses and investing some of the savings in alternatives to incarceration that are effective at reducing recidivism").

69.   *Id.*

70.   NELLIS, *supra* note 44 (reviewing multiple criminal justice reforms: modifying sentencing laws regarding drug-free school zones to restore judicial discretion to lessen racial disparities; dismantling war-on-drugs laws and redirecting the funds to prevention and drug intervention programs; and instituting bias training to prevent discriminatory and undue policing from the outset).

71.   *35 States*, *supra* note 49, at 1.

72.   *See supra* note 66.

73.   *Prison Spending in 2015*, VERA INST. JUST. tbl.1, https://www.vera.org/publications /price-of-prisons-2015-state-spending-trends/price-of-prisons-2015-state-spending-trends /price-of-prisons-2015-state-spending-trends-prison-spending [https://perma.cc/3ZY2-BGT6].

74.   GLENN R. SCHMITT, TIMOTHY DRISKO & CHRISTINA D. STEWART, U.S. SENT'G COMM'N, AN ANALYSIS OF THE IMPLEMENTATION OF THE 2014 CLEMENCY INITIATIVE 17 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170901_clemency.pdf [https://perma.cc/W8F4-4T6X].

75.   140 months is equivalent to 11.67 years; 11.67 years at $37,500 per year equals $437,625. Actual savings would be lower if incremental costs per prisoner are lower. In addition, a total social welfare-cost calculation would also need to take into account the costs associated with reentry (e.g., in terms of public-housing expenditures, offset by higher tax payments, etc.).

of 2010,[76] which reduced the disparity between crack-cocaine and powder-cocaine mandatory-minimum sentences. A report by the U.S. Sentencing Commission found the average reduction of time to be 73 months,[77] which, again, at the average costs cited earlier, is associated with roughly $228,000 per inmate. California's Prop 47, which reduced the sentences of individuals convicted of nonviolent minor felonies, has led to the reallocation of $103 million in prison expenditures to rehabilitative grant programs.[78]

The costs of caring for aging inmates, who are at an elevated risk of catastrophic medical events, is higher. A surge in state incarceration levels between 1993 and 2013 and the Supreme Court's decision in 1976 that prisoners must have access to diagnosis and treatment by a physician without "deliberate indifference to serious medical needs" have both contributed to an estimated tenfold increase in the cost of in-prison medical care from 1993 to 2013.[79] Early releases under "compassionate release" provisions at the federal and state levels are seen as not only humane and safe, providing a way for low-risk prisoners to spend their remaining days with their loved ones, but also fiscally responsible.[80]

2.   Public Safety Impact

While harder to observe directly, the public safety impacts of second chance reforms are also relevant to their viability. Because many with criminal records eventually reenter the justice system, recidivism—the likelihood of rearrest, reconviction, and/or reincarceration of an individual, within a particular amount of time[81]—is correlated with public safety. While it is im-

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76.   *Department of Justice Announces the Release of 3,100 Inmates Under First Step Act, Publishes Risk and Needs Assessment System*, U.S. DEP'T JUST. (July 19, 2019), https://www.justice.gov/opa/pr/department-justice-announces-release-3100-inmates-under-first-step-act-publishes-risk-and [https://perma.cc/C4VM-QFNF].

77.   U.S. SENT'G COMM'N, FIRST STEP ACT OF 2018 RESENTENCING PROVISIONS: RETROACTIVITY DATA REPORT 3, 8 (2019), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/retroactivity-analyses/first-step-act/201900607-First-Step-Act-Retro.pdf [https://perma.cc/EB3L-SRNQ] (reporting this average reduction of time in connection with the first one thousand or so sentence reductions granted under the retroactive provision).

78.   *Board Awards $103m in Prop 47 Funds to Innovative Rehabilitative Programs*, BSCC CAL. (June 8, 2017), http://www.bscc.ca.gov/news/board-awards-103m-in-prop-47-funds-to-innovative-rehabilitative-programs/ [https://perma.cc/TC7S-TGPS].

79.   MARY PRICE, FAMS. AGAINST MANDATORY MINIMUMS, EVERYWHERE AND NOWHERE: COMPASSIONATE RELEASE IN THE STATES 9 (2018), https://famm.org/wp-content/uploads/Exec-Summary-Report.pdf [https://perma.cc/9MBV-E5VF]; Estelle v. Gamble, 429 U.S. 97, 104 (1976).

80.   PRICE, *supra* note 79.

81.   KIM STEVEN HUNT & ROBERT DUMVILLE, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 7 (2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf [https://perma.cc/ZT8Z-XYK9].

possible to generalize about the recidivism impacts of second chances—in part because each recidivism measure, observed over a distinct period of time[82] and population, is unique—studies considering the individual second chance programs studied in this report cite promising findings.

For example, studies of California's Prop 47, which defelonized a number of crimes and reduced the prison population by thirteen thousand people,[83] have found that there was no statistically significant increase in crime overall with the rule change,[84] but that larceny and motor vehicle thefts increased moderately.[85] A 2018 U.S. Sentencing Commission study of early releases associated with the 2011 Fair Sentencing Guideline Amendment found no difference in recidivism rates or times between individuals that received reduced and nonreduced sentences.[86] In the context of expungement, a study by Sonja Starr and J.J. Prescott found that recipients of expungement posed a lower crime risk than the general population of Michigan as a whole.[87]

On the other hand, critics continue to claim that the defelonization of certain crimes under Prop 47 has emboldened criminals and removed the deterrent effect of being charged with and convicted of a felony.[88] In the context of the restoration of drivers' licenses, a realm adjacent to second chances, studies have suggested that those who have their licenses revoked pose

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82.   *See Measuring Recidivism at the Local Level: A Quick Guide*, URB. INST., https://www .urban.org/sites/default/files/2015/02/11/recidivism-measures_final-for-website.pdf [https:// perma.cc/T6DX-C9D7] (describing recidivism studies on time frames ranging from six months to three years to be typical).

83.   Bradley J. Bartos & Charis E. Kubrin, *Can We Downsize Our Prisons and Jails Without Compromising Public Safety? Findings from California's Prop 47*, 17 CRIMINOLOGY & PUB. POL'Y 693, 693–94 (2018).

84.   *Id.* at 711; *accord* MIA BIRD, MAGNUS LOFSTROM, BRANDON MARTIN, STEVEN RAPHAEL & VIET NGUYEN, PUB. POL'Y INST. OF CAL., THE IMPACT OF PROPOSITION 47 ON CRIME AND RECIDIVISM 3 (2018), https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf [https://perma.cc/T3KU-4A7L] (finding no increase in violent crime but finding an increase in larceny, particularly motor vehicle crimes). Bird et al. also found a reduction in recidivism among Prop 47 offenders, driven, predictably, by reductions in Prop 47 crime rates. *Id.*

85.   Though not enough to rule out alternative explanations. Bartos & Kubrin, *supra* note 83, at 711.

86.   KIM STEVEN HUNT, KEVIN MAASS & TODD KOSTYSHAK, U.S. SENT'G COMM'N, RECIDIVISM AMONG FEDERAL OFFENDERS RECEIVING RETROACTIVE SENTENCE REDUCTIONS: THE 2011 FAIR SENTENCING ACT GUIDELINE AMENDMENT 1 (2018), https://www.ussc.gov /sites/default/files/pdf/research-and-publications/research-publications/2018/20180328 _Recidivism_FSA-Retroactivity.pdf [https://perma.cc/N6NQ-BYX6] (comparing outcomes of offenders who were released early through retroactive application and offenders who had served their full sentences before the FSA guideline reduction retroactively took effect).

87.   Prescott & Starr, *supra* note 26, at 2514.

88.   Bill Melugin, *Mayor Garcetti Criticizes Prop 47, Laments 'Broken System' in Reaction to FOX 11 Meth Addiction Investigation*, FOX 11 L.A. (Feb. 5, 2020), https://www.foxla.com /news/mayor-garcetti-criticizes-prop-47-laments-broken-system-in-reaction-to-fox-11-meth- addiction-investigation [https://perma.cc/6HV5-CQ25].

higher than average driving risks, but they have been criticized for failing to take into account other factors that may explain the difference.[89] On balance, the available public safety evidence seems generally to support—or at least not justify slowing—the positive momentum for second chances.

3. Economic, Dignitary, and Civic Impact

In contrast to administrative-cost savings, which show up in the state ledger, the broader economic impacts of second chance laws have not been comprehensively studied. The policies are young, have varying uptake rates, and are implemented differently in different contexts, making it hard to make comparisons across settings. But in expungement- and driver's license–reinstatement contexts, fairness and economic rehabilitation interests may be compelling enough themselves to spur legislative change.[90]

Early studies of the economic impact of one type of second chance, records clearing, are encouraging.[91] Clearing one's record appears to set in mo-

89.   *See* John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 456–58 (2005) (stating that nearly all studies of road safety for drivers with suspended licenses don't take into account the lack of safety features in older cars that drivers with suspended licenses are more likely to be utilizing and the effect thereof on accidents leading to fatalities); *see also* SUKHVIR S. BRAR, CAL. DEP'T OF MOTOR VEHICLES, ESTIMATION OF FATAL CRASH RATES FOR SUSPENDED/REVOKED AND UNLICENSED DRIVERS IN CALIFORNIA 17 (2012), https://www.dol.wa.gov/about/docs/UnlicensedDriverStudy.pdf [https://perma.cc/S3WW-97Q9] (concluding that a cohort of drivers including drivers using suspended/revoked (S/R) licenses and unlicensed drivers were more likely to be involved in a fatal crash, not accounting for confounding variables like age of vehicles in crashes or safety features of involved vehicles).

90.   Take for example the case of drivers unlicensing. Many jobs require having a valid driver's license. *30 Percent of Civilian Jobs Require Some Driving in 2016*, U.S. BUREAU LAB. STAT. (June 27, 2017), https://www.bls.gov/opub/ted/2017/30-percent-of-civilian-jobs-require-some-driving-in-2016.htm [https://perma.cc/S4UQ-XWQ6] (indicating that 30 percent of jobs require driving). A New Jersey study documented, for example, that 42 percent of the time, license suspension resulted in job loss. JON A. CARNEGIE, DRIVER'S LICENSE SUSPENSIONS, IMPACTS AND FAIRNESS STUDY 56 (2007), https://www.nj.gov/transportation /business/research/reports/FHWA-NJ-2007-020-V1.pdf [https://perma.cc/Y58A-Y7LX]. Among replacement jobs, 88 percent paid less. *Id.* That license-reinstatement initiatives can reverse the tide or, at least, stem the stress on vulnerable populations and strain on public services associated with a lost license is plausible, though not proven. *See, e.g.*, L. WILLIAM SEIDMAN RSCH. INST., THE CITY OF PHOENIX MUNICIPAL COURT'S COMPLIANCE ASSISTANCE PROGRAM, 2016: AN ECONOMIC ASSESSMENT 7 (2017), https://finesandfeesjusticecenter.org /content/uploads/2018/11/Phoenix-license-restoration-pilot-THE-CITY-OF-PHOENIX-MUNICIPAL-COURT%E2%80%99S-COMPLIANCE-ASSISTANCE-PROGRAM.pdf [https://perma.cc/D63A-TGWT] ("[T]he long-term effects of continued economic and financial distress because of a suspended license and accumulated debt could have a detrimental downward spiral effect on an already economically distressed portion of the population. The economic downturn of the affected communities may also result in increased demand for public services.").

91.   How these individual gains, at scale, could translate into lasting gains for society in terms of increased tax revenue and decreased recidivism is hinted at in the following studies:

tion an internal redemptive process for the formerly "marked," enhancing their confidence and social status.[92] Small-scale studies of records-clearing programs in California[93] and Michigan[94] have documented gains in employability and earnings following records clearing.[95] These promising findings have given impetus to Clean Slate campaigns across the country, although, as explored in Part IV, whether or not the positive effects will replicate at scale remains unknown.

Another potential benefit to society of removing collateral consequences like the disenfranchisement of persons with felony convictions is greater civic participation.[96] However, studies have shown that among people with fel-

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Jacob Wascalus, *Development Programs Help Ex-Offenders Join the Workforce*, FED. RSRV. BANK MINNEAPOLIS (Oct. 1, 2013), https://www.minneapolisfed.org/article/2013/development -programs-help-exoffenders-join-the-workforce [https://perma.cc/326F-952J] (referring to a program designed to get ex-offenders 'gainful employment' and finding that "[o]ver the past 15 years, for every $1 the state has invested in the program, the return to Minnesota taxpayers from reduced state subsidies, increased state tax receipts, and lowered recidivism has been $7.72. That represents a 672 percent ROI over the time period"); Prescott & Starr, *supra* note 26, at 2512–14 (showing that the crime rate among Michigan residents with expunged records is lower than the rate in the general population, suggesting there's at least a strong correlation between expungement and lower recidivism).

92.   Ericka B. Adams, Elsa Y. Chen & Rosella Chapman, *Erasing the Mark of a Criminal Past: Ex-Offenders' Expectations and Experiences with Record Clearance*, 19 PUNISHMENT & SOC'Y 23, 30–33 (2017) (reporting, based on semistructured interviews with forty persons with past criminal records, that clearance facilitates "cognitive transformation and the affirmation of a new identity"); Jeffrey Selbin, Justin McCrary & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 57 (2018) (describing ongoing study that suggests the importance of dignity interests to those seeking records clearance).

93.   Selbin et al., *supra* note 92, at 8 (documenting an increase in employment rates from about 75 percent to 80–85 percent and average earnings by about one-third, or $6,000 in yearly salary, following expungement).

94.   *See* Prescott & Starr, *supra* note 26 (finding the receipt of a set-aside to be associated with an increase in the probability of employment from employment by a factor of 1.13, and reported quarterly wages increased by a factor of 1.23).

95.   A term that encompasses a variety of remedies to rehabilitate one's criminal record including sealing, set-aside, reclassification, expungement, and destruction, terms which, in turn, can mean different things in different contexts. *See, e.g.*, BRIAN ELDERBROOM & JULIA DURNAN, URB. INST., RECLASSIFIED: STATE DRUG LAW REFORMS TO REDUCE FELONY CONVICTIONS AND INCREASE SECOND CHANCES 3–4 (2018), https://www.urban.org/sites /default/files/publication/99077/reclassified_state_drug_law_reforms_to_reduce_felony_convi ctions_and_increase_second_chances.pdf [https://perma.cc/J4AZ-59GQ]; JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 113–32 (2015); *What is "Expungement?,"* A.B.A. (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal- docs/what-is-_expungement-/ [https://perma.cc/H7EZ-VW44].

96.   *See, e.g.*, MORGAN MCLEOD, SENT'G PROJECT, EXPANDING THE VOTE: TWO DECADES OF FELONY DISENFRANCHISEMENT REFORM (2018), https://www.sentencingproject .org/wp-content/uploads/2018/10/Expanding-the-Vote-1997-2018.pdf [https://perma.cc /HK8X-LJ2C] (documenting the success of reenfranchisement initiatives in bringing over 1.4 million ex-felons back into civic participation).

ony convictions whose right to vote has been automatically restored, turnout is low, in part because of misinformation about their ability to vote.[97]

B. *The Second Chance Gap and Its Causes*

But no matter how significant the promised benefits of a given second chance are, its impact depends on its delivery. The "second chance gap" is the difference between the apparent eligibility and delivery of a particular second chance in accordance with the law. Although the conditions precedent to a person not receiving a particular second chance vary widely, three contributors—each with a distinct pathology, set of underlying causes, and features—stand out: structural barriers (like the requirement that court debt be repaid) that prevent otherwise eligible individuals from getting their second chances, administrative barriers stemming from high information and transactional costs, and substantive gaps, due, for example, to the perceived benefits of a given second chance not outweighing the perceived costs (including retraumatization costs)[98] or not in fact being eligible.

When a person who has served their time and satisfied all the conditions precedent to applying for records clearance is barred from doing so because of unpaid fines and fees, structural barriers are standing in their way. High informational and transactional costs, on the other hand, are likely the culprit behind, for example, the miscalculations of good-time credits described at the beginning of this Article and, as later detailed in Section III.A, in many cases, nonapplication for the expungement of criminal records. Eligible individuals may also refuse relief because, in certain limited contexts, there are status benefits, not only harms, associated with a reputation for crime and toughness.[99]

As detailed in the next Part, the informational and bureaucratic hoops that one must jump through to get their second chances are often extensive and costly. While much of the remainder of this Article is devoted to discussing these costs and how they may be reduced, it is worth considering why second chance regimes are so complex in the first place. In the same way that the accused remain innocent until proven guilty in the U.S. crimi-

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97. David Scott McCahon, A Legacy of Exclusion: How Felon Disenfranchisement Affects Patterns of Civic Engagement in Ex-Felony Offenders (June 2015) (Ph.D. dissertation, University of California, Riverside) (eScholarship) (documenting lower-than-average turnout rates among ex-felons but hypothesizing that misinformation about the right to vote is partly to blame).

98. Elijah Anderson, *The Code of the Streets*, ATLANTIC (May 1994), https://www.theatlantic.com/magazine/archive/1994/05/the-code-of-the-streets/306601/ [https://perma.cc/4PBG-4NKC]; Saurabh Bhargava & Dayanand Manoli, *Psychological Frictions and the Incomplete Take-Up of Social Benefits: Evidence from an IRS Field Experiment*, 105 AM. ECON. REV. 3489 (2015).

99. Anderson, supra note 95; *see also* Bhargava & Manoli, *supra* note 98 (the social-benefits literature discusses the analogous and real psychological "stigma" costs associated with applying for social benefits).

nal justice system,[100] many second chance programs require defendants to "prove" that they deserve second chances before awarding them. As such, getting one's second chance through petition-based processes may include enduring a bureaucratic process, amassing information through a variety of sources, and being evaluated by an adjudicative or administrative body. The high cost of doing so in many cases may be insurmountable.

Administrative deficits and low uptake rates, the focus of this Article, are by no means unique to second chances laws. However, a few characteristics set the second chance programs discussed in this Article apart from other application-based social-benefit programs. First, the underlying decisions that create the need for second chances in the first place—to incarcerate a person, strip their rights (like driving or voting), or retain a criminal record—are fundamentally state based, unlike the market conditions that lead to, for example, a lack of money and the need for food stamps. Relatedly, while welfare programs redistribute, second chance initiatives correct—they change the state's initial punishment because it is no longer serving its purpose, rather than, for example, helping those in need. When a person has served their time and no longer poses an elevated risk, their record of past crimes becomes irrelevant from a public safety perspective. When, two years after a license has been revoked for debt purposes, it has still not been reinstated, the punishment has not served its intended purposes of compelling repayment.[101] Another way in which "second chances" differ from government benefits is that, by their nature, they also implicate personal and civic liberties, whether compromised by incarceration or the inability to vote, drive legally, or access the opportunities available to people with clean criminal records. Finally, as described above, second chances that shorten people's sentences can translate into immediate cost savings, in contrast to social-benefit programs that may generate short-term costs for the state.

C. *Measuring the Second Chance Gap*

The empirical focus of this Article is on the second chance gaps that are related to applicant uptake. The uptake or participation rate in government benefit programs has long been of interest to economists and policymakers.[102] This literature recognizes that there are costs to receiving social benefits, including the costs of learning about and applying for a given benefit,

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100.   *E.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) (stating "[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law").

101.   *Cf.* WHITELEMONS, *supra* note 43, at 4 (finding, based on study of licenses suspended in Florida for failure to pay fines, that over 75 percent of licenses suspended in 2016 remain so two years later).

102.   For a review, see Currie, *supra* note 34.

and that the costs may outweigh the benefits. [103] A newer behavioral-economics literature acknowledges that factors like incomplete information about benefits, "present bias," and program complexity can also contribute to lower-than-expected uptake rates.[104] But while the case for studying uptake may be easy, actually doing so, in imperfect data environments, is hard. To address these challenges, I describe two ways of approximating the gap in eligibility and application for second chances: the "uptake gap," measured cumulatively over time, and the "current gap," measured at a single point in time.

1.   The Uptake Gap

The "uptake gap" can simply be understood as the share of individuals (or other criminal justice units, such as charges or incidents) eligible for relief over time that has not applied for or received a given second chance. The nature of the inquiry, and its computation intensity, are best illustrated through an example.

Consider the fictitious state of Kent, which has a population that includes 10,000 people, 1,000 of whom have criminal records. On Day 1, Kent passes a law that decriminalizes adult marijuana use and also states that "any person convicted of a decriminalized act shall be eligible to clear their record of that crime." A look at the records of all 1,000 people on Day 1 reveals that 100 are eligible to clear now-decriminalized marijuana charges. If, by Day 100, 20 people have cleared their records, the number of remaining people that are eligible but have not yet cleared is 80, making for an 80 percent uptake gap. Simple enough. But what happens if calculation of the uptake gap is attempted on Day 101?[105] Because we can't see the 20 cleared records, we are unable to calculate the "true" number of people over time that are eligible for clearance, unless we have access to the number of records cleared or "complete" data. The calculation becomes even more complex when there is a contingent criterion—for example, that the "applicant not been convicted of a new crime for 3 years"—growing the number of people eligible for clearance over time.

2.   The Current Gap

The second chance gap can still be approximated in the absence of complete data if one considers the "current gap": the share of impacted individuals who, as of the time of measurement, appear to be eligible for relief but

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103.   As well as, in the case of social-welfare programs, stigma costs. *Id.* at 82–83 (explaining the costs of learning about and applying to social programs, as well as the potential role of stigma in deterring uptake).

104.   For an overview, see Alba, *supra* note 34, at 3–4.

105.   This never happens.

haven't received it. In the scenario above, on Day 1, 100 out of 1,000 people are eligible for the remedy, leading to a 10 percent current gap. But on Day 101, with the 20 people that have cleared their records no longer visible as eligible, only 80 people appear to be eligible for the gap among the number of people who have records, which, let's say, is still 1,000. The current gap, as of Day 101, is 8 percent. The uptake gap reflects the effectiveness of the delivery of a given second chance and shrinks as more people take the remedy (assuming that the number of people eligible doesn't grow, as in this example). The current gap, in contrast, is the product of not only a second chance law's administration but also its generosity (with respect to how many people within the impacted population are eligible), as well as factors contributing to the number of people within the target population. Both can be useful for evaluation and decisionmaking.

3.   Sizing the Gap(s)

Ascertaining eligibility for a government benefit using administrative data is difficult, due in part to privacy safeguards and the lack of common identifiers or other links across administrative systems.[106] In the case of second chances, it bears emphasizing that being "eligible" for relief does not always mean being "entitled" to relief—for example, presidential commutations and gubernatorial pardons described below often depend on the exercise of discretion[107] or satisfaction of other criteria that cannot be ascertained with available data. In this Article, "eligible" individuals or charges are those that substantially meet objective, published criteria. Such factors may encompass, for example, being charged of a qualifying (usually not too severe) offense, having one's case dismissed, or enduring a waiting period—all of which are generally ascertainable based on public records. But as discussed later, other eligibility criteria, like the person's character, are much harder to observe based on the criminal record.

