

PROTECTING PRIVACY WITHOUT JEOPARDIZING TRANSPARENCY

The Case for Data Preservation



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Executive Summary

Measures for Justice (MFJ) is leading a movement to change the future of criminal justice by developing tools that help communities, and the institutions that serve them, reshape how the system works. This work is only possible when we have access to case level data that speak to the ways in which people are experiencing their local criminal justice systems. This information provides a baseline for transparency and an evidence-based foundation to support discussions and decisions around criminal justice reform.

Our work has shined a light on many challenges and opportunities for data transparency in jurisdictions across the country at the state and local level. One challenge at the state level involves growing restrictions around access to criminal record and court case processing information. As states grapple with the staggering statistic that 1 in 3 Americans now has some form of criminal record, many are seeking to strengthen pathways to record clearance, at least for some offenses.

Completely removing access to arrest and conviction information drastically limits the view into system operations, further clouding our ability to understand how justice is served and people are impacted.

This report discusses the unintended consequences of record clearance initiatives and provides recommendations for states seeking to reduce the footprint of the criminal justice system while also retaining the data necessary to assess the effectiveness of these legislative reforms.

Introduction

In recent decades, the number of Americans with a criminal record has sky-rocketed. Today, it is estimated that nearly one in three adults is marked by some form of criminal record.¹ This widening scope, coupled with a growing recognition of the enduring harms of having a criminal record, has resulted in a bipartisan push across the country to alleviate the burden for at least some offense types.² In response a growing number of states are considering, and implementing, laws that prohibit access to individual criminal records and conviction information.

Today, it is estimated that nearly one in three adults is marked by some form of criminal record.

While these legislative reforms aim to reduce the stigma associated with having a criminal record and increase opportunities for second chances, they often have unintended consequences for data that are essential to understanding and assessing local systems of justice.

This paper begins with a brief description of the various criminal record relief laws across the country. Next, we consider how these laws provoke challenges, both for big picture insights about system operations and system impacted individuals. Finally, we highlight recommendations that encourage states to protect individual privacy without jeopardizing transparency and the data that allow us to understand system performance.

As states consider opportunities for people to move past former arrests and convictions, it is imperative they pursue a path forward that both protects the privacy of people eligible for record clearance and preserves as the data necessary to measure the effectiveness of these very reforms. Not only is this data required to understand the true impact of these recent policy changes, but prohibiting researchers' access to these cases significantly limits our ability to understand system performance more broadly, and the ways people experience their local criminal justice system.

¹ Lartey, J. April 1, 2023. How Criminal Records Hold Back Millions of People. The Marshall Project: <https://www.themarshallproject.org/2023/04/01/criminal-record-job-housing-barriers-discrimination>.

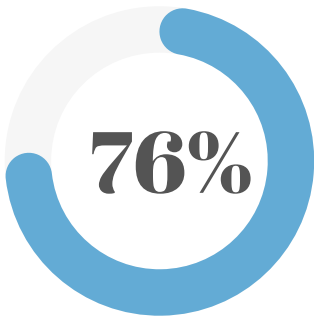
² Vallas, R., Dietrich, S., Avery, B. 2021. A Criminal Record Shouldn't Be a Life Sentence to Poverty. Center for American Progress: <https://www.americanprogress.org/article/criminal-record-shouldnt-life-sentence-poverty-2/>.

Overview of Record Relief Initiatives

Overcriminalization has left states grappling with the growing criminal records problem with legislative models intended to provide pathways to criminal records clearance, at least for certain record types. Depending on the state, record relief law(s) may be broad sweeping—for example, with eligibility for both misdemeanors and felonies and including those cases resulting in conviction. Or, the law might target certain case types or a subset of case types—for example, only certain misdemeanors or non-convictions may be eligible for clearance. There are no federal record clearance guidelines to follow and the clearance process in many states requires a tedious application process and long waiting times. As a result, eligibility for, and the process for obtaining, record relief looks drastically different depending on where you live.



of US States have a waiting period of more than 3 years to become eligible for conviction relief



