

**NEVER FREE AND CLEAR: A COMPARISON BETWEEN CRIMINAL
RECORD CLEARING SYSTEMS ACROSS THE UNITED STATES AND
AUSTRALIA**

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I. INTRODUCTION

“You keep doing the things that get you the money because you can’t get other jobs”¹ After graduating from high school, Gregory Payne began working for a company that made insurance manuals.² When his daughter got sick, he could not maintain his employment because he needed to take care of her.³ He began to sell drugs in order to financially support his family and was arrested and then sentenced to time in prison.⁴ When Mr. Payne was released, he could not find work, so he returned to dealing.⁵ He was arrested and imprisoned again.⁶ And again.⁷ And again.⁸ And again.⁹ Eventually, Mr. Payne decided to turn over a new leaf, and moved 100 miles away from his previous home in Santa Monica, California, to California City.¹⁰ It has been over seven years since he used or sold drugs, but that does not change the fact that potential employers still reject him based on his criminal record.¹¹ Unfortunately, his story is not unique.¹²

In July 2012, Michael Mirsky lost his job as a phone line technician.¹³ There were not a lot of other local opportunities in that field, so he trained at a community college to become a heating and air-conditioning specialist and joined the Pipefitters’ Union.¹⁴ While unemployed during his training, he lived off his savings and gifts, trying to prevent the bank’s threatened foreclosure on his home and sustaining himself on donated meals.¹⁵ Understandably, Mr. Mirsky fell behind on child support.¹⁶ Unbeknownst to him, a warrant was issued for his arrest.¹⁷ In June 2014, police showed up at his house, knocked him down, and

¹ Binyamin Appelbaum, *Out of Trouble, But Criminal Records Keep Men Out of Work*, NEW YORK TIMES (Feb. 28, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ Appelbaum, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Appelbaum, *supra* note 1.

¹² See, e.g., Jason Bost, *After 20 Years, Still Haunted by a Drug Conviction*, THE MARSHALL PROJECT (Oct. 26, 2017), <https://www.themarshallproject.org/2017/10/26/after-20-years-still-haunted-by-a-drug-conviction>.

¹³ Appelbaum, *supra* note 1.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

handcuffed him.¹⁸ He struggled, and they charged him with resisting arrest.¹⁹ He had never been arrested before.²⁰ He eventually pled guilty to resisting arrest, a felony.²¹ His only immediate penalty was a \$411 assessment of court costs.²² However, his criminal record followed him.²³ The Pipefitters Union arranged job interviews for him, but after submitting about thirty applications, Mr. Mirsky did not receive any job offers, which he attributed to his conviction.²⁴ After thirty months of unemployment, he is now working a temporary job rolling stacks of crated milk and orange juice to the loading docks at a commercial dairy.²⁵ He is not making much, and there is no job security.²⁶ He faces possible foreclosure of his home, owes thousands of dollars in arrears on child support payments, and his church even told him he can no longer serve as an usher.²⁷ Mr. Mirsky, wondering how he can get out of this cycle, asked “[h]ow can I pay child support if I can’t get a job?”²⁸ Some policymakers suggest that getting his criminal record cleared might be the answer to Mr. Mirsky’s all-too-common plight.²⁹ However, it is not that simple.³⁰

For Americans, criminal records affect nearly every facet of their lives, from education to employment to housing.³¹ These effects are often referred to as “collateral consequences.”³² People with criminal records continue to be treated as “criminals” long after they complete their court-assessed punishments.³³ Despite its prevalence, however, research shows this system of collateral consequences is ineffective.³⁴ Research shows that once an individual remains crime-free for four to seven years post-conviction, their chances of recidivism align with those in the general population.³⁵ Nonetheless, the weaponization of criminal background data can make it nearly impossible for the many Americans with criminal records to

¹⁸ Appelbaum, *supra* note 1.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Appelbaum, *supra* note 1.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Appelbaum, *supra* note 1.

²⁹ See Rebecca Vallas, Beth Avery & Sharon Dietrich, *A Criminal Record Shouldn't Be a Life Sentence to Poverty*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/criminal-record-shouldnt-life-sentence-poverty-2/>.

³⁰ See generally *Expunging or sealing records Article*, AZLAWHELP, https://azlawhelp.org/articles_info.cfm?mc=13&sc=66&articleid=147 (last visited Oct. 10, 2021).

³¹ Vallas, *supra* note 29.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

move on and rebuild their lives.³⁶ While the law does provide some ways for Americans to clear certain records, many qualified candidates are unaware of their eligibility; for those who *are* aware, they may not know how to navigate the record-clearing process.³⁷

Lingering criminal records plague more than just American lives; indeed, many developed nations struggle with the disposition of criminal record.³⁸ However, Australia provides a compelling contrast to the U.S. in that Australia utilizes a more user-friendly system for record-clearing.³⁹

This Note discusses the processes for clearing criminal records in both the U.S. and Australia. Part II of this Note discusses the history of criminal recordkeeping systems in each country, both federally and state-by-state, and the systems through which someone can clear their criminal record. Part III compares and analyzes these systems, and evaluates how these systems affect reintegration considerations, including employment, education, housing, and recidivism. In Part IV, this Note will discuss the deficiencies in each country's systems and the need for more research. Nonetheless, this Note will recommend that U.S. policymakers adopt federally uniform record-clearing systems mirroring those in Australia because it allows individuals with criminal records to move forward. Additionally, the U.S. should implement more safeguards against discrimination on the basis of criminal background.

II. LEGAL BACKGROUND OF CLEARING CRIMINAL RECORDS

A. Australia

Australia is well-known for being originally colonized by convicts.⁴⁰ The British founded New South Wales as a penal colony in 1788, which paved the way for the transportation of more than 160,000 convicts from England, Ireland, Scotland, and Wales to Australia over the next eighty years.⁴¹ These penal colonies were used as an alternative to the death penalty.⁴² Now, about one in every five

³⁶ Vallas, *supra* note 29.

³⁷ Christie Thompson, *Five Things You Didn't Know About Clearing Your Record*, THE MARSHALL PROJECT (Sept. 17, 2015), <https://www.themarshallproject.org/2015/09/17/five-things-you-didn-t-know-about-clearing-your-record>.

³⁸ *What the Data Says About Criminal Justice Systems Around the World*, WORLD JUST. PROJECT (Feb. 13, 2019), <https://worldjusticeproject.org/news/what-data-says-about-criminal-justice-systems-around-world>.

³⁹ *See Spent Conviction Guidelines in Australia*, AUSTRALIAN NAT'L CHARACTER CHECK, <https://www.austliannationalcharactercheck.com.au/spent-convictions-guidelines-in-australia.html> (last visited Nov. 9, 2021).

⁴⁰ Suemedha Sood, *Australia's penal colony roots*, BBC (Jan. 26, 2012), <https://www.bbc.com/travel/article/20120126-travelwise-australias-penal-colony-roots>.

⁴¹ *Id.*

⁴² *Id.*

Australians is a descendant of convicts.⁴³ Understanding Australia's history can help provide perspective in analyzing its current criminal justice system.

Australia treats spent convictions, or convictions that have been cleared from an individual's record, differently at the federal and state level.⁴⁴ The federal government is frequently referred to as the Commonwealth.⁴⁵ Australia has six states: New South Wales, Queensland, South Australia, Tasmania, Victoria, and Western Australia.⁴⁶ There are also two self-governing territories, the Northern Territory and the Australian Capital Territory, as well as several external territories.⁴⁷ The self-governing territories create their own laws, but only because the federal government has granted them that power and it can just as easily be taken away.⁴⁸ The external territories do not have their own law-making power at all, and instead fully rely on the federal government for legislation.⁴⁹ Each state and self-governing territory has their own statutes regarding spent convictions.⁵⁰

At the federal level, the Commonwealth has created a spent conviction scheme.⁵¹ When a conviction is "spent," it means that it does not have to be disclosed to employers, landlords, and other third parties, and unauthorized disclosure is prohibited.⁵² There are some exceptions to this: an intelligence or security agency, for instance, can access an applicant's spent conviction data.⁵³ Overall, however, an individual whose conviction has been "spent" is generally allowed to claim, even under oath, that they have not been charged with or convicted of the offense in question.⁵⁴

Under federal law, eligible convictions may be spent automatically.⁵⁵ Convictions become spent after a set period of time so long as that conviction did not carry an incarceration sentence exceeding thirty months *and* the individual has

⁴³ *Id.*

⁴⁴ *Spent Conviction Guidelines in Australia*, *supra* note 39.

⁴⁵ *Infosheet 20-The Australian system of government*, PARLIAMENT OF AUSTRALIA, https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government (last visited Nov. 9, 2021).

