# CLEAN SLATE, DIRTY DATA: AN AUDIT OF ALGORITHMIC AUTOMATED CRIMINAL EXPUNGEMENT LAWS*

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*Automatic criminal record restriction laws, which suppress records at the initiative of the state, rather than the individual, present a promising new way to provide second chances to the one in three American adults that live with a criminal record. Buoyed by the success of drug legalization measures and the "Clean Slate" movement, the number of states required to automatically suppress eligible criminal records has expanded dramatically, from a few pilot efforts to around half of all states. With the new laws comes a redemptive role for algorithms in the criminal justice system. Yet, to date, there has been limited empirical analyses of the extent to which algorithmic and automated Clean Slate laws can actually deliver the relief they promise. This Article offers an empirical assessment of criminal records restriction laws, analyzing thousands of commercial background checks and government records for their "fidelity" to the law. Within the sample of studied background checks, it finds that only a small share (2% on average among the studied states) included records restricted by law, a rate far lower than comparator states lacking similar restrictions. Reductions in the prevalence of restricted records correlated with rule changes, suggesting a clearance rate of around two-thirds or more of eligible records. This suggests that record restrictions can succeed where petition-based processes have failed, and offer a way to achieve mass records relief as a counterweight to mass criminalization. But fidelity to automatic criminal record restriction laws was far from perfect, raising the risk of ambiguity rather than equity in clearances. As algorithmic and automated measures become more widespread, so will the need for robust governance mechanisms. This Article calls for measures that shift*



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*not only the burden of implementation but oversight to the state, through government audits and a requirement to make administrative comment, complaint, and correction processes available. These and related measures would go far towards realizing the delivery, not just promise, of redemption through automation.*

## INTRODUCTION

*How has your criminal record impacted your life?*

"It has closed doors to different opportunities and held me back and made it difficult for me to support my family. I have four kids and it makes it harder to advance or get higher paying jobs for something that happened so long ago." -Roger P., Mexican, 20 years since his last conviction.

"I've been unable to get jobs and live life the right way." -Krystal E. African American, 9 years since her conviction.

"I cannot get housing assistance. My wife was denied custody of her 5 nephews and nieces because of my records." -Anonymous[1]

A staggering number of collateral consequences—penalties, disabilities, or disadvantages—limit the opportunities of people who live with criminal records.[2] While petition-based expungement processes exist in every state,

1. Testimonies provided to the Paper Prisons Initiative as part of the Paper Prisons Diary Tool, available at PAPER PRISONS INITIATIVE, https://www.paperprisons.org/diary.html [https://perma.cc/W7P7-BQL5].

2. The National Inventory of Collateral Consequences of Convictions maintained by the Justice Center of the Council for State Governments, has recorded over 40,000 collateral consequences in the areas of employment, business licensure and other property rights; occupational, professional license, and certification; government contracting and program participation; government benefits, loans, and grants; registration, notification, and residency restrictions; political and civic participation; judicial rights; housing; education; family/domestic rights; recreational licenses including firearms; and motor vehicle licensure. *See What Are Collateral Consequences?*, NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, https://niccc.nationalreentryresourcecenter.org [https://perma.cc/HUB7-AUYP] [hereinafter NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION]. Non-convictions records are also consequential as discussed in Part II, *infra*.

many remain underutilized[3] due to low awareness, administrative complexity, and filing costs.[4] This has created a sizable "second chance gap"—the difference between eligibility and delivery of relief from the criminal justice system—with respect to records relief.[5] With uptake rates of petition-based expungement in the single digits,[6] an estimated twenty- to thirty-million Americans remain unnecessarily saddled with records eligible for clearance under the law, reinforcing cycles of disadvantage.[7]

In response, policymakers have turned to a new mechanism for providing relief from criminal records: automatic criminal record restriction laws. These laws shift the responsibility for initiating expungement from the individual to the state. Early laws automatically restricting non-convictions have been followed by provisions that cover drug offenses and, more recently, older conviction records.[8] Since 2018, twelve states have passed "Clean Slate" laws that replace individual-initiated, petition-based processes for expunging arrest and conviction records with state-based, algorithmically-driven automated clearances.[9] Combined with gubernatorial mass pardons for certain marijuana offenses,[10] following the lead set by former President Biden,[11] these policies offer

3. Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519, 523–24 (2020) (estimating in 2020 that thirty to forty percent of people with criminal records have records that could be partially or fully cleared under existing law).

4. *Id.* at 526.

5. The "second chance gap" is the difference between eligibility and delivery of a person's second chance, the causes of which include "administrative failures such as lack of awareness, complicated criteria, informational deficiencies, inconsistent application of the rules and calculation mistakes; financial barriers and obligations also contribute to the gap." *What Is the "Second Chance Gap?,"* PAPER PRISONS INITIATIVE, https://paperprisons.org/SecondChanceGap.html [https://perma.cc/78VK-KT63] [hereinafter PAPER PRISONS INITIATIVE, *Second Chance Gap*].

6. *See* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2466 (2020) (documenting a 6.5% uptake rate of expungement in Michigan); Chien, *supra* note 3, at 549 tbl. 2 (documenting a three to nine percent uptake rate of Proposition 47 and 64 resentencing and reclassification); PAPER PRISONS INITIATIVE, *Second Chance Gap*, *supra* note 5 (documenting less than ten percent of convictions expungement uptake levels across multiple jurisdictions).

7. Chien, *supra* note 3, at 524.

8. *See infra* Appendix B.

9. *See* CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org [https://perma.cc/49UP-AHZW] (describing the Clean Slate Initiative's mission as passing and implementing laws that "automatically clear eligible records for people who have completed their sentence and remained crime-free"); *Clean Slate in the States*, CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org/states#states [https://perma.cc/XQ7L-HYAA] (listing twelve states that have enacted Clean Slate laws: Pennsylvania, Utah, New Jersey, Michigan, Connecticut, Delaware, Virginia, Oklahoma, Colorado, California, Minnesota, and New York).

10. *Marijuana Pardons and Expungements: By the Numbers*, NORML, https://norml.org/marijuana/fact-sheets/marijuana-pardons-and-expungements-by-the-numbers/ [https://perma.cc/G79X-LSCD] (reporting on the actions of twelve states and cities to issue blanket marijuana pardons and expungements).

11. *See* Proclamation No. 10688, 88 Fed. Reg. 90083 (Dec. 22, 2023); *see also Presidential Proclamation on Marijuana Possession, Attempted Possession, and Use*, U.S. DEP'T OF JUST.,

the promise of mass relief, as a counter to mass criminalization. Along with them has emerged a central role for the courts as administrators rather than adjudicators of criminal justice reform, and a redemptive role for algorithms in the criminal justice system.[12]

However, while these policies hold great promise, they also introduce novel issues of accountability and governance. Like the shift from individualized adjudication to "managerial" justice in the mass processing of misdemeanors,[13] the shift from individual petitions to mass records restriction raises concerns about accuracy and fairness.[14] In addition, several key questions remain, including: whether individuals that aren't aware of their expungement can nevertheless benefit from them, whether restricting information will cause decision-makers to seek alternative information or ways to discriminate,[15] and whether automatic clearances will worsen racial disparities.[16] It remains unclear

https://www.whitehouse.gov/briefing-room/presidential-actions/2023/12/22/a-proclamation-on-granting-pardon-for-the-offense-of-simple-possession-of-marijuana-attempted-simple-possession-of-marijuana-or-use-of-marijuana [https://perma.cc/ZC65-GS67] (last updated Jan. 13, 2025) (describing how one might apply for a certificate of pardon after former President Biden's 2023 proclamation).

12. *See infra* Part I (discussing the contrast).

13. *See, e.g.*, Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 614 (2014).

14. For an exploration of the administrative challenges to decarceral or second chance efforts, see, for example, Brianna Rauenzahn, *Administrative Barriers to Decarceration*, REGUL. REV. (Sept. 14, 2022), https://www.theregreview.org/2022/09/14/rauenzahn-administrative-barriers-to-decarceration/ [https://perma.cc/5EGZ-LAAB]; Neel U. Sukhatme, Alexander Billy & Gaurav Bagwe, *Felony Financial Disenfranchisement*, 76 VAND. L. REV. 143, 203–04 (2023) (describing the accounting and data complexities that prevent individuals from knowing what they owe in legal financial obligations, the payment of which are prerequisites to felony reinfranchisement). *See also* Chien, *supra* note 3, at 526 (identifying the presence of administrative barriers or "paper prisons" like cumbersome application processes, dirty data, and a lack of information in a number of second chance realms including resentencing, reinfranchisement, and expungement); ASHLEY NELLIS & LIZ KOMAR, THE SENT'G PROJECT, THE FIRST STEP ACT: ENDING MASS INCARCERATION IN FEDERAL PRISONS 6–7 (2023), https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf [https://perma.cc/JJX4-YXXM] (describing the many ways in which the First Step Act successfully streamlined the ability of individuals to get second chance relief through the Fair Sentencing Act and compassionate releases, and home confinement, but also citing the ways that a "lack of transparency has plagued the rollout of earned time credits").

15. For further exploration of this policy concern, see Alyssa C. Mooney, Alissa Skog & Amy Lerman, *Racial Equity in Eligibility for a Clean Slate Under Automatic Criminal Record Relief Laws*, 56 LAW & SOC'Y REV. 398, 402–04 (2022).

16. For further exploration of this policy concern, see *id.* at 403. *See also* Jennifer Doleac & Sarah Lageson, *The Problem with 'Clean Slate' Policies: Could Broader Sealing of Criminal Records Hurt More People than It Helps?*, NISKANEN CTR. (Aug. 31, 2020), https://www.niskanencenter.org/the-problem-with-clean-slate-policies-could-broader-sealing-of-criminal-records-hurt-more-people-than-it-helps/ [https://perma.cc/25BN-CS6J] (arguing that Clean Slate reforms may incentivize employers to rely on private vendors for criminal records information). Not to mention the other well-rehearsed concerns raised by techno-solutionism: a false sense of accomplishment, especially in light of the continued access to records by law enforcement; the greater, not less, uncertainty; and the perpetuation, rather than reversal, of existing biases and inequalities. *See* Eisha Jain, *Policing in the Age of Criminal Records*, 103 N.C. L. REV. 1441, 1442 (2025) [hereinafter Jain, *Criminal Records*]; Greta Byrum & Ruha

how effective changing the official will be in erasing the past. Persistent digital memories can trap and prevent people from spiraling up; just as advantage accumulates, so does disadvantage.

As states continue to adopt and refine these policies, understanding both their achievements and shortcomings is essential. Insofar as they deal with the root cause of the record itself, automatic record restriction laws promise broad, transformative benefits. But only to the extent that they effectively limit the dissemination of records. As such, a more pressing, and basic, question for people living with records is the extent to which the laws actually work, that is to say, actually clear records. The difficulty of doing so has been underscored by early reports from Utah[17] and Connecticut,[18] where Clean Slate rollouts have stalled, as well as the reporting of expunged records background check firms.[19] The growing reliance on records to screen individuals in or out of opportunity or out raises the stake.[20]

This study empirically evaluates automatic records restriction laws to assess their effectiveness in suppressing records.[21] It analyzes thousands of commercial background checks and government records for their faithfulness to the law.[22] This study focuses on automatic non-conviction record restrictions

Benjamin, *Disrupting the Gospel of Tech Solutionism to Build Tech Justice*, STAN. SOC. INNOVATION REV. (June 16, 2022), https://ssir.org/articles/entry/disrupting_the_gospel_of_tech_solutionism_to_build_tech_justice [https://perma.cc/KV5P-URUS].

17. Utah's 2019 Clean Slate measure was paused in 2024 so that the State could work through the backlog in clearances through the passage of House Bill 352. *See* H.B. 352, 65th Leg., Reg. Gen. Sess. (Utah 2024); *see also* Saige Miller, *There's a Long Backlog to Clear Criminal Records, So Utah Is Eyeing a 3-Year Pause*, KUER 90.1 (Feb. 23, 2024, 2:00 AM), https://www.kuer.org/politics-government/2024-02-23/theres-a-long-backlog-to-clear-criminal-records-so-utah-is-eyeing-a-3-year-pause [https://perma.cc/XRW6-CUZ8] (explaining the reason for the measure, which puts a temporary hold on processing new expungements).

18. Shortfalls in the implementation of Connecticut's 2021 Clean Slate law due to "outdated technology" and "outstanding legal and policy questions" has resulted in 13,600 rather than 80,000 residents benefiting, with individuals with more significant records more likely to be left behind. *See* Jaden Edison, *CT 'Clean Slate Law' Full Implementation Faces Another Delay*, CONN. MIRROR (Mar. 26, 2024, 5:00 AM), https://ctmirror.org/2024/03/26/ct-clean-slate-law-full-implementation/ [https://perma.cc/S8B6-VLH9]. In October 2024, the State hired a contractor to accelerate clearances. *See* Maysoon Khan, *Connecticut Hires Contractor to Implement Clean Slate Law After Repeated Delays*, CONN. MIRROR (Oct. 1, 2024, 8:00 AM), https://ctmirror.org/2024/10/01/ct-clean-slate-law-delay-contractor/ [https://perma.cc/C9YY-Q56T].

19. *See infra* note 88 and accompanying text.

20. *See infra* note 97 and accompanying text (describing the large numbers of contexts in which background records of conviction block opportunity); Jessica M. Eaglin, *Racializing Algorithms*, 111 CALIF. L. REV. 753, 780–82 (2023) (describing how "publicly and privately developed tools rely heavily on police data, like criminal arrest records, court records, appearance records, and convictions records" which Eaglin argues, in turn, have been made increasingly "cheap" and available through law).

21. For the only other study of this kind of which I am aware, see generally Matthew Stubenberg, Renee Danser & Daniel James Greiner, C*riminal Justice Record Clearing: An Analysis from Two States*, 100 N.D. L. REV. 11 (2025).

22. *See infra* Part II.

that have been in effect for a longer period of time. It considers three aspects of record restrictions: fidelity, between reported restrictions and reported records; trends in the reporting of suppressed records before and after rule changes; and impact of relief on the residual records of beneficiaries.

The results warrant optimism, as well as vigilance. We generally found the share of checks including improperly reported restricted records to be in the low single digits. Although compliance was imperfect, states with automatic restriction laws had significantly fewer suppressed records than states without these laws. Declines in suppressed record reporting rates corresponded with rule changes. These findings validate the vision of automatic restriction algorithms, as do the reports from states like Pennsylvania, where some forty-three million records of some 1.2 million people[23] have been cleared automatically, far exceeding the reach of petition-based processes.

But even in jurisdictions where records appeared to be successfully restricted, many suppressed records remained visible in background checks and in the court database we inspected. Faithful restriction is consequential; our analysis suggests that, among those who had charges eligible for restriction on their records, forty-seven to sixty percent of individuals had only charges eligible for restriction—meaning full statutory compliance could completely clear these individuals' records.[24] As states implement more complex conviction-restrictions, the risks of incomplete clearance will grow. Contending with them will require improved systemic and individual-level notice and governance mechanisms.

Part I describes and makes the case for studying automatic restriction laws. Part II describes our dataset and methodology for evaluating fidelity, trends, uptake, and quality of record restrictions. Part III presents our findings, of high, though not perfect, levels of compliance, and suggests the challenges that are likely to arise. To address them, Part IV makes the case for a new governance regime that shifts the burden of accountability to the state and industry, through government audits and requirements to make administrative comment, complaint, and correction processes available; and to carry out public awareness campaigns and provide free access to one's record. It also advocates for requiring industry to delete and update records, including by contract, to substantially boost delivery on the promise of meaningful relief from criminal records.

23. *PA House Passes Clean Slate Expansion!*, CMTY. LEGAL SERVS. PHILA. (June 7, 2023), https://clsphila.org/criminal-records/pa-house-passes-clean-slate-expansion/ [https://perma.cc/X6CZ-QFCP].

24. Although our methodology did not let us detect false positive situations wherein records were improperly suppressed, related research by Sarah Lageson and Robert Stewart, suggests that this outcome could also result. *See infra* note 88 and accompanying text.

## I. AN OVERVIEW OF AUTOMATIC RECORD RESTRICTION LAWS

An estimated one in three American adults has a criminal record of arrest, charging, conviction, and/or incarceration.[25] Black men are over four times more likely to have a felony conviction, systematically blocking their economic, housing, social, and civic opportunities.[26] Criminal background checks are used by some ninety percent of companies[27] and the majority of landlords[28] to screen prospective employees and tenants.[29] With the technologically-driven rise of "penal entrepreneurialism,"[30] inexpensive background checks have become commonplace and the basis of adverse actions across many domains.[31] Against

25. As of January 2025, the FBI reported that 86.9 million people had a criminal record. *See* FED. BUREAU INVESTIGATION, JANUARY 2025 NEXT GENERATION IDENTIFICATION (NGI) SYSTEM FACT SHEET 1 (2025), https://le.fbi.gov/file-repository/ngi-fact-sheet.pdf [https://perma.cc/HQ6T-KSXC]. In 2020, the U.S. Census Bureau estimated there to be about 258.3 million adults in the United States, for a ratio of about one in three. *See* Stella U. Ogunwole, Megan A. Rabe, Andrew W. Roberts & Zoe Caplan, *U.S. Adult Population Grew Faster than Nation's Total Population from 2010 to 2020*, U.S. CENSUS BUREAU (Aug. 12, 2021), https://www.census.gov/library/stories/2021/08/united-states-adult-population-grew-faster-than-nations-total-population-from-2010-to-2020.html [https://perma.cc/4TMM-2C9Y].

26. David McElhattan, *The Proliferation of Criminal Background Check Laws in the United States*, 127 AM. J. SOCIO. 1037, 1037–38 (2022) (contrasting the prevalence of felony convictions among U.S. adults (eight percent) with African American men (thirty-three percent) (citing Sarah K.S. Shannon, Christopher Uggen, Jason Schnittker, Melissa Thompson, Sara Wakefield & Michael Massoglia, *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1795 (2017))).

27. Shawn D. Bushway & Nidhi Kalra, *A Policy Review of Employers' Open Access to Conviction Records*, 4 ANN. REV. CRIMINOLOGY 165, 166 (2021).

28. ARIEL NELSON, NAT'L CONSUMER L. CTR., BROKEN RECORDS REDUX: HOW ERRORS BY CRIMINAL BACKGROUND CHECK COMPANIES CONTINUE TO HARM CONSUMERS SEEKING JOBS AND HOUSING 3 (2019), https://www.nclc.org/wp-content/uploads/2022/09/report-broken-records-redux.pdf [https://perma.cc/N2HX-97HK].