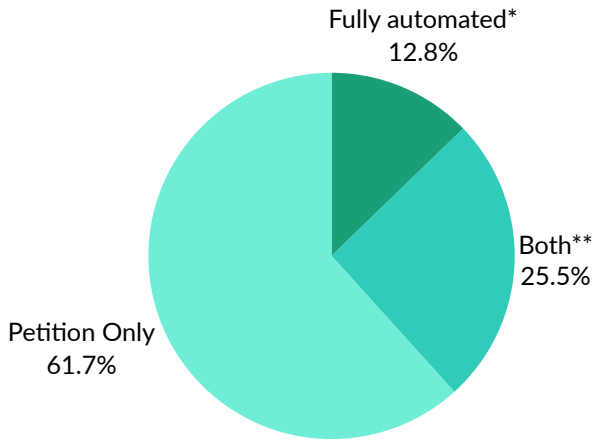
of those states require the defendant to finish their sentence before the waiting period starts

This is further complicated by the fact that states use a variety of terms to describe the process of making records inaccessible (e.g., “erased”, “expunged”, “cleared”, “sealed”, “destroyed”, “set aside”). These terms are sometimes used interchangeably despite differences in meaning and application state-to-state, further impeding our ability to look at comprehensive trends across jurisdictions. For the purposes of this report, we use the term “clearance” or “cleared” to refer generally to the removal of individual criminal records from administrative data systems and the available pool of information to conduct research and policy analysis.

These disparate qualifications and processes for record clearance make it difficult to glean a comprehensive picture of who is impacted by these policies and the extent to which they are successful. The Collateral Consequences Resource Center (CCRC) is one organization seeking to fill this gap by consolidating information and analysis pertaining to these various laws.³ According to an April 2023 analysis by CCRC’s Restoration of Rights project:

- 17 states, counting the District of Columbia, offer broad felony and misdemeanor relief;
- 21 states offer limited felony and misdemeanor relief;
- Six states offer relief for misdemeanors and pardoned felonies only;
- Three states offer some form of misdemeanor relief and no felony relief; and
- Four states, along with the federal government, have no general record relief for either misdemeanors or felonies (though there are some rare exceptions⁴).

Of the US states that offer relief, most still require a petition




* States in this category have all enacted legislation to automatically clear records based on eligibility; not all of the systems to do so have come fully online yet.

** States that have systems available to both accept petitions and automatically clear eligible records are included in “Both”.

As advocates and state legislatures work to broaden access to records relief opportunities, there has been an emphasis on efforts that automate the concealing, or removal of, data related to criminal histories and convictions from official administrative data repositories. Proponents of these changes assert that automating the relief process will increase accessibility and effectiveness by removing barriers often found in petition-based systems. A review of the statutes suggests the majority of states that offer record relief continue to impose a petition-based system. Several other states operate a partially automated system wherein people are offered the option of petitioning the court for clearance or wait for automated clearance. New York recently became the newest state to pass legislation that automates record clearance at the point of eligibility, including arrest information.⁵

³ For more information, see <https://ccresourcecenter.org/restoration-2/>.
⁴ For example, Alaska Stat. § 12.62.180(b) allows for one exception: written requests for record sealing only in instances of mistaken identity or false accusation.
⁵ For more information on the New York State Clean Slate Act: <https://nyassembly.gov/Press/?sec=story&story=106403>.



To date, the Clean Slate Initiative estimates their model legislation has provided a path for over 5 million people to receive full record clearance and over 6 million to have at least one conviction or non-conviction cleared.⁶

In their work, researchers and advocates have found, time and again, that criminal records punish people long after they have served their sentence.⁷ Even so, clearing a criminal record can also result in unintentional negative consequences. As change makers seek avenues to reduce the footprint of the criminal justice system, it is imperative to be mindful of the potential negative ramifications resulting from complete removal of records without exceptions for research and policy evaluation purposes.

When Data Disappear

As calls for criminal justice reform grow louder, researchers and policymakers depend on access to viable data in order to assess the effectiveness of these reforms. Much of the data generated by criminal justice agencies are either locked behind paywalls and/or require adhering to the procedural complexities of petitioning the court in order to access them. The data that do become available are then not always complete or accurate, which contributes to existing blindspots in the system. When records, and the data associated with them, are cleared from or sealed within the courts' case management system, the deficit in available data expands. Collectively, these barriers and blindspots decrease the amount, type, and even quality of research conducted on them. Greater transparency in the criminal justice system means answers to questions that communities, and researchers alike, have for their local justice system and its elected officials. Increased access to criminal justice data shines a light on potential issues that otherwise may have remained unnoticed.


