THE SECOND CHANCE GAP

Abstract

Over the last decade, dozens of states have enacted “second chance” reforms that increase the eligibility of individuals charged or convicted of crimes to, upon application, shorten their sentences, clean 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” - the gap between eligibility and delivery of second chance relief - and sizes it in connection with several second chance initiatives and laws. Using administrative data, I show that among a number of programs that rely on petition-based processes across a number of domains, only a small fraction of those eligible for second chances relief have received it. Using a novel dataset of ~60,000 criminal records based on background checks performed in 2017 and 2018 on persons primarily seeking gig economy work, I estimate that 30-40% of American adults with records, or 20-30M individuals, are entitled under state laws to clean their criminal records, partially or fully, but not have done so. When individuals do clear their records, studies suggest, their outcomes improve. These findings suggest that a large number of petition-based second chances have been missed chances, due to administrative factors like low awareness, bureaucratic delays, and high cost, high-friction application processes. To close second chance gaps at scale, this paper argues in favor of automated rather than petition-based processes. While automation raises its own set of issues, for example regarding notification and records preservation (in the case of records expungement), the automated delivery of second chances can help remove the bureaucratic

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hurdles, not steel bars, that prevent individuals from getting their second chance.
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On February 17, 2019, in a widely shared story, the Louisiana Times-Picayune reported that, “Louisiana Routinely Jails People Weeks, Months, Years after their Release Dates.” According to a state auditor’s report, the main culprit was inconsistencies in how release date calculations, often involving multiple factors, were being carried out. Similar missteps and overstays in the California (where some inmates were given 15% good behavior credit rather than 50%, resulting in an estimated tens of millions of dollars in unnecessary taxpayer expenses), Hawaii, DC (which in 2013 started paying on a $6M over detention settlement), and federal criminal justice systems have also been documented.

A few days earlier, the New York Times reported on the death of Steve Cheatham in prison while waiting for a court to rule on his compassionate release application. Created in the 1980s, compassionate release programs allow federal inmates who no longer pose a threat be sent

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3 La. Legis. Auditor, Managing Offender Data: Processes for Ensuring Accuracy (La. Dept. of Corr.) (Oct. 25, 2017), 9 (describing the need to factor into release date calculations: credit for time served, good time release ratio, credits earned for certified treatment or rehabilitation programs, good time credit lost due to behavior, and parole revocation recalculations).
4 Detailed supra at Part III. I.
7 Detailed supra at Part III. I.
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home, usually when nearing death. But since 2014, scores of elderly and terminally ill federal prisoners have died while waiting for the Bureau of Prisons (BOP) to rule on their applications.9

One in three American adults has a criminal record. But according to the analysis reported in this paper, an estimated 30-40% of them, or 20-30M Americans, are eligible to clear their records of charges that never turned into convictions under existing state laws, but have not done so. These are three examples that demonstrate how red tape, not steel bars, are holding individuals back in the American criminal justice system and thwarting the delivery of second chances.

One of the pillars of what Joan Petersilia has called the current, “transformative moment in criminal justice reform...away from […] harsh punishment policies”10 are “second chance” laws passed by dozens of state during the last decade. These laws make it easier for individuals charged with or convicted of crimes to, generally upon application, have their sentences shortened, crimes downgraded (e.g. from a felony to a misdemeanor), criminal records cleaned, and/or voting rights restored. They reflect the sentiment behind Kim Kardashian’s successful bid for presidential clemency for Alice Johnson (a 63-year old grandma given a life sentence for a drug-related crime),11 the 2018 midterm passage of Florida’s Amendment Four to restore the vote to over a million ex-felons,12 and the surprising passage of

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10 Joan Petersilia, *Realigning Corrections, California Style*, 664 Annals of the Am. Acad. of Pol. and Soc. Sci. E 8, 8 (2016). See also, e.g. the formation of the Law Enforcement Leaders to Reduce Crime and Incarceration group, comprised of more than 200 law enforcement police chiefs, prosecutors, sheriffs, and attorney generals committed to “changes to laws and practices that more effectively fight crime while reducing unnecessary imprisonment.” available at http://lawenforcementleaders.org/.


12 Though, whether it will remains to be seen, see e.g. Lori Rozsa, *A Joyous Day* Ahead as 1.4 Million Florida ex-Felons Have Voting Rights Restored, Wash. Post. (Jan. 5, 2019), available at https://www.washingtonpost.com/national/a-joyous-day-ahead-as-14-million-florida-ex-felons-have-voting-rights-restored/2019/01/05/58650ee2-106f-11e9-8938-5898ad28fa2_story.html?utm_term=.2d999a52ad6f (citing as one of the barriers to
the bipartisan First Step Act, which grants early release to qualifying federal prisoners\textsuperscript{13} that many deserve a second chance and some sentences deserve a second look.

Since 2007, at least 19 states have passed laws to reclassify or downgrade charges associated with non-violent property or drug crimes\textsuperscript{14} and at least 27 states have made it easier to qualify for early release or parole.\textsuperscript{15} During this time, several federal initiatives including the Fair Sentencing Act Guideline Amendment (Amendment 750), “Drugs Minus 2” (Amendment 782), the Obama Administration Clemency Project, the Johnson v. United States case, and the First Step Act of 2019, have offered resentencing options for federal inmates.\textsuperscript{16} Between 2009 and 2018, more than 30 states and the District of Columbia enacted laws that increase the scope of expungement and sealing remedies,\textsuperscript{17} and from 2013-2019, at least 46 states and the District

\textsuperscript{13} Through, e.g. the retroactive application of good time credits and the Fair Sentencing Act, at First Step Act, Sec. 101, §3632 and Sec. 404, respectively

\textsuperscript{14} 35 States Reform Criminal Justice Through Justice Reinvestment, A Fact Sheet from The Pew Charitable Trusts, (July 2018), at 2, available at http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2018/07/35-states-reform-criminal-justice-policies-through-justice-reinvestment (as described below, California has also passed Prop 47 and 64 to downgrade crimes)


of Columbia passed laws to reduce the collateral consequences of criminal records and convictions. From 1997 to 2018, at least 25 states expanded voter eligibility for ex-felons.

But while much attention has been paid to the increasing availability of second chances, little of it has been paid to their uptake. But even in a clear-cut case, to get his second chance, an individual must have the awareness, wherewithal and resources to determine eligibility, gather the relevant documents, prepare and file an application, in some cases pay outstanding fines and fees, and navigate the administrative process. In this Article, I argue that considerations of uptake are crucial for the many second chance laws that require individuals to apply for (rather than automatically obtain) relief, just as they have been in the wide range of policy areas ranging from transfer payments to telecommunications subsidies.

Studies have begun to document the public and private impacts associated with providing particular “second chances.” In terms of public expenditures, Obama’s Clemency initiative, for example, resulted in an average sentence reduction of 140 months per federal inmate that received a

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commutation. At a cost of incarceration of approximately $36,000 per year per federal prisoner, avoiding 140 months of incarceration translates, mechanically, into $422K per inmate in 2017 dollars, though the total marginal cost savings is less, and would also need to be balanced by the costs associated with reentry (e.g. in terms of public housing expenditures, offset by higher tax payments, etc.). In July 2019, 1,691 prisoners were released early as part of the First Step Act’s retroactive application of the Fair Sentencing Act of 2010, which reduced the disparity between crack cocaine and powder cocaine mandatory minimum sentences. A report by the US Sentencing Commission found the average reduction of time to be 73 months, which again, at the average costs cited earlier, is associated, roughly, with $219K per inmate.

California’s Prop 47, which reduced the sentences of individuals convicted of non-violent, minor felonies, has led to the reallocation of $103M in prison expenditures to rehabilitative grant programs. In terms of public safety, studies of the proposition, which reduced the prison population by 13,000, have found that larceny and motor vehicle thefts

25 Actual savings would be lower if incremental costs per prisoner are lower.
28 Board of State and Community Corrections Press Release, Board Awards $103m in Prop 47 Funds to Innovative Rehabilitative Programs (July 12, 2018) http://www.bscc.ca.gov/news.php?id=142
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increased moderately, but that there was no statistically significant increase in crime overall. A 2018 US 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 non-reduced sentences.

Studies of the personal impact of records clearing are also encouraging. Cleaning one’s record appears to set in motion an internal redemptive process for the formerly “marked,” enhancing their confidence and social status. Studies of records clearing programs in California, Michigan, and Chicago, some in development, have documented gains in

30 Though not enough to rule out alternative explanations. Bardos and Kubrin, supra note ___ at 695.
31 Id. at 695. Accord, Mia Bird, et. al., The Impact of Proposition 47 on Crime and Recidivism, Public Policy Institute of California (June 2018), 3 https://www.ppic.org/wp-content/uploads/r_0618mbr.pdf (finding no increase in violent crime but finding an increase in larceny, in particular 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.
33 How these individual gains, at scale, could translate into lasting gains for society, in terms of increased tax revenue and decreased recidivism remains unknown.
35 Id., Selbin et al (documenting an increase in employment rates from about 75% to 80-85% and average earnings by about one-third, or $6K in yearly salary following expungement).
36 Sonja Starr and JJ Prescott, Expungement of Criminal Convictions: An Empirical Study __Harv. Law Rev.__, forthcoming (finding the receipt of a set-aside to be associated with an increase in the probability of employment from 59% to about 65% and an average quarterly wage increase of 22%).
37 Charles E. Loeffler et al., Estimating the Labor Market Effects of the Criminal Record Expungement and Sealing (2016) (unpublished manuscript on file with the author) (finding expungement of minor records to be associated with a 2-4% increase in employability)
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employability and earnings following records-cleaning.\(^{38}\) How individual gains, at scale, might translate into lasting gains for society, through the more efficient allocation of talent and greater participation in civic life are unknown. Still, such positive findings support continuing waves of second chance reforms to decriminalize drug or property crimes, expand early release options, and revise eligibility for parole.\(^{39}\)

Among these, records clearance policies are unique in their scope and reach. Nationwide, more than 44,000 collateral consequences burden those who have completed their formal sentences, erecting barriers to, e.g. 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, and qualifying for military service.\(^{40}\) These consequences are both cumulative - as more and more people are added each year to the list of persons with criminal records, which now numbers at least 77M, or one in three adult Americans\(^{41}\) - but also enduring, as a person’s criminal record - if not cleared - continues to follow them throughout their lives, and restrict their personal liberty. While the number of people incarcerated per year in the US is in decline,\(^{42}\) the number of people with criminal records continues to grow. (Figure 1)

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\(^{38}\) 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. Described, e.g. in Jacobs, infra at __.

\(^{39}\) For an overview of these so-called Justice Reinvestment provisions, see Pew, supra note at __.

\(^{40}\) US Commission on Civil Rights, COLLATERAL CONSEQUENCES: The Crossroads of Punishment, Redemption, and the Effects on Communities (2019) (e.g. “Individuals with criminal histories 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, and qualifying for military service, and are targeted for deportation (for noncitizens).”) at 1.


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Fig 1: US State Prisoners, Arrests, and Criminal History File Subjects (1998-2014)\(^{43}\)

Data sources: Bureau of Justice Statistics, Corrections Statistical Analysis Tool\(^{44}\) (state prisoner data); FBI Yearly arrests,\(^{45}\) author’s calculations (state arrests); BJS and SEARCH Survey of State Criminal History Information Systems\(^{46}\) (criminal history file subjects)

As more and more states move 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 the gaps, and the open research questions that surround the administration of effective and impactful second chance relief.

This paper is an initial effort to do so, drawing upon and extending several literatures. First, by focusing on the administrative, rather substantive aspects of second chance relief, it builds upon the awareness in law and policy circles that, as Richard Thaler and Cass Sunstein have observed...
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“[s]mall and apparently insignificant details can have major impacts... []
‘everything matters.’”47 Joining other studies that consider mechanisms for
influencing the impact of the law other than by changing its substance,48 it
argues that in favor of automation to close the second chance gap. In so
doing, it also confronts some of the novel issues that automated government
decision-making, which has attracted recent attention in contexts that range
from benefits determinations to bail decisions,49 raises, including notification,
mistakes, and transparency.

Next, in its discussion of uptake problems in second chances and
design-based methods for solving them, this paper makes a novel
contribution to the existing literature on what has been called the
“nonparticipation problem,” or the failure of individuals eligible for
government benefits,50 including the federal earned income tax credit (EITC)
and SNAP programs, to take them up. In its analysis of hundreds of second
chance conditions across all fifty states, it identifies strategies for increasing
the robustness and ascertainability of eligibility criteria in a world of
imperfect data and information.