⁴⁶ *Australian States, Territories, and Capital Cities*, AUSTRALIA, <https://www.australia.com/en/facts-and-planning/about-australia/cities-states-and-territories.html> (last visited Nov. 9, 2021).

⁴⁷ *Id.*

⁴⁸ See Bridget Judd, *Why isn't the Northern Territory a state?*, AUSTRALIAN BROADCASTING CORPORATION NEWS (June 28, 2018), <https://www.abc.net.au/news/2018-06-29/why-isnt-the-northern-territory-a-state-curious-darwin/9919676>.

⁴⁹ AUSTRALIAN LAW REFORM COMMISSION, *10. External territories*, (July 15, 2010), <https://www.alrc.gov.au/publication/legal-risk-in-international-transactions-alrc-report-80/10-external-territories/>.

⁵⁰ *Spent Conviction Guidelines in Australia*, *supra* note 39.

⁵¹ Crimes Act 1914 (Austl.).

⁵² *Id.*

⁵³ *Criminal records*, AUSTRALIAN GOVERNMENT OFFICE OF THE AUSTRALIAN INFORMATION COMMISSIONER, <https://www.oaic.gov.au/privacy/your-privacy-rights/criminal-records/> (last visited Oct. 10, 2021).

⁵⁴ Crimes Act 1914, *supra* note 51.

⁵⁵ *Criminal records*, *supra* note 53.

not gotten into additional criminal legal trouble.⁵⁶ The set period of time, starting on the day of conviction, is ten years for adult offenders and five years for juvenile offenders.⁵⁷

Australia is not the first nation to contemplate spent conviction legislation.⁵⁸ The first spent conviction scheme originated in the United Kingdom with the Rehabilitation of Offenders Act of 1974.⁵⁹ In 1987, the Australian Law Reform Commission (ALRC), an independent Australian agency that provides the government with law reform recommendations, considered the implementation of a similar system.⁶⁰ The Secretary and Director of Research for the ALRC held discussions about spent conviction schemes with authorities throughout Europe, North America, and Japan in 1985.⁶¹ That December, the ALRC issued Discussion Paper Number twenty-five, entitled *Criminal Records*.⁶² This paper contained research results and ultimately outlined a proposal for a uniform spent conviction scheme.⁶³ It was distributed to about 700 policymakers and organizations, and was highly publicized in the press.⁶⁴ In 1986, the Commonwealth hosted various public hearings to evaluate the public's reception of the proposed overhaul.⁶⁵

Ultimately, the ALRC published a report that recommended that Australia adopt a spent conviction scheme.⁶⁶ The report first argued that “[a]n old conviction, followed by a substantial period of good behaviour, has little, if any, value as an indicator of how the former offender will behave in the future.”⁶⁷ The ALRC determined that relying on the old conviction would create “substantial prejudice to the offender which [would] outweigh its value as an indicator of future behaviour.”⁶⁸ The report recommended that convictions would become spent after ten years for those tried as adults, and after two years for those tried as juveniles.⁶⁹ The ALRC stated that when a conviction becomes irrelevant and the convict has paid their debt to society, the need for a lingering criminal record expires.⁷⁰

Australia codified many of these ALRC recommendations in the Crimes Legislation Amendment Act 1989.⁷¹ Some provisions differed from the report,

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See Moira Paterson & Bronwyn Naylor, *Australian Spent Convictions Reform: A Contextual Analysis*, 34(3) UNSW L.J. 938, 939 (2011).

⁵⁹ *Id.*

⁶⁰ The Law Reform Commission, *Spent Convictions Report No. 37*, AUSTRALIAN GOVERNMENT (1987), https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_37.pdf.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Paterson & Naylor, *supra* note 58.

⁶⁴ *Id.*

⁶⁵ The Law Reform Commission, *supra* note 60.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ The Law Reform Commission, *supra* note 60.

⁷¹ *Spent convictions*, AUSTRALIAN LAW REFORM COMMISSION (June 20, 1987), <https://www.alrc.gov.au/inquiry/spent-convictions/>.

however.⁷² Juveniles would have to demonstrate good behavior for five years rather than two.⁷³ Further, the federal government would only deem convictions “spent” where the sentence imposed consisted of a fine, bond, community service, or imprisonment for less than thirty months.⁷⁴ As a result of the passage of the Crimes Legislation Amendment Act 1989, the Commonwealth’s spent conviction scheme became law through Part VIIC of the Crimes Act 1914 in June 1990.⁷⁵

By the time that Australia adopted the spent conviction scheme federally, the state of Queensland already introduced the Criminal Law (Rehabilitation of Offenders) Act of 1986, and other states and territories had already published discussion papers, reports, and proposals for similar schemes.⁷⁶ As of 2022, every state and territory has a spent conviction scheme.⁷⁷ Most mimic the federal language.⁷⁸ Generally, schemes at the state, territory, and federal level only differ in the length of the waiting period before a conviction may be spent, or in the offenses that are excluded from being spent.⁷⁹ However, a big difference is that South Australia and Western Australia have application-based systems, as opposed to convictions automatically becoming spent after a prescribed amount of time.⁸⁰

Additionally, although spent convictions cannot be legally disclosed without an individual’s consent on employment applications and background checks, notwithstanding certain exceptions,⁸¹ Australian employers can and do ask about non-spent prior convictions.⁸² Australia’s 1989 Human Rights and Equal Opportunity Commission Regulations broadened the definition of employment discrimination so that it now includes criminal records.⁸³ Tasmania and the Northern Territory have laws explicitly prohibiting discrimination on the basis of criminal records.⁸⁴ These laws make it illegal to discriminate against someone in employment due to an *irrelevant* criminal record.⁸⁵ Whether a denial of

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 Law Reform Commission, *supra* note 60.

77 *Spent Conviction Guidelines in Australia*, *supra* note 39.

78 *See generally id.*

79 *See generally id.*

80 South Australia Spent Convictions Act 2009; *Apply for a spent conviction*, WESTERN AUSTRALIA GOVERNMENT, <https://www.wa.gov.au/service/justice/criminal-law/apply-spent-conviction> (last visited Oct. 10, 2021).

81 Applying for employment as a police officer, bartender, or to work with children are all situations where prospective employers may be entitled to information regarding spent criminal records. *See Discrimination in Employment on the Basis of Criminal Record*, AUSTRALIAN HUMAN RIGHTS COMMISSION (Dec. 2004), <https://humanrights.gov.au/our-work/rights-and-freedoms/human-rights-discrimination-employment-basis-criminal-record>.

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

employment due to a prior conviction is considered relevant or not is determined on a case-by-case basis.⁸⁶

B. United States

Like Australia, the United States (U.S.) has three statutory frameworks: federal law, which broadly applies to the entire nation and its territories; state law, which governs each of the fifty states, and territorial laws, which governs each of the sixteen territories.⁸⁷ The process for clearing a criminal record in the U.S. varies depending on if an individual was charged in federal or state court.⁸⁸ However, the U.S. record-clearing scheme differs greatly from Australia's spent conviction scheme.⁸⁹

The only solution that exists to clear a federal record is to get a presidential pardon.⁹⁰ The U.S. President gets pardon power from the U.S. Constitution.⁹¹ A presidential pardon may restore some civil rights that an individual lost as a result of their conviction, such as the right to vote or the right to own a firearm.⁹² Additionally, their criminal record will note that they received a pardon, which is intended to lessen the stigma surrounding the conviction.⁹³ However, receiving a presidential pardon for a conviction will not remove said conviction from an individual's record, and the conviction must still be disclosed on applications that ask for that information.⁹⁴ To get a presidential pardon, an individual must wait a minimum of five years after their conviction.⁹⁵ Then, they can email a petition to the Office of the Pardon Attorney or mail it to the Department of Justice.⁹⁶ The

⁸⁶ *Discrimination in Employment on the Basis of Criminal Record*, *supra* note 81.

⁸⁷ *The U.S. Legal System: A Short Description*, FEDERAL JUDICIAL CENTER, https://ar.usembassy.gov/wp-content/uploads/sites/26/2016/03/U_S_Legal_System_English07.pdf (last visited Jan. 7, 2022).

⁸⁸ *See generally Federal Restoration of Rights & Record Relief*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/> (last visited Nov. 9, 2021); *50-State Comparison: Expungement, Sealing & Other Record Relief*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-judicial-expungement-sealing-and-set-aside/> (last visited Nov. 9, 2021).

⁸⁹ *See, e.g., Pardon Information and Instructions*, THE UNITED STATES DEPARTMENT OF JUSTICE (Nov. 23, 2018), <https://www.justice.gov/pardon/pardon-information-and-instructions>; *What Is "Expungement?"*, AMERICAN BAR ASSOCIATION (Nov. 20, 2018), https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/what-is-expungement/.