Implications for Research & Data Insights

Measures for Justice (MFJ) has spent over a decade working with, and collecting data from, agencies across the country in order to dismantle barriers between communities and their data. MFJ uses this data to compile performance measures that can serve as a foundation for collaboration and accountability among communities, including the agencies themselves, research organizations, and the general public. These performance measures are presented at the aggregate, county level on MFJ's national portal, and more recently are being presented for a single county prosecutor's office on community-driven dashboards, called Commons.⁸ MFJ's methods of grouping data for a measure, compounded by continually refreshing the data to sustain recency, create an inherent necessity for consistency in the data over time.

⁶ The Clean Slate Initiative is a national, bipartisan non-profit advocacy organization working to expand and automate record clearance post-sentence completion: <https://www.cleanslateinitiative.org/>.

⁷ Forrest, C. 2016. Collateral Consequences of a Criminal Conviction: Impact on Corrections and Reentry. Corrections NIJ Update: <https://www.ojp.gov/pdffiles1/nij/249734.pdf>.

⁸ For more information about our community-driven data tool Commons, or to view our National Portal, see <https://measuresforjustice.org/what-we-do/solutions/>.



On any one of MFJ's dashboards, there are hundreds of underlying calculations that are used to populate the measures with applicable cases. Each calculation uses a specified set of criteria to establish the numerator and a denominator of the calculation. For example, out of the total number of cases filed (denominator), how many of them resulted in a conviction (numerator)?

**IN THE
COMMONWEALTH OF
PENNSYLVANIA**

70%

**OF CASES FILED RESULTED
IN A CONVICTION BETWEEN
2009-2013**

As it stands, the Commonwealth of Pennsylvania (PA) is currently presented on MFJ's national data portal with measures available for both sides of a case's disposition—including percentage of cases prosecuted and percentage of cases convicted—for the years 2009-2013. Pennsylvania's passage of a Clean Slate law, expected to have been fully in effect by 2019, means that MFJ's ability to continue to populate existing measures is at risk. Were MFJ to collect more data from Pennsylvania in the future, the only data that could be delivered would be convictions not eligible to be sealed, creating a double blind spot wherein we can no longer see any non-conviction, and just shy of half the convictions.⁹

It would no longer be possible for MFJ to calculate previously available measures related to dispositions (such as proportions between prosecutions and convictions) and pre-disposition events (specifically, bail measures in PA would no longer be available).¹⁰ A case's lifecycle cannot be traced and measured for pain points if half or more of the lifecycle is missing. Removing case information, or even entire cases, in this way exacerbates existing holes in data that are often already missing crucial pieces of information for research. The data are essentially lost, and both the efficacy and accuracy of their measurement is reduced.

46%

**OF THOSE CONVICTIONS
ARE MISDEMEANORS NOW
ELIGIBLE, AFTER 10 YEARS,
FOR CLEARANCE**

⁹ See infographics for a specific breakdown; Measures for Justice (2023). Measures for Justice Data Portal. (Data Release: 3.11.0). <https://app.measuresforjustice.org/portal/PA/measures/120?c=1>.

¹⁰ Learn more about Pennsylvania record relief eligibility from My Clean Slate PA: <https://mycleanslatepa.com/eligibility/>



THAT'S ABOUT
260,000
cases

**THAT WILL NO LONGER BE
MEASURABLE POST-FILING
ONCE THEY ARE CLEARED**

Unlike MFJ's national portal, which measures in five year cohorts, Commons measures month-to-month outcomes using a date relevant to the calculation. Shrinking the size of the cohort in this manner decreases the amount of cases available in the pool, thus magnifying even the slightest variations in the numerator or denominator. A case that is missing a filing date, for instance, would be excluded from the count of how many cases are prosecuted each month. If the agency later backfills that case's missing date, that case will now be counted in the measure. If the values in the measures are in constant flux, it can, and has, lead to confusion amongst those consuming the data.