Finally, this paper also builds on ongoing discourse about the use of
data and high-tech tools to sort individuals in a number of contexts,
including pretrial detention,51 loan qualification,52 and recruitment,53 and the
attendant risk that existing biases against the poor and disenfranchised will be
reinforced or amplified. As discussed in Part II, criminal records are

47 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).
48 For a brief overview of the related literatures of behavioral economics, regulatory design,
and administrative mechanisms, see Ryan Calo, paper, Code, Nudge, or Notice?, 99 Iowa L. Rev.
50 Francesca Alba, The Nonparticipation Problem: Behavioral Economics and The Take-Up of Social
Benefits 25 Jour. of Pol. Perspectives 2018. For a review of the long literature on take up, see
(finding that pre-trial risk assessment tools are biased against blacks).
52 See e.g. Solon Barocas & Andrew D. Selbst, paper, Big Data’s Disparate Impact, 104 Calif. L.
Rev. 671, 679 (2016).
53 Id. at 685.
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associated with a myriad of collateral consequences and used as inputs into a
wide variety of evaluations. Yet by focusing on the cleaning of criminal
records evaluations, at scale, this paper conceives of using computational
tools to narrow rather than exacerbate existing gaps, and to reduce rather
than automate inequality, borrowing from the title of Virginia Eubanks’
book.54

Part I introduces the concept of a “second chance gap” - the
difference between eligibility and uptake of a given second chance. It
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, are presently apparently 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 second chance gap at a particular point in time
and the policy opportunity presented by it.

Part II applies the concepts and methods outlined in Part I to several
novel data sources in order to roughly size several second chance gaps. In the
first section, drawing upon administrative data, it calculates “uptake gaps”
pertaining to the Obama Administration Clemency Initiative and California’s
Propositions 47 and 64. Using data collected by the Sentencing Project it also
offers, as a point of comparison, estimates of the “felony reinfranchisement
gap” in 13 states. Among these programs, chosen due to the availability of
administrative or primary data, the uptake gap is large, in most cases around
90%. The second section of Part II uses the “current gap” methodology laid
out in Part I to analyze individuals with criminal records. Applying a subset
of clearance laws in each of the 50 states to a sample of ~60,000 criminal
histories obtained as part of background checks performed in 2017 and 2018
on individuals seeking gig-economy jobs, and balancing the results nationally,
it finds that an estimated 30-40% of adults with records, or 20-30M

54 Virginia Eubanks, Automating Inequality (2018). This paper also owes a large debt to the
community of legal services attorneys, public servants, advocates and scholars working to
reorient the US criminal justice system towards rehabilitation, e.g. through public defense
and pro bono work, Clean Slate clinics, and other means. By focusing on the processes by
which justice-involved individuals can, but often aren’t, get their second chance, this paper
explores how to unlock opportunities for individuals despite their criminal records, at scale.
individuals are currently entitled to clear their records, partially or fully, but not have done so.

Based on comparing programs with relatively larger and smaller gaps, Part III discusses available evidence about the contribution of administrative “red-tape factors,” that is, factors other than a denial on the merits, to second chance gaps. It discusses several “code and code” interventions to simplify complex application procedures and shrink the burdens associated with delivering second chance gaps. Computational code can be used to automate the identification, application for, and award of relief of eligible individuals at scale. The law can specify the use of algorithms and automation, not petitions, to identify and clear eligible individuals. Both types of code can work together in support of removing the red tape, not just steel bars, that stand in the way of second chances. However, even in combination, they are no panacea, Part IV acknowledges, due to the proliferation of “unofficial” and largely unregulated records providers, who are under no obligation to provide updated, accurate data, the problems that flow from a lack of notice, and the challenges associated with incomplete public records. The paper concludes by discussing open research questions and the broader context of second chance relief work.

I. Defining the Second Chance Gap

The uptake or participation rate in government benefit programs have long been of interest to economists and policymakers.55 This literature recognizes that there are costs to participating in social benefit programs including the costs of learning about and applying for the benefit, and that the costs may outweigh the benefits.56 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.57 In this Part, I define what uptake means in the realm of “second chances” policies that provide relief to justice-
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involved individuals, then explore parallels between the delivery of social benefits and second chances.

This paper defines the “second chance gap” for any given second chance initiative or law as the difference between eligibility and delivery of second chances. There are at least two types of second chance gaps: the “uptake gap,” measured cumulatively over time, and the “current gap” measured at a single point in time. The “uptake gap” can simply be understood as the share of individuals (or other criminal justice unit, such as charge or incident) eligible for relief over time that has not applied for or received a given second chance. But while the uptake gap is easy to understand, it is hard to measure. For example, charges that have been cleared are no longer in the public record, leaving behind an incomplete record for analysis. As such I offer an alternative measure of the second chance gap ascertainable even in the absence of complete data. I define the “current gap” as the share of currently impacted individuals who appear to be eligible for relief but haven’t received it. While the uptake gap reflects the effectiveness of the delivery of a given second chance, the current gap is the product of not only a second chance law’s administration but also its generosity, as well as factors contributing to the number of people within the target population.

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. 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

58 This includes policies that provide relief to individuals with criminal records, even if they have never been incarcerated, beyond the narrower reentry context with which the term “second chances” is often associated, including by President George H.W. Bush during his State of the Union Address (Jan. 20, 2004), available at http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html (“America is the land of second chance [sic] and when the gates of the prison open, the path ahead should lead to a better life.”)

59 See, e.g. Alan Berube, Earned Income Credit Participation – What We (Don’t) Know, Brookings Institution Metropolitan Policy Program, (2005), available at https://www.brookings.edu/wp-content/uploads/2016/07/eitcparticipation.pdf (discussing the obstacles that complicate providing accurate estimates of eligibility and the geographical distribution of eligible nonparticipants); see also Jones supra note ___ at 49 (describing the challenge posed by the lack of certain data elements in administrative data for determining EITC eligibility).
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commutations and gubernatorial pardons of the right to vote described below often depend on the exercise of discretion or satisfaction of other criteria. In this paper, “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.

There are a few ways of approximating a particular second chances gap. The most accurate but most labor-intensive way is through a “top-down, 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 court or police records, to identify the eligible (or potentially eligible) population at an individual 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 or not, and among those, who has not received relief. 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 that moment, the relevant population. Individuals that qualify for relief fall into, and their prevalence in the relevant population comprise the current gap.

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, an application for relief to be completed and filed, and relief to be awarded through an administrative procedure. As such, 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.

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60 See infra note ____ (describing the eligibility criteria for Obama’s Clemency Initiative and gubernatorial pardon).
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Each of the steps 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. In selecting case studies to illustrate the uptake gap for this paper, I sought out initiatives for which the sizing steps described above had already been or could to some degree reliably be carried out. As a result, this paper 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 and missing and other data defects and vulnerabilities of these sources and as such, should be read as supplying estimates conditional upon them. In order to estimate the size the “current gap” in records clearing, I relied on a novel dataset of commercial background checks and consultations with lawyers and experts concerning the rules of each of the 50 states but, in some cases, as detailed below substantial uncertainty as to the law itself or the records to which we applied the law, remained.

Among these sources of imprecision in the analysis, three types of known “unknowns” should be kept in mind, two tending to inflate and one tending to depress the various “second chance gaps” described in this paper. First, because eligibility estimates are largely based on court and administrative records, they do not reflect mortality, mobility, and related demographic factors that might reduce the motivation or ability for one to seek relief in the state of one’s previous criminal activity. 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 above, the determination of eligibility in many cases involves the application of objective criteria to public records. However, some criteria (such as whether or not a prosecutor will object, or if certain conditions are met) are impossible to ascertain from the record. This paper acknowledges these “unmodeled” limits in data obtained from other reports, and, in my own analysis, I acknowledge them in

62 As described in Part II and Appendix, Part D: Clearance Criteria Example and Challenges.
Appendix table B2. Finally, and cutting in the other direction, this paper only considers a small subset of programs and criteria for second chance relief. As such, though this paper estimates that there are tens of millions of missed chances associated with non-conviction court records alone, it unclear how many more second chances are out there.

II. Sizing Second Chance Gaps

No matter how significant the benefits of a policy are, its impact depends on its uptake. The best intervention in the world would have limited impact if no one received it. This Part determines the uptake and current gaps associated with several second chance regimes. In the first subsection, I draw upon administrative data associated with several resentencing and reclassification programs. In the second subsection, I estimate felony reinfranchisement gaps in 12 states using published data. In the third subsection, I estimate current second chance records clearance gaps in all 50 states using background check data.

A. Uptake Gaps in Resentencing and Reclassification

Over the last five years, at least 14 states have passed laws to reclassify and/or reduce charges related with non-violent crimes, several of them with retroactive effect.63 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. This section estimates the second chance uptake gaps associated with the Obama Clemency Initiative, and California’s Propositions 64 and 47.

1. The Clemency Initiative Second Chance Uptake Gap

The Constitution specifies that, “the President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States,

63 Described in Pew, supra note ___.

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except in Cases of Impeachment." In 2014, the Department of Justice launched the Clemency Initiative to encourage non-violent federal drug offenders to petition President Obama for commutations. 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 10 years of their sentence. 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.

Table 1: Estimates of the Obama Clemency Initiative Second Chance Gap

<table>
<thead>
<tr>
<th>Provision</th>
<th>Estimated Total Number Eligible for Relief</th>
<th>Estimated Number of Total Eligible Receiving Relief</th>
<th>Applications Unreviewed by the Conclusion of the Program</th>
<th>Estimated % of Eligible Offenders Not Receiving Relief</th>
</tr>
</thead>
<tbody>
<tr>
<td>Obama Clemency Initiative</td>
<td>2,687</td>
<td>92</td>
<td>7,881</td>
<td>97%</td>
</tr>
</tbody>
</table>

Source: Schmitt, et al., supra note ___ at 11 and 34 fig.19, author’s analysis

64 U.S. Const. Art. II, § 2, cl. 1.
66 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 non-violent offender without ties to criminal organizations;
3. Had served at least 10 years of their sentence
4. Had displayed good behavior;
5. Lacked a record of violent behavior.
However, the decision within the discretion of the President, who could prioritize among or deviate from the published criteria. Id. 7-9.
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According to the Commission, 1,025 - 2,687 individuals (the spread representing inmates that met the time served criteria at the beginning and end of program) “appear[ed] to have met all the factors for clemency under the Initiative.” The initiative resulted in the largest numbers of commutations awarded by a President. Still, of the 2,687 individuals that were deemed by the Commission to have met the factors for clemency under the Initiative by its conclusion, only 54 - 92 of the 1,025 - 2,687, or 3-5%, received relief for a second chance gap of 95-97%. In addition, by the conclusion of the program in January 2017, 7,881 petitions for commutation and over 2,000 petitions for pardons were still pending. Those who received a commutation experienced an average sentence reduction of 140 months, which, at average cost rates, represents $373K (2015 dollars) per commutation. If the 2,595 individuals that the Commission identified as eligible had received comparable sentence reductions, the total average sum, associated with these reductions based on a mechanical calculation, would have been ~$968M, or close to a billion dollars. As discussed later, experts blamed the non-centralized administration of the program, uneven application of the criteria, and backlog for the gap between expected and delivered second chances.

2. California Prop 47 and 64 Second Chance Uptake Gaps

Prior to 2014, the offenses of shoplifting, receiving stolen property, writing bad checks, and forging checks were considered felonies in California. That changed when voters passed Prop 47, reducing the charges

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67 Id. at 34.
68 Over 1,700 individuals Id. at 2.
69 Id. at 34.
70 Id. at 10-11. Of the commutations that were granted, the Commission estimates that only 5.1% 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 “second chance” gap.
71 As described supra at note ___.
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associated with qualifying crimes from felonies to misdemeanors. 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, 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 has determined that, as of 2016, 513,229 county residents were “potentially eligible” for reclassification. The California Judicial Council estimates, based on self-reported numbers by each county, that by March 2018, Los Angeles had received 60.5K Prop 47 applications for reclassification. A single individual can file multiple applications, thus, to approximate the number of individuals associated with the filed applications, I applied a multiplier derived from data collected from 21 counties was applied to associate 47.4K individuals with the 60.5K applications. This estimate of the number of individuals that have filed for relief (47.4K) represents about 9% of the 513K persons estimated by the Los Angeles Public Defender’s office to be eligible for relief, resulting in a second chances

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

74 Unless the person had a prior conviction for identity theft, rape, child molestation, or other violent crime, or was a sex offender registrant. Described, e.g. in *Prop 47 Frequently Asked Questions*, Judicial Council Criminal Justice Services, (Nov. 2016), available at http://www.courts.ca.gov/documents/Prop47FAQs.pdf.

