Forgiving and Forgetting in American Justice

A 50-State Guide to Expungement and Restoration of Rights

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The Collateral Consequences Resource Center is a non-profit organization established in 2014 to promote public discussion of the collateral consequences of conviction, the legal restrictions and social stigma that burden people with a criminal record long after their court-imposed sentence has been served. The resources available on the Center website are aimed primarily at lawyers and other criminal justice practitioners, scholars and researchers, but they should also be useful to policymakers and those most directly affected by the consequences of conviction. We welcome information about relevant current developments, including judicial decisions and new legislation, as well as proposals for blog posts on topics related to collateral consequences and criminal records. In addition, Center board members and staff are available to advise on law reform and practice issues.

For more information, visit the CCRC at http://ccresourcecenter.org.
This report was prepared by staff of the Collateral Consequences Resource Center, and is based on research compiled for the Restoration of Rights Project, a CCRC project launched in August 2017 in partnership with the National Association of Criminal Defense Lawyers, the National Legal Aid & Defender Association, and the National HIRE Network. The report was originally published in October 2017, and republished as revised in January 2018.

The Restoration of Rights Project is an online resource containing detailed state-by-state analyses of the law and practice in each U.S. jurisdiction relating to restoration of rights and status following arrest or conviction. Jurisdictional “profiles” cover areas such as loss and restoration of civil rights and firearms rights, judicial and executive mechanisms for avoiding or mitigating collateral consequences, and provisions addressing non-discrimination in employment and licensing. In addition to the jurisdictional profiles, Project materials include a set of 50-state comparison charts that make it possible to see national patterns in restoration laws and policies, and summaries that provide a snapshot of available relief in each state. These summaries constitute the heart of this report, and three of the 50-state charts are also included in appendices.

The resources that comprise the Restoration of Rights Project were originally published in 2006 by CCRC Executive Director Margaret Love. They have been expanded over the years to broaden their scope and to account for the many changes in this complex and dynamic area of the law. In 2016, Project resources were re-organized into a unified online platform hosted on the CCRC website.

The Restoration of Rights Project is kept continuously up to date, and CCRC anticipates revising and republishing this overview report from time to time as warranted by developments in the law.
Forgiving & Forgetting in American Justice
A 50-State Guide to Expungement and Restoration of Rights

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INTRODUCTION

This report catalogues and analyzes the various provisions for relief from the collateral consequences of a criminal conviction that are now operating in each of the 50 states. Its goal is to facilitate a national conversation about how people who have been convicted of a crime may best regain their legal rights and social status. Given the millions of Americans who have a criminal record, and the proliferation of laws and policies excluding them from a wide range of opportunities and benefits, there is a critical need for reliable and accessible relief provisions to maximize the chances that these individuals can live productive and law-abiding lives after completion of their court-imposed sentences. Whatever their form, effective relief provisions must reckon with technological advances that have made criminal records easily available, and systemic discrimination that frustrates the rehabilitative goals of the justice system.

The title of the report ("Forgiving & Forgetting") suggests a framework for analyzing different types of relief provisions. For most of our history, executive pardon constituted the principal way that persons convicted of a felony could “pay their debt to society” and regain their full rights as citizens. This traditional symbol of official forgiveness was considered unreliable by mid-20th century reformers, who sought to shift responsibility for restoration to the courts. The reforms they proposed took two quite different approaches: One authorized judges to limit public access to an individual’s criminal record through sealing or expungement, while the other assigned judges something akin to the executive’s pardoning role, through deferred dispositions and set-asides. These two approaches to restoration of rights and opportunities have existed side by side for more than half a century and have never been fully reconciled.

Today, with a new focus on reentry and rehabilitation, policy-makers are again debating whether it is more effective to forgive a person’s past crimes (through executive pardon or judicial dispensation) or to forget them (through record-sealing or expungement). Despite (or perhaps because of) easy access to criminal records and pervasive background-checking practices, many states endorse the approach of forgetting through limits on public access, at least for less serious offenses and records not resulting in conviction. At the same time, national law reform organizations like the American Law Institute and the Uniform Law Commission, have proposed more transparent judicial forgiving or dispensing mechanisms.
variation of the forgiveness model is represented by administratively enforceable standards and procedures for limiting consideration of criminal history in employment and licensing.

While the analytical model of forgiving v. forgetting is necessarily imperfect given the wide variety of relief mechanisms operating in the states, it seems to capture the basic distinction between an approach that would mitigate or avoid the adverse consequences of past crimes, and an approach that would limit access to information about those crimes.

It is not the purpose of this report to recommend any specific approach to restoration, but simply to survey the legal landscape for the benefit of the policy discussions now underway in legislatures across the country. Its authors are mindful of the fact that very little empirical research has been done to measure outcomes of the various schemes described, many of which are still in their infancy. It is therefore hard to say with any degree of certainty which approach works best to integrate individuals with a criminal record into their communities. At the same time, we hope that our description of state restoration mechanisms and legislative trends will inform the work of lawyers and other advocates working to assist individuals in dealing with the lingering burdens imposed by an adverse encounter with the justice system.

In the pages that follow, we summarize and analyze state restoration laws organized into six categories: executive pardon, judicial record-closing, deferred adjudication, certificates of relief, fair employment and licensing laws, and restoration of voting rights. The judgments made about the availability of each form of relief, reflected in color-coded maps, are necessarily subjective, and we have done our best to explain our approach in each case.

