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The Estimated Size and Lost Earnings of New York's Second Chance Sealing Gap

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ESTIMATING THE EARNINGS LOSS ASSOCIATED WITH A CRIMINAL RECORD AND SUSPENDED DRIVER'S LICENSE

Colleen Chien, Alexandra George, Srihari Shekhar, and Robert Apel****

As states pass reforms to reduce the size of their prison populations, the number of Americans physically incarcerated has declined. However, the number of people whose employment and related opportunities are limited due to their criminal records continues to grow. Another sanction that curtails economic opportunity is the loss of one's driver's license for reasons unrelated to driving. While many states have "second chance" laws on the books that provide, e.g. expungement or driver's license restoration, a growing body of research has documented large "second chance gaps" between eligibility and delivery of relief due to the poor administration of second chance relief. This paper is a first attempt to measure the cost of these "paper prisons" of limited economic opportunity due to expungable records and restorable licenses, in terms of annual lost earnings. Analyzing the literature, we estimate the annual earnings loss associated with misdemeanor and felony convictions to be $5,100 and $6,400, respectively, and that of a suspended license to be $12,700.

We use Texas as a case study for comparing the cost (in terms of lost earnings) of the state's "paper prisons" – living with sealable records or restorable licenses – with the cost of its physical prisons. In Texas, individuals with criminal convictions may seal their records after a waiting period. But analyzing administrative data, we find that approximately 95% of people eligible for relief have not accessed it. This leaves 670,000 people in the "second chance sealing gap" eligible for but not accessing second chance relief, translating into an annual earnings loss of about $3.5 billion. Similarly, people that have lost driver's licenses are entitled to get their

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licenses restored under the law (in the form of "occupational driver's licenses," or "ODLs") in order to drive to work or school. But using a similar approach, we find that about 80% of the people that appear eligible for restored driver's licenses in Texas have not received them. This translates into about 430,000 people who needlessly lack licenses and a lower-bounds earnings loss of about $5.5 billion. Based on these figures, we find the cumulative annual earnings loss associated with Texas's "paper prisons" of limited economic opportunity due to lost but restorable licenses and convictions records eligible for sealing to be comparable with, and likely more than, the yearly cost to Texas of managing its physical prisons of around $3.6 billion.

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INTRODUCTION

In 2002, Christian Watts was charged with felony drug possession after connecting a friend with a contact who had a supply of MDMA (ecstasy).[1] Watts pleaded guilty to a lower misdemeanor charge, and the judge sentenced him to 3 months of house arrest and 36 months of probation.[2] At an average cost of $9.17 per day of probation, Watts's supervision cost federal taxpayers approximately $9,904.[3] But the consequences of his conviction did not end there. Since Watts completed his sentence, he has been denied civilian and military employment opportunities due to his record.[4] Despite earning associate's and bachelor's degrees, and the praise of a judge for his self-rehabilitation efforts,[5] Watts has been able to find work only as a dog walker and CrossFit trainer, jobs with average annual incomes of around $35,000.[6] Commenting that "my life is stuck in a standstill,"[7] Watts has abandoned plans to become a lawyer, a profession with an average annual income of about $90,000.[8] These figures imply a potential earnings gap of $55,000 per year and, associated with it, a gap in productivity, skills, and tax revenue.

In 2002, Demetrice Moore, a Certified Nursing Assistant ("CNA"), was convicted of grand larceny and sentenced to jail and costs, including the cost of the

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1. Maya Rhodan, *A Misdemeanor Conviction Is Not a Big Deal, Right? Think Again*, TIME, (Apr. 24, 2014, 5:26 PM), https://time.com/76356/a-misdemeanor-conviction-is-not-a-big-deal-right-think-again/ [https://perma.cc/VLW7-F3NR].

2. *Id.*; United States v. Watts, Order No. 2:04-CR-00146-PMP-RJJ (D. Nev. Apr. 25, 2011).