⁹⁰ *Pardon Information and Instructions*, *supra* note 89.

⁹¹ U.S. CONST. art. II, § 2.

⁹² *Pardon Information and Instructions*, *supra* note 89.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

petition must be filled out entirely and accurately, and must be notarized.⁹⁷ There are on average only 120.4 presidential pardons given per year.⁹⁸ To put that into perspective, consider that President Donald J. Trump received 2,498 petitions for pardons throughout his four-year term, and granted only 189 of those petitions.⁹⁹

When it comes to state convictions, the process varies state-by-state.¹⁰⁰ Although every state has a system in place for governor's pardons,¹⁰¹ which generally mirror presidential pardons, states have different statutory schemes for clearing records.¹⁰² Most states have some sort of "set aside" statute.¹⁰³ If a conviction is set aside, it will generally be treated the same as if it had been pardoned.¹⁰⁴ The set aside will be annotated on the individual's criminal record, but it will not remove the conviction from the criminal record.¹⁰⁵ For example, the state of Arizona has a set aside statute.¹⁰⁶ Once the appropriate time has elapsed, an individual may apply for their conviction to be set aside.¹⁰⁷ However, there are many exceptions, such as felonies that were designated as dangerous, felonies where the victim is under fifteen years of age, or any offense with an underlying sexual motivation.¹⁰⁸

Americans may also clear their records through a process known as "expungement."¹⁰⁹ Expungement destroys or seals a criminal conviction.¹¹⁰ Sealing a criminal conviction removes it from public access.¹¹¹ However, an expungement order does not remove online records from the internet or other media platforms.¹¹² For example, many prospective employers can find otherwise-expunged records through a quick Google search.¹¹³ Furthermore, there is no federal statute governing expungements, making expungement orders from federal

⁹⁷ *Pardon Information and Instructions*, *supra* note 89.

⁹⁸ *Executive clemency and pardons*, BALLOTPEdia, https://ballotpedia.org/Executive_clemency_and_presidential_pardons (last updated Oct. 17, 2022).

⁹⁹ *Clemency Statistics*, THE UNITED STATES DEPARTMENT OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics> (last updated Oct. 5, 2022).

¹⁰⁰ *50-State Comparison: Pardon Policy & Practice*, *supra* note 88.

¹⁰¹ *Id.*

¹⁰² *Pardon Information and Instructions*, *supra* note 89.

¹⁰³ *50-State Comparison: Expungement, Sealing & Other Record Relief*, *supra* note 88.

¹⁰⁴ *Expunging or sealing records Article*, *supra* note 30.

¹⁰⁵ *Id.*

¹⁰⁶ A.R.S. § 13-905.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *What Is "Expungement?"*, *supra* note 89.

¹¹⁰ *Id.*

¹¹¹ *Sealing of Records*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/sealing_of_records, (last updated July 2021).

¹¹² *What Is "Expungement?"*, *supra* note 89.

¹¹³ *Id.*

courts incredibly rare.¹¹⁴ State expungement laws vary.¹¹⁵ In Arizona, juvenile and marijuana offenses, now that it has been legalized recreationally, are the only offenses that qualify for expungement.¹¹⁶

While pardons, set asides, and expungements are a step in the right direction for the U.S., countless Americans still struggle to reintegrate into society because of their criminal records.¹¹⁷ Recall the stories from Mr. Payne and Mr. Mirsky—their plights are echoed by thousands of Americans and demonstrate how much more work needs to be done.¹¹⁸ A global analysis lends itself to a comparison between the U.S. and Australia, as both countries have high incarceration rates, but notably different approaches for dealing with criminal records.¹¹⁹ A system like Australia's, where record-clearing mechanisms help reduce collateral consequences of arrests and convictions, better serves justice for the convicted and for society at large.¹²⁰

1. Contemporary Record-Clearing Proposals and Initiatives

In the U.S., there are about the same number of Americans with criminal records as there are Americans with four-year college degrees.¹²¹ A criminal record could include misdemeanor convictions; felony convictions; arrests that never

¹¹⁴ In *Livingston v. United States Dep't of Justice*, the defendant convinced the appellate court to remand the issue of whether to grant an expungement for a federal record to the district court. See Steven F. Reich, *Expungement of Criminal Records in Federal Courts*, LAW JOURNAL NEWSLETTERS (Oct. 2009), https://www.manatt.com/uploadedFiles/Attorneys_and_Advisors/Reich,_Steven_F/Business%20Crimes%20Bulletin_Reich.pdf.

¹¹⁵ *What Is "Expungement?"*, *supra* note 89.

¹¹⁶ *Arizona Juvenile Record Sealing*, RECORD CLEARING RESOURCES FOR CRIMINAL RECORD REMOVAL, <https://www.recordclearing.org/states/arizona/arizona-juvenile-record-sealing/> (last visited Jan. 7, 2022); *Arizona Proposition 207: Marijuana Legalization Initiative*, ARIZONA JUDICIAL BRANCH, <https://www.azcourts.gov/prop207> (last visited Jan. 7, 2022).

¹¹⁷ Liz Benecchi, *Recidivism Imprisons American Progress*, HARVARD POLITICAL REVIEW (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/>.

¹¹⁸ Appelbaum, *supra* note 1.

¹¹⁹ Kimberly Monarrez, *Tackling Incarceration Rates in Australia and the United States*, UNITED STATES STUDIES CENTRE (Aug. 22, 2018), <https://www.uscc.edu.au/analysis/tackling-incarceration-rates-in-australia-and-the-united-states>.

¹²⁰ *Collateral consequences*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/collateral.html> (last visited Nov. 9, 2021).

¹²¹ Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CENTER FOR JUSTICE (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas>.

resulted in charges; or any combination thereof.¹²² By age twenty-three, about one in every three Americans will have been arrested, and that is before accounting for race or gender.¹²³

The Fair Housing Act does not explicitly prohibit housing discrimination on the basis of criminal background.¹²⁴ However, the U.S. Department of Housing and Urban Development (HUD) issued guidance on the Fair Housing Act in 2016 that prohibits landlords from denying housing on the basis of arrest records, carte blanche denials based on criminal records without justification, and conducting targeted background checks.¹²⁵ Conversely, someone can be denied housing because of criminal history if it demonstrates that they are dangerous.¹²⁶ The discretion to decide whether someone is dangerous is generally left up to landlords.¹²⁷ Additionally, federally subsidized housing is unavailable to low-income individuals for a minimum of five years after a felony conviction, regardless of the details of the felony.¹²⁸

Recent movements in the U.S. have pushed for a system that looks more like Australia's.¹²⁹ In 1998, Hawaii enacted the country's first "fair chance" law, prohibiting most private employers from asking applicants about their criminal background until giving them a conditional offer.¹³⁰ The employer may only revoke the offer if the offense disclosed is relevant to the position.¹³¹ An employer cannot characterize any criminal background as "relevant" unless that background bears a rational relationship to the responsibilities of the job in question.¹³² However, unless courts get involved, these relevancy determinations are left to the employers' discretion.¹³³ In recent years, more states have enacted similar laws, although they vary in what types of employers they apply to and what exemptions exist.¹³⁴

¹²² *Information about Criminal Records*, LEGAL AID AT WORK, <https://legalaidatwork.org/factsheet/records/> (last visited Nov. 9, 2021).

¹²³ Friedman, *supra* note 121.

¹²⁴ *Fair Housing For People With A Criminal History*, FAIR HOUSING CENTER FOR RIGHTS & RESEARCH, <https://www.thehousingcenter.org/resources/criminal-history/> (last visited Jan. 13, 2022).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *No Second Chance, People with Criminal Records Denied Access to Public Housing*, HUMAN RIGHTS WATCH (Nov. 18, 2004), <https://www.hrw.org/report/2004/11/18/no-second-chance/people-criminal-records-denied-access-public-housing#>.

¹²⁹ *Collateral consequences*, *supra* note 120.

¹³⁰ Appelbaum, *supra* note 1.

¹³¹ *Id.*

¹³² *Navigating the Line: What Hawaii Employers Can and Can't Do With Criminal Background Checks*, HAWAII EMPLOYERS COUNCIL (July 2019), <https://www.hecouncil.org/features-of-the-month/feature-of-the-month/navigating-the-line-what-hawaii-employers-can-and-can-t-do-with-criminal-background-checks/203817/>.

¹³³ *See id.*

¹³⁴ Appelbaum, *supra* note 1.