29. While tenant screening data varies, based on a 2022 survey of 1,100 landlords, the Urban Institute found that most landlords reported using income, job history, rental history, evictions, credit history and credit score, and criminal backgrounds when screening rental applicants. Jung Hyun Choi, Laurie Goodman & Daniel Pang, *The Real Rental Housing Crisis Is on the Horizon*, URB. INST. (Mar. 11, 2022), https://www.urban.org/urban-wire/real-rental-housing-crisis-horizon [https://perma.cc/UEV3-Q5SH]; *see also Neighbors in Danger Due to Lack of Tenant Screenings*, REAL PROP. MGMT., https://www.realpropertymgt.com/expert-tips/tenant-screening-is-one-of-the-most-important-parts-of-the-leasing-process-but-a-new-survey-of-do-it-yourself-diy-landlords-show [https://perma.cc/GD37-R9TE] (describing a survey of 150 do-it-yourself landlords reporting a fifty-one percent rate of checking criminal backgrounds).

30. *See generally* Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and the Rise of a New Penal Entrepreneurialism*, 60 BRIT. J. CRIMINOLOGY 245 (2020) [hereinafter Corda & Lageson, *Disordered Punishment*] (assigning the term to the autonomous collection and commodification of dispersed criminal records data by large numbers of private companies and internet players, driving growth in the criminal records industry (citing Malcolm M. Feeley, *Entrepreneurs of Punishment—The Legacy of Privatization*, 4 PUNISHMENT & SOC'Y 321, 321–44 (2002))).

31. NAT'L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, *supra* note 2; *see also Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities*, U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT,

this backdrop, state laws that proactively or "automatically" restrict the release of criminal records provide an important way—at least in theory—to address the long shadow cast by criminal justice contact.[32] This part introduces automatic record restriction policies and makes the case for studying them.

## A. *Automatic Record Restriction Laws in Context*

Though background checks can be a valuable tool for advancing safety,[33] their widespread and indiscriminate use is at odds with notions of fairness, equity, and rehabilitation.[34] Policymakers have developed several approaches to limit the prejudicial effects of criminal background checks, mostly by regulating when and what background information can be considered. Since 2010, cities, states, and the federal government have enacted "ban-the-box" rules that prohibit consideration of a job candidate's criminal background until the point of offer.[35] A separate set of regulations under the Fair Credit Reporting Act ("FCRA")[36] requires employers (users) taking adverse employment to give notice and provide for updating of incorrect information.[37] Additional disclosure obligations apply when an adverse action is taken, regardless of the

REDEMPTION, AND THE EFFECTS ON COMMUNITIES 9–34 (2019), https://www.govinfo.gov/content/pkg/GOVPUB-CR-PURL-gpo171283/pdf/GOVPUB-CR-PURL-gpo171283.pdf [https://perma.cc/VMG3-UB65] (further describing consequences across areas).

32. *Cf.* Corda & Lageson, *Disordered Punishment*, *supra* note 30, at 251–55 (describing the general European limitation on access to criminal records databases to authorized individuals and public authorities, but also how private firms in the United Kingdom and Sweden have used workarounds to access restricted records).

33. Universal background checks prior to gun purchases represent a public safety enhancing measure, though research on whether checks do in fact promote public safety has been limited by the failure of gun sellers to implement these checks as required. *See* April M. Zeoli, Alexander D. McCourt & Jennifer K. Paruk, *Effectiveness of Firearm Restriction, Background Checks, and Licensing Laws in Reducing Gun Violence*, 704 ANNALS AM. ACAD. POL. & SOC. SCI. 118, 128 (2022).

34. This is in large part because criminal history information reflects discretionary prosecution decisions as much as it does underlying criminality, as explored empirically through studies of traffic stops, charging decisions, and marijuana prosecution. *See* Jennifer L. Doleac, *Racial Bias in the Criminal Justice System*, *in* A MODERN GUIDE TO THE ECONOMICS OF CRIME 286, 286–304 (Paolo Buonanno, Juan Vargas & Paolo Vanin eds., 2022) (reviewing these studies). *See generally* SHAWN D. BUSHWAY, BRIAN G. VEGETABILE, NIDHI KALRA, LEE REMI & GREG BAUMANN, PROVIDING ANOTHER CHANCE: RESETTING RECIDIVISM RISK IN CRIMINAL BACKGROUND CHECKS (2022), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1300/RRA1360-1/RAND_RRA1360-1.pdf [https://www.perma.cc/XK8C-M7XJ (staff-uploaded archive)] (finding, based on an analysis of criminal histories from North Carolina, that factors like time since last conviction, age, and number of convictions—rather than just the fact of a criminal record—were predictive of reoffense risk).

35. *See, e.g.*, *Ban the Box*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/ban-the-box [https://perma.cc/8WQ7-2C7C (staff-uploaded archive)] (last updated June 29, 2021).

36. Pub. L. No. 91-508, 84 Stat. 1127 (codified as amended at 15 U.S.C. § 1681–1681x).

37. 15 U.S.C. § 1681b(b)(3) (requiring a user of a report, before taking adverse action against the consumer to whom the report relates, to provide a copy of the report and a summary of the consumer's rights to see and dispute inaccurate information in it).

context.[38] A parallel set of duties apply to consumer reporting agencies ("CRAs") when they report information that is likely to adversely impact the ability of the subject to obtain employment, in which case the CRA must provide notice to the consumer[39] or "maintain[] strict procedures" to ensure that the information is "complete and up to date."[40]

Further upstream, the FCRA imposes on entities supplying consumer information "(furnishers)"[41] to CRAs a general duty of accuracy[42] to accurately report and avoid known errors.[43] CRAs, in turn, are required to make reasonable efforts to ensure that the information they report reflects "maximum possible accuracy."[44] States have enacted their own versions of fair credit reporting laws to provide additional protections to consumers.[45] Laws of more general jurisdiction also govern the dissemination and use of criminal records, like the European right to be forgotten,[46] federal antidiscrimination provisions,[47] and

38. *See infra* Part III (including, by the entity taking an adverse action, providing notice of the action, credit score and factor disclosures, contact information about the credit reporting agency supplying the report, and notice of the individual's right to dispute the information in the report, as described in 15 U.S.C. § 1681m).

39. 15 U.S.C. § 1681k(a)(1).

40. *Id.* § 1681k(a)(2).

41. Referred to as an entity that "regularly and in the ordinary course of business furnishes information to one or more consumer reporting agencies about the person's transactions or experiences with any consumer." 15 U.S.C. § 1681s-2(a)(2)(A).

42. *See* 15 U.S.C. § 1681s-2(a) (outlining the duty of furnishers of information to provide accurate information even though this duty is only enforceable by government agencies, thus there being no private right of action).

43. FED. TRADE COMM'N, CONSUMER REPORTS: WHAT INFORMATION FURNISHERS NEED TO KNOW 1 (2016), https://www.ftc.gov/system/files/ftc_gov/pdf/698a_consumer_reports_2024_508.pdf [https://perma.cc/CZ4G-EBWQ].

44. *See infra* Section IV.B.3.a.

45. For example, supplementing the Fair Credit Reporting Act ("FCRA"), California's Investigative Consumer Reporting Agencies Act, provides consumers with additional rights in regard to investigative consumer reports that pertain to, e.g., character, reputation, and mode of living while the California Credit Reporting Agencies Act limits the situations in which employers can obtain consumer credit reports about their employees. CAL. CIV. CODE §§ 1786–1786.60; *id.* §§ 1785.1–1785.6. However, state laws are subject to two forms of express preemption: general and enumerated. *See infra* Part III (discussing FCRA's preemption provision, 15 U.S.C. § 1681t).

46. Recognized by the European Court of Justice in the 2014 Google Spain case. Jure Globocnik, *The Right to Be Forgotten Is Taking Shape: CJEU Judgements in GC and Others (C-136/17) and* Google v. CNIL *(C-507/17)*, 69 GRUR INT'L: J. EUR. INT'L IP L. 380, 380–81 (2020). For a discussion of right-to-be-forgotten "sensibilities" in U.S. law, see Amy Gajda, *Privacy, Press, and the Right to Be Forgotten in the United States*, 93 WASH. L. REV. 201, 202–64 (2018).

47. See, for example, the enforcement action brought by the Equal Employment Opportunity Commission to restrict the use of criminal background checks in hiring contexts to disproportionately screen out Black, Native American/Alaska Native, and multiracial applicants in a way that allegedly violates Title VII's ban on discrimination in employment contexts. Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Sues Sheetz, Inc. for Racially Discriminatory Hiring Practice (Apr. 18, 2024), https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice [https://perma.cc/QHF2-YUDS].

state-level protections against records-based discrimination[48] or privacy violations.[49] Another strategy is to *add* positive information, such as rehabilitation certificates, to offset negative inferences.[50]

### B. *Features of and Growth in State-Level Automatic Record Restriction Laws*

This Article focuses on state-level[51] automatic criminal record restriction laws that restrict the availability of records information directly at the source. These laws vary in mandated actions, eligibility criteria, and relief process but all "restrict"[52] records according to one of two main approaches. True "expungement" destroys or deletes all versions of a record, providing the broadest protection from downstream collateral consequences.[53] "Sealing,"[54] restricts public but not government access. "Reclassification" downgrades a criminal record.[55] When a conviction is "set-aside," in contrast, the original

48. *See, e.g.*, CONN. GEN. STAT. § 31-51i(e)–(f) (2023) (stating that no employer or employer's agent, etc., shall deny employment "solely on the basis that the prospective employee had a prior arrest, criminal charge or conviction, the records of which have been erased"); 18 PA. CONS. STAT. § 9124.2(b) (2025) (prohibiting consideration of a pardoned or expunged conviction in a licensing decision).

49. *See* Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Records, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. 1771, 1787–90 (2023) [hereinafter Lageson, *Criminally Bad Data*].

50. *See, e.g.*, Doleac, *supra* note 34, at 9 (describing studies of court-issued rehabilitation certificates and related training programs).

51. Expungements are currently only available at the state level, though House Resolution 2930—the Federal Clean Slate Act of 2023—would have established a framework for sealing records associated with several federal criminal offenses, both automatically and by petition. Clean Slate Act of 2023, H.R. 2930, 118th Cong. § 2 (2023).

52. At least seven different terms—annulment, dismissal, erasure, expungement, sealing, set-aside, and vacatur—are used in state regulations to describe record clearance actions. *See* DAVID J. ROBERTS, KAREN LISSY, BECKI GOGGINS, MO WEST & MARK PERBIX, SEARCH, TECHNICAL AND OPERATIONAL CHALLENGES OF IMPLEMENTING CLEAN SLATE: RESEARCH FINDINGS 4 (2023) [hereinafter ROBERTS ET AL., RESEARCH FINDINGS], https://www.search.org/files/pdf/Tech_Op_Challenges_Clean_Slate_ResearchFindings.pdf [https://perma.cc/64JV-RYB6] (referencing the taxonomy of the National Conference of State Legislatures).

53. *Id.* But expungement at the same time creates access problems for researchers, journalists, and those who otherwise require a complete record. *See* COLLATERAL CONSEQUENCES RESOURCE CENTER, MODEL LAW ON NON-CONVICTION RECORDS, at vi (2019), https://ccresourcecenter.org/wp-content/uploads/2019/12/Model-Law-on-Non-Conviction-Records.pdf [https://perma.cc/L5KQ-6E6G].

54. ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 4.

55. For example, Proposition 47 reclassified most drug possession offenses and property theft crimes under $950 from felonies to misdemeanors. Prop, 47, 2013-2014 Cong. (Cal.) (codified as amended at CAL. PENAL CODE § 1170.18 (2022)); *see also Proposition 47 and Proposition 64*, SANTA CLARA CNTY. DIST. ATT'Y OFF., https://da.santaclaracounty.gov/prosecution/departments/narcotics-unit/marijuana-expungements-faqs/proposition-47-proposition-64 [https://perma.cc/7C9F-N5F3 (staff-uploaded archive)]. Proposition 36, on the California ballot in 2024, would restore harsher penalties for many of the reclassified crimes. *See* LEGIS. ANALYST'S OFF., PROPOSITION 36: ALLOWS FELONY CHARGES AND INCREASES SENTENCES FOR CERTAIN DRUG AND THEFT CRIMES.

conviction remains viewable but is supplemented with an additional notation such as a "set-aside" order.[56] Automatic records restriction statutes may specify any of these forms of relief.

What records remain available, and to whom and on what terms, depends on the mechanism of restriction as well as on the context. As explained by Eisha Jain, restricted records generally remain unrestricted to law enforcement audiences.[57] Sealed records can also be accessed for certain job or occupational license clearances.[58] Even records destroyed at the county level may be retained in the state repository.[59]

Eligibility for record restriction typically hinges on record type (arrest, non-conviction, or conviction), offense severity (misdemeanor or felony), excluded offenses (driving under the influence or violent or sex offense), and waiting periods. Originally built for petition-based processes, conviction clearance criteria are often intensely detailed and can include long lists of conditions, inclusions, or exclusions.[60] Non-conviction clearance provisions tend to have fewer conditions and qualifications, consistent with the justice system's presumption of innocence.[61] Like the variety of types of relief

INITIATIVE STATUTE 1–2 (2024), https://lao.ca.gov/ballot/2024/prop36-110524.pdf [https://perma.cc/JKU4-UQZN].

56. *See Sealing and Expunging Criminal Records in Nebraska*, NEB. CT. RECS., https://nebraskacourtrecords.us/criminal-court-records/federal-and-state/sealing-expunging/ [https://perma.cc/DT29-QULB] (contrasting set-aside with sealing-based relief).

57. *See generally* Jain, *Criminal Records*, *supra* note 16 (describing how criminal records, even when restricted, can still be accessed by law enforcement).

58. *Id.*

59. *See, e.g.*, ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 12 (describing the preservation of expunged and sealed records in Delaware and Washington's modern state-level criminal history repositories).

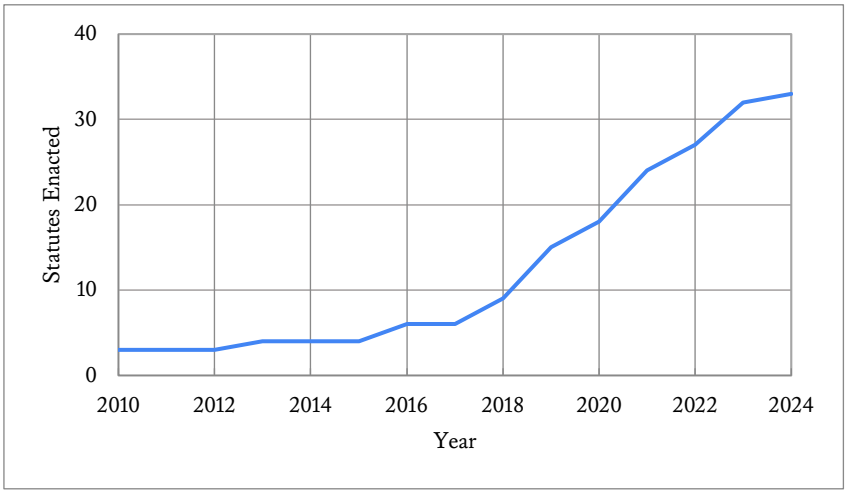
60. *See, e.g.*, MD. CODE ANN., CRIM. PROC. § 10-110 (2023) (enumerating which specific felonies and misdemeanors are eligible for expungement under what conditions of timing and application); 20 ILL. COMP. STAT. ANN. § 2630/5.2(a)(3) (2019) (listing broad classes of convictions disqualified for sealing or expungement).

61. Though non-conviction clearance criteria can also specify conditions precedent for relief; for example, no fines or fees are owed by the defendant, not only in the case at hand, but in any case. *See* Act of June 28, 2018, 2018 Pa. Laws 402 (codified as amended at 18 PA. CONS. STAT. §§ 9121–22; 41 PA. CONS. STAT. §§ 6307–08) (conditioning records relief on the payment of all outstanding fines and fees). A subsequent bill, PA Act 83 or "Clean Slate 2.0," did away with this requirement but still required outstanding restitution to be paid before expungement. *See* ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 9 (stating, based on interviews with local attorneys, that "[r]estitution must still be paid in order to qualify for records clearance and if the individual owes fines, fees, *and* restitution, they remain ineligible until all are paid"). In addition, recitals are often nuanced, for example, regarding the type of non-conviction records that are restricted. *Cf.* N.H. REV. STAT. ANN. § 651:5(II-a)(a) (2025) (applying a restriction to any person whose arrest resulted in a finding of not guilty, dismissed, or not prosecuted); UTAH CODE ANN. § 77-40a-302 (2025) (applying only to cases that have been acquitted or dismissed with prejudice); *see also* 20 ILL. COMP. STAT. ANN. § 2630/5.2(b)(2)(B)(i)–(ii) (2019) (providing particular remedies for "order of supervision" non-convictions after variable waiting periods following successful completion of the terms of supervision depending on the type of underlying charge).

provided, recitals also range with respect to how they express the nature of restriction, for example, "automatic expungement or deletion"[62] of, or that the relevant authorities "shall make nonpublic,"[63] relevant records.

Figure 1 depicts the growth in "automatic" restriction rules over time.[64] Whereas in 2010 only a small handful of restrictions were in force, by 2024, over thirty provisions had been passed into law.

**Figure 1. The Growth in Automatic Record Restriction Statutes**[65]




The target of these restrictions includes: (1) non-convictions, (2) decriminalized cannabis offenses (charges and convictions), and (3) more general classes of convictions under Clean Slate laws.[66]

62. UTAH CODE ANN. § 77-40a-203 (2022), *expanded on yet repealed by* H.B. 352, 65th Leg. Gen. Sess. (Utah 2024); *id.* § 77-40-114.1(a) (renumbered as § 77-40a-201 by S.B. 35, 64th Leg. Gen. Sess. (Utah 2022)); *see also* CONN. GEN. STAT. § 54-142a(b) (2023) ("[A]ll police and court records and records of the state's or prosecuting attorney . . . pertaining to such charge *shall be erased*." (emphasis added)).

63. MICH. COMP. L. § 780.621g(1) (2020); *see also* ALASKA STAT. § 22.35.030 (2023) (stating that the court system "*may not publish* a court record of a criminal case" resulting in acquittal or dismissal (emphasis added)).