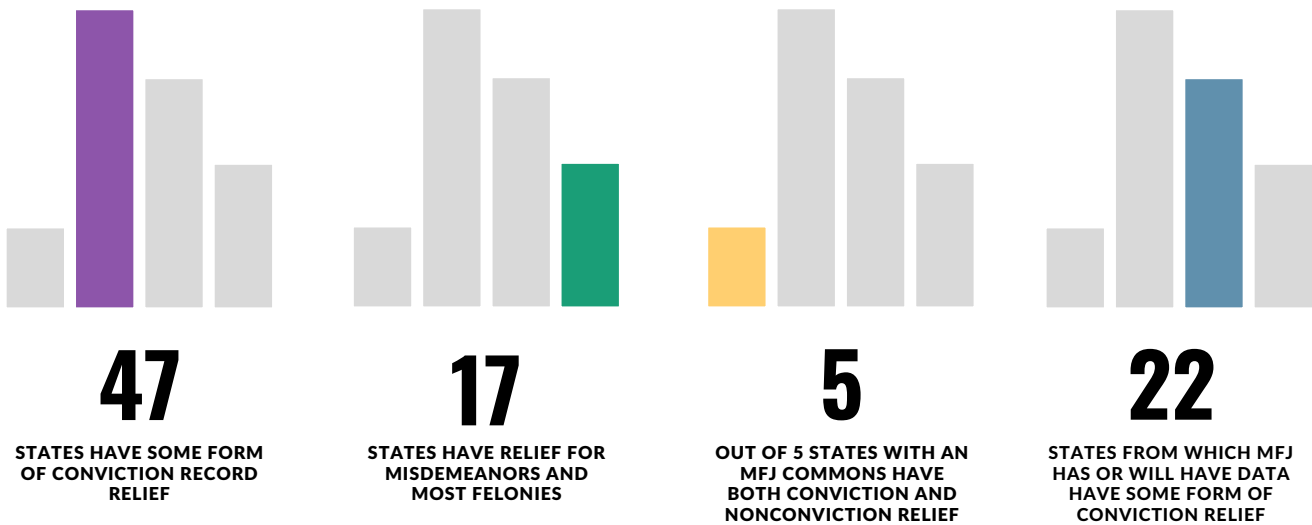
In the same way that diversion rates can be difficult to track if they are recorded as dismissals (successful completion) or guilty pleas (failure to complete), concealing information on convicted cases makes it difficult to accurately evaluate and monitor post-disposition events and disparities, such as racial inequity in sentencing.


AN AVERAGE OF
52,000
cases
ANNUALLY



More often than not, before a record is cleared, it starts off as a referred or filed case to be counted in a measure. Once that case becomes eligible and is cleared—whether for an arrest, a conviction, or both—the data are no longer available for consideration in a measure calculation. A cleared case can either manifest in complete removal from the dataset or removal of crucial pieces of information, such as a disposition or the charge information filed against that person. Those cases would then be excluded from measures in which they were formerly included, causing an apparent, and potentially drastic, fluctuation in the measure. The more cases and data points that are lost, the more difficult it becomes to effectively reflect the reality from which they're derived.

Over the past 12 years, MFJ has worked with various types of agencies, ranging from police to Departments of Corrections, from over 20 different US states. This means that researchers at MFJ have come across many different datasets and their associated challenges, including variances between agency types, file structures, and available fields of measurement. In partnership with agencies, we've learned how to navigate many of these obstacles, generating reliable performance measures for states across the country. However, legally imposed restraints around access to data, including limitations imposed by record clearance, are an ongoing challenge to our efforts to spur criminal justice system transparency. Specifically MFJ's measurement of the criminal justice system, and how well it's performing, is limited by our access to criminal records. As access decreases, the ability to fully measure and highlight certain sections of the criminal case lifecycle is lost. All of the states from which MFJ has received data have some form of record relief that will, or already does, affect MFJ's ability to provide a comprehensive set of measures.





