



MODEL LAW ON NON-CONVICTION RECORDS



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December 2019

Model Law on Non-Conviction Records

ABOUT

This model law provides policymakers with guidance on limiting access to and use of a subset of criminal records: records from arrests and criminal prosecutions that do not result in conviction. It is intended as a first step towards developing model legislation for regulating criminal records generally, including conviction and non-conviction records.

The model law report was produced by the Collateral Consequences Resource Center in consultation with lawyers, judges, lawmakers, academics, policy experts, and advocates. A first draft was discussed at the Roundtable on Non-Conviction Records held at the University of Michigan Law School on August 16 and 17, 2019. It was significantly revised through several rounds of comment. The project's reporters, advisors, and observers, as well as the model law's key features are listed on the following two pages.

The Roundtable was organized by the Collateral Consequences Resource Center in partnership with Professors J.J. Prescott and Sonja Starr of the Michigan Law faculty, and it was supported by the Charles Koch Foundation. The model law report was supported by Arnold Ventures.

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The Collateral Consequences Resource Center is a nonprofit organization established in 2014 to promote public engagement on the myriad legal and policy issues raised by the collateral consequences of arrest and conviction. <http://ccresourcecenter.org>

Model Law on Non-Conviction Records

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† Observers attended the Roundtable meeting at the University of Michigan Law School at which an earlier draft of the model law was discussed.

Model Law on Non-Conviction Records

KEY FEATURES

Automatic expungement of all non-conviction records, including records with no final disposition, except for pending matters:

Arrests records are automatically expunged when 60 days have elapsed after an arrest, unless charges are filed, the investigation is ongoing, or the person evaded prosecution. § 2(a).

Records relating to criminal cases are automatically expunged if no conviction has been entered in a case, and either all charges have been resolved or 18 months have elapsed without any activity in the case. §§ 1(c)(12), 2(b).

In cases where some charges have led to conviction, and other charges have been dismissed, have been acquitted, or have not been resolved after 18 months of inactivity, the electronic records relating to the non-convicted charges are automatically expunged. §§ 1(c)(6), 2(c).

Non-disclosure of expunged records, except for specified purposes:

Custodians of expunged records may not use or disclose expunged records, except to the subject of the record, for authorized criminal justice purposes (two alternatives are proposed, one requiring court approval and the other not), and for specified purposes relating to criminal defense, civil litigation, administrative proceedings, and research. § 4(a)(1).

Restrictions on government use of expunged records:

Expunged non-conviction records may not be used against the subject of the record in a range of decisions by police, prosecutors, courts, correctional authorities, and parole boards, except regarding the underlying matter in which the expunged record arose, provided that prior participation in diversion or deferred adjudication may be considered in determining admission to such a program. § 4(a)(2)-(4).

Restrictions on commercial dissemination of non-conviction records:

Government contracts to sell criminal records must require that a customer who previously received records that have since been expunged, and who requests records about the same person, be notified of the expungement and delete the expunged records. § 4(b)(1). A commercial provider of criminal records may not disseminate dated records of arrests and charges, or expunged records. § 4(b)(2).

Restrictions on civil inquiries into and use of non-conviction records:

Unless otherwise authorized by law or court rule, it is unlawful for employers, licensing boards, housing providers, educational and lending institutions, and insurers to inquire into, consider, disseminate, or take adverse action based on non-convictions, including expunged records. § 4(c).

Limitation of liability:

There is no civil liability for providing a person with benefits such as employment, housing, education, etc., notwithstanding the person's non-conviction record. § 4(d).

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INTRODUCTION

The model law that is the subject of this report is intended to provide criminal justice policymakers with guidance on limiting access to and use of records of criminal matters that do not result in conviction. It was developed by the Collateral Consequences Resource Center (CCRC) in the summer and fall of 2019, in collaboration with a group of lawmakers, scholars, lawyers, advocates, service providers, judicial officials, academics, custodians of records, and other experts. The model law takes up non-conviction records as a starting point for addressing the systematic adverse impact of a criminal record on the lives of people who have one, as well as those with whom they live and work. We envision this model law as a first step towards a project that would encompass conviction and non-conviction records, and the structure and many of its features can be adopted as part of efforts to provide for conviction relief as well. In these introductory paragraphs we address the need for this model law and describe the process by which it was developed.

I. Use of and access to non-conviction records

When a person is arrested, the police generate a record and send it to a state's central repository. Many arrests do not lead to charges. If charges are filed, they may be dismissed by the prosecutor or by the court. Increasingly, people are placed in diversion programs, with or without a guilty plea, where completion of specified requirements results in dismissal of the case. Occasionally, the accused goes to trial and is acquitted, or prevails on appeal.

These are all scenarios that do not result in conviction.¹ Yet each one produces a criminal record that may result in a litany of adverse consequences for its subject, including adverse action by employers, schools, licensing boards, housing providers, social services agencies, and immigration and law enforcement officials; ineligibility for public benefits; threats to child custody; violations of probation and parole; civil asset forfeiture; consideration in subsequent criminal cases such as at sentencing and in eligibility for legal relief; and reputational harm.² Justice Sonia Sotomayor recently put it succinctly: “Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination by employers, landlords, and whoever else conducts a background check.”³ Well before the current era of pervasive background checking, courts understood that an arrest record, “if it becomes known, may subject an individual to serious difficulties.”⁴

“Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the ‘civil death’ of discrimination...” – Justice Sonia Sotomayor

Twenty years ago, many thought it unnecessary to regulate access to outcomes less serious than a felony conviction, owing to the practical obscurity of most criminal records. But the advent of digitized records systems in the post-9/11 context has fed a public appetite for

unfettered access to information about individuals with whom we interact. A criminal record—even one that has terminated without a conviction—has become a sorting mechanism increasingly relied upon by employers, schools, landlords, and other authorities, as well as a net-widening device for law enforcement and immigration authorities.⁵ A new commerce in background screening and data aggregation has sprung up to facilitate public inquiries, with little regulation.⁶ These checks often turn up a record of an “open” arrest or charge without any final disposition (as requirements for reporting dispositions tend to be unclear and hard to enforce), which may seem to an employer or landlord more ominous than a closed case.⁷

Of course, the public has a well-established interest in access to records of court proceedings and to a lesser extent records of law enforcement activities. But the public’s interest in knowing a specific person’s involvement in a criminal justice proceeding diminishes with the conclusion of that proceeding, and it diminishes further still when the proceeding terminates in the individual’s favor without a conviction. At the same time, the subject of the record has heightened privacy, reputational, and social interests in non-disclosure. Further, the public has an interest in policies that avoid repeated or ongoing involvement with the criminal justice system.⁸

In recent years, reform advocates and lawmakers have expressed a growing interest in reining in the widespread dissemination and use of criminal records, including non-conviction records, to reduce barriers to opportunity. Nonetheless, current federal and state laws restricting how government and private parties may access and use non-conviction records often have limited application and are hard to enforce. The federal Fair Credit Reporting Act (“FCRA”) generally prohibits covered background checkers from disseminating information about arrests that are more than seven years old,⁹ but this information is still likely available via online “people search” services that may not be subject to FCRA.¹⁰ At the state level, only a handful of states have laws specifically prohibiting both employers and occupational licensing boards from inquiring about and considering non-convictions.¹¹

Current federal and state laws restricting how government and private parties may access and use non-conviction records often have limited application and are hard to enforce.

Almost every state provides some type of individualized record relief (e.g., sealing or expungement) for non-convictions, but eligibility criteria tend to be either unclear or restrictive, and petition-based procedures tend to be burdensome or intimidating, or both.¹² The result is that only a small percentage of those eligible for relief even apply.¹³ Responding to this “up-take” shortfall, a small but growing number of states have dispensed with the requirement of a separate petition and authorized sealing or expungement of non-conviction records either automatically or on an expedited basis, at the time of disposition of the criminal case or after a brief waiting period.¹⁴ Other states have also shown interest in streamlining their provisions for record relief in cases not resulting in conviction.¹⁵ Ironically, in a number of these states it may

be harder to clear the record of uncharged arrests, which do not find their way into a court document, than to clear charges that are dismissed or acquitted, which do.

In sum, most states do not provide for accessible and effective relief from the adverse consequences of a criminal matter that terminated without a conviction. It is this shortcoming that the model described in this report is intended to help jurisdictions remedy.

II. Model law project

In early 2019, CCRC identified the need for policy guidance to limit discrimination based on non-conviction records, through our research into state law-making for the Restoration of Rights Project. This research revealed both strong state interest in addressing record-based discrimination and a patchwork of approaches that left gaps in coverage and accessibility.¹⁶ As discussed, many states impose confusing eligibility requirements and burdensome procedures that ensure many if not most non-conviction records will remain publicly available. There are few best practices for legislatures wishing to deal with the problem, and no relevant guidance from major law reform organizations like the American Law Institute and the Uniform Law Commission.¹⁷

In response, we carried out a multi-phase process of research and consultation during the spring and summer 2019 to prepare a draft model law. This draft was discussed at a roundtable conference at the University of Michigan Law School on August 16 and 17, 2019, organized by CCRC in partnership with Professors J.J. Prescott and Sonja Starr of the Michigan Law faculty. A group of about 25 experts—including judicial officials, practitioners, prosecutors, legal aid staff, academics, records repository officials, policy staff, and other experts—held a two-day discussion to assess and refine the draft model law.

The consensus of the group was that a model law on non-conviction records should provide for robust and automatic relief that restricts access to and use of such records for non-criminal justice purposes; that these restrictions should apply to all types of offenses, to all official custodians of records, and to uncharged arrests and other undisposed cases as well as to dismissed and acquitted charges; that the law should regulate private providers of background information; and that it should strictly limit (insofar as permitted by other law) how non-conviction records are accessed and used for non-criminal justice purposes. There was no consensus on the issue of law enforcement and prosecutor access to expunged non-conviction records, and the model therefore offers alternatives based upon the two principal approaches in the states. It also limits the use of expunged records against the subject of the record for certain discretionary decisions by criminal justice officials and judges.

Following the roundtable, CCRC engaged in four rounds of comments and revisions, resulting in this fifth and final draft of the model law text, which includes commentary. In our model, non-conviction records are automatically expunged upon disposition (or after a specified period if no disposition is reported). Thus, the only non-conviction records that will not be expunged are records of uncharged arrests for a specified period, and records of pending cases

with docket activity in the past 18 months, including active diversions and deferred adjudications (which may nonetheless not be disclosed or reported during the diversion or deferral period). While we use the term “expunge” to describe our record relief, we do not propose to destroy records but to sequester them so that access is available only to the subject of the records or a person or entity whose access is specifically authorized by statute or court order. The model law also prohibits the use of most non-conviction records (whether they have been expunged or not) in civil decision-making contexts.

The model law has four sections, each followed by a comment. Certain provisions of the model law offer alternative options, which are set off by brackets. Endnotes with additional background are provided at the end of each section.

The first section of the model law consists of purposes and definitions. The second section provides for automatic expungement of three different categories of non-conviction records: arrests that are not charged; charged cases that are terminated in favor of the accused; and dismissed or acquitted charges in cases resulting in a conviction. The third section deals with procedures for sequestering expunged records, as well as a process for correction of errors. It also authorizes the subject of an expunged record to deny its existence.

The fourth section deals with dissemination and use of non-conviction records, including but not limited to records that have been expunged. It describes how expunged records are to be maintained and on what basis they can be accessed (i.e., for certain criminal justice, civil litigation, and research purposes), and limits private dissemination of expunged records by private providers of criminal records. It limits inquiry into and use of non-convictions and expunged records for civil purposes, including by employers and landlords, unless otherwise authorized by state or federal law. It limits liability for someone who provides employment or another benefit or opportunity notwithstanding a non-conviction record. Finally, it provides civil enforcement tools for the limits on dissemination and use of non-convictions.

¹ Bureau of Justice Statistics studies from 1990-2009 examined samples of felony cases charged in the 75 largest counties in the country. The 2009 study found that of cases that were adjudicated, 66% resulted in a conviction (54% of a felony and 12% of a misdemeanor), about 25% resulted in dismissal of charges, and 9% resulted in a deferred adjudication or diversion outcome. BRIAN A. REAVES, U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009 2, 22 (2013), <https://www.bjs.gov/content/pub/pdf/fdluc09.pdf>. These figures do not include felony arrests that were not charged. In other words, the study found for charged felony cases in large counties a non-conviction rate of 34%. This figure was relatively consistent for BJS studies between 1990 and 2009. *Id.* at Fig. 18. It is not clear what effect the inclusion of only large counties in the BJS studies had on the non-conviction rates. Almost certainly, if the study had included misdemeanors and uncharged arrests, the non-conviction rate would have been considerably higher than 34%.

² Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 997–1000 (2019); Benjamin D. Geffen, *The Collateral Consequences of Acquittal: Employment Discrimination on the Basis of Arrests Without*

Convictions, 20 U. PA. J. L. & SOC. CHANGE 81 (2017); Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 821–844 (2015).