64. These rules met the strict criteria of specifying that the State will, of its own initiative and without any action by the defendant, suppress one or more forms of criminal records.

65. This figure tracks the growth in record restriction provisions over time based on the statutes listed in Appendix A.

66. Only laws that meet the following standards qualify as Clean Slate: "automation of record clearance, automatic clearance upon eligibility of the record (noting that eligibility varies from state to state); inclusion of arrest records; inclusion of misdemeanor [conviction] records; and, a strong recommendation for laws to include eligibility of at least one felony record." *Criteria for Clean State Legislation*, CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org/states#criteria [https://perma.cc/SW6E-QN29].

Unlike reforms that target single domains like employment, record restriction laws address the root cause of collateral consequences: the record itself. As such, they can deliver broad-based relief not limited to a single domain, but only if the relevant records are effectively suppressed. As more states adopt and implement automatic restriction policies, examining the experiences of early adopters can yield important lessons.

Empirical analysis offers insight into the effectiveness and oversight needed for automation more generally. In theory, automatic records restrictions only involve one principal actor, the state, in contrast to, for example, fair chance hiring rules that require compliance on the part of a myriad of commercial actors. However, in practice, because records are held in multiple jurisdictions with multiple information systems, and in multiple bureaucratic silos,[67] and then delivered by multiple third-party vendors, the compliance burden associated with automatic records relief is extensive. Likewise, though states do not have the same pressure to raise revenue and increase profit that private firms do, budget deficits and shortfalls impose their own constraints.[68]

Though records restriction rules represent just one of many domains of government in which automation is playing a more prominent role, the rules raise both distinct and familiar challenges. In the realm of contrasts, the overall aim of record restriction is to *restore* freedom from collateral consequences for eligible individuals and promote data privacy interests.[69] This distinguishes it from the class of algorithms in the criminal justice system that attempt to *predict*, for example, who is most likely to recidivate, in the case of risk assessments, or which areas are likely to be crime hotspots, in the case of policing algorithms.[70] The equity implications are also different—for example, in principle, law enforcement's use of facial recognition technologies is meant to more precisely rule *in* as well as rule *out* suspects.[71] The efficiency of prosecution is enhanced when hit rates are improved and marginal prospects are not swept up indiscriminately. But even assuming the technology was to perform equitably across groups,[72] when the legitimacy of the underlying

67. For example, at the state repository and local levels. ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 9.

68. For example, to overcome fiscal challenges at the state level, the House Resolution 2983, the Fresh Start Act would appropriate $50 million a year for states to automate their record clearance programs. Fresh Start Act of 2023, H.R. 2983, 118th Cong. (2023).

69. Sarah E. Lageson & Alessandro Corda, *Chasing a Clean Slate: The Shifting Roles of Privacy and Technology in Criminal Record Expungement Law and Policy*, 38 HARV. J.L. & TECH. 1, 3–7 (2024).

70. Aziz Z. Huq, *Racial Equity in Algorithmic Criminal Justice*, 68 DUKE L.J. 1043, 1047–50 (2019).

71. U.S. COMM'N ON C.R., THE CIVIL RIGHTS IMPLICATIONS OF THE FEDERAL USE OF FACIAL RECOGNITION TECHNOLOGY 4 (2024), https://www.usccr.gov/files/2024-09/civil-rights-implications-of-frt_0.pdf [https://perma.cc/A9V6-28V9] (describing the use of facial recognition technologies as a tool for investigation and exonerations).

72. *Compare* Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification*, 81 PROC. MACH. LEARNING RSCH. 1, 2 (2018) (documenting how

surveillance is also under question, the equity implications of deployment are far from clear.

Record restriction laws, in contrast, represent the automation of a nonfrivolous benefit rather than a penalty or evaluation, and a reduction of what Cass Sunstein has called "sludge"—the red tape, bureaucracy, and taxing processes that stand in the way of desirable outcomes.[73] Although the criminal justice tools that typically draw the most attention, like risk assessment and surveillance technologies, serve prosecutors, record restrictions laws automate processes that benefit *defendants*.

But the act of records suppression itself raises a host of familiar concerns about the deployment of algorithms in government systems. Though the relevant algorithms are more likely to be rule-based than statistical, opacity remains a concern in light of challenges raised by data quality, data missingness,[74] and ambiguities in how a restriction rule may be applied and when it will go into effect, given lags between the enactment and operationalization of the law.[75] A lack of awareness by parties impacted by algorithms and, as a result, a lack of accountability to them, limits oversight. Automated screening processes further risk exacerbating the negative consequences of unsuppressed records, for example, by scoring or filtering out people without them knowing the basis for doing so, potentially erroneously.[76]

The risks associated with inaccurate information in automation are widely acknowledged. Several federal agencies have specifically called out the risks that low quality datasets pose to the functioning of automated systems and actions

commercial facial recognition technologies perform markedly worse on women and in particular women of color), *with* Gabrielle Shea, *Face Recognition Technology Accuracy and Performance*, BIPARTISAN POL'Y CTR. (May 24, 2023), https://bipartisanpolicy.org/blog/frt-accuracy-performance [https://perma.cc/S944-FLSL (staff-uploaded archive)] (reporting, based on government tests released by the National Institute of Standards and Technology and the Department of Homeland Security, that the most accurate facial recognition algorithms are "highly accurate overall and across demographic groups" but that across all algorithms, accuracy—overall and across demographic groups—varies widely).

73. *See* CASS R. SUNSTEIN, SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT 1–7 (2021).

74. *See* ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 13–18 (describing challenges arising from the lack of necessary data like dispositions, which are missing from some thirty-two percent of arrests in state criminal history information systems, or fines, fees, and restitution information that exists in multiple systems).

75. *See supra* notes 17–19 and accompanying text (describing delays in several Clean Slate states).

76. For example, this also may occur through the inclusion of erroneous records in training data. The evaluation processes that rely on background check data, in turn, are often themselves ambiguous and do not necessarily clearly disclose the role that such information plays. *See* Alec C. Ewald, *Barbers, Caregivers, and the "Disciplinary Subject": Occupational Licensure for People with Criminal Justice Backgrounds in the United States*, 46 FORDHAM URB. L.J. 719, 782 (2019) ("[L]icensure means being governed by ambiguous, often opaque laws, subject to deep scrutiny by civil officials (recall the 'degree of penitence' the Maryland staffer said the Board hopes to witness) who may use subjective standards and wide-ranging types of criminal-justice information.").

taken based on them.[77] The European Union ("EU") Artificial Intelligence ("AI") Act has specifically designated AI systems that implicate employment decisions, which background checks feed into, as "high-risk" and subject to heightened scrutiny and pre-market validation.[78] The Act requires "training, validation and testing data sets [to] be relevant, representative, and to the extent possible, free of errors and complete."[79] The importance of data accuracy is underscored by the so-called "right of rectification," included in both the EU's General Data Protection Regulation[80] as well as numerous U.S. state-level statutes.[81]

This raises at least two kinds of additional problems. Given the demographic realities of the criminal justice system, the failure to comply with restriction laws and suppress records, while impacting all with qualifying criminal records, risks also disparately harming groups overrepresented in criminal justice data.[82] And, indeed, in earlier analyses of the prospective effects of Clean Slate legislation, co-authors and I have found that they would produce

77. *Joint Statement on Enforcement of Civil Rights, Fair Competition, Consumer Protection, and Equal Opportunity Laws in Automated Systems*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/joint-statement-enforcement-civil-rights-fair-competition-consumer-protection-and-equal-0 [https://perma.cc/7FDS-WGXG] (a joint statement issued by the Consumer Financial Protection Bureau, Department of Justice Civil Rights Division, Equal Employment Opportunity Commission, and Federal Trade Commission describing as problematic data that reflect errors, historical biases, and unrepresentative information); *see also* Ngozi Okidegbe, *Discredited Data*, 107 CORNELL L. REV. 2007, 2035–36 (2022) (explaining how flawed datasets, like those with errors or omissions, can cause an algorithm to produce faulty predictions).

78. Commission Regulation 2024/1689 of June 13, 2024, Laying Down Harmonised Rules on Artificial Intelligence and Amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144 and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Act), 2024 O.J. (L 1689) Annex III ¶ 4 (defining AI systems that intended to be used in employment contexts, including in the analysis and filtering of job applications, as high-risk).

79. *Id.* at Art. 10 ¶ 3.

80. Regulation (EU) 2016/679, of the European Parliament and of the Council of 27, April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) 2016 O.J. (L 119) Art. 16 ("Right to rectification: The data subject shall have the right to obtain from the controller without undue delay the rectification of inaccurate personal data concerning him or her. Taking into account the purposes of the processing, the data subject shall have the right to have incomplete personal data completed, including by means of providing a supplementary statement.").

81. *See, e.g.*, Act of July 15, 2024, 2024 Cal. Stat. 96 (codified at CAL. CIV. CODE § 1798.106) (specifying consumers' "Right to Correct Inaccurate Personal Information"); An Act Concerning Additional Protection of Data Relating to Personal Privacy, ch. 483, 2021 Colo. Sess. Laws 3445 (codified as amended at COLO. REV. STAT. § 6-1-1302) (outlining consumers' "Right to Correction").

82. In many cases, these groups are the law's intended beneficiaries. For example, the 2023 New York Clean Slate Act recites a desire to "curb . . . discrimination" against people with convictions, noting that "[w]hile New York has made great strides in fighting discrimination—on the basis of many attributes, experiences, and circumstances of New Yorkers—discrimination on the basis of past convictions still persist." Act of Nov. 16, 2023, ch. 630, § 1, 2023 N.Y. Sess. Laws 1374, 1374 (codified as amended at N.Y. CRIM. PROC. L. § 160.57).

disproportionate benefits, narrowing the large disparities between Black and white individuals in the share of population with a conviction and, even to a greater degree, felony convictions.[83] There also looms the risk that implementation of restrictions will be uneven and biased. In a study that documented discrepancies between background check and "official" records, Wells and his co-authors also found that "African-Americans and younger participants were more likely to have inaccuracies on their record,"[84] though they did not identify why this was the case. Examining the nexus between race and poor quality criminal justice data, McElhattan has also found that states with higher proportions of Black Americans in their felony record populations tend to have less complete and accurate criminal records, even as they subject their residents to more searching background check requirements.[85] In addition, in contrast to the enactment of laws, the fidelity of records to record restriction rules is generally difficult to observe. Not only are the beneficiaries of automatic records restriction policies generally not necessarily aware that the restriction

83. *See, e.g.*, COLLEEN CHIEN, ANGELA MADRIGAL, NIVEDITA THAPA & VARUN GUJARATHI, PAPER PRISONS INITIATIVE, THE ILLINOIS SECOND CHANCE EXPUNGEMENT/SEALING GAP 1 n.3, https://paperprisons.org/states/pdfs/reports/The%20Illinois%20Second%20Chance%20Expungement%20and%20Sealing%20Gap.pdf [https://perma.cc/K9RM-R8BT] (reporting, based on an analysis of a random sample of twenty-five percent of criminal histories associated with all individuals charged with a misdemeanor or felony from 2000 to 2022, that automatic application of records clearance criteria would result in a thirty-one percent reduction in the Black-White conviction gap, and a fifty-seven percent reduction in the Black-White felony conviction gap); *see also* COLLEEN CHIEN, HITHESH BATHALA, PRAJAKTA PINGALE, EVAN HASTINGS & ADAM OSMOND, PAPER PRISONS INITIATIVE, THE CONNECTICUT SECOND CHANCE PARDON GAP 3, https://paperprisons.org/states/pdfs/reports/The%20Connecticut%20Second%20Chance%20Absolute%20Pardon%20Gap.pdf [https://perma.cc/VPX9-NMTY] (providing similar projections of reductions in disparities as a result of the implementation of Clean Slate policies in Connecticut); *accord* COLLEEN CHIEN, ALYSSA AGUILAR, NAVID SHAGHAGI, VARUN GUJARATHI, ROHIT RATHISH, MATTHEW STUBENBERG & CHRISTOPHER SWEENEY, PAPER PRISONS INITIATIVE, THE MARYLAND SECOND CHANCE EXPUNGEMENT GAP 2–5, https://paperprisons.org/states/pdfs/reports/The%20Maryland%20Second%20Chance%20Expungement%20Gap.pdf [https://perma.cc/G3TV-6LNU] (providing similar projections in Maryland). *But see* ALISSA SKOG, KARLA PALOS CASTELLANOS, JOHANNA LACOE & MOLLY PICKARD, CAL. POL'Y LAB, WHO BENEFITS FROM AUTOMATIC RECORD RELIEF IN CALIFORNIA? 4 (2024), https://capolicylab.org/wp-content/uploads/2024/10/Automatic-Record-Relief-in-California.pdf [https://perma.cc/2GM6-SMUU] (reporting, based on an analysis of California's Clean Slate law, that Black Californians are overrepresented amongst those who are ineligible for a fully clean record under automated relief; this finding is not necessarily in conflict with the findings reported above that disparities would shrink).

84. MARTIN WELLS, ERIN YORK CORNWELL, LINDA BARRINGTON, ESTA BIGLER, HASSAN ENAYATI & LARS VILHUBER, CRIMINAL RECORD INACCURACIES AND THE IMPACT OF A RECORD EDUCATION INTERVENTION ON EMPLOYMENT-RELATED OUTCOMES 38 (2020), https://www.dol.gov/sites/dolgov/files/OASP/evaluation/pdf/LRE_WellsFinalProjectReport_December2020.pdf [https://perma.cc/S2WR-MRQ4].

85. David McElhattan, *Punitive Ambiguity: State-Level Criminal Record Data Quality in the Era of Widespread Background Screening*, 24 PUNISHMENT & SOC'Y 367, 381 (2021).

policies even exist,[86] much less what timing or other conditions must be satisfied before they can benefit, but the point of restriction policies is to hide records from the public. This complicates the task of being able to tell whether or not a record has been effectively expunged.[87] For all these reasons, the question of fidelity to automatic record restrictions is important to address through empirical study.

## II. METHODOLOGY

This study analyzes the effectiveness of automatic record restriction rules by considering the "fidelity"—the degree to which records designated by statute for restriction were in fact restricted in background checks. The analysis also considers differences in the reporting of suppressed records before and after the introduction of automatic restriction rules in two states.

For automatic record restriction laws to have their intended effect, first, the relevant records must be suppressed from public view by the state source; and second, the reporting entity (for example, a background check company) must faithfully report the record as provided by the source—that is to say, without the suppressed records. Errors on background checks, widely documented,[88] commonly result from misidentifications, failure to suppress expunged records,[89] and reliance on outdated, duplicate or unofficial sources.[90]

86. THE CLEAN SLATE INITIATIVE, THE IMPACTS OF CLEAN SLATE LAWS IN PENNSYLVANIA, UTAH, AND MICHIGAN 5 (2024) [hereinafter THE CLEAN SLATE INITIATIVE, THE IMPACTS OF CLEAN SLATE LAWS], https://www.cleanslateinitiative.org/research-data-publications/yougov-survey-report [https://perma.cc/3F5X-N86U] (finding, based on a survey of 800 people with arrest and conviction records in Clean Slate states, that over half of respondents—fifty-four percent to seventy-one percent—had not heard of the law).

87. Indeed, the only way for a consumer to complain about the failure to suppress records is to know about it. *See, e.g.*, *Consumer Complaint 8478182*, CONSUMER FIN. PROT. BUREAU (Mar. 5, 2024), https://www.consumerfinance.gov/data-research/consumer-complaints/search/detail/8478182 [https://perma.cc/V86N-XZJK] (providing an example of a consumer complaint demanding removal of expunged data from a credit report).

88. *See, e.g.*, Sarah Lageson & Robert Stewart, *The Problem with Criminal Records: Discrepancies Between State Reports and Private-Sector Background Checks*, 62 CRIMINOLOGY 5, 5 (surveying the literature before introducing their own study of 101 subjects, which found that "60 percent and 50 percent of participants had at least one false-positive error on their regulated and unregulated background checks, and nearly all (90 percent and 92 percent of participants, respectively) had at least one false-negative error"); *see also* WELLS ET AL., *supra* note 84, at 38 (reporting that thirty percent of participants' records contained at least one error in the form of duplicate entries or dismissed charges that should not have been included, making their histories appear more extensive than they actually were).

89. Mira Edmonds, J.J. Prescott, Sonja Starr & German Marquez Alcala, *The Expungement Process: Survey Evidence on Applicants' Experience*, OHIO STATE J. CRIM. L. (forthcoming 2025). A forthcoming survey conducted by Mira Edmonds, J.J. Prescott, Sonja Starr, and German Marquez Alcala found that ten percent of respondents receiving expungements reported that expunged convictions had definitely appeared in background checks, while forty-seven percent were not sure. *Id.*

90. *See, e.g.*, NELSON, *supra* note 28, at 3.

Automatic record restriction introduces another potential type of error—incomplete government automation—while intensifying the risk of outdated records appearing in background checks.

Prior research illustrates the challenge of incomplete implementation.[91] In 2022, Matt Stubenberg, Renee Danser, and Jim Greiner of the Harvard Access to Justice Lab scraped records from official court websites for four Pennsylvania counties, several years after the enactment of the state's first automatic restriction, Clean Slate bill.[92] Their research uncovered over 200,000 charges, corresponding to over 100,000 cases over four counties, still publicly accessible despite meeting automatic sealing criteria.[93] Citing reasons similar to the ones that have plagued petition-based expungement,[94] including data inaccuracies, missing information, and overly nuanced criteria,[95] the authors observed that "even when the government undertakes information suppression from its own databases, it finds the task challenging."[96]

Although recent policies have emphasized conviction records, this Article focuses on automatic non-conviction laws for a few reasons. Non-conviction records significantly impact individuals;[97] being merely charged—even without conviction—is associated with "large and persistent drops in formal employment."[98] Further, automatic non-conviction restriction laws have been

91. *See generally* Stubenberg et al., *supra* note 21 (analyzing criminal records in Pennsylvania and Kansas to determine the number of records eligible for expungement or sealing).

92. *Id.* at 15.

93. *Id.* at 15, 36, fig. 13 (showing the total number of cases eligible for partial or complete clearance in Alleghany county alone to be over 100,000).

94. *See* Chien, *supra* note 3, at 519.

95. Stubenberg et al., *supra* note 21, at 26–27, 58–67.

96. *Id.* at 15.