Automated clearance efforts seek to eliminate this gap by removing the necessity of the person affected to get involved. Since most states limit clearance to lesser offenses or to first time offenders, even clean slate laws have the potential to increase existing racial inequities in opportunities that are afforded. Historically, it has been shown that the severity, and extent, of a criminal record disproportionately impacts people of different races and socioeconomic statuses.¹³ Notably, some advocates are working to address this problem. The Clean Slate Initiative, for example, puts forth a strong recommendation for legislation to include clearance eligibility for at least one felony record. Still, in practice, relief is less accessible to people that are more likely to be people of color, and governments may be inadvertently exacerbating disadvantages experienced by an already suffering community.¹⁴ While advocates are working hard to address these deficiencies, concerns around inequitable implementation further underscore the need to preserve data in such a capacity that enables us to examine trends related to record clearance offerings.




Without it, we are left to make decisions and shape policy in the dark with little evidence to guide us.

Recommendations

While all data have limitations, their proximity to the events coupled with reporting requirements make data collected by local law enforcement agencies and courts the most regularly recorded information we have to speak to system performance. While the quality and completeness of data collected vary considerably between jurisdictions, administrative data repositories maintained by these agencies are the most robust data sources with the capacity to speak to the ways in which different people experience their local justice systems. When legislation requires the complete destruction or electronic erasure of criminal records from these systems, we are effectively erasing the experiences of certain people and surrendering our ability to understand broader trends in how people are interacting with their local systems of justice.


¹³ Mooney, A.C., Skog, A., Lerman, A. E. 2022. Racial equity in eligibility for a clean slate under automatic criminal record relief laws. California Policy Lab: <https://escholarship.org/uc/item/1z462541>

¹⁴ Lageson, S. E. 2022. 'Clean Slate' Justice Laws Offer a Second Chance - Only to Some. Wired: <https://www.wired.com/story/clean-slate-law-race/>



To be clear, Measures for Justice recognizes the harmful implications of having a criminal record that have led to various initiatives and legislation aimed at reducing the footprint of the criminal justice system. Moreover, this report is not to be construed as advocating for total transparency of individual criminal records. We recognize the vast body of research that illustrates the cycles of harm and disadvantage perpetuated by the stigma associated with having a criminal record, and the dangers of personally identifying information being used in nefarious ways. For these reasons, it is imperative that criminal justice legislators and agencies alike work to safeguard individual-level data from misuse. The good news is that there are ways courts and other criminal justice agencies can preserve crucial information and promote transparency while protecting the privacy of people with past arrests and convictions.

Invest in Data Infrastructure




As states consider legislative reforms that impact criminal justice data, lawmakers should be mindful of the resources required to support and maintain a reliable data infrastructure. Criminal justice agencies including the courts should assess how data are currently tracked within their administrative data systems, establishing standard processes and protocols where they do not exist. While criminal record clearance poses new data challenges for agencies, to the extent the law allows, data infrastructure can be built in a way that protects personal identifiable information without completely erasing these cases from data repositories. For example, an individual's name and date of birth can be replaced with a unique identifier that allows agencies and researchers to still account for the case in their analyses. To the extent possible, these efforts should be collaborative and involve other local and state agencies. The creation of compatible systems, including a shared unique identifier, is critical to understanding criminal case processing overall.

Strengthen and Standardize Pathways to Data

When considering legislation to protect cleared records from public access, lawmakers should incorporate a component that preserves case-level information for research and policy evaluation purposes. California's Senate Bill No 731 paved the way for more than a million people to have prior conviction information sealed without restricting the dissemination of information gleaned from court records for research purposes.¹⁵ As another example, the New York Clean Slate Act passed in June 2023 includes language expressly permitting the sharing of de-identified information for research purposes.¹⁶

¹⁵ See CA SB-731 Criminal records: relief. (2021-2022). https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB731.

¹⁶ See NY State Senate Bill S7551A (2023): <https://www.nysenate.gov/legislation/bills/2023/S7551>; NY State Assembly Bill A1029C (2023): <https://www.nysenate.gov/legislation/bills/2023/A1029/amendment/C>.



Measures for Justice has collected case-level data from hundreds of local and state agencies across the country. There are a variety of ways to ensure valuable information is accessible to researchers so as to not stifle their ability to see how the systems are operating, while simultaneously protecting the information from unauthorized disclosure. As an example, agencies could require a written research application or data sharing agreement that includes provisions around data security and use to protect the data. Legislation mandating avenues for data transparency should be clear in defining what constitutes bona fide research to ensure these pathways to data access are consistently available to qualified persons or organizations. Further, agencies should ensure transparency in the data request process itself by publicly identifying the data available and process for obtaining this information.