³ *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting) (citing G.J. Chin, *The New Civil Death*, 160 U. PA. L. REV. 1789, 1805 (2012)). Pervasive discrimination based on a non-conviction record unfairly condemns a large cross-section of society. As the Supreme Court explained, “[t]he mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.” *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957). Lower courts have made similar points. See, e.g., *Utz v. Cullinane*, 520 F.2d 467, 478 (D.C. Cir. 1975) (“An arrest record, without more, is a fact which is absolutely irrelevant to the question of an individual’s guilt.”); *United States v. Zapete-Garcia*, 447 F.3d 57, 60 (1st Cir. 2006).

⁴ *Menard v. Mitchell*, 430 F. 2d 486, 490 (D.C. Cir. 1970).

⁵ See, e.g., Tina Rosenberg, *Have You Ever Been Arrested? Check Here*, N.Y. Times (May 24, 2016), <https://www.nytimes.com/2016/05/24/opinion/have-you-ever-been-arrested-check-here.html> (“Even the briefest minor interaction with the justice system can leave someone with a criminal record — and a permanent barrier to a job, housing, education or an occupational license.”). Non-conviction records have adverse consequences within the justice system itself when they are used by police to heighten surveillance and predict future behavior, and by courts and prosecutors to impose harsher penalties and rule out benefits in subsequent cases.

⁶ See MARGARET COLGATE LOVE, JENNY ROBERTS, & WAYNE A. LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY AND PRACTICE §§ 5:2 through 5:6 (NACDL/West, 3d ed. 2018-2019). For example, a member survey conducted by the Society for Human Resource Management in 2012 revealed that 87% of its organizations conduct criminal background checks on some or all of their job applicants. See BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS 2, SOC’Y FOR HUMAN RESOURCE MGMT. (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

⁷ The FBI’s Interstate Identification Index system, which is compiled from state repository submissions, is “missing final disposition information for approximately 50 percent of its records.” U.S. DEPT. OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 3 (June 2006), http://www.justice.gov/olp/ag_bgchecks_report.pdf. For an explanation, based on one state’s experience, of why so many records of non-convictions are missing final dispositions, and how this can seriously disadvantage their subjects, see *infra* note 25.

⁸ See REBECCA VALLAS & SHARON DIETRICH, ONE STRIKE AND YOU’RE OUT, CENTER FOR AMERICAN PROGRESS (Dec. 2, 2014) (estimating the cost of employment losses among people with a criminal record as roughly \$65 billion per year).

⁹ 15 U.S.C. § 1681c. These limits have been held not to apply to diversionary dispositions that include a guilty plea. *Aldaco v. Rentgrow, Inc.*, No. 18-1932 (7th Cir. 2019). In addition, FCRA indirectly restricts dissemination of expunged and sealed records by requiring background screeners to use “reasonable procedures to ensure maximum possible accuracy,” and in the employment context, “strict procedures,” unless contemporaneous notice is provided to the person. 15 U.S.C. §§ 1681e(b), 1681k. Federal regulatory guidance limiting consideration of non-conviction records in employment was recently held invalid by one court of appeal. *Texas v. EEOC*, No. 18-10638 (5th Cir. 2019). Federal regulatory guidance likewise limits consideration of non-conviction records in housing, but this guidance may be vulnerable to challenge as well. See U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF GENERAL COUNSEL GUIDANCE ON APPLICATION OF FAIR HOUSING ACT STANDARDS TO THE USE OF CRIMINAL RECORDS BY PROVIDERS OF HOUSING AND REAL ESTATE-RELATED TRANSACTIONS 1, 5 (April 4, 2016).

¹⁰ See Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and The Rise of a New Penal Entrepreneurialism*, *The British Journal of Criminology* (June 18, 2019), <https://doi.org/10.1093/bjc/azz039>.

¹¹ See, e.g., Cal. Labor Code § 432.7; Gov't Code § 12952; Colo. Rev. Stat. § 24-5-101; Conn. Gen. Stat. § 46a-80(e); D.C. Code § 32-1342; Mich. Comp. Laws § 37.2205a; Wis. Stat. § 111.335; 50-state comparison chart on *Consideration of Criminal Records in Licensing and Employment*, Restoration of Rights Project (Aug. 2019), <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>; MARGARET LOVE & DAVID SCHLUSSEL, REDUCING BARRIERS TO REINTEGRATION: FAIR CHANCE AND EXPUNGEMENT REFORMS IN 2018, COLLATERAL CONSEQUENCES RESOURCE CENTER 7-9 (2019), <http://ccresourcecenter.org/wp-content/uploads/2019/01/Fair-chance-and-expungement-reforms-in-2018-CCRC-Jan-2019.pdf>.

¹² For example, some states limit eligibility for expungement of non-conviction records to specific offenses, see Ala. Code §§ 15-27-1, 15-27-2 (misdemeanors and non-violent felonies); Miss. Code Ann. §§ 99-15-59 (misdemeanors only); or to individuals who have no prior record of conviction, see, e.g., Del. Code Ann. tit. 11 § 4372; Fla. Stat. Ann. §§ 943.0585; 20 Ill. Comp. Stat. Ann. 2630/5.2(b); Mo. Rev. Stat. § 610.120(2); N.C. Gen. Stat. § 15A-146(a); R.I. Gen. Laws § 12-1-12.1; W.Va. Code § 61-11-25. Other states require an arrest-free waiting period before permitting an individual to file for expungement, even after an acquittal. In many states, the application process is costly (civil filing fees, satisfaction of court debt) and burdensome (production of law enforcement records, hearing at which the prosecutor may oppose relief and the court must find that the individual's need for relief outweighs the public's right to know about their arrest). See, e.g., Ohio Rev. Code Ann. §§ 2953.52; 22 Okla. Stat. Ann. § 18(A)(7). The District of Columbia has one of the most restrictive schemes for record relief for non-conviction records, applying similar eligibility criteria and process to conviction and non-conviction records. See D.C. Code §§ 16-801, 16-803 (waiting period of two to four years; various prior or subsequent criminal records are disqualifying or extend the waiting period by 5 or 10 years; waiting periods for all of a person's arrests and convictions must be satisfied unless a person waives right to seal the arrests and convictions; court must find that sealing "is in the interests of justice" under a multifactor balancing test).

¹³ See J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, __ HARV. L. REV. 133, forthcoming (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353620 (of individuals eligible for Michigan's set-aside authority for conviction records, only 6.5% receive relief within five years of eligibility); Colleen V. Chien, *The Second Chance Gap*, __ MICH. LAW. REV. __, forthcoming (2020) (estimating conservatively that 25-30 million individuals are entitled under state laws to clear their criminal records, partially or fully, but not have done so) (documenting in four Maryland counties, about 71% of expungeable offenses were not expunged, the overwhelming majority of which were for non-convictions).

¹⁴ At least thirteen states have procedures for non-conviction record relief that apply to both court and repository records, and that are either automatic (no petition or request required), or provide expedited relief at the time of disposition. Only a few of these state laws are comprehensive, in that they cover both uncharged arrests and charged cases terminated in favor of the accused, and apply to both past and future matters (Nebraska, New York, and Pennsylvania). The other relief schemes are more limited in application, to varying degrees. Most were enacted recently. The summaries below do not cover petition-based relief that may co-exist with automatic or expedited relief:

- California: Enacted in 2019, AB 1076 provides, effective January 1, 2021, that the state Department of Justice will automatically provide prospective "record relief" for misdemeanor arrests dismissed, acquitted, or uncharged for one year; felony arrests punishable by imprisonment in county jail that are acquitted or uncharged for 3 years; or arrests after successful completion of a specified diversion program. See 2019 CA A.B. 1076, CA 2019-2020 Regular Session.
- Colorado: Enacted in 2016, and revised in 2019, a provision allows for expedited "sealing" at the

time of a non-conviction disposition in a charged case (replacing a burdensome civil petition process). Colo. Rev. Stat. § 24-72-705. A motion “may be informal and may be made in open court at the time of the dismissal of the case or the acquittal of the defendant,” or it may be made “subsequent to the dismissal or acquittal through the filing of a written motion.” *Id.* “[T]he court shall promptly process the defendant’s request.” A \$65 fee is assessed, waivable for indigency. Sealing of uncharged arrests, however, is available only by civil petition. § 24-72-704.

- Connecticut: Since 1981, police, court, and prosecutorial records “shall be erased” when a person: (1) is found not guilty or the charges are dismissed and the period to appeal expires, or an appeal upholds the acquittal or dismissal; or (2) a charge is nolle and 13 months elapse (if a charge has been continued at the request of the prosecutor, and 13 months have elapsed since the continuance, with no prosecution or other disposition, the charge is nolle upon motion of the person). Conn. Gen. Stat. Ann. § 54-142a; Conn. Gen. Stat. Ann. § 54-142a, Editor’s and Revisor’s Notes, 1981 Amendment (West). The term “erase” is defined to include “actual physical destruction” of records upon an individual’s request. Conn. Gen. Stat. § 54-142a(e). Where a charging document includes more than one count, erasure of dismissed or acquitted counts is not permitted if the case is pending. § 54-142a(g). Since 2008, if the case has been disposed and one or more counts result in conviction, dismissed or acquitted charges are “erased” from electronic records released to the public. *Id.* The statute does not appear to cover uncharged arrests.
- Illinois: Enacted in 2017 and effective in 2018, a provision allows for immediate “sealing” of records of arrests and charges resulting in acquittal or dismissal with prejudice. Ill. Comp. Stat. Ann. 2630/5.2(g). The court must inform the defendant at disposition of the right to immediate sealing. *Id.* A petition may be filed during the dispositional hearing, which the court may grant or deny. *Id.* Uncharged arrests may only be sealed or expunged by petition. 20 Ill. Comp. Stat. 2630/5.2(d).
- Maine: Since 2013, records are made “confidential” if: an arrest is uncharged for a year; or a charge is undisposed for a year, dismissed with prejudice or finality, acquitted, terminated with prejudice, or terminated due to lack of jurisdiction. Me. Rev. Stat. Ann. tit. 16, § 703(2). However, disclosure of such information may be made, among other reasons, to “[a]ny person who makes a specific inquiry . . . as to whether a named individual was summonsed, arrested or detained or had formal criminal charges initiated on a specific date.” *Id.* § 705(1)(E).
- Michigan: Where an arrested person is released without charges, law enforcement agencies and the Michigan State Police (MSP) are required to “destroy” any biometric and arrest records. If charges are brought against the arrested individual but dismissed before trial, and if the court or prosecutor does not object within 60 days, the MSP is required to “remove” the arrest record from the internet records system and “any entry concerning the charge” from the law enforcement information network, “upon receipt of an appropriate order issued by the district court or the circuit court.” Mich. Comp. Laws §§ 28.243(3)(7), (8), (9) (first enacted in 1986 in a more limited form); § 764.26a (enacted in 2018). Any biometric and arrest records “shall be expunged or destroyed, or both, as appropriate.” *Id.* If an accused is found not guilty, or if a decision is made not to proceed with a prosecution, “the biometric data and arrest card must be destroyed by the official holding those items when the clerk of the court entering the disposition shall notify the department of any finding of not guilty or nolle prosequi.” The reporters of this model law have been advised by the Michigan courts that they have a policy of making their own corresponding records “non-public” in any case covered by the statutes applicable to law enforcement agencies and the MSP.
- Nebraska: Information from cases not resulting in conviction is automatically “removed from the public record,” though available to law enforcement: after one year for uncharged arrests, after two years for charges not filed because of completed diversion, and immediately for charges filed and later dismissed by the court, including because of acquittal, drug court completion, and deferred judgments. Neb. Rev. Stat. § 29-3523 (made applicable to uncharged arrests in 1997, arrest records

for dismissed cases in 2007, acquittals and court records in 2016, past cases in 2018, and deferred judgments in 2019). Such records are made public if the person is currently subject to prosecution or correctional control due to a separate arrest, or is a candidate for or holder of public office. *Id.*