Bigger grassroots movements in the U.S. include The Clean Slate Initiative and the Ban the Box Campaign.¹³⁵ The Clean Slate Initiative, a bipartisan policy model, focuses on the automation of clearing criminal records.¹³⁶ Many Americans who qualify for their convictions to be set aside do not even know what a set aside is or how the process works.¹³⁷ The application-based system serves as a barrier to reintegration, which is what the Clean Slate Initiative is working to address.¹³⁸ So far, Connecticut, Pennsylvania, Virginia, Michigan, and Utah have enacted Clean Slate acts, and more states are studying or advancing this initiative.¹³⁹

The Clean Slate Act has made a lot of progress thus far in states that have passed it.¹⁴⁰ In Pennsylvania, there has already been more than 33 million criminal cases automatically sealed and more than 45 million criminal offenses automatically sealed only nine months after implementing the new legislation.¹⁴¹ Specifically, 75,869 misdemeanor convictions have been automatically sealed.¹⁴² Prior to the implementation of the Clean Slate Act, Pennsylvania allowed misdemeanors to be sealed through application starting back in November 2016.¹⁴³ Since then, only 1,463 misdemeanors have been sealed through the application process.¹⁴⁴ That means that the automatic process seals around 52 times as many misdemeanors as the application process did.¹⁴⁵

This process has helped almost one million Pennsylvanians, but it is not without its problems.¹⁴⁶ Notably, the automatic process relies on the assumption that court records are accurate.¹⁴⁷ Because only certain grades of offense are eligible for automatic sealing, mismanaged records can create logistical problems.¹⁴⁸ For instance, a third-degree felony would not be eligible, whereas a

¹³⁵ CLEAN SLATE INITIATIVE, <https://cleanslateinitiative.org> (last visited Nov. 9, 2021); BAN THE BOX CAMPAIGN, <https://bantheboxcampaign.org> (last visited Nov. 9, 2021).

¹³⁶ CLEAN SLATE INITIATIVE, *supra* note 135.

¹³⁷ Christie Thompson, *Five Things You Didn't Know About Clearing Your Record*, THE MARSHALL PROJECT (Sept. 17, 2015), <https://www.themarshallproject.org/2015/09/17/five-things-you-didn-t-know-about-clearing-your-record>.

¹³⁸ CLEAN SLATE INITIATIVE, *supra* note 135.

¹³⁹ *State Tracker*, CLEAN SLATE INITIATIVE, <https://cleanslateinitiative.org/state-map/> (last visited Oct. 10, 2021).

¹⁴⁰ Maggie Jo Buchanan & Nick Jacobson, *Clean Slate is Critical for a Healthy Democracy*, CENTER FOR AMERICAN PROGRESS (April 26, 2021), <https://www.americanprogress.org/issues/courts/news/2021/04/26/498720/clean-slate-critical-healthy-democracy/>.

¹⁴¹ Shannon M. Dietrich, *PA Clean Slate: Delivering on Its Promises*, COMMUNITY LEGAL SERVICES (May 1, 2020), <https://clsphila.org/wp-content/uploads/2020/05/Clean-Slate-implementation-report-final.pdf>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Dietrich, *supra* note 141.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

second-degree misdemeanor probably would.¹⁴⁹ Older cases tend to have missing data in the online system, and may leave the grade of offense blank.¹⁵⁰ This would cause the algorithm to ignore these offenses, even if in reality, the individual may qualify for automatic record sealing.¹⁵¹ Different jurisdictions have taken different measures to address this issue, but there is no quick fix.¹⁵²

There is also a possibility that court records are just simply incorrect.¹⁵³ In 1970, Congress enacted the Fair Credit Reporting Act (FCRA) to regulate the industry of consumer report agencies (CRAs).¹⁵⁴ CRAs provide employers with criminal record reports of prospective employees.¹⁵⁵ The FCRA requires that when a report is “‘likely to have an adverse effect’ on an employment decision,” CRAs must either “‘maintain strict procedures designed to insure that [the information reported] is complete and up to date’” or notify the consumer when the report is sent to the employer.¹⁵⁶ However, because the FCRA is not a strict liability statute, individuals may only get legal recourse when the noncompliance with procedure is willful or negligent.¹⁵⁷ Otherwise, it can be difficult to hold a CRA liable for incorrect criminal background information.¹⁵⁸

Additionally, the Clean Slate Act that was passed in Pennsylvania requires that individuals do not have any outstanding financial obligations related to their conviction for it to be eligible to be sealed.¹⁵⁹ This policy disqualified half of the eligible misdemeanor convictions in the state.¹⁶⁰ With convictions remaining on their records for potential employers to see, it is no wonder that these individuals do not have the financial means to pay off their court debts.¹⁶¹

Michigan is implementing the most thorough clean slate law in the nation, allowing for automatic expungement of misdemeanors seven years after sentencing and automatic expungement of felonies either ten years after sentencing or when that individual is released from incarceration.¹⁶² Life offenses and criminal sexual conduct are excluded, but those with drug, property, and traffic offenses are

149 *Id.*

150 *Id.*

151 Dietrich, *supra* note 141.

152 *Id.*

153 Noam Weiss, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 274 (2012).

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 Dietrich, *supra* note 141.

159 *Id.*

160 *Id.*

161 *First-of-Its-Kind Report: How Much Criminal Justice Debt Does the U.S. Really Have?*, FINES & FEES JUSTICE CENTER (April 28, 2021), <https://finesandfeesjusticecenter.org/2021/04/28/new-ffjc-report-how-much-criminal-justice-debt-does-the-u-s-really-have/>.

162 Clean Slate Initiative, *Michigan*, <https://www.safeandjustmi.org/our-work/clean-slate-for-michigan/>.

eligible.¹⁶³ This holds true regardless of whether an individual owes any money to the courts.¹⁶⁴ The state allows for an individual to get up to two felonies and four misdemeanors automatically expunged, and after that, the individual may petition for further expungements.¹⁶⁵ In Michigan, the terms “set aside” and “expungement” are used interchangeably, but both are consistent with the definition of expungement—the offense is removed entirely from an individual’s public record.¹⁶⁶ Because the Michigan legislature enacted the Clean Slate package of bills in October 2020, there is not yet data on the effectiveness of this initiative.¹⁶⁷ The rollout should be complete by April 2023.¹⁶⁸ Once this program is fully rolled out, policymakers will better be able to evaluate the success of record-clearing integration efforts.

Ban the Box was formed from All of Us or None, a grassroots campaign organized by formerly incarcerated Americans.¹⁶⁹ Ban the Box aims to reduce required disclosure of prior convictions by removing the “box” on applications, such as those used for employment or education, that inquire about the applicant’s criminal background.¹⁷⁰ The campaign began in 2004 with a focus on public employers, and found its first success when Minnesota “banned the box” in 2009 for public employment applicants.¹⁷¹ Since then, over forty-five cities and counties have removed questions regarding criminal records from their employment applications.¹⁷²

The campaign has since been extended to housing and colleges.¹⁷³ Louisiana passed legislation in 2017 that removes the question regarding applicant’s criminal history from public college applications, although some exceptions apply.¹⁷⁴ Since then, California, Colorado, Maryland, and Washington have followed suit.¹⁷⁵

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Setting Aside an Adult Criminal Conviction*, MICHIGAN LEGAL HELP, <https://michiganlegalthelp.org/self-help-tools/crime-traffic-and-id/setting-aside-adult-criminal-conviction> (last visited Feb. 24, 2022).

¹⁶⁷ Clean Slate Initiative, *supra* note 162.

¹⁶⁸ *Id.*

¹⁶⁹ Linda Evans, *Ban the Box in Employment, a Grassroots History*, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, 10 (2016), <https://www.prisonerswithchildren.org/wp-content/uploads/2016/10/BTB-Employment-History-Report-2016.pdf>.

¹⁷⁰ BAN THE BOX CAMPAIGN, *supra* note 135.

¹⁷¹ *About: The Ban the Box Campaign*, <http://bantheboxcampaign.org/about/#.YWOqoS1h0dV> (last visited Oct. 10, 2021).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Issue 2: Beyond the Box in Higher Education*, <https://www.unlockhighered.org/beyond-the-box.html> (last visited Oct. 10, 2021).

¹⁷⁵ Noel Vest, Andrew Winn, Sonja Tonnensen-Casalegno & Emily Blake, *Celebrating Banning the Box in Higher Education in California*, ROOT AND REBOUND (Oct.

“Banning the box” seems like one obvious solution to ease reintegration.¹⁷⁶ However, it has been proven that removing questions regarding prior convictions from housing applications causes landlords to use race as a proxy for criminal background, resulting in disparate treatment of people of color.¹⁷⁷ Therefore, the solution might not be that simple.