More detailed information about different forms of relief is available from the state-by-state summaries that are the heart of this report. Citations to relevant laws and comparisons of the laws of each state are included in the 50-state charts in the appendices. Up-to-date summaries and charts are available from the Restoration of Rights Project (http://restoration.ccresourcecenter.org), which additionally includes in-depth discussions of the law and policy in its state-by-state “profiles.” We intend to republish this report from time to time to reflect significant changes in the law.
EXECUTIVE PARDON

Pardon has been described as the patriarch of restoration mechanisms, whose roots in America are directly traceable to the power of the English crown. Just as a power to pardon was assigned to the president in Article II of the U.S. Constitution, the constitutions of all states but Connecticut provide for an executive pardoning power. Pardon is the ultimate expression of forgiveness and reconciliation from the sovereign that secured the conviction. For almost two centuries, pardon played a routine operational role in the criminal justice system, shortening court-imposed sentences and restoring civil rights lost because of conviction.

Nowadays, pardon is a shadow of its once-robust self, particularly in states where the governor exercises the power without restraint. But in a dozen states, where the pardoning authority is shielded from the political process by constitutional design, pardon still thrives. In those states (colored gold on the map on the following page) people who can demonstrate their rehabilitation have a good chance of official forgiveness, which relieves legal disabilities and certifies good character. In another handful of states (colored dark blue) the pardon process is regular and reliable, although in recent years it has produced few grants.

Not surprisingly, in most of the states where pardons are granted on a routine basis, the governor either has marginal involvement in the pardon process, or shares power with other executive officials. In six states, the pardon power is exercised in most or all cases by an independent board. In five of those six states, the power derives from the state constitution. (In Connecticut, the power to pardon has since colonial times remained within the legislature’s control, so that pardoning is both authorized and limited by statute.) In five of the independent board states, pardoning is frequent and regular, administered through a transparent and accountable process. In Alabama, Connecticut, Georgia, South Carolina, and Idaho, hundreds of pardons are granted each year to ordinary people convicted of garden variety crimes who are seeking to mitigate the harsh lingering consequences of conviction. Utah is also an independent board state, but that state has for many years had a broad expungement remedy so that there has been little or no call on the pardon power.

In most of the states where pardons are granted on a routine basis, the governor either has marginal involvement in the pardon process, or shares power with other executive officials.
In another 14 states, the governor shares the pardon power with other officials or with an appointed “gatekeeper” board. In about half of these states pardon remains a viable form of relief, and pardoning occurs at regular intervals through a public process: Delaware, Nebraska, and Pennsylvania are the stars of this category. Arkansas and South Dakota governors have traditionally pardoned generously, and Minnesota’s pardon board grants a substantial portion of its surprisingly small annual caseload. California’s current governor Jerry Brown has revived the practice of pardoning in that state, which had fallen on hard times since the 1980s.

The pardon process is regular and transparent in Florida, Illinois, Ohio, and Washington, but pardons have been less frequent in these states in recent years than in the past. Virginia’s last three governors have issued a substantial number of “simple pardons” (for forgiveness), although the process for obtaining this relief is opaque and irregular. While Arizona and Louisiana have statutory procedures calling for regular public hearings on pardon applications, the governors in those states have issued very few grants in recent years.

In Arkansas, Connecticut, Pennsylvania, South Dakota, Texas, and Washington a full pardon entitles the recipient to expungement, but in Illinois the pardon must authorize this additional relief. Oklahoma makes expungement available to pardon recipients only after a lengthy crime-free waiting period, and Delaware authorizes expungement only for pardoned misdemeanors. In the other “regular” states pardon does not carry with it judicial relief, though in disclosing the conviction a person may also report that it has been pardoned.
The states colored pale blue on the map are ones in which pardoning in recent years has been infrequent or rare, or uneven depending upon the inclinations of the incumbent governor. In none of the states in this last category may an ordinary person at present have a reasonable expectation of success, and in a few cases the power has been abused by late-term irregular grants that confirm popular suspicions about the corruptibility of the pardon power. Federal convictions, and convictions obtained in District of Columbia courts, may be pardoned only by the president. The number of presidential pardons granted in recent years is small compared to the number of applications that are filed each year, and there has been only one pardon granted to a D.C. Code offender in the past two decades.

More specific information about pardoning policies and procedures in each state is available in the 50-state chart from the Restoration of Rights Project at Appendix A.

**Judicial Record-Closing Authorities**

The concept of expungement or sealing of a criminal record originated in the 1940s in specialized sentencing schemes for juvenile offenders, whose susceptibility to antisocial conduct was thought to be temporary and who were therefore considered “easier to rehabilitate than adults.” The idea was to minimize the legal consequences of conviction and give youthful offenders “an incentive to reform” by “removing the infamy of [their] social standing.” It was not long before the optimistic reformers of the age proposed extending this “clean slate” concept to adult offenders, authorizing courts to seal convictions and defendants to deny them. A different sort of “clean slate” approach was proposed by the drafters of the 1962 Model Penal Code, which authorized courts to vacate the record of conviction to signal a defendant’s rehabilitation but expressly retained the record of conviction.