- New Hampshire: Per a 2018 enactment, for cases disposed on or after January 1, 2019, any person whose arrest resulted in a finding of not guilty on all charges, or whose case was dismissed or not prosecuted, shall have the arrest record and court record “annulled”: thirty days following the finding of not guilty or of dismissal if an appeal is not taken; or upon final determination of the appeal affirming dismissal if an appeal is taken. N.H. Rev. Stat. Ann. § 651:5(II-a)(a). A person whose conviction was subsequently vacated by a court shall have the arrest and court record “annulled.” § 651:5(II-a)(b). In 2019, HB 637 added protections for non-conviction records, including uncharged arrests, by creating two categories of criminal history information to be maintained by criminal justice agencies: “confidential” and “public.” “Confidential criminal history information,” subject to certain access restrictions, is defined to include records of undisposed arrests and charges, non-conviction dispositions, and annulled convictions. §§ 106:B-1, 106:B-14.
- New Jersey: Per a 2015 enactment, the court—at the time of dismissal, acquittal, or discharge of criminal proceedings without conviction or finding of guilt—“shall” order “expungement” upon receipt of an application (unless the disposition resulted from a plea agreement involving a conviction on another charge). N.J. Stat. Ann. § 2C:52-6(a).
- New York: Longstanding New York law provides for “sealing” of the record at the time that a case is terminated “in favor of the accused,” unless the court on its own motion or upon the motion of the prosecutor finds “the interests of justice require otherwise.” N.Y. Crim. Proc. Law § 160.5. However, this provision only covers an uncharged arrest if the arresting agency or the prosecutor certifies that the case will not proceed further. New provisions in New York law, effective April 11, 2020, will address uncharged arrests and other undisposed cases by excluding records from specified criminal history reports if there has been no activity for five years; and address non-convicted charges by prohibiting the state repository, in providing criminal history returns for civil inquiries, from providing records other than convictions, or arrests and criminal actions that are pending. *See* 2019 NY Senate Bill S1505 (2020 Budget), Part II, subpart L, *adding* N.Y. Exec. Law § 845-C (the repository and courts may not include in criminal history reports, except for law enforcement, courts, and certain government agencies, records without an open warrant not indicating a final disposition, without an entry in five years; for serious offenses, the district attorney must be asked if a matter is still pending, but if the district attorney fails to respond within six months, the information is excluded) and *adding* N.Y. Exec. Law § 845-D (restricting state repository criminal history returns for civil inquiries to providing convictions and pending arrests and criminal actions).
- Pennsylvania: The Clean Slate Act of 2018 provides for immediate eligibility for an “order for limited access” for “charges which resulted in a final disposition other than a conviction,” which will issue “within 30 days after entry of the disposition and payment of each court-ordered obligation.” 18 Pa. Cons. Stat. Ann. §§ 9122.2(a)(2), (b)(2)(i). The courts and state police are directed to identify all cases eligible for automated sealing between June 28, 2019 and June 27, 2020. As revised in 2018, a provision requires that arrest records not be disclosed to the public if three years have elapsed with no indication of a disposition or pending proceedings. § 9121(b)(2)(i). A preexisting provision provides for “expungement” if no disposition is received within 18 months of arrest and the court of jurisdiction certifies that no disposition is available and no action is pending. § 9122(a).
- South Carolina: Under a provision enacted in 2009, South Carolina provides for automatic or expedited “expungement” of certain low-level charges brought in summary court if the charges are acquitted, dismissed, or nolle prossed. S.C. Code Ann. § 17-22-950 (procedures are different if the person was or was not fingerprinted; and the prosecutor may object on the grounds of other pending charges or ineligibility).

- Utah: Enacted in 2019, HB 431 provides that effective May 1, 2020, a process will begin to automatically “expunge” cases in which all charges resulted in acquittal or dismissal with prejudice (excluding plea in abeyance cases). *See* Utah Code Ann. § 77-40-114.

In addition, at least six states have more narrow provisions that make specified non-conviction records held by the state repository and/or law enforcement agencies—but not court records—confidential (Alaska, Hawaii, Georgia, Montana, Florida, and Washington). *See* Alaska Stat. §§ 12.62.160(b)(8), 12.62.900(19) (non-conviction records held by criminal justice agencies “may not be released” absent a specific exception, if a year has elapsed after: arrest, referral to a prosecutor, or charge, if no indication of disposition; the prosecutor or grand jury elected not to begin proceedings; dismissal; or acquittal); Alaska Stat. § 22.35.030 (physical court records remain accessible to the public, but online court records may not be published on the court’s website if 60 days have elapsed after: acquittal on all charges; dismissal of all charges, including per suspended judgment, but not plea agreement in another case; or acquittal on some and dismissal of remaining charges); Haw. Rev. Stat. § 846-9 (non-conviction repository data may only be “disseminated” to criminal justice agencies and other individuals and agencies authorized by Hawaii law); Ga. Code Ann. § 35-3-37 (for arrests after July 1, 2013, state repository records are automatically “restricted” if: the repository is notified that a case is closed without charges; absent notification of closure, a specified waiting period has elapsed, depending on the seriousness of the charges; or all charges are dismissed or acquitted, with certain exceptions); Mont. Code Ann. § 44-5-202(8) (“Photographs and fingerprints . . . must be returned by the state repository to the originating agency, which shall expunge all copies” if a person is “released without the filing of charges, if the charges did not result in a conviction, or if a conviction is later invalidated.”); Mont. Dept. of Justice, *Non-Conviction Removal and Sealing* (last accessed Dec. 5, 2019 at 4:02pm), <https://dojmt.gov/enforcement/criminal-record-expungement-and-sealing> (where § 44-5-202(8) applies, the repository expunges the associated arrest records); Fla. Stat. § 943.0595 (directing the Department of Law Enforcement to adopt rules to automatically seal its own records—but not court records or other law enforcement records—upon a non-conviction disposition); Wash. Rev. Code § 10.97.050 (non-conviction records held by criminal justice agencies, excluding courts, may not be disseminated for a non-criminal justice purpose, except if the incident occurred in the previous 12 months and the matter is currently being processed, or as otherwise authorized by law, executive order, or court order); *see also* *Seattle Times Co. v. Ishikawa*, 640 P. 2d 716 (Wash. 1982) (state constitutional right of access requires a finding of compelling circumstances for sealing court records).

¹⁵ *See* Love & Schluskel, *supra* note 11 at 10 (In 2018, “[e]ight states legislated to facilitate sealing of non-conviction records . . .”). In 2019 to date, six additional states have enacted laws to facilitate sealing or expungement of non-conviction records. *See* Restoration of Rights Project, *infra* note 16; *Legislative update: third quarter 2019 sees more new licensing and expungement laws*, Collateral Consequences Resource Center (Oct. 11, 2019), <http://ccresourcecenter.org/2019/10/11/legislative-update-third-quarter-2019-sees-more-new-licensing-and-expungement-laws/>.

¹⁶ The Restoration of Rights Project catalogues and describes current U.S. law and practice concerning restoration of rights following arrest or conviction in all 50 states, D.C., Puerto Rico, the Virgin Islands, and the federal system. *See* Restoration of Rights Project, <http://ccresourcecenter.org/restoration/>.

¹⁷ The Legal Action Center provides a model sealing/expungement law for “arrests that never led to conviction and old/minor convictions.” *Sealing/Expunging Arrest and Conviction Records: Model Laws*, Legal Action Center (last accessed Nov. 26, 2019, at 9:57pm), https://lac.org/toolkits/sealing/model_law_sealing.htm. The Alliance for Safety and Justice recently released policy guidelines for record relief legislation. *See* LENORE ANDERSON ET. AL, CREATING MODEL LEGISLATIVE RELIEF FOR PEOPLE WITH PAST CONVICTIONS, ALLIANCE FOR SAFETY AND JUSTICE (Sept. 2019), <https://allianceforsafetyandjustice.org/wp-content/uploads/2019/09/Model-Policies-Brief.pdf> (“The process should provide an automatic record relief mechanism . . . Relief must come at—or very soon after—end of sentence . . . Relief can be focused to maximize safety . . . Relief must extend to a wide spectrum of offenses . . .”).

MODEL LAW AND COMMENTARY

§ 1 General Provisions

(a) Purpose

(1) The purposes of this act are:

- (A) To reduce stigma, discrimination, and barriers to opportunity that adversely affect people with a criminal record, where that record is of an arrest or charge with no associated conviction;
- (B) To declare that governments are responsible for developing criminal record systems and policies that take account of the adverse effects associated with criminal records broadly defined;
- (C) To eliminate obstacles that typically operate to limit access to record relief—including fees, the necessity of individual requests, complex eligibility criteria, and burdensome procedures; and
- (D) To uphold the presumption of innocence where an arrest or charge has no associated conviction.

(2) This act directs government agencies and courts to expunge non-conviction records on a systematic basis, without the requirement of a request or payment of a fee by an affected individual. It also prohibits the consideration of most non-conviction records in a variety of civil contexts. This act does not displace any existing laws that authorize additional remedies, for example, upon individual petition or request, to persons with arrest or conviction records or any other records not covered by this act, or to a class of persons whose conduct has been decriminalized.

(b) Effective date

The effective date of [specific subsections] shall be [X months or years] following enactment, to enable the affected government agencies and courts to prepare to carry out this act.

(c) Definitions

- (1) “Arrest record” means information in electronic or physical form consisting of identifiable descriptions and notations of arrests and detention.
- (2) “Criminal justice purpose” means an activity relating to the detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, defense, correctional supervision, or rehabilitation of accused or convicted persons.
- (3) “Expunge” means to sequester records so that access is available only to the subject of the records or the subject’s representative, or a person or entity whose access is specifically authorized by statute or court order.
- (4) “Expunged record” means a record expunged under this chapter.

- (5) “Non-convicted charge” means a charge that was brought against a person in a criminal case in which the person was convicted of one or more counts, and the charge has resulted in a disposition other than a conviction for the charged offense, including a dismissal, acquittal, or nolle prosequi, or a felony arrest or charge for which only a misdemeanor or other less serious conviction resulted. This includes a conviction is reversed or overturned on appeal, that results in final non-appealable order of acquittal or dismissal. If one or more charges in a case have resulted in a conviction, but other charges have not been resolved, and 18 months or more have passed without any docket entry in the case, all charges without a conviction shall be considered a “non-convicted charge,” unless the court has been informed by the prosecuting attorney or law enforcement agency with jurisdiction within the previous six months that the charges are actively pending or, at any time, that the person has evaded prosecution.
- (6) “Non-criminal justice purpose” means any purpose other than a criminal justice purpose.
- (7) “Non-conviction record” means the record of an arrest or charge with no associated conviction.
- (8) “Private provider of criminal records” means a non-governmental entity or person that assembles or distributes criminal history records for commercial purposes. This definition excludes attorneys that assemble or distribute criminal history records on behalf of clients. Further, this definition does not apply to the extent that such an entity or person is engaged in journalism. For purposes of this definition, “journalism” means obtaining, writing, reviewing, editing, or otherwise preparing news for any newspaper, periodical, book, press association, newspaper syndicate, wire service, radio or television station, internet new service, or other news service.
- (9) “Records relating to the court proceeding and arrest” means information in electronic or physical form consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, summons or citations, pleas, guilty and not guilty findings and verdicts, dispositions in juvenile proceedings, diversions, deferred adjudications, and any disposition, including acquittal, dismissal, nolle prosequi, conviction, correctional supervision, or release.
- (10) “Repository” means the [name of the single, coordinating entity of this state with the duty to receive, store, maintain, and disseminate criminal-history-record information].
- (11) “Terminated in favor of the accused” means that, in a criminal case, any charges have resulted in acquittal, or have been nolle prossed or otherwise dismissed, including pursuant to a diversion or deferred adjudication proceeding. If charges have not been resolved and 18 months or more have passed without any docket entry in the case, the case shall be considered “terminated in favor of the accused,” unless the court has been informed by the prosecuting attorney or law enforcement agency

with jurisdiction within the previous 6 months that the case is ongoing or, at any time, that the person has evaded prosecution. If a person is convicted, and the conviction is reversed or overturned on appeal, the matter shall be considered “terminated in favor of the accused” upon a final, non-appealable order of acquittal or dismissal.

Comment

a. Scope. This section lays out the purpose, effective date, and definitions for a systematic approach for automatically expunging criminal records of all non-convictions other than arrests and charges that have not yet been disposed, and for which specified time periods have not yet elapsed. These specified time periods are set forth in § 2(a) for arrests and in §§ 1(c)(5) and (11) for charges. Juvenile adjudication records are not within the scope of this model law.

b. Purpose. Subsection (a) describes the four purposes of the model law. The first purpose is to identify the intended effect of expungement on the individual, namely: “to reduce stigma, discrimination, and barriers to opportunity” due to the record. This goal is effectuated by § 3(a)(8), which authorizes the subject of an expunged record to state that no record exists and that any underlying arrests or court proceedings did not occur; and § 4, which imposes restrictions on access to and use of expunged non-conviction records (and non-conviction records generally). The second purpose is systematic: to declare that governments are responsible for systematically managing criminal records to account for adverse effects on subjects of records. (Such an approach is laid out in §§ 2–3.) The prevailing approach in the states—with only a handful of exceptions—puts the onus on affected individuals by affording relief only to those who meet typically narrow eligibility requirements and go to the trouble and expense of affirmatively petitioning the government for relief.¹⁸ The third purpose of the model is to eliminate obstacles that typically result in low rates of access to relief, including “fees, the necessity of individual requests, complex eligibility criteria, and burdensome procedures.” The fourth purpose, specific to non-convictions, is to affirm the presumption of innocence. Far too often, non-conviction records are treated as evidence of a likelihood of wrongdoing, contravening foundational principles of our criminal justice system.¹⁹

c. Effective date. As set out in § 1(b), jurisdictions may wish to establish delayed effective dates for certain subsections of the model law, ranging from several months to multiple years after enactment, to account for administrative and technological complexities of automating record relief (which will necessarily vary by subsection).²⁰ Other subsections should go into effect immediately, such as those at §§ 4(b) and (c) concerning inquiries into and dissemination of records of arrests and charges generally. Provisions for prospective expungement, §§ 2(a)–(c), may be effective sooner than those for retroactive expungement, § 2(d). Provisions for expunging uncharged arrests, §§ 2(a), 3(a)(1), which do not require any court involvement, should be effective sooner than for charged cases, which do. §§ 2(b)–(c), 3(a)(2)–(3).