75 Kelly Emling, Chief Deputy Public Defender, *Los Angeles County Public Defender’s Prop. 47 Task Force Report to County Board of Supervisors* (July 19, 2016), 5 (available at http://file.lacounty.gov/SDSInter/bos/supdocs/105259.pdf). 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).


uptake gap of at least 91%, based on comparing the individuals who were “potentially eligible” for and applied for relief.78

78 Though this number represents the percentage difference between potentially eligible and 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 21 counties was 71%. Kelman & Carlson, supra note __. However because this number does not account for abandonments or pendency, it understates the approval rate.
THE SECOND CHANCE GAP

Table 2: Estimates of Select Prop 47 Reclassification and Prop 64 Reclassification and Resentencing Second Chance Uptake Gaps

<table>
<thead>
<tr>
<th>Provision</th>
<th>Estimated Number Eligible for Relief</th>
<th>Number of Applications for Relief</th>
<th>Estimated Gap</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prop 47 Resentencing and Reclassification - LA County</td>
<td>513,229 LA county residents “potentially eligible” for relief</td>
<td>60,517 applications, corresponding to ~47,374 applicants(^{79})</td>
<td>91%</td>
</tr>
<tr>
<td>California Prop 64 Resentencing and Reclassification</td>
<td>218,094(^{80})</td>
<td>6,251(^{81})</td>
<td>97%</td>
</tr>
</tbody>
</table>

Sources: Prop 47 Figures: Los Angeles Public Defender’s Task 47 Task Force; Prop 64 Figures: California Judicial Council, California DOJ (see notes), author’s analysis

A comparable gap existed in connection with 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 currently serving sentences for Prop. 64 crimes to apply for resentencing relief, and for persons with completed Prop 64 sentences to apply to downgrade or clear their convictions.\(^{82}\) In the fall of 2018, a California Senate report, based on data provided by the California Department of Justice,\(^{83}\) estimated that 218,094 individuals were eligible for resentencing or reclassification. But by March 2018, only 6,251 petitions statewide had been filed,\(^{84}\) representing less than 3% of that total, or a gap of

\(^{79}\) See id.

\(^{80}\) California Senate Committee on Appropriations Report, AB 1793, page 2, (“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”) available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB1793#

\(^{81}\) Total applications as of March 2018, Ca. Judicial Council Prop 64 Data Summary Report, supra note ___.


\(^{83}\) California Senate Committee on Appropriations Report, supra note ___.

\(^{84}\) CA Judicial Council Prop 64 Data Summary Report, supra note ___.
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97%. Carrying out their own sizing exercises, the district attorneys of San Francisco (SF) and Alameda identified similar gaps, and the San Francisco DA estimated that half (62%) of the San Francisco convictions eligible for relief were eligible for resentencing relief. The majority of states provide similar, petition-based paths to reducing or clearing previous convictions.

B. The Reinfranchisement Gap

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 form of administrative process. Generally, ex-felons 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.

85 According to estimates published by the SF and Alameda DAs, an estimated 7,978 and 5,900 convictions, respectively, were potentially eligible for relief. By December 2017, 232 and 609 applications, respectively, had been received. Taken together, this amounts to a gap of around 90-97%. See Press Release, George Gascon, District Attorney of San Francisco County, District Attorney George Gascon Applies Proposition 64 Retroactively to Every Marijuana Case Since 1975 (Jan. 31, 2018), available at http://sfdistrictattorney.org/district-attorney-george-gascon-%C3%B3n-applies-proposition-64-retroactively-every-marijuana-case-1975 (identifying 7,978 total including 4,940 felony and 3,038 misdemeanor candidates sentenced prior to the initiative’s passage), Press Release, Nancy E. O’Malley, District Attorney of Alameda County, DA O’Malley’s Ongoing Efforts & Policy Regarding Dismissal of Cannabis-Related Criminal Convictions (Feb. 20, 2018), available at http://www.alcoda.org/newsroom/2018/feb/cannabis_convictions_prop_64_policy (identifying 5,900 convictions, not broken out by felony and misdemeanor totals), Judicial Council, supra note __, (December 2017 release, on file with the author).

86 Including 4,940 felony marijuana resentencing candidates and 3,038 misdemeanor candidates sentenced prior to the initiative’s passage, see supra note __.


89 Id., author’s analysis of each state’s statutes.
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Over several decades, Christopher Uggen and his collaborators have worked to systematically define, measure, and track felony disenfranchisement. By examining state prison records and reinfranchisement 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 co-authors filed records requests with and received data from the appropriate agencies in the 12 states that disenfranchise beyond sentence completion in order to ascertain the number of restorations granted by each state over the same period. Because their numbers do not exclude the small subset of offenses ineligible for reinfranchisement and do not take into account felony reinfranchisement waiting times, their estimates represent upper bounds estimates of the number of individuals potentially eligible for reinfranchisement during this period. Based on both the number of post-sentence 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, from 85% to 100%.

90 Finding, for example, that as of the 2016 election, approximately 6.1M people, or 2.5% of the voting age population, was disenfranchised due to a current or previous felony conviction, and that 7.4% of African-Americans was disenfranchised, as compared to 1.8% of non-African Americans, Id. at 3.

91 Based on author's analysis of each of the 12 states' felony disenfranchisement laws, the subset of individuals “permanently disenfranchised” in each state are narrow and circumscribed, for example, because, in the state of Delaware, they were convicted of murder, bribery, or a sexual offense. Del. Const., art. V, § 2. In 2013 (H.B. 10).

92 This finding is consistent with earlier estimates of re-enfranchisement rates ranging from one tenth of 1% in Wyoming and Mississippi to 17% in Delaware, Jeff Manza and Christopher Uggen, LOCKED OUT, 89.
Table 3: Restoration of Voting Rights in States that Disenfranchise Residents Post-Sentence Completion

<table>
<thead>
<tr>
<th>State</th>
<th>Restorations</th>
<th>Period of Restoration Estimates</th>
<th>Avg Restorations per year (calculated)</th>
<th>Post-Sentence Disenfranchised</th>
<th>Share of Disenfranchised Not Reinfanished (calculated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>16,022</td>
<td>2004-2015</td>
<td>1,457</td>
<td>231,896</td>
<td>94%</td>
</tr>
<tr>
<td>Arizona</td>
<td>31</td>
<td>2010-2015</td>
<td>2</td>
<td>116,717</td>
<td>100%</td>
</tr>
<tr>
<td>Delaware</td>
<td>2,285</td>
<td>1988-2015</td>
<td>85</td>
<td>116,717</td>
<td>98%</td>
</tr>
<tr>
<td>Florida</td>
<td>271,982</td>
<td>1990-2015</td>
<td>10,879</td>
<td>1,487,847</td>
<td>85%</td>
</tr>
<tr>
<td>Iowa</td>
<td>115,325</td>
<td>2005-2015</td>
<td>11,533</td>
<td>23,976</td>
<td>17%</td>
</tr>
<tr>
<td>Kentucky</td>
<td>10,479</td>
<td>2008-2015</td>
<td>1,497</td>
<td>242,987</td>
<td>96%</td>
</tr>
<tr>
<td>Mississippi</td>
<td>335</td>
<td>2000-2015</td>
<td>22</td>
<td>166,494</td>
<td>100%</td>
</tr>
<tr>
<td>Nevada</td>
<td>281</td>
<td>1990-2011</td>
<td>14</td>
<td>62,080</td>
<td>100%</td>
</tr>
<tr>
<td>Tennessee</td>
<td>11,581</td>
<td>1990-2015</td>
<td>772</td>
<td>323,354</td>
<td>97%</td>
</tr>
<tr>
<td>Virginia</td>
<td>21,664</td>
<td>2002-2016</td>
<td>1,547</td>
<td>408,570</td>
<td>95%</td>
</tr>
<tr>
<td>Wyoming</td>
<td>107</td>
<td>2003-2015</td>
<td>9</td>
<td>17,414</td>
<td>99%</td>
</tr>
<tr>
<td>Total</td>
<td>450,092</td>
<td>(see above for range)</td>
<td>2,529</td>
<td>3,205,121</td>
<td>88%</td>
</tr>
</tbody>
</table>

Source: Uggen et.al. (2016) (raw data), author’s analysis

C. The Records Cleaning Second Chance Current Gap

When an individual is booked or arrested, a police record is created.98 Formal charges generate court records.99 Due in part to the uniquely

94 Id. at 13.
95 Id. at 13.
96 Id. at 17.
97 Following the passage of Amendment 4 in Florida in November 2018, Florida will make reinfranchisement automatic, rather than petition-based.
99 Id. at 54-59.
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American tradition of broad access by citizens to government records, both types of criminal records 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.100 Though generated primarily to aid law enforcement, starting in 2014, background checks began to be processed primarily for noncriminal justice purposes.101 Over the last 10 years, the number of fingerprints processed for noncriminal justice purposes increased by nearly 90%, while the number processed for criminal justice purposes actually decreased.102 Concerns about employer liability and advances in information technology have contributed to making background checks commonplace.103

According to the FBI, approximately one of every three adults, or 75.9 million unique Americans, has a criminal record;104 in 2016 there were 110M subjects in state criminal history files according to a survey carried out by the Bureau of Justice Statistics and SEARCH, a consortium of state criminal history information systems.105 The majority of records involve

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100 Id. at 159-223 (discussing US criminal record exceptionalism) and 58-74 (discussing the digitization and market for criminal records).
102 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)
105 Goggins supra note ___ (reporting that state level criminal databases include 110.2 M Americans in 2016)
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misdemeanors\(^\text{106}\) and charges that do not turn into convictions. Within the studied dataset of \(\sim 60,000\) (court) criminal background checks, 13\% of charges were associated with felony convictions, 45\% with misdemeanor or other minor convictions, and 42\% with non-conviction dispositions.\(^\text{107}\)

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.”\(^\text{108}\) Because a criminal record can substantially limit a person’s opportunity to obtain employment, housing, public benefits, and student loans, and to qualify for certain professions and gain entrance into higher education, having a record has been called “a civil death.”\(^\text{109}\) Available research suggests that criminal records of convictions have more serious collateral consequences than those that reflect only non-convictions,\(^\text{110}\) particularly in the employment context. However, even nonconvicted records have led to negative immigration, employment, housing, and educational outcomes,\(^\text{111}\) studies have documented.

\(^{106}\) For an overview of relevant studies see, e.g. Peter Leasure, *Misdemeanor Records and Employment Outcomes: An Experimental Study*, Crime & Delin. 1, at 3-4 (2018). Misdemeanors generally encompass crimes punishable by 1 year or less of incarceration and include e.g. activities such as marijuana possession, littering, driving without a valid license, turnstile jumping or more serious crimes. Jenny Roberts, *Expunging America’s Rap Sheet*, 2015 Wis. L. Rev. 321, 325 (2015).

\(^{107}\) Including acquittals and dismissals, but not diversions and deferrals, which, while reflecting a termination in favor of the accused, reflect a probationary status. See Appendix Part B for additional methodological details.

\(^{108}\) Roberts, *supra* note \(\_\_\_), at 326.

\(^{109}\) Adams, *supra* note \(\_\_\_), at 24.

\(^{110}\) For an overview of the literature see, e.g. Leasure, *supra* note \(\_\_\_) at 1-2, 4-5.

\(^{111}\) Described in, e.g. Eisha Jain, *Prosecuting Collateral Consequences*, 104 Geo. L. Journ., 1207 (2016) (describing e.g. the suspension of a professional license, eviction from public housing, and receiving public benefits as collateral consequences associated with arrests; Eisha Jain, *Arrests as Regulation*, 67 Stan. L. Rev. 809, 810 & 821-844 (2015) (describing the use of arrest information by immigration enforcement officials to screen individuals who may fall within a removal priority (about 20\% 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/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); Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. Rev. 896, (2014) (finding that mere arrests can be bars to hiring) cf Christopher Uggen et al, *The Edge Of Stigma: An Experimental Audit of the Effects Of Low-Level Criminal Records On Employment*, 52 Criminology 4: 627 (2014), at 637 (finding a 4\%
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These consequences can be avoided by taking advantage of records cleaning, an umbrella term that refers to a variety of types of records relief including sealing, expungements, set-asides, conviction reduction, certificates of rehabilitation, and pardons. As described earlier, these efforts are part of a broader set of policies aimed at reducing the harms associated with having a criminal record. But they will only succeed at doing so to the extent they are taken up.

To develop an estimate of the national current records clearing gap is a daunting task. To attempt it, I obtained anonymized criminal history data on 60,269 people with criminal records from across the 50 states. The individuals were seekers of primarily on-demand jobs whose backgrounds were checked between January 2017 and October 2018. To these records, I

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difference in callback rates associated with people with arrest records vs. 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 non-conviction data to screen out individual job applicants, employers nevertheless adopt blanket policies that reject individuals with any record, including a non-conviction record.)