The debate between these two approaches to restoration continues to this day. Many states have embraced the cause of forgetting, apparently because many advocates do not trust decision-makers to be fair and rational where criminal records are concerned. Others, influenced by national law reform proposals, prefer a more transparent form of restoration. See the section on certificates of relief that follows.
Laws limiting public access to criminal records have proliferated in the past five years, with more than 20 states expanding existing record-closing laws or enacting entirely new ones. In 2017 alone, Illinois, Montana and New York enacted expansive new sealing schemes applicable to adult convictions, while nine other states either relaxed eligibility requirements or otherwise supplemented their existing sealing or expungement authorities to make relief more broadly available at an earlier date. Of these nine, the most ambitious reforms were enacted by Nevada, which was one of several states that created a presumption in favor of relief for eligible persons.3

But record-closing laws differ widely from state to state, in scope (including eligibility criteria and waiting periods), legal effect, standards and procedures. The following discussion is therefore necessarily general, and readers wishing more specific information are invited to consult the individual state summaries and 50-state chart that follows in this report, and the more detailed information in the state profiles of relief mechanisms from the Restoration of Rights Project (http://restoration.ccresourcecenter.org).

**Scope & eligibility**

The map on the following page organizes state record-closing laws into categories according to the scope of covered offenses. It is important to note that assignment to specific color-coded categories is an imperfect grading system, because it does not factor in eligibility criteria such as prior record and waiting periods, accessibility of the process, or thoroughness of relief. Thus, for example, a state like Louisiana was included in the “gold” category only because of the number of offenses that are eligible for expungement in that state, and its 10-year eligibility waiting period and limited effect would seem to make its relief less comprehensive than what is offered by Indiana and Minnesota. At the same time, Indiana’s broad and accessible “expungement” scheme merits no more than a “dark blue” grade because it limits record-closing (“sealing”) to relatively minor offense categories. It is easy to see how making assignments to specific categories was an exercise that frequently felt like pounding square pegs into round holes. With that caveat, we summarize the research underlying the map categories.

Closure of at least some adult conviction records is authorized in all but nine states, but scope ranges widely. At one extreme is Illinois’s recently expanded sealing law, which extends relief to all but a few very serious felonies without regard to an applicant’s prior record, after a uniformly brief waiting period of three years. At the other end of the spectrum is California’s
very limited closure for underage first offender misdemeanors and certain marijuana offenses (including those that have been decriminalized). (California also makes available more transparent judicial and administrative relief, which is discussed more fully in later sections of this report.)

Between these two extremes, there are as many differing approaches as there are states, with scope generally dependent on seriousness of the offense, and eligibility generally dependent on prior record and the passage of time since completion of sentence. For example, in New York and Oregon, closure is available for most felonies but only if it is the person’s only serious offense. Indiana’s law extends judicial relief styled “expungement” to all but the most serious violent offenses after graduated waiting periods, but limits public access to the record only for misdemeanors and minor felonies. Nevada now offers sealing for almost all felonies, the only proviso being a clean record during a graduated waiting period.

North Carolina and Kentucky authorize closure of most non-violent misdemeanors and low-level felonies, but only for those with no prior felony convictions. Missouri’s new sealing law, which takes effect at the beginning of 2018, will permit closure of a significant number of felonies and misdemeanors, but only one felony and two misdemeanors will be eligible for closure in a person’s lifetime. Michigan’s recently expanded law is similar, as is Ohio’s. Similarly, Rhode Island and Tennessee both amended their first-offender expungement authorities in 2017 to make relief available to individuals with more extensive records. But
many states make record-closing a one-bite affair: In Indiana and Illinois, for example, individuals may seek sealing relief for multiple prior eligible offenses, but may not return for further relief if they are again convicted.

Eligibility is not always categorical: Maryland limits closure to a long list of over 100 misdemeanors, while Minnesota limits felony sealing to a list of 50 offenses ranging from aggravated forgery to livestock theft. Eligibility criteria are sometimes curiously complex. For example, in Oregon closure is available for many non-violent misdemeanors and less serious felonies, but only if the individual has not been convicted in the previous 10 years (or ever, if the record for which closure is sought is a Class B felony) nor arrested within the previous three years.

Eligibility waiting periods may be uniform or graduated, short or long. No two states are alike. Many have waiting periods of a decade or more, which would seem in tension with stated legislative goals of reducing recidivism. For example, by the time someone has satisfied Louisiana’s waiting period of 10 crime-free years after completion of sentence, they would appear to be in little or no jeopardy of reoffending. Massachusetts, New York, North Carolina and other states have similarly long eligibility waiting periods.

As noted in the previous section, several of the states where executive pardon is generally available make pardon grounds for automatic expungement. However, only Connecticut’s pardon system is recognized with a “gold” designation on the color-coded record-closing map, since only that state makes “erasure” of the court record widely available by action of an administrative board. By the same token, the color categories assigned Arkansas, Pennsylvania, and South Dakota may to some extent understate the availability of record-closure in those states.

**Effect of expungement or sealing**

Terminology is an unreliable guide to what laws accomplish as a practical matter, since words like “sealing” and “expungement” have no fixed meaning, and are interpreted and applied differently from state to state. In some states sealed records may be closed only to private parties, in others public employers and licensing boards may also be denied access, and in still others, records may no longer be available even to law enforcement without a court order. In some states “expungement” is indistinguishable from sealing (e.g., Louisiana, Kansas, Rhode Island and Vermont), and in others expunged records are physically destroyed (e.g., Maryland, Montana, Pennsylvania, North Carolina). In Indiana, an expungement order does not limit
public access to the record of most felonies, although expunged misdemeanors and non-
conviction records are also sealed. Even in states where expunged records are physically
destroyed, traces may remain in a court’s index. Sealed records typically remain available
only to law enforcement, at least without a court order.