1 *d. Expungement.* States use a variety of terms to describe record relief that involves
 2 limiting public access, such as expungement, sealing, erasure, non-disclosure, limited access, etc.
 3 Not only do these terms have varying functionalities, but even the same term may not have the
 4 same effect from jurisdiction to jurisdiction.²¹

5 The model law adopts the term “expungement” to describe record relief for non-
 6 conviction records, based on a view that it carries a stronger message of restoration than a term
 7 like “sealing,” and indicates that the record of past involvement with the criminal justice system
 8 should be removed from public consciousness. (In contrast, “sealing” seems to suggest
 9 something more of a temporary enclosure of the record, which could easily be undone or
 10 “unsealed”). While the term “expungement” is commonly understood to mean destruction or
 11 deletion of the record,²² the model law adopts a less drastic form of record relief, defining
 12 “expunge” in § 1(c)(3) to mean “sequestration,” which makes the record unavailable unless
 13 disclosure is authorized by law or court order, but does not destroy it. In rejecting destruction,
 14 the model law recognizes society’s significant interests in preserving the records of arrests and
 15 criminal proceedings—including those records to which access is restricted—for a variety of
 16 purposes, including scholarly research, government accountability, oversight, and compliance.
 17 In addition, the subject of a record often has an interest in maintaining access to their own
 18 record. For example, non-citizens in removal proceedings may be irreparably harmed if they
 19 cannot obtain a certified copy of their record in order to demonstrate that an arrest or charge did
 20 not result in conviction.²³ Accordingly, the model law does not provide that a record should be
 21 completely deleted from a records system or otherwise destroyed. (Even in state relief schemes
 22 that define expungement relief to include destruction, commonly at least one copy of the record
 23 is still preserved.²⁴) At the same time, the model law also recognizes the interests of society and
 24 the person in alleviating barriers to social and economic opportunity, and therefore provides that
 25 expunged records will not be accessible to anyone unless authorized by law or court order. *See*
 26 § 3(a).

27 *e. Terminated in favor of the accused; non-convicted charges.* This section defines cases
 28 “terminated in favor of the accused” and “non-convicted charges,” establishing the criteria under
 29 which records in charged cases are automatically expunged as provided in §§ 2(b) and (c). As
 30 discussed in § 2, comment (d), for non-convicted charges only electronic records are expunged.
 31 Criteria for expunging uncharged arrests are set forth at § 2(a).

32 The model law deems a charged case “terminated in favor of the accused” when either:
 33 all charges are resolved without conviction, or more than 18 months have passed without
 34 conviction or docket entry, unless the court is informed by the prosecuting attorney or law
 35 enforcement agency with jurisdiction within the previous six months that the case is ongoing or,
 36 at any time, that the person has evaded prosecution. Charges will only be considered resolved by
 37 conviction if this is clearly and unambiguously indicated in the record. This includes cases where
 38 any convictions were reversed or overturned on appeal, and a final order results in acquittal or
 39 dismissal. Once a case is “terminated in favor of the accused,” the records are expunged

pursuant to §§ 2(b) and 3(a). Almost all the states provide eligibility for record relief for charged cases resulting in a non-conviction disposition, either immediately or after a brief waiting period (rarely more than one year). The model law’s formulation for undisposed cases is inspired by a recently enacted New York law, with a modification: the period of docket inactivity resulting in relief is shortened from the 5 years provided under New York law to 18 months.²⁵ An 18-month period accords with the Uniform Criminal Records Accuracy Act, which requires a repository to exclude from background checks any undisposed criminal proceeding after 18 months of inactivity. *See* Unif. Crim. Records Accuracy Act § 303(d)(1) (Unif. Law Comm’n 2018).²⁶

The model law deems a charge in a criminal case as “non-convicted” when other charges in the case have resulted in conviction, but the charge in question has resulted in a disposition other than a conviction, including dismissal, acquittal, nolle prosequi, or there has been docket inactivity for 18 months (paralleling the 18-month period of docket inactivity for cases terminated in favor of the accused). A “non-convicted” charge includes a felony arrest or charge that resulted in a misdemeanor or other less serious conviction.

f. Repository. The model law’s definition of “repository” (used throughout §§ 2–4), is drawn from the Uniform Criminal Records Accuracy Act’s definition of “state repository,” leaves to the enacting state to decide whether the state criminal records repository is a state police or independent executive function, which affords “flexibility and is consistent with the current variety of practices.”²⁷

¹⁸ *See, e.g.*, Kan. Stat. Ann. § 22-2410(b); Va. Code Ann. § 19.2-392.2. The federal system affords almost no relief: a narrow expungement authority applies to first-offense drug deferred adjudication for persons under 21, 18 U.S.C. § 3607(a), and a person’s DNA analysis is expunged if a final court order establishes that any charges were dismissed or acquitted, or no charges were filed during the applicable time period. 42 U.S.C. § 14132(d); 10 U.S.C. § 1565(e).

¹⁹ *See Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”); *Schware v. Bd. of Bar Examiners of N.M.*, 353 U.S. 232, 241 (1957) (“The mere fact that a [person] has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct.”); *Utz v. Cullinane*, 520 F.2d 467, 478 (D.C. Cir. 1975) (“An arrest record, without more, is a fact which is absolutely irrelevant to the question of an individual’s guilt.”); *see generally* Anna Roberts, *Arrests as Guilt*, *supra* note 2, 70 ALA. L. REV. 987. In contrast, the current approach in the United Kingdom is to balance the individual’s right to privacy in applying for employment against the need to protect public safety in regard to even acquittals. *See R (AR) v Chief Constable of Greater Manchester Police* [2018] UKSC 47 (upholding the disclosure—in connection with an application for a lecturer positions—of the details of a criminal charge for which a person was tried and acquitted, in an “Enhanced Criminal Check” which is provided for certain professions, such as hospitals, airports, daycare centers, schools, etc.) (“In principle, even acquittal by a criminal court following a full trial can be said to imply no more than that the charge has not been proved beyond reasonable doubt. In principle, it leaves open the possibility that the allegation was true, and the risks associated with that.”).

²⁰ *See, e.g.* GET READY, GET SET: PENNSYLVANIA PREPARES FOR CLEAN SLATE IMPLEMENTATION, COMMUNITY LEGAL SERVICES OF PHILADELPHIA (March 2019),

https://clsphila.org/sites/default/files/news/Get%20Ready%20Get%20Set%20Clean%20Slate%20Report%20-%20March%202019_0.pdf/.

²¹ The concept of expungement or sealing of a criminal record originated in the 1940s in specialized sentencing schemes for juveniles, whose susceptibility to antisocial conduct was thought to be temporary compared to adults. The idea was to minimize the legal consequences of conviction and give “youthful offenders” “an incentive to reform” by “removing the infamy of [their] social standing.” Soon, reformers proposed extending this “clean slate” concept to adults. MARGARET LOVE, JOSHUA GAINES & JENNY OSBORNE, COLLATERAL CONSEQUENCES RESOURCE CENTER, FORGIVING & FORGETTING IN AMERICAN JUSTICE: A 50-STATE GUIDE TO EXPUNGEMENT AND RESTORATION OF RIGHTS 6 (August 2018), <https://ccresourcecenter.org/tag/forgiving-and-forgetting/>. Over time, almost every state has adopted some sort of restriction on public access to criminal records, but lawmakers in different states have selected a range of terms to describe relief, and have assigned different functionality to the same terms—relief may include destruction or not, and it may withhold access to various government agencies or not. Terms like “expungement” and “sealing” are most frequently used, though other terms like “shielding” (MD), “limited access” (PA), “erasure” (CT), “restriction” (GA), “withheld” (AR), “confidential” (AK), have been adopted. California’s new “clean slate” law uses the more generic terms “arrest relief” and “conviction relief.” See 2019 CA A.B. 1076, CA 2019-2020 Regular Session.

²² “1. To remove from a record, list, or book; to erase or destroy . . . 2. Parliamentary law. To declare (a vote or other action) null and outside the record.” EXPUNGE, Black’s Law Dictionary (11th ed. 2019).

²³ See Seth P. Lyons, *Risks and Rewards: Is Record Clearing Right for Your Noncitizen Client?* Clearinghouse Article, Sargent Shriver National Center on Poverty Law (Aug. 2017), <https://www.povertylaw.org/clearinghouse/article/risks>.

²⁴ For example, California destroys records resulting from identity theft, and destroys records if a person successfully petitions for a finding of factual innocence (destruction is delayed until the resolution of any civil action filed based on the arrest or prosecution). Cal. Penal Code §§ 851.8; 530.6. Connecticut provides that upon the person’s request, the clerk or custodian must cause “actual physical destruction” of records not earlier than three years after disposition of criminal case. Conn. Gen. Stat. § 54-142a(e). Illinois provides for destruction of all but court records in expungement cases. 20 Ill. Comp. Stat. Ann. 2630/5.2(a)(1)(E). Minnesota provides for destruction of arrest records and certain identifying information in cases where no charges are filed or where all charges are dismissed prior to a determination of probable cause. Minn. Stat. § 299C.105. Pennsylvania provides for “remov[al of] information so that there is no trace or indication that such information existed,” and the “eliminat[ion of] all identifiers which may be used to trace the identity of an individual.” 18 Pa. Cons. Stat. § 9102.

²⁵ N.Y. Crim. Proc. Law § 160.50 (“Order upon termination of criminal action in favor of the accused”); See 2019 NY Senate Bill S1505 (2020 Budget), Part II, subpart L, *adding* N.Y. Exec. Law § 845-C (effective April 11, 2020, the division of criminal justice services and office of court administration may not include in criminal history reports, except for law enforcement, courts, and certain government agencies, any information on “undisposed cases”—records without an open warrant not indicating a final disposition, and for which “no entry has been made in the criminal history records for a period of at least five years”; in cases involving serious offenses, the district attorney must be asked if a matter is still pending, but if the district attorney fails to respond within six months, the information shall be excluded).

New York lawyers who served as Advisors to the model law project explained the high percentage of undisposed cases in repository and court records systems in that state as the product of reporting requirements that are unclear and/or unenforced, mistakes made along the way by various actors in the criminal justice system, and the vagaries of official record-keeping that make it look as though the individual has an open, pending case or undisposed charge, when that is not true. Just as one example, multiple charges in a criminal case may be resolved by a plea to one of them, or to a charge added to the docket for purposes of disposition, while charges other than the pled-to charge may remain on court

records as “not disposed yet,” although in fact they have been covered by a plea. This can have serious consequences for the subjects of these records if they are asked to list their criminal convictions, since they would likely and understandably leave these non-conviction records out. Once a background check is run they will be accused of lying or falsifying applications, be denied the jobs, licenses, employment clearance, apartments, college or law school admission they seek, and be branded as not credible.

²⁶ It also bears noting that Pennsylvania has a provision for expungement 18 months after an arrest if the repository lacks a disposition and the court of jurisdiction certifies that there is no disposition or pending action. 18 Pa. Cons. Stat. § 9122(a).

²⁷ See UNIF. CRIM. RECORDS ACCURACY ACT § 102(4), comment (UNIF. LAW COMM’N 2018) (quoting BECKI R. GOGGINS & DENNIS A. DEBACCO, SEARCH, THE NATIONAL CONSORTIUM FOR JUSTICE INFORMATION AND STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016: A CRIMINAL JUSTICE INFORMATION POLICY REPORT viii (2018) (“Although usually housed in the Department of Public Safety, the central repository is maintained in some states by the State Police, Attorney General, or other state agency.”)).

§ 2 Expungement of Non-Conviction Records

(a) Uncharged arrests

(1) The repository shall automatically expunge the arrest record, as described in § 3, without the need for a request or payment of a fee, when:

(A) The arresting agency or prosecutor informs the repository that no charges will be filed;

(B) 60 days have elapsed since the arrest, unless the arresting agency or prosecutor has informed the repository that charges have been filed or that investigation is ongoing; or

(C) 120 days have elapsed since the repository is informed that investigation is ongoing, unless the prosecutor or responsible investigating agency provides an additional notice that charges have been filed or that investigation remains ongoing.

(2) If at any time after an arrest record is expunged the repository is informed by the prosecutor or responsible investigating agency that charges have been filed or that investigation is ongoing, the repository shall restore the record. If 120 days have elapsed after the record has been restored without the repository being informed that charges have been filed or that investigation remains ongoing, the repository shall again expunge the record.

(3) An arrest shall not be expunged under (1) or (2) if a bench warrant has been issued and has not been recalled, and the subject of the record has failed to appear or is a fugitive.

(b) Cases terminated in favor of the accused

(1) When all charges against a person in a criminal case are terminated in favor of the accused, the [court] [clerk of court] shall initiate expungement of the person's records relating to the court proceeding and arrest, as described in § 3, without the need for a request or payment of a fee.

(2) If a prosecutor refiles any expunged charges that were dismissed without prejudice, the court may reverse the expungement of the dismissed charges.

(3) During the pendency of a deferred judgment agreement or diversion agreement, the [court] [clerk of court] shall direct that no records in the matter shall be disclosed for non-criminal justice purposes.

(c) Non-convicted charges in conviction cases

In a criminal case in which a person was convicted of one or more charges, the [court] [clerk of court] shall expunge the records related to any non-convicted charges, except that such expungement shall apply only to electronic records and need not be redacted from paper records. The expungement shall be carried out as described in § 3, without

the need for a request or payment of a fee. Although this chapter does not require restricting access to, or redacting, paper files, all non-convicted charges in conviction cases (and related arrests unless the charge of arrest was convicted) will be considered “expunged” for all other purposes of this chapter.