4.   Top-Down, Bottom-Up Approach

There are a few ways of approximating a particular second chance gap. The most accurate but most labor-intensive way is through a "top-down,

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106.   *See, e.g.*, Alan Berube, *Earned Income Credit Participation—What We (Don't) Know*, BROOKINGS (2005), https://www.brookings.edu/wp-content/uploads/2016/07/eitcparticipation .pdf [https://perma.cc/369X-NK5Y] (discussing the obstacles that complicate providing accurate estimates of eligibility and the geographical distribution of eligible nonparticipants); *cf.* Maggie R. Jones, *Changes in EITC Eligibility and Participation, 2005–2009* (Ctr. for Admin. Records Rsch. & Applications, Working Paper No. 2014-04, 2014), https://www.census.gov/content/dam/Census/library/working-papers/2014/adrm/carra-wp-2014-04.pdf [https://perma.cc/BD6D-ZDP9] (describing the challenge posed by the lack of certain data elements in administrative data for determining EITC eligibility).

107.   *See infra* Section II.A.1 (describing the eligibility criteria for Obama's Clemency Initiative).

bottom-up" approach. First, the statutes and rules that provide relief must be ascertained and the eligibility criteria determined by experts in the jurisdiction. Second, the criteria must be applied to the relevant records, typically corrections, court, or police records, to identify the eligible (or potentially eligible) population at an individual charge, incident, and person level. When calculating the uptake gap, the third step requires determining the complete universe of individuals, charges, or incidents eligible for relief over time and whether or not they have been awarded. When the uptake gap can't be ascertained for the reasons described above, then the current gap can be calculated, based on the same step of determining eligibility as well as measuring, at a given moment in time, the relevant population. Individuals that qualify for relief fall into, and their prevalence in the relevant population comprise, the current gap.

5. Observing the Leaky Relief Pipeline

Another way to approximate the gap is by directly observing leaks along the relief pipeline. For an individual to receive relief through a petitions-based process requires the prerequisites to relief to be fulfilled, including in many cases the payment of outstanding fines and fees; an application for relief to be completed and filed; and relief to be awarded through an administrative procedure. As a result, the share of eligible individuals that fails to apply for relief (for example, because they never start, or because they start but do not complete the process) provides a lower bound measure of the gap—for example, one that is due to a lack of awareness or a lack of a completed application despite awareness. Court or administrative backlogs that delay approval of meritorious cases present another directly observable component of the gap.

Each of the approaches outlined above presents challenges in the absence of clean data from which eligibility criteria can be applied and evaluated, actual uptake can be estimated, and the two can be compared. As described in detail in Appendix M, care was taken to select initiatives for which the sizing steps described above had already been or could to some degree reliably be carried out. As a result, this Article relies heavily on and owes a large debt to administrative estimates provided by government agencies or others with specialized access to primary data, by virtue of position or substantial effort. But it also incorporates the assumptions, missing data, and other data defects and vulnerabilities of these sources and, therefore, should be read as supplying estimates conditional upon them.

II. Sizing Second Chance Gaps

This Part identifies and calculates the "second chance gap"—the difference between eligibility and delivery—associated with several of the second chances offered under the law. The first Section estimates resentencing gaps left behind by the Obama Clemency Initiative and California's Propositions

64 and 47, each of which allows prisoners to qualify for early releases, and describes available data on compassionate-release second chance gaps. The second Section estimates felony reenfranchisement gaps in twelve states using published data. The third Section reports on second chance gaps in the expungement of convictions in about ten states and estimate second chance gaps with respect to the clearance of nonconvicted charges in all fifty states using background check data.

A. *Second Chance Gaps in Resentencing and Reclassification*

Between 2007 and 2017, at least eighteen states passed laws to reclassify and/or reduce charges related to nonviolent crimes, several of them with retroactive effect.[108] A related set of developments at the federal level, by the courts, the executive branch, and Congress, has provided federal drug-trafficking inmates opportunities to reduce their sentences.[109] Compassionate-release laws, which allow persons to shorten their sentences, have been on the books for a long time but have been used rarely. This Section estimates the second chance gaps associated with the Obama Clemency Initiative and California's Propositions 64 and 47 and discusses the compassionate-release second chance gap.

1. The Clemency Initiative Second Chance Gap

The Constitution specifies that, "[t]he President . . . shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[110] In 2014, the Department of Justice launched the Clemency Initiative to encourage nonviolent federal drug offenders to petition President Obama for commutations.[111] Applications would be prioritized if the applicant would likely have received a shorter sentence under the current law and met other eligibility criteria, including serving at least ten years of their sentence.[112] The U.S. Sentencing Commission performed a comprehensive review of the Clemency Initiative, using a top-down, bottom-up approach to determine estimates of the number of offenders eligible for relief and, among them, how many received it as reported in Table 1.

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108.   *35 States*, *supra* note 46.

109.   *See, e.g.*, First Step Act of 2018, 18 U.S.C. § 3632.

110.   U.S. CONST. art. II, § 2, cl. 1.

111.   SCHMITT ET AL., *supra* note 74, at 1–4.

112.   Under the Initiative, clemency petitions would be prioritized if the individual was serving a federal sentence in prison and (1) would have received a "substantially lower sentence" if convicted of same offense today; (2) represented a nonviolent offender without ties to criminal organizations; (3) had served at least 10 years of their sentence; (4) did not have a significant criminal history; (5) had displayed good behavior; and (6) lacked a record of violent behavior. However, the decision was within the discretion of the president, who could prioritize among or deviate from the published criteria. *Id.* at 7–9.

TABLE 1: ESTIMATES OF THE OBAMA CLEMENCY INITIATIVE SECOND CHANCE
GAP[113]

Provision	Estimated Total Number Eligible for Relief	Estimated Number of Total Eligible Receiving Relief	Applications Unreviewed by the Conclusion of the Program	Estimated Percentage of Eligible Offenders Receiving Relief
Obama Clemency Initiative	2,687	92	7,881	3%

According to the Commission, 1,025 to 2,687 individuals (the spread representing inmates that met the time-served criteria at the beginning and end of the program) "appear[ed] to have met all the factors for clemency under the Initiative."[114] The Initiative resulted in the largest numbers of commutations awarded by a president.[115] Still, of the 1,025 to 2,687 individuals that were deemed by the Commission to have met all of the factors for clemency under the Initiative by its conclusion, only 54 to 92, or 3%–5%, received relief, for a second chance gap of 95%–97%.[116] In addition, by the conclusion of the program in January 2017, 7,881 petitions for clemency were still pending.[117] Those who received a commutation experienced an average sentence reduction of 140 months, which, as described above, translates mechanically into about $437,000 (2018 dollars) per commutation.[118] If the 2,595 individuals that the Commission identified as eligible that did not have their sentences commuted had received comparable sentence reductions, the total average sum associated with these reductions based on a mechanical calculation would have been more than $1.1 billion. As discussed later, experts blamed the noncentralized administration of the program, uneven application of the criteria, and backlog for the gap between expected and delivered commutations.[119]

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113.   *Id.* at 11, 34 fig.19.

114.   *Id.* at 33–34.

115.   Over 1,700 individuals. *Id.* at 2.

116.   *Id.* at 34.

117.   *Id.* at 10–11. Of the commutations that were granted, the Commission estimates that only 5.1 percent met all the published standards, *id.* at 18, leading some to comment that inmates were "inexplicably" being provided with relief, and in some ways leading to a "misapplication," not just a "second chance" gap. *See, e.g.*, Margaret Colgate Love, *Obama's Clemency Legacy: An Assessment*, 29 FED. SENT'G REP. 271 (2017).

118.   *See* notes 74–75 and accompanying text (140 months = 11.67 years; at about $37,500 per year = ~$437).

119.   *See infra* Sections III.B–D.

2.   The Compassionate-Release Second Chance Gap

In almost every state, courts have the right to reduce the sentences of prisoners, upon application, on the basis of "compassionate release."[120] The 1984 Sentencing Act created a similar authority in the federal system, specifying that releases should take place only under "extraordinary and compelling reasons"[121] as designated by the U.S. Sentencing Commission.[122] Defendants' medical conditions (i.e., serious illness), age, family circumstances, or other reasons may all qualify. But while the case for compassionate release of elderly, aging, or sick prisoners or prisoners who face family emergencies is easy, almost intuitive, to understand, it has proven hard to administer.[123]

It is impossible to ascertain with certainty how many people are eligible for compassionate release in part because of the vagueness or plain absence of the criteria, as described in Part III. However, at the federal level, the elderly are the fastest growing population in federal prison and are estimated to represent close to 30 percent of the federal prison population,[124] which, assuming a federal prison population of 175,000, is about 50,000.[125] But in the thirteen months before an inspector-general hearing before the Sentencing Commission in 2016 on compassionate release, only 296 elderly inmates, or less than 0.1 percent of 175,000, applied for release, and of those, only 2 people, or less than 1 percent of applicants, were released.[126] While an estimated 21,000 people from Kansas,[127] 96,000 people from Pennsylvania,[128]

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120.   *See* PRICE, *supra* note 79 (documenting the compassionate-release laws of forty-nine states and the District of Columbia); *see also supra* note 8 (describing the federal compassionate-release authority).

121.   18 U.S.C. § 3582(c)(1)(A)(i).

122.   28 U.S.C. § 994(t).

123.   *Id.*; *see also* FED. BUREAU OF PRISONS, U.S. DEP'T OF JUST., NO. 5050.50, COMPASSIONATE RELEASE/REDUCTION IN SENTENCE: PROCEDURES FOR IMPLEMENTATION OF 18 U.S.C. §§ 3582 AND 4205(G), at 4–12 (2019), https://www.bop.gov/policy /progstat/5050_050_EN.pdf [https:// perma.cc/3D99-DX46].

124.   Letter from Senator Brian Schatz et al. to Thomas R. Kane, Acting Dir. of Fed. Bureau of Prisons, and Rod Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just. (Aug. 3, 2017), https://www.schatz.senate.gov/imo/media/doc/2017.08.03%20Letter%20to%20BOP%20and% 20DAG%20re.%20Compassionate%20Release%20FINAL.pdf [https://perma.cc/ED66-YLC8].

125.   *See Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics /population_statistics.jsp [https://perma.cc/PW3Z-X5JU] (providing fiscal year 2019 statistics on federal prison population).

126.   Letter from Senator Brian Schatz et al. to Thomas R. Kane, *supra* note 124.

127.   *Kansas Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles /KS.html [https://perma.cc/N66Y-UGDR].

128.   *Pennsylvania Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org /profiles/PA.html [https://perma.cc/6JA4-QSZS].

and 39,000 people from New Jersey are behind bars,[129] just 7 individuals received compassionate releases from 2009 to 2016, and in Pennsylvania and New Jersey, the comparable numbers were 9 and 2, according to data collected by Families Against Mandatory Minimums.[130]

3. California's Propositions 47 and 64 Second Chance Gaps

Prior to 2014, the offenses of shoplifting, receiving stolen property, writing bad checks, and forging checks could be charged as felonies in California.[131] That changed when voters passed Prop 47, reducing the charges associated with qualifying crimes from felonies to misdemeanors.[132] It applied retroactively, creating a way for offenders still serving time for Prop 47 crimes to reduce their sentences, and for those that had completed their sentences already to reclassify those convictions to misdemeanors,[133] but only upon successful petition. Official statewide estimates for the number of people eligible for and receiving relief are not available. However, in California's largest county, Los Angeles, the Public Defender's Prop 47 Task Force determined that, as of 2016, 513,229 county residents had convictions "potentially eligible" for reduction.[134] The Judicial Council of California has reported, based on self-reported numbers by each county, that by March 2020, Los Angeles had received 36,300 Prop 47 applications for reclassification.[135] A single individual can file multiple applications.[136] Thus, to approx-

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129.   *New Jersey Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org /profiles/NJ.html [https://perma.cc/7QFA-ZYBK].

130.   PRICE, *supra* note 79, at 123 ("Pennsylvania, for example, is not required to report statistics, but a 2015 news article stated that only nine prisoners were granted compassionate release between 2009 and 2015. In Kansas, which has detailed eligibility criteria and process rules, just seven individuals received compassionate release between 2009 and 2016. In New Jersey, medical parole has been granted no more than two times a year since 2010." (footnotes omitted)).

131.   DEBRA BOWEN, SEC'Y OF STATE OF CALIF., OFFICIAL VOTER INFORMATION GUIDE 34–37 (2014), https://vig.cdn.sos.ca.gov/2014/general/en/pdf/complete-vigr1.pdf [https:// perma.cc/7FLK-ZHQP].

132.   Including grand theft, shoplifting, receiving stolen property, writing bad checks, and check forgery involving $950 or less and drug possession. *Id.*

133.   Unless the person had a prior conviction for identity theft, rape, child molestation, or other violent crime, or was a sex-offender registrant. Jud. Council's Crim. Just. Servs. & Richard Couzens, *Frequently Asked Questions*, CAL. CTS. (Nov. 2016), https://www.courts .ca.gov/documents/Prop47FAQs.pdf [https://perma.cc/GY7K-UYU6].

134.   *Prop 47: Los Angeles County*, CNTY. L.A. (July 19, 2016), http://file.lacounty .gov/SDSInter/bos/supdocs/105259.pdf [https://perma.cc/G7TZ-FS9Q]. It is important to acknowledge that this number may be inflated, because only cases that fall below a certain dollar threshold are Prop 47 eligible and the criteria used by the public defender to determine its estimate are unclear (and the Task Force did not respond to my request for this information).

135.   CRIM. JUST. SERVS., JUD. COUNCIL OF CAL., PROPOSITION 47 DATA SUMMARY REPORT (2020), https://www.courts.ca.gov/documents/for-publication_prop-47.pdf [https:// perma.cc/QRM9-2XAX].

imate the number of individuals associated with the filed applications, I applied a multiplier derived from data collected from twenty-one counties[137] to associate about 28,000 individuals with the 36,300 applications. This estimate of the number of individuals that have filed for relief (28,400) represents about 5 percent of the some 513,000 persons estimated in 2016 by the Los Angeles Public Defender's office to be eligible for relief, resulting in a second chances uptake gap of at least 95 percent, or around 487,000 people, based on comparing the individuals who were "potentially eligible" for and applied for relief.[138] Los Angeles County residents represent approximately one-quarter of California's residents; if the estimated eligibility for Prop 47 relief provided by the Public Defender's Office of 513,000 people is scaled accordingly, approximately 2 million Californians are eligible for Prop 47 relief. According to the California Department of Justice only about 381,000 petitions, associated with around 249,000 people using the method above, have been filed across California,[139] implying that as many as 1.8 million Californians remain in the Prop 47 reclassification gap.

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136. *See How to Reclassify Your Felony Under Prop. 47*, MYPROP47, https://myprop47.org/wp-content/uploads/2015/03/Reclassification-8.5x11-FINAL.pdf [https://perma.cc/U9E4-XEM8].

137. Brett Kelman & Cheri Carlson, *Nearly 200,000 Felonies Erased by Prop 47, but Some Former Felons Don't Know*, DESERT SUN (Dec. 14, 2016, 8:29 AM), https://www.desertsun.com/story/news/crime_courts/2016/12/14/prop-47-felony-convictions-erased/94636060/ [https://perma.cc/ZNQ9-JU28] (describing the collection of data from counties based on official records requests provided to public defenders and state courthouses, resulting in a total of approximately 198 thousand convictions and 155 thousand individuals).

138. Though this number represents the percentage difference between those potentially eligible and those who applied for relief, the number of both the records actually eligible for and actually awarded relief are likely smaller. One data point consistent with the latter assertion is that the rate of approved to filed applications in twenty-one counties was 71 percent. *Id.* However, because this number does not account for abandonments or pendency, it understates the approval rate.

139. CRIM. JUST. SERVS., JUD. COUNCIL OF CAL., *supra* note 135.

TABLE 2: ESTIMATES OF SELECT PROP 47 RECLASSIFICATION AND PROP 64
RECLASSIFICATION AND RESENTENCING SECOND CHANCE UPTAKE GAPS[140]

Provision	Estimated Number Eligible for Relief	Number of Applications for Relief	Estimated Uptake
Prop 47 Resentencing and Reclassification— L.A. County	513,229 L.A. county residents "potentially eligible" for relief	60,517 applications, corresponding to approximately 47, 374 applicants	9%
California Prop 64 Resentencing and Reclassification	218,094	6,251	3%

A comparable gap exists in connection with the redesignation or clearing of old marijuana convictions under California's Prop 64. The measure legalized adult recreational use of marijuana, reduced or eliminated criminal penalties for most marijuana offenses, and created a way for persons with completed Prop 64 sentences to apply to downgrade or clear their convictions.[141] In the fall of 2018, a California Senate report, based on data provided by the California Department of Justice, estimated that 218,094 individu-individuals were eligible for resentencing or reclassification.[142] But by March 2018, only 6,251 petitions statewide had been filed, representing less than 3 percent of that total, or a gap of 97 percent. Carrying out their own sizing exercises, the district attorneys of San Francisco (S.F.) and Alameda identified similar gaps,[143] and the San Francisco D.A. estimated that more than

140. Emling, *supra* note 134; CRIM. JUST. SERVS., JUD. COUNCIL OF CAL., *supra* note 135; S. APPROPRIATIONS COMM., APPROPRIATIONS FISCAL SUMMARY OF A.B. 1793, 2017–2018 REG. SESS., at 2 (Cal. 2018) [hereinafter FISCAL SUMMARY OF A.B. 1793] ("According to DOJ, there are 218,094 convictions that may be eligible currently for recall or dismissal of sentence, dismissal and sealing, or redesignation as provided by Proposition 64."); CRIM. JUST. SERVS., JUD. COUNCIL OF CAL., PROPOSITION 64 DATA SUMMARY REPORT (2020), https://www.courts.ca.gov/documents/Prop64-Filings.pdf [https://perma.cc/4XX9-DL9L].

141. J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 64: "ADULT USE OF MARIJUANA ACT" RESENTENCING PROCEDURES AND OTHER SELECTED PROVISIONS 6 (2017), https://www.courts.ca.gov/documents/prop64-Memo-20170522.pdf [https://perma.cc/5K29-MQSH].

142. FISCAL SUMMARY OF A.B. 1793, *supra* note 140, at 2.

143. According to estimates published by the S.F. and Alameda District Attorneys, an estimated 7,978 and 5,900 convictions, respectively, were potentially eligible for relief. *See District Attorney George Gascón Applies Proposition 64 Retroactively to Every Marijuana Case Since 1975*, S.F. DIST. ATT'Y (Jan. 31, 2018) [hereinafter *Gascón*], https://sfdistrictattorney.org /district-attorney-george-gasc%C3%B3n-applies-proposition-64-retroactively-every-marijuana -case-1975 [https://perma.cc/82AH-JVXP]; *DA O'Malley's Ongoing Efforts & Policy Regarding Dismissal of Cannabis-Related Criminal Convictions*, OFF. ALAMEDA CNTY. DIST. ATT'Y (Feb. 20, 2018), https://www.alcoda.org/newsroom/2018/feb/cannabis_convictions_prop_64_policy

half (62 percent) of the San Francisco convictions eligible for relief were eligible for resentencing relief.[144] The majority of states provide similar, petition-based paths to reducing or clearing previous convictions.[145]

B. *Second Chance Gaps in Reenfranchisement*

Although most states deny felons the right to vote when they are incarcerated, eleven states do not automatically restore these rights following completion of their sentences but instead require ex-offenders to apply for relief through government pardon, judicial restoration, or other forms of administrative process.[146] Generally, people with felonies that have completed their sentences, paid all outstanding fines or restitution, endured any required waiting period, and have not been disqualified due to the nature of their offenses can apply.[147]

Over several decades, Christopher Uggen and his collaborators have worked to systematically define, measure, and track felony disenfranchisement.[148] By examining state prison records and reenfranchisement records, they have been able to track the number of individuals that have completed their sentences but have remained disenfranchised. In support of a 2016 report, Uggen and his coauthors filed records requests with and received data from the appropriate agencies in the twelve states that disenfranchise beyond sentence completion in order to ascertain the number of restorations granted by each state over the same period.[149] Because their numbers do not exclude the small subset of offenses ineligible for reenfranchisement[150] and do

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[https://perma.cc/6G6D-PXRM] (identifying 5,900 convictions, not broken out by felony and misdemeanor totals). By the end of 2017, 232 and 609 applications, respectively, had been received. *See* CRIM. JUST. SERVS., JUD. COUNCIL OF CAL., *supra* note 140; O'Malley, *supra*. Taken together, this amounts to a gap of around 90–97 percent.

144.   *See Gascón*, *supra* note 143. Including 4,940 felony marijuana resentencing candidates and 3,038 misdemeanor candidates sentenced prior to the initiative's passage. *Id.*

145.   This includes states that allow petition-based relief for misdemeanor and lesser offenses. *See generally Compare States*, CLEAN SLATE CLEARINGHOUSE, https://cleanslateclearinghouse.org/compare-states/.

146.   Alabama, Arizona, Delaware, Iowa, Kentucky, Mississippi, Nebraska, Nevada, Tennessee, Virginia, Wyoming. UGGEN 2016, *supra* note 41, at 4; *see also* Frances Robles, *1.4 Million Floridians with Felonies Win Long-Denied Right to Vote*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/florida-felon-voting-rights.html [https://perma.cc/82LR-B66V].

147.   The raw data comes from UGGEN 2016, *supra* note 41, at 13, 15.

148.   *E.g.*, *id.* at 3 (finding that as of the 2016 election, approximately 6.1 million people, or 2.5 percent of the voting age population, were disenfranchised due to a current or previous felony conviction, and that 7.4 percent of African Americans were disenfranchised, as compared to 1.8 percent of non-African Americans).

149.   *Id.* at 13.

150.   Based on my analysis of each of the twelve states' felony-disenfranchisement laws, the subset of individuals "permanently disenfranchised" in each state is narrow and circum-

not take into account felony-reenfranchisement waiting times, their estimates represent upper-bounds estimates of the number of individuals potentially eligible for reenfranchisement during this period. Based on both the number of postsentence disenfranchised individuals and the rate of restoration, the state-estimated share of ex-felons that have served their time but have not regained the franchise appears to range, with the exception of Iowa

TABLE 3: RESTORATION OF VOTING RIGHTS IN STATES THAT DISENFRANCHISE RESIDENTS POST-SENTENCE COMPLETION[151]

State	Restorations	Period of Restoration Estimates	Average Restorations per Year (Calculated)	Postsentence Disenfranchised	Share of Disenfranchised Reenfranchised (Calculated)
Alabama	16,022	2004–2015	1,457	231,896	6%
Arizona	31	2010–2015	6	116,717	0%
Delaware	2,285	1988–2015	85	4,067	36%
Florida[152]	271,982	1990–2015	10,879	1,487,847	15%
Iowa	115,325	2005–2015	11,533	23,976	83%
Kentucky	10,479	2008–2015	1,497	242,987	4%
Mississippi	335	2000–2015	22	166,494	0%
Nevada	281	1990–2011	13	62,080	0%
Tennessee	11,581	1990–2015	772	323,354	3%
Virginia	21,664	2002–2016	1,547	408,570	5%
Wyoming	107	2003–2015	9	17,414	1%
Total	450,092	(see above for range)	2,529	3,205,121	12%

scribed, because, for example, in the state of Delaware, they were convicted of murder, bribery, or a sexual offense. DEL. CONST. art. V, § 2.