97. *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–1000 (2019); Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without Convictions*, 20 U. PA. J.L. & SOC. CHANGE 81, 85–88 (2017); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV., 823–44 (2015) (describing the use of non-conviction records to, for example: deny employment opportunities; restrict housing access; limit access to professional licenses; lead to misidentification; deny credit applications and loans, which negatively affects individuals' financial stabilities; limit access to social services; restrict travel and citizenship to—in some instances—increases chances of deportation; disqualify individuals from voting and jury service; create educational barriers by decreasing chances of acceptance and the receipt of financial aid; deny military enlistment; render one ineligible to serve in public office; and restrict one's ability to own a firearm).

98. Amanda Y. Agan, Andrew Garin, Dmitri K. Koustas, Alexandre Mas & Crystal Yang, *Can You Erase the Mark of a Criminal Record? Labor Market Impacts of Criminal Record Remediation* 3, 14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32394, 2024) (finding felony non-convictions to be associated with a persistent decline in employment of eight to eleven percent, and misdemeanor non-convictions, with a decline of seven to eight percent, as compared to comparable declines of thirteen to twenty-six percent and eleven percent for felony and misdemeanor convictions, respectively). This works builds on previous work, see Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637 (2014) (finding arrest records to be associated with fewer callbacks).

around longer and are relatively simpler and more straightforward.[99] As such, they can serve as a litmus test for the broader implementation of automatic record restriction policies.

### A. *The Approach of this Article*

This study builds upon prior work by examining fidelity to record restriction laws in five states, as well as evaluating the laws' impact on record suppression rates and the overall "quality" of non-conviction restrictions.

Fidelity: The study first measures background check fidelity—whether restricted records continue to appear in reports. It considers (1) *absolute* fidelity—the presence of legally restricted records on checks, and (2) *relative* fidelity—a comparison of reports from states with automatic restrictions ("treated") against similar states without restrictions ("untreated").

Suppression Trend and Estimated Uptake: Records suppression rates alone do not necessarily indicate a law's effectiveness. A low rate of suppressed records after implementation might simply reflect a small initial pool of eligible records rather than effective policy. Conversely, a higher rate of suppressed records could hide a significant impact if the baseline were substantially higher before the law took effect. To evaluate the law's impact on suppression levels, a segmented regression approach using pre- and post-law background check data from two states (Nebraska and Pennsylvania) was applied. This approach allowed estimation of both the "uptake rate" and effectiveness in bridging the gap between eligibility and actual delivery of restriction relief.

Quality: The analysis also evaluated how many individuals in two states (with both pre- and post-law data) would achieve completely clear records if the law was faithfully implemented. This allowed us to approximate the "quality" of reform based not only in principle but also in practice.

### B. *Selection of Restriction Provisions, Data Aggregation, and Cleaning*

The analysis proceeded in several steps. First, we reviewed relevant non-conviction restriction statutes[100] and conducted related internet research.

99. *Compare* 18 PA. CONS. STAT. § 9122.2(a)(2) (2018) (describing Pennsylvania's non-conviction clearance rule which allows any non-conviction charge to be suppressed, without a waiting period subjecting to limited access information "pertaining to charges which resulted in a final disposition other than a conviction"), *with id.* § 9122.2(a)(1) (2023) (describing Pennsylvania's misdemeanor conviction clearance rule, which, subject to exceptions, defines a qualifying misdemeanor offense as one that falls into one of several categories including having "a misdemeanor offense punishable by imprisonment of no more than two years," and requires a multi-year waiting period during which the individual must be free of any new conviction, and that the defendant not owe any restitution).

100. *See* Margaret Colgate Love, *50-State Comparison: Expungement, Sealing & Other Record Relief*, COLLATERAL CONSEQUENCES RES. CTR., https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisonjudicial-expungement-sealing-and-set-aside-2-2/ [https://perma.cc/QWV4-RW7Z]

Focusing only on "automatic" restrictions,[101] we ascertained other aspects of each relevant law including eligibility criteria, waiting period, and effective date, by reviewing the text and legislative history of each bill.[102]

Next, anonymous criminal background check data were obtained from a private credit reporting agency that generously shared data with us for research purposes. The entire national dataset included approximately 200,000 comprehensive background checks that were carried out over two time periods: 2017 through mid-2018, and the first half of 2021, primarily performed as part of the gig-job employment process. States with at least 500 incidents were selected for detailed analysis: Connecticut, Nebraska, New York, Pennsylvania, and South Carolina. As a rough comparator, we created a group of states with similar sizes and profiles,[103] but which lacked the same automatic records restrictions.

Data cleaning involved coding outcomes using text classifiers to match statutory criteria (such as, acquittals and dismissals). Events were aggregated at the person-day-jurisdiction level, separating convictions from non-convictions, then outcomes were labeled according to the relevant eligibility criteria.[104]

### C. *Data Analysis*

For the fidelity analysis, the statutory language of each statute was construed to develop eligibility logic as described in Appendix B. Generally, laws required suppression of fully acquitted or dismissed incidents.[105] Due to

(last updated July 2024) [hereinafter Love, *50-State Comparison*] (providing results from a survey of automatic record restrictions).

101. *See Automatic Clearing of Records*, NAT'L CONF. STATE LEGISLATURES, https://www.ncsl.org/civil-and-criminal-justice/automatic-clearing-of-records [https://perma.cc/V4FC-9RHB (staff-uploaded archive)] (last updated July 19, 2021) (describing "automatic" restrictions as those where the petitioner did not have to do anything to receive relief); *see also infra* Appendix B (providing examples of operative recitals).

102. *See infra* Appendix B.

103. Including Arizona, Maine, Nevada, North Carolina, Tennessee, and Texas none of which had automatic non-conviction records restriction provisions in effect during the studied period. *See* Love, *50-State Comparison*, *supra* note 100 (indicating that of the six states, only one—North Carolina—had a provision automating the expungement of non-conviction records, but that this law only went in effect in December 1, 2021, outside the scope of this analysis as our records were last generated in mid-2021).

104. To identify non-convictions, first we identified the record types specified in our study states, in particular identifying dispositions that qualified as dismissals with or without prejudice, and acquittals/not guilty outcomes. We then noted which dispositions reflected guilt (primarily by being identified as reflecting a guilty, nolo contendere, or similar outcome). If a disposition did not fall into the statutory definition of a suppressed non-conviction or a conviction, we considered it an "other" non-conviction disposition; for example, "pending/transferred," "not classified." Charges with dispositions missing were also considered non-convictions. For a similar approach, see Chien, *supra* note 3, at app., tbl. M-1.

105. *See* S.C. CODE ANN. § 17-22-950(B) (2024); CONN. GEN. STAT. § 54-142a (2025). *But see* 18 PA. CONS. STAT. § 9122.2 (2025) (providing that, in Pennsylvania, clearance of non-conviction charges—even when other charges from the incident are ineligible—is permissible).

data limitations,[106] narrow statutory exclusions were not modeled; thus, perfect suppression (one hundred percent) was not expected.

For each state, we analyzed "treated" records—background checks that were generated after the passage of each restriction law. We next carried out our "trend" analysis and estimated uptake for the two states (Nebraska and Pennsylvania) for which we also had sufficient observations pre-rule change.[107] Finally, for those two states we took records before the rule change and analyzed the extent to which, if all records expected to be suppressed were in fact suppressed, individuals would achieve a complete record clearance.

### D. *Limitations of the Analysis and Audit of Government Records*

The present study has several notable limitations. Its subjects—gig-job seekers obtaining checks from a single agency—do not necessarily represent all individuals with criminal records or record checks, limiting generalizability.

Data anonymity also prevented us from pinpointing the source of non-compliance: the state, the background check company, or both. To compensate, we conducted a supplementary check on records in the state of Pennsylvania. This audit involved a sample of 400 court records previously identified by Stubenberg, Danser, and Greiner[108] as including unsuppressed non-conviction records. Each record[109] was revisited on the Pennsylvania court website[110] during the months of July–September 2024. This allowed us to specifically identify the government's—as compared to background check companies'—failure to suppress.

106. For example, we were unable to model record exclusions associated with a candidate or holder of public office because it was a condition that required information beyond the record to which we had access. NEB. REV. STAT. § 29-3523(1)(b) (2024). For other nonmodeled criteria, see *infra* Appendix B.

107. For Pennsylvania, there were a total of 12,774 charges in the pre-period and 15,112 charges in the post-period. For Nebraska, data was analyzed at the incident level. There was a total of 2,378 incidents in the pre-period and 647 incidents in the post-period. Author's calculation based on data that is on file with the author.

108. *See* Stubenberg et al., *supra* note 21, at 22. As in the Studenberg, Danser, and Greiner study, this audit focused on the criminal records data of four Pennsylvania counties: Alleghany, Beaver, Butler, and Lawrence. *Id.*

109. *See id.* at 33. Non-conviction final disposition types include: nolle prossed (case dismissed), withdrawn, dismissed by accelerated rehabilitative disposition, not guilty, dismissed (other), dismissed (lower court), and various subtypes of withdrawn and dismissed charges. *Id.*

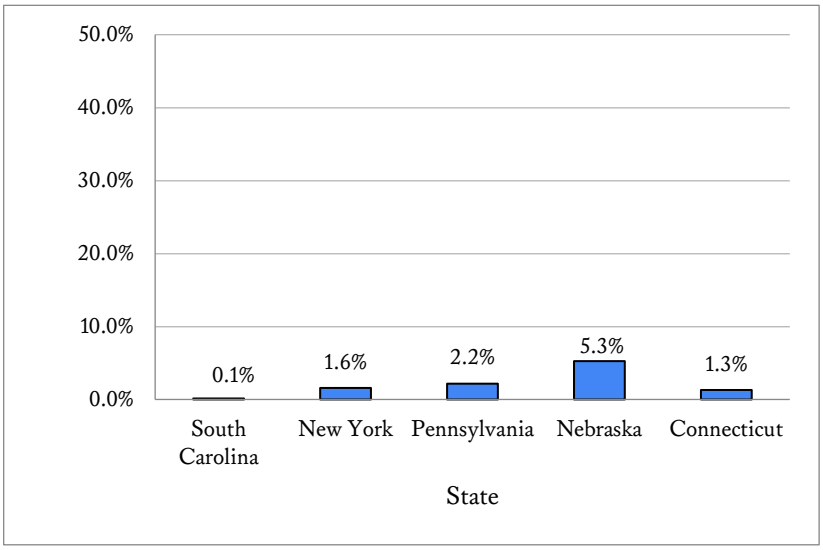
110. *See The Unified Judicial System of Pennsylvania Web Portal*, ADMIN. OFF. PA. CTS., https://ujsportal.pacourts.us/CaseSearch [https://perma.cc/GRY7-R5WD].

## III. RESULTS

### A. *Fidelity*

Our primary goal was to understand the fidelity of background checks to record restrictions: did records statutorily designated for suppression in fact show up in the background checks we studied? The data, as shown in Figure 2, suggests the answer to largely be no. Among the background checks we studied, only a small share, 0.2–5%, contained records of non-convictions suppressed by the statute.

**Figure 2. Share of Reported Background Checks Containing Suppressed Records**[111]




In terms of *absolute* fidelity, meaning that none of the records statutorily designated for restriction showed up in the record, South Carolina stands out, with just a handful of suppressed records visible in the studied background checks. However, among all states whose records we inspected, the average share of checks containing a suppressed record was two percent. This was significantly lower than the counterpart average share among background

111. As described earlier, for Pennsylvania our analysis was at the charge level given that the state allows for expungement of an individual's non-convictions—even when the record of the associated incident includes other convictions. *See supra* Part II.

checks among the states that did not have equivalent restrictions, of thirty-six percent.[112]

The results provide some reason for optimism, especially in light of the reported frequency of errors on background checks. For the most part, statutorily suppressed criminal records did not appear on the records we studied. The same was not true of states that lacked the same restrictions, suggesting a meaningful relationship between restriction legislation and actual records suppression.

### B. *Suppression Trends and Uptake*

To get a sense of the extent to which restriction rules, as compared to other factors, accounted for the rates of reporting we observed, we further considered the prevalence of suppressed charges before and after the automatic restriction went into effect in the two jurisdictions in which there were rule changes in the relevant data and sufficient numbers of observations to carry out the analysis, as shown in Figure 3.[113] In both states, Nebraska and Pennsylvania, the prevalence of suppressed records was significantly lower among records generated after the rule change than it was among records before the rule change.[114] Following the rule change, in Nebraska, the rate of suppressed charges among relevant records was 5.3% while in Pennsylvania it was only 2.1%.[115]

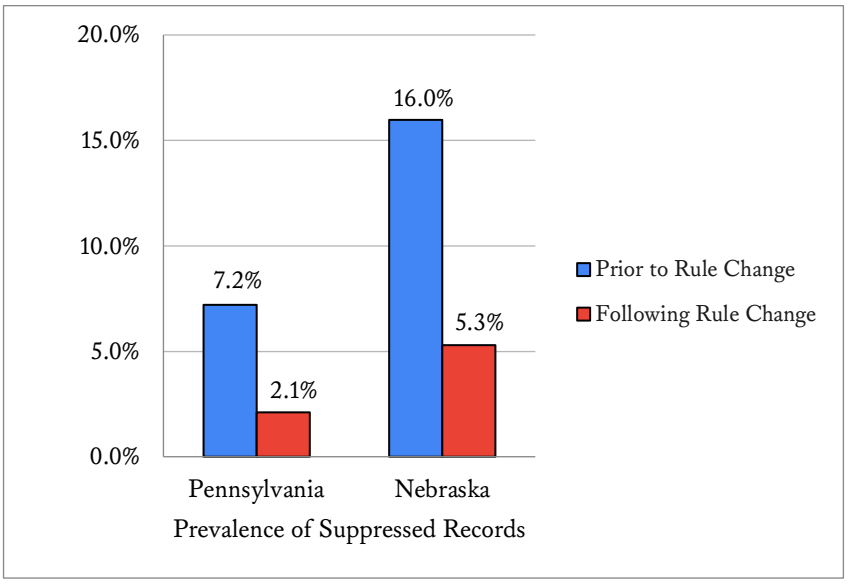
112. Z-test of proportions comparing the average proportion of cases in treated states versus the control states ($z = 94.76$, $p < .0001$) (2.01% vs 34.7%) (analysis on file with the author).

113. Y(suppression) = b0 + b1months + b2pre-post + b3months*pre-post (the binary pre-post indicator (0 = pre law, 1 = post law) was included as a moderator of the relationship between time in months and suppression) (analysis on file with the author). For Pennsylvania: log oddsY(suppression) = -3.29 + -.01months + -2.43pre-post + .13months*pre-post. The b2 coefficient (b2 = -2.43, bootstrapped se = .01, $p < .001$) indicates that post intervention had significantly lower log odds of suppression than pre intervention within the first month of implementation. For Nebraska: log oddsY(suppression) = -1.39+ .01months + -1.53pre-post + -.01months*pre-post. The b2 coefficient (b2 = -1.53, bootstrapped se = .38, $p < .001$) indicates that post intervention had significantly lower log odds of suppression than pre intervention within the first month of implementation.

114. For Pennsylvania: chi-square(1) = 412.3, $p < .001$; For NE: chi-square(1) = 49.5, $p < .001$. (analysis on file with the author).

115. Though our sample was small, it also suggested that the rate of suppression in the post-treatment period was not necessarily consistent. While in the case of Nebraska, the prevalence of suppressed records stayed relatively consistent in the post-treatment period, especially when compared to the upward trend seen in the pre-treatment era, in Pennsylvania our analysis showed a slight uptick of suppressed records over time in the post-treatment period.

**Figure 3. Prevalence of Suppressed Records in Background Check Data**




To contextualize these findings, we can use the share of suppressed records before and after the rule change as a rough benchmark,[116] if we assume general comparability between pre- and post- populations. In Pennsylvania, even though only about two percent of all incidents still contained records that should have been suppressed after rule implementation, that two percent represents a substantial twenty-nine percent of the seven percent suppressed charge rate observed prior to the rule change. In other words, it is possible that three in ten of the charges that should have been cleared still showed up in the post- implementation data. The proportion in Nebraska is comparable, with as many as approximately five percent out of sixteen percent, or thirty-three percent of records continuing to reflect suppressible charges—as shown in Figure 3.

While necessarily hampered by data limitations given the nature of expungement, it is worthwhile to try to estimate the size of the gap that remains following automatic record restrictions. The thought experiment above suggests a clearance rate of two-thirds to seventy percent in the two jurisdictions studied.

116. *See supra* notes 113–15 and accompanying text. It is important to acknowledge that lack of access to suppressed records prevented a precise apples-to-apples comparison. *Id.*

### C. *Sources of Automatic Clearance Success and Failure*

The lack of absolute fidelity in the post-clearance period led us to further investigate possible sources of error, by the government or background check firms. Our check of the 400 government records previously identified as visible but suppressed found that in forty-eight percent of the cases, the record remained visible.[117] This implies that, in the case of Pennsylvania records, government error may at least be partly to blame for the continued availability of restricted records.

Closer inspection of unsuppressed records across jurisdictions hinted at other factors contributing to the relatively higher and lower fidelity levels observed. In all of the jurisdictions besides South Carolina, exposed non-conviction dispositions were expressed in a wide variety of nonuniform, misspelled, and otherwise "dirty" ways.[118] In some cases, the data in the record was not easily matched to the eligibility criteria, creating some ambiguity as to whether or not the record should even be cleared.[119] South Carolina, which had the lowest prevalence of suppressed records, also stood out due to its relatively smaller size (sixteen individual judicial circuits,[120] as compared to, for example, sixty in Pennsylvania[121]). In addition, in contrast to jurisdictions that implement "top down" expungement, beginning with an order from a centralized

117. *See, e.g.*, Pennsylvania v. Celeta Ann Mills/Hood, CP-04-CR-0002088-2019 (C.P. Beaver Cnty. 2019) (reporting a "dismissed" charge); Pennsylvania v. Denstitt, CP-10-CR-0001668-2019 (C.P. Butler Cnty. 2019) (reporting a "withdrawn" charge).

118. Including dispositions like: Dismisse, dismissed — lack of evidence, dismissed — loe, dismissed — lop.

dismissed — other, dismissed — rule 1013remanded to municipal court, dismissed — rule 546rule 546 — open.

dismissed — rule 586, DISMISSED — RULE 586 (SATISFACTION/AGREEMENT), dismissed — rule 586proceed to court, DISMISSED — YOP/YES, dismissed by accelerated rehabilitative disposition, dismissed by accelerated rehabilitative disposition (ard) judgment of acquittal (prior judgment of acquittal (prior to disposition), nolle prosse, nolle prossed (analysis on file with the author).