III. ANALYSIS

A. Comparative Analysis

It was reported that only twenty-two percent of prison discharges in Australia secured paid employment to begin within two weeks of release.¹⁷⁸ This is actually less than the twenty-seven percent of American prisoners in a study by the Urban Institute’s Justice Policy Center that had a job already lined up while still in prison.¹⁷⁹ The reason for this discrepancy is unclear, but one factor that could be affecting this data is the prevalence of work release programs in the U.S. For instance, community transition programs, which allow prison inmates to work in the community during business hours and return to their prison facilities each night, prove very effective in helping convicts secure employment upon release.¹⁸⁰ In fact, prisoners who participate in work release programs are more than twice as likely than prisoners who did not participate in work release programs to secure employment within the first full quarter of their release from prison.¹⁸¹ Typically, however, only prisoners who are deemed non-dangerous to society are permitted to join a work release program, and those prisoners may have been the ones more likely to gain employment regardless.¹⁸² Australia has work release programs as

22, 2020), <https://rootandrebond.medium.com/celebrating-banning-the-box-in-higher-education-in-california-e50bf01e0f06>.

¹⁷⁶ *About: The Ban the Box Campaign*, *supra* note 171.

¹⁷⁷ Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 *THE Q. J. OF ECON.* 191, 191 (2011).

¹⁷⁸ *The health of Australia’s prisoners*, *AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE*, 19 (2018), <https://www.aihw.gov.au/getmedia/2e92f007-453d-48a1-9c6b-4c9531cf0371/aihw-phe-246.pdf.aspx?inline=true>.

¹⁷⁹ Christy Visser, Sara Debus & Jennifer Yahner, *Employment after Prison: A Longitudinal Study of Releases in Three States*, URBAN INSTITUTE JUSTICE POLICY CENTER, 3 (Oct. 2008), <https://www.urban.org/sites/default/files/publication/32106/411778-Employment-after-Prison-A-Longitudinal-Study-of-Releesees-in-Three-States.PDF>.

¹⁸⁰ William D. Bales, Catie Clark, Samuel Scraggs, David Ensley, Philip Coltharp, Alexa Singer & Thomas G. Blomberg, *An Assessment of the Effectiveness of Prison Work Release Programs on Post-Release Recidivism and Employment*, THE FLORIDA DEPARTMENT OF CORRECTIONS AND FLORIDA STATE UNIVERSITY COLLEGE OF CRIMINOLOGY AND CRIMINAL JUSTICE, 28 (Dec. 2015), <https://www.ojp.gov/pdffiles1/nij/grants/249845.pdf>.

¹⁸¹ *Id.*

¹⁸² *Id.*

well, but it is unclear how prevalent these programs are in Australia as compared to the U.S.¹⁸³

One could speculate that Australia's surprisingly low post-conviction employment rate might be linked to why someone ended up incarcerated in the first place.¹⁸⁴ Half of Australian adults entering prison were unemployed in the thirty days prior to their incarceration.¹⁸⁵ However, studies show that statistics are similar in the U.S., with only 49% of adult male prisoners having employment within two years before being incarcerated.¹⁸⁶

It is estimated that formerly incarcerated individuals in the U.S. are unemployed at a rate above 27%.¹⁸⁷ That is about five times higher than the general unemployment rate across the U.S.¹⁸⁸ This is not for lack of trying.¹⁸⁹ One study determined that 93.3% of formerly incarcerated individuals in the U.S. are either employed or actively looking for work, which is higher than the 83.8% of individuals in the general population that are employed or actively looking for work.¹⁹⁰

No matter the cause, the reality is that the vast majority of employers ask about criminal records.¹⁹¹ Indeed, about nine out of every ten employers in the U.S. check criminal record databases when hiring new employees.¹⁹² In the U.S., more than 25% of jobs require a license or certification.¹⁹³ Often, those with criminal backgrounds cannot obtain the requisite licensure for professions in fields like healthcare, education, and transportation.¹⁹⁴ As Melissa, a thirty-five-year-old woman with prior convictions for property crimes that she committed while addicted to drugs, stated:

¹⁸³ See *id.*; *Work Ready, Release Ready*, WORKSKIL AUSTRALIA EMPLOYMENT AND COMMUNITY SERVICES, <https://www.workskil.com.au/for-individuals/support-to-find-work/work-ready-release-ready/> (last visited Jan. 13, 2021).

¹⁸⁴ *Prisoners more likely to be homeless, unemployed and suffer poor mental and physical health*, AUSTL. INST. OF HEALTH AND WELFARE (May 30, 2019), <https://www.aihw.gov.au/news-media/media-releases/2019/may-1/prisoners-more-likely-to-be-homeless-unemployed-an>.

¹⁸⁵ *Id.*

¹⁸⁶ Adam Looney, *5 facts about prisoners and work, before and after incarceration*, BROOKINGS (Mar. 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/>.

¹⁸⁷ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment among formerly incarcerated people*, PRISON POLICY INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Appelbaum, *supra* note 1.

¹⁹² *Id.*

¹⁹³ Beth Avery, Maurice Emsellem & Han Lu, *Fair Chance Licensing Reform: Opening Pathways for People with Records to Join Licensed Professions*, NATIONAL EMPLOYMENT LAW PROJECT, 7, (Dec. 2019), <https://s27147.pcdn.co/wp-content/uploads/FairChanceLicensing-v4-2019.pdf>.

¹⁹⁴ Vallas, *supra* note 29.

I went to school in 2009 for six months. I completed the CNA¹⁹⁵ course. I did my externship or internship and everything. I took my state exams...I passed everything. I did this because my teacher told me that it had been so long since my last conviction that they'd probably go ahead and let it go. And so I believed him and I went through everything. And then I got a letter in the mail that had my license number on it, so I did get my license. So, I did pass. I did get my license and underneath that it said, 'Your license has been revoked.'¹⁹⁶

These licensing practices weaken the economy, jeopardize public safety, prevent employers from utilizing the best possible workforce, and slow down advancements in racial and social justice.¹⁹⁷

Additionally, the fear of rejection due to prior criminal records may actually inhibit potential employees from applying to jobs.¹⁹⁸ This situation becomes a self-fulfilling prophecy for many.¹⁹⁹ For instance, Mario, a thirty-eight-year-old father who was convicted at age fifteen for sex with a minor stated:

I was really reluctantI didn't want to go through the letdown of going through the process because when I get into most jobs, and I interview, I usually come back with a second and sometimes third interview. And, you know, I don't want to go through the disappointment of, "okay, so we're going to do the background check." And then getting shot down, you know. I'm not going to set myself up for failure like that.²⁰⁰

Of the formerly incarcerated individuals who *do* gain employment after prison, the majority are making a low income and fall below the poverty line.²⁰¹ Even for individuals who were never sentenced to time in prison, their prior convictions can have similar effects.²⁰² For instance, an applicant for employment that has a criminal record is 50-63% less likely to receive an interview or offer when compared to an applicant who is identical in all aspects absent a criminal record.²⁰³

¹⁹⁵ (C.N.A. stands for Certified Nursing Assistant) *Nurse Assistant Training Classes*, AMERICAN RED CROSS, <https://www.redcross.org/take-a-class/cna/cna-training/cna-classes> (last visited Mar. 29, 2022).

¹⁹⁶ Ericka B Adams, Elsa Y Chen, & Rosella Chapman, *Erasing the mark of a criminal past: Ex-offenders' expectations and experiences with record clearance*, CRIME & JUSTICE RESEARCH ALLIANCE, (Apr. 21, 2016), <https://journals-sagepub-com.ezproxy4.library.arizona.edu/doi/pdf/10.1177/1462474516645688>.

¹⁹⁷ Avery, *supra* note 193.

¹⁹⁸ Adams et al., *supra* note 196.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Couloute, *supra* note 187.

²⁰² *Id.*

²⁰³ *Id.*

This has major effects on the nation's economy.²⁰⁴ In 2014, the U.S. workforce was short about 1.8 million workers due to the collateral consequences of prior convictions and incarceration.²⁰⁵ This labor shortage increased the national unemployment rate by about 1% and it costs the economy roughly \$80 billion in GDP annually.²⁰⁶

One more factor in the reintegration analysis is education. The more education an individual attains, the more likely they are to secure gainful employment and have a higher income.²⁰⁷ This holds true in both the U.S. and Australia.²⁰⁸ Therefore, one cannot fully understand how record clearing impacts employment without first understanding how record clearing impacts access to education.