151.   UGGEN 2016, *supra* note 41, at 13, 15.

152.   These numbers do not reflect developments after the passage of Amendment 4 in Florida in November 2018, which, though it purported to make felony reenfranchisement automatic, largely failed to do so due to a rule that required outstanding legal financial obligations to be repaid prior to voter restoration. Though challenged and overturned by a lower court on the grounds of its constitutionality, the requirement remained in effect during the 2020 presidential election. *See* Mower & Taylor, *supra* note 27.

and Delaware, from 85 to 100 percent.[153]

C. *Second Chance Gaps in Records Clearance*

When an individual is booked or arrested, a police record is created.[154] Formal charges generate court records.[155] A charge can be disposed as a conviction (typically the result of a plea);[156] a nonconviction;[157] some sort of diverted or deferred judgment that, if completed successfully, terminates in a dismissal; or through another administrative resolution like a transfer. Out of the nearly 80 million people with criminal records,[158] an estimated 19 million have a felony conviction record.[159] The remaining majority have misdemeanor convictions and unconvicted charges on their records.[160]

Due in part to the uniquely American tradition of broad access by citizens to government records, records of both convictions and nonconvictions are more widely available to background check providers and their customers, including prospective employers, licensing bodies, and other entities, in the United States than anywhere else in the world.[161] Though generated primarily to aid law enforcement, since 2014, background checks have been processed primarily for non-criminal justice purposes.[162] Between 2006 and 2016, "the number of fingerprints processed for noncriminal justice purposes increased by 89.6 percent . . . while the number processed for criminal jus-

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153.   This finding is consistent with earlier estimates of reenfranchisement rates ranging from one-tenth of 1 percent in Wyoming and Mississippi to 17 percent in Delaware. Jeff Manza & Christopher Uggen, Locked Out: Felon Disenfranchisement and American Democracy 89 (2006).

154.   Jacobs, *supra* note 95, at 36.

155.   *Id.* at 54–59.

156.   U.S. Sent'g Guidelines Manual § 1A1.4(c) (U.S. Sent'g Comm'n 2018).

157.   For example, due to the charge being dismissed, withdrawn, nolle prossed, or abandoned.

158.   *See* sources cited *supra* note 17.

159.   Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 Demography 1795, 1806 (2017).

160.   Within the sample of criminal histories studied for this Article, felony conviction charges comprised around 9 percent of the total, while misdemeanor, minor, and unknown conviction charges comprised around 50 percent of the total, and the remainder were nonconvicted. *See* Table A-3.

161.   Jacobs, *supra* note 95, at 58–74, 159–223 (discussing the digitization of and market for criminal records and U.S. criminal-record exceptionalism).

162.   Becki Goggins, *New Blog Series Takes Closer Look at Findings of SEARCH/BJS Survey of State Criminal History Information Systems, 2016*, Search (Mar. 29, 2018), https://www.search.org/new-blog-series-takes-closer-look-at-findings-of-search-bjs-survey-of-state-criminal-history-information-systems-2016/ [https://perma.cc/ZN4G-AF2F]. Gun and employment background checks are two of the largest categories of civilian checks. *See id.*

tice purposes actually decreased by 6.6 percent."[163] Concerns about employer liability and advances in information technology have contributed to making background checks commonplace.[164] That only a small minority of criminal records are "serious" (reflecting felony convictions) supports the view that "mass criminalization" is as urgent a problem as "mass incarceration."[165] Because a criminal record can substantially limit a person's opportunity to obtain employment, housing, public benefits, and student loans; to qualify for certain professions; and to gain entrance into higher education, having a record has been called "a civil death."[166] Available research suggests that felony convictions carry the most serious collateral consequences, including being barred from jobs, housing, and social reintegration opportunities.[167] However, even nonconvicted records have led to negative employment,[168] immigration, housing, and educational outcomes.[169]

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163.   *Id.* (reporting that noncriminal checks grew from 7.7 million to 14.6 million, while the number processed for criminal justice purposes shrank from 12.1 million to 11.3 million).

164.   Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 327 (2009).

165.   Jenny Roberts, *Expunging America's Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 326.

166.   Adams et al., *supra* note 92, at 24.

167.   For an overview of the literature see, for example, Prescott & Starr, *supra* note 26, at 2468–71, 2500.

168.   For an overview of the literature see, for example, Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, 65 CRIME & DELINQ. 1850, 1852–54 (2018).

169.   *E.g.*, Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810, 821–44 (2015) [hereinafter Jain, *Arrests as Regulation*] (describing the use of arrest information by immigration-enforcement officials to screen individuals who may fall within a removal priority (about 20 percent of those deported had no criminal conviction); by employers to monitor off-duty workers, leading to their suspension or termination; by public-housing officials to identify tenants who may be in breach of their lease and thereby subject to eviction; by social services after a child's parent or guardian's arrest leading to custody disruptions; and by schools to protect other students or identify those with counseling needs but also leading to stigmatization of these students); Eisha Jain, *Prosecuting Collateral Consequences,* 104 GEO. L.J. 1197, 1207 (2016) (describing, for example, the suspension of a professional license, eviction from public housing, and ineligibility for public benefits as collateral consequences associated with arrests); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 896 (2014) (finding that mere arrests can be bars to hiring); Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637 (2014) (finding a 4 percent difference in callback rates associated with people with arrest records versus people without records); *see also* Ryan A. Hancock, *The Double Bind: Obstacles to Employment and Resources for Survivors of the Criminal Justice System*, 15 U. PA. J.L. & SOC. CHANGE 515, 516 (2012) (finding that, while in places like Pennsylvania, it is illegal to use nonconviction data to screen out individual job applicants, employers nevertheless adopt blanket policies that reject individuals with any record, including a nonconviction record).

These consequences can be avoided by taking advantage of records clearing, as implemented by states through sealing, vacaturs, expungements, expunctions, set-asides, and destruction. [170] As described earlier, these efforts are part of a broader set of policies aimed at reducing the harms associated with having a criminal record.[171] But these policies will only succeed at doing so to the extent they are taken up. Complexity is a hallmark of many states' clearance laws, which vary widely regarding the criteria they include, who they cover, and the type of relief they provide.[172] The paragraphs below describe analyses to estimate second chance expungement gaps based on applying state-level rules to criminal histories.

1.   State-Level Second Chance Gaps in the Expungement of Convictions

In the majority of states, qualifying individuals may apply to clear their criminal convictions by methods other than pardoning.[173] The rules vary by state, and generally provide one or more "general categories" of relief, typically conditioned upon the crime being of lesser severity and the expiration of a waiting period that depends on the severity of the crime. [174] Many states also offer limited special eligibility, based, for example, on the decriminalization of the underlying crime, a sexual offender's status as a human trafficking victim, or the conviction being someone's first offense.[175] In Washington state, individuals can get general relief, for example, under the rule that misdemeanors and gross-misdemeanor convictions can be vacated three years after completion of sentence requirements,[176] while Class C (less serious) fel-

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170.   *See, e.g.*, San Jose State Univ. Record Clearance Project, *Criminal Record Clearing in a Nutshell*, GOOGLE SLIDES (Jan. 2018), https://docs.google.com/presentation/d/1IevvpNpNd4J GYLgRUY1ADjBgSitH4YVygG1jI-Lie4g/ [https://perma.cc/A8AF-PP3Q].

171.   *See generally* BETH AVERY, MAURICE EMSELLEM & PHIL HERNANDEZ, NAT'L EMP. L. PROJECT, FAIR CHANCE LICENSING REFORM: OPENING PATHWAYS FOR PEOPLE WITH RECORDS TO JOIN LICENSED PROFESSIONS (2017), https://www.nelp.org/wp-content/uploads/Toolkit-Fair-Chance-Licensing-Reform.pdf [https://perma.cc/U9HT-HNC3].

172.   *See infra* Section III.B, Table 5: Clearance Criteria Examples and Challenges.

173.   *Compare States*, *supra* note 145 (analysis based on selection of expungements of conviction records on any basis besides "pardon"). *But see Virginia: Restoration of Rights & Record Relief*, RESTORATION RTS. PROJECT (Aug. 28, 2020), https://ccresourcecenter.org/state-restoration-profiles/virginia-restoration-of-rights-pardon-expungement-sealing/   [https://perma.cc/8N6C-YEG2] ("Virginia law makes no provision for expunging adult conviction records, except those that have been vacated pursuant to a writ of actual innocence . . . or those which were the subject of an absolute pardon (for innocence)." (citations omitted)).

174.   *Id.*; Margaret Colgate Love, *supra* note 19. For a sample of conviction-clearance eligibility criteria, see also Table 5: Clearance Criteria Examples and Challenges.

175.   *Compare States*, *supra* note 145.

176.   Except in the case of domestic violence convictions, which have a five-year waiting period. *Washington: Adult Record Clearance Overview*, CLEAN SLATE CLEARINGHOUSE, https://cleanslateclearinghouse.org/states/washington/ [https://perma.cc/J7M6-P2JQ]; WASH. REV. CODE § 9.96.060 (2020).

onies are clearable five years after sentence completion, and Class B (more serious) felonies after ten years. Colorado's rule that courts must seal records of "misdemeanor offense[s] for the use or possession of marijuana that would not have been a criminal offense if the act occurred on or after December 10, 2012"[177] is an example of a special eligibility criteria.

Table 4-1 presents uptake-gap estimates sourced from several sources, several based on applying the eligibility criteria to samples of criminal histories using the basic approach described in the previous Part. While each estimate has its weaknesses, requiring compensation for missing data and not modeling unascertainable criteria,[178] collectively the data show that, across states, the uptake rates are low, generally on the order of less than 20 percent. These low uptake rates persist across juvenile and adult clearance criteria and populations.

TABLE 4-1: ESTIMATES OF SECOND CHANCE GAPS IN THE EXPUNGEMENT OF CONVICTION RECORDS

State	Population	Period of Analysis	Estimated Uptake Rate[179]	Estimated Number of People in the Convictions Clearance Gap[180]
Washington[181]	Adult	1999–2019	<3%	At least ~1 million people[182]
California (Prop 64 and Prop 47)[183]	Adult	2016–2018	~5–8%	~2 million people[184] (upper bounds)

177.　COLO. REV. STAT. § 24-72-710(1) (2017), *repealed by* Act of May 28, ch. 295, 2019 Colo. Sess. Laws 2732.

178.　*E.g.*, Colleen V. Chien, Zuyan Huang, Jacob Kuykendall & Katie Rabago, *The Washington State Second Chance Expungement Gap*, SSRN 3 (Mar. 25, 2020), https://papers.ssrn .com/sol3/papers.cfm?abstract_id=3529777 [https://perma.cc/NAU8-P7X9].

179.　Based on twenty years of actual expungements data unless otherwise noted. When a range was presented, we reproduced the conservative (larger) uptake value.

180　When a range was presented, we reproduced the conservative (smaller) estimate of people in the gap.

181.　Chien et al., *supra* note 178.

182.　*Id.*

183.　*See supra* Section II.A.3.

184.　This number represents the actual statewide Prop 64 gap and the statewide Prop 47 gap estimated based on data from Los Angeles county as described in Section II.A.3, *supra*.

New York[185]	Adult	1992–2018	~<1%	~1.3 million people
Connecticut[186]	Adult	~1960–2019	~<4%[187]	~300 thousand people
Rhode Island[188]	Adult	1993–2019	~30%	~380 thousand people
Iowa[189]	Adult	1993–2019	~26%[190]	~360 thousand people
North Carolina[191]	Adult	1992–2018	~6%	~190 thousand people
South Carolina[192]	Adult	~1980–2019	N/A	~340 thousand people
Oregon[193]	Adult	2003–2019	~25%[194]	~300 thousand people
Missouri[195]	Adult	through 2020	<1%[196]	~380 thousand people

185. *The New York Second Chance Sealing Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/NY.html (on file with the *Michigan Law Review*).

186. *The Connecticut Second Chance Pardon Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/CT.html (on file with the *Michigan Law Review*)

187. Includes convictions and nonconvictions.

188. *The Rhode Island Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/RI.html (on file with the *Michigan Law Review*).

189. *The Iowa Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/IA.html (on file with the *Michigan Law Review*).

190. Includes convictions and nonconvictions.

191. *The North Carolina Second Chance Expunction Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/NC.html (on file with the *Michigan Law Review*).

192. *The South Carolina Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/SC.html (on file with the *Michigan Law Review*).

193. *The Oregon Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/OR.html (on file with the *Michigan Law Review*).

194. Includes convictions and nonconvictions.

195. *The Missouri Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/MO.html (on file with the *Michigan Law Review*).

196. Includes convictions and nonconvictions.

Minnesota[197]	Adult	2009–2019	~9%[198]	~360 thousand people
Michigan[199]	Adult	1983–2011	6.5%[200]	N/A
Washington[201]	Juvenile	1997–2013	0.2%	N/A
Colorado[202]	Juvenile	2003–2013	2%	N/A
Michigan[203]	Juvenile	2009–2013	11%	N/A

2.   Estimates of the Nonconvictions-Expungement Second Chance Gap

While the previous Section reports estimates of the share and number of Americans with convictions eligible for clearance, a sizeable percentage of charges are not convicted because the charges are dropped or dismissed, the accused is acquitted, or the accused agrees to a plea bargain that includes some convicted and other unconvicted charges.

Every state allows for the clearance of unconvicted charges as a general matter,[204] and, as described below, some even take steps to automatically—meaning, without any action by the defendant—restrict access by the general public to such records. This consensus is consistent with the criminal justice

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197.   *The Minnesota Second Chance Expungement Gap*, PAPER PRISONS (2020), https://paperprisons.org/states/MN.html (on file with the *Michigan Law Review*).

198.   Includes convictions and nonconvictions.

199.   Prescott & Starr, *supra* note 26, at 1, 14.

200.   *Id.* at 19 (calculating a five-year uptake rate).

201.   Daniel Litwok, Essays on the Economics of Juvenile Crime and Education (2015) (unpublished Ph.D. dissertation, Michigan State University) (manuscript at 78), https://d.lib.msu.edu/etd/3615/datastream/OBJ/View/ [https://perma.cc/V6ZM-XD58]; *accord* Calero, *supra* note 26, at 37 (documenting an uptake rate of juvenile sealing in Washington of less than 10 percent).

202.   Litwok, *supra* note 201.

203.   *Id.*

204.   See Appendix B-3, on file with the author, for a summary of the laws of the states. *See also* Jain, *Arrests as Regulation*, *supra* note 169, at 826, 854. Purging nonconvictions is also consistent with the presumption of innocence and in theory could prevent the racial skew in arrests—49 percent and 44 percent of African American and Latino men are arrested by age twenty-three, as compared to one-third of adults in general—from causing a skew in the wide-ranging "collateral consequences" associated with having a criminal record. But again, only to the extent that there is proportional uptake of clearance remedies. *Id.* at 817.

system's foundational presumption of innocence and, arguably, the nature of nonconviction records as a greater reflection of the arresting or charging officer's discretionary decisions than of the defendant's culpability.

Calculating the "uptake gap"—the share of people eligible over time to receive relief that have actually received it—associated with nonconvicted-records relief is difficult to do because of the "disappearance" of records from public view upon expungement. However, using the methods described in the previous Part, one can obtain at any point an estimate of the "current gap"—the share and number of people currently with a record who could receive relief. This Part marshals a novel national dataset of criminal histories to provide a rough estimate of the current gap of expungable nonconviction records in all fifty states, which it then uses as the basis of a national estimate of people in the current gap based on laws governing nonconvictions.

Doing so required proceeding in several steps, working with law and data-science research assistants at Santa Clara and Columbia Universities as well as experts in criminal law and criminal procedure to (1) develop criminal history data samples through a partnership with a background check company and also from states, (2) process and label the data, (3) ascertain the law of each state, (4) develop a script to apply the law to the data sample to ascertain each state's second chance current expungement gap, (5) compare these gap estimates based on the background check-company sample with gap estimates based on representative data to estimate the direction of any bias, and (6) based on these comparisons, develop a rough, national estimate of the size of the current nonconvictions records-clearing gap. Each of these steps is outlined briefly below and in detail in Appendix M.

First, I worked with the background check company Checkr to develop a novel dataset comprising the anonymized criminal histories of around sixty thousand people with criminal records, generally more than one thousand per state,[205] chosen randomly at the state level, from across the fifty states.[206] The individuals were seekers of primarily on-demand jobs whose background checks took place between January 2017 and October 2018.[207] The team then cleaned, labeled, and grouped the data into criminal incidents.

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205.   The number of checks in the studied sample per state averaged around 1,400 and, with the exception of Vermont (N=473) and Kansas (N=754), numbered over 1,000 (Table A-2); each sample size should be kept in mind for the purpose of developing point estimates. See Appendix M for an overview of the data and the methods used to analyze them.

206.   There is currently no process for expunging federal charges and convictions, but the majority of states implement various programs for expungement. *See* Love, *supra* note 19.

207.   These were carried out by commercial background check company Checkr. While Checkr performs more than ten million background checks per year for more than ten thousand customers, Carolyn Said, *Checkr Adds Ongoing Screening for Gig Economy Workers*, S.F. CHRON. (Aug. 5, 2018, 5:00 AM), https://www.sfchronicle.com/business/article/Checkr-adds-ongoingscreening-for-gig-economy-13131037.php [https://perma.cc/SX45-27M9], it has been reported that approximately 80 percent of its checks are for on-demand companies. Checkr

Doing so was a nontrivial task. Table 4-2 provides a sample of data constructed based on actual criminal history records. Although some of the dispositions are straightforward (e.g., "dismissed" and "guilty") and appear in "plain English," others (like "NOLLE PROSEQUI") take legal knowledge to decipher and yet others, like "transferred," "remanded," and "revoked," could not be resolved as a disposition of guilt or nonguilt. The steps we took to reduce the "unknown" disposition rate, in consultation with experts, are detailed in Appendix M.

TABLE 4-2: SAMPLE CRIMINAL HISTORY DATA

Court	Charge	Charge Type	Disposition	Sentence
MAGISTERIAL DISTRICT COURT	Theft of Leased Property		DISMISSED	
COMMON PLEAS COURT	MARIJUANA-SMALL AMOUNT FOR PERSONAL USE	misdemeanor	NOT INDICATED	
DISTRICT COURT	FAILURE TO MAINTAIN CONTROL		GUILTY	$100.00 FINE; $60.00 COSTS; $35.00 FEES;
COMMON PLEAS COURT	THEFT OF SERVICES - ACQUISITION OF SERVICE		OTHER	
DISTRICT COURT	AGGRAVATED BURGLARY	felony	DISMISSED	
COMMON PLEAS COURT	DISORDERLY CONDUCT HAZARDOUS/ PHYSICAL OFFENSE		NOLLE PROSEQUI	

Next we ascertained the nonconviction-clearance laws of all fifty states. As described in Appendix M, we relied heavily on summaries of the law provided by the Collateral Consequences Resource Center's Restoration of

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powers the gig economy. The firm's on-demand clients include Uber, Lyft, GrubHub, Instacart, Postmates, and DoorDash. Kyle Wiggers, *Checkr and Uber Built a Service to Monitor Workers' Background Records*, VENTUREBEAT (July 13, 2018, 7:09 AM), https://venturebeat.com/2018/07/13/checkr-and-uber-built-a-service-to-monitor-workers-background-records/ [https://perma.cc/R3BF-YCTU]; Connie Loizos, *Background Checks Pay for Checkr, Which Just Rang Up $100 Million in New Funding*, TECHCRUNCH (Apr. 12, 2018, 9:24 AM), https://techcrunch.com/2018/04/12/background-checks-pay-for-checkr-which-just-rang-up-100-million-in-new-funding/ [https://perma.cc/EH3P-LS7T]; TrueBridge Cap., *The Gig Is Up: The Real Value of Gig Economy Startups Isn't the Model—It's the Supply*, FORBES (Aug. 10, 2016, 11:41 AM), https://www.forbes.com/sites/truebridge/2016/08/10/the-real-value-of-gig-economy-startups/ [https://perma.cc/J9MF-6LLB]. The sample covered records randomly selected over the time period (except in the case of Vermont, whose records were sampled over an extended period of time in order to achieve a sufficient sample size).

Rights Project 50-State Comparison as well as the Council for State Governments Clean Slate Clearinghouse. We also consulted the text of statutes in effect in 2018 (the period of the records we obtained) to determine the scope of available relief. To complement our research, we consulted with practicing attorneys on particularly challenging aspects of interpretation. One aspect of relief, often unascertainable based on reading the statute, was the extent to which the state allowed for clearance of unconvicted charges even if other charges in the incident were convicted.[208] To make this determination in ambiguous cases, we consulted with experts and state attorneys knowledgeable of each state's laws during the relevant period. When in doubt, we defaulted to the more conservative version of the rule (superstrict over strict over lenient).

After cleaning the data and ascertaining the rules, we developed a script to apply the state rules to the cleaned state records in order to approximate the share of people in the second chance nonconvictions current expungement gap with records eligible for but not receiving clearance. The final steps were to carry out a robustness check, on a handful of states where we had "representative" data, in order to quantify the extent of the bias introduced by relying on our data sample and then to use this information to develop state-level estimates to develop a national estimate of the number of people in the second chance expungement gap.

3.   Estimates of State-Level Nonconvictions-Expungement Second Chance
Current Gaps

The aggregate results of our analysis of the nonconvictions-expungement second chance gap are reported in Table 4-3, discussed below. However, the state shares, as reported in Table B-1, show considerable variation. Less than 1 percent of Vermont gig workers studied, for example, had a clearable record, while 76 percent of the gig workers with records in North Carolina did.

These differences, in turn, flow from the several factors that contribute to a state's second chance gap, including the breadth or "generosity" of the relief offered (with a higher share of individuals eligible for relief in states with more lenient policies), rates of conviction,[209] and clearance mechanisms. A state might have a small gap because its policy is "superstrict" and stingy, not allowing any nonconvictions records to be cleared, or conversely,

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208.   For example, within a given criminal incident, a person can be susceptible to multiple charges (e.g., charged with trespassing, public display of intoxication, and loitering) but convicted of less than all of them (e.g., just loitering).

209.   In the gig-jobseeker sample, the ratio of nonconvictions to all charges visible in the data varied among states between less than 10% and more than 70%. *Cf. Data Portal*, MEASURES FOR JUST., https://measuresforjustice.org/portal (determining "case dismissal" and "case not prosecuted" rates for seven states and finding a range between 13.7% (in Pennsylvania) and 46% (in North Carolina)).

as in the case of Vermont, because their methods for clearing out nonconvictions is efficient. As explored below, these factors undercut mechanical comparisons between states based on the size of their gaps. But they are still important because they illustrate the extent to which individuals in each state that are ready and willing to contribute to the workforce[210] have improvable records.

4.   Toward a National Estimate of the Nonconvictions-Expungement Second Chance Current Gap

Just how many people nationally fall into the second chance expungement current gap due to nonconvictions alone? Of the multiple challenges that are associated with coming up with a rough estimate based on gig-jobseeker records, perhaps the largest is that gig jobseekers with records cannot be presumed to be representative of the population of people with records in general. To estimate the size and direction of the bias, we carried out the robustness checks described in Appendix M. As detailed there,[211] we found that gig jobseekers have eligibility rates that are roughly comparable to the eligibility rates among people with records in general. These findings suggested that the gig-jobseeker shares reported in this study can be used to provide rough estimates of the national population of people with clearable records.