119. For example, in Nebraska, an individual that is currently subject to prosecution or correctional control, or is a candidate or holder of public office, cannot avail themselves of records restriction. In our coding we assumed that these conditions did not apply. *See supra* note 106.

120. S.C. LEGIS., TYPES OF COURTS, CASES HEARD, AND WHO REPRESENTS PROSECUTION AND DEFENSE 2, https://www.scstatehouse.gov/CommitteeInfo/HouseLegislativeOversightCommittee/AgencyWebpages/ProsecutionCoordination/Court%20types,%20cases%20heard%20in%20each,%20and%20who%20represents%20prosecution%20and%20defense%20(10.12.18).pdf [https://perma.cc/NS3E-CNGH (staff-uploaded archive)]; *see also* S.C. CONST. art. V. § 13 (providing that "[t]he General Assembly shall divide the State into judicial circuits of compact and contiguous territory").

121. *See Learn*, ADMIN. OFF. PA. CTS. (2024), https://www.pacourts.us/learn [https://perma.cc/7XRU-N74G].

authority,[122] South Carolina courts have a "bottom-up" approach according to which decentralized summary courts are empowered to expunge non-convictions without the need to wait for an order from the circuit judge.[123]

### D. *Quality*

How much fidelity to automatic records restrictions matters depends in part on the extent of relief they offer. Factors relevant to quality, as such, include the scope of relief (how comprehensive or generous is the law in addressing different types of non-conviction records?), as well as its interaction with other records (what proportion of individuals with non-conviction records have other, potentially more serious conviction records that would still appear on background checks?). To address these questions, we looked at records before and after rule changes in the two states for which we had sufficient data. In Pennsylvania, eleven percent[124] of individuals in the pretreatment period had records containing only suppressed-eligible charges and in Nebraska, thirteen percent[125] of individuals in the pretreatment period had records with only suppressed-eligible charges. If we limit our analysis only to people who stood to benefit from the suppression of acquitted or dismissed charges, rather than all people with records, the proportion is much higher: sixty-six percent of the beneficiaries of automatic non-conviction records restriction in Pennsylvania and forty-seven percent of the beneficiaries in Nebraska would have completely clear records as a result of complete suppression. An analysis of California's Clean Slate automatic expungement laws has found that, of those entitled to relief, seventy percent would likely have all their records relieved.[126]

122. For example, Pennsylvania, whose centralized Administrative Office of the Pennsylvania Courts initiates the process by transmitting, on a monthly basis, records of eligible cases. *See* DAVID J. ROBERTS, KAREN LISSY, BECKI GOGGINS, MO WEST & MARK PERBIX, SEARCH, TECHNICAL AND OPERATIONAL CHALLENGES OF IMPLEMENTING CLEAN SLATE: TECHNICAL APPENDIX—PROFILES OF 11 STUDY STATES, at H-7 (2023), https://static1.squarespace.com/static/62cd94419c528e34ea4093ef/t/6435811a2736df73a066fe64/1681228059124/Tech_Op_Challenges_Clean_Slate_TechnicalAppendix.pdf [https://perma.cc/SZ6E-ALBV].

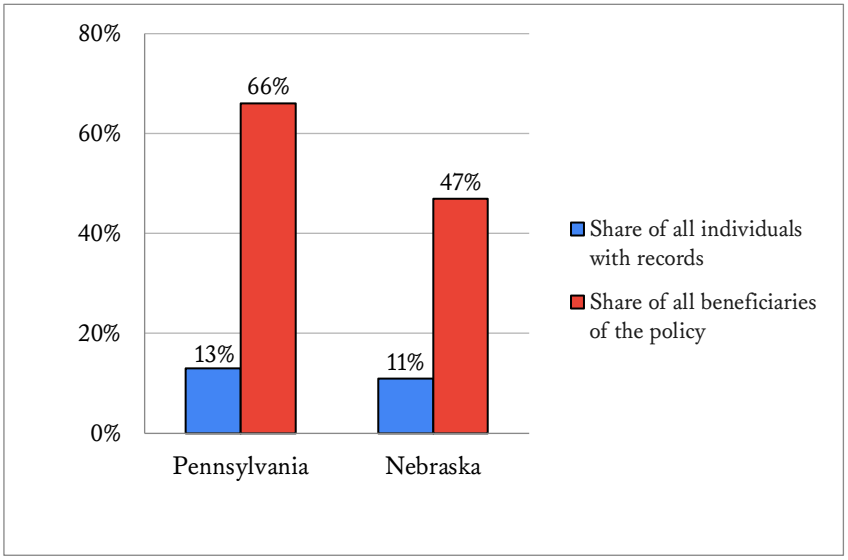
123. *See* S.C. CTS., CIRCUIT COURT EXPUNGEMENT PROCESS 1, https://www.sccourts.org/forms/pdf/SCCA223A1(a).pdf [https://perma.cc/XU6W-ND5H] ("[T]he summary courts are responsible for expunging the records of all criminal cases handled in their courts resulting in a not guilty finding, judicial dismissal, or nolle pross. All other expungements should be processed through the solicitor's office and issued by a circuit court judge").

124. Out of the 1555 Pennsylvania background checks we inspected, 177 had records containing only suppression-eligible non-conviction charges (analysis on file with the author).

125. Out of 1164 Nebraska background checks we inspected, 149 had records containing only suppression-eligible non-conviction incidents (analysis on file with the author).

126. SKOG ET AL., *supra* note 83, at 4 (reporting, based on an analysis of California's Clean Slate law, that Black Californians are overrepresented amongst those who are ineligible for a fully clean record under automated relief).

**Figure 4. Share of People Who Would Have No Record Following Clearance of All Eligible Non-Convictions**




## IV. DISCUSSION AND RECOMMENDATIONS

What lessons can be drawn from the present case study? Recent research underscores the lasting negative impacts of criminal records, even minor ones.[127] Automated records clearance promises relief—but does it deliver? The present audit suggests reasons for optimism—in an estimated seventy percent of eligible cases,[128] relevant non-conviction restriction rules appear to have been correctly applied, a dramatic improvement over the single-digit uptake rates of petition-based expungement. Implementing automatic conviction and non-conviction records restriction rules, millions of people—at least 1.2 million in Pennsylvania[129] and a little more than 1 million in Michigan[130]—have had their records improved, providing substantial validation of the Clean Slate model.

127. *See supra* Part II; *see also* Agan et al., *supra* note 98, at 3, 14.

128. *See supra* Part III.

129. Marshall Keely, *Gov. Shapiro, Lawmakers Tout Pa's 'Clean Slate 3.0' Law*, FOX 43, https://www.fox43.com/article/news/local/second-chances-gov-shapiro-lawmakers-tout-clean-slate/521-4fc94170-b93b-4731-b95d-538b0588938f [https://perma.cc/S7ZU-87JH] (last updated June 11, 2024, 3:47 PM).

130. KAMAU SANDIFORD & JOHN S. COOPER, SAFE & JUST MICH., CLEAN SLATE YEAR 3: THE FIRST YEAR OF AUTOMATIC EXPUNGEMENT—LOOKING BACK & LOOKING AHEAD 4, 8 (2024), https://safeandjustmi.org/wp-content/uploads/2024/04/Clean_Slate_Year_3_Report.pdf [https://perma.cc/M5KF-2DTH] (relying on data from the Michigan State Police to find that, as of March 21, 2024, the total number of people with partial expungements was 912,416, and the total

But the effectiveness of automated expungement laws must be measured not only by broad success rates but also by the experience of affected individuals. Implementation of automated expungement of non-convictions has been uneven across states, and even in leading states like Pennsylvania, omissions and mistakes still occur.[131] Public awareness remains limited.[132] For individuals whose records have resulted in, for example, blocked employment or housing opportunities, scant information and a "pretty good chance" of record clearance do not necessarily provide the knowledge and confidence needed to move forward and surmount the significant hurdles records present.

As more and more laws go into effect, what was once a small trickle of petition-based expungements is now giving way to a flood of state-based automated expungements. This is a positive development. But many of the old risks remain.[133] And a new set of challenges associated with difficulties in implementing the law risks thwarting the salutary intent of automatic expungement laws, but just on a much more massive scale. The incorporation of records into automated decision-making processes in critical areas like employment and housing further raises the stakes.[134]

number of people with full automatic expungements was 283,428); *see also* Michigan Attorney General, *Michigan Clean Slate: A Game-Changer for Expunging Certain Convictions*, YOUTUBE, at 02:07 (Apr. 11, 2023), https://www.youtube.com/watch?v=89cJ2bXkz2o [https://perma.cc/X43Q-W526] (on file with the North Carolina Law Review) (anticipating that "over one million residents will have convictions automatically expunged on April 11[, 2023]").

131. *See, e.g.*, Criminal Record of [name redacted], First Jud. Dist. Penn. Ct. Summ. (2024) (on file with the North Carolina Law Review) (showing a Pennsylvania record with non-convictions showing up with convictions, despite the statute's requirement to clear all non-conviction cases).

132. *See* THE CLEAN SLATE INITIATIVE, THE IMPACTS OF CLEAN SLATE LAWS, *supra* note 86, at 21 (reporting that over half of respondents to a survey in beneficiary states had not heard of Clean Slate).

133. For example, of errors or omissions in implementation as well as lack of awareness about (automated) expungement and the inability to verify correct implementation, intensifying uncertainty among those affected.

134. For example, automated job screening sites like Gusto and Workday have built pipelines to background checks generated by sources like Checkr as well as First Advantage. *See Our Partners: Gusto*, CHECKR, https://checkr.com/company/partners/gusto [https://perma.cc/8XBE-4LM3]; *Checkr: Streamline Your Background Checks with Checkr in Workday*, WORKDAY, https://marketplace.workday.com/en-US/apps/446018/checkr:-streamline-your-background-checks-with-checkr-in-workday/overview [https://perma.cc/VV2T-3ABB]; *First Advantage Software Integration for Background Check*, WORKDAY, https://marketplace.workday.com/en-US/apps/414140/first-advantage-software-integration-for-background-check/overview [https://perma.cc/RLA7-HV8Q]. However, what is less clear is how the raw criminal records information, once obtained, is being presented to the decision-maker. For example, raw criminal records information could be presented to the customer in a FCRA-compliant way with the right to dispute, etc. when it is part of an adverse decision. *See* CHI CHI WU, ARIEL NELSON, APRIL KUEHNHOFF, STEVE SHARPE, NICOLE CABAÑEZ & CAROLINE COHN, DIGITAL DENIALS: HOW ABUSE, BIAS, AND LACK OF TRANSPARENCY IN TENANT SCREENING HARM RENTERS 120 (2023), https://www.nclc.org/wp-content/uploads/2023/09/202309_Report_Digital-Denials.pdf [https://perma.cc/P4YR-AMDV] (showing redacted tenant screening reports that show ratings given to prospective tenants and the criminal records check information that is also part of the report but not describing how the criminal

While the "growing pains" identified above do not undermine the premise of automatic records restrictions, they do highlight the need for continued governance measures and the recognition of the passage of Clean Slate laws as the beginning, not the end, of delivering relief. Below, I describe existing background check safeguards and their limited applicability to the unique issues raised by automatic record restrictions. Then, I propose a new governance framework for the modern era of automated expungement.

### A. *From Petitioner-Initiated to Government-Responsible Governance of Records Restriction*

Mistakes in the reporting of criminal history are nothing new.[135] But just as individuals have traditionally been responsible for initiating expungement petitions, so, too, do individuals currently shoulder the burden of dealing with faulty records. While producers and users of background checks are obligated by law to meet accuracy[136] and notice requirements,[137] it is up to affected individuals to identify and seek redress of errors.[138] But to the extent doing so works for the implementation of petition-based expungements,[139] it is

records information factors into the overall background check score). The information could also part of a discrete decision—acting as a screen—or instead feed into an overall score that incorporates the records information and other data fields.

135. *See supra* Part II (first citing studies by Lageson and Stewart, *supra* note 88, at 9; and then citing WELLS ET AL., *supra* note 84, at 2–3); *see also* NELSON, *supra* note 28, at 16. For specific examples, see Watson v. Caruso, 424 F. Supp. 3d 231, 237 (D. Conn. 2019) (seeking damages against a background check company for including a criminal conviction in an employment report that had been erased from the employee's record through a petition-based request); NELSON, *supra* note 28, at 19–20 (recounting how, even after a man "had a conviction vacated and sealed" pursuant to New York state law, the conviction appeared on his background check, leading to him being denied an apartment).

136. 15 U.S.C. § 1681e.

137. *Id.* § 1681g.

138. *Id.* § 1681i (detailing the procedures a consumer reporting agency ("CRA") must follow only after a consumer notifies the CRA "directly, or indirectly through a reseller" to dispute the "completeness or accuracy of any item of information contained in [their] file"); *see also supra* Part I (discussing FCRA's general duty of accuracy and a notice requirement if a CRA reports information that is likely to have an adverse impact on the subject).

139. According to critics, existing quality safeguards fall short because the available legal remedies do not change the basic economics of background checks and have failed to incentivize investments in records quality (I thank Erika Heath for making this point to me). In addition, because the FRCA, which is the primary federal source of regulation of criminal background checks, has limited jurisdiction, plaintiffs are left without recourse against those who fall out of—and may even purposefully evade coverage under—the FCRA. *See* Lageson, *Criminally Bad Data*, *supra* note 49, at 1778 (describing websites unregulated by FCRA that host criminal justice information and create digital "traces" of criminal record contact that can still be found post-expungement); Lageson & Stewart, *supra* note 88, at 9 (summarizing how FCRA covers certain purveyors of background checks but not "people search" firms or the "mugshot" industry); NELSON, *supra* note 28, at 29–31 (citing companies' arguments that FCRA does not apply to them because: (1) they disclaim FCRA duties, or (2) deny the FCRA even applies). The FCRA also provides more limited oversight of "furnishers," entities that provide data to CRAs, despite their role, in many cases, of originating errors. *See* 15 U.S.C. § 1681s-2 (outlining duties of furnishers).

insufficient for automated expungement, where errors often remain invisible to those affected. When mistakes *are* detected, algorithmic rather than human error is likely to blame, making settlements ineffective. These and related unique characteristics of automated, as opposed to petition-based, expungement, counsel at least three shifts in criminal records governance.

1. From Regulating "the Industry" to also Regulating "the Data"

The poor quality of background checks is often attributed to the practices of background check companies and others that traffic in criminal records data, driven by the economics of data brokering.[140] But this study demonstrates that fragile underlying data, whether maintained by "profit-driven" background check companies or "good-faith" government agencies, is also a significant culprit. Lawsuits serve as an important check on background check firms but are ill-suited for compelling states. State agencies are often protected from suit by sovereign[141] or state immunity,[142] or are punishable only when there is bad faith.[143] Funding constrains what states can do. Moreover, the expansion of automated record restrictions will be chilled if the enactment of each law is followed by a flood of lawsuits.

Given these limitations, the focus of regulation must shift beyond just the actors handling the data to ensuring the integrity of the data itself. This requires

140. *See, e.g.*, Lageson, *Criminally Bad Data*, *supra* note 49, at 1778–79 (outlining how for-profit data brokers "create new error through sloppy data matching techniques by failing to regularly update criminal record information, and by reselling erroneous criminal record information to other data vendors and background check companies."); NELSON, *supra* note 28, at 17–24 (identifying common errors that arise in criminal background check reports from companies using "unsophisticated or over-inclusive matching criteria," "fail[ing] to use all available information," and not removing expunged records or out-of-date or legally prohibited information, like arrests older than seven years); *see also* 15 U.S.C. § 1681c(a)(2) (prohibiting CRAs from reporting arrest records more than seven years old).

141. *See* Kelsey Joyce Dayton, Comment, *Tangled Arms: Modernizing and Unifying the Arm-of-the-State Doctrine*, 86.6 U. CHI. L. REV. 1603, 1611 (outlining the "arm-of-the-state doctrine, which extends the Eleventh Amendment's grant of state sovereign immunity to state agencies); *see also* Alabama v. Pugh, 438 U.S. 781, 782 (1978) (holding that a lawsuit against Alabama and its "Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit"). Although most criminal records are at the state level, the question of whether or not the federal government is immune from FCRA-based claims is unresolved. *See generally* George Dylan Boan, Recent Development, *"Say the Magic Words": How Sovereign Immunity Absolves the Federal Government from its Obligations Under the Fair Credit Reporting Act*, 99 N.C. L. REV. 1617 (2021) (describing the circuit split on whether the definition of "person" in FCRA waived sovereign immunity, and if so, allows plaintiffs to sue the government under Section 1681n-o).

142. *See, e.g.*, MINN. STAT. § 609A.015 subdiv. 6 (2025) ("Employees of the Bureau of Criminal Apprehension shall not be held civilly liable for the exercise or the failure to exercise, or the decision to exercise or the decision to decline to exercise . . . or for any act or omission occurring within the scope of the performance of their duties under [the automatic expungement of records] section.").

143. *See, e.g.*, *id.* § 609A.04 ("[A]n individual whose record is expunged may bring an action under [the civil remedies statute] against a government entity that knowingly opens or exchanges the expunged record in a manner not authorized by law.").

proactive measures to improve record accuracy at the source rather than relying solely on after-the-fact legal challenges.

#### 2. Shifting Towards a Rules-Based Regime

A liability-focused approach is also ineffective when the people most affected lack awareness of the problem (of incomplete or erroneous automation of records clearance). Currently, individuals bear the responsibility of identifying inaccuracies and seeking redress. But widely applied algorithms cannot be effectively remedied by individual suits. Whereas each expungement petition is in a way "bespoke" and advances individual justice, automated record clearance more closely resembles a mass-produced product where small but widespread defects can have significant consequences. This also counsels a shift away from a pure liability regime and towards a proactive, rules-based governance approach that includes quality controls, systematic monitoring, and oversight.

#### 3. From Litigated to Administrative Interventions

Finally, the challenges of implementing records restriction at scale counsel greater use of administrative remedies. "Harm reduction," carried out through a complaint and correction process, in many cases will be more effective than, for example, punitive sanctions alone, which have their place as well. Going further upstream, stronger safeguards to ensure data quality *before* records are made accessible to background check companies are warranted and discussed at greater length below.