In Australia, a police check is required for academic admission in fields that require individuals to interact with vulnerable populations.²⁰⁹ This leads to universities frequently requesting criminal background information when individuals apply for admission.²¹⁰ This allows the university to prevent students from spending years studying for a career working with children, for example, just to find out after graduating that they are not eligible for a career in that field and cannot use their degree.²¹¹

In the U.S., more than half of individuals who have been formerly incarcerated hold only a high school diploma or GED equivalent.²¹² As of 2008, 29% of Americans held a college degree, while only 4% of Americans who were formerly incarcerated held a college degree.²¹³ There is no available data reflecting the percentage of these 4% of formerly incarcerated Americans who received their college degree before, during, or after their prison sentence.²¹⁴ However, there is a lot of data showing that many institutions of higher education ask questions regarding criminal history on their applications, and the mere presence of these questions can deter individuals with records from even applying.²¹⁵ A survey given

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Couloute, *supra* note 187.

²⁰⁷ *Education Pays*, U.S. BUREAU OF LABOR STATISTICS (Apr. 21, 2021), <https://www.bls.gov/emp/chart-unemployment-earnings-education.htm>; *Education and Work, Australia*, AUSTRALIAN BUREAU OF STATISTICS (Nov. 11, 2020), <https://www.abs.gov.au/statistics/people/education/education-and-work-australia/latest-release>.

²⁰⁸ *Id.*

²⁰⁹ *The Use of Criminal Records in University Admissions in Australia*, COLLEGE CURES (Nov. 12, 2020), <https://collegecures.com/2020/the-use-of-criminal-records-in-university-admissions-in-australia/>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Lucius Couloute, *Getting Back on Course: Educational exclusion and attainment among formerly incarcerated people*, PRISON POLICY INITIATIVE (Oct. 2018), <https://www.prisonpolicy.org/reports/education.html>.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

by the Center for Community Alternatives together with the American Association of Collegiate Registrars and Admissions Officers showed that about two thirds of the responding colleges collect criminal justice information from applicants.²¹⁶ Although some schools say they merely collect this information for data purposes, less than half of the colleges that collect this information have written policies governing the use of criminal background data in the application review process.²¹⁷ Additionally, less than half of the colleges that collect this data train their staff on how to use this information.²¹⁸

An additional factor to consider is housing. Australian landlords can utilize police checks, which are background checks sourced from releasable convictions and offenses in the National Criminal Database and the National Police Record.²¹⁹ There are no Commonwealth laws that prevent housing discrimination against an individual on the basis of criminal records.²²⁰ In a study from 2003, 16% of prisoners expected to be homeless after their prison release.²²¹ Further, new releases seldom know how to find housing at all.²²² In the state of Victoria, for instance, 58% of prisoners received no information regarding housing resources before being released.²²³

This problem is not unique to Australia. Property management companies and landlords frequently ask about prior criminal convictions in housing applications in the U.S. too.²²⁴ As previously mentioned, the Fair Housing Act does not explicitly prohibit housing discrimination on the basis of criminal background, but the U.S. HUD has issued guidance prohibiting landlords from denying housing on the basis of arrest records, denying housing to every person with a criminal history, and being inconsistent in requiring background checks.²²⁵ However, this is not a heavily audited practice, and generally, discretion is solely in the hands of landlords.²²⁶ Additionally, individuals with a felony conviction within the last five

²¹⁶ *The Use of Criminal History Records in College Admissions Reconsidered*, CENTER FOR COMMUNITY ALTERNATIVES INNOVATIVE SOLUTIONS FOR JUSTICE (last visited Oct. 10, 2021), <https://www.communityalternatives.org/wp-content/uploads/2020/02/use-of-criminal-history-records-reconsidered.pdf>.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Real Estate Police Checks in Australia*, AUSTRALIAN NATIONAL CHARACTER CHECK (last visited Jan. 13, 2022), <https://www.australiannationalcharactercheck.com.au/real-estate-police-checks-in-australia.html>.

²²⁰ *Irrelevant criminal record*, LEGAL SERVICES COMMISSION SOUTH AUSTRALIA (last visited Jan. 13, 2022), <https://lawhandbook.sa.gov.au/ch17s01s02s14.php>.

²²¹ *Homelessness Among Former Prisoners in Australia*, BACKPACK BED FOR HOMELESS, <https://backpackbed.org/au/homelessness-among-former-offenders-in-australia> (last visited Jan. 13, 2022).

²²² *Id.*

²²³ *Id.*

²²⁴ *Fair Housing For People With A Criminal History*, *supra* note 124.

²²⁵ *Id.*

²²⁶ *Id.*

years are not eligible for federally subsidized housing, regardless of income.²²⁷ For many that have just been released from prison, the only apartments that will accept them may themselves increase the tenant's risk of recidivism.²²⁸ Such apartments are frequently afflicted with a lot of drug use and crime, which can just perpetuate the cycle of addiction and repeated criminal activity.²²⁹ For many releasees, they may not be able to find apartments that accept them at all, and other collateral consequences, such as lack of employment and income, may impede access to housing as well.²³⁰ In 2008, for example, 2% of formerly incarcerated Americans were homeless, which is nearly ten times higher than the rate of homelessness experienced by the general population.²³¹

Finally, one must consider rates of recidivism to evaluate how effectively record-clearing programs improve reintegration after incarceration. Recidivism is "the tendency of a convicted criminal to repeat or reoffend a crime after already receiving punishment or serving their sentence."²³² In the two years after their release from punishment, about 36% of individuals incarcerated in America will be reconvicted, and about 29% will be reimprisoned.²³³ Alaska has the highest recidivism rate in the country at 66.41%.²³⁴ Alaska does not have any process for expunging convictions.²³⁵ Delaware has the second highest recidivism rate, at 64.9%.²³⁶ Delaware has a petition-based expungement program.²³⁷ The lowest recidivism rate in the country, 20.1%, is in Oklahoma.²³⁸ Oklahoma has a petition-based expungement program like Delaware.²³⁹ South Carolina and Virginia both follow Oklahoma, tied with a recidivism rate of 23.1%.²⁴⁰ In South Carolina, most criminal records that do not involve an actual conviction are automatically sealed,

²²⁷ *No Second Chance, People with Criminal Records Denied Access to Public Housing*, *supra* note 128.

²²⁸ Kristian Hernández, *More States Consider Automatic Criminal Record Expungement*, PEW TRUSTS (May 25, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/05/25/more-states-consider-automatic-criminal-record-expungement>.

²²⁹ *Id.*

²³⁰ Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POLICY INITIATIVE (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>.

²³¹ *Id.*

²³² *Recidivism Rates by State 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/state-rankings/recidivism-rates-by-state> (last visited Jan. 14, 2022).

²³³ *Recidivism Rates by Country 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/country-rankings/recidivism-rates-by-country> (last visited Jan. 14, 2022).

²³⁴ *Recidivism Rates by State 2021*, *supra* note 232.

²³⁵ *Clean Slate Initiative*, *supra* note 139.

²³⁶ *Recidivism Rates by State 2021*, *supra* note 232.

²³⁷ *Clean Slate Initiative*, *supra* note 139.

²³⁸ *Recidivism Rates by State 2021*, *supra* note 232.

²³⁹ *Clean Slate Initiative*, *supra* note 139.

²⁴⁰ *Recidivism Rates by State 2021*, *supra* note 232.

but it is difficult to get an expungement for a conviction through the petition-based process.²⁴¹ Virginia has a petition-based record clearing process that was expanded in 2021, and the state automatically seals records for non-convictions and several misdemeanor convictions, such as possession of marijuana.²⁴² Another state with a low recidivism rate is Michigan, at 28.1%.²⁴³ One could speculate that these reduced records correlate to Michigan's record clearing initiatives, considering Michigan is home to the most extensive clean slate laws in the country, although more research is needed to confirm.²⁴⁴

Australia has a higher recidivism rate overall than the U.S., with somewhere between 39% and 46% of convicts returning to prison within two years of release.²⁴⁵ In a study that looked at the percentage of prisoners who were released in 2017 or 2018 returning to prison within two years, Northern Territory had the highest recidivism rate at 60.8%.²⁴⁶ Compare this to Western Australia and South Australia, the only two states that require a *petition* to be filed for expungement, as opposed to record sealing occurring automatically.²⁴⁷ Surprisingly, South Australia actually has the lowest recidivism rate in Australia, with only 34.8% of individuals returning to prison.²⁴⁸ Western Australia has the second lowest recidivism rate at 36.6%.²⁴⁹

Although this data may suggest an inverse correlation between automated record clearing and measures of successful integration, the studies themselves may be the limiting factor. It is important to remember that almost every study in Australia regarding post-conviction employment, education, housing, and recidivism has a follow up period of *less than five years* after release.²⁵⁰ Because Australia's adult spent conviction scheme only automatically clears records at ten years post-conviction, it is very possible that the effects—and potential successes—of this scheme are not reflected in *any* data. What is indisputable, however, is this: the data clearly demonstrate that merely possessing a criminal record negatively impacts nearly every aspect of an individual's life after release.²⁵¹ Additionally, some narrowly focused data resulting from a study in the U.S. supports the conclusion that record clearing leads to greater success in reintegration and a lower risk of recidivism.²⁵²

²⁴¹ *Clean Slate Initiative*, *supra* note 139.