(d) Retroactivity

Expungement of non-conviction records as authorized by this section shall apply to arrests and charges before, on, and after [effective date of this act]. Expungement of arrests and charges prior to [effective date of this act] shall be expunged under the procedures described in § 3(a) within [X months] of the [effective date of this act].

(e) Waiver

A person may not waive the right to expungement under this section as part of a plea, deferred judgment, or diversion proceeding. Any such purported waiver is void and unenforceable as against public policy.

Comment

a. Uncharged arrests. Many record relief schemes provide only for judicial relief, with the result that uncharged arrests, which typically do not generate a court case, are often overlooked. A repository, not a court, is a central authority with respect to arrest records. Therefore, the model law directs the repository to initiate expungement of uncharged arrests when the criteria in § 2(a) are satisfied. The repository also provides notice of expungement to law enforcement and prosecutorial agencies, as described in § 3(a). In a jurisdiction where the arrest record is regularly not sent to the repository before charges are filed, or perhaps not at all, provisions should direct the arresting or prosecuting agency to initiate expungement in such cases when an uncharged arrest becomes eligible for expungement.

Current law and practice typically treat arrests that have not been charged—or that have been charged and resolved, but their disposition has not been reported to the repository—as open or pending. An open arrest record can prejudice a person by creating the impression they are subject to an active criminal action, when, in reality, a government official has simply not reported the disposition of the arrest (e.g. prosecution was declined, or the case was charged and resolved). As of 2016, an average of 32% of arrests in repositories in the 50 states and Guam lacked dispositions.²⁸ To avoid prejudice against the subject of an uncharged arrest record, § 2(a) provides that an arrest shall automatically be expunged by the repository if the arresting agency or prosecutor informs the repository that no charges will be filed, or if 60 days elapse after the arrest, unless prosecutorial or law enforcement officials report that charges have been filed or an investigation is ongoing (the latter delays expungement by an additional 120 days). The repository is not required to notify prosecutorial or law enforcement officials before expunging the arrest upon the lapse of 60 days. The record is restored upon the filing of charges or notice of an ongoing investigation (the latter reverses expungement for 120 days). In jurisdictions where charges are typically filed more than 60 days after arrest, a longer waiting period prior to expungement of arrests may be enacted.²⁹ Note that undisposed charges are

subject to automatic expungement after 18 months of inactivity under §§ 1(c)(5), (11) and 2(b), (c). The purpose of these provisions is to place the burden on responsible government agencies to report dispositions of arrests promptly, rather than allow the stigma of an open arrest (or charging) record to remain on an individual’s record, sometimes indefinitely.

b. Initiating expungement in charged cases. §§ 2(b) and (c) give jurisdictions the option of having either the court or clerk of court initiate expungement in cases terminated in favor of the accused and non-convicted charges in conviction cases. If the court is assigned this role, it can issue an order that provides the subject of the record with documentation of expungement. However, assigning this role to the court clerk would save court resources, and presumably the clerk could issue a notice of expungement to serve the same ends. The procedures for carrying out expungement, and notifying the subject, are provided in § 3(a).

c. Terminated in favor of the accused. Expungement eligibility for cases terminated in favor of the accused is discussed at § 1, comment (e), including the 18-month inactivity rule. *See* § 1(c)(11). § 2(b) directs the court or clerk of court to automatically expunge such cases. This subsection provides that during the pendency of a deferred judgment agreement or diversion agreement, the records in the matter shall not be disclosed for non-criminal justice purposes.³⁰ The subsection also allows for reversal of expungement upon the refiling of expunged charges that were dismissed without prejudice.

d. Non-convicted charges. § 2(c) provides for automatic expungement of the electronic records related to non-convicted charges. (Expungement eligibility for non-convicted charges is discussed at § 1, comment (e), including the 18-month inactivity rule. *See* § 1(c)(5).) The model law does not require redaction of paper records related to a criminal case in which some (but not all) charges resulted in conviction, in consideration of the administrative burdens such a requirement would impose, and the degree of “practical obscurity” that exists in paper records.³¹ Nonetheless, § 2(c) clarifies that while only the electronic records will be expunged, all non-convicted charges in conviction cases (and related arrests unless the charge of arrest was convicted) will be considered “expunged” for all other purposes of the model law.

e. Retroactivity. The automatic provisions of this model law apply to cases from before, on, and after the effective date. The jurisdiction should establish a period of months during which it will expunge eligible arrests and charges occurring prior to the effective date. Pennsylvania and Utah provide current examples of states implementing retroactive automatic relief in this fashion.³² On June 28, 2018, Pennsylvania enacted the Clean Slate Act of 2018, with amendments related to sealing by petition taking effect on December 26, 2018, and other provisions related to automatic relief becoming effective on June 28, 2019. *See* 2018 Act 56 (Pa. HR 1419). The law directs the courts and state police, between June 28, 2019 and June 27, 2020, to identify all past cases eligible for automated sealing, and seal them in phases during that period. About 30 million cases will be sealed.³³ On March 28, 2019, Utah enacted the Utah Expungement Act, effective May 1, 2020. *See* 2019 Session Law Ch. 448 (H.B. 431). For cases adjudicated prior to the effective date, “[r]easonable efforts within available funding shall be

made to expunge or delete a case as quickly as is practicable,” with a goal to expunge eligible cases within one year of when the case is identified as eligible. Utah Code Ann. § 77-40-102.

f. Waiver prohibited. § 2(e) adapts a provision from Indiana that prohibits waiver of expungement as part of a plea agreement. *See* Ind. Code § 35-38-9-11(a). It goes further to prohibit waiver as part of a diversion or deferred adjudication. However, it does not bar a person from waiving the requirement, at § 3(a)(2), that an appellate court remove the defendant’s full name from a published opinion.

²⁸ BECKI R. GOGGINS AND DENNIS A. DEBACCO, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016 Table 1 (Feb. 2018), <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

²⁹ For background, most states provide record-clearing relief for uncharged arrests. Some do not. *E.g.*, Iowa Code § 901C.2(1)(a); Conn. Gen. Stat. § 54-142a (but if a criminal charge has been continued at the prosecutor’s of the prosecutor, and 13 months have elapsed since the continuance, with no prosecution or disposition, the charge is nolle upon motion, and eligible for erasure). For those that do provide relief, there is considerable variety in when an arrest will be deemed “uncharged” and the matter “disposed,” and eligible for relief (whether by petition or automatic process) including: the time of release without charges, Md. Code Ann., Crim. Proc. §§ 10-103.1, 10-103; after a decision not to file charges, Ark. Code Ann. § 16-90-1410; at the time a court determines “no charges have been or are likely to be filed,” Kan. Stat. Ann. § 22-2410; or after a waiting period that may or may not coincide with the statute of limitations period. Example waiting periods include 180 days in Wyoming, Wyo. Stat. Ann. § 7-13-1401(a); 1 year in Arkansas, Delaware, Idaho, Kentucky, and Oregon, Ark. Code Ann. § 16-90-1409; Del. Code tit. 11, § 4372(b); Idaho Code Ann. § 67-3004(10); Ky. Rev. Stat. Ann. § 431.076; Or. Rev. Stat. § 137.225(1)(b); 3 years in Pennsylvania, 18 Pa. Cons. Stat. § 9121(b)(2)(i); 2–7 years in Georgia depending on offense type, Ga. Code Ann. § 35-3-3; and the limitations period in California, Cal. Penal Code § 851.91(a)(1)(A). Effective January 1, 2021, California will automatically provide prospective arrest relief for misdemeanors uncharged for 1 year and felonies punishable by imprisonment in county jail uncharged for 3 years. 2019 CA A.B. 1076, CA 2019-2020 Regular Session.

³⁰ This provision is modeled on Michigan laws dealing with deferred judgment, which provide that a person, after a guilty plea or finding, is placed on probation (sometimes in a specialized court program), with entry of judgment deferred and the records made non-public. Those who successfully complete requirements are discharged, charges are dismissed, and the court and police records remain non-public (specific uses may be authorized by statute). *See* Mich. Comp. Laws §§ 762.13, *et seq.*, 333.7411, 769.4a; 750.350a; 750.430, 436.1703, 600.1076(6), 600.1206(1)(i), 600.1209(6), 600.1090, *et seq.*

This provision also finds some support in the Model Penal Code: Sentencing (“MPC”), which states that “[i]nsofar as possible, [a] deferred-adjudication program should attempt to restore defendants to the legal and social position of someone who has never been charged with a crime. For individuals who successfully complete the terms imposed by the court, [the code] provides that the charges be dismissed with prejudice, that the disposition not be considered part of the defendant’s criminal record, and that collateral consequences should not be triggered by the disposition.” *See* MODEL PENAL CODE: SENTENCING § 6.02B, comment i (AM. LAW INST. 2017). However, the Model Penal Code goes on to reject the expungement of records of arrests or charges, opting instead to “follow[] the original Code’s practice of ameliorating the harms that flow from conviction rather than attempting the difficult—and perhaps inadvisable—step of trying to hide the fact of past arrest or charge—in an era of electronic records Even were the law to allow individuals to state ‘truthfully’ that they had never been arrested or convicted, these representations would often be viewed as concealments or lies in the broader world.

On this view, some form of ‘certificate of rehabilitation’ is preferable to ineffectual attempts at erasure of the past.” *Id.* This model law departs from the MPC on the latter point. With the rapid expansion of record-sealing and expungement laws in the past several years, it is increasingly recognized as valid and appropriate for the law to authorize a person to state that they have never been arrested or charged (or convicted) if their record has been expunged or sealed. This especially true for non-conviction records, where there is no other form of relief available, as executive pardon and judicial relief remedies like set-aside, certificates of rehabilitation, and other “forgiving” mechanisms apply only to convictions.

³¹ See, e.g. David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385 (2017). This approach accords with those of Connecticut and Tennessee, which authorize removal of dismissed or acquitted charges from public electronic databases. See Conn. Gen. Stat. § 54-142a(g) (“when the criminal case is disposed of, electronic records or portions of electronic records released to the public that reference a charge that would otherwise be entitled to erasure under this section shall be erased in accordance with the provisions of this section”); Tenn. Code Ann. § 40-32-101(j) (authorizing “removal of public records from electronic databases . . . relating to the person’s arrest, indictment, charging instrument, or disposition for any charges other than the offense for which the person was convicted”). A new section of New York law will prohibit the state repository, in providing criminal history returns for civil inquiries, from providing records other than convictions, or arrests and accompanying criminal actions that are pending. See N.Y. Exec. Law § 845-D (effective April 11, 2020).

Several other states specifically authorize relief for non-convicted charges. Pennsylvania’s law appears to be the broadest, mandating that courts grant an automatic “order for limited access” (sealing) for “[c]riminal history record information pertaining to charges which resulted in a final disposition other than a conviction.” 18 Pa. C.S.A. § 9121(b)(2)(i). Pennsylvania caselaw authorizes “expungement” of nolle prossed or acquitted charges, but not those dismissed pursuant to a plea agreement. See *Commonwealth v. Hanna*, 964 A.2d 923 (Pa. Super. 2009). Maine makes confidential “[i]nformation disclosing that a criminal charge has been dismissed by a court with prejudice or dismissed with finality by a prosecutor other than as part of a plea agreement.” Me. Rev. Stat. Ann. tit. 16, § 703(2)(G). Georgia and Louisiana authorize petitions for sealing a felony charge not leading to conviction in a multicount case where the individual is convicted of a misdemeanor (though in Georgia’s case the authority is further limited). See Ga. Code Ann. § 35-3-37(j)(1) (providing that if a person’s felony charge dismissed or nolle prossed or acquitted, and the person was convicted of a misdemeanor offense (but not a lesser included of the felony), the person may petition the court for restricted access to the felony charge within 4 years of the arrest); La. Code Crim. Proc. Ann. Art. 985.1(a) (“A person may file an interim motion to expunge a felony arrest from his criminal history when that original arrest results in a conviction for a misdemeanor.”). North Carolina courts are authorized to grant petitions to expunge dismissed charges in multicount cases, subject to the requirement that a person have no prior felony convictions (which applies to all non-conviction cases). N.C. Gen. Stat. § 15A-146(a1). Alabama’s law is less clear, but sealing of non-convicted charges appears to be permitted based on the fact that a separate sealing petition must be filed for each charge. See Ala. Code §§ 15-27-1; -2.

³² New York and Illinois have recently provided for expungement of certain marijuana convictions. Both states made this relief retroactive. These laws, while narrowly focused on a set of specific offenses and thus presumably easier to implement, also provide for delayed timelines for implementation. See N.Y. Crim. Proc. Law § 160.50(5)(a) (Office of Court Administration has one year to implement marijuana expungement); 20 ILCS 2630/5.2(i)(1)(C) (establishing a tiered timeline for implementation of marijuana expungement). California’s recently enacted automatic record relief law provides for prospective relief only. See 2019 CA A.B. 1076, CA 2019-2020 Regular Session (effective January 1, 2021).

³³ *CLS Blog: Clean Slate Sealing Process Announced as June 28th Start Approaches*, Community Legal Services of Philadelphia (June 20, 2019), <https://clsphila.org/news/cls-blog-clean-slate-sealing-process-announced-june-28th-start-approaches>.