3. $9.17 per day x 30 days per month x 36 months = $9,903.60. For per-day probation supervision costs, see *Supervision Costs Significantly Less than Incarceration in Federal System*, U.S. CTS. (July 18, 2013), https://www.uscourts.gov/news/2013/07/18/supervision-costs-significantly-less-incarceration-federal-system [https://perma.cc/VX3P-PZXV].

4. *Watts*, Order No. 2:04-CR-00146-PMP-RJJ.

5. *Id.*; Rhodan, *supra* note 1 (At Watts's hearing, the judge said, "I wish I had far more people before me who show the kind of self-rehabilitation and effort that you've demonstrated" and even shook Watts's hand.).

6. *See Professional Dog Walker Salary in Las Vegas, NV*, ZIPRECRUITER, https://www.ziprecruiter.com/Salaries/Professional-Dog-Walker-Salary-in-Las-Vegas,NV [https://perma.cc/5DX2-GFE6]; *Fitness Trainer Salary in Las Vegas, NV*, ZIPRECRUITER, https://www.ziprecruiter.com/Salaries/Fitness-Trainer-Salary-in-Las-Vegas,NV [https://perma.cc/ZNQ3-4WAG] (listing average salaries at $30,906 and $36,325, respectively).

7. Rhodan, *supra* note 1.

8. *See Prosecutor Salary in Las Vegas, NV*, ZIPRECRUITER, https://www.ziprecruiter.com/Salaries/Prosecutor-Salary-in-Las-Vegas,NV [https://perma.cc/LZ7R-UDDL]. *See also Watts*, *supra* note 4 (Watts explained, "I want to continue to further my education and have an active application into Boyd school of law for this fall semester. I'm hoping to pursue a career as a prosecutor. Law school is costly and at 37 years old loans of that magnitude can be daunting. I did not want this to deter me from accomplishing my goal. I came to discover if I served my country in the military, not only can I satisfy my sense of duty, contribute to the greater good, but the government will help me with the cost of my education. I want very much to enlist as an officer and serve, possibly in the National Guard. However, no branch of the military will accept me with my current federal drug conviction.").

lawyer appointed to represent her because she was indigent.[9] Moore served her time but could not repay the costs.[10] As a result, her driver's license was automatically suspended.[11] This interfered with her work because "[a]s a CNA, she had to drive extensively to care for elderly and disabled patients in their homes."[12] Despite this, Moore attempted to keep working and was consequently convicted several times and jailed for driving with a suspended license.[13] In the end, Moore had to "stop[] working as a CNA because of the required driving."[14] An average-to-experienced CNA makes around $30,000 to $40,000 annually.[15]

Many have commented on the massive size of the American criminal justice system and celebrated reforms to reduce it.[16] But while the number of people put behind bars declines,[17] those who have old convictions and criminal records[18] continue to encounter structural barriers to work or the deprivation of a driver's license.[19] Among the freedoms curtailed by losing one's license or having a criminal

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9. Mario Salas & Angela Ciolfi, *Driven by Dollars: A State-By-State Analysis of Driver's License Suspension Laws for Failure to Pay Court Debt*, LEGAL AID JUST. CTR. 3 (Fall 2017), https://www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf [https://perma.cc/TB7Z-DPDF].

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Certified Nursing Assistant Salary Guide*, NURSEJOURNAL (Mar. 2, 2022), https://nursejournal.org/cna/salary/ [https://perma.cc/C24X-AX9L].

16. *See Overcrowding and Overuse of Imprisonment in the United States*, AM. CIV. LIBERTIES UNION 8 (May 2015), https://www.ohchr.org/sites/default/files/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf [https://perma.cc/SLQ5-33SE] (discussing the causes of the growth in the U.S. incarcerated population).

17. John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995/ [https://perma.cc/58GZ-3VJW] ("At the end of 2019, there were just under 2.1 million people behind bars in the U.S., including 1.43 million under the jurisdiction of federal and state prisons and roughly 735,000 in the custody of locally run jails.").

