II(B)(1). 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 plea, where completion of specified requirements results in dismissal. Occasionally, the accused goes to trial and is acquitted, or prevails on appeal. These are all scenarios that do not result in conviction, yet each produces a criminal record that may result in a litany of adverse consequences for its subject.\(^1\) Sometimes there is no indication in the official court or repository files of whether or how an arrest or charge was resolved, but the record remains open, the matter apparently still pending, which may seem to an employer or landlord more ominous than a closed case.\(^2\)

It is particularly disturbing, at a time when so many Americans have taken to the streets to protest police violence and racism, that in most states the mere fact of an arrest will leave a person with a criminal record that is hard to erase, creating long-term barriers to employment and housing, and in other areas of daily life. Protesters should not wind up with a lifelong criminal record.\(^3\)

In 2019, we published a **Model on Law on Non-Conviction Records**.\(^4\) Drafted in consultation with an advisory group of lawyers, judges, lawmakers, academics,

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2. The FBI’s Interstate Identification Index system, compiled from state repository submissions, was “missing final disposition information for approximately 50 percent of its records” as of 2006. U.S. Dept. of Justice, Office of the Attorney General, The Attorney General’s Report on Criminal History Background Checks 3 (June 2006), [https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf](https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf).


policy experts, and advocates, the model law provides policy guidance on limiting access to and use of non-convictions. The conventional expungement or sealing process requires a burdensome and expensive court procedure that only a small percentage of those who are eligible will ever complete. Instead, our model recommends automatic expungement of all non-conviction records, including records with no final disposition, except for pending matters. The model also sets out recommended restrictions on accessing, inquiring about, and commercially disseminating non-conviction records.

Consistent with these recommendations, 15 states now automatically expunge or seal most non-conviction records. California and North Carolina will join this group when their recently enacted laws go into effect in 2021. Of these 17 laws, 10 were enacted in the last five years alone: Kentucky and North Carolina (2020); California, New Jersey, and Utah (2019); New Hampshire, Pennsylvania, and Vermont (2018); Montana (2017); and Nebraska (2016). The other seven states are Alaska, Connecticut, Maine, Michigan, New York, South Carolina, and Wisconsin. Some of these laws provide relief at the time of disposition and others after a waiting period. While these reforms are promising, some states do not cover dispositions like uncharged arrests or dismissals without prejudice, or relief may be prospective only (i.e. California), requiring affected individuals to file a court petition to obtain relief. Those gaps can be filled through subsequent lawmaking. For example, in New York, a progressive 1970s-era law provided for sealing of non-convictions at disposition by the court, but uncharged arrests frequently languished in the state records repository because the police or prosecutor neglected to indicate that the matter would not proceed. In 2019, New York made undisposed cases confidential after five years, providing relief for people with uncharged arrests and other matters stuck in limbo.

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6 Expungement is automatic for non-convictions disposed in Magistrate or Municipal Court, but a petition is required if disposed in other courts. See S.C. Code Ann. § 17-22-950.

7 See N.Y. Crim. Proc. Law § 160.50.

8 Id. § 845-C. 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

In addition to the 17 states that have automatic sealing, 7 states expedite non-conviction relief through motions filed at the time of dismissal or acquittal without any waiting period (Colorado, Illinois, Massachusetts, Mississippi) or through a simplified administrative procedure (Delaware, Hawaii, Idaho).9

But 26 states and D.C. still require a court petition process before they will seal or expunge non-convictions, an approach increasingly seen as inappropriate and unnecessary for this category of records. Many of these jurisdictions unreasonably restrict eligibility and impose burdensome procedural hurdles such as filing fees and contested hearings.10 The federal system and Arizona completely lack a non-conviction expungement law, though Arizona allows non-convictions to be notated as “cleared” if the subject can show that the charge was “wrongful.”11 Federal law provides no relief at all.12

9 See supra note 4.
10 Id.
12 Federal law has a narrow expungement authority that applies to first-offense drug deferred adjudication for persons under 21, 18 U.S.C. § 3607(a), and some courts have held that federal courts have inherent ancillary authority to expunge records where an arrest or conviction is found to be invalid or a clerical error is made. See, e.g., United States v. Jane Doe, 833 F.3d 192 (2d Cir. 2016), vacating 110 F. Supp. 3d 448 (E.D.N.Y. 2015) (collecting cases); United States v. Crowell, 374 F.3d 790, 792-93 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005).
For these 26 petition-based states, restrictive eligibility criteria may include disqualifications based on some unrelated record, such as a prior conviction or prior record-sealing, a current registration obligation, or a bare arrest during a waiting period. For example, in Florida, a prior conviction in a Florida court for any felony or a list of specified misdemeanors, including as a minor, disqualifies a person from sealing or expungement, as does a prior sealing or expungement of any kind.13 The District of Columbia has one of the most restrictive schemes, applying similar complex eligibility criteria to conviction and non-conviction records alike, including multiple waiting periods and disqualifying arrests and convictions, ending with a discretionary decision by a judge.14