Besides this source of imprecision in the analysis, two other "unknowns" should be kept in mind, one tending to inflate and another tending to both deflate and inflate the nonconvictions second chance gaps reported in this Article. First, because the estimates are largely based on court and administrative records, they do not reflect mortality, mobility, and related demographic factors that might reduce one's motivation or ability to seek relief in the state of one's previous criminal activity.[212] While taking these factors into account would reduce the number of "motivated" as well as eligible individuals, perhaps the simpler approach is just to assume that some amount of the gap is natural and due to the factors cited above and related demographic shifts. Second, as described in Appendix M, the determination of eligibility in many cases involved unobservable factors that we could not model in data.[213] These factors cut both ways: a prosecutor's objection or the nonrepayment of debt, in jurisdictions where it matters, could make a charge that we treated as eligible in fact not eligible. However, good-time credits or the successful completion of diversion programs, which we did not account for, could have led to undercounting. This Article acknowledges these "unmod-

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210.   As inferred from a job application leading to their background check.

211.   *See infra* Appendix M, Section 2: Robustness Checks.

212.   *See* Shannon et al., *supra* note 159, at 1800.

213.   As described in Appendix M, Section 1 and Table 5: Clearance Criteria Example and Challenges.

eled" limits in data, provides examples of them in Appendix M, and includes a laundry list in Table 5 of some of the particularly challenging eligibility criteria to implement at scale embedded in expungement laws.

Applying each state's estimated share in rough proportion to the national population of individuals with criminal records of around 80 million[214] yielded a cumulative, lower-bounds national second chance gap among individuals with criminal records of roughly 35 percent, or 28 million individuals,[215] a stunning total. Twenty-two percent had fully clearable records.

TABLE 4-3: ESTIMATES OF THE NATIONAL SECOND CHANCE
NONCONVICTIONS-EXPUNGEMENT CURRENT GAP

Individuals	Share of Individuals with Records Clearable (Partially or Fully) Within the Sample	Estimated Average Share of Individuals Fully Clearable	Estimated National Average Share of Individuals with Clearable Records (State Balanced)	Estimated Number of People in the U.S. Criminal Population Eligible with Clearable Records
In the sample: 61,158 U.S. criminal population: 80 million	39%	22%	35%	20–30 million

5.   Explaining Differences in State-Level Nonconvictions-Expungement
Second Chance Current Gaps

What explains the variance among states with respect to the share of people in the second chance expungement gap? I worked with a research assistant to implement a hierarchical multiple linear regression to assess the contribution of state and local policies as well as the demographic characteristics of the target population to the current gap (the percentage of cases eligible for clearance) of a given county.[216] Three policy factors were initially considered: the generosity of the state nonconvictions clearance law (whether lenient or strict), the presence of automatic clearing processes as provided

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214.   Based on each state's share of arrests from 1995 to the present. For details, see Appendix M.

215.   Thirty-five percent of eighty million is twenty-eight million. For reasons elaborated in Appendix M, this total may understate the number of people with clearable unconvicted charges, because people with only uncharged arrests are more likely to be eligible for clearance.

216.   This analysis was carried out on a prefinal version of the data, and thus is provided for discussion purposes.

for in state law,[217] and each county's conviction rate (percentage of charges that led to convictions). A second model also included three county-level demographic variables: the average age of people charged, the rural/urban classification,[218] and the population of the county.

The model results, reported in Appendix C, suggested that a large share of the variance in the second chance gap could be explained based on policy factors including not only the presence of "automatic" clearing but also the convictions rate (what share of charges became convictions) and state clearability policy (strict, lenient, superstrict).[219] Beyond state policy factors, geographic and demographic factors also appear to be correlated to some degree with the probability of clearance. The most rural counties (RUC=9) had about a 5 percent larger gap than the least rural (RUC=1) ones, and younger people were associated with slightly larger gaps (with a 10-year change in average county age at time of conviction corresponding with a 2.3 percent increase in the gap). Both of these correlations were significant at the 99 percent confidence level,[220] indicating that uptake is not equal across all groups.

III.   NARROWING THE SECOND CHANCE GAP

So far, this Article has introduced the concept of "second chance gap"—the difference between the number of individuals eligible for and receiving second chance relief—and provided some rough estimates of the gap associated with several second chance provisions. It documents uptake rates of less than 10 percent among many of the initiatives studied and, for the first time, provides an estimate in the tens of millions of individuals with records that could clear them partially or fully based on nonconvictions-clearance policies. These findings are important for understanding the high cost, high volume, and high impact potential of second chance policies. This Part draws from contrasts in the implementation of second chances programs with relatively larger and smaller gaps to identify the practices associated with narrower gaps.

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217.   The range in provisions was considerable. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-142a(c)(1) (West 2019) ("Whenever any charge in a criminal case has been nolled . . . if at least thirteen months have elapsed since such nolle, all police and court records and records of the state's or prosecuting attorney or the prosecuting grand juror pertaining to such charge shall be erased . . . ."); ME. REV. STAT. ANN. tit. 16, § 703(2)(A) (2020) ("Unless the person remains a fugitive from justice, summons and arrest information without disposition if an interval of more than one year has elapsed . . . and no active prosecution of a criminal charge stemming from the summons or arrest is pending [will be confidential.]").

218.   *2010 Census Urban and Rural Classification and Urban Area Criteria*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/geography/guidance/geo-areas/urban-rural/2010-urban-rural.html [https://perma.cc/SGN6-9S8B].

219.   *See* text accompanying notes 350–351 (r2 = 0.753, all ps < 0.001).

220.   *See* text accompanying notes 350–351 (r2 = 0.757).

It is important to acknowledge that the foregoing discussion is not comprehensive and neglects many factors and details that may prove to be critical in the administration of a particular program. Little attention has been paid in this Article, for example, to what can prove to be big obstacles, like the fines and fees that must be paid in some cases to qualify for relief.[221] However, recognizing that "issues of judicial administration affect substantive case outcomes,"[222] the following discussion focuses on solving the parts of the gap that are attributable to administrative, "red tape" factors, as distinct from substantive or structural denials, through ruthless iteration, burden shifting, and automation.

A. *Defending, Not Damning, Second Chance Gaps?*

Before doing so, it is important to acknowledge and address a few of the arguments that might be raised in favor of accepting, rather than trying to narrow, second chance gaps and their complex rules and administration. First, some of the gap may simply be due to the fact that the relief offered may simply not be desired by or "worth it" to the eligible recipient. Second, one might argue that the gaps between eligibility and delivery signal that second chance policies are performing valuable screening functions between those that do and don't merit second chances and, further, permitting a wider and more generous range of forgiveness policies. Relatedly, it could be that the procedural and substantive requirements of second chance laws, as well as the individualized nature of their application—for example, when a hearing and or private petitions are required—encourage and reward rule following and other socially productive behaviors, and so reducing these burdens will likewise reduce these incentives. A third argument, based on equity, could be that in certain contexts, making the delivery of one's second chance easier will degrade the benefits of second chances restoration for those who have made the effort relative to others. I briefly explore and address the first two defenses of second chance gaps below and take up the third in Part IV's discussion of impact and disparities.

One explanation for the low uptake of a given second chance is that the second chance is simply not valued by the eligible party. Restoring a person's right to vote isn't going to matter much if the person isn't interested in registering or turning out to vote. Other second chances may not seem worth the

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221.   *See, e.g.*, Joy Radice, *Access-to-Justice Challenges for Expungement in Tennessee*, 30 Fed. Sent'g Rep. 277 (2018). Because individuals with criminal pasts often have depressed earnings, the application and legal fees required to complete records clearance can be prohibitive. Jenny Montoya Tansey & Katherine Carlin, Code for Am., Closing the Delivery Gap 23 (2018), http://s3-us-west-1.amazonaws.com/codeforamerica-cms1/documents/Closing -the-Delivery-Gap.pdf [https://perma.cc/QGG9-C59T] (reporting based on a survey of 569 expungement seekers that almost 40 percent of respondents owing fines reported they were unable to pay).

222.   Devins, *supra* note 54, at 112.

candle: the benefit of restoring one's second chance—for example, in the case of a person who is able to erase an unconvicted charge only to have remaining on one's record much more serious convictions—may in fact be minimal. As the broader nonparticipation literature has found, concrete and immediate informational and transactional costs can appear to outweigh the downstream benefits of a social benefit.[223]

But just as with social-benefit programs, privately rational nondelivery of second chances may be socially suboptimal. Lower uptake in such programs by vulnerable or at-risk communities (such as, in the case of welfare, immigrants)[224] means that the benefit is not reaching those who need it the most. The benefits of civic participation, as through voting or participating on a jury, inure to the community at large. And individuals may fail to appreciate the economic and longer-term social benefits of reintegration.

One might nevertheless defend large second chance gaps and the high costs that contribute to them on a few grounds: first, that high standards promote good behavior and rule following, and second, that they serve to separate the wheat from the chaff, providing a valuable filtering function to screen out those who don't merit second chances. While appealing, these defenses are misplaced, in large part because the second chance gap measures uptake *conditional* on qualification, such that any incentive for good behavior comes from the substantive, not procedural, requirements associated with getting one's second chance. As a result, the individuals that have the organization and wherewithal to endure second chance application procedures are likely to be those with access to lawyers and resources, exacerbating existing disparities. In the case of invisible yet very real encumbrances like having a criminal record or having a suspended license, low uptake rates combined with high apparent eligibility seem to indicate that the administrative and debt hurdles of clearance or restoration are not spurring learning but instead operating to put second chances out of reach.

In addition, while no government program is expected to have complete uptake, the reported second chance uptake rates in convictions expungement of, in most cases, less than 20 percent[225] described in Part II leave much room for improvement. The size and consequences of the second chance

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223. *See, e.g.*, Alba, *supra* note 34, at 3 (describing the "present bias" or hyperbolic discounting that can impact the social benefit participation decision).

224. *See* Currie, *supra* note 34, at 16 (describing studies that document depressed rates of enrollment among immigrant children in Medicaid, conditional on their qualifying, and, conditional on being poor, lower rates of enrollment in SSI among Hispanic children).

225. As a point of comparison, the uptake rates of a number of large means-tested social welfare programs is closer to 50%–80%. *See* Jacob Goldin, *Tax Benefit Complexity and Take-Up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 67 n.46 (2018) (describing an 83% uptake rate among SNAP programs and a similarly high participation level among Medicaid and CHIP programs but cautioning that differences in methodology complicate direct comparisons; also describing 2014 Supplemental Nutrition Program for Women, Infants, and Children (WIC) participation rates as at 55%).

gaps identified in this report support putting aside individualized, case-by-case assessments in favor of a different, scalable approach to addressing mass criminalization. This means reducing the costs—on both the applicant and the criminal justice system—associated with restoring each second chance. Two types of code—legal code and computational code—can be leveraged to do this. As discussed below, legal code that burden shifts and lays out a centralized framework for relief and computer code for automating and implementing these principles can work together to support second chances at scale.

Finally, while low uptake rates could theoretically make second chance rules more politically palatable, it is equally plausible that low awareness of the second chance gap to date has prevented this mechanism from operating thus far. On the contrary, for the reasons described in Part I, second chance laws to date have enjoyed a warm bipartisan embrace because they are hoped to be effective, not because they aren't delivered.

The third defense of the second chance gap, in the context of records clearing, is more worrisome—that by automatically clearing everyone's record, discrimination will increase as factual, individualized information is replaced with group assumptions. I leave a more robust discussion of how the void left by expunged data may be replaced with statistical discrimination or other improper inferences to Part IV.

Before turning to the following discussion of ways to narrow the second chance gap, it is important to acknowledge that it neglects other, perhaps more important, questions—for example, about the scope of relief provided and the legitimacy of the underlying deprivation of rights. However, recognizing that "issues of judicial administration affect substantive case outcomes,"[226] the following discussion focuses on addressing the parts of the gap that are attributable to administrative, "red-tape" factors to second-chance gaps, through ruthless iteration, burden shifting, and automation.

B. *Ruthless Iteration*

One finding that emerges from reviewing relatively more and less successful second chance initiatives is that implementing them at scale requires clear, ascertainable, consistently applied criteria. But in context after context, untested rules that do not take into account the wide variety of scenarios that may arise or explicitly consider capacity to implement have stymied the delivery of second chances. Given the complexity of the criteria and the data required to implement them, perfection should not be expected on the first try, but rather, ruthless iteration, to fulfill the intent and promise of second chances.

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226.   Devins, *supra* note 54, at 112.

Attempting to apply records-clearance criteria in an automated way demonstrates the challenges.[227] Data-hygiene issues all too familiar to data practitioners, including data silos, missing data, and dirty data,[228] make it difficult to apply widely used criteria that are specific to the person, charge, or disposition status. To know whether or not a conviction is the person's "first offense," she has "stayed clean" for the requisite period of time, or she has satisfied other qualifying (or disqualifying) conditions[229] requires a reliable way to identify that person across statewide criminal records;[230] for example, through a unique state ID. But according to the Council for State Government's Justice project, only eighteen states have and use a unique state identification (SID) number for each person consistently.[231] Provisions that are "person specific" are both common and difficult to ascertain at scale without an authorized identification strategy.[232] Table 5 includes a list of expungement provisions that, while operational in a petition-by-petition clearance process, have proven difficult to implement at scale; the reason they are problematic; and drafting alternatives.

There will still be important reasons to include hard-to-ascertain criteria—individuals with more involved criminal histories or that have served longer sentences will require more vetting but also may receive more impactful relief when they qualify. However, the extent to which data silos, missing data, and dirty data reduce the ability of candidates to be cleared efficiently should at least be taken into consideration and, where possible, minimized. This requires not a "one and done" approach but an agile, iterative approach that allows for refinement of the criteria to fit the existing informational infrastructure. Rules that don't take into account capacity to implement are not limited to expungement.[233] For example, errors in resentencing calculations have been blamed on the inability of "court clerks to record judges' orders correctly, prison and jail administrators to properly read those

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227. Some of which are listed in Table 5: Clearance Criteria Examples and Challenges.

228. *See, e.g.*, Anders Haug & Jan Stentoft Arlbjørn, *Barriers to Master Data Quality*, 24 J. ENTER. INFO. MGMT. 288, 292–97 (2011).

229. For examples, see Table 5: Clearance Criteria Examples and Challenges.

230. Rather than, for example, a statewide case-management system.

231. The Council of State Gov'ts Just. Ctr., *Action Item 3: Use Measures That Permit More Timely Analysis in Addition to Cohort-Based Measures*, 50-STATE REP. ON PUB. SAFETY, https://50statespublicsafety.us/part-2/strategy-1/action-item-3/#graphic-3 [https://perma.cc/D2FH-RSLP].

232. Rhode Island, for example, includes three record-specific criteria that require, respectively, conviction records to be connected to a first misdemeanor or first felony and for the person to have no subsequent arrests or convictions. 12 R.I. GEN. LAWS §§ 12-1.3-2 to .3-3(b)(1) (2002). However, as of 2017, it did not have or use a common ID across criminal justice data systems. The Council of State Gov'ts Just. Ctr., *supra* note 231.

233. *See, e.g.*, Goldin, *supra* note 225 (discussing the role of complexity in the EITC context, and distinguishing between informational and computational complexity).

instructions, and facility staff to accurately add and subtract good-time credits."[234]

Iteration and consultation with implementers can ensure that second chance criteria are developed in a way that supports not only their clarity but consistent application, as is underscored by considering the Clemency Initiative, compassionate release, and "Drugs Minus Two" resentencing programs, all of which enable inmates to apply for shortened sentences. In her report *Lessons Learned*, a comprehensive analysis of several federal resentencing initiatives, Caryn Devins cites as one of the factors that led to the success of the Drugs Minus Two initiative—which had a relatively small second chance gap[235]—that in most cases eligibility for the program could readily be determined without a complex legal analysis.[236] This enabled courts to grant relief regardless of whether an affected individual filed a motion. It also allowed the U.S. Sentencing Commission to generate preliminary lists of eligible defendants to district courts upon request.[237]

In contrast, the Obama Clemency Initiative, by all accounts, suffered from uneven and inconsistent application of the criteria for commutation. In its report, the U.S. Sentencing Commission noted the high rate of false negatives and positives resulting from the mismatch between published criteria and outcomes.[238] According to former U.S. Pardon Attorney Margaret Love, this meant that "[r]elief was granted in dozens of cases that evidently did not satisfy the eligibility criteria announced" while "many prisoners whose cases did meet the eligibility criteria were *inexplicably* denied relief."[239]

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234.   Laura Sullivan, *Without Reviews, Inmates Can Get Lost in U.S. Prison System*, NPR (Apr. 5, 2013, 4:09 AM), https://www.npr.org/2013/04/05/176302378/without-reviews-inmates-can-get-lost-in-u-s-prison-system [https://perma.cc/3APX-6JZ6].

235.   Of about 21 percent based on figures published by the U.S. Sentencing Commission. U.S. SENT'G COMM'N, 2014 DRUG GUIDELINES AMENDMENT RETROACTIVITY DATA REPORT tbls.1 & 3 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications /retroactivity-analyses/drug-guidelines-amendment/20150624-Drug-Retro-Analysis.pdf [https://perma.cc/H3NL-2G52].

236.   Devins, *supra* note 54, at 73–74.

237.   *Id.* at 91, 117.

238.   SCHMITT ET AL., *supra* note 74, at 2 (only 5.1 percent of the offenders who received a commuted sentence met all the factors, while only 3.4 percent of the sentences of drug-trafficking offenders that met all the factors did).

239.   Love, *supra* note 117, at 271–72 (emphasis added).

TABLE 5: CLEARANCE CRITERIA EXAMPLES AND CHALLENGES

Criteria	Administrability Challenge	Example	Drafting Alternative
Sentence completion	Not tracked in court data and hard to infer as clean sentencing data is often not available; it also is often unclear whether or not outstanding fines and fees must be paid and whether they have been.	Records relating to a first conviction voided upon the petitioner's successful completion of the sentence will be sealed by the court. KY. REV. STAT. ANN. § 218A.275(1), (8), (9) (West 2012). Record can be sealed by the court one year after sentence completion if the petitioner has no subsequent convictions. COLO. REV. STAT. § 24-72-706(1)(a), (1)(b)(i), 1(f).	Disposition date (+ X Years)
First conviction; qualifying conditions	Lack of unique identifier across precludes determination		Bless commercial identification approximation technique
Personal demographic trait such as age, military status, or other condition	Information may not be easily ascertainable/available on the record or charge category condition	Records relating to an offense committed by current and former military personnel can be dismissed." CAL. PEN. CODE § 1170.9 (West 2015). A record may be destroyed when the person who is the subject of the record reaches thirty-eight years of age. CAL. WELF. & INST. CODE § 781(d) (West 2020).	Specify an identification strategy that can be implemented at scale or do not include demographic traits
Class or grade condition	Missing class, grade, or category information	Records relating to a charge or conviction for a petty offense, municipal ordinance violation, or a Class 2 misdemeanor as the highest charge can be removed from the public record after 10 years, if all court-ordered conditions are satisfied. S.D. CODIFIED LAWS § 23A-3-34 (2016).	Explicitly specify the qualifying crimes
Court-ordered conditions	Require individual review/check for any "court-ordered" conditions and compliance		Do not include court-ordered conditions
Laundry list disposition criteria	Vulnerable to changes to definitions, requires detailed clean data	Records of arrest are destroyed within 60 days after detention without arrest, acquittal, dismissal, no true bill, no information, or other exoneration. R.I. GEN. LAWS § 12-1-12(a), (b).	Simple description, e.g., "All records that do not end in a conviction"

Prison staff, corrections officials, and final decisionmakers have little guidance in many cases.[240] This results in confusing eligibility criteria that take so long to evaluate that applicants die in the interim.[241] For states like Illinois and Michigan that have programs in place but "provide no detailed rules or guidance on implementing them,"[242] the present situation is even more dire.

In the case of federal compassionate release, ruthless iteration and oversight provided by the Office of Inspector General (OIG) of the Department of Justice, watchdog groups, and Congress have helped to, over time, improve implementation of the law. After a 2013 OIG report detailed "significant problems with the management" of the compassionate-release program, the BOP implemented new provisions meant to increase and clarify the law.[243] But a 2015 report, revised again in 2016, found that the new provisions did not address the problem and reiterated that the BOP's guidelines were still inadequate and recommended "revising the requirements that limit the availability of compassionate release for these inmates."[244] In 2016, the Sentencing Commission stepped in to provide broader, stronger and more ascertainable criteria.[245] For example, for elderly prisoners with medical conditions, it eliminated the requirements that prisoners over sixty-five years old be "experiencing deteriorating physical or mental health that substantially diminishes their ability to function in prison" and that "[c]onventional treatment promise[] no substantial improvement," as previously required by the BOP.[246]

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240.   *Id.* at 14.

241.   *Id.* at 7.

242.   *Id.* at 12.

243.   *See* OFF. OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., *supra* note 62, at 46.

244.   *Id.* at i–iii.

245.   U.S. SENT'G GUIDELINES MANUAL § 1B1.13 cmt. n.1 (U.S. SENT'G COMM'N 2018) (stating that the standard of "extraordinary and compelling reasons" can be met on four grounds: Medical, Age, Family Circumstances, and Other, and defining each); *see also* S. REP. NO. 115-139, at 80 (2017) ("In 2016, the U.S. Sentencing Commission [USSC] amended the criteria for compassionate release and encouraged BOP to file a motion for those prisoners who meet the criteria the Commission identified."); *id.* at 80–81 (where the Senate gave BOP sixty days to respond to its inquiry with answers as to how it had complied with the new criteria, which criteria it had not implemented, an explanation of why not and a plan to comply, the number of prisoners granted and denied compassionate release in the five years preceding along with the number of applicants, the reasons for each denial or grant of release, the duration of time between application submission and determination, and the number of prisoners who died waiting for determination with the duration of time they had waited); *see also* Letter from Senator Brian Schatz et al. to Thomas R. Kane, *supra* note 124 (directing BOP to file all motions for compassionate release that may meet one of the criteria thereof and demanding that data on reform implementation be transmitted directly to the Senate).

246.   *See* FAMS. AGAINST MANDATORY MINIMUMS, COMPASSIONATE RELEASE AND THE FIRST STEP ACT: THEN AND NOW 2–3, https://famm.org/wp-content/uploads/Compassionate-Release-in-the-First-Step-Act-Explained-FAMM.pdf [https://perma.cc/DPX3-QXM9].

In 2017, the Senate Appropriations Committee, under pressure from outside groups, directed the BOP to report on its efforts to increase its use of compassionate release, and to essentially report on the second chance gap and its root causes, by providing data on the number of requests, their results, the reasons for denials, and the number of people who died waiting for an answer.[247] In the spirit of continual improvement, the First Step Act of 2018 further streamlined eligibility[248] and introduced a right of appeal, building oversight on discretion. It also added a notification provision to families of prisoners that fall into eligibility.[249]

C. *Centralization and Burden Shifting*

Centralizing and shifting the burden for delivering second chances to the state is another strategy for narrowing the second chance gap. For example, one of the major criticisms of the Clemency Initiative was that decisions were made by a decentralized staff given wide latitude to grant, deny, and even refashion sentences.[250] The lack of a unified approach to reviewing applications introduced inconsistencies and inefficiencies in administration.[251] The Drugs Minus Two program (like certain previous presidential pardon programs[252]), in contrast, benefited from a uniform and "proactive, relatively centralized and efficient process."[253]

The experiences of California and Pennsylvania with records clearing are also illustrative. California has fifty-eight counties, each responsible for

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247. S. Rep. No. 115-139, at 80 (where the Senate gave BOP a list of categories on which it must produce data, concluding with "(8) for each year, the number of prisoners who died while their compassionate release requests were pending and, for each, the amount of time that had elapsed between the date the request was received by the warden").