§ 3 Procedures Applicable to Expunged Records

(a) Expungement procedure and effect

- (1) For uncharged arrests that are entitled to expungement under § 2(a), the repository shall sequester the record such that access is not available unless specifically authorized by § 4(a), another statute, or court order. Within 30 days of sequestering the record, the repository shall notify the arresting agency and any other law enforcement or prosecutorial agency which may be in possession of such arrest records about the expungement. Such agencies shall sequester the arrest records within 30 days such that access is not available unless specifically authorized by § 4(a), another statute, or court order.
- (2) For cases terminated in favor of the accused that are entitled to expungement under § 2(b), the clerk of court shall sequester the court records of the case such that access is not available unless specifically authorized by § 4(a), another statute, or court order. The clerk shall notify any appellate court in which the case was processed that this statute requires that any opinions in the case published on the court's website be modified to remove the defendant's full name, unless the defendant files a statement in the appellate court waiving this requirement.
- (3) For non-convicted charges in conviction cases that are entitled to expungement under § 2(c), the clerk of court shall sequester the electronic court records of the non-convicted charges such that access is not available unless specifically authorized by § 4(a), another statute, or court order. This chapter does not require restricting access to, or redacting, paper files related to non-convicted charges in conviction cases.
- (4) Within 30 days of sequestering the record under (2) or (3), the clerk of court shall notify the repository, any prosecutorial or law enforcement agency, and any lower court in which the case was processed, about the expungement. Within 30 days, the repository and such agencies shall sequester the following records, such that access is not available unless authorized by § 4(a), another statute, or court order:

 - (A) For an expungement under (2), all records relating to the court proceeding and arrest; and
 - (B) For an expungement under (3), the electronic records relating to the charge, including the arrest records relating to the charged offense or a felony arrest that was subsequently charged as a misdemeanor or less serious crime.
- (5) For a pending deferred judgment agreement or diversion agreement subject to § 2(b)(3), the [court] [clerk of court] shall provide that no court records in the matter shall be disclosed for non-criminal justice purposes, and notify the repository, any prosecutorial or law enforcement agency, and any lower court in which the case was processed that no records in the matter shall be disclosed for non-criminal justice purposes. Upon revocation of a diversion or deferred adjudication, the [court] [clerk

of court] shall reverse this non-disclosure and provide notice accordingly.

- (6) The jurisdiction shall exercise the extent of its authority to provide that expunged records in national, interstate, or state databases are either removed or sequestered, with access unavailable unless specifically authorized by § 4(a), another statute, or court order. Any records that are expunged under this section shall be considered “sealed record information” for the purposes of the National Crime Prevention and Privacy Compact, 34 U.S.C. § 40316.
- (7) For uncharged arrests entitled to expungement under § 2(a), and for cases terminated in favor of the accused entitled to expungement under § 2(b), the repository and law enforcement agencies shall [after a one year delay][forthwith], [destroy][sequester such that access is only available if authorized by statute or court order] the related biometric records, including mugshots, DNA, and fingerprints.
- (8) The subject of an expunged record:
- (A) need not reveal the existence of the expunged record and is legally entitled to state that no such record exists and that any underlying arrests, charges, diversion, deferred adjudication and/or court proceedings did not occur; and
- (B) is not liable for perjury, false statements, or any similar charges due to the denial or non-acknowledgement of an expunged record.
- (9) Correctional authorities upon release of a person without charges, and a court upon disposition of one or more charges against a person as a non-conviction, shall inform the person that their record will be automatically expunged, and shall explain the effect of that remedy. In addition, the state attorney general via a public internet website shall provide a notice explaining eligibility for and the effect of expunging non-conviction records, as well as how a person can determine whether their record has been expunged.

(b) Requests to correct errors relating to expungement

The repository and court shall issue regulations allowing individuals or their attorney to submit requests, at no cost, to expunge the record of an arrest, charge, and/or case on the grounds that the record should have been expunged or is otherwise erroneous or erroneously included in a criminal history report. Such requests shall be processed expeditiously.

Comment

a. Sequestering records. As discussed in § 2, comment (a), the model law requires the repository to initiate expungement of uncharged arrests, and the court to initiate expungement of charged cases. § 3(a) supplies the procedure: the repository or court clerk shall sequester the record in its possession, and with 30 days notify the arresting agency, and any other court or law enforcement or prosecutorial agency that may be in possession of the record (and for charged cases, the repository) to do so. As detailed in § 4(a), a sequestered record may not be accessed,

1 used, acknowledged, or disseminated unless authorized by statute or court order. § 4(a) provides
2 specific authorizations for disclosure to the subject of the record and for certain criminal justice
3 purposes, civil litigation, and research purposes.

4 *b. Redaction of appellate opinions.* In cases terminated in favor of the accused
5 following appeal, § 3(a)(2) directs the court clerk to notify the appellate court to remove the
6 defendant’s full name from any opinions published on the court’s website, unless the person
7 waives this requirement. Under current law, some states provide for redacting appellate
8 opinions, others prohibit it, and many statutes do not address the issue.³⁴

9 *c. Paper copies of non-conviction charges excluded.* As discussed in § 2, comment (d),
10 while the model law provides for electronic expungement of non-conviction charges in
11 conviction cases, it does not require restricting access to, or redacting, paper copies of court or
12 law enforcement files.

13 *d. Other databases.* § 3(a)(6) directs the jurisdiction to exercise the extent of its
14 authority to provide that expunged records in national, interstate, or state databases are removed
15 or sequestered, consistent with the model law.

16 This provision specifically provides that any expunged records shall be considered
17 “sealed record information” for the purposes of the National Crime Prevention and Privacy
18 Compact, 34 U.S.C. § 40316, but as discussed below, there could be challenges to this
19 application. Under this Compact, the FBI and the 34 Party States,³⁵ “agree to maintain detailed
20 databases of their respective criminal history records, including arrests and dispositions, and to
21 make them available to the Federal Government and to Party States for authorized purposes.” *Id.*
22 Article 4 provides for: (1) the FBI to exclude “sealed records” when providing criminal history
23 records to state repositories for noncriminal justice purposes as authorized by specified federal
24 and state law; and (2) the FBI and state repositories to exclude “sealed records” when providing
25 criminal history records to criminal justice agencies, and to other governmental or
26 nongovernmental agencies for noncriminal justice purposes as authorized by specified federal
27 and state law. *Id.* § 40316, art. IV. “Sealed record information” is defined by the Compact
28 statute, with respect to adults, as “that portion of a record that is—(i) not available for criminal
29 justice uses; (ii) not supported by fingerprints or other accepted means of positive identification;
30 or (iii) subject to restrictions on dissemination for noncriminal justice purposes pursuant to a
31 court order related to a particular subject or pursuant to a Federal or State statute that requires
32 action on a sealing petition filed by a particular record subject.” *Id.* § 40316, art. I(21)(A).

33 There is a risk that the Compact’s definition of “sealed records information” could
34 exclude expunged records under certain adaptations of this model law. Namely, the model law
35 allows a jurisdiction to: (1) make expunged records available for criminal justice uses under
36 § 4(a)(1)(B) (not satisfying the first clause of the definition of sealed records); (2) not destroy
37 biometric information under § 3(a)(7) (not satisfying the second clause); and (3) provide for the
38 court clerk—rather than the court—to initiate expungement under § 3(a) (not satisfying the third
39 clause). The Compact’s definition of sealed records does not appear to contemplate an

1 automated relief system without petitions or judicial orders: the third clause only includes
2 records subject to court-ordered or petition-based relief. One way to overcome this definitional
3 problem is to direct the court to periodically issue an omnibus order expunging all records
4 eligible for automatic relief in that period.³⁶

5 *e. Biometric records.* For biometric records (also known as identification records)
6 associated with an expunged arrest or charge—including mugshots, fingerprints, and DNA—
7 § 3(a)(7) gives a jurisdiction options to either sequester or destroy the records upon either
8 expungement or after a one-year delay. Currently, some states require agencies to destroy
9 biometric records associated with the arrest or court proceeding following expungement or
10 record-sealing, but others do not require destruction if the information is preserved such that it
11 does not indicate involvement in the criminal justice system.³⁷

12 *f. Authorized denial.* § 3(a)(8) entitles the subject of an expunged record to lawfully
13 deny or not acknowledge the record as well as any underlying arrest, charge, or diversion,
14 deferred adjudication, or court proceeding. A person is not liable for perjury, false statements, or
15 similar charges for doing so. This approach is consistent with current law in many states.³⁸
16 (While it is not clear that such a provision provides immunity from federal perjury or false
17 statement charges, a person’s knowledge of this provision should negate any criminal intent.) In
18 addition, § 4(c) prohibits civil decision-makers from inquiring about, disseminating, or taking
19 adverse action based on expunged records—as well as certain non-conviction records
20 generally—or failure to disclose them. And it requires that criminal history inquiries explicitly
21 exclude expunged records.

22 *g. Notice.* § 3(a)(9) provides for an explanation, upon release without charges, upon a
23 non-conviction disposition of charges, and via the internet, about eligibility for and the effect of
24 expungement, as well as how to determine if one’s record has been expunged. The model law
25 does not go further and provide for individualized notification upon expungement, i.e. via mail
26 or the internet, out of concern that sending notices could expose records to third-parties,
27 undermining the purposes of expungement. Further, obtaining current contact information could
28 be burdensome.³⁹ However, the absence of individualized notice in an automatic relief system is
29 likely to result in many beneficiaries being unaware that their record has been expunged.
30 Therefore, jurisdictions should consider devising more targeted notification processes, taking
31 into account trauma-informed research and principles.⁴⁰

32 *h. Error correction.* It is inevitable that errors will arise on people’s criminal records, as
33 multiple institutions and officials are involved in the creation, maintenance, and expungement of
34 criminal records. Yet, jurisdictions may not have any formal process or authority that allows
35 individuals to have errors in their criminal record corrected.⁴¹ Therefore, § 3(b) requires the
36 repository and court to issue regulations to allow for requests to correct criminal record errors to
37 be submitted at no cost and processed expeditiously. *See also* Unif. Crim. Records Accuracy Act
38 Art. 4 (Unif. Law Comm’n 2018) (setting forth a process for requests to correct criminal history
39 record information).

³⁴ Compare Ky. Rev. Stat. Ann. § 431.076 (providing that if expungement is ordered, an appellate court which issued an opinion in the case may, upon motion of the petitioner, “order the appellate case file to be sealed and also direct that the version of the appellate opinion published on the court’s Web site be modified to avoid use of the petitioner’s name”); Ind. Code § 35-38-9-1(f) (providing in expunged cases that the records of the sentencing court, court of appeals, and supreme court must be redacted or sealed; and if a person is named in an appellate decision, the court must redact the electronic opinion and opinion held by publishers); Michigan Court Rules 8.119(I), 7.211(C)(9), 7.311 (trial and appellate courts may seal court records upon motion), with D.C. Code § 16-803(l) (providing that the Court may not order the redaction of the movant’s name from a published opinion of the trial or appellate courts); Md. Code. Ann., Crim. Proc. § 10-102(c) (providing that the published opinion of a court is not subject to expungement).

³⁵ In addition to the 34 party states, at least another ten states and territories have executed a Memorandum of Understanding (MOU) with the Compact Council (a council established by the Compact to monitor operations and proscribe rules and procedures), and this MOU is a voluntary commitment to abide by the Compact and Council rules. See *Frequently Asked Questions Regarding the National Crime Prevention and Privacy Compact Act of 1998*, National Crime Prevention and Privacy Compact Council (Nov. 2016; non-substantive updates July 2019), <https://ucr.fbi.gov/cc/library/compact-frequently-asked-questions>.

³⁶ Pennsylvania and Utah’s automated record relief systems provide for judicial orders, while California’s does not. Compare 18 Pa. Cons. Stat. § 9122.2(b)(5) (“Each court of common pleas shall issue monthly an order for limited access for any [eligible] record in its judicial district”); Utah Code Ann. §§ 77-40-114, -115 (providing for judicial orders for automatic expungement cases, except traffic offenses) with 2019 CA A.B. 1076, CA 2019-2020 Regular Session (“The department [of justice] shall grant relief to a person identified pursuant to [arrest relief and conviction relief eligibility]. . . . On a monthly basis, the department shall electronically submit a notice to the superior court having jurisdiction over the criminal case, informing the court of all cases for which a complaint was filed in that jurisdiction and for which relief was granted”).