In sum, the distinct characteristics of automated clearance governance regime justify shifts in the governance of the quality of criminal records: towards overall data quality, a rules—rather than liability—based regime, and administrative—rather than litigated—interventions. In the sections below, I describe reforms directed at the government and the private sector, as well as impacted individuals, embodying a "binary" approach that centers both broader accountability as well as personal rights.[144]

### B. *Regulating Government Implementation of Records Restrictions*

Just as the automatic restriction of records begins with the state, so too does the present discussion begin with government implementation of records restrictions. Discrepancies between the restriction under law and government records can arise from numerous sources: (1) the transition period needed to

144. *See* Margot E. Kaminski, *Binary Governance: Lessons from the GDPR's Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529, 1533–37 (2019) (discussing binary governance's two prongs: "individual process and systemic regulation involving collaborative governance").

bring government records systems into compliance;[145] (2) actual errors in the state's logic or indeterminate data;[146] and (3) apparent errors, where records that appear eligible for restriction are not, due to factors like eligibility criteria outside the record[147] or the resolution of ambiguities in the law. Together they highlight the need for measures like public education, a private right to access one's records for free, administrative audits, and state-level complaint/comment and correction mechanisms[148] for ensuring the integrity of automatic restriction within government records. While mechanisms like audits have recently been invoked to protect against algorithmic harm,[149] these mechanisms can be equally valuable, in the present context, for ensuring algorithmic benefit.

### 1. Public Education and Private Access to One's Criminal History Information

While the consequentiality of criminal records is clear, the rules that govern expungement in many cases are confusing. A key risk with automated restriction is that beneficiaries may be unaware or misinformed about what the law is and how its eligibility provisions work, when it is projected to be implemented, and whether it has been correctly carried out. To address this,

145. As experienced in states like Connecticut, New Jersey, and California. *See supra* Parts I, II.

146. For example, in our own analysis of non-convictions that should have been suppressed, we found many incidents with only relevant dispositions like "dismissed" (including its various permutations), or "nolle prosequi," and "not guilty," still visible on the record. But as legal aid attorney and Clean Slate godmother Sharon Dietrich has remarked about Pennsylvania's criminal justice data, the problems include "bad data," "completely aberrational data," and "endless little problems" (for example, counties having nonuniform reporting, the random absence of needed grade or date data, etc.). Interview by author with Sharon Dietrich (on file with author); *see also* Sharon Dietrich, *Ants Under the Refrigerator?*, 30 CRIM. JUST. MAG. 26, 28 (2016); PERSIS S. YU & SHARON M. DIETRICH, NAT'L CONSUMER L. CTR., BROKEN RECORDS: HOW ERRORS BY CRIMINAL BACKGROUND CHECKING COMPANIES HARM WORKERS AND BUSINESSES 36 (2012), https://filearchive.nclc.org/pr-reports/broken-records-report.pdf [https://perma.cc/E4SM-GKWF].

147. For an example of a statute that requires fines and fees be fully paid already, see IOWA CODE § 901C.2(a)(2) (2020) (requiring as a prerequisite to relief that "court costs, fees, and other financial obligations ordered by the court or assessed by the clerk" in particular criminal cases sought to be expunged must be paid, including the cost of indigent counsel). Often this information is not apparent based just on inspection of the background check. ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 14–18.

148. *See, e.g.*, *Blueprint for an AI Bill of Rights*, WHITE HOUSE, https://www.whitehouse.gov/ostp/ai-bill-of-rights [https://perma.cc/9XCD-JA92] (specifying, in the context of automated systems, the rights of individuals to "notice and explanation" about how the automated system is being applied as well as "human alternatives, consideration, and fallback" alternatives to automated systems); *see also* The Digital Services Act, 2022 O.J. (L 277) 67 (requiring annual audits by very large online platforms and service providers for compliance with its terms, as described in *Delegated Act on Independent Audits under the Digital Services Act*, EUR. COMM'N (Feb. 23, 2024), https://digital-strategy.ec.europa.eu/en/news/delegated-act-independent-audits-under-digital-services-act [https://perma.cc/6DCK-AEGA]).

149. *See* Inioluwa Deborah Raji, Colleen Honigsberg, Peggy Xu & Daniel Ho, *Outsider Oversight: Designing a Third Party Audit Ecosystem for AI Governance*, *in* PROCEEDINGS OF THE 2022 AAAI/ACM CONFERENCE ON AI, ETHICS, AND SOCIETY 557, 558 (2022).

states should carry out public education campaigns and provide timely notice to affected individuals, clearly explaining eligibility criteria, procedures, and timelines. Public portals can further clarify these details, especially regarding delays or phased rollouts.[150] These portals should present "plain English" (and other language) explanations of how law works and what it means to its beneficiaries. While some states have unveiled websites, others have not, leaving the public guessing about when relief is to be granted, and at what level, e.g. within state police records,[151] a central state repository, or county level records.[152] And states as well vary dramatically in the information that they provide and what they require of users before they will provide it.[153] In an ideal world, the criteria are provided in both human-readable and machine-readable formats to support learning, auditing, and predictive analysis.[154] In addition, before a defendant leaves court and subsequently, effective notice should be

150. For example, at the state, then local levels, as in the case of California's record restrictions. Enacted in 2022, Senate Bill 731 specified that clearance in California begins with the state Department of Justice reviewing and clearing certain records at the state repository level and then implementing the changes at the county level. *See* CAL. PENAL CODE §§ 851.93 (a)(1), (b)(1); *id.* §§ 1203.425 (a)(1)(A), (a)(2)(B) (describing monthly review at the Department of Justice followed by relief through the inclusion, in the state repository, of "a note stating 'relief granted,' listing the date that the department granted relief and this section"). Subsequent to this act, and additional county-level checks, county courts "shall not disclose information." *See id.* § 851.93(c); *id.* § 1203.425 (a)(3) (covering non-convictions).

151. *See, e.g.*, CONN. GEN. STAT. § 54-142a(a) (2023) (specifying erasure of "all police and court records and records of any state's attorney pertaining to such charge").

152. As in the case of California, whose Senate Bill 731 is implemented at the state, and then the county levels. *See supra* note 150 and accompanying text.

153. *Compare Sealed Case Search*, COLO. JUD. BRANCH, https://www.coloradojudicial.gov/sealed-case [https://perma.cc/8KNT-WGGL] (requiring the user to provide court location, year, "case class," "case sequence," name, date of birth, and either driver's license or social security number), *with Project Clean Slate: Register Now and Case Status*, CITY DETROIT, https://detroitmi.gov/government/mayors-office/mayors-initiatives-and-programs/project-clean-slate/register-now-and-case-status [https://perma.cc/88XM-4BYT] (allowing weekly case status updates for people registered with Detroit's Project Clean Slate).

154. *See Blueprint for an AI Bill of Rights*, *supra* note 148 (specifying that "automated systems should provide generally accessible plain language documentation including clear descriptions of the overall system functioning and the role automation plays"). The criteria should also address details such as how missing data is being handled, what charges, specifically, might fall into certain categories of eligibility or ineligibility and any other assumptions or details not readily ascertainable by the lay public. While no Clean Slate website of which we are aware discloses the algorithm or the implementation details needed to "replicate" expungement determinations, some websites contain more consumer-helpful disclosure than others. *Compare Sealed Case Search*, *supra* note 153 (failing to list all the criteria, and instead explaining that the public portal is a search tool for individuals to confirm whether their conviction was sealed automatically and noting the types of cases on which the search tool would not have information), *with My Clean Slate*, CMTY. LEGAL SERVS. PHILA., https://clsphila.org/my-clean-slate/ [https://perma.cc/8VU4-N27A] (providing an overview of eligibility for attorneys, as well as an FAQ page with more lay-friendly language that explains the concept of clearance and practical information impacted parties need).

provided about the restrictions that will automatically go into effect when eligibility criteria are met.[155]

Further, subjects should be given access to their own official records[156] free of charge.[157] This would allow subjects to ascertain their records as well as confirm that automatic restrictions have been properly applied, advancing both individual interests *in record relief* and state interests *in the accuracy of the record*. Publicizing decision logic can also reduce the cost of records clearance as approaches to restriction are shared and standardized.[158] It can also help when administrative or other factors delay implementation of the law in general, rather than in any one individual case. In such a situation, equity counsels allowing individuals to file requests for streamlined relief.[159] Preverification of one's claim to relief based on published eligibility criteria can avoid increased administrative burdens.[160]

155. *See, e.g.*, MINN. STAT. § 609A.015 subdiv. 4 ("The court shall notify a person who may become eligible for an automatic expungement under this section of that eligibility at any hearing where the court dismisses and discharges proceedings against a person . . . .").

156. Or at the very least, changes to their records. *See, e.g.*, *Sealed Case Search*, *supra* note 153 (providing a search tool for defendants to verify if their conviction has been sealed as mandated by COLO. REV. STAT. § 13-3-117(3)(c) (2024)).

157. *See* SKOG ET AL., *supra* note 83, at 21; *accord* Lageson, *Criminally Bad Data*, *supra* note 49, at 1802–03 (recommending search websites be established to give individuals a "no-cost review[]" of their record). Utah and Michigan both provide access to background checks as part of their Clean Slate regulations, but both still charge a fee. For example, in Utah, see *Instructions for Automatic and Petitioned Expungement Verification*, BUREAU CRIM. IDENTIFICATION, https://bci.utah.gov/wp-content/uploads/sites/15/2023/07/Expungement-Verification-Application.pdf [https://perma.cc/D3GH-R5VN] (last updated July 14, 2023) (listing a fifteen dollar fee), and in Michigan, see *Find Out What Remains on Your Record*, MICH. STATE POLICE, https://www.michigan.gov/msp/services/chr/conviction-set-aside-public-information/michigan-clean-slate/record [https://perma.cc/WT9E-S9TS] (charging users thirty or ten dollars to access "all" or "publicly available" criminal history information).

158. Government rules and algorithms to implement automatic records restrictions should not be entitled to trade secret protection given that they do not confer independent economic value as is required under trade secret law. *See* Camilla A. Hrdy, *The Value in Secrecy*, 91 FORDHAM L. REV. 557, 557 (2022). When private sector contractors are hired to implement automatic records restrictions, states should ensure that they preserve the right to share the same subject matter.

159. New Jersey's 2019 Clean Slate law offers a version of this concept by creating an interim process for individuals eligible for expungement to file petitions while the state implements automation. *See* N.J. REV. STAT. § 2C:52-5.3 (2023) (outlining a process for filing for expungement which is no longer available "after the establishment of the automated 'clean slate' process"); *see also* Margaret Colgate Love, *New Jersey Restoration of Rights & Records Relief*, RESTORATION RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/new-jersey-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/6AE3-MSJD] ("Section 7 of the 2019 law provides that individuals eligible for relief under the 'clean slate' provision may petition the court for relief beginning in June 2020.").

160. If becoming overwhelmed with requests is a concern, individuals could be required to specify one or more ways in which expedited relief would unblock a concrete opportunity, for example through the submission of an offer letter contingent upon clearance. Such an approach would allow people who actively seek to rely upon their clearances to get them early, while also enabling the systematic administrative process to run its course.

### 2. Administrative Comment, Complaint, and Correction

Consistent with a harm-reduction model, states should establish administrative comment processes by which members of the public can ask questions about their records and report potential errors and request corrections or clarifications.[161] If questions or doubts cannot be resolved through a simple administrative comment process, individuals should also be able to lodge formal complaints with an oversight authority, and expect an answer or redress from the state. The Consumer Financial Protection Bureau's ("CFPB") consumer complaint database[162] provides a good model for collecting and resolving complaints related to official reports. Anyone can submit a complaint directly online using a voluntary mechanism. Once a consumer complaint is filed, the information is authenticated by the CFPB, and when well-formed,[163] sent to the company for a response[164] within specific timeframes. The CFPB publishes complaint data (with personal information removed) and uses the information to guide enforcement actions, write better rules, and inform the public.

Though CFPB's database already processes complaints associated with commercial background checks, but to extend its reach in order to specifically support record restriction[165] several modifications may be required. As discussed later, the site could more expressly support reporting on state, not just industry records. It also may make sense for state officials to consider standing up their own complaint databases to facilitate intra-county comparisons, learning, and consistency, cultivate expertise about how the rules work, and couple record restriction efforts with other state initiatives.[166]

161. Michigan offers the possibility of review on their expungement assistance website, which states: "If your record was not automatically expunged and you believe it should have been, you will need to email the Michigan State Police Department." *Expungement Assistance*, MICH. DEP'T ATT'Y GEN., https://www.michigan.gov/ag/initiatives/Expungement-Assistance [https://perma.cc/KMW3-6TPG]; *see also Blueprint for an AI Bill of Rights*, *supra* note 148 (specifying that individuals "should have access to timely human consideration and remedy by a fallback and escalation process if an automated system fails, it produces an error, or [the individual] would like to appeal or contest its impacts").

162. *Consumer Complaint Database*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/data-research/consumer-complaints/ [https://perma.cc/2LET-BTYW].

163. The Consumer Financial Protection Bureau ("CFPB") does not publish complaints that "are missing critical information, such as the name of the company or product category, have been referred to other agencies, are duplicative, would reveal trade secrets, are fraudulently submitted, or identify the incorrect company." NATHAN CORTEZ, ADMIN. CONF. OF THE U.S., AGENCY PUBLICITY IN THE INTERNET ERA 62–63 (2015), https://www.acus.gov/sites/default/files/documents/agency-publicity-in-the-internet-era.pdf [https://perma.cc/57VA-GBDQ (staff-uploaded archive)].

164. *See* Nathan Cortez, *Regulation by Database*, 89 U. COLO. L. REV. 1, 47 (2018).

165. The Dodd-Frank Act specifies the establishment and maintenance of the database "to facilitate the centralized collection of, monitoring of, and response to consumer complaints regarding consumer financial products or services." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1013, 124 Stat. 1376, 1969 (2010) (codified at 12 U.S.C. § 5493(b)(3)(A)).

166. For example, medical debt reporting has also been the subject of growing state legislation. *See* Maanasa Kona, *States Continue to Enact Protections for Patients with Medical Debt*, COMMONWEALTH

### 3. Structured Fidelity Audits

While the proposals above focus on ensuring that individuals have ways to gain information and relief, systemic fidelity requires systematic measures. To assure the integrity of the records data, states should carry out fidelity audits. Unlike the present academic audit, internal and external audits of records repositories are already mandated under the law of a large number of states.[167] A new area of focus of such audits could be to systematically verify compliance with automatic restriction laws, assess algorithmic logic accuracy, and identify demographic disparities to prevent discriminatory outcomes, and to publish the results.

Legislative provisions could go further, empowering accountability agencies to conduct regular fidelity audits, coupled with mandatory and regular reporting to legislative and public bodies. Such structured "second party" audits[168] can facilitate continuous improvement and ensure corrective action is swiftly taken when noncompliance is identified. They would represent an improvement over purely "internal" audits—conducted *by* the party being audited *on* the party being audited—which leaves much to be desired in terms of accountability.[169] Also, "third party" journalistic or academic audits have the advantage of independence but the disadvantages of a lack of representative data[170] or detailed fields—like race, not to mention requiring data access which can be difficult or expensive to come by.

A few record restriction statutes already contain some level of systematic accountability, for example, requiring the number of cleared records to be tracked and reported, and even at the county or district court level.[171] Raw

FUND: BLOG (Aug. 8, 2024), https://www.commonwealthfund.org/blog/2024/states-continue-enact-protections-patients-medical-debt [https://perma.cc/N6FY-UUGU (staff-uploaded archive)] (referring to the enactment of consumer protections in eight states including Delaware and Florida).

167. Twenty-nine states and the District of Columbia have reported conducting internal audits, and twenty-six states, the District of Columbia, and Guam have reported conducting external audits; the frequency ranges from more than once per year to every several years. BECKI R. GOGGINS & DENNIS A. DEBACCO, SEARCH, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2020, at 6 (Dec. 2022), https://www.ojp.gov/pdffiles1/bjs/grants/305602.pdf [https://perma.cc/6H97-S4PX].

168. Raji et al., *supra* note 149, at 558 (describing "second party" audits as audits in which a counterparty or an entity with oversight authority conducts an audit; the audit is not conducted wholly independently, as the auditor has the cooperation of the audited, but also introduces external pressure to improve).

169. *Id.*

170. *Id.*

171. *See* CAL. PENAL CODE § 1203.425(a)(3)(A) (2023) (requiring county level reporting of the number of clearances executed pursuant to AB1076 by the California Department of Justice); COLO. REV. STAT. § 13-3-117(4) (2024) (specifying the production of yearly reports by the court of the number of conviction records in the prior calendar year that were considered for and given sealing, and the reasons for district attorney objections, and further, that the data be disaggregated by race, sex, and offense level); *see also* 18 PA. CONS. STAT. §§ 9141(a)(1), 9122.5(d)(1), 9141(a)(2) (specifying annual

counts provide evidence that a process has started, and details about the relative volume of clearances year to year or from county to county can reveal comparative trends and prompt investigation in the case of anomalies. But to check that restriction has actually taken place as expected requires a more granular analysis of individual records.

Audits can help build trust, as well as surface errors. Audits that include the racial and demographic dimensions of clearances[172] can further preemptively address antidiscrimination concerns as well as identify the need for further legislation to address gaps that might inadvertently be created or exacerbated by records restriction.[173]

### C. *Regulating Background Check Company Implementation of Records Restrictions*

While government agencies have primary responsibility for restricting official records, background check companies could play a more muscular role in ensuring statutorily suppressed information is not disseminated. Below, I describe responsibilities that include proactively refraining from the release of certain records, deleting expunged or sealed records from private databases, updating records before reporting them, implementing adverse event safeguards, and providing notifications to individuals, of automatic records restrictions from which they might benefit, and to the state, of apparent errors in clearances.

When proposing state regulation of credit reporting agencies, it is important to keep in mind the biggest obstacle to doing so—the preemption provisions of the FCRA. The FCRA enshrines a general rule *against* preemption[174] except in cases of conflict,[175] but also enumerates exceptions to

audits, not of the actual clearances, but of the *plans, policies and procedures* for implementing automatic records clearance, within Pennsylvania's "central repository and of a representative sample of all repositories").

172. *See, e.g.*, Clean Slate Act of 2023, H.R. 2930, 118th Cong. (2023) (specifying the issuance of a public report that disaggregates relevant data by race, ethnicity, gender, and the nature of the offense); COLO. REV. STAT. § 13-3-117(4) (2024) (specifying the reporting of same with respect to records considered for and actually granted clearances).