In Indiana, commercial record providers are prohibited from reporting closed convictions,
supplementing protections afforded by the Federal Fair Credit Reporting Act. Colorado is one
of several jurisdictions that prohibit closed records from being introduced as evidence in civil
actions brought against employers and/or landlords for the actions of their employees/renters.

The effect of sealing or expungement orders on legally restricted opportunities is unclear in
many states. It is true that many record-closing laws purport to authorize a person to deny
having been convicted, but this is perilous advice when dealing with entities required by law
to conduct a background check. A few states make clear that expunged or sealed convictions must be disclosed for
employment requiring a background check (e.g., Illinois, Indiana, New York). Kansas specifically requires disclosure of expunged
convictions in certain licensing and public employment applications (health, security, gaming, commercial driver or guide,
investment adviser, law enforcement), and Missouri has a similar disclosure requirement for professional licenses, or any
employment relating to alcoholic beverages, the state-operated lottery, or provision of emergency services. Missouri’s law is one
of the few that makes clear that “an expunged offense shall not be
grounds for automatic disqualification of an application, but may be a factor for denying
employment, or a professional license, certificate, or permit.” Some states require that even
non-conviction records that have been expunged must be disclosed in some contexts (e.g.,
Alabama, Kansas, Louisiana)

In sum, quite apart from the risk of exposure by technology or social media or industrious
background-checkers, record-closing relief can rarely promise an entirely clean slate, particularly where felony convictions are concerned.

**Process**

Procedures for closing a record also vary widely, and may or may not offer prosecutors or
victims an opportunity to object. Relief for eligible applicants may be automatic, presumed, or
dependent on the court’s discretion. In some cases, the law specifies criteria to guide a court’s
discretion (e.g., Minnesota and New Hampshire), in others the court’s discretion is unlimited
(e.g., New Jersey and North Carolina), and in still others sealing is mandatory if statutory
eligibility criteria are met (e.g., Indiana, Kentucky, Louisiana). In Utah, where most felonies may be expunged after a graduated waiting period, an order must issue unless the court finds that this would be “contrary to the public interest.” In a few states filing fees may be prohibitively high for persons of limited means (approaching $500 in Kentucky), while in others the courts and bar have gone out of their way to assist persons of limited means. For example, Indiana’s courts publish model forms for different types of case, and provide information about where those seeking relief may obtain the assistance of a pro bono lawyer.

**Non-conviction and juvenile records**

Almost all states authorize sealing or expungement where no conviction results, whether because of acquittal, reversal, or dismissal of charges. Only three states (Arizona, Idaho and Wisconsin) make no general provision for limiting public access to non-conviction records. In some states (e.g., Illinois, New Jersey and New York) the record is sealed routinely upon final disposition of the case without the need for a separate court proceeding, while in others (e.g., Nebraska) sealing happens after a brief waiting period in which an individual is expected to be crime-free. In many states, arrest records not resulting in charges are automatically sealed or expunged after a short waiting period.

Still, a distressingly large number of states require individuals who have been charged but not convicted of any crime to go to court to argue the case for clearing their record. A subset of these states restrict relief to individuals with a limited prior record (e.g., Florida, North Carolina, Oklahoma, Rhode Island), or to specific types of non-conviction records (e.g., Alaska, Idaho, New Mexico). The 50-state chart from the Restoration of Rights Project at Appendix B offers a quick reference guide to which states require a full-blown judicial proceeding before a non-conviction record is expunged, including some that make relief in such cases discretionary with the court, or dependent upon the concurrence of the prosecution. The filing fees associated with going to court are alone enough to deter those of limited means, and most states do not provide counsel.

Deferred adjudication schemes may also result in dismissal of charges without conviction upon successful completion of a period of probation. Because their importance in enabling charged individuals to avoid a conviction record, they are discussed in detail in the following section.

All states provide for judicial sealing or expungement of at least some juvenile adjudication records, applying procedures and standards that tend to be more favorable to affected individuals than those applicable to adult records. Many states also place general limits on
public disclosure of juvenile records apart from any action by a court. Some states make sealing relief automatic and mandatory except for serious violent offenses, but most make sealing discretionary with the court. Some states require a crime-free waiting period, and a few require the court to make a finding of rehabilitation. There is significant variation in how expungement and sealing of juvenile records is handled even among neighboring states. For example, while Montana and Nevada automatically seal most juvenile records when the subject reaches age 18 or 21, respectively, South Dakota and Wyoming permit sealing/expungement only upon petition, and only after the court makes a finding of rehabilitation. Similarly, Illinois, Virginia and West Virginia make expungement of most juvenile records automatic, while South Carolina and Georgia require the court to make a finding of rehabilitation before sealing a juvenile's record.

**Judicial dismissal of charges without record-sealing**

Before leaving discussion of judicial record-closing laws we note several states that authorize their courts to dismiss charges or set aside (vacate) the record of conviction, avoiding the consequences of conviction without sealing or otherwise limiting public access to the record. Arizona, California and Nebraska are the main states in this small category. (New Hampshire, Oregon and Washington have recently added record-sealing to their venerable set-aside schemes.) West Virginia enacted a set-aside authority in 2017, joining California, Idaho, and North Dakota in offering a process by which minor felonies may be reduced to misdemeanors, but (like the other three states mentioned) offering no sealing of the record in those cases. California limits use of a conviction that has been dismissed or set aside by employers and licensing boards, and Indiana also limits use and reporting of serious offenses that have been the subject of an order styled “expungement” that does not seal the record.