112 See infra at note ___. (citing studies of the Vera Institute and CCRC)

113 Including, in California, related to drug diversions, factual innocence, juvenile offenses, offenses related to being involved in human trafficking, marijuana

114 Described, e.g. in *San Jose State University Record Clearance Project, Criminal Record Clearing in a Nutshell*, (Jan. 2018), (on file with the author and stored at https://docs.google.com/presentation/d/11evvpNpNd4JGY1gRUY1ADjBgSitH4YYygG1j1-Lie4g/edit).


116 The number of checks in the studied sample per state averaged 1,487 and with the exception of Vermont (N=484) and Kansas (N=767) numbered over 1,000 (Appendix, Part B: State Descriptive Methods and Metrics); each sample size should be kept in mind for the purpose of developing point estimates. See Appendix, Parts A & B for an overview of the data and the methods used to analyze them.

117 There is currently no process for expunging federal charges and convictions, but the majority of states implement various programs for expungement. See *Restoration of Rights Project supra* note ___.

118 Carried out by commercial background check company Checkr. While Checkr’s website describes it as carrying out more than 10 million background checks per year for more than 10,000 customers (checkr.com/, it has been reported that approximately 80% of its checks are for on-demand companies. 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 (2018), https://venturebeat.com/2018/07/13/checkr-and-uber-built-a-service-to-monitor-workers-background-records/). Carolyn Said, *Checkr adds ongoing screening for gig economy workers*, San
applied simplified versions of the law to ascertain eligibility for clearance developed through close consultation with experts and state attorneys. Through this exercise, each state’s laws during the relevant period were classified, roughly, into one of three main buckets: “strict” (only allowing for clearance of non-convictions 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 “super-strict” (disallowing the clearance of court records under any circumstances). 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. As detailed in Appendix Part B, when in doubt, I defaulted to the more conservative version of the rule (superstrict over strict over lenient), however ambiguity remained and as such, the resulting approximate categorization remains that, approximate.

It should also be noted that a considerable share of the data was ambiguous, lacking in clear disposition data or missing other key fields.

While the overwhelming majority of lenient jurisdictions allowed for clearance of court and arrest records not associated with a guilty conviction, two states, Alaska and Iowa, allowed for court but not arrest records.

In the case of two states, Ohio and South Dakota, the law could not be determined with certainty (for example, in the case of South Dakota, the Assistant Attorney General stating that the clearability of partial non-convictions raised an “unanswered question”) (email on file with the author), leading us to assume, conservatively, that the states followed a “strict” records clearance policy.

See discussion in Part III, infra and Appendix, Part D: Clearance Criteria Examples and Challenges(provisions)

For example, though Georgia and Louisiana both offer partial redaction in certain limited cases, making then “lenient,” in part I coded them as “strict” because partial redaction was only available in a subset of nonconvicted cases.

Further, while care was taken to model some preconditions of relief, not all conditions could be ascertained, making the estimates provided both under and overinclusive. See Appendix Part B for details.
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needed to ascertain eligibility. While only 60% of charge dispositions used
the “plain English” terms of “guilty,” “convict,” “admit,” “not guilty,”
“dismiss,” “acquit”); approximately 27% of charges lacked ascertainable
dispositions, reflecting, for example, that the case had been transferred, was
pending, or undecided. To carry out my analysis, I excluded these
“unascertainably disposed” charges, however if they in fact reflect outcomes
that deviate in important ways from those with ascertainable dispositions,
this will skew the results. About 43% of charges and 60% of incidents were
associated with conviction dispositions.\textsuperscript{124}

\begin{footnotesize}
\textsuperscript{124} These numbers are depressed, in part, by the numbers of charges and cases that lacked
dispositions. 58% of discernably disposed charges and 70% of discernably disposed
incidents had conviction dispositions.
\end{footnotesize}
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Table 3.1: Charge Dispositions

<table>
<thead>
<tr>
<th>Dispositions (N=577,164)</th>
<th>Share of Total Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resolved</td>
<td>73%</td>
</tr>
<tr>
<td>Guilty^125</td>
<td>43%</td>
</tr>
<tr>
<td>Not Guilty^126</td>
<td>31%</td>
</tr>
<tr>
<td>Unresolved</td>
<td>27%</td>
</tr>
<tr>
<td>Diverted/Deferred</td>
<td>1%</td>
</tr>
<tr>
<td>Missing Dispositions</td>
<td>10%</td>
</tr>
<tr>
<td>Unknown^127/Not Classified</td>
<td>10%</td>
</tr>
<tr>
<td>Transferred/Not Decided</td>
<td>2%</td>
</tr>
<tr>
<td>Pending</td>
<td>4%</td>
</tr>
<tr>
<td>&quot;Plain English&quot; Disposition^128</td>
<td>59%</td>
</tr>
</tbody>
</table>

The application of state rules to state records resulted in a wide range of current records clearance gaps by state. (Appendix, Part B: State Descriptive Statistics) Though an estimated 40%-45% of people with criminal records, in states that allow for clearance of court records,^129 could clear their record partially or fully, states varied widely in their share of individuals with criminal court records who could clear them partially or fully. below, Vermont, for example, had a second chance records clearing gap, based on records available to employers, of less than 1% while the estimated second chance gap in Massachusetts is over 90%.

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

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^125 Includes guilty verdicts and plea dispositions.
^126 Includes acquittals, dismissals, dropped, and probation dispositions.
^127 Including dispositions like “no information”, “process other”, “adjudication withheld”
^128 Disposition includes "dismiss," "not guilty", "acquit", "guilty", "convicted", "admit", "admission", "glty"; not, e.g. “nolle”
^129 Montana, Florida, Minnesota, Montana, New Mexico, Washington and Wisconsin do not, only allowing for clearance of police records; North Dakota does not allow for clearance of non-convictions in general.
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for relief in states with more lenient policies), rates of conviction, and clearance mechanism. A state might have a small gap because their policy is “super-strict” and stingy, not allowing any non-convictions records to be cleared, or conversely, because their clearance mechanism is efficient. These factors belie mechanical comparisons between states and their gaps. But overall, these numbers are important because they illustrate, the extent to which individuals in each state that are ready and willing to contribute to the workforce, based on their job applications, have improvable records.

However, these figures are also deficient and depressed in a few ways as a measure of the true national second chance records clearance gap. First, they do not include arrests that do not turn into charges that show up in police records, and which are clearable in all but a few states. Second, they also exclude the numerous and varied bases for cleaning of conviction records. Third, gig jobseekers are not representative of adult Americans nationally, nor necessarily those with criminal records. As detailed in the Appendix, when compared with the actual current gap calculated, based on total data for jurisdictions within four states, the gig-jobseeker was uniformly smaller, on the order of 4 to 25%. These findings suggest that the gig

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130 In the gig jobseeker sample, the ratio of non-convictions to all charges visible in the data varied among states between less than 10% and more than 70%. Cf, Measure for Justice Data Portal, available at https://measuresforjustice.org/portal/ (last visited Feb. 5, 2019) (determining “case dismissal” and “case not prosecuted” rates, for 7 states and finding a range between 16.5% (in Utah) and 46% (in North Carolina)) (see website for definitional detail).

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

132 Including Alaska, North Dakota and Iowa. Author’s analysis in consultation with in-state attorneys in collaboration with the Council of State Governments.

133 For a sample of these terms, see Appendix, Part D: Clearance Criteria Examples.

134 As a subset of contingent workers, gig job seekers are likely to be more urban, younger, and live in a Western state than non-contingent worker. U.S. Bureau of Labor Statistics, “Contingent and Alternative Employment Arrangements” (Washington, DC: U.S. Department of Labor, 2018), at https://www.bls.gov/news.release/pdf/conemp.pdf (table 2) (finding contingent workers to be more than twice as likely as non contingent workers to be under 25), https://www.gigeconomydata.org/basics/who-participates-gig-economy#footnoteref12_wfxjs5u (reporting that gig workers are geographically concentrated in urban areas in Western states)

135 At Part C.

136 As explained in the Appendix, I carried out this calibrating analysis on several states using complete or representative court records over certain periods, and comparing state-level “actuals” gaps as reflected in these records, with the gaps observed within the gig jobseeker
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jobseeker shares of this study can be used to provide lower-bounds estimates. Applying each state’s lower-bound estimate in rough proportion\textsuperscript{137} to the national population of individuals with criminal records\textsuperscript{138} yielded a cumulative, lower-bounds national second chance gap among individuals with criminal records of roughly 35%, or 20-30M individuals.\textsuperscript{139} Of those, 40% of individuals with clearable records had clearable felonies and more than a third\textsuperscript{140} had fully clearable records.

\textsuperscript{137} Based on each state’s share of arrests from 1995 to the present, using data collected at \url{https://ucr.fbi.gov/crime-in-the-u.s.}, yielding an aggregate share of 36.4% (Part A: Descriptive Statistics)

\textsuperscript{138} ~77 M-100M Americans are estimated to have a criminal record. Federal Bureau of Investigation, September 2018 Next Generation Identification System Fact Sheet (2018) (reporting criminal records associated with 77 million unique individuals, based on fingerprints). \url{https://www.fbi.gov/file-repository/ngi-monthly-fact-sheet/view} Cf U.S. Dept’t of Justice, Survey of State Criminal History Information Systems, 2012 at Table 1 (2014) (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) available at \url{https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf}; U.S. Dept’t of Justice, Survey of State Criminal History Information Systems, 2012 at Table 25 (2014) (Reporting 79 million unique criminal records based on the Interstate Identification Index). Some fraction of these individuals only have arrest records. An analysis by Tia Stevens of University of South Carolina based on a 16 year-long U.S. Bureau of Labor Statistics survey tracking 7,335 randomly selected people in their 20’s found that 25% of arrests do not lead to charges but I estimate that the share of individuals with only arrest records is less than that, because individuals with an uncharged arrest may either have another charged arrest or not. Described in Fields & Emshwiller, supra note ___ and confirmed in correspondence with Tia Stevenson, on file with the author. States generally allow arrest records to be cleared more readily than court records, making it likely that the non-consideration of arrest records and arrest records policies in this analysis deflates the overall estimate.

\textsuperscript{139} 35% x 77M. See \textit{id.} for an estimate of the impact of the exclusion of arrest records and arrest records clearance policies from this analysis.

\textsuperscript{140} 13%.
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Table 4: Estimates of the Gig Jobseeker and National Current Records Clearance Gaps

<table>
<thead>
<tr>
<th>Individuals</th>
<th>State Average Share of Individuals with Records Clearable (Partially or Fully)**</th>
<th>State Average Share of Individuals Fully Clearable**</th>
<th>Est. National Average Share of Individuals Weighted by Arrests by State</th>
<th>Estimated People in the Second Chance Current Gap</th>
</tr>
</thead>
<tbody>
<tr>
<td>60,269141</td>
<td>53%</td>
<td>17%</td>
<td>35%</td>
<td>25-30M</td>
</tr>
</tbody>
</table>

Based on modeling non-convictions clearance criteria

**Among states that offer clearance of court records

What factors explain the variance in the size of the second chance gap? I worked with a research assistant to conduct a hierarchical multiple linear regression to assess the contribution of state and local policies as well as demographic characteristics of the target population to the current gap (the percentage of cases eligible for clearance) of a given county. Three policy factors were initially considered: the generosity of the state non-convictions clearance law (whether lenient or strict), the presence of “any” automatic clearing provision in state law,142 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 classification143 and ln(population) of the county.

The model results suggest that more than three-quarters of the variance in the second chance gap can be explained based on policy factors not only including the presence of any “automatic” clearing criteria but also the convictions rate (what share of charges became convictions), and state

141 The total was 59,874 when D.C. residents were excluded.
142 The range in provisions was considerable, compare, e.g. Maine’s provision, which states that “Records of an arrest or court proceeding that did not lead to a conviction immediately become confidential. 16 M.R.S.” § 703(2), and Connecticut’s more restricted rule that, “Police, court, and state’s attorney records relating to a case for which a nolle prosequi was entered are erased within 13 months.” Conn. Gen. Stat. § 54-142a(c).
143 Obtained from the Census Bureau’s urban/rural codes, available at https://www.census.gov/data/tables/2017/demo/popest/counties-total.html#par_textimage

Electronic copy available at: https://ssrn.com/abstract=3265335
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clearability policy (strict, lenient, super-strict). 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% 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% increase in the gap). Both of these correlations were significant at the 99% confidence level, indicating that uptake is not equal across all groups.