³⁷ Compare Ala. Code § 41-9-625 (law enforcement required to delete photographs, “fingerprints and other identifying information” within 30 days of release if the person is not charged or is cleared of the charges); *Mobile Press Register, Inc. v. Lackey*, 938 So. 2d 398, 402 (Ala. 2006) (“other identifying data” means “information that can be used to track down and identify persons in the manner that photographs and fingerprints are used. Examples include an individual’s blood type, height, weight, hair color, eye color, scars, physical deformities, etc.”); Mich. Comp. Laws §§ 28.243(8), (10) (where a person has been found not guilty or nolle prosequi or where charges were dismissed before trial—if the prosecutor agrees, the court orders, or the judge and prosecutor do not object within 60 days—the arrest record, biometric evidence, arrest card, and fingerprints, shall be expunged or destroyed, as appropriate); V.I. Code Ann. tit. 5, § 3731 (an expungement order includes all “photographs . . . fingerprints and the collection of DNA samples”) with La. Code Crim. Proc. Ann. art. 972 (expungement excludes DNA); Fla. Stat. §§ 943.045(5), (6) (“Criminal history information” subject to sealing and expungement “does not include identification information, such as biometric records, if the information does not indicate involvement of the person in the criminal justice system.”); Ga. Code Ann. § 35-3-30(4)(A) (restricted and sealed records “does not include identification information, such as fingerprint records, to the extent that such information does not indicate involvement of the individual in the criminal justice system”). A federal statute directs expungement of DNA from the FBI’s DNA index if the DNA was included based on a federal arrest, and a final court order establishes that any charges were dismissed or acquitted, or not filed during the applicable time period. 42 U.S.C. § 14132(d); 10 U.S.C. § 1565(e).

³⁸ See, e.g., Alaska Stat. § 12.62.180; Ark. Code Ann. § 16-90-1417; Cal. Penal Code § 851.91(e)(2)(B); Col. Rev. Stat. § 24-72-703(2)(b); Conn. Gen. Stat. § 54-142a(e)(3); Del. Code Ann. tit. 11, § 4376(e); Haw. Rev. Stat. § 831-3.2(e); Kan. Stat. Ann. §§ 22-2410(g); 21-6614(k); Wyo. Stat. Ann. § 7-13-1401(f). In addition, some states authorize denial of an expunged or sealed record with specific exceptions. See, e.g., D.C. Code §§ 16-801(11); 16-803(m) (exceptions for jury service, and certain government or licensed employment); Fla. Stat. §§ 943.059(6); 943.0585(4) (specific exceptions such as criminal justice employment, subsequent prosecution, admission to the bar, certain licenses and sensitive employment, etc.); La. Code Crim. Proc. Ann. art. 973(C) (exceptions for law enforcement, prosecutors, and courts). Furthermore, some states authorize denial of the record in specified civil contexts (but tend to also include broader language that the proceedings are deemed not to have occurred). See, e.g., Ala. Code § 15-27-6 (“the proceedings regarding the charge shall be deemed never to have occurred The petitioner whose record was expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application. However, the petitioner whose record was expunged shall have the duty to disclose the fact of the record and any matter relating thereto to any government regulatory or licensing agency, any utility and its agents and affiliates, or any bank or other financial institution”); Ky. Rev. Stat. Ann § 431.076 (“After the expungement, the proceedings in the matter shall be deemed never to have occurred The person whose record is expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit, or other type of application”). Other states do not explicitly address the issue. See, e.g., Ga. Code Ann. § 35-3-37; Idaho Code Ann. § 67-3004; Iowa Code § 901C.2.

³⁹ Cf. Cal. Health & Safety Code § 11361.9 (providing that, by July 1, 2020, the prosecution must determine and notify the court and public defender whether it will challenge sealing of marijuana convictions on the basis of eligibility or that the person presents “an unreasonable risk to public safety”; the public defender must make “a reasonable effort” to notify the person whose potential relief is being challenged).

⁴⁰ See Aditi Joshi, *Rethinking the Notifications Process*, Code for America (Oct. 22, 2019), <https://www.codeforamerica.org/news/rethinking-the-notifications-process>.

⁴¹ See Laura Bult & Rosa Goldensohn, *The Rap-Sheet Trap: The 7-Year Quest to Fix 1 Skewed Sheet*, City Limits (March 3, 2015), <https://citylimits.org/2015/03/03/the-rap-sheet-trap-the-7-year-quest-to-fix-1-skewed-sheet/>, documenting a 7-year quest in New York to fix three arrest entries that were listed as open and still pending on a person’s RAP sheet, even though the arrests had already been resolved, and the arrests erroneously listed dates during which the person had been in jail. An advocacy group, the Legal Action Center, could not find a way to solve the problem via the NYPD, Manhattan district attorney’s office, and courthouse. The errors were ultimately resolved following a series of meetings between advocacy groups, including the Center, and top staff of the Manhattan district attorney’s office, after which the district attorney’s office sent a letter to Division of Criminal Justice Services stating that the arrests were mistakes and the district attorney had no intention of prosecuting them.

§ 4 Dissemination and Use of Non-Conviction Records

(a) Access to and use of expunged records

(1) A repository, law enforcement or prosecutorial agency, or court shall sequester and maintain expunged records in its possession in a separate area, respond to any inquiries as though no record exists, and not disseminate, use internally, or reveal the existence of expunged records for any purpose, except as authorized by statute or court order, including the following:

(A) Expunged records shall be disclosed to the subject of the records or the subject's attorney, at no cost, within [5] days of a request; an electronic method for making such requests via the internet must be made available; and a repository, if requested, shall include in such a disclosure a copy of the person's statewide criminal history report;

(B) *Alternative A:* A court may, upon a finding that justice requires it, order disclosure of expunged records to a member of a law enforcement agency [or prosecutor] who shall file an ex parte request certifying that the request is for the purpose of investigating, prosecuting, or enforcing criminal law [or for criminal justice employment or certification], and such records may be introduced in a criminal case in accordance with applicable rules of evidence, subject to the exclusions in § 4(a)(2);

Alternative B: Expunged records shall be available to a member of a law enforcement agency [or prosecutor] for the purpose of investigating, prosecuting, or enforcing criminal law [or for criminal justice employment or certification], and a court may order, upon a finding that justice requires it, that such records may be introduced in a criminal case in accordance with applicable rules of evidence, subject to the exclusions in § 4(a)(2);

(C) A court may, upon a finding that justice requires it, order disclosure of expunged records for criminal defense purposes to a criminal defense attorney or self-represented criminal defendant upon an ex parte request certifying in writing that the request is for the purpose of investigating or defending a criminal case, including to examine potential evidence of unlawful patterns of behavior by government actors, and such records may be introduced in a criminal case in accordance with applicable rules of evidence;

(D) A court may order disclosure of expunged records for the purposes of civilian investigation or evaluation of a civilian complaint or civil action concerning law enforcement or prosecution actions. The court shall issue any protective order appropriate to protect the confidentiality and security of the records, considering the public's interest and right of access;

(E) A court may authorize public disclosure of expunged records in civil or administrative proceedings arising from law enforcement or prosecution actions

1 if, after a hearing with notice to the subject of the records with an opportunity
2 to be heard, the court finds that the need for public disclosure of the records
3 substantially outweighs the subject's interests in non-disclosure. If the
4 proponent of the record is the subject of the record, no court authorization is
5 required; and

6 (F) Expunged records may be disclosed to persons for research purposes under an
7 agreement with a government agency that maintains the records, which limits
8 the use of the information to research and ensures confidentiality and security.

9 (2) Law enforcement officers and prosecutors shall not consider expunged records of
10 arrests and charges in making decisions concerning stops, searches, arrests, charges,
11 diversions, and deferred adjudications involving the subject of that record, except
12 regarding the specific investigation or case in which the expunged record originally
13 arose, and except that prior participation in diversion or deferred adjudication may be
14 considered in determining whether diversion or deferred adjudication is appropriate
15 in the instant matter.

16 (3) Courts shall not consider expunged records of arrests and charges in determining
17 bail, preventive detention, or the appropriate sentence in a subsequent case, except
18 that prior participation in diversion or deferred adjudication may be considered in
19 determining whether diversion or deferred adjudication is appropriate in the instant
20 matter. Courts, parole boards, and corrections authorities shall not consider
21 expunged records in making decisions concerning confinement, supervision,
22 revocation or release.

23 (4) No risk assessment tool, method, or algorithm used by police, prosecutors, courts,
24 parole boards, or corrections authorities shall take account of expunged records of
25 arrests and charges.

26 (5) No provision of this law is intended to restrict access to deidentified data about
27 arrests and criminal cases—that is, records that exclude all personally identifying
28 information (such as names, Social Security numbers, driver's license numbers,
29 home addresses, and birth month and day). For purposes of research and
30 government accountability, the jurisdiction shall make available, in publicly
31 accessible criminal justice databases, deidentified individual- and case-level
32 information about arrests, court proceedings, charges, and convictions. These
33 deidentified datasets should retain information about records that have been
34 expunged or sequestered pursuant to this chapter.

35 **(b) Dissemination by private providers of criminal records**

36 (1) If a repository, court, or government agency contracts with a private entity or person
37 to sell criminal history record information, in bulk or otherwise, and previously
38 provided the private entity or person with records of an arrest or charge that was

subsequently expunged, the repository, court, or government agency shall include notice in a subsequent request for records about the person that the arrest or charge has been expunged. Such contracts shall require that the entity or person delete any expunged records from its files, and not disseminate them, unless the entity or person is the subject of the record or their attorney. They shall also include a penalty provision as in (e)(2).

(2) A private provider of criminal records shall not disseminate to a third party:

(A) Any record of an arrest or criminal charge if more than six months have elapsed since the record was retrieved from the government agency or court;

(B) Any record of an arrest if the private provider of criminal records has information that the arrest record has been expunged; the prosecution has been declined; or more than 60 days have elapsed from the date of arrest and there is no record of any charges having been filed; and

(C) Any record of a criminal charge and any underlying arrest if the private provider of criminal records has information the charge has been expunged; the charge resulted in a dismissal, acquittal, or another non-conviction disposition; the charge resulted in a conviction for a different or lesser offense; a deferred judgment agreement or diversion agreement is pending; or 12 months have elapsed from the date of the charge and there is no record of conviction for the offense of the charge. This provision does not prohibit dissemination of an arrest if a person was convicted for the offense of the arrest.

(c) Civil inquiries and adverse action

(1) Unless specifically authorized by federal or state law or court rule, it is unlawful for employers, occupational and professional licensing boards, housing providers, educational institutions, lending institutions, and insurers—in making lawful criminal history inquiries about a current or prospective applicant, employee, volunteer, licensee, tenant, home purchaser, mortgagor, student, borrower, or insured—to inquire into, consider, disseminate information about, or take adverse action based on:

(A) whether a person has been arrested or charged [, except for a pending felony charge, where the person has been released pending trial and is not currently enrolled in diversion or deferred adjudication for the charge]; or

(B) an expunged record.

(2) In making a criminal history inquiry described in (1):

(A) information must be requested in a manner that explicitly excludes expunged records. Even if not explicitly limited, any criminal history inquiry shall be deemed to not call for information about expunged records; and

(B) no adverse action may be taken based on failure to disclose or acknowledge an

arrest, charge, or record described in (1)(A) or (B).

(d) Limitation of liability

(1) In any civil action:

(A) There shall be no liability against an employer, occupational or professional licensing board, housing provider, educational institution, lending institution, or insurer if the grounds for liability are that the defendant was negligent or otherwise at fault for providing employment, volunteer work, licensing, tenancy, a home purchase, a mortgage, an education, a loan, or insurance notwithstanding a non-conviction record; and

(B) A non-conviction record may not be introduced as evidence against a person or entity that provided employment, volunteer work, licensing, tenancy, a home purchase, a mortgage, an education, a loan, or insurance notwithstanding the record, without regard to whether the person or entity knew of or suspected the existence of a record.

(2) A person or entity described in this subsection does not have a duty to investigate based solely on their knowledge or suspicion of the fact of an arrest or charge.

(e) Civil enforcement

(1) A person or entity that, in violation of §§ 4(a) or (c), disseminates, inquiries about, uses, or takes adverse action based upon a criminal record or failure to disclose a criminal record, shall be liable for a civil penalty of [\$x.00] per violation, damages, and other available remedies, enforceable by the attorney general, [appropriate county or local government attorney,] or the subject of the record. In a civil enforcement action, the judgment against a defendant shall include attorney's fees and costs.

(2) A private entity or person that fails to delete records as required within 15 days of a notice of expungement or disseminates expunged records after such notice, in violation of § 4(b)(1), and a private provider of criminal records that disseminates records in violation of § 4(b)(2), shall be liable for a civil penalty of [\$x.00] per arrest or charge multiplied by the number of days elapsed between the date that the deletion became required or the dissemination became prohibited and the time of the violation. This penalty is enforceable by the attorney general, [appropriate county or local government attorney,] or the subject of the record. In a civil enforcement action, the judgment against a defendant shall include attorney's fees and costs, and may include suspension of access to electronic court and repository records for a specified period of time, and other available remedies.

(3) A government employee who fails to comply with a requirement of this section may be subject to discipline by their employer.

Comment

a. Scope. This section addresses dissemination and use of non-conviction records, including arrests and charges that have been expunged pursuant to §§ 2 and 3, and arrests and charges generally.

b. Sequestering expunged records. § 4(a) requires custodians of records not to acknowledge or disseminate expunged records absent authorization by statute or court order.

c. Subject of the record. § 4(a)(1)(A) authorizes expedited disclosure of an expunged record to the subject of a record or their attorney (within five days is recommended). An electronic method via the internet must be made available. A repository, if requested, shall include in such a disclosure a copy of the person's statewide criminal history report. A jurisdiction should also provide for disclosure when the subject is deceased, to ensure access for the representative of the estate and/or a person who is eligible to bring a wrongful death action on the subject's behalf.

d. Criminal justice. § 4(a) addresses criminal justice access to and use of expunged non-conviction records in several ways. First, § 4(a)(1)(B) provides two alternative provisions for law enforcement and prosecutor access. Second, §§ 4(a)(2) through (4) limits specific uses of expunged records by law enforcement, prosecutors, courts, and correctional authorities. Third, § 4(a)(1)(C) provides for access and use for purposes of criminal defense.