As discussed in the next section, some of the states that authorize deferred adjudication leading to dismissal of charges provide for sealing or expungement of the record, and some do not.

Appendix B contains a 50-state comparison of the laws authorizing expungement, sealing and set-aside in each state from the Restoration of Rights Project, and should be consulted for additional detail.
Deferred adjudication (or deferred sentencing) is a statutory judicial mechanism that allows individuals to avoid the collateral consequences of a conviction at the front end of the criminal process by giving them an opportunity to avoid conviction altogether. Deferred adjudication, which is generally managed by the court, is distinguished from pure diversion, which is generally controlled entirely by the prosecutor. In most states, an individual must first enter a guilty plea, after which the court continues the case without entering a judgement of conviction, while the individual serves a period of probation or supervision. Upon successful completion of probation or supervision, the charges are dismissed and, in most states, the record may then be sealed or expunged.

As the map on the following page indicates, deferred adjudication is available in at least some cases in all but 13 states. And, in almost all states that make deferred adjudication available for a significant number of offenses, closure of the record of charges/arrest is available upon successful completion of the required process. Deferred adjudication schemes originated in the 1970s as a way of avoiding collateral consequences, and the recently revised sentencing articles of the Model Penal Code contain a specific proposal for deferred adjudication that does not require a defendant to enter a guilty plea.

Eligibility for deferred adjudication is generally based on the type of offense and on an individual's criminal history. This disposition is generally not available for particularly serious offenses since it requires admission of guilt and, in most states, a relatively brief period of probation or supervision. However, as with conviction record-closing mechanisms discussed in the preceding section, eligibility varies greatly among states.

Fifteen states (gold on the map), including New York, Texas, and Washington, make deferred adjudication available, with record closure, for most misdemeanors and significant number of felonies, even to individuals who have been previously convicted. Eight other states (dark blue), including Illinois, Michigan, and Maryland, make deferred adjudication with record closure available for a similarly broad class of offenses, but restrict eligibility to first felony offenders. Seven states (medium blue), including Georgia, Minnesota, New Mexico, and North Carolina, authorize deferred adjudication for many felonies and misdemeanors, but make no provision for sealing the record. The remaining seven states either restrict eligibility to minor offenses (light blue), or to a narrow subset of offenses (pale blue) – usually drug offenses, as is the case in New Jersey, South Carolina, and Virginia. Many states seeking to manage collateral consequences have expanded their provisions for deferred adjudication and deferred sentencing in recent years.
Further information about deferred adjudication procedures and eligibility can be found in the state summaries in this report. More detailed information about applicable procedures and eligibility can be found in the state-by-state profiles in the Restoration of Rights Project (http://restoration.ccresourcecenter.org). These profiles also identify other judicially-managed drug treatment or other limited purpose courts (e.g., veterans, mental health) that promise avoidance of a criminal record upon successful completion of the program. Because diversion usually does not typically involve the court and is rarely controlled by statute, it is not captured in these resources.
A growing number of states authorize their courts to issue orders or “certificates” that avoid or mitigate collateral consequences and provide some reassurance about a person’s rehabilitation. New York’s certificate scheme is the oldest, dating from the 1940s, and its “Certificates of Relief from Disabilities” and “Certificates of Good Conduct” have the most far-reaching legal effect when coupled with that state’s nondiscrimination laws. Other states have more recently adopted a wide variety of other names for similar judicial certificates, but all are in the forgiving or dispensing tradition of executive pardon. They should be distinguished from more limited executive or judicial orders restoring voting and other civil rights, including firearms rights. Unlike the record-closing authorities discussed earlier in this report, these “certificates of relief” do not remove information from a person’s criminal history or limit public access to the record, but aim instead “to confront history squarely with evidence of change.”

Certificates of relief that directly limit the application of collateral consequences to their recipients are now available from the courts in ten states, and from administrative agencies in a handful of others (notably Connecticut and Rhode Island). That number appears to be growing, however, and certificate mechanisms have recently been proposed by the Uniform Law Commission, and by the American Law Institute in the revised sentencing articles of the Model Penal Code. These national law reform proposals include a limited order of relief at sentencing to aid reentry, and more comprehensive relief after a waiting period to recognize and reward rehabilitation. Neither proposal provides for sealing or otherwise limiting public access to the record.

All certificates of relief have the effect of converting mandatory collateral consequences (automatic disqualifications imposed by law) into discretionary ones, giving decision-makers discretion to grant opportunities and benefits to individuals who would otherwise be barred from them by law. Some states go further to require that certificates be given weight in the discretionary decision-making process. In Ohio, for example, a “Certificate of Qualification for Employment” creates a “rebuttable presumption that the person’s criminal convictions are insufficient evidence that the person is unfit for the license, employment opportunity, or certification in question.”
Certificates are generally effective at relieving a range of occupational and business licensing consequences, and may also relieve mandatory bars to public and private employment, as is the case in Illinois, New York, North Carolina and Vermont. A few certificates carve out exceptions for specific consequences, particularly those that relate to licensing and employment in sensitive occupations. For example, Washington’s “Certificate of Restoration of Opportunity” does not provide licensing relief for nurses and physicians, private investigators, teachers, or law enforcement personnel, among others. Illinois’ “Certificate of Relief from Disabilities” authorizes relief only in 27 licensed fields. California’s “Certificate of Rehabilitation” limits consideration of felony convictions by licensing boards, relieves the obligation to register as a sex offender, and constitutes the first step in the executive pardon process.