18. Becki Goggins, *New Blog Series Takes Closer Look at Findings of SEARCH/BJS Survey of State Criminal History Information Systems, 2016*, SEARCH (Mar. 29, 2018), https://www.search.org/new-blog-series-takes-closer-look-at-findings-of-search-bjs-survey-of-state-criminal-history-information-systems-2016/ [https://perma.cc/U2QS-NLW2] (showing the growth in the number of subjects in state criminal history files from about 81 MILLION in 2006 to about 110 million in 2016, however representing biometric (fingerprint) data that contains duplicates).

19. *See* Kansas v. Glover, 140 S. Ct. 1183, 1192 (2020) (In her concurring opinion, Justice Kagan notes that "several studies have found that most license suspensions do not relate to driving at all; what they most relate to is being poor."). *See also Best Practices to Reducing Suspended Drivers*, AM. ASS'N OF MOTOR VEHICLES 34–37 (Feb. 2013), https://web.archive.org/web/20220215144910/https://www.aamva.org/Suspended-and-Revoked-Drivers-Working-Group/ (Building off of the Department of Transportation's H.S. 811 092, "Reasons for Drivers License Suspension, Recidivism and Crash Involvement

history, economic liberty stands out. As the Supreme Court commented about suspended licenses in *Bell v. Burson*, "[o]nce licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees."[20]

To remove these barriers, nearly every state has laws on the books that allow old, generally minor, convictions to be expunged.[21] In many states, lost licenses can be restored in order to support going to work or school.[22] But as an emerging literature has documented, the poor administration of "second chance" policies means that many of the people, and often the majority, that are eligible for "second chance" laws to, e.g., expunge records or restore licenses, are not receiving the benefits of these laws. One of us has defined this difference as the "second chance gap" and estimated its size across a number of realms, including expungement, restoration of the right to vote, and resentencing.[23] An associated project, the Paper Prisons Initiative, has documented uptake rates of expungement across over a dozen states, finding rates of less than 10%—implying that over 90% of eligible people are not taking advantage of the law—to be common.[24]

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among Suspended/Revoked Drivers," this study estimates that, based on a sample of drivers from six states in the United States, the number of people who had licenses suspended for reasons unrelated to driving increased from 21% to 29% between 2002 and 2006.). *But see, e.g.*, Nina R. Joyce et al., *Individual and Geographic Variation in Driver's License Suspensions: Evidence of Disparities by Race, Ethnicity, and Income*, 19 J. TRANSP. & HEALTH 1, 3–5 (2020) (finding that, based on a random sample of about 7.6 million drivers in New Jersey, the prevalence of people with non-driving-related suspensions between 2004 and 2018 decreased from 7.9% to 5%).

20. Bell v. Burson, 402 U.S. 535, 539 (1971).

21. In this Article, we use the word "expunged" to refer generally to the shielding of records from public view through records remediations strategies such as sealing, orders of nondisclosure, and expunction.

22. *See What Is a Hardship License vs. Restricted License Comparison*, INTOXALOCK (June 30, 2021), https://www.intoxalock.com/blog/post/difference-between-hardship-and-restricted-license/ [https://perma.cc/HF27-A34H] (describing that states including Florida, Indiana, Wisconsin, Arkansas, and Kentucky all have "hardship licenses" that allow certain individuals to have licenses for going to work, and California, Texas, Washington, Virginia, and Iowa have "restricted licenses" that serve a similar purpose). Such licenses are also available to drivers in Pennsylvania. *See also Occupational Limited License*, PA. DEP'T TRANSP. & VEHICLE SERVS., https://www.dmv.pa.gov/Information-Centers/Suspensions/Pages/Occupational-Limited-Licenses.aspx [https://perma.cc/54YR-UEVZ].