248. *See* 18 U.S.C. § 3582(c)(1)(A) (supplemented by the First Step Act of 2018, giving prisoners the opportunity to appeal BOP's decision not to file a motion for compassionate release).

249. That includes notification to a prisoner's loved ones seventy-two hours after a terminal diagnosis of the right to submit a compassionate-release request, and requirements that the BOP must process requests within fourteen days, in addition to providing assistance to prisons unable to submit release requests on their own. *Id.* § 3582(d)(2)(A)(i)–(iv).

250. *See, e.g.*, Rachel E. Barkow & Mark Osler, *Designed to Fail: The President's Deference to the Department of Justice in Advancing Criminal Justice Reform*, 59 Wm. & Mary L. Rev. 387, 429–32 (2017). The need to decentralize came, in part, from the program's well-publicized resource constraints, but drawing upon former prosecutors as reviewing staff introduced another problem: "structural bias." *Id.* at 434; *see also* Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. Rev. 802, 824 (2015).

251. Barkow & Osler, *supra* note 250, at 429–32.

252. *See, e.g.*, Love, *supra* note 117, at 275 n.5 (Clemency Legacy) (describing President Ford's Clemency Board, which "reviewed approximately 21,500 applications over a period of 12 months, and submitted a total of 14,514 recommendations for clemency to the President, most of which were granted").

253. Devins, *supra* note 54, at 74.

deciding how to implement key parts of Propositions 47 and 64.[254] A review of county websites undertaken for this Article yielded no information about how to clear one's record under these provisions for twenty-two and twenty-eight counties, respectively.[255] Putting in place a default centralized, statewide process would relieve the burden on individual counties to devise their own programs. During the writing of this Article, California passed AB-1793, largely implementing this idea by requiring the identification and automatic clearance of Prop 64 eligible offenses unless objected to by a prosecutor.[256] Pennsylvania's recently enacted Clean Slate Act assigns responsibility for sealing nonconvictions and minor convictions from criminal records to the state police and statewide Administrative Office of Pennsylvania Courts.[257] Burden shifting in these ways not only supports more efficient, centralized administration, but also automation and cost-savings, addressed in the next Subsection.[258]

But even when the burden is on the state, small differences in how the law is drafted or implemented can contribute to big differences in the consequences of a criminal record. Two states that have similar rules on paper but divergent outcomes with respect to what employers see are Alaska and Vermont. Under Alaskan law, records relating to a case where all charges result in acquittal or dismissal cannot be published on a publicly available website sixty days after the date of acquittal or dismissal.[259] In Vermont, the waiting time until recently was longer, twelve months, but the court will seal the rec-

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254. Including the scope of form of petition and admissible evidence. J. RICHARD COUZENS & TRICIA A. BIGELOW, PROPOSITION 47: "THE SAFE NEIGHBORHOODS AND SCHOOLS ACT" 43, 54 (2017), https://www.courts.ca.gov/documents/Prop-47-Information.pdf [https://perma.cc/8YHE-DYJ5] ("The statute does not define the scope of evidence admissible to prove or disprove the petitioner's eligibility for resentencing" and "[n]o particular form of petition is specified by the initiative"); *accord* COUZENS & BIGELOW, *supra* note 141, at 19, 40.

255. Many of these included the twenty-two counties that lack a formal public defender's office. CALIFORNIANS FOR SAFETY & JUST., SECOND CHANCES AND SYSTEMS CHANGE: HOW PROPOSITION 47 IS CHANGING CALIFORNIA 56 (2017), https://safeandjust.org/wp-content/uploads/P47_Report_Final.pdf [https://perma.cc/Q7ML-7ZNQ].

256. CAL. HEALTH & SAFETY CODE § 11361.9 (West 2020) (outlining a process under which the Department of Justice, before July 1, 2019, will "review the records in the state summary criminal history information database and shall identify past convictions" and courts shall automatically "reduce or dismiss the conviction" if there is no prosecutorial challenge by July 1, 2020).

257. 18 PA. CONS. STAT. § 9122.2(a)–(b) (2018). In those situations where the courts miss a case or are missing grading information, a petitioner may still proactively file a sealing petition. § 9122.3(c).

258. State-based identification can support clearance across disparate counties—a survey of clearance seekers in California found that 43 percent had charges in multiple counties. *Clear My Record*, CODE FOR AM., https://www.codeforamerica.org/what/clear-my-record [https://perma.cc/28KK-EWXJ]. It also can support economies of scale by enabling clearance on multiple bases using a "human-centered" rather the more typical "case-centered" approach.

259. ALASKA STAT. § 22.35.030 (2018).

ord after dismissal or a finding of no probable cause.[260] But while Vermont's second chance current gap was close to 0 percent for the studied years, based on data available to employers, the second chance gap among gig jobseekers in Alaska did not decline in 2017,[261] despite its enactment of its "no website access" policy in 2016.[262] This could be because background check companies can nonetheless access criminal justice data through, for example, a state data feed or court runner and disseminate this information electronically even in the absence of a state website.[263]

In Vermont, until 2019, a person's criminal history record was sealed by the court twelve months after a finding of no probable cause, dismissal at arraignment, or dismissal without prejudice before trial, unless the prosecuting attorney objected.[264] But arguably just as, if not more, important than this law is the decision of the Vermont agency that provides information to employers, the Vermont Criminal Information Center (VCIC), to only "report[] information on someone who has been *convicted* of a crime."[265] This provides a seal around criminal information that is not present in Alaska.

D. *Automating Delivery of Second Chances*

Though every second chance program is unique, each petition-based system requires the same basic steps to be carried out: the applicant must ascertain the criteria, gather court and other records, and work with a lawyer to apply the criteria to existing records to determine eligibility and apply; and the state must evaluate the application and grant relief.[266] Student re-

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260.   VT. STAT. ANN. tit. 13, § 7603(a) (Supp. 2019).

261.   In fact, it increased from approximately 30 percent to 37 percent, based on my analysis on sample sizes of 86 and 115 cases, respectively (limiting the precision of point estimates).

262.   COLLATERAL CONSEQUENCES RES. CTR., *supra* note 51, at 4.

263.   *See, e.g.*, Kasey Schroer, *Background Check FAQs – Criminal and Offense History Searches*, HIRERIGHT: BLOG (Dec. 13, 2008), https://www.hireright.com/blog/background-checks/criminal-background-checks/background-check-faqs-criminal-and-offense-history-searches [https://perma.cc/5RPY-YPVF] (saying companies like HireRight "maintain a network of court runners to facilitate in-person courthouse record searches" where records are not available online).

264.   Tit. 13, § 7603(a) (2018). Note that the timeline was changed to sixty days in the 2019 statutory supplement.

265.   *Information for Court Diversion Participants About Criminal Records*, VT. CT. DIVERSION, http://vtcourtdiversion.org/court-diversion/information-on-criminal-records/ [https://perma.cc/4Z2H-6L2E] ("If an employer runs a check on a person against whom charges were filed and subsequently dismissed . . . VCIC staff will inform the employer that there is 'no record.'").

266.   For example, for a person to reclassify her felony under California's Prop 47 requires determining eligibility based on conviction records; obtaining a copy of her criminal record (or records); completing the forms of the Superior Court in which she was convicted for each felony; making copies of the form, one each for the Superior Court and district attorney where she was convicted; and filing these forms. The D.A., Superior Court, and, in some cases, the public defender in that district must then verify all the information provided, coordinate among bu-

searchers at Stanford have estimated the public and private costs of carrying out petition-based records clearing in California, including the court's cost, the cost of preparing the application, and related costs, at $3,757.[267]

Automation can reduce the costs of clearing first, by implementing steps in the process to scale. The California Senate Appropriations Committee has estimated the costs of identification of Prop 64-eligible convictions through the DOJ's centralized repository and the cost of the court processing petitions to be about $7.87–$27.87 million per 218,094 convictions, at an average cost of about $36–$128 per cleared conviction.[268]

Far more efficient is the "total automation" option that does not require any action by the second chance recipient or court. Many states automatically restore voting rights,[269] for example, and a handful of states specify that nonconviction records "shall" be expunged.[270] Several counties in California, working with Code for America, have also worked to proactively provide relief without a petition under Propositions 47 and 64.[271] Under the terms of Pennsylvania's Clean Slate Act, the state automatically sealed nonconviction and older conviction records,[272] at an estimated "one-time" cost to the courts of $3.4 million.[273] An estimated 1.15 million Pennsylvanians received relief under the bill in the first year.[274] This translates into a cost per person receiving relief, based on just the nonconvictions backlog, of approximately $2.96.

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reaucracies, and evaluate the claim. *Change My Record*, MY PROP 47, http://myprop47 .org/change-my-record/ [https://perma.cc/FB2C-A4W3].

267.   MEYLI CHAPIN, ALON ELHANAN, MATTHEW RILLERA, AUDREY K. SOLOMON & TYLER L. WOODS, A COST-BENEFIT ANALYSIS OF CRIMINAL RECORD EXPUNGEMENT IN SANTA CLARA COUNTY 6 (2014). The process of applying for reenfranchisement is generally even more involved, requiring, for example, an individual to determine and then pay outstanding fines and fees; wait the mandatory waiting period, if any; determine his criminal history; use legal analysis to apply the criteria for restoration; fill out the forms and apply to the relevant tribunal; prepare to answer questions about home life, job status, employment history, and child support; prepare a record of any encounters with law enforcement; get certified copies of document relating to criminal offenses; get references; and then proceed to a hearing, followed by a board recommendation, and then a gubernatorial decision. *See* MANZA & UGGEN, *supra* note 153, at 84–89.

268.   FISCAL SUMMARY OF A.B. 1793, *supra* note 140.

269.   *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 9, § 8.181 (2018).

270.   *See, e.g.*, IOWA CODE ANN. § 692.17(1) (West 2016).

271.   *See, e.g.*, *supra* note 143 (noting the proactive initiatives of San Francisco and Alameda).

272.   18 PA. CONS. STAT. §§ 9121(b), 9122 (2018).

273.   Email from Ami Levin, Data Exch. Project Manager, Admin. Off. of Pa. Cts., to author (July 24, 2020, 11:17 AM) (on file with the *Michigan Law Review*).

274.   Sharon Dietrich, *As COVID-19 Continues, Expanding Clean Slate Legislation Will Help People in Need*, PHILA. INQUIRER (July 1, 2020 9:30 AM), https://www.inquirer.com /opinion/commentary/clean-slate-legislation-records-sealed-pennsylvania-covid-19-recovery- 20200701.html [https://perma.cc/E6Q4-EY6C].

TABLE 6: RECORDS CLEARING COST ESTIMATES

Implementation	Cost	Components
Legal-Clinic-Assisted Petition-Based Clearance[275]	$3,757 per person	$59 (probation office costs), $242 (court costs), $3,412 (legal assistance provided by the Records Clearance Project), $44 (legal fees of the offender)
Automated Identification + Petition Based Clearance[276]	$36–$128 per charge	$5–$26 million (court costs), $2.9 million (DOJ identification costs) (does not include prosecution/PD costs)
"Clean Slate" Total Automation[277]	Approximately $2.96 per person ($3.4 million to support an initial tranche of around 1.15 million people eligible for relief)	$195 thousand (for changes to police computerized criminal history systems), $50 thousand (for implementation by the Administrative Office of PA Courts)

IV. OPEN POLICY AND RESEARCH QUESTIONS

This Article has described and documented the gaps that exist between available and delivered second chances and highlighted approaches for narrowing these gaps at scale. Yet while the case studies of the previous Section describing the advantages of automated and automatic methods over petition-based ones counsel their embrace, an appreciation of the broader contexts and dynamics point in the opposite direction, away from a too-narrow focus on closing the second chance gap through better-written laws and administrative fixes alone. Chief among them is that the very frame of "second chances" risks legitimizing the underlying criminalization, incarceration, and deprivation of the right to vote, get a good job and housing, and to be free in the first place. This Part, at its conclusion, discusses the existence of a "first chance gap" when the rules of the United States and other countries are compared.

This Part also identifies open policy and research questions that address other aspects of the administration and delivery of second chances and,

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275.   CHAPIN ET AL., *supra* note 267, at 6.

276.   FISCAL SUMMARY OF A.B. 1793, *supra* note 140.

277.   18 PA. CONS. STAT. §§ 9121(b), 9122 (2018).

more importantly, their impact. These include the important role of debt and data in contributing to "second second chance gaps"; the futility of fully clearing one's record in a digital age; our current lack of understanding of the public and private impacts of second chance relief at scale, particularly in the absence of notification and in the shadow of statistical discrimination; and the second chance gap among women and juveniles.

A. *Second Second Chance Gaps*

Even when automation is embraced, debt-related barriers and dirty data can lead to incomplete delivery, creating "second second chance gaps" and the risk of exacerbating, rather than reducing and ultimately eliminating, "unwarranted racial disparities across the criminal justice system" as called for by the civil rights community.[278] Both are discussed below.

Limits on available administrative data make it difficult to determine the extent to which debt is deterring applications for second chances. But debt obligations pose distinct barriers to the delivery of second chances and currently stand in the way of records expungement,[279] license reinstatement,[280] and enfranchisement[281] second chances. The inability to fulfill these prerequisites creates wealth-based barriers to second chances, creating a real risk of their regressive impact. While automation holds the ability to "level the playing field" as to awareness and application burden, in the absence of debt relief it can further exacerbate, rather than narrow, existing disparities.[282] The debt can include fines, fees, and restitution, each with a distinct purpose and

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278.   LEADERSHIP CONF. ON CIV. & HUM. RTS., THE USE OF PRETRIAL "RISK ASSESSMENT" INSTRUMENTS: A SHARED STATEMENT OF CIVIL RIGHTS CONCERNS 2–3 (2018) (Principle 1).

279.   *E.g.*, Mackenzie J. Yee, *Expungement Law: An Extraordinary Remedy for an Extraordinary Harm*, 25 GEO. J. ON POVERTY L. & POL'Y 169, 186 (2017) (citing IND. CODE § 35-38-9-2(e)(2), (3) (2017) (specifying that only if the court finds that the defendant has "paid all fines, fees, and court costs, and satisfied any restitution obligation placed on the person as part of the sentence" and met other requirements, it "shall" expunge the conviction record)); *see also* WASH. REV. CODE § 9.94A.637(1) (2019) (requiring satisfaction of all sentence elements, including "any and all legal financial obligations," as part of sentence completion prerequisite to expungement).

280.   *E.g.*, April D. Fernandes, Michele Cadigan, Frank Edwards & Alexes Harris, *Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform*, 15 ANN. REV. L. & SOC. SCI. 397, 407 (2019) (describing *Johnson v. Jessup*, 381 F. Supp. 3d 619 (M.D.N.C. 2019), in which Johnson's license was reinstated only after plaintiff paid outstanding fees associated with traffic tickets); *see also* VA. CODE ANN. § 46.2-395 (2017) (stating that a license shall remain suspended until all fines and fees are paid in full, or installment payment plan approved).

281.   *E.g.*, Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. C.R–C.L. L. REV. 189, 224 (2016) ("Felons who have failed to pay fines, fees, restitution, and court costs in Alabama, Arizona, Arkansas, Connecticut, and Delaware cannot be re-enfranchised until their [legal financial obligations] are paid.").

282.   *See* LEADERSHIP CONF. ON CIV. & HUM. RTS.,, *supra* note 278.

rationale.[283] For example, a defendant may get a speeding ticket and be is-sued a fine.[284] Or if they are found guilty of theft, they may be ordered to pay restitution in the amount of the stolen amount to the plaintiff.[285] But increas-ingly, defendants are also being charged by the court for fees associated with operating the legal system, even tangential aspects not directly related to the disposition of cases.[286] In contrast to fines, which are usually limited in amount and intended to deter,[287] and restitution, which is meant to compen-sate victims in criminal cases,[288] court and correction fees can apply to all cases and can quickly run into the thousands and outweigh fines and restitu-tion.[289] Saddling a defendant with "use costs,"[290] fees can be motivated by a municipality's desire to raise revenue.[291]

For poor defendants, repayment requirements can present insurmount-able structural barriers to second chances. Like the other burdens associated with records clearance, financial costs operate in a regressive manner, put-ting expungement out of the reach of those who arguably need it the most. While current American Bar Association guidelines call for the courts to

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283. Thomas Capretta, *Highway Robbery: Due Process, Equal Protection, and Punishing Poverty with Driver's License Suspensions*, 26 WM. & MARY BILL RTS. J. 1213, 1217 n.41 (2018) (describing the multiple purposes as articulated by the Virginia Supreme Court of the state's statutory court-collection process including: "to facilitate the payment of fines, court costs, penalties . . . to collect the monies due . . . as a result of these convictions, and []to assure pay-ment of court-ordered restitution to victims of crime").

284. Fernandes et al., *supra* note 280, at 409.

285. *Cf. id.*

286. Edelman, *supra* note 43, at 215 ("Governments jacked up fines and added moun-tainous fees that had no connection with the violation—for example, a portion of a $500 fee went toward the cost of running the courthouse gym in one county in Michigan."(footnote omitted)).

287. *See, e.g.*, Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 418 (2019) (describing how "a reduced fine or public service can adequately serve the state's interest in accomplishing deterrence and punishment" (footnote omitted)).

288. Atkinson, *supra* note 281, at 190 n.4 ("Restitution is payment from an offender to a victim for losses suffered as a result of the crime. It is authorized in every state.").

289. WHITELEMONS, *supra* note 43, at 8, 12–13 (describing former inmates returning to society with debts totaling in the thousands of dollars and listing examples of common fees that add up to over $1,200).

290. Atkinson, *supra* note 281, at 190–91 ("Defendants in criminal cases began having to pay restitution, court costs, room and board, and even public defender fees. As time went on, fees spiraled into new areas: DNA testing, medical examinations, even jury selection." (foot-notes omitted)).

291. Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016) (describing the municipal budgetary constraints, including following the Great Recession, that have led city criminal justice municipalities to impose fines, fees, court costs, and interest); *see also* Edelman, *supra* note 43, at 215 (describing the diversion of "court fees" in one county of Michigan being collected and applied to finance a county-employee fitness gym).

have the ability to waive fines and fees after individualized assessments,[292] and some jurisdictions have moved in this direction,[293] this trend is not universal and waiver is often only available after years of timely payments.[294] Those who can't pay may find themselves barred from the employment that they need to become able to do so. As it has in debtor's prison and related contexts,[295] this aspect of the criminal justice system punishes the poor,[296] potentially long after their time has been served.

    Another "second second chance gap" in expungement has been created by the poor quality of criminal justice data and, in particular, ambiguous dispositions (described below in Section IV.C) and charge-grade (e.g., "felony B," "misdemeanor 2") information. The lack of grade or severity data is problematic because many states' eligibility criteria use charge grades as a way to distinguish between clearable and nonclearable offenses.[297] In the first year of implementation of the Pennsylvania Clean Slate Act, many people

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    292.   Malia Brink, *ABA Guidelines on Fines and Fees Used to Promote Critical Reforms*, CRIM. JUST., Summer 2019, at 54, 54 ("Further the Guidelines state that neither a fine nor a fee should ever 'be greater than an individual's ability to pay,' noting that judges must have the 'ability to waive or reduce' any fine or fee (Guidelines 1 and 2). The Guidelines further state that a hearing on ability to pay should be held before the imposition of any fine or fee (Guideline 4)." (quoting ABA PRESIDENTIAL TASK FORCE ON BUILDING TR. IN THE AM. JUST. SYS., TEN GUIDELINES ON COURT FINES AND FEES 1–2 (2018))), https://www.americanbar.org /content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines _court_fines.pdf [https://perma.cc/9MUZ-ZEQM]).

    293.   *See, e.g.*, Fernandes et al., *supra* note 280, at 409 (describing Washington state's new policy allowing for waiver of multiple forms of legal financial obligations upon a finding of indigency).

    294.   *See, e.g.*, OKLA. STAT. ANN. tit. 22, § 983a (2003 & Supp. 2019) ("On or after November 1, 2016, the court shall have the authority to waive all outstanding fines, court costs and fees in a criminal case for any person who . . . [h]as made installment payments on outstanding fines, court costs, fees and restitution ordered by the court on a timely basis every month for the previous twenty-four (24) months following release from the custody of the Department of Corrections.").

    295.   Fernandes et al., *supra* note 280, at 405 (describing the practice of "pay or stay, or incarcerating people for inability to pay fines and fees" that commonly arises in the context of "those who have outstanding debt owing to traffic violations or misdemeanor offenses [and] are threatened with jail because they do not have the means to pay at the time of assessment. Courts generally specify a per-day amount that is compensated toward the remaining debt, usually between $10 and $30 per day in jail. The widespread use of this practice to compel payment of outstanding legal debt has prompted scholars, civil rights attorneys, and advocates to declare these modern-day debtors' prisons").

    296.   *See generally* LOÏC WACQUANT, PUNISHING THE POOR: THE NEOLIBERAL GOVERNMENT OF SOCIAL INSECURITY (2009) (arguing that, in the post-civil rights era, the criminal justice system has been used as a tool to curb social insecurity by penalizing poverty).

    297.   *See, e.g.*, *infra* Table 5: Clearance Criteria Examples and Challenges; *accord* Michael Hollander, Dir. of Analytics, DATA Lab, Phila. Dist. Att'y's Off., Presentation: The Hidden Problems Behind Clean Slate: Legacy Data Problems in Automated Record Clearing (Nov. 14, 2019) (discussing the issue of missing grades in the application of Pennsylvania state law to Pennsylvania criminal records).

with convictions have been unable to get relief due to missing grade data, falling into the "second second chance gap."[298] In drafting California's AB1076, which was passed in the fall of 2019 and provides for automated clearance of some convictions, lawmakers punted on data issues, stating that relief would only be granted if "relevant information is present."[299] While this makes the law implementable without huge costs, it also means that many who likely deserve relief won't get it.

In addition to grade data, personal information pertaining, for example, to the individual's military status, age, sexual trafficking-victim status, or to the amount of money at stake, or that implicates discretion or other out-of-record criteria is also nearly impossible to implement at scale.[300] Criteria based on the date of sentence completion are also surprisingly difficult to implement, due to indeterminate sentencing and the complexities of what can happen after a person is sentenced,[301] and because it is much harder to pinpoint a completion date than, for example, disposition date. The good news is that policy interventions can be used to address each such issue ex ante by, for example, blessing the use of standard commercial name-matching techniques; pegging waiting times to disposition dates, rather than sentence completion date;[302] and more generally taking into account implementation in policy development. Table 5 lists problematic phrases and drafting alternatives, but perfection on the first try should not be expected; rather, ruthless iteration as discussed in Part III is required.

B. *The Impossibility of Forgetting*

In the vein of thinking about reentry more broadly, even if an individual clears her official criminal record, the growth in the number and accessibility of electronic criminal records[303] increases the risk that expunged information

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298. Hollander, *supra* note 297.