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

Most certificate laws include an eligibility waiting period, presumably to give individuals time to establish rehabilitation, but a few states make limited relief available as early as sentencing to assist with reentry. Colorado, New Jersey, New York, and Vermont fall into this category. Colorado is the only state whose “Order of Collateral Relief” does not seem intended to evidence rehabilitation, authorizing sentencing courts to lift certain mandatory bars in the case of defendants not sentenced to prison to facilitate their reentry. Somewhat anomalously, the certificates in New Jersey and New York evidence rehabilitation even when issued as early as sentencing, but Vermont requires beneficiaries of an early order to return to court for more complete relief after a further waiting period.

Like record-closure, eligibility for a certificate of relief generally depends on three factors: 1) the nature of the conviction for which relief is sought; 2) the passage of time since conviction or completion of sentence; and 3) prior and subsequent conviction history. However, certificates are usually available for a broader category of offense than is eligible for sealing or...
expungement, and after a shorter waiting period, making them presumptively a better aid to reentry than most record closure mechanisms. In North Carolina, for example, a certificate is available for more felony offenses after a significantly shorter waiting period (one year for a certificate vs. five to ten years for expungement). In Illinois, New Jersey, and New York, a court may issue a certificate as early as sentencing, or at any time thereafter.

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

Most states make certificates available only to people with less serious criminal histories. In Washington, for example, certificates are only available to individuals with no subsequent convictions who have not been convicted at any time of a Class A felony, certain sex offenses, and a handful of other serious felonies. Colorado limits certificates to individuals sentenced to community corrections, while North Carolina and Rhode Island limit certificates to those convicted of minor nonviolent crimes.

Issuance of a certificate is entirely discretionary in all states except Washington, and an otherwise eligible petitioner may be denied relief if the court does not make the necessary findings, sometimes weighing the applicant’s need for relief against the public welfare. Moreover, the scope of relief granted in any specific case is generally up to the court: a certificate may be unlimited in scope (subject only to legally established limits), or it may provide relief only from those consequences specified in the certificate itself. This allows the court to tailor the scope of relief to each petitioner and his or her specific circumstances, including employment, licensing, or other objectives. Most states authorize revocation of the certificate if the person reoffends.
States are increasingly directing attention to the employment barriers facing people with criminal records in the age of computer-generated criminal background checks. As evidenced by the map on the following page, most states now have at least some overarching law purporting to limit discrimination based on arrest or conviction in either employment or licensure, or both. While only a few states provide for administrative enforcement of these laws, the existence of standards for considering criminal records may encourage employers and licensing boards to make individualized determinations.

For the most part, state laws regulating consideration of criminal record in employment apply only to public employment, and generally exclude certain categories like law enforcement employment. Nondiscrimination laws in the District of Columbia and six states—California, Hawaii, Massachusetts, New York, Pennsylvania, and Wisconsin—apply to private employment as well.

States typically have statutory prohibitions on considering criminal record in employment and licensing decisions unless there is some type of relationship—e.g., “direct,” “substantial,” “reasonable,”—between the record and the duties and responsibilities of the employment or license sought. States in the “general regulation” category (marked in lighter shades of blue on the map) have laws like this for either employment or licensing or both. Even states that cover licensing and employment decisions generally may exclude certain types of licenses or employment, such as jobs in law enforcement and health, and licenses working with vulnerable populations. And states with no general regulation limiting consideration of arrest or conviction in licensing decisions may nonetheless have license-specific regulations on consideration of criminal record.

But more than half the states go beyond the general standard. Ten states and the District of Columbia (gold) have more specific regulations affecting both public employment and licensing decisions. Another 17 states (dark blue) specifically regulate either employment or licensing, though not both. Most commonly, states in these two top categories put teeth in the “relationship” standard by requiring employers and/or licensing authorities to consider specific enumerated factors before denying employment or refusing to grant a license based on conviction. These factors usually include nature and seriousness of offense; relationship between the offense and ability and capacity to perform the duties required of the position.
sought; time elapsed since commission of the offense; age of applicant at the time of offense; and efforts at rehabilitation since the offense.

In Hawaii, Minnesota, and New Mexico, a person determined to be “rehabilitated” may not be disqualified from employment or licensure even if their conviction is found to be directly related to the employment or license sought. In Minnesota, for example, even if a direct relationship is found, applicants may not be disqualified if they can demonstrate “sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought.” One year of law-abiding conduct and compliance with conditions of supervision is sufficient to demonstrate rehabilitation. North Dakota has a similar scheme for licensure, allowing denial of a license only if, after considering several enumerated factors, “it is determined that such person has not been sufficiently rehabilitated, or that the offense has a direct bearing upon a person’s ability to serve the public in the specific occupation, trade, or profession.”

A few states go beyond the general relationship standard by prohibiting consideration of older convictions. In Washington, employers may only consider convictions that occurred within the last ten years (and only if the crime directly relates to the employment sought). In Maine, licensing agencies may only consider convictions within the last 3-10 years, depending on the license sought. In Massachusetts, misdemeanor convictions older than five years may not be
considered in employment decisions. Hawaii applies a more stringent standard when considering convictions older than 10 years.