23. *See* Colleen Chien, *America's Paper Prisons: The Second Chance Gaps*, 119 MICH. L. REV. 519, 519 (2020) (analyzing a variety of second chance programs in the United States, including clemency, compassionate release, resentencing, and nonconvictions expungement, and finding that in many cases "only a small fraction (less than 10 percent) of those eligible for relief actually received it.").

24. PAPER PRISONS INITIATIVE, https://www.paperprisons.org/ [https://perma.cc/XX2F-4V7H] (documenting the "uptake rate" of expungement relief in states across the United States); *see also* J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460, 2461 (2020) (finding

The economic impacts of paper prisons are more difficult to quantify than the out-of-pocket costs of physical prisons, but they are still consequential. Though the total unemployment rate in January 2022 was less than 4%, the last estimate of unemployment of formerly incarcerated people living in the United States, published in 2018, reported an unemployment rate of "over 27%—higher than the total U.S. unemployment rate during any historical period, including the Great Depression, at which time the figure was close to triple the national unemployment rate."[25]

But the fact that the costs of paper prisons are largely unquantified and unknown makes it difficult to know how much to prioritize closing such paper prisons through full delivery of second chances. It also obscures the cost of the poor drafting of second chance laws, which in many cases are complicated and difficult to apply.[26] One obstacle to passing "clean slate" bills that would narrow the second chance gap has been the out-of-pocket costs of updating records.[27] But an understanding of the costs of paper prisons and a lack of action to close them is lacking. As such, it is important to quantify the economic costs of second chance gaps. This Article does so by estimating the earnings and employment consequences of old expungable convictions and lost driver's licenses that are available for restoration under existing law.

Part I of the Article provides an overview of two of Texas's second chance laws, governing the grant of orders of nondisclosure ("ONDs") and restoration of occupational driver's licenses ("ODLs"). It details the processes required to obtain each form of second chance relief and explores how various administrative factors may contribute to gaps in their uptake. Part II then describes the populations of people eligible for convictions and driver's license relief and our methodology for estimating each second chance gap, measured by the number of individuals with records who qualify for relief (the "current gap"), the share of people eligible for a given second chance that have obtained it (the "uptake gap"), and the number of years it would take to clear each second chance backlog based on the current pace of relief. Part III presents estimates of the lost earnings and employment consequences associated with a criminal record and a lost driver's license. We then

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that in Michigan, "among those legally eligible for expungement, just 6.5% obtain it within five years of eligibility").

25. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), https://www.prisonpolicy.org/reports/outofwork.html [https://perma.cc/E85F-LAAD] (describing the findings based on the National Former Prisoner Survey, conducted in 2008); Kimberly Amadeo, *Unemployment Rate by Year Since 1929 Compared to Inflation and GDP*, THE BALANCE, https://www.thebalance.com/unemployment-rate-by-year-3305506 [https://perma.cc/E85F-LAAD] (reporting a national unemployment rate of 10% in 2009).

26. *See infra* Appendix Part A for a description of Texas's sealing law.

27. *See, e.g.*, Rachel M. Cohen, *Washington Governor Vetoes Bill that Would Have Automatically Cleared Criminal Records*, THE APPEAL (May 19, 2020), https://theappeal.org/politicalreport/washington-governor-vetoes-clean-slate-bill/ [https://perma.cc/L6ZK-V8M6] (Washington State in 2020 passed a "clean slate" bill that would have narrowed the second chance gap, but the Governor vetoed the bill due to cost, in part due to the anticipated cost of COVID expenditures).

use these estimates and the findings from Part II to calculate the earnings loss associated with Texas's paper prisons.

In Texas, we find that approximately 5% of people eligible for sealing relief have accessed it, leaving a gap of about 670,000 people (with people in the gap having their last conviction, on average, 17 years ago). We estimate the earnings loss associated with this gap to be approximately $3.5 billion annually. Using a similar approach, we find that about 20% of people eligible for ODLs in Texas have accessed them—leaving a gap of 430,000 people eligible for ODLs who have not gotten one—which translates into an earnings loss of about $5.5 billion. Based on these figures, we find the cumulative annual earnings loss associated with Texas's "paper prisons" to compare to, and even exceed, the yearly cost of funding physical prisons in Texas, which is around $3.6 billion.