173. For studies by McElhattan, Wells, Chien, and co-authors in the context of incomplete records restriction, see *supra* notes 84–86 and accompanying text. *See also* SKOG ET AL., *supra* note 83, at 4 (reporting that, in the context of restrictions that are estimated to disproportionately leave behind certain groups, Black Californians are overrepresented amongst those who are ineligible for a fully clean record under automated relief).

174. 15 U.S.C. § 1681t(a) ("Except as provided in subsections (b) and (c), does not annul, alter, affect, or exempt any person subject to the provisions of this subchapter from complying with the laws of any State with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency.").

175. "Conflict preemption takes place when state law imposes a duty that is 'inconsistent—i.e., in conflict—with federal law.'" Consumer Data Ass'n v. Frey, 26 F.4th 1, 5 (2022) (quoting and citing Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 478 (2018)).

this general rule. In relevant part, FCRA, in essence, states that state regulations will be expressly preempted if they pertain to "any *subject matter* regulated under"[176] a laundry list of FCRA provisions, or implicate "*conduct required* by" a long list of FCRA provisions,"[177] or implicate several other statutorily specified types of conduct including certain "exchange[s] of information" and "disclosures," as well as the "frequency of disclosure."[178] As such, determining whether a particular state law is preempted involves analyzing these overlapping provisions, an inquiry widely recognized as complex and unsettled. Of course, modification of FCRA is also possible and would avoid preemption challenges.

### 1. Considering Direct Prohibition on Release of Statutorily Suppressed Records

Considering the implementation challenges state governments face, it is worth exploring shifting the attention to background check companies to suppress eligible records from the checks they report. The case for requiring companies, not just governments, to restrict records is several-fold. First, background check companies are already accustomed to doing so, through their compliance with the FCRA's prohibition on reporting non-convictions more than 7 years old in most cases.[179] As such, the obligation and capacity to identify and screen out particular records is already well-established in the industry. Second, adding such "point-of-release" filters provides a more comprehensive shield against the disclosures of suppressed information that could arise from any of the large number of public data sources out there, not just from the "official" record but other versions as well.[180] Third, background check companies, unlike the state, can pass the cost of compliance to their customers, the buyers of criminal history information. These costs, in turn, can be reduced through the release by public agencies of the algorithms and decision logic applied to effect clearance.

One source of potential authority for requiring companies to attend to statutory restrictions is the FCRA. The FCRA requires background check

176. 15 U.S.C. § 1681t(b)(1).

177. *Id.* § 1681(t)(b)(5).

178. *Id.* U.S.C. § 1681(t)(b)(2)–(4).

179. *Id.* § 1681c(a)(5) (noting subject to some limited exceptions, prohibiting the disclosure of "[a]ny . . . adverse item of information, other than records of convictions of crimes . . . which antedates the report by more than seven years").

180. For example, "mug shot" databases that do not necessarily update their records with the ultimate resolution of the conflict that resulted in the initial booking, see Lageson, *Criminally Bad Data*, *supra* at note 49, at 1779. *See, e.g.*, Micah Altman, Alexandra Wood, David R. O'Brien, Salil Vadhan & Urs Gasser, *Towards a Modern Approach to Privacy-Aware Government Data Release*, 30 BERKELEY TECH. L.J. 1967, 2067 (2015) (suggesting the implementation of additional privacy controls—such as risk assessments, purpose specification, and transparency—at the point of release stage in municipal open data portals to "limit or provide notice of the scope of information released in a systematic way").

companies to follow reasonable procedures to assure "maximum possible accuracy" when preparing consumer reports.[181] Maximally accurate information has been deemed to be information that is "relevant and current."[182] Enforcing this requirement, courts have found background checks that include old records whose conviction status have changed, for example, through petition-initiated processes, to be inaccurate.[183] The same logic could also be said to extend to records designated by statute for restriction.

Language from a January 2024 advisory opinion of the CFPB provides some support for such a reading. According to it, when preparing consumer reports, consumer reporting agencies violate their legal obligations if they do not have procedures in place that: "[P]revent reporting information that is duplicative or that has been expunged, sealed, or otherwise legally restricted from public access."[184] Records whose restriction is required by statute would seem to fit the definition of information "otherwise legally restricted from public access."[185] That the phrase appears separately from "expunged" and "sealed" suggests that background check company's obligations extend beyond records sealed or expunged in fact. However, it is less clear that a court would find a violation of FCRA if a regulated entity disclosed a record designated by statute for restriction that was not in fact restricted, given the plain language understanding of "accuracy" as being in accord with the official, publicly available record.[186] Another problem with FCRA is that its enforcement mechanisms are limited and cumbersome, and, as described earlier in this part, require the initiative of the harmed party.

This strengthens the case for direct state legislation. Such laws, directed at background check companies, could mirror the record restrictions that already bind public agencies. For example, a potential law could require not

181. 15 U.S.C. § 1681e(b) ("[I]t shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.").

182. *See* Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (citing St. Paul Guardian Ins. Co. v. Johnson, 884 F.2d 881, 883 (5th Cir. 1989)).

183. *See, e.g.*, Watson v. Caruso, 424 F. Supp. 3d 231, 245 (D. Conn. 2019) (including a criminal conviction that had been erased from an employee's record made it inaccurate for purposes of the Fair Credit Reporting Act); Gates v. Grier Found., No. 23-CV-01443, 2024 WL 184448, at *3 (M.D. Penn. Jan. 17, 2024) (describing background check that included an expunged misdemeanor trespass conviction as "inaccurate"); Abrogina v. Kentech Consulting, Inc., No. 16cv0662, 2023 WL 6851988, at *4 (S.D. Cal. Oct. 17, 2023) (holding that the reporting of a conviction subsequently dismissed and expunged raised a genuine issue of material fact about the accuracy of Plaintiff's report). However, courts have reached different conclusions about the reasonableness of a CRA's procedures when expunged information is still available on public records. *See, e.g.*, Houston v. TRW Info. Servs., Inc., No. 88. Civ. 0186, 1989 WL 59850, at *2 (S.D.N.Y. May 2, 1989).

184. CFPB Fair Credit Reporting Rule, 12 C.F.R. § 1022 (2024).

185. *Id.*

186. *See TRW Info. Servs., Inc.*, 1989 WL 59850, at *2 (finding that a CRA behaved responsibly when it reported a record that had been vacated but the court's docket had not been updated accordingly).

only state agencies and courts, but also all who sell records, including CRAs and their vendors, to refrain from publicly reporting non-convictions, forming a more robust seal.[187] Or a law could enshrine a conviction restriction on industry that is similar to its conviction restriction on states. Doing so would align with the general principle of regulatory robustness regarding records and the shared responsibilities of both the originators and distributors of records.[188] The question is whether or not such provisions would be preempted.

On the one hand, as a leading treatise describes, "state laws that have obsolescence periods which differ from those in the FCRA are preempted."[189] A party could convincingly argue that because the release of non-convictions is already regulated by 15 U.S.C. § 1681c(a), which is identified as the subject of subject matter preemption, the proposed restriction setting the reporting window to zero would be preempted since the law already describes a reporting window of seven years.[190] But based on this logic, the propriety of conviction suppression presents a closer call, since the release or nonrelease of convictions are not expressly regulated by FCRA. But even if statutory suppression of convictions by industry was permissible, it might be difficult to accomplish given that suppression rules would require specificity about which records were, in fact, eligible and how ambiguities in the data should be dealt with.

But if achievable, a bit of effort to clarify how the rules will apply, in light of data frailties and missingness, could go a long way in resolving the inherent tension between CRAs, who prefer to be over-inclusive so that their reports are not viewed as missing critical information, and consumers, who would prefer a more under-inclusive approach to avoid harmful and prejudicial errors or

187. Such a mandate potentially regulating commercial speech would need to be narrowly crafted to directly advance a substantial government interest. *See* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (outlining a four-part test to determine whether a regulation on commercial speech, which concerns lawful activity and is not misleading, is permissible under the First Amendment). Here, a background check company's "speech" of disseminating information about criminal records may not even fall into *Central Hudson*'s definition of protected commercial speech; while the speech is lawful, reporting statutorily expunged or sealed records could be considered misleading, as the legislature has decided that the records should not be publicly reportable. Even assuming the speech is not misleading and is thus protected, a state has a substantial government interest in protecting the privacy and in promoting the rehabilitation of its citizens. Further, regulating the release of expunged or sealed records directly advances these government interests by preventing outdated or legally invalid information from causing harm. Lastly, the records restriction statutes are narrowly tailored to a subset of eligible records, just like preexisting regulations that have not been found to infringe on protected commercial speech like FCRA's ban on disseminating old non-convictions and bans on disseminating juvenile records information. *See* 15 U.S.C. § 1681(a)(2).

188. Indeed, as described earlier, FCRA's accuracy duties apply to both furnishers and credit reporting agencies. *See supra* Section I.A.

189. Unless they were in effect on September 30, 1996, as certain rules were grandfathered in. *See* CHI CHI WU & ARIEL NELSON, *Preemption of State Obsolescence Laws*, *in* FAIR CREDIT REPORTING, at 5.2.6 (10th ed., 2022).

190. 15 U.S.C. § 1681c(a).

unnecessary disclosures that could jeopardize one's opportunities.[191] Moving towards such a belt-and-suspenders governance scheme, in turn, could prompt a process to clearly and robustly define eligibility criteria, standardize record resolution approaches, and develop and agree upon consistent methodologies for calculating waiting periods and approaches for infirm data. The publication and production of government guidance or an algorithm, as described above, potentially developed in consultation with industry, would reduce the cost of compliance. While specifics would need to be tailored to local conditions and records infrastructures, moving in this direction would present a new, practical model for compliance that accounts for, rather than ignores, the complexities of record restriction.

2. Requiring Records Deletion and Updating by Regulation or Contract

Even short of requiring companies to proactively restrict records, legislatures can enhance the accuracy of criminal records through stronger regulation of records quality. Provisions that prohibit firms from disclosing expunged or sealed records and mandate their deletion from private databases, following the lead of states like Indiana and Connecticut,[192] can complement state-focused automated records restriction provisions and the FCRA's federal accuracy standards.

Furthermore, the changing nature of criminal histories (even ones that are a decade old[193] or older) in an era of automatic record restrictions creates a much greater risk of inaccurate records due to a lack of updating. This justifies imposing a specific duty on records providers to refresh their records within a specific time frame before they report them. Connecticut law, for example, specifies that buyers of criminal justice information shall, *prior to disclosing it, purchase updated information*, "on a monthly basis or on such other schedule" as established by the Judicial Department or related entity, *and then to update its records to permanently delete erased records*.[194] Another way to increase the chance of records being current is to require reports to include the date the data was

191. *See* Apodaca v. Discover Fin. Servs., 417 F. Supp. 2d 1220, 1230 (D.N.M. 2006) (highlighting this tension). I thank Erika Heath for making this point to me.

192. For a survey, see Kristine Hamann, Patricia Riley & Charlotte Bismuth, *The Evolving Landscape of Sealing and Expungement Statutes*, AM. BAR ASS'N (Jan. 22, 2024), https://www.americanbar.org/groups/criminal_justice/publications/criminal-justice-magazine/2024/winter/evolving-landscape-sealing-expungement-statutes/ [https://perma.cc/7MDX-6ZHJ (staff-uploaded, dark archive)] (describing direct third party regulations that prohibit the dissemination of arrest or conviction records after receiving notification of their expungement, like in Indiana, Louisiana, North Carolina, and Texas, or require their deletion, like in Colorado and Connecticut).

193. *See, e.g.*, H.B. 689, 2023 Gen. Assemb., Reg. Sess. (Pa. 2023) (making certain felonies eligible for sealing, but only after a 10-year waiting period, free of convictions).

194. CONN. GEN. STAT. § 54-142e(2)(B) (2023) (specifying the required refresh process in order to refreshed records); *id.* § 54-142c (describing erased records).

collected.[195] The CFPB, which administers the FCRA, could also issue parallel guidance specifying that reported adverse information must have been sourced within a certain limited time period.[196] With respect to preemption, the closest relevant provision of FCRA is 15 U.S.C. §1681e(b) which requires reasonable procedures to assume maximum possible accuracy, but does not specify what these procedures are to be. As such, a records deletion or updating requirement would not be expressly preempted, nor would it present an inconsistency that would trigger general preemption.

It is important to acknowledge that merely mandating that CRAs take additional steps does not guarantee that they will happen. One of the reasons bad data continues to exist is because lawsuits cannot be filed every time there is an information lapse, and even when suits are filed, they are viewed as a cost of doing business. Thus, a more direct strategy would be to require implementation of the steps above—for example, direct filtering of records or inclusion of restriction information—as a condition for accessing underlying background data. Illustrating this strategy, in Pennsylvania, access to bulk records is conditioned on compliance with a requirement that records be updated with reference to the state's most recent version of the "Lifecycle" file.[197] While credit reporting agencies can still function when they are fined, their ability to stay in business and produce records is limited when their access is restricted, providing a more powerful deterrent. Requiring registration of background check firms in order for them to obtain bulk data could provide an administrative mechanism for achieving the same result.[198]

### 3. Providing Subjects with Information About Records Restriction and Reporting Apparent Government Errors

Final roles background check companies can play include sharing information about relevant statutes with subjects and reporting apparent errors in official data to authorities. On the first point, when background checks are reported to subjects, companies could be required to disclose the record restrictions that are in effect and the available ways for subjects to verify their

195. VA. CODE ANN. § 19.2-392.16(D) (2024).

196. See, for example, the policy that applies in the case of "investigative consumer reports" under 15 U.S.C. § 1681l (specifying that, in the case of investigative consumer reports, adverse information must have been collected within three months or been verified in the process of making the report).

197. *See Agreement Concerning Bulk Distribution of Electronic Case Record Information on Recurring Basis*, NAT'L EMP. L. PROJECT, https://www.nelp.org/app/uploads/2017/11/PA-Courts-Agreement-Distribution-Electronic-Case-Record-Information.pdf [https://perma.cc/X6HF-MJXS] (mandating that subscribers retrieve data weekly from the Administrative Office of Pennsylvania courts and require that anyone who receives electronic case record information of expunged information delete that information from their records).

198. *See, e.g.*, *Consumer Credit Reporting Agencies*, N.Y. STATE DEP'T FIN SERVS., https://www.dfs.ny.gov/apps_and_licensing/credit_reporting_agencies [https://perma.cc/J5MX-DM3Q] (requiring consumer credit agencies to submit annual reports as a condition of registration).

records and pursue rights to redress, if any.[199] Doing so would advance not only the goals of fidelity but also the broader goals of automatic records restriction laws which, as they stand, currently do not require notification to impacted parties.[200] Background check companies are also uniquely positioned to disseminate information about restrictions and surface discrepancies between the law and the record. When potential errors in the official record are detected, whether discovered through their own processes or by subjects, CRAs could also be under a duty to report them to a clearinghouse like the CFPB's complaint database.[201] Such disclosure and reporting requirements would serve multiple purposes: increasing awareness of automatic record restrictions, empowering consumers to identify potential noncompliance, and enlisting background check companies in auditing.[202] Like requiring records updating, obligating industry to register errors that they see implicates the "maximal accuracy" requirements of the law under 15 U.S.C. § 1681e(b) but does not in any way interfere with it or otherwise create other preemption concerns.

Another way to shore up the fidelity of records restrictions, in contexts where it really matters, is by updating adverse event reporting requirements to include information of record restriction. Currently, under the FCRA, a prospective or actual employer that relies upon background information to make an adverse action[203] has several affirmative obligations. Prior to the action being taken, the user of the report is required to send to the consumer a pre-adverse action disclosure containing the individual's consumer report and a description of the rights of the consumer,[204] allowing them the opportunity to contest any inaccurate information. As part of this disclosure, background check

199. Connecticut law specifies some version of this, stating that employment application forms that contain "any question concerning the criminal history of the applicant shall contain a notice, in clear and conspicuous language" reminding applicants of their rights to not disclose suppressed information. CONN. GEN. STAT. § 31-51i(d) (2023).

200. *See infra* Appendix B (noting the author's analysis listed in the Appendix).

201. Such a function could be coordinated by the CFPB, which already offers a way for consumers to complain about discrepancies on their background checks, and to take action on their behalf. *See Submit a Complaint About Financial Product or Service*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/complaint/ [https://perma.cc/PE8A-599X]. The CFPB could make reporting possible by not only individuals but also background check companies and consumers of checks. *Id.*

202. *See* NELSON, *supra* note 28, at 5.

203. Including, for example: a denial of employment or any other decision for employment purposes that adversely affect any current or prospective employee; or a denial or cancellation of, an increase in any charge for, or any adverse or unfavorable change in the terms of a government license or benefit. *See* 15 U.S.C. § 1681a(k)(1)(B)(ii)–(iii).

204. *See id.* § 1681m (outlining duties of users of consumer reports that take adverse actions). State fair chance laws can have more extensive reporting requirements. See, for example, the California Fair Chance Act, which requires a more intensive individualized assessment when an employer intends to rescind a conditional offer that includes, among other things, consideration of the nature and gravity of the offense, time passed since the offense, and the nature of the job held or sought. CAL. CODE REGS. tit. 2, § 11017.1(c)(1) (2023).

firms could also be required to include information about statutory restrictions. Like the notifications described above, this would increase the chance that errors could be detected and corrected before any adverse action is taken. However, any state-level proposal would need to be carefully crafted in order to avoid existing law. Requirements to provide information as part of 15 U.S.C. § 1681(g) might be preempted under 15 U.S.C. § 1681t(b)(3) which specifically regulates "disclosures"). However, requirements to provide information as part of 15 U.S.C. § 1681m(a) are less likely to be preempted because the scope of preemption it outlines pertains to *subject matter* regulated under the statute, and further, to the "duties of a person" and not the content of the disclosure. Requirements to provide information as part of 15 U.S.C. § 1681b(3) would not be expressly preempted because 1681b is not listed under the express preemption provision, however problems could arise in connection with 15 U.S.C. § 1681t(b)(1)(c) and in particular, with respect to 15 U.S.C. § 1681m, related to duties of notice under adverse action.