III. Reducing the Second Chance Gap

So far, this paper 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 sizeable uptake gaps among the studied programs and attempts to estimate the “current” gap associated with records clearance policies. It finds that about 30-40% of adults with record, or 20-30M Americans, fall into the current second chance records clearing gap and that a large share of the variation between jurisdictions can be accounted for by policy and, to a lesser extent, demographic factors. It is important to acknowledge that in some cases unobservable substantive factors such as discretion can make a person that appears eligible for relief in fact not entitled to it. In addition, as the broader nonparticipation literature has found, concrete and immediate informational and transactional costs can appear to dwarf the downstream benefits of, for example, a cleaner record or the right to vote. But just as with social benefit programs, privately rational non-participation may be socially sub-optimal. Lower uptake in such programs by vulnerable or at-risk

144 r2 = 0.753, all ps < 0.001; See Appendix, Part E: Multiple Linear Regression Results.
145 r2 = 0.757, all ps except ln(population) < 0.001, See Id.
146 For example, under California’s Prop 47, eligible inmates may still nevertheless not be entitled to resentencing if the court determines them to pose “an unreasonable risk to public safety.”
147 See, e.g. Alba, supra note ___ at 3 (describing the “present bias” or hyperbolic discounting that can impact the social benefit participation decision)
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communities (such as, in the case of welfare, immigrants) mean that the benefit is not reaching those who need it the most.

In addition, while no government program is expected to have complete uptake, reported second chance uptake rates of 5-10% leave much room for closing the gap. This Part compares and contrasts the implementation of second chances programs with relatively larger and smaller gaps to identify some of the practices and approaches that for doing so.

Article III courts are used to deciding cases or controversies by taking into account the particular facts of each case, but the size and consequences of the second chance gaps identified support applying a different, scalable approach to address 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.

It is important to acknowledge that the discussion below 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 paper, 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.

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148 See Currie, supra note __ at 16 (describing studies that document depressed rates of enrollment among immigrant children conditional on qualifying for Medicaid, and, conditional on being poor, lower rates of enrollment in SSI among Hispanic children.

149 As a point of comparison, the uptake rates of a number of large means-tested social welfare programs is closer to 50-80%. Goldin, supra note ___ at 7-8 and FN 37 (describing an 80% 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%).

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However, recognizing that “issues of judicial administration impact substantive outcomes,” the following discussion focuses on the role of administrative or “red tape” factors, as distinct from merits-based denials, to second-chance gaps.

1. Clear, Consistently-Applied, and Ascertainable Criteria

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. Attempting to apply records clearance criteria in an automated way demonstrates the challenges. As described next, data hygiene issues all too familiar to data practitioners, including data silos, missing data, and dirty data 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 requires a reliable way to identify that person across statewide criminal records, for example through a unique state ID. But according to the Council for State Government’s Justice project, only 18 states have and use a unique state identification (SID) number for each person consistently. Provisions that are “person-specific,” are both common and difficult to ascertain at scale without an authorized identification strategy. Compounding such “data silos” are problems of expungement seekers that 40% of respondents owing fines reported they were unable to pay.

152 Some of which are listed in Appendix, Part D.
154 For examples, see Appendix, Part D: Clearance Criteria Examples and Challenges.
155 Rather than, for example, a state-wide case management system.
156 Action Item 3: Use measures that permit more timely analysis in addition to cohort-based measures, 50-State Report, available at https://50statespublicsafety.us/part-2/strategy-1/action-item-3/#graphic-3
157 Rhode Island, for example, includes three criteria, that require, respectively, conviction records to be connected to a “first misdemeanor,” “first felony,” or for the person to have
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“missing data”: for example, the lack of grade or severity data called for by some state’s eligibility criteria.158 Personal information pertaining, for example, to the individual’s military status, age, or the amount of money at stake, or which implicate discretion or other out of record criteria, are also nearly impossible to implement at scale.159 Another issue is “dirty data.” Criteria based on the date of sentence completion are surprisingly difficult to implement, for example, because, when even available, sentencing data is often unstructured160 and it is much harder to pinpoint a completion date than, for example, disposition date. Policy interventions can be used to address each such issue ex ante, for example, by blessing the use of standard commercial name matching techniques, pegging waiting times to disposition dates, rather than sentence completion date,161 and more generally taking into account implementation in policy development, but doing so ex post is more fraught.

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

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158 For examples see Appendix, Part D: Sample Clearance Criteria. Accord Michael Hollander, presentation to the Workshop to Close the Second Chance Gap on November __, 2018. (discussing the issue of missing grades in the application of Pennsylvania state law to Pennsylvania criminal records)

159 For example, one aspect of the of California Prop 47, it’s $950 ceiling with respect to property crimes has been relatively hard to implement at scale because it requires analysis of the police record. Interviews with district attorney offices and author’s analysis. Conversely, two of the factors that made computational determination of the expungeable 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. Correspondence with Stubenberg, March 2, 2018.

160 For example, “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”

161 For a list of problematic phrases and drafting alternatives, see Appendix, Part D: Clearance Criteria Examples and Challenges
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efficiently should at least be taken into consideration, and where possible, minimized.

The importance of ascertainable and consistently-applied criteria is underscored by considering the Clemency Initiative and “Drugs Minus Two” federal resentencing program, which also enabled federal inmates to apply for shortened sentences, but which had a much smaller uptake gap. In her report *Lessons Learned*, a comprehensive analysis of several federal resentencing initiatives, Cary Devins cites as one of the factors that led to the success of the Drugs Minus Two initiative that in most cases eligibility for the program could readily be determined without a complex legal analysis. This enabled courts to grant relief regardless or not an affected individual filed a motion. It also allowed the US Sentencing Commission to generate preliminary lists of eligible defendants to district courts upon request.

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. According to former U.S. Pardon Attorney Margaret Love, this meant that “[r]elief was granted in dozens of cases that evidently not satisfy the eligibility criteria announced…” while “many prisoners whose cases did meet the eligibility criteria were inexplicably denied relief.”

Overly complex rules or regimes can compromise personal liberty. In the context of early release, for example, calculating prisoner sentences requires the application of complex sentencing formulas that, for example,

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163 Devins, * supra* note ___, at 69.
164 Id.
165 Schmitt, * supra* note ___, at 2. (only 5.1% of the offenders who received a commuted sentence met all the factors, while only 3.4% of the sentences of drug trafficking offenders that met all the factors did.)
167 See also Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, Tax Law Rev. ____ (forthcoming) (discussing the role of complexity in the EITC context, and distinguishing between informational and computational complexity)
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depend on “court clerks to record judges' orders correctly, prison and jail administrators to properly read those instructions, and facility staff to accurately add and subtract good-time credits.” Errors can result in overstays and early releases. A 2008 investigation of good time credits in California state prison found that good behavior wasn’t counted properly in state prisons, for example, and that some inmates were given 15% good behavior time instead of the 50% to which they were entitled. State records reflected that in more than half of the cases inspected (354 of 679) the offenders were set to overstay their time in prison, “for a combined 104 years too long,” at an estimated cost of $44M in taxpayer expenses in 2008.

2. Streamlined, Centralized Delivery of Second Chances at the State, Not Petitioners’ Initiative

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 to refashion sentences. The lack of a unified approach to reviewing applications introduced inconsistencies and inefficiencies in administration. The Drugs Minus Two program (like certain previous

170 Id.
171 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 program, “structural bias” Described in Rachel E. Barkow, Clemency and Presidential Administration of Criminal Law, 90 N.Y.U. L. Rev 802, 824, (2015).
172 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, 426- 429 (2017).
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Presidential pardon programs\(^{173}\) in contrast, benefited from a uniform and “proactive, relatively centralized and efficient process.”\(^{174}\)

California has 58 counties, each responsible for deciding how to implement key parts of Propositions 47 and 64.\(^{175}\) A review of county websites undertaken for this paper yielded no information about how to clear one’s record under these provisions for 22 and 28 counties,\(^{176}\) respectively.\(^{177}\) 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 paper, 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.\(^{178}\) Pennsylvania’s recently enacted Clean Slate Act assigns responsibility for sealing non-convictions and minor convictions from criminal records to the state police and statewide Administrative Office of Pennsylvania Courts.\(^{179}\) Burden shifting in these

\(^{173}\) Love (Clemency Legacy), supra note ___, at 271. (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. Citing Osler and Fass, The Ford Approach and Real Fairness for Crack Convicts, 23 Fed. Sent’g Rep. 228 (2011).)

\(^{174}\) Devins, supra note __, at 70.


\(^{176}\) Author’s analysis of state provisions.

\(^{177}\) Many of these included the 22 counties that lack a formal Public Defender’s Office; Second Chances and Systems Change, Californians For Safety And Justice, (2017), at 56.

\(^{178}\) Assem. Bill 1793, 2017-2018, ch. 993, 2018 Cal. Stat.(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 identify past convictions and courts to automatically reduce or dismiss the conviction pursuant to if there is no prosecutorial challenge by July 1, 2020).

\(^{179}\) In those situations where the courts miss a case or are missing grading information, a petitioner may still proactively file a sealing petition.
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ways not only supports more efficient, centralized administration, but also automation and cost-savings, addressed in the subsection.  

But even when the burden is on the state, small differences in how the law is drafted or implemented can contribute to big difference in the consequences of a criminal records. 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 60 days after the date of acquittal or dismissal. In Vermont, the waiting time is longer, 12 months, but the court will seal the record after dismissal or a finding of no probable cause. But while Vermont’s second chance current gap was close to 0% for the studied years, based on data available to employers the second chance gap among gig-jobseekers in Alaska did not decline in 2017, despite its adoption of its “no website access” policy in 2016. This could be because background check companies can nonetheless access criminal justice data, for example, through a state data feed or court runner and disseminate this information electronically even in the absence of a state website.

In Vermont, a person’s criminal history record is sealed by the court 12 months after a finding of no probable cause, dismissal at arraignment, or dismissal without prejudice before trial, unless the prosecuting attorney objects. 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

180 State-based identification can support clearance across disparate counties – a survey of clearance seekers in California found that 43% had charges in multiple counties. Clear My Record, Code For America, https://www.codeforamerica.org/what/clear-my-record. It also can support economies of scale by enabling clearance on multiple bases using a “human-centered” rather the more typical “case-centered” approach.
181 Alaska Stat. § 22.35.030.
182 13 V.S.A. § 7603(a)
183 From approximately 30% to 37%. Author’s analysis, though on sample sizes of 86 and 115 cases, respectively, limiting the precision of point estimates.
184 13 V.S.A. § 7603(a).
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on someone who has been convicted of a crime.”185 This provides a seal around criminal information that is not present in Alaska.

3. Automating Delivery of Second Chances

Though every second chance program is unique, each petition-based system requires the same basic functions to be carried out: for the applicant to 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 for the state to evaluate the application and grant relief.186 Student researchers 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 $3,757.187

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 cost of the court

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185 Vermont Court Diversion: A Community Response to Crime, Information for Court Diversion Participants about Criminal Records, available at http://vtcourtdiversion.org/court-diversion/information-on-criminal-records/ (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.”)

186 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, per felony, making copies of the form, one for each the Superior Court and District Attorney where convicted, and filing these forms. The DA, Superior Court, and in some cases, the Public Defender in that district must then verify all the information provided, coordinate among bureaucracies, and evaluate the claim. My Prop 47, Californians For Safety And Justice, available at www.myprop47.org

187 The process of applying for reinfranchisement is generally even more involved, for example, requiring an individual to determine, 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, then proceed to a hearing, followed by a board recommendation, and then a gubernatorial decision. Manza and Uggen, supra note ___, at 84-94.
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processing petitions to be about $7.87-27.87M per 218,094 convictions, at an average cost of about $36-$164 per cleared conviction.188

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, for example, and a handful of states specify that non-conviction records “shall” be expunged.189 Several counties in California, on their own initiative, have also worked to proactively provide relief without a petition under Prop 47 and 64.190 Under the terms of Pennsylvania’s Clean Slate Act, the state will automatically seal non-conviction and older conviction records,191 at an estimated one-time engineering cost of $245K.192 If we assume that at least 2.4M Pennsylvanians will get relief under the bill,193 this would translate into a cost per cleaned person based on just the non-convictions backlog of ~$0.09.