I. OVERVIEW OF TEXAS'S RECORD SEALING AND LICENSE REINSTATEMENT LAWS

For our exploration of the economic impacts of the second chance gap, we used Texas as a case study for a few reasons. First, Texas has the ninth largest economy in the world by GDP and prides itself on being business friendly and a reliable source of skilled workers.[28] Secondly, like many states, Texas has been under fiscal pressure to reform and reduce the costs of its criminal justice system and has led the country in many respects in doing so.[29] As part of this reform, policymakers and politicians have widely celebrated the cost savings associated with closing Texas's physical prisons.[30] However, while the number of Texans who were incarcerated in state prisons and jails decreased by 20% between fiscal years 2005 and 2020,[31] the number of individuals with a criminal history in the state doubled

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28. *Texas Enters 2021 as World's 9th Largest Economy by GDP*, TEX. DEV. CORP. (Jan. 27, 2021), https://businessintexas.com/news/texas-enters-2021-as-worlds-9th-largest-economy-by-gdp/ [https://perma.cc/ML4J-FR7J] (describing the benefits of Texas for businesses as including "highly competitive tax climate, world-class infrastructure, a skilled workforce of 14 million people, business-friendly economic policies and abundant quality of life").

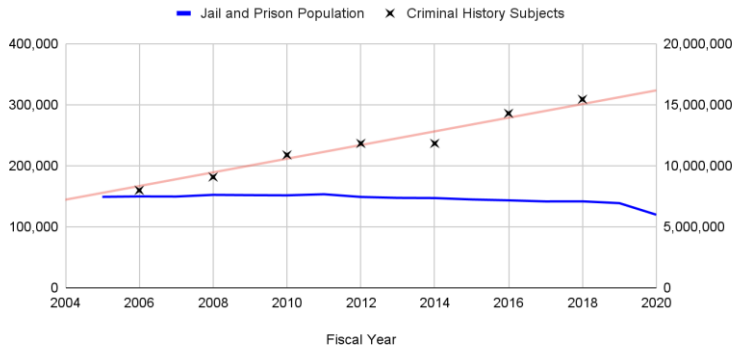
29. Michael Haugen, *Ten Years of Criminal Justice Reform in Texas*, RIGHT ON CRIME (Aug. 1, 2017), https://rightoncrime.com/2017/08/ten-years-of-criminal-justice-reform-in-texas/ [https://perma.cc/28WQ-MV4U] (describing states adopting justice reinvestment packages similar to the ones in Texas).

30. *See* Jolie McCullough, *As the Texas Prison Population Shrinks, the State Is Closing Two More Lockups*, TEX. TRIB. (Feb. 21, 2020, 8:43 AM), https://www.houstonpublicmedia.org/articles/news/2020/02/21/361405/as-the-texas-prison-population-shrinks-the-state-is-closing-two-more-lockups/ [https://perma.cc/GTL8-BD5P] (describing how in 2020, for example, the Texas Department of Criminal Justice projected that closing two Texas prisons would "free up about $20 million in its budget"); *see also* Brandi Grissom, *With Crime, Incarceration Rates Falling, Texas Closes Record Number of Prisons*, DALL. MORNING NEWS (July 5, 2017, 12:41 PM), https://www.dallasnews.com/news/politics/2017/07/05/with-crime-incarceration-rates-falling-texas-closes-record-number-of-prisons/ [https://perma.cc/R2ZS-5WM5] (estimating that Texas could "eliminate more than 2,000 beds . . . [and] save the state some $49.5 million" from closing four prisons).