Several states in the “specific regulation” category also require employers or licensing boards to provide written reasons for a rejection based on criminal record, a process that can facilitate enforcement of the nondiscrimination laws. States with this requirement include Arkansas, Connecticut, Louisiana, Nevada, New Mexico, New York, North Dakota, Pennsylvania, and the District of Columbia. In Louisiana, a licensing entity “shall issue” an occupational or professional license to an “otherwise qualified” convicted person unless the conviction involves a felony that “directly relates to the position of employment sought, or to the specific occupation, trade or profession for which the license, permit or certificate is sought.”

While numerous states have statutory standards for considering arrest or conviction in employment and/or licensure, only a few incorporate regulatory enforcement mechanisms. Hawaii, Massachusetts, New York, Wisconsin and, recently, California and Nevada fall into this category. Hawaii’s law prohibiting consideration of conviction except in limited circumstances is enforced by the Hawaii Civil Rights Commission; New York’s Human Rights Law makes it unlawful to deny employment or licensure based on a criminal conviction that is not “directly related” to the opportunity involved, and authorizes enforcement through the Division of Human Rights (or through civil action in public employment); Wisconsin’s Fair Employment Act, which bars discrimination in employment and licensing decisions based on a criminal conviction, is enforced by the Labor and Industry Review Commission. Massachusetts’ general fair employment law makes it unlawful to take adverse action based on non-conviction records and some misdemeanor convictions and is enforced by the Massachusetts Commission against Discrimination.

In June 2017, Nevada passed an expansive law limiting the extent to which public employers may consider a criminal conviction in employment decisions, setting forth specific standards for decision. The new law makes failure to comply with established procedures an unlawful employment practice and authorizes complaints to be filed with the Nevada Equal Rights Commission. Months later, in October of 2017, California enacted fair employment legislation applicable to both public and private employment that requires employers to conduct individualized assessments to determine whether a prior conviction has a “direct and adverse relationship with the specific duties of the job” before rejecting an applicant. California’s law,
which is enforceable by the state’s Department of Fair Employment and Housing, also prohibits consideration of non-conviction records and convictions that have been sealed, dismissed or “statutorily eradicated.”

Massachusetts’ general fair employment practices law makes it unlawful for any employer, public or private, to request information on arrests without conviction, certain minor first misdemeanor convictions, and misdemeanor convictions older than five years. This law is enforced by the Massachusetts Commission Against Discrimination.

Although there are many exceptions to these nondiscrimination requirements, and the direct relationship test has tended in most states to be interpreted in favor of the employer or licensing authority, comprehensive enforcement schemes put employers and licensing authorities on notice that a decision to exclude based on criminal history cannot be arbitrary.

Over and above the nondiscrimination laws discussed above, many states have enacted other laws designed to improve employment opportunities for people with criminal records. For example, most states (30) and the District of Columbia now have laws applicable to public employers that prohibit threshold inquiries into criminal history, and in some cases these laws apply to private employers as well. These so-called ban-the-box laws are designed to allow employers to consider an applicant’s qualifications before they account for their criminal history. (The National Employment Law Project keeps track of these laws in a report that is periodically updated.)

To the extent ban-the-box laws simply postpone consideration of criminal history until a later stage in the hiring process, they may not be a complete solution to the problem of employment discrimination. Ban-the-box laws are most effective where they are combined with substantive limitations on employer decisions that come into play at a later stage of the hiring process. It therefore seems significant that most of the states that have specific nondiscrimination standards (colored gold or dark blue on the map) also have ban-the-box laws.

Some states protect employers from negligent hiring liability, which is the primary reason cited by employers for not hiring someone with a criminal record. Frequently such protections are triggered when an employee or applicant for employment receives some form of individualized restoration of rights, such as a pardon or judicial sealing. But other states, like Colorado, Minnesota and New York, absolutely limit or prohibit the use of conviction
evidence in a negligent hiring civil suit. Massachusetts protects employers so long as they have relied on information from the state’s Criminal Offender Record Information System (CORI) and reached a decision within 90 days of receiving that information.

Appendix C contains a 50-state comparison of the laws regulating consideration of conviction in employment and licensing in each state and should be consulted for additional detail. The National Employment Law Project has also published a report that analyzes each state’s licensing non-discrimination laws in detail.13

LOSS & RESTORATION OF VOTING RIGHTS

The map on the following page reflects national patterns of disenfranchisement based on a felony conviction. (The varied provisions for restoration of other civil rights and firearms rights are described in the state-by-state summaries that follow.) While most people know that Vermont and Maine allow even prisoners to vote, many are unaware that in 19 additional states and the District of Columbia, felony offenders do not lose their right to vote at all unless sentenced to a prison term. These states are indicated in dark blue on the map. In 15 of those 19 states and D.C., anyone may vote if they are not actually incarcerated. In California, Colorado, Connecticut, and New York, disenfranchisement of those sentenced to a prison term continues until completion of parole. (In these four states, federal offenders on supervised release may vote.)

In 21 states and the District of Columbia, felony offenders do not lose their right to vote unless sentenced to a prison term.

In 21 states (medium blue) the right to vote is restored automatically in most cases upon completion of a court-imposed sentence (or in Nebraska two years afterwards). In several of the states in this category restoration of voting rights is automatic only for first offenders (Arizona), or for less serious non-violent first offenders (Nevada and Wyoming), and others must seek restoration from a court or administrative board. In addition, several states in this category have special rules for people convicted of voter fraud, requiring them to seek a pardon before they are eligible to register.
In Alabama and Mississippi, only conviction of certain crimes results in disenfranchisement, and restoration is by pardon. In Alabama restoration is relatively easy, especially for first offenders, but in Mississippi it is exceedingly rare.