The model law does not take a position on whether law enforcement and prosecutorial officials should be required to obtain a court order to access expunged non-conviction records (if the court on a finding that justice requires disclosure), or whether access should be provided on a routine basis. The states are roughly split on the question of law enforcement access to expunged or sealed non-conviction records, and the question appears to be one on which there are valid arguments to be made for either position.⁴² Requiring a court order—and a judicial determination that justice requires disclosure—provides greater protection against government officials making discretionary criminal justice decisions that disfavor a person because of their expunged non-conviction record. But such a requirement could limit the availability of such records to develop facts for the purposes of investigation and prosecution.

In either case, the model law prohibits criminal justice officials from using an expunged record to make a variety of decisions. Specifically, law enforcement and prosecutorial officials may not consider a person's expunged non-conviction record of arrests and charges in making decisions concerning stops, searches, arrests, charging, diversion, and deferred adjudication involving that person (except with regard to the specific matter underlying the expunged record and that prior participation may be considered in eligibility for diversion and deferred adjudication). Courts may not consider such records in bail, preventive detention, and sentencing (except that prior participation may be considered in eligibility for diversion and deferred adjudication). Courts, parole boards, and corrections authorities may not consider them in confinement, supervision, revocation, or release decisions. Risk assessment instruments used

1 by criminal justice officials may not take account of expunged records of arrests and charges,
2 including any risk assessment instrument that has already been adopted in the jurisdiction.

3 Criminal defense attorneys and self-represented criminal defendants are also authorized
4 to seek a court order for access to expunged records. A jurisdiction that allows routine access for
5 prosecutors and law enforcement to expunged records, but not defense counsel, should enact
6 additional provisions such as broad discovery rules to level the playing field between the
7 government and defense in criminal cases.

8 *e. Civil litigation.* Disclosure and use of expunged records for complaints or civil
9 actions concerning law enforcement or prosecution actions is provided for by §§ 4(a)(1)(C)–
10 (D).⁴³ The initial disclosure of records may be subject to protective order; and the public
11 disclosure in a civil or administrative proceeding may be authorized by a court following a
12 hearing with notice and opportunity to be heard for the subject of the records. Such requirements
13 are not applicable where the proponent of the record is the subject of the record.

14 *f. Research.* Expunged records may be disclosed for research with an agreement to
15 ensure confidentiality and security.⁴⁴ § 4(a)(1)(F). Deidentified information about expunged
16 records is made available as part of publicly accessible criminal justice databases. § 4(a)(5).

17 *g. Private criminal record providers.* § 4(b) prohibits “private providers of criminal
18 records” from disseminating expunged records and non-conviction records where specified
19 periods of time have elapsed. Private providers are broadly defined in § 1(c)(8) to include any
20 non-governmental person or entity that collects or distributes criminal records for commercial
21 purposes, except to the extent that they engage in journalism, and excluding attorneys that
22 assemble or distribute criminal history records on behalf of clients.

23 In the digital era, privately-owned databases collect massive amounts of criminal record
24 information from public sources—most commonly from court records but also from police
25 blotters and other publicly available sources of information.⁴⁵ The hundreds of commercial
26 background screeners that conduct the majority of criminal background checks often rely on
27 these private databases. Some screeners send “runners” to check the results against courthouse
28 records, but some do not.

29 The Fair Credit Reporting Act (FCRA) imposes certain obligations background screeners
30 as “credit reporting agencies” (CRAs).⁴⁶ A CRA may not disseminate information about arrests
31 more than seven years old.⁴⁷ CRAs must follow “reasonable procedures to ensure maximum
32 possible accuracy,” and in the employment context, unless contemporaneous notice is provide to
33 the person being screened, must use “strict procedures” to ensure data is up to date.⁴⁸ When
34 screeners report expunged or sealed cases, they may take the position that they did not know
35 about the expungement. Despite litigation concerning reporting of expunged and sealed cases,
36 “[d]eficiencies of enforcement mechanisms, a certain degree of ambiguity in regulatory
37 guidance, and practical difficulties in constantly keeping databases up to date make the problem
38 of inaccurate and outdated criminal records hard to eradicate.”⁴⁹ In addition to commercial

1 screeners that are subject to FCRA, there are a variety of online “people search” services that
2 “scrape and buy official and semi-official sources, criminal, financial, licensing, and many
3 others, and make compilations available for a fee.”⁵⁰ Thus far, such services have successfully
4 argued they are “mere information aggregators” not subject to FCRA, by providing disclaimers
5 that users are not to use the information for decision-making (such as employment or housing)
6 and but only “in an information-gathering spirit.”⁵¹

7 To address the dissemination of expunged records by private providers, including both
8 commercial background screeners concededly subject to FCRA and “people search” services that
9 claim not to be covered, § 4(c) has a two-pronged approach. The first paragraph obligates
10 courts, repositories, and other government records custodians that contract with private entities
11 or persons to sell or otherwise make available to them criminal history record information to take
12 the follow steps. First, if the custodian previously supplied the private entity or person with
13 records of an arrest or charge that was subsequently expunged, the custodian must include a
14 notice of expungement in a subsequent request for records about the same person. Second, the
15 contract must require that upon such a notice, the entity or person delete any expunged records
16 from its files and not disseminate them, unless the entity or person is the subject of the record or
17 their attorney. This is an adaptation of the approach of the Administrative Office of
18 Pennsylvania Courts, which provides monthly a data file, the “LifeCycle file,” listing expunged
19 cases to be removed from private databases, per a contract with buyers.⁵² The model law does
20 not require a monthly list of all expunged cases, which could be burdensome, large, and lead to
21 unintended exposure of records to third-parties.

22 The second paragraph prohibits a “private provider of criminal records”—defined at
23 § 1(c)(8)—from disseminating a variety of arrest and charging records. The first prohibition
24 concerns arrests or charges where more than six months lapse after the record was retrieved from
25 a government source. This protects against distribution of stale data, which is more likely to
26 include “open” cases that have since been expunged or otherwise resolved. The second
27 prohibition covers arrest records, if there is information that the arrest has been expunged,
28 prosecution has been declined, or there is no record of charges after 60 days. The third
29 prohibition covers records of a charge, if there is information that the charge was expunged, if
30 the charge resulted in a non-conviction disposition or conviction for a different or lesser offense,
31 or if there is no record of conviction after 12 months.

32 *h. Civil inquiries and adverse action.* § 4(c) restricts civil inquiries and adverse action
33 based on non-conviction records in employment, occupational licensing, housing, education,
34 lending, and insurance, in several ways. First, it prohibits these civil decision-makers—unless
35 specifically required by federal or state law or court rule—from inquiring into, disseminating,
36 using, and taking adverse action based on non-conviction records, including but not limited to
37 records have been expunged. An optional provision excludes from these prohibitions pending
38 felony charges for which a person is released pending trial and is not currently enrolled in
39 diversion or deferred adjudication. An earlier provision, § 3(a)(8) authorizes the subject of an

expunged record to deny its existence; this subsection goes further and adopts the approach of a few states to require covered civil decision-makers to make explicit that a person need not respond to criminal history inquiries with information about expunged records.⁵³ It also deems such inquiries not to call for expunged records, even if not explicitly limited. Finally, the subsection provides that no adverse action may be taken based on failure to disclose or acknowledge a non-conviction record covered by the subsection. Note that these prohibitions on the use of an arrest or charge do not prohibit obtaining or using other information indicating that a person actually engaged in conduct underlying an arrest or charge, or imposing discipline or other sanctions pursuant to non-criminal law or authority.

This subsection is consistent with a growing number of state laws that prohibit use of most non-conviction records in employment and/or occupational licensing.⁵⁴ It is an important complement to automatic expungement, as it can take effect immediately, whereas automatic expungement requires lead time and institutional resources to implement. Further, many beneficiaries of automatic expungement will not know that their records have been expunged or that they are authorized to deny the expunged records. In addition, this subsection provides protections for out-of-jurisdiction non-conviction records, which will not be subject to the expungement process. Unlike expungement, however, this subsection does not restrict access to records, but rather commands civil decision-makers not to ask about, seek out, or use records, which may prove difficult to enforce.

i. Limitation of liability. § 4(d) limits liability and evidence in a civil lawsuit brought on grounds that the defendant was negligent or at fault for providing specified civil benefits or opportunities notwithstanding a record of arrest or criminal charge. This provision is influenced by existing statutory negligent hiring protections in some states.⁵⁵

j. Civil enforcement. § 4(e) provides for civil enforcement tools for dissemination and use of non-conviction records in violation of § 4—including civil penalties, damages, and attorney’s fees and costs in an enforcement actions, and public employee discipline.⁵⁶ For violations by private providers of criminal records, the court is specifically authorized to suspend access to electronic court and repository records for a specified period of time.

⁴² See Margaret Love & David Schlusell, *Survey of law enforcement access to sealed non-conviction records*, Collateral Consequences Resource Center (June 26, 2019), <http://ccresourcecenter.org/2019/06/26/national-survey-of-law-enforcement-access-to-sealed-non-conviction-records/> (half the states either do not allow law enforcement access to sealed records for routine law enforcement activity, or condition law enforcement access on a court order, as in New York, or formal written request).

⁴³ See, e.g., D.C. Code § 16-806(b).

⁴⁴ See, e.g., Me. Rev. Stat. Ann. tit. 16, § 705(1)(D).

⁴⁵ See Alessandro Corda & Sarah E. Lageson, *Disordered Punishment: Workaround Technologies of Criminal Records Disclosure and The Rise of a New Penal Entrepreneurialism*, *The British Journal of Criminology* (June 18, 2019), <https://doi.org/10.1093/bjc/azz039>; Sharon Dietrich, *Ants Under the*

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

⁴⁶ A CRA is defined as: “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.” 15 U.S.C. § 1681a(f).

⁴⁷ That is, where the statute of limitations has run and the person’s annual salary is not reasonably expected to be \$75,000 or more. 15 U.S.C. § 1681c.

⁴⁸ 15 U.S.C. §§ 1681e(b), 1681k.

⁴⁹ Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Record Exceptionalism*, 30 FED. SENT’G REP. 241, 243 (2018).

⁵⁰ See Corda & Lageson, *supra* note 45.

⁵¹ *Id.*

⁵² See Dietrich, *supra* note 45.

⁵³ See, e.g. Ind. Code § 35-38-9-10(c); Mass. Gen. Laws ch. 276, § 100A.

⁵⁴ See, e.g. Cal. Labor Code § 432.7; Gov’t Code § 12952 (employers in most situations may not inquire into, consider, or distribute information about diversion or arrest not followed by conviction, except release pending trial, and certain arrests of health care workers); Assem. Bill 2138, 2017-2018, ch. 995, 2018 Cal. Stat. (effective July 1, 2020, most state licensing boards may not base denial on an arrest resulting in non-conviction); Colo. Rev. Stat. § 24-5-101 (licensing agencies and public employers may not use arrests or charges not resulting in conviction (underlying conduct may be considered) for denial or adverse action); Conn. Gen. Stat. § 46a-80(e) (in applications for state employment, permitting, licensing, certification, or registration, the state may not use or disseminate records of arrest not followed by conviction); D.C. Code § 32-1342 (the government (except courts) and private employers with more than 10 employees may not inquire into non-pending arrests or charges that did not result in conviction); Mich. Comp. Laws § 37.2205a (employers may not consider misdemeanor arrest records); Wis. Stat. § 111.335 (it is employment discrimination to ask an employee or occupational licensee or applicant for information about an arrest record, except if charges are pending, or employment depends on bondability); see also *50-state comparison chart on Consideration of Criminal Records in Licensing and Employment*, Restoration of Rights Project (Aug. 2019), <http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing-and-employment/>.

⁵⁵ See Colo. Rev. Stat. § 8-2-201(b) (negligent hiring protections for convictions not “directly related” to employment, arrests and charges that did not result in conviction, and sealed or pardoned records); 730 ILCS 5/5-5.5-15(f) (protections for reliance on certificate of relief from disabilities); Ind. Code § 22-2-17 (protections for arrests and charges that did not result in conviction, records that were expunged, pardoned, sealed, vacated, or reversed, and unrelated offenses). Minn. Stat. § 181.981 (arrests and charges that did not result in conviction, sealed records, etc.); N.Y. Exec. Law § 296(15) (antidiscrimination law compliance); N.C. § 15A.173.5 (knowledge of certificate of relief); Ohio Rev. Code Ann. § 2953.25-G(2) (certificate of qualification for employment); Tenn. Code Ann. § 40-29-107 (certificate of employability); Tex. Civil Practice and Remedies Code § 142.002 (suits based solely on conviction); RCW §§ 9.97.010, 9.97.020 (certificate of restoration of opportunity).

⁵⁶ See, e.g., Cal. Penal Code § 851.92(c); Md. Code Ann., Crim. Proc. § 10-108.