299. Assemb. B. 1076, 2019 Leg., Reg. Sess. (Cal. 2019).

300. For example, one aspect of California Prop 47, its $950 ceiling with respect to property crimes, has been relatively hard to implement at scale because it requires analysis of the police record. *See supra* note 261 and accompanying text. Conversely, two of the factors that made computational determination of the expungable population in Maryland possible were that the laws were very objective and that all the information needed to determine eligibility was on the state website. Email from Matthew Stubenberg, IT Dir. & Staff Att'y, Md. Volunteer Laws. Serv., to author (Mar. 2, 2018, 6:25 AM) (on file with the *Michigan Law Review*).

301. An example might be, "probation: 5 YEARS; restitution: 1760; other: 90 DAYS WORK; RELEASE ** 11/05/2014 SENTENCE MODIFICATION-PROBATION REVOKED; 6 YEARS DEPARTMENT OF CORRECTIONS, 241 DAYS CREDIT FOR TIME SERVED, $1906.08 RESTITUTION."

302. For a list of problematic phrases and drafting alternatives, see Table 5: Clearance Criteria Examples and Challenges.

303. Blumstein & Nakamura, *supra* note 164, at 328.

will remain accessible to employers and others.[304] Although credit-reporting agencies that are subject to the Fair Credit and Reporting Act (FCRA) have a duty to report accurate information and to provide means of redress when errors are made, unofficial "people search" websites are not bound by these requirements.[305]

Audits of commercial-screening companies have revealed that they are at risk of reporting sealed records, misclassification (for example, reporting a misdemeanor as a felony), or inappropriately disclosing information protected by consumer and privacy laws.[306] When records providers don't have in place protocols for updating data or do not receive updated data in an easily ingestible fashion, the risk of outdated, inaccurate information is high.[307] The "futility of expungement,"[308] or impossibility of erasure, not to mention its fundamental conflict with the First Amendment and tradition of government-records transparency and accessibility, has led a number of prominent advocates to oppose expungement as a priority strategy.[309]

Individuals can take several steps to protect themselves from outdated criminal-profile data,[310] but at a systemic level, laws that effectively regulate background screening and "mugshot" services,[311] and that make it easy (for example, by requiring regular publication of the "change file") to update databases of information, and that comply with and punish the dissemination of outdated information, can help.[312] In Europe, the "right to be forgotten" has been used to require Google to delist references to a businessman's criminal history,[313] and the novel idea of using the Digital Millennium Copyright Act (DMCA) to require commercial providers to "take down" mugshots has

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304.   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, 1725–26 (2003).

305.   15 U.S.C. §§ 1681a, 1681i, 1681k.

306.   PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER L. CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES   3–4   (2012),   https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf [https://perma.cc/HQ6V-487F].

307.   Roberts, *supra* note 165, at 345–46.

308.   *E.g.*, JACOBS, *supra* note 95, at 308 (describing clearing remedies as "largely futile").

309.   *See, e.g.*, *id.* at 130 (describing former Pardon Attorney Margaret Love's opposition to expungement); *id.* at 121–23 (describing the "insurmountable" obstacles the First Amendment places on prohibiting media disclosure of expunged information).

310.   Sharon M. Dietrich, *Ants Under the Refrigerator? Removing Expunged Cases from Commercial Background Checks*, CRIM. JUST., Winter 2016, at 26, 28–29.

311.   Roberts, *supra* note 165, at 345–46.

312.   Dietrich, *supra* note 310, at 29.

313.   Jason Tashea, *'Right to Be Forgotten' Can Apply to Criminals: UK High Court Rules Against Google*, A.B.A. J. (Apr. 16, 2018, 8:00 AM), https://www.abajournal.com/news/article/right_to_be_forgotten_can_apply_to_criminal_records_rules [https://perma.cc/F6QD-JSZT].

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also been suggested[314]—at some cost, it must be acknowledged, to the First Amendment. The exercise of such rights would supplement the authority of the Consumer Financial Protection Bureau (CFPB), Federal Trade Commission (FTC), and Fair Credit Reporting Act to police the accuracy of criminal background checks prepared by commercial screeners.[315]

The redaction of records also raises significant challenges for researchers, criminal defense attorneys, journalists, and others seeking complete records with which to, inter alia, hold the prosecutor and the judiciary accountable for their decisions. In addition, given that many expungement laws contemplate that records will remain available to law enforcement,[316] chances that one can get completely away from one's past record seems vanishingly small. These realities raise questions about the relative costs and benefits of closing second chance gaps as opposed to enacting other types of reform, including "forgiving" remedies. Licensure reform[317] and Ban the Box policies, [318] for example, are less burdened by the tradeoff between records expungement and access to complete and full government records raised by Clean Slate policies.

C. *Punishing Innocence with Dirty Data*

A collateral finding of this research is that criminal justice data information about *non*convictions—arrests or charges that have been dropped, acquitted, or diverted or are pending or otherwise not accompanied by a determination of guilt—is widely available through background checks. A person with a severe felony charge—even if the charge is dropped—will still be harmed by it. Among the over half a million charges reviewed in the analysis of background checks reported in Part III, only about 40 percent included a definitive record of conviction (Table A-2)—the sort of information that an employer should care most about.

What's worse, the disposition was often unclear. As described in Appendix M, for the analysis reported in Part III, our team of law and tech stu-

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314. Jason Tashea, *Use Copyright Law to Battle Mugshot Extortion*, A.B.A. J. (Mar. 27, 2018, 9:23 AM), http://www.abajournal.com/lawscribbler/article/use_copyright_law_to_battle _against_mugshot_extortion [https://perma.cc/PFT4-HUTZ].

315. Dietrich, *supra* note 310, at 28 ("[T]he background screening industry is regulated by two federal agencies, the Federal Trade Commission (FTC) and the relatively new Consumer Financial Protection Bureau (CFPB)."); *May Background Screeners Lawfully Report Expunged Records?*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 6, 2018), https://ccresourcecenter.org/2018/02/06/may-background-screeners-lawfully-report-expunged -records/ [https://perma.cc/HXQ3-J8NY].

316. Love, *supra* note 19.

317. *E.g.*, *Collateral Consequences in Occupational Licensing Act*, INST. FOR JUST., https://ij.org/activism/legislation/model-legislation/model-collateral-consequences-reduction- act/ [https://perma.cc/G96S-9MRC].

318. *See infra* notes 335–336 and accompanying text.

dents spent hundreds of hours cleaning ambiguous disposition data. A large share of the records included terms like "nolle pro sequi" and "nolo conten-dere" (legalese for "dismissed" and "guilty (no contest)"), which mean little to the average prospective landlord, employer, or person evaluating a candi-date, but also terms like "no true bill," "forfeit," and "adjudication withheld," which were difficult even for seasoned attorneys to place into "guilty" or "not guilty" categories. If you were an employer, a job applicant's aggravated as-sault charge from a previous year might give pause, even if the disposition didn't indicate that person was guilty. Out of the over half a million disposi-tions we initially considered, many had to be discarded because of ambigui-ties in the data, and only 59 percent, we estimate, included a "plain English" disposition.[319]

Fine distinctions risk meaning even less to the computers that are in-gesting criminal data en masse, often with little oversight, to make decisions on a wide range of official and civil contexts.[320] Criminal background checks purport to protect the workplace and other environments from convicted criminals. But civil punishments based on nonconvictions, in areas as di-verse as housing,[321] employment,[322] and immigration,[323] are being meted out. Crucially, the criminalization of innocence risks disproportionate impact on the nearly 50 percent of African American men and more than 40 percent of Latino men arrested by the age of twenty-three, as compared to about 22 percent among white males.[324]

The Model Law on Non-Conviction Records developed by the Collateral Consequences Resource Center and a team of advisors including myself rec-ommends automatic expungement of most arrests and charges that do not result in conviction, a laudable goal consistent with the foundational pre-

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319.   Disposition includes "dismiss," "not guilty," "acquit," "guilty," "convicted," "admit," "admission"; not, for example, "nolle." *See infra* Appendix M.

320.   *See* Goggins, *supra* note 162.

321.   MARIE CLAIRE TRAN-LEUNG, SARGENT SHRIVER NAT'L CTR. ON POVERTY L., WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING 16–20 (2015), https://www.povertylaw.org/wp-content/uploads/2019/09/WDMD-final.pdf [https://perma.cc/6D7J-5AWZ]; Colin Lecher, *Automated Background Checks Are Deciding Who's Fit for a Home*, VERGE (Feb. 1, 2019, 8:00 AM), https://www.theverge.com/platform/amp/2019/2/1/18205174/automation-background-check-criminal-records-corelogic [https://perma.cc/W9DT-Q93N].

322.   *See* Goggins, *supra* note 162.

323.   Christie Thompson, *How ICE Uses Secret Police Databases to Arrest Immigrants*, MARSHALL PROJECT (Aug. 28, 2017, 7:00 AM), https://www.themarshallproject.org/2017/08/28/how-ice-uses-secret-police-databases-to-arrest-immigrants [https://perma.cc/578E-KBPB].

324.   Robert Brame, Shawn D. Bushway, Ray Paternoster & Michael G. Turner, *Demo-graphic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQ. 471, 478 (2014).

sumption of innocence.[325] But to even determine whether the many charges with ambiguous dispositions should be considered nonconvicted or not will often require judgement calls, a way to resolve stale charges, and a number of other data-compensation steps.

D. *Understanding the Impact of Second Chance Relief*

Unlocking better outcomes and removing unfair barriers, not just mechanically delivering second chances, should be viewed as the ultimate goal and yardstick of second chance relief. In this regard, it is important to acknowledge that there may be tradeoffs between the quantity and quality of second chance relief. What is easy (e.g., clearing recent nonconvictions without notice) is not necessarily what is meaningful (e.g., destruction of old felony conviction records with the knowledge and redemption of the person).

Currently, little is known about how records clearing can be carried out at scale and with the greatest social benefit. That is because existing studies documenting the positive impact of clearing have been of petition-based clearing, which introduces significant selection bias and implicates a qualitatively different process than automated clearing. Completing the clearance process provides an individual with increased confidence,[326] the knowledge of how to characterize one's newly cleared past, and in some cases, wraparound services,[327] each of which may contribute to improved outcomes. To that end, two factors are hypothesized to be required for an individual to benefit from records clearance: (1) that the clearance is effective at preventing background checks from discovering the information, and (2) that the individual has and exercises her right to be allowed to deny a record's existence.[328] But just as a person unaware of the restored right to vote probably won't register or go to the polls, not knowing one's past record has been cleared can lead to inadvertent and unnecessary disclosures of past history.[329] The experience of automated felony reenfranchisement holds a number of cautionary tales for automated expungement. In the reenfranchisement context, researchers have found that "a high percentage of individuals with past criminal involvement hold uncertain or incorrect beliefs about their right to vote" and that this "reduce[s] voter turnout."[330] The hypothesized mecha-

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325.   *Model Law on Non-Conviction Records*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/model-law-on-non-conviction-records-3/   [https://perma.cc /4WND-FKC5].

326.   Adams et al., *supra* note 92, at 27, 43.

327.   As recommended by, for example, CALIFORNIANS FOR SAFETY & JUST., *supra* note 255, at 57.

328.   I thank Serena Holthe for making this point to me.

329.   Kelman & Carlson, *supra* note 137.

330.   Marc Meredith & Michael Morse, *The Politics of the Restoration of Ex-Felon Voting Rights: The Case of Iowa*, 10 Q.J. POL. SCI. 41, 43 (2015).

nisms are important and turn on several factors that are likely to operate, potentially even on a heightened scale, to automated expungements.

First, misinformation and uncertainty about one's rights are present because policies are set at the state level and vary widely by state, making it difficult to determine which specific policies apply to a particular ex-felon, who also may have charges across states. The policies differ in subtle ways, "with distinctions based on the specific crime or the length of time since discharge," and they are also "particularly fluid" with frequent changes and updates.[331] Second, when the cost of mistakenly asserting a second chance that one doesn't have is high—casting a vote when ineligible is a felony,[332] and not disclosing a prior criminal record can also have significant consequences—the uncertainty about whether one has a second chance is even more likely to chill its use. In this regard, it is notable that Pennsylvania's Clean Slate Act, which automatically seals nonconviction records—records associated with summary convictions and misdemeanors within ten years, as long as the individual's record is clear—does not require notification.[333] Neither does California's AB1793, which significantly automates the process of clearing marijuana convictions.[334]

Beyond the notification question, however, the impact of records clearing more broadly, particularly on those with and without records, deserves attention. Studies have found that Ban the Box strategies that prohibit employers from asking job applicants about their criminal histories or performing background checks until the point of hiring, on the theory that delaying criminal history information will diminish its importance, have inadvertently led to statistical discrimination against low-skilled Black men without a record while not necessarily improving outcomes for young, low-skilled Black men with records.[335] Records clearing at scale could have similar unintended consequences.

In her review of studies of the impact of Ban the Box, Jennifer Doleac, the author of several of the studies, concluded that because Ban the Box removes the ability of young, low-skilled Black male applicants without records to signal their clean records, employers rely on their own judgments and "assume there is a high likelihood that they have a record and do not in-

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331.   *Id.* at 47.

332.   *Id.* at 43.

333.   H.B. 1419, 2017 Gen. Assemb., Reg. Sess. (Pa. 2018).

334.   Fiscal Summary of A.B. 1793, *supra* note 140.

335.   *See, e.g.*, Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 24–25 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22469, 2016), https://www.nber.org/system/files/working_papers/w22469/w22469.pdf [https://perma.cc/GD8N-2XQP] (finding that "Ban the Box" strategy reduces the probability of employment for young Black and Hispanic men without a college degree by 3.4 and 2.3 percentage points respectively).

terview them."[336] However, Clean Slate is distinguishable from Ban the Box in at least three ways. First, because information will be removed selectively from qualifying records, employers won't necessarily be aware that any information they were previously able to access is missing from a particular record. Nor will employers, as in Ban the Box, be specifically prohibited from accessing information in a way that plausibly prompts an awareness of the absence of criminal information and the need to address it through speculation. If employers "don't know what they are missing" under Clean Slate, they are less likely to replace individualized judgments with general statistical discrimination. Second, Clean Slate rehabilitates only the subset of records that meet the eligibility criteria, as compared to Ban the Box, which applies to all criminal histories. Third, it can be implemented in multiple ways—for example, by removing expunged information entirely from the system or by retaining it, but with an indicator that the information is no longer available. These factors belie facile conclusions about Clean Slate based on Ban the Box but do not undercut the need for data to address them.

E. *What About the (Women and) Children?*

Further research is also needed to understand the different experiences of particular subgroups and how policy attention can be prioritized, including with respect to juveniles. Clean Slate efforts to date have been focused on adults, but catching individuals earlier in their lives may have a greater impact on not only the individual but also society.[337] Though sealing remedies were originally "pioneered in the juvenile justice system,"[338] and separate juvenile courts developed to protect the privacy of minors, the spectre of juvenile "super predators" and related developments led to a gradual loosening of restrictions.[339] But while more attention has been paid recently to the expansion of access to juvenile records, little of it has focused on the methods available to shrink this access, whether automated or petition based. But juvenile sealing rates, as reported in Table 4-1, also reflect a low (less than 10

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336.   *The Fair Chance to Compete for Jobs Act: Hearing on H.R. 1076 Before the Subcomm. C.R. & C.L. of the H. Comm. on Oversight & Reform*, 116th Cong., at III, 10 (2019) (written statement of Jennifer Doleac, Professor of Economics, Texas A&M University, submitted by Rep. Roy).

337.   This is consistent, for example, with the Heckman curve, which hypothesizes that "[s]kill remediation programs . . . are much less efficient compared to early intervention programs" for individuals with educational disadvantages, indicating diminishing returns to investments in human capital over an individual's lifetime. James J. Heckman, *Policies to Foster Human Capital* 42 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7288, 1999), https://www.nber.org/system/files/working_papers/w7288/w7288.pdf [https://perma.cc/X36M-J2AP].

338.   JACOBS, *supra* note 95, at 114.

339.   Joy Radice, *The Juvenile Record Myth*, 106 GEO. L.J. 365, 382, 418 (2018).

percent) uptake gap.[340] Yet given the potentially significant consequences on a young adult's trajectory from their criminal record, the uptake gap among juveniles may be as much if not more of a critical policy priority than the adult second chance gap, and it has started to receive policy attention.[341]

The disparate impacts of records and records clearance on other populations is also notable. For example, several studies have found that women represent almost 50 percent of those seeking records clearance,[342] as compared to approximately 25 percent of those arrested,[343] due potentially in part to the desire of women to enter "caregiving" fields such as nursing and geriatric care, whose licensing requirements often bar individuals with criminal records.[344] This suggests that criminal records act as a particular impediment to women, with implications for how expungement awareness campaigns are targeted and the urgency of licensure reforms. Likewise, the immigration consequences for noncitizens of clearable criminal records, which in the case of deportation[345] arguably dwarf other collateral consequences, also deserve further attention. Understanding the particular ways in which criminal records impact distinct populations can support tailored solutions to providing appropriate relief from a criminal history.

F.   *The First Chance Gap*

Finally, a focus on the second chance gap should not draw attention away from another, perhaps more important gap: the gap between the United States and other Western countries in what is taken away, and therefore requires restoration in the first place, when an individual becomes system involved. In the same way that the U.S. Constitution, open government tradition, and data industry conspire in the United States to make forgetting impossible, in Europe, prohibitions on disclosure, judicial anonymization of

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340.   Calero, *supra* note 26, at 37 (finding that more than 90 percent of juveniles qualified for but had not taken advantage of available remedies).

341.   *See, e.g.*, *Biden-Sanders Unity Task Force Recommendations*, BIDEN HARRIS 8, 61, https://joebiden.com/wp-content/uploads/2020/08/UNITY-TASK-FORCE-RECOMMEND ATIONS.pdf [https://perma.cc/34S9-KWV8] (stating that "children who do enter the juvenile justice system should be given a true second chance, including by automatically sealing and expunging juvenile records" and specifying that the receipt of federal funds be conditioned on "the automatic expungement and sealing of juvenile records").

342.   *See, e.g.*, TANSEY & CARLIN, *supra* note 221, at 12 (finding that 48 percent of records-clearance applicants were female); Prescott & Starr, *supra* note 26 (finding 46 percent of studied set-aside recipients to be female).

343.   *Ten-Year Arrest Trends*, *supra* note 65 (showing that female arrests comprised 23 to 27 percent of all arrests from 2006 to 2015).

344.   Elsa Y. Chen & Ericka B. Adams, *"I've Risen Up from the Ashes that I Created": Record Clearance and Gendered Narratives of Self-Reinvention and Reintegration*, 14 FEMINIST CRIMINOLOGY 143, 150–54 (2019).

345.   *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 360–64 (2010) (describing the deportation risks that accompany criminal pleas).

defendant names, and a strong tradition of privacy as well as various conti-
nent-wide regulations and courts work to make finding an individual's crim-
inal history in the first place difficult.[346] Likewise, felon reenfranchisement is
unnecessary in the large number of European countries that don't take away
the rights of incarcerated individuals to vote in the first place.[347] In this con-
text, closing the second chance gap feels more like a last resort than a first-
order option for ensuring that everyone has a fair shot from the start.

Prosecutors play crucial roles in the creation of the need for second
chances. In the regression models described earlier, among the three policy
factors, choice of clearance method explained some of the variance: counties
that had adopted to some degree an "automatic" clearance approach had a
4.1 percent lower second chance current gap.[348] Also highly relevant to the
size of the gap was, naturally, the generosity of the state's policy (did the state
allow for clearance of any nonconvictions or all nonconvictions?)—as this
difference in policy defines whether and to what degree nonconvictions
charges can be cleared. But also, perhaps less expected, the convictions rate,
or how many charges turned into convictions, were highly relevant: a 10 per-
cent increase in the share of charges that were never convicted was associat-
ed with a 10 percent increase in the second chance gap. The share of charges
in the sample that were actually convictions ranged dramatically state by
state, as shown in Table-A2.

Yet uncharged and unconvicted arrests and charges, when not cleared,
stay on people's records and in criminal-records databases that are used by
employers, lenders, licensing agencies, and social-service agencies to feed in-
to algorithmic and other determinations.[349] In this vein, efforts to support
contact with the system without creating a record, as pursued by the pro-
gressive D.A. movement, are worthy of further piloting, evaluation, and
adoption.

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346.   JACOBS, *supra* note 95, at 159–61.

347.   *Id.* at 250.

348.   One might ask, why doesn't introducing automated methods of clearance account
for more of the difference in gap sizes? There are several possible explanations. First, methods
that appear automated on the books do not always result in effective clearance in implementa-
tion, as in the case of Alaska. States that likewise do not have policies of automation can none-
theless, because of policy choices, be more effective at shielding records due to a variety of
factors. In addition, our model currently has the flaw that it does not account for time effects,
in part because of the uncertainty around the retroactivity of clearance efforts, which distorts
the analysis pertaining to states that adopted automatic clearance provisions only. Finally, be-
cause so few states have adopted automatic clearing, and they do so in such different ways, the
explanatory power of this variable, relative to the others where there is a greater range of val-
ues, is small.

349.   JACOBS, *supra* note 95, at 4; Jain, *Arrests as Regulation*, *supra* note 169, at 824–25; *see
also* James B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 U. ST.
THOMAS L.J. 387, 395 (2006).

Conclusion

This Article has introduced the concept of the second chance gap as an important metric for measuring the effectiveness of the growing wave of second chance laws. Though automating second chances in the ways discussed in this Article may be viewed as in tension with a justice system that requires individualized attention, it provides a way to scale relief in a way that traditional models cannot. Regardless of the specific implementations jurisdictions choose, only by attending to the details of administration and measurement will the potential of second chance opportunities to save taxpayer money, restore dignity, and further economic integration, to break the cycle of mass criminalization, be fulfilled.