²⁴² *Id.*

²⁴³ *Recidivism Rates by State 2021*, *supra* note 232.

²⁴⁴ *Clean Slate Initiative*, *supra* note 139.

²⁴⁵ *Recidivism Rates by Country 2021*, *supra* note 233; *Released Prisoners Returning to Prison*, SENT'G ADVISORY COUNS., <https://www.sentencingcouncil.vic.gov.au/sentencing-statistics/released-prisoners-returning-to-prison> (last visited Jan. 14, 2022).

²⁴⁶ *Released Prisoners Returning to Prison*, *supra* note 245.

²⁴⁷ South Australia Spent Convictions Act 2009, *supra* note 80.

²⁴⁸ *Released Prisoners Returning to Prison*, *supra* note 245.

²⁴⁹ *Id.*

²⁵⁰ *See, e.g., The health of Australia's prisoners*, *supra* note 178; *Irrelevant criminal record*, *supra* note 220; *Recidivism Rates by Country 2021*, *supra* note 233.

²⁵¹ *See, e.g., id.*

²⁵² Adams et al., *supra* note 196, at 16, 23.

B. The Role of Violent Crimes

Expungement laws in both the United States and Australia contain similar caveats: violent crimes are generally ineligible for record clearing.²⁵³ That reflects a common attitude toward those convicted of violent crimes.²⁵⁴ In Australia, violent crime is typically defined as “including the offence categories of homicide, assault, sexual assault and robbery (both armed and unarmed).”²⁵⁵ The U.S. defines violent crime similarly, with the Federal Bureau of Investigation stating that it is composed of “four offenses: murder and nonnegligent manslaughter, forcible rape, robbery, and aggravated assault.”²⁵⁶ However, states and territories vary in what they consider to be violent crimes.²⁵⁷ In Washington, D.C., U.S., individuals have been charged with a violent crime for simply yelling at a law enforcement officer.²⁵⁸

Grassroot initiatives in the U.S. are also full of exceptions.²⁵⁹ When the Louisiana legislature passed Ban the Box laws to remove questions regarding prior convictions from public college applications, it allowed the colleges to continue to deny admission for crimes involving sexual conduct or stalking.²⁶⁰ Louisiana State University pushed for these exceptions, reasoning that on a campus where individuals live in close quarters, this information is extremely relevant.²⁶¹

Violent offenders make up more of the prison population than most people think.²⁶² In Australia, acts intended to cause injury was the most common offense that led to arrest in the 2020-2021 fiscal year.²⁶³ In the U.S., it is a common misconception that the “war on drugs” is the biggest contributor of mass incarceration.²⁶⁴ In actuality, 60% of state prison growth since 1990 has come from

²⁵³ *Criminal records*, *supra* note 53; *see, e.g.*, A.R.S. § 13-905.

²⁵⁴ German Lopez, *Want to End Mass Incarceration? This Poll Should Worry You*, VOX (Sept. 7, 2016), <https://www.vox.com/2016/9/7/12814504/mass-incarceration-poll>.

²⁵⁵ Samantha Bricknell, *Trends in violent crime*, Trends & issues in crime and criminal justice no. 359 (June 25, 2008), <https://www.aic.gov.au/publications/tandi/tandi359>.

²⁵⁶ U.S. Department of Justice Federal Bureau of Investigation, *Crime in the United States*, FBI:UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/violent-crime> (last visited Mar. 27, 2022).

²⁵⁷ Josie Duffy Rice, *My Brother, the Violent Offender*, SLATE (Aug. 14, 2017), <https://slate.com/news-and-politics/2017/08/the-criminal-justice-system-treats-violent-offenders-as-irredeemable-theyre-not.html>.

²⁵⁸ *Id.*

²⁵⁹ Scott Jaschik, *‘Bank the Box’ Gains Momentum...But Only With Exceptions*, INSIDE HIGHER ED (July 10, 2017), <https://www.insidehighered.com/admissions/article/2017/07/10/louisiana-law-reflects-momentum-ban-box-movement-only-exceptions>.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² Lopez, *supra* note 254.

²⁶³ Australia Bureau of Statistics *Recorded Crime-Offenders*, AUSTRALIA BUREAU OF STATISTICS <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release> (last visited Mar. 27, 2022).

²⁶⁴ Rice, *supra* note 257.

violent offenders.²⁶⁵ Therefore, it is crucial to consider the applicability of expungement to violent offenders if a real difference is going to be made.

We know that rehabilitation is generally a successful mechanism for reducing recidivism.²⁶⁶ There is evidence that without rehabilitation, just imposing sanctions and incarceration may actually have the reverse effect.²⁶⁷ This holds true for all offenders, including violent ones.²⁶⁸ In the U.S., only 1% of those convicted for homicide are arrested for homicide again after release.²⁶⁹ In 2012, Maryland's highest court determined that juries throughout the 1970s had been given incorrect jury instructions.²⁷⁰ This resulted in many cases being remanded.²⁷¹ Some defendants opted for a new trial, while others signed plea agreements with their sentence consisting fully of time already served.²⁷² About 150 individuals who had previously "been deemed the 'worst of the worst'" were released from prison, and none of them reoffended or even violated their parole.²⁷³ However, some data shows that violent offenders in the U.S. reoffend at a higher rate than nonviolent offenders.²⁷⁴ In 2005, over 60% of violent offenders recidivated, compared to 40% of nonviolent offenders.²⁷⁵ Regardless, more Americans actually support reducing prison sentences for nonviolent criminals with a high risk of reoffending than support reducing prison sentences for violent criminals with a low risk of reoffending.²⁷⁶

If rehabilitation can allow those convicted of violent crimes to have a low chance of reoffending but there is still widely-garnered support for excluding violent offenders from easier reintegration, we must ask some crucial questions. First, why are these crimes considered less redeemable than others? Next, who in our society is benefitting from the continued collateral consequences faced by violent offenders?

²⁶⁵ Lopez, *supra* note 254.

²⁶⁶ Karen Heseltine et al., *Prison-based correctional rehabilitation: An overview of intensive interventions for moderate to high-risk offenders*, AUSTRALIAN GOVERNMENT AUSTRALIAN INSTITUTE OF CRIMINOLOGY (Aug. 27, 2021), <https://www.aic.gov.au/publications/tandi/tandi412>.

²⁶⁷ *Id.*

²⁶⁸ Nina Papalia et al., *Violent Offender Treatment Effectiveness: What We Know and Where to From Here?*, SOCIETY OF CLINICAL PSYCHOLOGY, <https://div12.org/violent-offender-treatment-effectiveness-what-we-know-and-where-to-from-here/> (last visited Mar. 27, 2022).

²⁶⁹ Marc Morjé Howard, *The Practical Case for Parole for Violent Offenders*, THE NEW YORK TIMES (Aug. 8, 2017), https://www.nytimes.com/2017/08/08/opinion/violent-offender-parole-sentencing-reform.html?_r=1.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Recidivism Among Federal Violent Offenders*, UNITED STATES SENTENCING COMMISSION, <https://www.ussc.gov/research/research-reports/recidivism-among-federal-violent-offenders> (last visited Mar. 27, 2022).

²⁷⁵ *Id.*

²⁷⁶ Lopez, *supra* note 254.

Crimes of violence typically have victims,²⁷⁷ which is one reason why they may be seen as more egregious than nonviolent crimes. Additionally, individuals may be unaware of the data that shows that violent offenders can be rehabilitated.²⁷⁸ However, an even bigger factor is likely the political and philosophical standings of decisionmakers.²⁷⁹ When taking a stance on the convictions and collateral consequences of violent offenders, questions that individuals may ask themselves are:

Is violence a permanent and immutable condition? Is violence always physical? What if a person is harmed and hurt and scared by never touched? Is fear a prerequisite for violence? How much does intention matter? Is violence more violent if you wear a certain color or if you're friends with certain people? If you're a certain race? Should those who are deemed violent be condemned forever, or are there violent people wasting away in prison cells who deserve our mercy?²⁸⁰

Reasons for wanting to keep barriers to reintegration in place for violent offenders may follow closely in line with three of the four reasons for incarceration in the first place.²⁸¹ Those reasons are retribution, incapacitation, deterrence, and rehabilitation,²⁸² with the first three serving as reasons that individuals oppose record clearing for violent offenders. Some may want to prevent violent offenders from clearing their criminal records because they believe that the offender should continue to be punished for their crimes. For others, the rationale may be public safety reasons to keep people who they deem as potentially dangerous out of their housing and places of employment. Others may believe that continued collateral consequences of a conviction may deter others from committing crimes when they see how it can affect the rest of their lives moving forward.