## CONCLUSION

Automatic criminal record restriction laws represent a promising paradigm shift in criminal justice reform, replacing petition-based processes with algorithmic and automated interventions. The empirical analysis reported in this Article provides suggestive evidence that the laws we studied have largely succeeded in their core mission—restricting eligible records from public view—with estimated fidelity rates of up to seventy percent. This marks a substantial improvement over petition-based approaches and, together with the results achieved in certain states, demonstrates the capacity of Clean Slate models to deliver meaningful relief at scale from the collateral consequences of criminal records.

However, the promise of automatic record restriction laws remains at risk of being incompletely fulfilled. Implementation challenges persist, with up to a third of eligible records remaining visible in background checks and government databases, creating uncertainty about record status for affected individuals. As states implement increasingly complex conviction-based restriction algorithms, these fidelity gaps will likely widen without robust oversight. This Article thus calls for a new governance regime that shifts accountability and enforcement from individuals to the state and to industry, and which embraces public education, broad records access, administrative correction processes, systematic audits, and industry-level regulation. Only through such comprehensive reforms can we ensure that the Clean Slate laws delivers on their redemptive potential to remove the barriers that hold millions back.

APPENDIX A: RECORDS RESTRICTION PROVISIONS

| State | Type of Restriction | Year | Bill Number | Statutory Provision |
|---|---|---|---|---|
| California | Convictions | 2022 | S.B. 731 | CAL. PENAL CODE §§ 1203.425(a)(2)(C), 851.93(b)(1) (2024). |
| California | Non-Convictions and Convictions | 2019 | A.B. 1076 | CAL. PENAL CODE §§ 1203.425, 851.93 a(2)(a) et seq. (2024). |
| Colorado | Cannabis Arrests and Convictions | 2021 | H.B. 21-1090 | COLO. REV. STAT. § 24-72-706(1)(f)(l) (2024). |
| Colorado | Convictions | 2022 | S.B. 22-099 | COLO. REV. STAT. § 13-3-117 (2024). |
| Colorado | Non-convictions | 2019 | H.B. 1275 | COLO. REV. STAT. § 24-72-704(2)(a)–(b)(I)(B) (2024) |
| Connecticut | Convictions | 2021 | S.B. 1019 | CONN. GEN. STAT. § 54-142a (2023). |
| Connecticut | Non-Convictions | 2008 | S.B. 694 | CONN. GEN. STAT. § 54-142a (2023). |
| Delaware | Convictions and Non-Convictions | 2021 | S.B. 111 2021 | 11 DEL. CODE ANN. § 4373(a) (2022). |
| Illinois | Cannabis Arrests and Convictions | 2019 | H.B. 1438 | 20 ILL. COMP. STAT. ANN. 2630/5.2(i) (2024). |
| Kentucky | Non-Convictions | 2020 | H.B. 327 | KY. REV. STAT. § 431.076 (2020). |
| Maryland | Non-Convictions | 2021 | S.B. 0602 | MD. CODE ANN., CRIM. PROC. § 10-105.1 (2023). |
| Michigan | Convictions | 2020 | Public Act 193 of 2020 | MICH. COMP. LAWS |

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|---|---|---|---|---|
| | | | | § 780.621g(1) (2021). |
| Minnesota | Cannabis | 2023 | H.F. 100 | MINN. STAT. § 609A.055 (2024). |
| Minnesota | Non-Convictions | 2023 | S.F. 2909 | MINN STAT. § 609A.015 (2024). |
| Nebraska | Non-Convictions | 2016 | L.B. 505 | NEB. REV. STAT. § 29-3523(3) (2019). |
| New Hampshire | Non-Convictions | 2018 | N.H. SB556 | N.H. REV. STAT. ANN. § 651:5(II-a)(a) (2020). |
| New Jersey | Cannabis | 2019 | A. 5981/S. 4154 | N.J. STAT. ANN §§ 2C:52-5.2, 2C:52-6.1 (2020). |
| New Jersey | Non-Convictions | 2019 | S. 4154 | N.J. STAT. ANN. § 2C:52-6(a) (2024). |
| New Mexico | Cannabis Arrests and Convictions | 2023 | H.B. 314 | N.M. STAT. § 29-3A-8 (2025). |
| New York | Convictions | 2023 | A1029C | N.Y. CRIM. PROC. L. § 160.57 (2024). |
| New York | Cannabis arrests and Convictions | 2019 | S.B. 06579 | N.Y. CRIM. PROC. L. §§ 160.50(1), (3)(k)(i)–(iv) (2021). |
| New York | Non-Convictions | 1992 | S1505 | N.Y. CRIM. PROC. L. § 160.50 (2024). |
| Oklahoma | Convictions | 2022 | H.B. 3316 | 22 OKLA. STAT. ANN. § 18(C) (2024). |
| Oklahoma | Non-Convictions | 2024 | S.B. 1770 | 22 OKLA. STAT. ANN. § 18(C) (2024). |
| Pennsylvania (CS 1.0) | Non-Convictions | 2018 | Act 56 | 18 PA. CONS. STAT. § 9122.2(a) (2024). |

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| Pennsylvania (CS 3.0) | Convictions | 2023 | Act 36/HB 689 | 18 PA. CONS. STAT. § 9122.2 (2024). |
| South Carolina | Non-Convictions | 2009 | H3022 | S.C. CODE ANN. §§ 17-22-950; 17-1-40(B)(1) (2016). |
| South Dakota | Convictions | 2021 | S.B. 174 | S.D. CODIFIED L. § 23A-3-34 (2025). |
| Utah | Convictions | 2019 | H.B. 431 | UTAH CODE ANN. § 77-40a-203 (repealed 2024). |
| Utah | Non-Convictions | 2019 | H.B. 431 | UTAH CODE ANN. § 77-40a-201 (renumbered in 2022 amendment). |
| Vermont | Cannabis Arrests and Convictions | 2020 | S. 234 | 18 VT. STAT. ANN. § 4230 (2024). |
| Vermont | Non-Convictions | 2018 | S. 173 | 13 VT. STAT. ANN. § 7603(a)(1), (e)(1) (2024). |
| Virginia | Non-Convictions | 2021 | S.B. 1339 | VA. CODE ANN. § 19.2-392.8(A) (2024). |
| Virginia | Cannabis | 2021 | H.B. 2113 | VA. CODE ANN. § 19.2-389.3 (2024). |
| Virginia | Convictions | 2021 | H.B. 2113 | VA. CODE ANN. § 19.2-392.6 (2024); § 19.2-392.7 (2024). |

## APPENDIX B: STUDIED NON-CONVICTION RECORD RESTRICTION RULES AND MODELING ASSUMPTIONS

| State | Restriction provision, recital, and exclusions |
|---|---|
| Connecticut | "Whenever in any criminal case, on or after October 1, 1969, the accused, by a final judgment, is found not guilty of the charge or the charge is dismissed, all police and court records and records of any state's attorney pertaining to such charge shall be erased upon the expiration of the time to file a writ of error or take an appeal,[205] if an appeal is not taken, or upon final determination of the appeal sustaining a finding of not guilty or a dismissal, if an appeal is taken." CONN. GEN. STAT. § 54-142a(a) (2023).<br><br>Recital: "shall be erased"<br><br>Included: non-convictions<br><br>The operative language was in effect in 2009.[206]<br><br>Eligibility: among cases decided after 1/1/2010, cases where charges were fully acquitted or dismissed, twenty days postdate of disposition.<br><br>Excluded/not modeled: "charge[s] for which the defendant was found not guilty by reason of mental disease or defect or guilty but not criminally responsible by reason of mental disease or defect." |
| Nebraska | "[A]ll criminal history record information relating to the case shall be removed from the public record . . . (c) When . . . the case is dismissed by the court (i) on motion of the prosecuting attorney, (ii) as a result of a hearing not the subject of a pending appeal, (iii) after |

205. We approximated this time to file a writ or error or take an appeal to be twenty days based on the CONN. R. APP. PROC. § 72-3(a), and CONN. R. APP. PROC. § 63-1(a), with each statute specifying a twenty-day deadline, following the notice of the judgment or decision, for taking action. *See* CONNECTICUT PRACTICE BOOK, CONN. JUD. BRANCH 468, 502 (2025), https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf [https://perma.cc/7RZ5-LEGV].

206. Act of Feb. 2008, Pub. Act. No. 08-151, § 1, 2008 Conn. Acts 565, 565 (2008) (codified at CONN. GEN. STAT. § 54-142a(a) (2023)).

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| | acquittal, (iv) after a deferred judgment, or (v) after completion of a program prescribed by a drug court or any other problem solving court approved by the Supreme Court, the criminal history record information shall not be part of the public record immediately upon notification of a criminal justice agency after acquittal pursuant to subdivision (3)(c)(iii) of this section or after the entry of an order dismissing the case." NEB. REV. STAT. § 29-3523(3)(c).<br><br>The operative language was added as part of a 2016 amendment that went into effect January 1, 2017.[207]<br><br>Recitals: "shall be removed from the public record," "shall not be part of the public record."<br><br>Eligibility: among cases decided after 1/1/2017, cases where charges were fully acquitted or dismissed.<br><br>Excluded/not modeled: cases where a person is currently subject to prosecution or correctional control, or is a candidate or holder of public office. |
| New York | "[T]he record of such action or proceeding shall be sealed" upon "termination of a criminal action or proceeding against a person in favor of such person," unless the district attorney demonstrates to the satisfaction of the court or the court determines on its own motion "that the interests of justice require otherwise and states the reasons for such determination on the record . . . ." N.Y. CRIM. PROC. L. § 160.50(1) (2023).<br><br>"[T]ermination of a criminal action or proceeding against a person in favor of such person" is defined to include complete dismissals and complete acquittals, as |

207. Act of Apr. 18, 2016, ch. 505, § 1, 2016 Neb. Laws 106, 106 (codified at NEB. REV. STAT. § 29-3523(3)(c)) (amending the statute to how it exists today except for one of the five instances of a court's dismissal that fall within the statute); *see also* Act of May 30, 2019, ch. 686, § 12, 2016 Neb. Laws 1136, 1141 (codified at NEB. REV. STAT. § 29-3523(3)(c)) (adding the fifth instance of dismissal by the court that falls within this statute).

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| | well as arrests where the district attorney or relevant law enforcement agency has elected not to proceed. § 160.50(3). Upon sealing, the record shall be available to law enforcement only upon a court order, and to prosecutors and corrections personnel on a limited basis. *Id.* § 160.50(1)(d).<br><br>The operative language was in effect in 2010.[208]<br>Recital: "shall be sealed."<br><br>Eligibility: among cases decided after 1/1/2010, cases where charges were fully acquitted or dismissed.<br><br>Excluded/not modeled: when the DA or court determine "the interests of justice require otherwise"; dismissals after a court finds that a person is "incapacitated" due to their mental health. |
| South Carolina | "Upon acquittal, dismissal, or nolle prosequi of charges in" Magistrate or Municipal Court "after June 2, 2009,[209] the court is required to automatically . . . expunge the record, unless a prosecution or law enforcement agency objects on the basis that the person has other charges pending or the charges are ineligible for expungement"; older charges may be expunged by petition. S.C. CODE ANN. § 17-22-950.<br><br>The operative language was enacted by the Governor on June 2, 2009.[210]<br><br>Recital: "automatically expunge" |

208. N.Y. CRIM. PROC. L. § 160.50 (2023); *see* Act of May 24, 1991, ch. 142, secs. 1–3, 1991 N.Y. Laws 2494, 2494 (codified at N.Y. CRIM. PROC. L. § 160.50(1)(c), (2)–(4)) (showing the inclusion of new language that is referred to as the operative language above). Legis. Serv. 142 LexisNexis (outlining the legislative history that indicates an enactment date of the operative language).

209. Margaret Colgate Love, *South Carolina Restoration of Rights & Record Relief*, RESTORATION RTS. PROJECT, https://ccresourcecenter.org/state-restoration-profiles/south-carolina-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/ASL5-8QM2] (last updated Dec. 5, 2024) (discussing S.C. CODE ANN. § 17-22-950).

210. H.B. 3022, 118th Gen. Assemb., Reg. Sess. (S.C. 2009).

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|---|---|
| | Eligibility: among Magistrate or Municipal cases decided after 6/2/2011, cases where charges were fully acquitted or dismissed. |
| Pennsylvania | "Clean slate limited access.<br>(a) General rule.—The following shall be subject to limited access: . . . (2) Criminal history record information pertaining to charges which resulted in a final disposition other than a conviction." 8 PA. CONS. STAT. § 9122.2.<br><br>Recital: "shall be subject to limited access"<br><br>The operative provisions went into effect between June 28, 2019 and June 28, 2020.[211]<br><br>Modeled eligibility: among cases decided after 6/2019, cases where charges were non-convicted and individual had no other convictions on their records. |

211. Act of June 28, 2018, ch. 56, §§ 2–3, 2018 Pa. Laws 402, 406–14 (codified at 18 PA. CONS. STAT. § 9122.2–6; 42 PA. CONS. STAT. §§ 6307(b), 6308(b)); *see also Act 56 of 2018 (HB 1419)—Limited Access Petitions & Clean Slate Limited Access*, REP.-ELECT NATE DAVIDSON, https://web.archive.org/web/20241204094855/https://www.pahouse.com/Kim/cleanslate/ [https://perma.cc/K2GK-YDGW (staff-uploaded archive)] (identifying the effective dates of the law).

## APPENDIX C: DESCRIPTIONS OF RULE CHANGES AND MODELING APPROACHES FOR PENNSYLVANIA AND NEBRASKA

Pennsylvania

Pennsylvania has been a national leader in automatic restriction laws and policy. In 2018, Act 56, dubbed "Clean Slate 1.0," was signed into law, providing for the automatic clearance of old minor convictions for nonviolent offenders, as well as all non-conviction charges.[212] The law took effect for newly eligible offenses on June 28, 2019, while the bill specified a processing deadline of June 28, 2020 for court personnel and the Pennsylvania State Police to complete the processing of previously eligible records.[213]

While no limits were placed on the types of non-conviction charges that could be cleared,[214] under the first version of the law, to receive relief, eligible individuals could not receive automatic clearance if they owed outstanding court fines, fees, or restitution. In 2020, Act 83, or Clean Slate 2.0 eliminated the requirement that unpaid fines and fees be paid, but it retained the requirement that no restitution be owed in order to clear eligible records.[215] The Pennsylvania Office of the Courts has reported sealing, between 2019 and 2023, 20.7 million non-conviction, 24.3 million summary conviction and 172 thousand misdemeanor conviction cases.[216]

Given that our records were generated in the 2017–21 time period, we applied the most conservative eligibility assumptions, those of Clean Slate 1.0. As such we modeled records suppression eligibility for Pennsylvania, conservatively, by focusing on individuals that did not owe any fines, fees, or restitution, which we identified as having no conviction records or sentences in our records. While this included a much smaller subset of people that were entitled to any relief, it allowed us to reduce the presence of people who appeared to but were not in fact eligible for relief in our data. We considered our 2017–18 background check records to be "untreated," since they were generated before the rule change; while we considered records generated in 2021 to be subject to the rule change, which went into effect in the 2019–20 time period.

212. Act of June 28, 2018 §§ 2–3; *see also* ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 5 (confirming that all non-conviction records become eligible for Clean Slate sealing thirty days after the court entered its disposition).

213. Act of June 28, 2018 §§ 2–3.

214. In contrast to conviction records, for which certain types, including offenses involving danger to a person, offenses against the family, offenses involving firearms and other dangerous articles, and sexual offenses and sex offender registration were precluded. 18 PA. CONS. STAT. § 9122.3(a)(2)(iv).

215. *See* ROBERTS ET AL., RESEARCH FINDINGS, *supra* note 52, at 9.

216. *Processed Clean Slate Counts by County (June 28, 2019–December 15, 2024)*, PA. CTS., https://www.pacourts.us/Storage/media/pdfs/20220615/201741-countyprocessedcleanslatenumbers.pdf [https://perma.cc/5YTU-3YUW].

Nebraska

Nebraska has long had a policy of restricting the dissemination of certain criminal history information.[217] In 2016, via LB 505, the legislature added a significant additional class of non-convictions to its automatic restriction provision, charges that are dismissed or acquitted, without any waiting period.[218] The newly enacted law also included a directive to the court to take action to seal all the records associated with the case as well as to notify a number of other entities with records, including the Nebraska Commission on Law Enforcement and Criminal Justice, and the Nebraska State Patrol.[219] The law further makes explicit that in any application for employment, education, license, or other privilege, questions about a sealed record are prohibited; but if they are asked, the person may respond as if the offense never occurred.[220]

As specified in the bill, the operative date of the new law was January 1, 2017.[221] Although the bill was approved by the governor on April 18, 2016, the effective date was set for the following year in order to "allow time to put mechanisms in place to comply with the new law so that the records would be properly removed from public view."[222] Around the time of the operative date, local press reported that sealing was taking place "immediately."[223]

Among our records, we limited our "pre-" law analysis to checks initiated before Jan 1, 2017, and our "post-" law analysis to records generated in 2021.

217. For example, restricting information about stale arrests that have not resolved within a year, see NEB. REV. STAT. § 29-3523(1) (2006), as well as unfiled charges following a completed diversion or charges dismissed on certain motions, with a waiting period. *See id.* § 29-3523(2)(b)–(c) (2009). § 29-3523(2)(b)–(c) (2009).

218. L.B. 505, 104th Leg., Reg. Sess. (Neb. 2016); *see also* NEB. REV. STAT. § 29-3523(3)(c).

219. NEB. REV. STAT. § 29-3523 (7)(b)-(c).

220. L.B. 505, 104th Leg., Reg. Sess. (Neb. 2016).

221. *Id.* § 2.

222. Brief of Amicus Curiae Univ. of Neb. Coll. of L. Civ. Clinical L. Program at 10, State v. Coble, 908 N.W.2d 646 (Neb. 2018) (No. S-17-769). The legislative history indicates that the time was necessary to implement computer programming "changes relating to data entry into the Nebraska Criminal Justice Information System (NCJIS)." Neb. Leg., Floor Debate on LB 505, 104th Leg., 1st Sess. 11 (Feb. 8, 2016).

223. Zach Pluhacek, *Nebraska Courts to Start Sealing Criminal Cases That End in Acquittal, Dismissal*, LINCOLN J. STAR (Dec. 29, 2016), https://journalstar.com/news/state-and-regional/govt-and-politics/nebraska-courts-to-start-sealing-criminal-cases-that-end-in-acquittal-dismissal/article_c36b7105-b3a7-5882-8ad8-bc460874d542.html [https://perma.cc/EZ26-NCEY (staff-uploaded, dark archive)].