14 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 multi-factor balancing test). For example, in what may be a unique concession to
Other states limit eligibility based on the type of offense or nature of the non-conviction disposition. For example, Alabama does not allow violent felony charges to be expunged unless the person was acquitted after trial.\(^{15}\) In one high profile 2019 case, the state dropped capital murder charges before trial after surveillance footage exonerated the accused, but the record was categorically ineligible for expungement because the now-failed charges were violent felonies. Alabama’s attorney general acknowledged that the case “may draw light to a situation in which the [expungement] statute could be amended,” but no steps have apparently been taken to do this. \(^{16}\) A few states, including Idaho, Virginia, and Wyoming, do not permit deferred adjudication cases to be expunged, no matter the offense.

Some of the 26 petition states require satisfaction of court debt, such as costs and fees, as a prerequisite to expungement, despite the lack of a conviction in the case.\(^{17}\) Iowa’s requirement to pay all court debt as a precondition to expungement was challenged by a woman who could not afford to pay the $718 court-appointed attorney fee imposed when her case was dismissed.\(^{18}\) After the Iowa Supreme Court rejected her argument that this represented unfair wealth discrimination, we filed an amicus brief encouraging the U.S. Supreme Court to take up the case, but the petition was declined.\(^{19}\)

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\(^{17}\) See, e.g. Iowa Code § 901C.2(a)(2).

\(^{18}\) See State v. Doe, 927 N.W.2d 656 (Iowa, 2019).

\(^{19}\) See id.; Amicus Brief of Collateral Consequences Resource Center et. al in Support of Petition for Certoari, No. 19-169 (U.S. 2019), available at https://www.supremecourt.gov/DocketPDF/19/19-169/115174/20190909162439215_190903%20for%20E-Filing.pdf. In a subsequent case, the Iowa Supreme Court rejected the state’s argument that the court debt requirement extends to any debt owed in any case, holding that a person only need to pay off the debt in the case sought to be expunged in order to be eligible. See Doe v. State, No. 19–1402 (Iowa, May 22, 2020).
Unlike states that expunge non-convictions at the time of disposition on an automatic basis (i.e. New Jersey) or upon request (i.e. Colorado), the petition-based states usually have waiting periods—during which, in some states such as Missouri, an otherwise-eligible person must remain conviction-free or the waiting period begins anew. The length of time varies from days (180 in Wyoming) to a year (Indiana) to multiple years (3 in Missouri). Sometimes a state’s regular waiting period is extended for serious charges (D.C.), uncharged arrests (Nevada), or charges dismissed without prejudice or following diversion or deferred adjudication (Alabama). In a few cases, the person may not even be arrested during a recent period (i.e. Oregon requires a three-year arrest-free period, excluding the arrest sought to be expunged).

The petition process itself is usually costly as a result of filing fees, background fees, the demanding production of law enforcement and court records, collection of evidence of good character, and/or formal service on prosecutors, etc. A formal court hearing may be required at which the prosecutor and alleged victims may oppose relief—either in every case or if an objection is filed. Sometimes the requirement of a hearing is left entirely up to the court.

Some petition states have a generous standard of review for those petitioning to expunge non-convictions (Indiana, for example, requires the court to grant relief to eligible applicants unless charges are pending against them, and Nevada applies a rebuttable presumption in favor of sealing). But other states apply a broad discretionary standard more commonly found in the conviction context. Oregon, for instance, requires the court to determine “that the circumstances and behavior of the applicant…warrant setting aside” and sealing the non-conviction record—the same discretionary standard that Oregon applies to conviction records.

The end result of all these barriers is not only exclusion but also deterrence. The unreasonable call for completion of costly, intimidating, and time-intensive tasks,

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such as document production and service of process, means that many thousands will resign themselves to simply living with the fact of a record. Years after charges were dismissed, very few will want to have to hire a lawyer again and make a trip back to the police station and courthouse, especially if they have since moved out of town or to another state. So it is encouraging that so many additional states have moved towards automatic or streamlined expungement of non-convictions in recent years, a trend that will hopefully continue to accelerate. But it is disturbing, particularly at a time when large-scale protests have produced thousands of arrests, that more than half the states retain antiquated petition systems in urgent need of reform.