When considering who benefits from the continued collateral consequences of the criminal justice systems in both the U.S. and Australia, it is important to first consider the scope and value of the prison systems. Australia has

²⁷⁷ Bricknell, *supra* note 255; U.S. Department of Justice Federal Bureau of Investigation, *supra* note 256.

²⁷⁸ Rice, *supra* note 257.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ FOURTH PURPOSE, *The 4 Purposes of Incarceration*, <https://4thpurpose.org/4-purposes/> (last visited Mar. 27, 2022).

²⁸² *Id.* (“Retribution is how the system retaliates against the offender for causing injury to someone else...Incapacitation is the idea that by physically removing some from society we are able to prevent them from committing future crimes, because they are locked up or restrained somehow...Deterrence is the idea that the threat of punishment will keep people from committing crimes, and that those who have committed crimes will be discouraged from reoffending after experiencing punishment...Rehabilitate means to return something to its original state.”).

the most private prisoners per capita in the world.²⁸³ Among those who profit from Australia's private prison industry are Serco and G4S, two United Kingdom-based organizations, and GEO Group and MTC, two U.S.-based organizations.²⁸⁴ In the U.S., the private prison industry makes an annual profit of about \$374 million.²⁸⁵ Private prisons in both Australia and the U.S. are making Americans richer.²⁸⁶ There are also other less direct ways that individuals profit from the prison industrial complex.²⁸⁷ For instance, a lot of prisons and jails in the U.S. will contract with the telephone service provider that will charge people the most money to speak with incarcerated individuals over the phone, creating a monopoly.²⁸⁸ Additionally, the background check services industry in the U.S. has a market size of \$3 billion.²⁸⁹

At least one study suggests that clearing criminal records reduces an individual's likelihood of recidivism and increases their likelihood for successful societal reintegration.²⁹⁰ Clearly, it would be best for individuals with prior criminal records to reintegrate into society, and that would also be beneficial for society. However, the many individuals that have a financial stake in the prison system would likely want to prevent successful reintegration and instead support laws that leads to greater recidivism. Keeping individuals in the cycle of incarceration is what makes those individuals their money. Policymakers should focus on the record-clearing processes that best serve society as a whole, not just those who focus on punishment at the cost of rehabilitation, or those that profit from increased recidivism and incarceration.

IV. RECOMMENDATIONS

After researching both the U.S. and Australia's respective systems for clearing criminal background records, in order to improve outcomes for individuals with records within employment, education, housing, and recidivism, the U.S. should: adopt a federally uniform automatic process for record clearing and implement more safeguards against discrimination on the basis of criminal background within all sectors. Both countries should also consider allowing

²⁸³ Dan Butler, *Prisons for profit: The business of incarceration*, NITV, (Aug. 27, 2021), <https://www.sbs.com.au/nitv/article/2021/08/27/prisons-profit-business-incarceration>.

²⁸⁴ Stephanie Tran, *Profits of punishment: the big business of Australia's private prisons*, MICHAELWESTMEDIA, (Nov. 20, 2021), <https://www.michaelwest.com.au/profits-of-punishment-the-big-business-of-australias-private-prisons/>.

²⁸⁵ Katharina Buchholz, *Private Prisons in the United States*, STATISTA, (Jan. 29, 2021), <https://www.statista.com/chart/24058/private-prisons/>.

²⁸⁶ Tran, *supra* note 284.

²⁸⁷ *Regulating the prison phone industry*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/phones/> (last visited Mar. 27, 2022).

²⁸⁸ *Id.*

²⁸⁹ *Background Check Services Industry in the US-Market Research Report*, IBISWORLD (Nov. 16, 2020), <https://www.ibisworld.com/united-states/market-research-reports/background-check-services-industry/>.

²⁹⁰ Adams et al., *supra* note 196.

criminal record clearing mechanisms to become more accessible for those convicted of crimes of a violent nature.

First, the U.S. should adopt a federally uniform automatic record-clearing process, much like Australia has. Although there is not enough data regarding the success of Australia's process, the statistics that address the negative effects those with records face highlights the rationale for pursuing a federally uniform automatic record-clearing process. Both a cooperative multi-state effort as well as an automatic process would allow a more accessible path forward for those negatively impacted by their criminal records. At worst, when a policymaker has to choose between auto- or application-based record clearing processes, automatic programs are more likely to improve reintegration.

Additionally, the U.S. should implement more safeguards against discrimination on the basis of criminal background. Although in many sectors, this type of discrimination is prohibited, individuals may not find out the reason that they did not secure a job, college acceptance, or apartment rental. Additionally, even if an individual believes they were treated unfairly due to their criminal record, if they have had adverse experiences with the legal system before, they may be hesitant about getting involved with it again. If individuals do decide to pursue legal recourse, they are likely to struggle in providing proof of discrimination because prospective employers owe no duty of transparency. Under our current system, this means that the bad actor will likely never be held accountable. Therefore, I propose an expansive auditing system in these different sectors to ensure that individuals with criminal records are receiving proper treatment under the law. This auditing system should require prospective employers to be transparent regarding reasons behind denying individuals with criminal records. This information could help facilitate research to see exactly how a record influences employment rates post-release.

Both the U.S. and Australia would likely benefit from removing exceptions to their record clearing laws. The data shows that offenders of violent crimes can become rehabilitated. The majority of those with criminal records in both countries have records of violent crimes. Therefore, to make a real impact, both countries need to make reintegration into society easier for all offenders, including those with convictions for violent offenses.

Finally, research on this matter must become a priority. The data analyzed throughout this Note leaves a lot of questions unanswered. One might expect that because Australia has an automatic record clearing system,²⁹¹ and the U.S. does not even have a federal *petition*-based record clearing system outside of presidential pardons,²⁹² that Australia would have better outcomes in employment, education, housing, and recidivism. However, studies do not confirm this expectation, especially with regards to employment and recidivism.²⁹³ One possible reason for

²⁹¹ *Criminal records*, *supra* note 53.

²⁹² *See, e.g., Pardon Info. and Instructions*, *supra* note 89.

²⁹³ *The health of Australia's prisoners*, *supra* note 178; Visher, *supra* note 179; *Recidivism Rates by Country 2021*, *supra* note 233.

this discrepancy is that the studies in each nation were not entirely parallel.²⁹⁴ For instance, when it comes to employment, the rate of Australians who have a job lined up within two weeks of release from incarceration is being compared to the rate of Americans who have a job already lined up while incarcerated.²⁹⁵ The U.S. is moving forward with movements such as the Clean Slate Initiative,²⁹⁶ but without corresponding research, policymakers cannot predict whether more initiatives will actually improve Americans' reintegration after incarceration. While common sense suggests such programs *should* improve reintegration, there may be unexpected consequences, such as the steady increase in racism following Ban the Box initiatives.²⁹⁷ Therefore, it is crucial that the U.S. conduct more research, and more methodologically sound research, to determine the most optimal long-term solution.

V. CONCLUSION

The U.S. should adopt a federally uniform, automatic record-clearing system, much like that adopted by Australia. The data shows that automatic systems affect many more individuals than petition-based systems, and that a federal system where individuals have no realistic way to clear their records can result in poor outcomes in employment, education, housing, and recidivism. The U.S. should also implement safeguards against discrimination on the basis of criminal background, because even though it is somewhat prohibited by law, there is generally no accountability for the bad actors who discriminate. Both the U.S. and Australia should remove exceptions to record clearing laws to allow all offenders, regardless of whether they were convicted of a violent or nonviolent offense, to have a better chance at successfully reintegrating into society. Finally, conducting more research on this topic must become a priority for both nations.

If Gregory Payne, the dedicated father who sold drugs to support his sick daughter, had had his criminal record automatically cleared since moving to California City, he may very well be currently employed in the insurance industry again. This would allow him to afford his daughter's medical bills. If Michael Mirsky, the heating and air-conditioning specialist who has struggled to find lucrative employment due to a prior conviction of resisting arrest, had had his criminal record automatically cleared, he could have since paid off his child support arrears and prevented the foreclosure of his home.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ CLEAN SLATE INITIATIVE, *supra* note 135.

²⁹⁷ Agan & Starr, *supra* note 177.