APPENDIX A

TABLE A-1: BASIC STATISTICS

Average age range at time of charge	29.6 (mode = 21)	
Number of states represented	50	
Average number of checks per state*	1,395	
Unique individuals studied	61,658	
Incidents studied	204197	
Charge Types	**Count**	**Share**
Misdemeanor	310,802	66.99%
Not classified	1,785	0.38%
Felony	97053	20.92%
Minor	54,334	11.71%
Total charges	463,974	
Total misdemeanor + felony charges	407,855	
Charge Disposition	**Count**	**Share**
Nonconvicted: acquitted, dismissed or other	179,655	38.72%
Diversion or deferral	5,443	1.17%
Conviction	246043	53.03%
Pending/ transferred	23,699	5.11%
Unknown	9,134	1.97%
Total charge dispositions	463,974	100%
Total diversion or deferral + pending/ transferred	29,142	
*One person may have records in multiple states		

TABLE A-2: STATE-LEVEL BASIC STATISTICS

State	Charge Count	Misde-meanor %	Felony %	Minor %	Not Classi-fied %	Charge Convic-tion %	Noncon-viction %	Diver-sion or Deferral %	Pending/ Trans-ferred %	Un-known %
Total	463,974	66.99%	20.92%	11.71%	0.38%	53.03%	38.72%	1.17%	5.11%	1.97%
AK	3322	70.59%	14.18%	15.23%	0.00%	82.27%	16.98%	0.12%	0.57%	0.06%
AL	4386	55.38%	35.64%	8.98%	0.00%	57.82%	37.25%	1.07%	3.85%	0.00%
AR	5240	75.27%	19.50%	5.17%	0.06%	68.80%	23.45%	1.34%	4.39%	2.02%
AZ	12865	44.89%	29.00%	21.27%	4.84%	53.74%	42.09%	0.18%	2.17%	1.82%
CA	7219	64.86%	26.96%	8.19%	0.00%	74.35%	23.59%	0.39%	0.80%	0.87%
CO	15343	47.94%	16.33%	35.50%	0.23%	41.05%	57.60%	0.34%	0.04%	0.97%
CT	3411	72.59%	27.00%	0.41%	0.00%	82.35%	17.38%	0.06%	0.03%	0.18%
DE	6896	73.36%	22.32%	4.31%	0.01%	31.28%	66.84%	0.46%	0.44%	0.99%
FL	29906	54.17%	17.80%	27.90%	0.13%	40.50%	50.22%	1.14%	2.21%	5.92%
GA	8787	70.73%	29.11%	0.14%	0.02%	48.50%	36.11%	0.08%	10.70%	4.61%
HI	2968	66.41%	25.00%	8.52%	0.07%	58.93%	38.11%	2.63%	0.17%	0.17%
IA	12822	93.60%	5.20%	1.18%	0.02%	74.33%	23.53%	1.41%	0.19%	0.55%
ID	14895	48.66%	7.87%	43.47%	0.00%	69.71%	24.95%	1.26%	3.29%	0.79%
IL	8286	52.82%	25.34%	21.61%	0.22%	40.08%	47.61%	0.49%	8.18%	3.63%
IN	10530	62.73%	14.30%	22.85%	0.12%	61.86%	36.57%	0.72%	0.44%	0.41%
KS	2150	67.95%	30.70%	1.35%	0.00%	54.56%	41.35%	3.53%	0.23%	0.33%
KY	5500	69.35%	17.02%	13.64%	0.00%	60.44%	30.42%	1.91%	5.78%	1.45%
LA	3975	55.57%	34.04%	10.39%	0.00%	58.74%	38.99%	0.40%	1.38%	0.48%
MA	3971	60.72%	35.58%	3.65%	0.05%	25.99%	70.39%	0.98%	2.29%	0.35%
MD	21218	72.74%	15.87%	10.84%	0.55%	16.73%	62.57%	0.00%	20.14%	0.56%
ME	3568	80.41%	19.06%	0.53%	0.00%	74.83%	23.49%	0.25%	0.64%	0.78%
MI	3524	62.32%	36.92%	0.77%	0.00%	60.98%	34.36%	0.06%	4.20%	0.40%
MN	11107	94.63%	5.07%	0.19%	0.12%	84.18%	14.49%	0.14%	0.98%	0.21%
MO	6231	63.06%	32.47%	3.90%	0.58%	92.20%	3.61%	0.00%	0.08%	4.11%
MS	2509	61.62%	38.10%	0.28%	0.00%	63.45%	25.11%	0.36%	9.29%	1.79%
MT	3142	71.23%	28.71%	0.06%	0.00%	62.57%	28.80%	4.77%	3.25%	0.60%
NC	26191	39.83%	17.86%	42.30%	0.00%	38.09%	59.28%	0.00%	1.73%	0.91%
ND	5428	86.31%	9.86%	3.70%	0.13%	88.84%	5.27%	0.09%	0.35%	5.45%
NE	5553	80.82%	10.39%	8.77%	0.02%	69.98%	27.07%	0.11%	2.76%	0.09%

NH	4033	29.78%	69.40%	0.72%	0.10%	60.97%	37.86%	0.00%	1.12%	0.05%
NJ	5085	20.04%	57.09%	16.89%	5.98%	42.05%	50.97%	0.53%	5.57%	0.88%
NM	11361	76.03%	23.15%	0.44%	0.38%	27.02%	60.74%	5.62%	6.57%	0.04%
NV	54305	76.22%	23.70%	0.06%	0.01%	51.99%	38.70%	0.71%	7.24%	1.36%
NY	2909	42.52%	53.28%	4.16%	0.03%	71.47%	7.29%	0.00%	19.35%	1.89%
OH	9575	86.91%	12.68%	0.34%	0.06%	62.83%	27.89%	0.15%	3.57%	5.57%
OK	7358	80.39%	17.74%	1.77%	0.11%	60.34%	23.10%	16.24%	0.03%	0.29%
OR	7556	40.85%	25.94%	33.07%	0.13%	61.39%	36.83%	0.79%	0.94%	0.04%
PA	27164	71.23%	26.23%	1.78%	0.76%	34.38%	37.94%	0.03%	22.18%	5.47%
RI	3908	72.85%	26.43%	0.69%	0.03%	60.67%	34.34%	0.15%	4.20%	0.64%
SC	14781	87.71%	11.91%	0.31%	0.07%	76.97%	21.11%	0.00%	1.79%	0.13%
SD	4286	86.79%	10.43%	2.75%	0.02%	59.50%	38.71%	0.02%	1.00%	0.77%
TN	9399	77.06%	18.30%	3.71%	0.93%	39.59%	45.72%	2.32%	8.25%	4.13%
TX	11638	73.90%	20.63%	4.45%	1.01%	47.59%	36.04%	7.97%	1.03%	7.38%
UT	6570	90.14%	6.83%	3.03%	0.00%	64.28%	34.79%	0.03%	0.88%	0.02%
VA	10668	57.80%	23.03%	18.94%	0.23%	58.08%	36.50%	0.25%	3.08%	2.08%
VT	1045	87.66%	12.34%	0.00%	0.00%	98.37%	0.19%	1.24%	0.10%	0.10%
WA	4643	80.10%	19.71%	0.19%	0.00%	59.27%	37.86%	2.33%	0.13%	0.41%
WI	9483	63.07%	22.07%	14.45%	0.41%	67.08%	30.55%	0.75%	0.32%	1.31%
WV	4098	72.79%	26.74%	0.46%	0.00%	41.51%	51.42%	0.98%	5.81%	0.29%
WY	3166	84.43%	15.29%	0.28%	0.00%	61.75%	32.79%	3.00%	1.30%	1.17%

TABLE A-3: DISPOSITION STATISTICS

State	Charge Count	Misde-meanor Convic-tion Count	Felony Convic-tion Dis-position Count	Minor and Not Classified Convic-tion Count	Noncon-viction	Diversion Count	Pending/ Trans-ferred Count	Unknown Count
Total	463,974	174,431	42,552	56,226	160,426	6,254	17,170	6,915
Share of Total Count	-	37.6%	9.2%	12.1%	34.6%	1.3%	3.7%	1.5%
AK	3322	2,030	293	410	564	4	19	2
AL	4386	1,549	763	224	1,634	47	169	0
AR	5240	2,774	666	165	1,229	70	230	106
AZ	12865	3,317	1,544	2,053	5,415	23	279	234
CA	7219	3,669	1,369	329	1,703	28	58	63
CO	15343	3,025	927	2,346	8,838	52	6	149
CT	3411	1,931	868	10	593	2	1	6
DE	6896	1,598	514	44	4,609	32	30	68
FL	29906	7,042	1,910	3,163	15,019	341	661	1,770
GA	8787	3,102	1,156	4	3,173	7	940	405
HI	2968	1,047	507	195	1,131	78	5	5
IA	12822	9,088	326	115	3,017	181	24	71
ID	14895	4,902	475	5,006	3,716	188	490	118
IL	8286	1,292	1,029	1,001	3,945	41	678	301
IN	10530	3,907	760	1,847	3,851	76	46	43
KS	2150	794	372	7	889	76	5	7
KY	5500	2,508	429	387	1,673	105	318	80
LA	3975	1,291	851	193	1,550	16	55	19
MA	3971	431	501	100	2,795	39	91	14
MD	21218	2,743	541	266	13,276	0	4,273	119
ME	3568	2,221	438	11	838	9	23	28
MI	3524	1,394	741	14	1,211	2	148	14
MN	11107	8,942	384	24	1,609	16	109	23
MO	6231	3,764	1,713	268	225	0	5	256
MS	2509	1,013	572	7	630	9	233	45

MT	3142	1,527	439	0	905	150	102	19
NC	26191	4,300	1,752	3,922	15,526	0	453	238
ND	5428	4,231	399	192	286	5	19	296
NE	5553	3,314	215	356	1,503	6	153	5
NH	4033	849	1,592	18	1,527	0	45	2
NJ	5085	474	1,069	595	2,592	27	283	45
NM	11361	2,406	599	66	6,901	638	746	5
NV	54305	24,122	4,107	4	21,016	386	3,932	739
NY	2909	901	1,140	38	212	0	563	55
OH	9575	5,401	601	13	2,670	14	342	533
OK	7358	3,639	711	90	1,700	1,195	2	21
OR	7556	1,617	1,076	1,946	2,783	60	71	3
PA	27164	7,059	1,964	316	10,306	8	6,025	1,486
RI	3908	1,843	513	15	1,342	6	164	25
SC	14781	10,509	831	37	3,120	0	265	19
SD	4286	2,300	171	79	1,659	1	43	33
TN	9399	2,824	771	125	4,297	218	775	388
TX	11638	4,230	1,044	263	4,194	928	120	859
UT	6570	3,846	254	123	2,286	2	58	1
VA	10668	3,632	1,190	1,375	3,894	27	329	222
VT	1045	903	125	0	2	13	1	1
WA	4643	2,085	659	8	1,758	108	6	19
WI	9483	3,876	1,215	1,269	2,897	71	30	124
WV	4098	1,451	236	14	2,107	40	238	12
WY	3166	1,718	230	7	1,038	95	41	37

APPENDIX B

TABLE B-1

State	Inci-dents	Charges	Unique People	Convic-tion Rate	Noncon-viction-Clear-ance Policy	Waiting Period? (Days)	Number of Peo-ple with Cleara-ble Rec-ords	Per-centage of Peo-ple with Cleara-ble Rec-ords Within Sample	Share of People that Could Clear Their Record Entirely Within Sample
Total	204,197	372,673	61,658	80%	-		26,826	39%	22%
AK	1,998	2,803	1,169	95%	Strict	60	70	6%	5%
AL	2,180	3,789	1,199	70%	Lenient	730	482	40%	24%
AR	2,876	4,582	1,245	89%	Strict		384	31%	26%
AZ	4,609	9,112	1,682	85%	Super-strict		0	0%	0%
CA	4,210	6,497	2,032	94%	Strict		365	18%	15%
CO	4,198	9,678	1,566	73%	Strict		962	61%	40%
CT	2,380	3,392	1,221	91%	Lenient	395	291	24%	18%
DE	2,796	6,473	1,243	62%	Strict		800	64%	51%
FL	10,511	19,681	2,685	55%	Super-strict		0	0%	0%
GA	3,486	7,423	1,748	77%	Strict	1460	368	21%	15%
HI	1,696	2,625	1,054	66%	Lenient		547	52%	42%
IA	8,221	12,411	1,581	95%	Strict	180	636	40%	27%
ID	4,829	8,011	1,288	86%	Strict	365	568	44%	32%
IL	3,776	5,697	1,679	60%	Strict		1,080	64%	56%
IN	3,866	7,973	1,408	81%	Lenient	365	815	58%	30%
KS	1,194	2,034	754	75%	Strict		297	39%	34%
KY	2,863	4,297	1,256	86%	Lenient		565	45%	33%
LA	2,278	3,485	1,280	75%	Strict		529	41%	37%
MA	1,998	3,681	1,249	22%	Lenient	1825	340	27%	11%
MD	5,586	14,957	1,645	58%	Strict	1095	952	58%	33%
ME	2,175	3,492	1,266	90%	Strict		252	20%	17%
MI	2,376	3,335	1,334	81%	Strict		470	35%	30%
MN	7,669	10,925	1,861	97%	Strict		276	15%	10%
MO	3,053	5,695	1,498	97%	Strict	1095	0	0%	0%
MS	1,768	2,215	1,210	80%	Strict		305	25%	25%

MT	1,821	2,871	1,162	84%	Strict		356	31%	27%
NC	6,373	14,441	1,848	65%	Lenient		1,406	76%	53%
ND	3,374	4,909	1,366	99%	Strict		98	7%	6%
NE	3,211	4,913	1,346	89%	Strict		395	29%	24%
NH	1,827	3,955	1,192	85%	Strict		416	35%	27%
NJ	1,715	3,661	1,060	73%	Strict		460	43%	38%
NM	4,275	9,881	1,401	62%	Strict		1,026	73%	58%
NV	27,102	49,232	1,669	88%	Strict		1,118	67%	38%
NY	1,654	2,227	1,156	100%	Strict	365	22	2%	2%
OH	5,225	8,652	1,877	93%	Strict		528	28%	19%
OK	2,964	6,019	1,214	84%	Lenient	365	510	42%	26%
OR	2,524	4,918	1,252	80%	Lenient		726	58%	37%
PA	5,796	19,050	1,905	87%	Lenient		1,133	59%	29%
RI	2,474	3,685	1,273	77%	Strict		536	42%	36%
SC	7,931	14,444	1,658	95%	Lenient		687	41%	27%
SD	2,628	4,100	1,259	90%	Strict		350	28%	20%
TN	3,931	7,667	1,482	68%	Lenient		1,062	72%	49%
TX	6,562	9,183	2,121	71%	Strict	365	1,095	52%	43%
UT	3,723	6,310	1,416	85%	Strict	180	588	42%	31%
VA	4,663	8,132	2,098	81%	Strict		955	46%	37%
VT	747	1,030	473	100%	Lenient	365	1	0%	0%
WA	3,200	4,502	1,549	67%	Strict	730	601	39%	31%
WI	3,369	7,853	1,391	93%	Strict		303	22%	14%
WV	2,280	3,789	1,243	72%	Strict	60	638	51%	40%
WY	2,236	2,986	1,233	82%	Strict	180	462	37%	32%

TABLE B-2

State	Percentage of People with Clearable Records Within Checkr Sample	Number of People that Could Clear Their Record Entirely Within Checkr Sample	Share of People that Could Clear Their Record Entirely Within Checkr Sample	Number of People with a Felony Charge	Number of People with a Felony Charge that Could Remove any Felony Charges	Percentage of People with a Felony Charge that Could Remove any Felony Charges	Percentage of People Nationally with Records (SEARCH)	Crim Population-Balanced Share of People with Clearable Records	Number of People Estimated to Have Clearable Records (M)	Number of People Estimated to Have Records Clearable of Felonies
Total	39%	13,689	22%	23,200	7,476	32%	100.0%	35.4%	25.50	13.92
AK	6%	54	5%	242	28	12%	0.3%	0.0%	0.01	0.006
AL	40%	290	24%	553	142	26%	2.1%	0.8%	0.61	0.297
AR	31%	323	26%	332	90	27%	0.7%	0.2%	0.15	0.043
AZ	0%	0	0%	801	0	0%	1.7%	0.0%	0.00	0.000
CA	18%	310	15%	630	121	19%	9.8%	1.8%	1.27	0.497
CO	61%	619	40%	545	209	38%	1.6%	1.0%	0.71	0.239
CT	24%	215	18%	494	34	7%	1.1%	0.3%	0.19	0.029
DE	64%	633	51%	428	183	43%	2.2%	1.4%	1.04	0.301
FL	0%	0	0%	1,067	0	0%	5.9%	0.0%	0.00	0.000
GA	21%	257	15%	651	121	19%	3.8%	0.8%	0.57	0.271
HI	52%	447	42%	245	90	37%	0.5%	0.3%	0.19	0.038
IA	40%	422	27%	223	80	36%	0.7%	0.3%	0.20	0.038
ID	44%	407	32%	252	116	46%	0.4%	0.2%	0.12	0.034
IL	64%	942	56%	677	252	37%	6.5%	4.2%	2.99	0.800
IN	58%	425	30%	444	213	48%	1.6%	0.9%	0.68	0.340
KS	39%	256	34%	280	91	33%	1.4%	0.5%	0.39	0.140
KY	45%	420	33%	282	140	50%	1.3%	0.6%	0.42	0.141
LA	41%	478	37%	575	201	35%	1.5%	0.6%	0.46	0.193
MA	27%	139	11%	502	9	2%	1.4%	0.4%	0.28	0.018
MD	58%	546	33%	620	328	53%	1.5%	0.9%	0.62	0.371
ME	20%	214	17%	311	65	21%	0.5%	0.1%	0.07	0.023
MI	35%	400	30%	489	103	21%	2.9%	1.0%	0.72	0.187
MN	15%	180	10%	201	31	15%	1.0%	0.2%	0.11	0.019
MO	0%	0	0%	530	0	0%	1.5%	0.0%	0.00	0.000
MS	25%	300	25%	508	68	13%	0.9%	0.2%	0.17	0.039

MT	31%	319	27%	363	142	39%	0.2%	0.1%	0.05	0.022
NC	76%	981	53%	495	402	81%	1.6%	1.2%	0.86	0.354
ND	7%	83	6%	175	16	9%	0.2%	0.0%	0.01	0.002
NE	29%	326	24%	211	95	45%	0.4%	0.1%	0.08	0.024
NH	35%	322	27%	1,012	361	36%	0.4%	0.1%	0.11	0.121
NJ	43%	398	38%	767	338	44%	2.1%	0.9%	0.66	0.564
NM	73%	807	58%	392	266	68%	0.6%	0.4%	0.30	0.100
NV	67%	639	38%	621	424	68%	0.8%	0.5%	0.39	0.256
NY	2%	21	2%	805	15	2%	9.0%	0.2%	0.12	0.089
OH	28%	361	19%	352	145	41%	2.2%	0.6%	0.45	0.182
OK	42%	319	26%	409	28	7%	0.9%	0.4%	0.29	0.025
OR	58%	463	37%	557	299	54%	1.2%	0.7%	0.48	0.311
PA	59%	559	29%	682	453	66%	2.6%	1.5%	1.10	0.894
RI	42%	460	36%	355	146	41%	0.9%	0.4%	0.28	0.087
SC	41%	452	27%	535	359	67%	1.6%	0.7%	0.47	0.373
SD	28%	246	20%	202	73	36%	0.3%	0.1%	0.06	0.016
TN	72%	731	49%	398	246	62%	2.1%	1.5%	1.09	0.367
TX	52%	905	43%	620	213	34%	13.0%	6.7%	4.83	1.138
UT	42%	446	31%	161	51	32%	0.7%	0.3%	0.21	0.024
VA	46%	786	37%	542	260	48%	2.1%	1.0%	0.70	0.231
VT	0%	0	0%	74	0	0%	0.2%	0.0%	0.00	0.025
WA	39%	480	31%	392	70	18%	1.6%	0.6%	0.46	0.067
WI	22%	192	14%	608	93	15%	1.4%	0.3%	0.22	0.104
WV	51%	492	40%	376	193	51%	0.6%	0.3%	0.24	0.093
WY	37%	397	32%	214	73	34%	0.2%	0.1%	0.05	0.009

APPENDIX C: MULTIPLE LINEAR REGRESSION RESULTS

Step	Variables	Model 1	Model 2	R2
Step 1	Automatic clearance	-0.294**	-0.041**	0.12
Step 2	Generosity	0.181**	0.112**	0.20
Step 3	Conviction rate	-1.02**	-1.022**	0.75
Step 4	RUCC_2013 [T.2.0]		0.015	0.76
	RUCC_2013 [T.3.0]		0.018	
	RUCC_2013 [T.4.0]		0.021	
	RUCC_2013 [T.5.0]		0.021	
	RUCC_2013 [T.6.0]		0.058**	
	RUCC_2013 [T.7.0]		0.028	
	RUCC_2013 [T.8.0]		0.026	
	RUCC_2013 [T.9.0]		0.051*	
	Average age		-0.002**	
	Inpopulation		0.017*	
N= 2253, **=p<.001, *=p<.01				

I worked with a research assistant to conduct a hierarchical multiple linear regression to predict the current records-clearing gap based on state and local policies and the demographics characteristics of the target population. The current record clearing gap was calculated as the percentage of cases eligible for clearance at the county level. Relevant policies included the generosity of the state's clearance rules (lenient or strict, with superstrict counties omitted due to the lack of any clearance), the presence of any "automatic" clearing provisions in state law,[350] and the county's conviction rate (percentage of charges that led to convictions).

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350.   The range in provisions was considerable. Compare, for example, Maine's provision, under which records of an arrest or court proceeding that did not lead to a conviction become confidential immediately, 16 ME. REV. STAT. ANN. tit. 16, § 703(2) (2020), and Connecticut's more restricted rule, under which records from the police, court, and state's attorney that relate to a case for which a nolle prosequi was entered are erased within thirteen months. CONN. GEN. STAT. § 54-142a(c) (2019).

Model 1: Gap size = Auto-Clearance + Generosity + ConvictionRate

Model 2: Gap size = Auto-Clearance + Generosity + ConvictionRate + Age + Lnpopulation + Rural-Urban Code

These three variables were included in the initial regression ($r2=0.753$, all ps < 0.001). Each successive variable explained additional variance (all Fs > 4.2, all ps < 0.01). A second regression model was then run to add demographic variables: the average age of people charged, the rural/urban classification[351] and ln(population) of the county ($r2=0.757$, all ps except ln(population) < 0.001).

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351. *2010 Census Urban and Rural Classification and Urban Area Criteria, supra* note 218.

APPENDIX M

This Appendix contains two Sections. Section 1 describes the data collected and the methods and assumptions used to develop an estimate of the second chance nonconvictions-expungements gap, at the state and national levels. Section 2 describes the robustness checks carried out, to test the strength of one key assumption in the development of a national estimated second chance gap: that the eligibility of gig workers for nonconvictions-expungement relief was similar enough to the eligibility of people with records in general that it could serve as the basis for a national estimate. The data reported is provided in Appendices A and B.

SECTION 1

Step 1: Estimating the Second Chance Nonconvictions Expungement Gap

To approximately size the national second chance nonconvictions-expungement gap, I worked with the background check company Checkr, which generously shared data with this project, to develop fifty state-level samples of background checks, collectively the "*National Gig Jobseeker Database*" (or "gig-jobseeker sample"). Checkr in turn obtained the raw data primarily from court sources. The state samples comprised the checks of individuals seeking primarily on-demand jobs between January 2017 and October 2018,[352] and, as shown in Table A-1, numbered about 1,400 per state and, as shown in Table B-1, included over 1,000 checks in all states except Vermont and Kansas. Collectively the total number of checks was around 60,000.[353]

People seeking gig-economy jobs are not necessarily representative of people with background checks in general. To apply for a gig-economy job requires, for example, that the person not be incarcerated, live in an area where gig-economy jobs are available, and be capable of doing gig-economy jobs such as driving or delivery. For these reasons we might expect the gig-jobseeker sample to skew younger and more urban but also to exclude incarcerated people with longer sentences. In order to compare our results based on our gig-jobseeker sample with the results of the same analysis carried out on a representative sample, we collected representative data from several states, as shown in Table M-3, and used it to carry out parallel eligibility analyses, as described in Section 2.

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352.   *See supra* note 207.

353.   *See supra* Table A-1.

Step 2: Data Cleaning and Processing

In the Section that follows, we describe the steps undertaken to reduce the share of unknown dispositions and charge types, remove outliers, and group the charges into incidents.

1. Dispositions Cleaning

When a person is charged of a crime, that charge can resolve in any of a number of ways, including through a determination of guilt or innocence, a dismissal, or a transfer, and the expungability of the charge depends on its disposition. To prepare our data for analysis, we developed a taxonomy, in consultation with two criminal law attorneys and one criminal law professor,[354] to classify each disposition into one of four major categories (nonconviction, conviction, pending/transferred, and unknown) as shown in the table below.