Importantly, beyond barriers for researchers and policy analysts, individuals often struggle to access their own cleared records as an unintended consequence of record clearance. One example can be found in the reliance on criminal records throughout immigration proceedings where an individual who has a cleared conviction requires access to their own records to make the case that their past conviction does not bar them from obtaining citizenship. Some state laws preclude access to cleared records, including access for the individual whom the records are about, without a court order. This is especially challenging considering the increased presence of Immigration and Customs Enforcement around courthouses in recent years, which can subsequently make attempting to obtain such a court order an additional risk for the individual.¹⁷ Without protections for people in these specific situations, automatic clearance—and subsequent locking away—of a record hinders a person's ability to prove their criminal history doesn't preclude them from citizenship. Considering the seriousness of these consequences, in addition to creating pathways for research and policy analysis, it is essential that states ensure there are mechanisms in place that allow individuals to obtain their own records, without the added burden and risk of obtaining a court order.

Implement Safeguards to Protect Data from Misuse

Recent research has highlighted that efforts to protect cleared criminal record information from public access have not been wholly effective.¹⁸ In addition to being used by employers and landlords to screen individuals for job and housing opportunities, third party companies obtain individual level criminal records, despite efforts to restrict the release of this information through official channels.

¹⁷ Immigration Legal Resource Center June 2020. Best Practices: Clean Slate and Immigrants: https://www.ilrc.org/sites/default/files/resources/2020.06_clean_slate_and_immigrants-final.pdf

¹⁸ Koerner, G., & Kettani, H. 2019. Privacy concerns on expungement laws in the digital world. Proceedings of the International Conference on Information System and System Management (ISSM), Rabat Morocco. New York, NY: ACM. <https://doi.org/10.1145/3394788.3394791>.



These companies further stigmatize people who have been arrested or convicted, often publishing personal identifying information, like mugshots, and profiting by charging fees for their removal. If the goal of criminal record relief is to reduce the burden associated with a criminal record, legislators should prioritize protecting individual data from the nefarious ways it is often used under our current structures and governing policies. A 2023 report by Council of State Governments Justice Center outlines a set of best practices, including strengthening safeguards to prevent the disclosure of sensitive information by the private sector and the creation of oversight bodies.¹⁹



Conclusion

A lack of criminal records when trying to conduct analysis on policies pertaining to those same records creates a fundamental, and ironic, dissonance between studying the consequences while also eliminating them. By encouraging the erasure of criminal case information, states are inadvertently obscuring critical information necessary for evidence-based decision-making. Is the policy having the intended impact? Are people given equitable opportunities to benefit from the change? It is difficult to assess the progress and consequences of reforms, and hold agencies accountable for their part in the implementation when there is an absence of data.

Researchers depend on reliable and consistent access to the data they are studying. For studies using case-level information aggregated at the county, state, or even federal level, the ability to review a full set of criminal cases applicable to a study is a necessity. In the work that MFJ is doing, applicable criminal cases include any case referred or filed in the state in question, including convictions. Tracking all stages of a case in this way provides a big picture view of how cases are moving through the system: the average length between arrest for an offense and case disposition, how many referred cases were declined, and more. Without access to robust information pertaining to all cases initiated, we're unable to examine broader patterns and trends relating to the way people are experiencing their local systems of justice. As states ponder their next move to reduce the footprint of the criminal justice system, it is imperative that the protection and preservation of data is at the forefront of their considerations.

¹⁹ Gaines, J. 2023. Beyond Confidentiality: Modernizing Criminal Record Clearance Policies in the Digital Age. The Council of State Governments Justice Center.



Contributors:

Shelby Davis, Assistant Director of Research and Strategic Initiatives
Raelynn Walker, Assistant Director of Research and Data Processing

Acknowledgments:

Allyssa Birth, Communications and Marketing Manager
Sema Taheri, Director of Research and Strategic Initiatives
Janice Olukotun, Research Intern
Laura Chavez, The Clean Slate Initiative