188 California Senate Committee on Appropriations AB1793 Report (Hearing date: August 6, 2018), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB1793
189 See, e.g. NY, Iowa Code Ann. Section 692.17(1).
190 For example, San Francisco and Alameda, as described above.
193 A conservative number based on the 2.4M people from the Common Pleas courts with charges from 2003-2017 identified by former legal services attorney Michael Hollander as eligible for relief described in the Appendix, Part C. Clean Slate will clear all eligible records, not limited by the time of the charge, it will also cover Magisterial District Courts (that in 2017, processed about 56% of the criminal cases (see http://www.pacourts.us/assets/files/setting-768/file-7040.pdf?ch=0f0e4c, at 10 and 146 ) (reporting that 175,085 criminal cases were resolved by Common Pleas courts and 224,784 criminal cases were resolved by Magisterial District Courts)), making the 2.4M figure likely a conservative number.
### Table 5: Records Clearing Cost Estimates

<table>
<thead>
<tr>
<th>Implementation</th>
<th>Source of Estimate</th>
<th>Cost</th>
<th>Components</th>
</tr>
</thead>
<tbody>
<tr>
<td>Legal-Clinic-Assisted Petition-Based Clearance</td>
<td>Chapin, et. al.194</td>
<td>$3,757 per person</td>
<td>$59 (probation office costs), $242 (court costs), $3,412 (legal assistance provided by the Records Clearance Project), $44 (legal fees of the offender)</td>
</tr>
<tr>
<td>Automated Identification + Petition Based Clearance</td>
<td>California Senate Appropriations Committee195</td>
<td>$36-$164 per charge</td>
<td>$5-$26M (court costs), $2.9M (DOJ identification costs) (does not include prosecution/PD costs)</td>
</tr>
<tr>
<td>Clean Slate</td>
<td>Pennsylvania Senate Appropriations Committee196</td>
<td>~$0.09 per person ($245K to support an initial tranche of ~2.5M people eligible for relief)</td>
<td>195K (for changes to police computerized criminal history systems) and 50K (for implementation by the Administrative Office of PA Courts)</td>
</tr>
</tbody>
</table>

195 *Ca. Senate Appropriations Committee, supra note ___*.  
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IV. Open Policy and Research Questions

This paper 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. These include our current lack of understanding of the public and private impacts of second chance relief at scale, particularly in the absence of notification, the futility of fully cleaning one’s record in a digital age, the second chance gap among juveniles, and the importance of the “first chance gap.”

1. Understanding the Private and Public Impacts of Second Chance Relief (and Lack of Uptake Thereof)

Unlocking opportunities and better outcomes, not just mechanically clearing, 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 non-convictions without notice) is not necessarily what is meaningful (e.g. destruction of old felony conviction records with the knowledge and redemption of the ex-felon).

Currently, little is known about how records cleaning 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 cleaning which introduces significant selection bias and implicates a qualitatively different process that automated clearing. Completing the clearance process provides an individual with increased confidence,\(^{197}\) the knowledge of how to characterize one’s newly cleared past, and in some cases, wrap-around services,\(^{198}\) each of which may contribute to improved

\(^{197}\) Ericka Adams et al., Erasing the Mark of a Criminal Past: Ex-Offenders’ Expectations and Experiences with Record Clearance, 19 Punishment & Soc’Y 23, 27, 43 (2017)

\(^{198}\) As recommended by, e.g., Californians for Safety and Justice, supra note ____, at 57.
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. 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 record has been cleared can lead to inadvertent and unnecessary disclosures of past history. In this regard, it is notable that Pennsylvania’s Clean Slate Act, which automatically seals non-conviction records, records associated with summary convictions after five years and misdemeanors within ten years, as long as the individual’s record is clear, does not require notification. Neither does California’s AB1793, which significantly automates the process of clearing marijuana convictions.

Beyond the notification question, however, the impact of records clearing more broadly, particularly on those with and without records, is poorly understood. Studies have found that ban-the-box strategies intended to help those with records have ended up hurting individuals that are demographically similar to them but don’t have records, and records clearing at scale could have similar unintended consequences as the removal of objective information from evaluation contexts may cause employers and others to rely on their own, subjective (and possibly racist), judgments. The distributional impacts of having records, clearing them, and clearing them selectively, on economic outcomes, public safety, and economic inequality, particularly in comparison with other fair chance measures, raises salient, unanswered questions that deserve priority.

2. The Impossibility of Forgetting

199 I thank Serena Holthe for making this point to me.
200 Kelman and Carlson, supra note __.
202 See, e.g. Jennifer L. Doleac and Benjamin Hansen, Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden, NBER Working Papers. 22469, National Bureau of Economic Research, 2016 (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% points respectively)
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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\(^{203}\) increases the risk that expunged information will remain accessible to employers and others.\(^{204}\) 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.

Audits of commercial screening companies have revealed that they are at risk of reporting sealed records, misclassification (e.g., they report a misdemeanor as a felony), or inappropriately disclosing information protected by consumer and privacy laws.\(^{205}\) When records providers don’t have in place protocols for updating data or do not receive updated data in a usable fashion, the risk of outdated, inaccurate information is high.\(^{206}\) What’s been called the “futility of expungement,”\(^{207}\) referring to the impossibility of erasure, not to mention its fundamental conflict with the First Amendment and tradition of government records transparency and accessibility, have led a number of prominent advocates to oppose expungement as a priority strategy.\(^{208}\)

Individuals can take several steps to protect themselves from outdated criminal profile data,\(^{209}\) but at a systemic level, laws that effectively regulate background screening and “mug shot” services,\(^{210}\) and that make it

\(^{203}\) Alfred Blumstein and Kiminori Nakamura, Redemption in the Presence of Widespread Criminal Background Checks, 47 Criminology, 327, 328 (2009).


\(^{206}\) Roberts, supra note __, at 345.

\(^{207}\) Jacobs, supra note __, at 308 (describing clearing remedies as “largely a futility”)\(^{208}\)

\(^{208}\) See id. at 130 (describing Former Pardon Attorney Margaret Love’s opposition to expungement), 121-3 (describing the “insurmountable” obstacles the First Amendment places on prohibiting media disclosure of expunged information)


\(^{210}\) Roberts, supra note 63, at 346.
easy (for example, by requiring regular publication of the “change file”)\textsuperscript{211} to update databases of information and comply with and punish the dissemination of outdated information, can help. In Europe, the “Right to be Forgotten” has been used to require Google to delist references to a businessman’s criminal history,\textsuperscript{212} and the novel idea of using the Digital Millennium Copyright Act (DMCA) to require commercial providers to “take-down” mugshots has also been suggested,\textsuperscript{213} however, it must be acknowledged, at some cost 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\textsuperscript{214} prepared by commercial screeners.\textsuperscript{215}

The redaction of records also raises significant challenges for researchers, criminal defense attorneys, journalists and others seeking a complete records with which to, \textit{inter alia}, hold the judiciary accountable for its decisions. In addition, given that many expungement laws contemplate that records will remain available to law enforcement, chances that one can get completely away from one’s past seem vanishing 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 and collateral consequences reform box policies, for example, are less burdened by the tradeoff between records expungement and access to complete and full government records raised by Clean Slate policies.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{211} Dietrich, \textit{supra} note 
, at 28.
\item \textsuperscript{212} Jason Tashea, \textit{Right to be Forgotten’ Can Apply to Criminals}, A.B.A.J. (Apr. 16, 2018).
\item \textsuperscript{214} The background screening industry is regulated by two federal agencies, the Federal Trade Commission (FTC) and the relatively new Consumer Financial Protection Bureau (CFPB). Dietrich, \textit{supra} note 
, at 28.
\end{itemize}
\end{footnotesize}
THE SECOND CHANCE GAP

3. Punishing Innocence

A collateral finding of this research is that criminal justice data information about non-convictions – arrests or charges that have been dropped, acquitted, diverted or are pending or otherwise not accompanied by a determination of guilt – are widely available through background checks. As described earlier, among over half a million charges, fewer than half of them (about 43%) included a record of conviction — the sort of information that an employer should care most about. (Table 3.1) What’s worse, the disposition was often unclear. 40 percent of the records included terms like “nolle pro sequi,” “nolo contendere,” or “transfer” which mean little to the average prospective landlord, employer, or person evaluating a candidate. (Table 3.1) Fine distinctions risk meaning even less to the computers that are ingesting criminal data en masse, often with little oversight, to make decisions on a wide range of official and civil contexts. Criminal background checks purport to protect the workplace and other environments from convicted criminals. But civil punishments based on non-convictions, in areas as diverse as housing, employment, and immigration, are being meted out. The risk the criminalization of innocence, one that risks having a disproportionate impact on the nearly 50% of African-American men and more than 40% of Latino men arrested by the age of 23.

4. What about the (Women and) Children?

218 https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1206&context=jlasc
220 [add cite]
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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 not only on the individual, but society.221 Though sealing remedies were originally “pioneered in the juvenile justice system,”222 and separate, juvenile courts, developed to protect the privacy of kids, the specter of juvenile “super predators” and related developments223 led to a gradual loosening of restrictions. 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. The one study of the uptake of juvenile sealing of which I am aware, focused in Washington, documented, in effect a 90% uptake gap.224 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.

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% of those seeking records-clearance,225 as compared to ~25% of those arrested,226 due potentially in part to the desire of women to enter “caregiving” fields such as nursing and geriatric care

221 Consistent, e.g. with the Heckman curve, which hypothesizes that skill 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. Described in James Heckman, Policies to Foster Human Capital, NBER Working Paper No. 7288 (1999)
222 Jacobs, supra note ___, at 116
223 As described in Radice, supra note ___, at 382 and 418.
225 Starr and Prescott, supra note ____ (finding 47% of studied set-aside recipients to be female); Tansey and Carlin, supra note ____, at 13 (finding that 48% of records-clearance applicants were female)
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whose licensing requirements often bar individuals with criminal records,\(^{227}\) suggesting that criminal records act a particular impediment to women, with implications for how education efforts are targeted, and the urgency of licensure reforms. Likewise, the immigration consequences for non-citizens of clearable criminal records, which complement and in the case of deportation\(^{228}\) arguably dwarf other collateral consequences, also deserve further attention. Understanding the particular ways in which criminal records impact disparate populations can support tailored solutions to providing appropriate relief from a criminal history.

5. 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 US and other Western countries in what is taken away, and therefore requires restoration in the first place, when an individual touches the criminal justice system. In the same way that the US Constitution, open government tradition, and data industry conspire in the US to make forgetting impossible, in Europe, prohibitions on disclosure, judicial anonymization of defendant names, a strong tradition of privacy, as well as various continent wide regulations and courts work to make finding an individual’s criminal history in the first place difficult.\(^{229}\) Likewise, felon reinfranchisement 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.\(^{230}\) In this context, closing the second chance gap feels more like a last resort than a first order option for ensuring that everyone has a fair and first shot.

Prosecutors also play a role in the creation of the need for second chances. In the regression models described earlier, among the three policy factors, clearance method explained some of the variance: counties that had


\(^{229}\) Jacobs, supra note __, at 159-1616

\(^{230}\) Id, at 250.
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adopted to some degree an “automatic” clearance approach had a 4.1% lower second chance current gap.231 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 non-convictions or all non-convictions) - as this difference in policy defines whether and to what degree non-convictions charges can be cleared. But also, perhaps less expected, the convictions rate, or how many charges turned into convictions, were highly relevant: a 10% increase in the share of charges that were never convicted was associated with a 10% increase in the second chance gap. The share of charges state by state that actually turn into convictions ranged from less than 30 percent to more than 80 percent in my sample. (Appendix Part B)

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 agencies232 to feed into algorithmic and other determinations. But the consequence of the poor and uneven administration of records relief wouldn’t be so consequential if there weren’t so many people in the records clearing gap. In this vein efforts to support contact with the system without creating a record, are worthy of further piloting and investigation.

CONCLUSION

This paper 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

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231 One might ask, why doesn’t introducing automated methods of clearance account for more of the difference in gap sizes? There are several possible explanation. First, methods that appear automated on the books do not always result in effective clearance in implementation as in the case of Alaska. States that, likewise do not have policies of automation, can nonetheless, 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 in part the analysis pertaining to states that adopted automatic clearance provisions only. Finally, because so few states have adopted automatic clearing and do so in such different ways, the explanatory power of this variable, relative to the others where there is a greater range of values, is small.