TABLE M-1: DISPOSITION CATEGORIES

Major Category	Subcategory
Nonconviction	Acquit, not guilty
Nonconviction	Dismiss with prejudice
Nonconviction	Dismiss without prejudice
Nonconviction	Nonconviction withheld
Nonconviction	Nonconviction first offender
Nonconviction	Nonconviction other
Nonconviction	Prejudgment probation
Conviction	Plea
Conviction	Probation
Conviction	Guilty other
Conviction	Adjudication
Pending/ transferred	Pending

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354.   I am deeply indebted to Professor Ellen Kreitzberg and legal services attorneys Michael Hollander and Matthew Stubenberg for their help in developing rules to clean and normalize case dispositions into guilty, nonguilty/dismissed, pending, transferred, and diversion/deferred categories.

Pending/ transferred	Transferred
Unknown	Not classified
Unknown	Not enough information
NonConvictionDivDif	Deferral
NonConvictionDivDif	Diversion

States vary in how they view, treat, and characterize certain dispositions, and so in cases of ambiguity, we relied upon state-specific internet research to try to classify major categories of dispositions. Doing so necessarily introduced imprecision, however, given the varied bases of disposition, so to approximate the extent of this imprecision we asked a third criminal law attorney to independently review the labels. This exercise resulted in an initial agreement rate of 94%, which we then resolved through iteration.[355] After the dispositions were implemented, a subsequent manual review of about 50 thousand codings took place, finding ambiguity with about 584 codings, or about 1.2%.[356]

Based on the efforts outlined above, we placed 96.9% of dispositions overall into one of the three definitive categories of conviction, nonconviction, and pending/transferred, with the distribution shown in Table A-1. The "unknown" disposition rate was below 10% for all states and below 5% for all but five states.[357]

2.   Charge-Type Cleaning

In many cases, the eligibility of a record for clearance depended on the severity of the underlying charge, meaning whether a charge is a felony, misdemeanor, or a minor (traffic, infraction, or summary) charge.[358] To prepare the data for processing, missing values for charge-severity labels were inferred from (1) exact matches and (2) fuzzy matches (i.e., where the same charge or offending statute was identified). These two steps yielded a labeling rate of 92% across all states. We further improved upon these results by using general keyword classification (e.g., that "murder" is a felony) based on

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355.   An example of an ambiguous disposition was "appealed," which could be characterized as "pending" or "guilty," as most appeals follow guilty verdicts. We coded such terms as indicating that the charge was "pending."

356.   Some of these included "no action," "warrant quashed," and "adjournment in contemplation of dismissal," which we coded as a nonguilty disposition, but which could also indicate that the case was still pending; when a case was indicated as "retired" we indicated it was "pending," but it could also be closed without a guilty resolution.

357.   *See supra* Table A-2.

358.   For example, in Texas, misdemeanors can be expunged after one year, while felonies have a three-year waiting period. TEX. CODE CRIM. PROC. ANN. art. 55.01(a) (West 2019).

trends in the data and internet research. As shown in Table A-2, these efforts resulted in known-charge-severity labels for about 99% of charges, and above 94% across states.

3. Data Processing

From the sample, we marked unresolved charges for exclusion (charges with pending/transferred or unknown dispositions, about 3% of the total); we also excluded minor charges and records of individuals whose age was under 16 or over 80, records from Washington D.C., records where the years since charge was less than 0, records that were missing a key data element (ID, disposition date, disposition, or state), and records where the disposition date was not between 1992 and 2018 (inclusive). We confirmed that the exclusion of minor charges (e.g., parking tickets) did not cause attrition among people in the sample.

From the charge-level data, we grouped each charge involving the same person, on the same day, and in the same jurisdiction into an incident, leaving approximately 373 thousand charges over 204 thousand incidents.[359]

Step 3: Ascertaining the Scope of Relief Offered by Each State's Nonconvictions Laws

The next step was to ascertain the nonconviction-clearance laws of all fifty states in force during the time of the sample. To determine the rules of each state, we took the following steps. As described below, we relied heavily on and owe an enormous debt to the meticulous work of the Collateral Consequences Resources Center's (CCRC) Restoration of Rights Project (RRP) headed by Margaret Love,[360] as well as to the Council of State Government's (CSG) Clean Slate Clearinghouse Project, for putting us in touch with many in-state attorneys when aspects of the law could not be determined from reading and researching the statute. Because records-relief criteria are often extremely complex and intricate, we consulted and compared closely the summaries provided by the RRP and CSG and consulted practicing attorneys where possible. However, to the extent that these summaries and the practice experience of the attorneys we consulted were in error, those errors are also reflected in our analysis.

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359. *See* Table B-1.

360. RESTORATION RTS. PROJECT, https://ccresourcecenter.org/restoration [https://perma.cc/4TKQ-U3UD].

1. Internet Research of the Scope of State Nonconvictions-Clearance
Laws

To ascertain the scope of records relief for nonconvicted charges, we worked with a criminal law professor and several teams of students to review the detailed summaries of the law governing the records remediation of adult nonconvictions as of around 2018, the time of our sample, provided by the RRP,[361] and where there was ambiguity, state statutes. In 2018 and again in 2019, I worked with a team of students to review the CSG's Clean Slate Clearinghouse 2017 summary of the laws.[362] We did a final independent check based on the sources described above in the summer of 2020.

Based on these sources, we coded each state's laws along several major dimensions for inclusion in our eligibility model.

- *Coverage*: We coded whether the statute appeared to make relief available for (1) unconvicted arrest records only, or (2) nonconvicted court records, in particular acquitted and dismissed charges.[363] When a state's law specified that nonconvicted records were to be made confidential automatically or otherwise not disclosed without the need for a petition, we did not exclude the state from our analysis, on the assumption that charges that were not effectively cleared through the specified mechanism were still eligible for relief. When relief was available for nonconvicted court records, we further researched whether nonconvicted charges in incidents that had convictions ("partial nonconvictions") could be cleared, as described below. We also noted (but did not model) when other kinds of nonconvictions besides acquittals and dismissals (e.g., diversions or deferrals) were eligible for relief.

- *Waiting Period*: From the statute, we noted waiting periods that were associated with relief for nonconvicted court charges as well as with pending or transferred cases that lacked a definitive conviction or nonconviction disposition. To reduce complexity, in

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361.   We accessed summaries of the law from previous years using the Internet Archive Wayback Machine. *Wayback Machine*, INTERNET ARCHIVE, https://archive.org/web/ [https://perma.cc/2CHQ-WG5D].

362.   *Learn   About   Your   State*,   CLEAN   SLATE   CLEARINGHOUSE, https://cleanslateclearinghouse.org/states/.

363.   We noted states that restricted relief for dismissals—for example, California, which, under SB393, made dismissed unconvicted charges sealable only if dismissed with prejudice. S.B. 393, 2017 Leg., Reg. Sess. (Cal. 2017). In Arizona, for example, the law allows individuals to petition for relief when they have been "wrongfully arrested, indicted or otherwise charged for any crime," ARIZ. REV. STAT. ANN. § 13-4051(A) (2012), which we interpreted as allowing for relief from acquitted and dismissed charges. In Mississippi, "[a]ny person who is arrested, issued a citation, or held for any misdemeanor and not formally charged . . . or upon dismissal of the charge, may apply to the court . . . for the charges to be expunged." MISS. CODE ANN. §§ 99-15-59 (2019). We assumed that in this case dismissals due to acquittals were also expungable.

cases where there were different waiting periods for different types of nonconvictions, we defaulted to the longer waiting period where we could not model the two periods. For example, in Arkansas over the time studied, nolle dismissals entered by the prosecutor have a one-year waiting period whereas all other nonconvictions are eligible at the time of disposition with no waiting period. In such a case, we assumed that all nonconvictions had to wait for one year. Likewise, Texas imposes waiting periods of between one and three years depending on the charge type (one year for misdemeanors and up to three for felonies and misdemeanors charged in felony cases); we applied the three-years period for all clearable nonconvictions.

- *Waiting Period Trigger*: When there was a waiting period, we tracked its trigger—for example, disposition or arrest. Because we did not have the date of arrest in our data, in all cases, we started the waiting period at the date of disposition.

- *Other Eligibility-Narrowing Conditions*: We tracked and modeled conditions that narrowed eligibility, including having a pending charge in the same case or a previous conviction, or where relief varied based on charge type (e.g., excluding felony nonconvictions).

- *Unmodeled Criteria*: We noted but, because of data limitations or because the criteria only impacted a small number of states, did not model several criteria that operate to both expand and reduce eligibility.

Leading to overcounting: We left out of our model the following eligibility criteria that would limit relief: consent of the prosecuting attorney,[364] outstanding legal debt,[365] the running of the statute of limitations,[366] not having certain specific charges (e.g., DUIs), and discretion.[367] If these criteria were left in the model, it could lead to overcounting.

Leading to undercounting: We also left out of our model eligibility criteria that would have extended relief to, for example, acquitted and dismissed

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364. *E.g.*, S.D. CODIFIED LAWS § 23A-3-27 (2020) (allowing for expungement of court records "[a]fter one year from the date the prosecuting attorney formally dismisses the entire criminal case on the record").

365. IOWA CODE § 901C.2(a)(2) (2020) (requiring as a prerequisite to relief that "court costs, fees, and other financial obligations ordered by the court or assessed by the clerk" in particular criminal cases sought to be expunged must be paid, including the cost of indigent counsel).

366. *See, e.g.*, NEV. REV. STAT. § 179.255 (2020) (requiring, for cases where prosecution was declined, that "the applicable statute of limitations has run").

367. *See, e.g.*, MASS. GEN. LAWS ch. 276, § 100C (2020) (stating that sealing is available if "it appears to the court that substantial justice would best be served").

charges levied against individuals who otherwise did not have a record,[368] deferred or diverted charges,[369] charges where the disposition was withheld,[370] first-time-offender charges,[371] charges where the disposition was probation before adjudication,[372] and stale charges (where a waiting period had passed).[373]

These omissions led to underestimating eligibility.

2. Research on Partial Nonconvictions

Within a given criminal incident, a person can be accused of multiple charges but convicted of less than all of them. One important dimension of relief pertains to the extent to which a state allows for clearance of unconvicted charges even if other charges in the incident were convicted.

To make the determination of this aspect of the scope of relief, we read the RRP and CSG summaries of the law in order to classify the charges, roughly, into one of three main buckets: "strict" (only allowing for clearance of nonconvictions if no charges associated with an incident resulted in a guilty outcome), "lenient" (allowing for clearance of court records associated with any charge that did not lead to a conviction), or "superstrict" (including no provisions for the clearance of court records).[374]

In a number of cases, the law appeared to make plain whether or not relief was possible. For example, New Jersey Stat. Ann. § 2C:52-6(a)(3) states that "[a]n expungement . . . shall not be ordered where the dismissal, acquittal, or discharge resulted from a plea bargaining agreement involving the

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368.   We modeled Florida as "superstrict" because although sealing and expunction were technically available, they were available only to individuals that had no prior record. *Florida Restoration of Rights & Record Relief*, RESTORATION RTS. PROJECT (June 28, 2020), https://ccresourcecenter.org/state-restoration-profiles/florida-restoration-of-rights-pardon-expungement-sealing [https://perma.cc/5R67-RYYD].

369.   *See, e.g.*, HAW. REV. STAT. § 831-3.2(a)(5) (2020) (stating that expungement is available in deferred adjudication cases after a one-year waiting period).

370.   For example, in Florida, "[w]here adjudication has been withheld, there is no conviction for purposes of impeachment, but the record may be sealed only if all other eligibility requirements for sealing are met." *Florida Restoration of Rights & Record Relief*, *supra* note 368.

371.   *See, e.g.*, DEL. CODE ANN. tit. 11, §§ 4373-74 (2020) (stating expungement is mandatory where charges involve first-time misdemeanor, but discretionary in other cases).

372.   For example, "[u]nder Fla. Stat. § 948.01(2), trial courts may withhold adjudication of guilt after a plea has been accepted or after a verdict of guilty has been rendered and place the defendant on probation . . . . Upon successful completion of probation, charges may be dismissed . . . . Records . . . may be expunged after ten years." *Florida Restoration of Rights & Record Relief*, *supra* note 368.

373.   Because we could not discern when action had last been taken in the case.

374.   During the relevant period, for example, under Wisconsin law, expungement was not available for nonconvicted court records, DIR. OF STATE CTS. OFF., EXPUNGING COURT RECORDS: HELPFUL INFORMATION AND FREQUENTLY ASKED QUESTIONS (Apr. 2015), www.co.kenosha.wi.us/DocumentCenter/View/1108 [https://perma.cc/HXX6-Z9SV], leading us to code the state as "superstrict."

conviction of other charges,"[375] implying that nonconvicted charges could not be expunged if other charges in the incident were convicted, or that New Jersey was a "strict" jurisdiction.

In other cases, however, whether or not the partial nonconvictions could be cleared could not be ascertained readily based on the record. To determine the laws in these cases, we worked with an attorney at the CSG's Clean Slate Clearinghouse Project to consult over email with in-state expungement attorneys knowledgeable of each state's laws during the relevant period.[376] This information sometimes required judgment calls on the part of the attorneys we consulted; for example, in the case of two states, Ohio and South Dakota, the law could not be determined with certainty (in the case of South Dakota, the assistant attorney general stated that the clearability of partial nonconvictions raised an "unanswered question"),[377] leading us to assume, conservatively, that each state followed a "strict" records-clearance policy. In some cases we could not get a definitive answer. When in doubt, we defaulted to the more conservative version of the rule (superstrict over strict over lenient).[378] Because of our heavy reliance on the RPP, we did a final review of the superstrict categories with the RPP and conformed our assumptions accordingly.

The assumptions we used, and the sources we relied upon to reach them, are shown in Appendix B-3 (Strict-Superstrict-Lenient coding notes),[379] as is the source we relied upon to make up to two determinations for each state: first, did the state offer records relief for nonconvicted court records under the law (if not, it was "superstrict"), and second, when the state offered relief, did it allow for the clearance of nonconvicted charges in an incident where other charges were convicted (was it "lenient" or "strict" in its treatment of nonconvicted charges?). The table below contains the assumptions we applied to model waiting periods and charge severity restrictions.

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375.   N.J. STAT. ANN. § 2C:52-6(a)(3) (2020).

376.   *See, e.g.*, Email from Alex Lesman, Pol'y Analyst, Council of State Govs. Just. Ctr., to author (Feb. 25, 2019, 11:00 AM) (on file with the *Michigan Law Review*). More correspondence between the author and Alex Lesman on a state-by-state basis is on file with the *Michigan Law Review*.

377.   *Id.*; *see also* Email from Alex Lesman, Pol'y Analyst, Council of State Govs. Just. Ctr., to author (Nov. 12, 2018, 6:22 AM) (on file with the *Michigan Law Review*).

378.   For example, though Georgia and Louisiana both offer partial redaction in certain limited cases, making them "lenient," we conservatively coded each state as "strict."

379.   For the specific statute or source we relied upon to make these assumptions, see Appendix B-3 (on file with author) ("Strict-Superstrict-Lenient coding notes" Column F).

TABLE M-2: WAITING PERIOD ASSUMPTIONS

State Abbreviation	If Any, Waiting Period for Acquittal (disposition = R_NG_not_guilty_ adjudication) of Felonies	If Any, Waiting Period (days) for Dismissals (R_NG_Dismissed_w _Prejudice R_NG_Dismissed_wo _Prejudice) of Felonies	If Any, Waiting Period for Ac- quittal or Dis- missal of Misdemeanors	Exclusions of Felony Nonconvic- tions
MA	3650	3650	1825	
OK	3650	3650	365	
AL	1825	1825	730	
GA	1460	1460	1460	
MD	1095	1095	1095	
MO	1095	1095	1095	
TX	1095	1095	365	
WA	730	730	730	
CT		395	395	
ID	365	365	365	
IN	365	365	365	
NY	365	365	365	
VT	365	365	365	
IA	180	180	180	
UT	180	180	180	
WY	180	180	180	
AK	60	60	60	
WV	60	60	60	1

Step 4: Calculating the Share of Charges by State Eligible for Clearance

To the gig-jobseeker background check database obtained in Step 1 and processed in Step 2, we applied the nonconviction-clearance laws as ascertained in Step 3 in order to get an estimate of the share of individuals in the

sample, per state, with criminal records eligible for nonconviction relief, partially or fully. The results are shown in Table B-1. About 40% of individuals in our sample had records that could be cleared partially or fully.

Step 5: Developing a National Estimate Based on State Eligibility Shares

To develop a national nonconvictions-eligibility estimate based on the state eligibility shares derived in Step 4, we took several steps. First, we assumed that state eligibility shares from nonconvictions from the Checkr sample were comparable enough to state eligibility shares from convictions estimated from representative criminal history repositories that we could use them as the basis for a national estimate. Section 2 presents several checks we used to test this assumption. Next, to generate a cumulative estimated national eligibility share based on state shares, we created weights using people who appear in state repositories, as reported by SEARCH, the National Consortium for Justice Information and Statistics, in 2016.[380] This yielded a national eligibility share, weighted by the record-holding population by state, of about 35% of people nationally with records who could clear them partially or fully. To convert this share to a numerical national total, our next step was to multiply these weights by the population of people with records, around 80 million, yielding a total of about 28 million individuals.

35% clearance rate * 80 million with records = 28 million

This 80 million figure includes people who have been arrested but never charged, which, based on an analysis prepared for this report based on the National Longitudinal Survey of Youth, comprise about 20% of the total.[381] Like unconvicted charges, uncharged arrests are generally clearable under state law[382] with a petition, but unlike unconvicted charges, there are usually few constraints on their clearance. The application of the eligibility rate derived based on nonconvicted court records may therefore depress the reported total of 28 million individuals.

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380. BECKI R. GOGGINS & DENNIS A. DEBACCO, SEARCH, NAT'L CONSORTIUM FOR JUST. INFO. & STAT., SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT tbl.2 (2018), https://www.ncjrs.gov /pdffiles1/bjs/grants/251516.pdf [https://perma.cc/RJ4U-4NZJ].

381. This analysis was prepared by Robert Apel of Rutgers University for this study, based on the NLSY97, an ongoing U.S. Bureau of Labor Statistics survey tracking 8,984 people starting in their teens. He found that approximately 20 percent of people arrested are never charged. *See* Memorandum from Robert Apel, Professor, Rutgers Sch. of Crim. Just., to author (June 5, 2020) (on file with the *Michigan Law Review*); *National Longitudinal Survey of Youth 1997*, NAT'L LONGITUDINAL SURVEYS, https://www.nlsinfo.org/content/cohorts/nlsy97 [https://perma.cc/6P5Y-EBE9].

382. Including Alaska, North Dakota, and Iowa. I developed this analysis in consultation with in-state attorneys in collaboration with the Council of State Governments. *See* Appendix B-3 (on file with author).

SECTION 2: ROBUSTNESS CHECKS

To test the strength of one key assumption in our development of a national estimated second chance gap, that the eligibility of gig workers for nonconvictions-expungement relief was similar enough to the eligibility of people with records in general for nonconvictions-expungement relief that it could serve as the basis for a national estimate, we obtained representative data from several states. To each of the representative sources shown below, we applied the relevant eligibility criteria to get an eligible share, and also generated a comparable eligible share based on Checkr data matched to the representative data. In the case of Maryland[383] and Pennsylvania[384] we relied upon analyses carried out by legal services attorneys and expungement experts. The results are shown below.

Comparing state-level "actuals" gaps as reflected in these records with the gaps observed within the gig-jobseeker sample (matching for geography and time period), we found gig jobseekers to have roughly comparable eligibility rates to those in more representative data. If anything, the Checkr sample appears to slightly underestimate eligibility. These findings suggest

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383.   To identify cases eligible for expungement, in connection with developing a tool to aid in the provision of legal services, Matthew Stubenberg analyzed court records from the years 1995–2015 from four Maryland jurisdictions: Baltimore City, Baltimore County, Anne Arundel County, and Frederick County. *See* Email from Matthew Stubenberg, *supra* note 300; MDEXPUNGEMENT, https://www.mdexpungement.com [https://perma.cc/C4V9-DPDD]. At the time, Maryland allowed nonconviction records and records associated with a few convictions to be expunged from court records upon petition. MD. CODE ANN., CRIM. PROC. § 10-105 (West 2015). The share of cases identified as expungable but not expunged in each jurisdiction varied, but across the four jurisdictions, out of 1.41 million cases with final dispositions, around 997 thousand were identified as including expungable offenses that were not expunged, for a gap of about 71 percent. Email from Matthew Stubenberg, *supra* (documenting collaboration with author).

384.   Former Pennsylvania Community Legal Services staff attorney Michael Hollander, in the fall of 2018, undertook an analysis of court records and cases in the Pennsylvania Common Pleas and Municipal Courts, which process the bulk of felony and misdemeanor criminal cases in Pennsylvania, using a tool created to make it easier to expunge criminal records in Pennsylvania. Excluded from the analysis were summary cases in Philadelphia (submisdemeanor), cases from minor courts outside of Philadelphia, and MDJ cases. *See* Email from Michael Hollander, Dir. of Analytics, Off. of Dist. Att'y, to Rebecca Vallas, Vice President, Poverty to Prosperity Program, Ctr. for Am. Progress, and author (Nov. 9, 2018, 6:12 AM) (on file with the *Michigan Law Review*); *see also* Rana Fayez, *Meet the Disruptor: Michael Hollander*, PHILA. CITIZEN (May 3, 2016), https://www.thephiladelphiacitizen.org/disruptor-michael-hollander-expungement-generator/ [https://perma.cc/M9PA-2STG]. Hollander applied a slightly simplified version of the eligibility criteria based on the law at the time and assumed that diversionary programs had been completed and excluded other eligibility criteria (for example, that anyone who turns 70 and has been arrest free for 10 years can have all of their cases expunged). Email from Michael Hollander, *supra*. Based on applying the criteria to court records, Hollander found that out of 2,030,595 people with disposed criminal records from 2003–2017, 1,570,694, or 77.3% of them, were eligible for clearing. *Id.* Approximately 91%–94% of the eligible but not expunged cases were based on nonconvictions, rather diversionary charges, making for an approximate total nonconvictions current gap rate of 73% (77% · 94%).

that the gig-jobseeker shares of this study can be used to provide rough esti-mates.

TABLE M-3: ACTUAL VS. GIG-JOBSEEKER NONCONVICTIONS CURRENT GAPS

State	Description of Representative Sample	Current Gap (Eligible Share) in Representative Data	Current Gap (Eligible Share) in Jobseeker Sample (matched sample)
MD	Complete records from 1995–2015 for Baltimore City and Baltimore, Anne Arundel, and Frederick Counties	71%[385]	53%
PA	Complete records from 2003–2017 for Pennsylvania Common Pleas and Municipal Courts	73%[386]	66%
AK	A sample of 9,758 criminal cases from the state AOC from 1980–2018	24%	18%
SC	A sample of around 4,000 criminal histories from the South Carolina Law Enforcement Division	63%	41%

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385.   Email from Matthew Stubenberg, *supra* note 300. The overwhelming majority of these potential expungements were based on nonconvictions. *Id.*

386.   *Id.*