There are only four states in which felony offenders lose the right to vote permanently unless restored by executive action: Florida, Iowa, Kentucky, and Virginia. Generally, residents of these four states who were convicted in other jurisdictions are eligible for restoration of voting rights, and may be able to vote if their rights were restored where they were convicted.

In Virginia, the present governor has made restoration of civil rights virtually automatic upon completion of sentence for those convicted of non-violent felonies. However, the state supreme court ruled that the governor may not, consistent with the state constitution, restore rights on a blanket basis by executive order. Those convicted of violent crimes must wait five years after discharge before applying for restoration.

Procedures for restoration in the other three states vary. In Iowa, felony offenders were restored automatically to the franchise by an executive order issued in 2005, but since 2011 they have been required to seek restoration from the governor on a case-by-case basis. Under current policy, a convicted person will be eligible for restoration of rights
only upon satisfaction of fines, restitution, or other financial obligations stemming from the crime. In Kentucky, too, felony offenders must seek restoration by applying to the governor.

Florida currently imposes the stiffest bar to re-enfranchisement, and the current governor has imposed an in-person hearing requirement for many different categories of crime. The waiting time for restoration is lengthy even for cases not requiring a hearing, and thousands of individuals remain permanently disenfranchised in that state.

Details on loss and restoration of voting and other civil rights are available in the state summaries in this report, and in the more detailed state-by-state profiles in the Restoration of Rights Project (http://restoration.ccresourcecenter.org).

**CONCLUSION**

One of the most important and difficult challenges of the modern criminal justice system has been finding ways to avoid or mitigate the disabling effects of a criminal record, to enable affected individuals to reintegrate fully into their communities. This is not a new problem, but its human scale today is daunting. Law reformers and legislatures understand the need to meet this challenge, and in recent years have been reworking old solutions and devising new ones. Many of these modern-day restoration efforts have only recently been put in place, and the results of even longstanding relief schemes have not been studied. As evidenced by this report, there is not even consensus as to how best to approach the problem: is it more effective to “celebrat[e] the negotiation – or survival – of the perilous correctional experience,” or to deny that it ever occurred? Is one approach more suited than another for different types of records? Are there other more effective ways than case-by-case judicial or executive restoration to persuade the public to overlook the fact of a criminal record, or at least to apply fair and reasonable standards in considering it? It is our goal in preparing this report to benefit the policy discussions now underway concerning these issues, and at the same time to inform the work of lawyers and other advocates working with affected individuals to obtain relief that will enable them to function effectively in their communities.
One of the few empirical studies of the effectiveness of a specific relief mechanism tracked over an eleven-year period the employment status and annual income of 235 Californians who had had charges dismissed or their offense level reduced from felony to misdemeanor. See Jeffrey Selbin, et al., Unmarked? Criminal Record Clearing and Employment Outcomes, 108 J. CRIM. L. & CRIMINOLOGY No. 1 at 34 (2017). This study found a modest increase in the employment rate of those in the sample (most were already employed, albeit in low-wage jobs). More significantly, however, after three years their average real earnings had increased by roughly a third. Presumably this sort of empirical research may be particularly challenging conduct where the purpose of relief is to eliminate evidence of the record.


Other terms used to designate record-closing are annulment (NH), erasure (CT), restriction (GA), non-disclosure (TX), withheld (AK). Most recently, Maryland enacted a new record-closing authority it calls “shielding.” Authorities providing for the dismissal of charges or the set-aside of a conviction record may or may not be accompanied by a further authorization to seal the record. See section on record-closing laws.


A recent report from the United States Sentencing Commission (USSC) catalogues various programs managed by federal courts that are geared to avoiding a prison sentence. See Federal Alternative-to-Incarceration Court Programs (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf. This report describes generally analogous state problem-solving court programs, but does not focus on statutory deferred adjudication options aimed at avoiding conviction and generally leading to expungement of the record. Perhaps because federal law contains only one narrow authority for deferred adjudication (18 U.S.C. § 3607, sometimes referred to as the Federal First Offender Act), the USSC report does not address non-incarceration outcomes that avoid a conviction record. Curiously, it does not suggest the potential usefulness of such outcomes in reducing recidivism, or
proposed further study of these issues. Notably, such a study has been suggested on several occasions by the Practitioner’s Advisory Group to the USSC.


10 Love, supra note 1 at 1713. See also Jeremy Travis, Invisible Punishment: An Instrument of Social Exclusion, in INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT 36 (Meda Chesney-Lind & Marc Mauer eds., 2002) (“We need to find concrete ways to reaccept and reembrace offenders who have paid their debt for their offense.”).


15 For a sampling of proposals for neutralizing the exclusionary effect of a criminal record, see Alessandro Corda, More Justice and Less Harm: Reinventing Access to Criminal History Records, 60 HOWARD L. J. 1, 3 (2016) (“the stigma that public access and dissemination entail must be reinvented as an ancillary criminal sanction that is ordered at sentencing, if at all, for a limited time as a deserved supplement to criminal sanctions imposed”); James Jacobs, THE ETERNAL CRIMINAL RECORD 314 (Harvard U. Press 2015) (“We should not minimize the influence that public policy could have if government demonstrated willingness to employ ex-offenders and otherwise eliminate mandatory disabilities imposed on them.”); Nora V. Demleitner, Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences, 11 STAN. L. & POL’Y REV. 153, 162 (1999) (“ex-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation.”).