232 Described e.g. in Jain, supra note ___, Jacobs. supra note__ at __, see also James B. Jacobs, Mass Incarceration and the Proliferation of Criminal Records, 3 U. ST. THOMAS L.J. 387, 395 (2006)
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discussed in this paper 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 enhance the welfare of millions of Americans be fulfilled.
## APPENDIX

### Part A: Descriptive Statistics

<table>
<thead>
<tr>
<th>Basic Statistics</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Avg Age Range of Individuals at Time of Charge</td>
<td>24</td>
</tr>
<tr>
<td>Number of States Represented</td>
<td>50</td>
</tr>
<tr>
<td>Average number of checks per state</td>
<td>1,487</td>
</tr>
<tr>
<td>Individuals studied</td>
<td>60,269</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Charge Types</th>
<th>count</th>
<th>share</th>
</tr>
</thead>
<tbody>
<tr>
<td>misdemeanor</td>
<td>216,823</td>
<td>52.6%</td>
</tr>
<tr>
<td>not classified</td>
<td>80,905</td>
<td>19.6%</td>
</tr>
<tr>
<td>felony</td>
<td>75,194</td>
<td>18.3%</td>
</tr>
<tr>
<td>minor</td>
<td>39,053</td>
<td>9.5%</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Charge Disposition</th>
<th>count</th>
</tr>
</thead>
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<tr>
<td>pending charges</td>
<td>55,436</td>
</tr>
<tr>
<td>guilty</td>
<td>245,687</td>
</tr>
<tr>
<td>not guilty / dismissed</td>
<td>177,193</td>
</tr>
</tbody>
</table>

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233 87% of the "not classified" charge types were profiled as "unknown"

234 Excluded from the analysis, <2% of these pending charges represented transfers or otherwise had a disposition value

235 Includes cases dismissed, terminated due to “nolle pro sequi,” abandoned, diverted, acquitted, withdrawn, or not prosecuted, and related spellings of same.
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Part B: State Descriptive Methods and Metrics

Table B1: State Level Metrics

<table>
<thead>
<tr>
<th>State</th>
<th>Incidents</th>
<th>Charges</th>
<th>People</th>
<th>Conviction Rate(^{236})</th>
<th>Non-convictions Clearance Policy</th>
<th>% of People with Clearable Records</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>224518</td>
<td>577164</td>
<td>60269</td>
<td>-</td>
<td>-</td>
<td>53(^{238})</td>
</tr>
<tr>
<td>AK</td>
<td>2401</td>
<td>3282</td>
<td>1273</td>
<td>58.21%</td>
<td>Strict</td>
<td>7</td>
</tr>
<tr>
<td>AL</td>
<td>2325</td>
<td>3939</td>
<td>1258</td>
<td>85.34%</td>
<td>Lenient</td>
<td>57</td>
</tr>
<tr>
<td>AR</td>
<td>2909</td>
<td>4714</td>
<td>1243</td>
<td>60.12%</td>
<td>Strict</td>
<td>29</td>
</tr>
<tr>
<td>AZ</td>
<td>6122</td>
<td>12167</td>
<td>1810</td>
<td>75.12%</td>
<td>Strict</td>
<td>43</td>
</tr>
<tr>
<td>CA</td>
<td>4410</td>
<td>7077</td>
<td>2080</td>
<td>59.00%</td>
<td>Strict</td>
<td>16</td>
</tr>
<tr>
<td>CO</td>
<td>6277</td>
<td>15635</td>
<td>1847</td>
<td>75.81%</td>
<td>Strict</td>
<td>52</td>
</tr>
<tr>
<td>CT</td>
<td>2399</td>
<td>3431</td>
<td>1227</td>
<td>42.14%</td>
<td>Lenient</td>
<td>26</td>
</tr>
<tr>
<td>DE</td>
<td>2893</td>
<td>6888</td>
<td>1276</td>
<td>82.57%</td>
<td>Strict</td>
<td>64</td>
</tr>
<tr>
<td>FL</td>
<td>13214</td>
<td>22874</td>
<td>2749</td>
<td>33.04%</td>
<td>Super Strict</td>
<td>0</td>
</tr>
<tr>
<td>GA</td>
<td>3340</td>
<td>7177</td>
<td>1725</td>
<td>60.12%</td>
<td>Strict</td>
<td>38</td>
</tr>
<tr>
<td>HI</td>
<td>1767</td>
<td>2706</td>
<td>1111</td>
<td>60.16%</td>
<td>Lenient</td>
<td>51</td>
</tr>
<tr>
<td>IA</td>
<td>8276</td>
<td>12540</td>
<td>1583</td>
<td>58.02%</td>
<td>Strict</td>
<td>40</td>
</tr>
<tr>
<td>ID</td>
<td>9591</td>
<td>14384</td>
<td>1428</td>
<td>76.87%</td>
<td>Strict</td>
<td>56</td>
</tr>
<tr>
<td>IL</td>
<td>4080</td>
<td>5871</td>
<td>1725</td>
<td>75.79%</td>
<td>Strict</td>
<td>50</td>
</tr>
<tr>
<td>IN</td>
<td>4230</td>
<td>8384</td>
<td>1462</td>
<td>56.06%</td>
<td>Lenient</td>
<td>66</td>
</tr>
<tr>
<td>KS</td>
<td>1212</td>
<td>2088</td>
<td>763</td>
<td>55.34%</td>
<td>Super Strict</td>
<td>0</td>
</tr>
<tr>
<td>KY</td>
<td>3149</td>
<td>4978</td>
<td>1317</td>
<td>57.47%</td>
<td>Lenient</td>
<td>46</td>
</tr>
<tr>
<td>LA</td>
<td>2497</td>
<td>3896</td>
<td>1329</td>
<td>66.85%</td>
<td>Strict</td>
<td>42</td>
</tr>
<tr>
<td>MA</td>
<td>2054</td>
<td>3827</td>
<td>1252</td>
<td>60.93%</td>
<td>Lenient</td>
<td>91</td>
</tr>
</tbody>
</table>

\(^{236}\) Charge-level

\(^{237}\) Deduplicates individuals with more than 1 state affiliation

\(^{238}\) The average among states that offer clearance of court records was 53%.

Electronic copy available at: https://ssrn.com/abstract=3265335
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<table>
<thead>
<tr>
<th>State</th>
<th>Population</th>
<th>Incarcerated</th>
<th>Incarcerated Population</th>
<th>Incarceration Rate</th>
<th>Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>MD</td>
<td>5905</td>
<td>16562</td>
<td>1693</td>
<td>26.97%</td>
<td>Strict</td>
</tr>
<tr>
<td>ME</td>
<td>2241</td>
<td>3580</td>
<td>1283</td>
<td>23.94%</td>
<td>Lenient</td>
</tr>
<tr>
<td>MI</td>
<td>2433</td>
<td>3402</td>
<td>1357</td>
<td>76.93%</td>
<td>Super Strict</td>
</tr>
<tr>
<td>MN</td>
<td>7728</td>
<td>11026</td>
<td>1871</td>
<td>64.46%</td>
<td>Strict</td>
</tr>
<tr>
<td>MO</td>
<td>3166</td>
<td>5862</td>
<td>1481</td>
<td>85.32%</td>
<td>Strict</td>
</tr>
<tr>
<td>MS</td>
<td>1694</td>
<td>2128</td>
<td>1168</td>
<td>100.00%</td>
<td>Lenient</td>
</tr>
<tr>
<td>MT</td>
<td>1606</td>
<td>2585</td>
<td>1039</td>
<td>75.05%</td>
<td>Super Strict</td>
</tr>
<tr>
<td>NC</td>
<td>11194</td>
<td>24242</td>
<td>2404</td>
<td>67.35%</td>
<td>Lenient</td>
</tr>
<tr>
<td>ND</td>
<td>3532</td>
<td>5148</td>
<td>1384</td>
<td>40.75%</td>
<td>Super Strict</td>
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<tr>
<td>NE</td>
<td>3420</td>
<td>5384</td>
<td>1375</td>
<td>94.41%</td>
<td>Strict</td>
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<td>NH</td>
<td>1852</td>
<td>4002</td>
<td>1200</td>
<td>72.23%</td>
<td>Strict</td>
</tr>
<tr>
<td>NJ</td>
<td>2345</td>
<td>4860</td>
<td>1344</td>
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<td>NM</td>
<td>4375</td>
<td>10158</td>
<td>1427</td>
<td>48.48%</td>
<td>Super Strict</td>
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<tr>
<td>NV</td>
<td>23039</td>
<td>41538</td>
<td>1630</td>
<td>31.17%</td>
<td>Strict</td>
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<tr>
<td>NY</td>
<td>1755</td>
<td>2391</td>
<td>1215</td>
<td>49.78%</td>
<td>Strict</td>
</tr>
<tr>
<td>OH</td>
<td>4460</td>
<td>7648</td>
<td>1621</td>
<td>92.14%</td>
<td>Strict</td>
</tr>
<tr>
<td>OK</td>
<td>3358</td>
<td>6696</td>
<td>1238</td>
<td>65.79%</td>
<td>Lenient</td>
</tr>
<tr>
<td>OR</td>
<td>4215</td>
<td>7579</td>
<td>1484</td>
<td>69.64%</td>
<td>Strict</td>
</tr>
<tr>
<td>PA</td>
<td>6315</td>
<td>20780</td>
<td>1958</td>
<td>62.86%</td>
<td>Lenient</td>
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<tr>
<td>RI</td>
<td>2613</td>
<td>3715</td>
<td>1277</td>
<td>47.72%</td>
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<tr>
<td>SC</td>
<td>7250</td>
<td>13744</td>
<td>1640</td>
<td>66.26%</td>
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<tr>
<td>SD</td>
<td>2735</td>
<td>4246</td>
<td>1284</td>
<td>77.44%</td>
<td>Strict</td>
</tr>
<tr>
<td>TN</td>
<td>4396</td>
<td>8410</td>
<td>1524</td>
<td>60.76%</td>
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</tr>
<tr>
<td>TX</td>
<td>9313</td>
<td>12889</td>
<td>2204</td>
<td>46.59%</td>
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<tr>
<td>UT</td>
<td>2850</td>
<td>4875</td>
<td>1232</td>
<td>49.31%</td>
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<tr>
<td>VA</td>
<td>5682</td>
<td>10098</td>
<td>2217</td>
<td>65.35%</td>
<td>Strict</td>
</tr>
<tr>
<td>VT</td>
<td>692</td>
<td>957</td>
<td>421</td>
<td>62.12%</td>
<td>Lenient</td>
</tr>
<tr>
<td>WA</td>
<td>3139</td>
<td>4414</td>
<td>1533</td>
<td>99.79%</td>
<td>Super Strict</td>
</tr>
</tbody>
</table>
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<table>
<thead>
<tr>
<th>State</th>
<th>Total Checks</th>
<th>Convicted</th>
<th>Non-Convicted</th>
<th>Clearance Criteria</th>
<th>Clearance Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>WI</td>
<td>4184</td>
<td>9309</td>
<td>1482</td>
<td>62.53%</td>
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<td>WV</td>
<td>2362</td>
<td>3799</td>
<td>1245</td>
<td>68.90%</td>
<td>Strict</td>
</tr>
<tr>
<td>WY</td>
<td>2116</td>
<td>2864</td>
<td>1170</td>
<td>44.80%</td>
<td>Strict</td>
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</tbody>
</table>

To generate the statistics reported, I analyzed the background report data of 60,269 people seeking primarily on-demand jobs carried out between January 2017 and October 2018. The data was provided to me through a partnership with background check company Checkr, which services over 10,000 customers per month and powers the gig economy; Checkr, in turn sourced the data directly from court sources. Each set of “checks” was randomly selected at the state level. The 60,269 checks were associated with ~577K charges. From the charge-level data, I grouped each charge involving the same person, on the same day, in the same jurisdiction, into an incident, identifying 265K incidents. I then reviewed the disposition information and based on a taxonomy developed in consultation with expert attorneys, further classified each reported disposition into one of several categories: not guilty (adjudicated), dismissed (with prejudice and without prejudice), deferred, diverted, pre-trial probation, pending, guilty (plea, default, or adjudicated), unknown, transferred/not decided. Doing so necessarily introduced imprecision as states may vary how they view, treat, and characterize certain dispositions, making this exercise at best an approximation.

To these records, I applied the approximate non-convictions clearance criteria of each state during the relevant time period (Jan 2017-June 2018) in order to get a rough estimate of the number of individuals fall into the “second chance gap,” and are eligible for relief but have not taken advantage of it, based on the information available within court records. This required grouping each state’s rules for clearance of non-convictions criteria into one of three categories: super strict (not offering records relief for dismissed/acquitted court records), strict (offering records relief only for incidents where all charges were not convicted), or lenient (offering records relief even in cases where some charges were convicted). To discern each state’s rule, I worked with the Council of State Governments (Justice
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Project), a non-profit group that maintains the “Clean Slate Clearinghouse,” a repository of state clearance criteria, and focused on the clearance of nonconvictions, which all but one state (North Dakota) recognize as clearable to some degree. Based on reading each law and consulting with in-state attorneys, and further consultations with the invaluable Restoration of Rights Project of the Collateral Consequences Resource Center which contains similar information, I determined the scope of each state’s records clearance laws in order to place it within one of three categories: “strict” (only allowing for clearance of non-convictions 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 “super-strict” (only allowing for the clearance of police, not court records). Doing so revealed that, even among this relatively simple form of records clearing law, there was great heterogeneity. When in doubt, I defaulted to the more conservative version of the rule (superstrict over strict over lenient), however ambiguity remained and as such, the resulting approximate categorization remains that, approximate. After the data was prepared for analysis, the rules of each state were applied to the data of each state.

239 Available at Millions of adults in the U.S. have a criminal record, Clean Slate Clearing House, https://cleanslateclearinghouse.org/. Another invaluable resource was the http://restoration.ccresourcecenter.org/, however because of the difference between written and implemented policies, confirmation with in-state attorneys was necessary.

240 North Dakota does provide for two bases for criminal clearance, one related to marijuana convictions (N.D. Cent. Code, § 19-03.1-23(9)) and the other to human trafficking (N.D. Cent. Code § 12.1-41-14).

241 This consensus is consistent with the criminal justice system’s foundational presumption of innocence and arguably, the nature of non-conviction records as a reflection of the arresting or charging officer’s discretionary decisions as discussed in Eisha Jain, Arrests as Regulation, 67 Stan. Law. Rev. 815, 826 & 854 (2015). Purging nonconvictions is also consistent with the presumption of innocence, and, in theory could prevent the racial skew in arrests – 49% and 44% of African-American and Latino men are arrested by age 23, as compared to one third of adults in general. Id., 817 – 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.

242 For example, Georgia and Louisiana both offer partial redaction (or are otherwise “lenient”) in certain limited cases, but in my model, I coded them as “strict.” Collateral Consequences Resources Center, Roundtable on Non-Convictions Records, August 2019, p 30 (on file with the author)

243 I am deeply indebted with Professor Ellen Krietzberg and legal services attorneys Michael Hollander and Matthew Stubenberg for their help in developing rules to clean and normalize
Beyond these rough groupings, states may condition relief on the satisfaction of additional criteria including waiting period, form of non-conviction record (e.g. dismissal, acquittal, with or without prejudice), debt, judicial discretion, charge type and additional criteria. As shown in Table B2, I adopted approaches to approximating these conditions that, while taking into account major waiting times and disqualifications due to previous felonies, also led to modest undercounting (due to the exclusion from our count of clearable charges deferred, diversionary, plea, and “dismissed with prejudice” charges, all of which are clearable in certain jurisdictions on certain terms) and overcounting (due to the failure to take into account disqualifying obstacles to relief including debt, certain (usually serious) charges, and pending charges).

Table B2: Modeling Assumptions

<table>
<thead>
<tr>
<th>Clearance Condition</th>
<th>States Impacted</th>
<th>How Modeled</th>
<th>Impact</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waiting periods or carveouts associated with deferred or diverted charges</td>
<td>42 states&lt;sup&gt;244&lt;/sup&gt;</td>
<td>Apply to all states over all time by not allowing for clearance of deferred or diverted charges</td>
<td>Undercounting of clearable charges (up to 1% of all charges)</td>
</tr>
<tr>
<td>Waiting periods or other limitations associated with dismissals without prejudice</td>
<td>See, e.g. Alabama, Kentucky&lt;sup&gt;245&lt;/sup&gt;</td>
<td>Apply to all states over all time by not allowing for clearance of charges dismissed without prejudice</td>
<td>Undercounting of clearable charges (up to 0.2% of all charges)</td>
</tr>
<tr>
<td>Waiting periods associated with dismissed or acquitted charges</td>
<td>Maryland, Iowa, Missouri, Utah, Washington, Wyoming, Connecticut, Arkansas</td>
<td>Added waiting periods as shown in Table B3</td>
<td>-</td>
</tr>
<tr>
<td>Inclusion of plea agreements</td>
<td>All states</td>
<td>Did not allow for clearance of plea agreement based dismissals</td>
<td>Undercounting of clearable charges in jurisdictions allowing case dispositions into guilty, non-guilty/dismissed, pending, transferred, diversion/deferred categories.</td>
</tr>
</tbody>
</table>

<sup>244</sup> CCRC 2019, supra note __, at fn 39.<br>245 Id.
# SECOND CHANCE GAP

<table>
<thead>
<tr>
<th>Discretionary exclusions or delays</th>
<th>See, e.g. Iowa, Indiana, Delaware, Kentucky, Kansas, Washington, Massachusetts, NY\textsuperscript{246}</th>
<th>Did not account for exclusions</th>
<th>Overcounting of likely cleared charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusions or delays based on offense type (generally serious), court debt, or if criminal charges are pending</td>
<td>See, e.g. Connecticut, California,\textsuperscript{247} Iowa, Alabama,\textsuperscript{248} Indiana,\textsuperscript{249} Mississippi</td>
<td>Did not account for exclusions</td>
<td>Overcounting of clearable charges</td>
</tr>
<tr>
<td>Restrictions based on previous felony convictions</td>
<td>Illinois, North Carolina, Rhode Island,\textsuperscript{250} West Virginia\textsuperscript{251}</td>
<td>Added restriction based on available record</td>
<td>-</td>
</tr>
</tbody>
</table>

\textsuperscript{246} Id., 19-20
\textsuperscript{247} Id., 21 (specifying that in Connecticut “a not guilty or dismissal by reason of mental disease or defect is ineligible for erasure,” and that “California makes sealing unavailable if an arrest or charge is for murder or lacks a statute of limitations (unless acquitted or found innocent) or if a person intentionally evaded prosecution”)
\textsuperscript{248} Id., 24
\textsuperscript{249} Id., 22 (specifying that Indiana will not allow expungement if charges are currently pending)
\textsuperscript{250} R.I. Gen. Laws §12-1-12.1 ("anyone acquitted or exonerated in a criminal case may file a motion to seal court records...a person who has been convicted of a felony is not entitled to relief")
\textsuperscript{251} W. Va. Code § 61-11-25 (“Anyone charged with a criminal offense in West Virginia is found not guilty or charges have been dismissed (not as a result of an exchange for a guilty plea for another offense) is entitled to file a petition to expunge all records relating to arrest, charge, or other matters,a person has been previously convicted of a felony is not allowed to file a petition for expungement”).
THE SECOND CHANCE GAP

Part C: Actual vs. GigJobseeker Gaps

<table>
<thead>
<tr>
<th>State (and years of analysis)</th>
<th>Actual Gap Share</th>
<th>Sample (GigJobseeker) Gap</th>
<th>Difference</th>
<th>Sample Discount</th>
</tr>
</thead>
<tbody>
<tr>
<td>MD (1995-2015)²⁵³</td>
<td>71%</td>
<td>68%</td>
<td>-3%</td>
<td>-4%</td>
</tr>
<tr>
<td><strong>PA (2003-2017)²⁵⁴</strong></td>
<td>73%</td>
<td>65%</td>
<td>-8%</td>
<td>-11%</td>
</tr>
<tr>
<td>CO* (2000-2018)²⁵⁵</td>
<td>34%</td>
<td>30%</td>
<td>-4%</td>
<td>-12%</td>
</tr>
<tr>
<td>AK (1980-2018)</td>
<td>24%</td>
<td>18%</td>
<td>-6%</td>
<td>-25%</td>
</tr>
</tbody>
</table>

To estimate the size and direction of the bias in the criminal records sample of ~60,000 gig jobseekers (the “Sample”) studied in this paper as compared to a representative population of persons with criminal records, I obtained representative data or estimates from several sources, then applied each state’s criteria to the representative data as well as on the Sample, matching the geography and years. The Colorado Judicial Branch provided data on cases from 2000 through 2018,²⁵⁶ and, I used data from 9,758 criminal cases from 1980 to 2018 sourced from the Alaska AOC through a

²⁵² Provided for illustrative purposes.
²⁵³ Both analyses included Baltimore City, and Baltimore, Arundel, and Frederick Counties.
²⁵⁴ Both analyses included the Pennsylvania Common Pleas and Municipal Courts.
²⁵⁵ Incident rather than human gap.
²⁵⁶ Covering three months of each year, in total covering ~747,550 incidents and 1.8M charges.
records provider. In the case of Maryland257 and Pennsylvania,258 I relied upon analyses carried out by legal services attorneys and expungement experts. As reported in Part B, in all cases larger gaps in the Actual sample were observed than in the GigJobseeker sample.

257 To identify cases eligible for expungement, in connection with developing a tool to aid in the provision of legal services, MDExpungement.com, created by Matthew Stubenberg, IT Director/Staff Attorney of Maryland Volunteer Lawyers Services (MVLS), Stubenberg analyzed court records from the years 1995-2015 from four Maryland jurisdictions: Baltimore City, Baltimore County, Arundel County, and Frederick County (described at https://www.mdexpungement.com/statistics.php). At the time, Maryland allowed non-conviction records and records associated with a few convictions to be expunged from court records upon petition. The share of cases identified as expungeable but not expunged in each jurisdiction varied, but across the four jurisdictions, out of 1.41M cases with final dispositions, ~997K were identified as including expungeable offenses that were not expunged, for a gap of about 71%. (Email from Stubenberg, March 2, 2018 (on file with the author)). The overwhelming majority of these potential expungements were based on non-convictions.

258 Based on a tool created to make it easier to expunge criminal records in Pennsylvania (described at http://thephiladelphiacitizen.org/disruptor-michael-hollander-expungement-generator), in the fall of 2018, former-Pennsylvania Community Legal Services staff attorney Michael Hollander 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. Excluded from the analysis were summary cases in Philadelphia (sub-misdemeanor), cases from minor courts outside of Philadelphia and MDJ cases. (Email from Michael Hollander, Community Legal Services, to author (Nov 9, 2018) (on file with author)). 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). Based on applying the criteria to court records, Hollander found that out of 2,030,595 people with disposed criminal records from 2003-2017, 1570694, or 77.3% of them, were eligible for clearing. Approximately 94% of the eligible but not expunged cases were based on non-convictions, rather diversionary charges, making for a total non-convictions current gap rate of 73%.
### THE SECOND CHANCE GAP

Part D: Clearance Criteria Examples and Challenges

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Administrability Challenge</th>
<th>Example</th>
<th>Drafting Alternative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence completion</td>
<td>Not tracked and hard to infer as clean sentencing data is often not available; often unclear whether or not outstanding fines are fees must be paid, or whether they are.</td>
<td>Records relating to a first conviction ...voided upon the petitioner’s successful completion of the sentence will be sealed by the court. KRS §§ 218A.276(1), (8), (9). Record...can be sealed by the court one year after sentence completion if the petitioner has no subsequent charges or convictions. Colo. Rev. Stat. § 24-72-705(1)(c)(l), (1)(e)(l).</td>
<td>Disposition Date (+ X Years)</td>
</tr>
<tr>
<td>First conviction; qualifying</td>
<td>Lack of unique identifier across precludes determination</td>
<td>Specify an identification strategy that can be implemented at scale or do not include demographic traits.</td>
<td></td>
</tr>
<tr>
<td>conditions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Personal demographic trait</td>
<td>Information may not be easily ascertainable / available on the record or charge category condition</td>
<td></td>
<td></td>
</tr>
<tr>
<td>such as age, military status, or</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>other condition</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Class or grade condition</td>
<td>Missing class, grade or category information</td>
<td>Explicitly specify the qualifying crimes</td>
<td></td>
</tr>
<tr>
<td>Court-ordered conditions</td>
<td>Require individual review / check for any “court-ordered” conditions and compliance re: same</td>
<td>Do not include court-ordered conditions</td>
<td></td>
</tr>
<tr>
<td>Laundry list disposition</td>
<td>Vulnerable to changes to definitions, requires detailed clean data</td>
<td>Simple description e.g. “All records that do not end in a conviction”</td>
<td></td>
</tr>
<tr>
<td>criteria</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
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 super-strict counties omitted due to the lack of any clearance), the presence of any “automatic” clearing provisions in state law, and the county’s conviction rate (percentage of charges that led to convictions).

The range in provisions was considerable, compare, e.g. Maine’s provision, which states that “Records of an arrest or court proceeding that did not lead to a conviction immediately become confidential. 16 M.R.S.” § 703(2), and Connecticut’s more restricted rule that...
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Model 1: Gap size = Auto-Clearance + Generosity + ConvictionRate
Model 2: Gap size = Auto-Clearance + Generosity + ConvictionRate + Age + Ln(population) + Rural-Urban Code

These three variables were included in the initial regression. (r^2 = 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\(^{260}\) and ln(population) of the county. (r^2 = 0.757, all ps except ln(population) < 0.001)

\(^{260}\) Obtained from the Census Bureau’s urban/rural codes, available at https://www.census.gov/data/tables/2017/demo/popest/counties-total.html#par_textimage

“Police, court, and state’s attorney records relating to a case for which a nolle prosequi was entered are erased within 13 months.” Conn. Gen. Stat. § 54-142a(c).