31. From 148,988 people to 119,707 people. This excludes participants in the Substance Abuse Felony Program. *See Statistical Reports*, TEX. DEP'T OF CRIM. JUST. (2020,

over the same period, according to repository consortium SEARCH.[32] There are 5 million people in Texas's database of people with convictions. Before the law was reformed in 2020, 1.4 million Texans, or 5% of the population, had suspended licenses.[33] As such, the extent to which people with records and suspended licenses are integrated into the workforce—or not—has significant consequences for the Texas economy.

Fig. 1: Texas Jail and Prison Population and Criminal History Subjects



Sources: Texas Department of Criminal Justice's Annual Statistical Reports for

2005) at 8 (all reports as of Jan. 21, 2022, available at https://www.tdcj.texas.gov/publications/statistical_reports.html).

32. Data from bi-annual *Survey of State Criminal History Information Systems*, SEARCH (2020, 2008, 2009, 2011, 2014, 2015, 2018, 2020) at Table 1 (2020 report available, e.g., at https://www.ncjrs.gov/pdffiles1/bjs/grants/255651.pdf). In 2006, the repository had 7,986,300 records. BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., SURVEY OF STATE CRIMINAL HISTORY INFORMATION, 2006 36, 40 (Oct. 2008), https://www.ojp.gov/pdffiles1/bjs/grants/224889.pdf [https://perma.cc/P8RV-GVB7]. In 2018, that number was 15,437,500. Becki R. Goggins & Dennis A. DeBacco, *Survey of State Criminal History Information Systems, 2018: A Criminal Justice Information Policy Report*, SEARCH 34 (Nov. 2020), https://www.ncjrs.gov/pdffiles1/bjs/grants/255651.pdf [https://perma.cc/NC3D-QBWK].

33. At least 400,000 licenses remain suspended, though the elimination of a controversial program restored 1.4 million licenses. Letter from Dep't of Pub. Safety to Karly Jo Dixon from the Tex. Fair Def. Project (on file with authors). For more on the significance of the repeal of the controversial program, see Emily Gerrick & Mary Mergler, *Commentary: Lawmakers Need to Fix Another Problem that Buries Texas Drivers in Fines*, STATESMAN (July 5, 2020), https://www.austintexas.gov/edims/document.cfm?id=340640 [https://perma.cc/WM5Z-RQBN] ("We cannot overstate how significant the repeal of this program is. When the law goes into effect in September, 1.4 million license suspensions will be lifted, and nearly $2.5 billion of surcharge debt will be wiped clean. Huge numbers of people will escape the cycle of suspensions and get back on the road driving legally. This repeal will help vulnerable Texans achieve financial stability, save taxpayer dollars and boost the Texas economy.").

fiscal years 2005 through 2020 (for jail and prison population data)[34]; SEARCH (for criminal subjects data).[35]

Another reason to focus on Texas is that, over the past several decades, Texas has introduced laws that advance both criminal justice and workforce-related objectives, allowing individuals with old convictions to get them sealed and individuals that have lost their licenses a chance to regain their right to drive to work or school.[36] The scale of Texas's criminal justice system and its adoption of many second chance reforms, as well as the lack of attention paid to their implementation, make the state a good subject for study and analysis.

Below we provide an overview of Texas's second chance laws, describing their legislative history and the processes set forth by the law for obtaining relief. These laws share the goals of advancing economic interests and removing barriers to work, as well as preserving public safety.

A. Record Relief: Order of Nondisclosure

In Texas, every time a person is convicted of a crime, this event is memorialized in the person's criminal record, which sets off various "collateral consequences," or civil punishments that follow a person long after time has been served. The National Inventory of Collateral Consequences of Conviction has cataloged over 1,600 civil sanctions in Texas alone for people with criminal records spanning child support, employment, volunteering, civic participation, real estate, visitation and parental rights, and housing residency.[37] People with certain criminal records are disqualified from numerous top jobs for people without college degrees. "Security Guards," which appears on Texas Labor Analysis's list of the top 25

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34. Data about the size of the on-hand state jail and prison population was obtained from *Statistical Reports*, TEX. DEP'T CRIM. JUST. 8 (2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012, 2011, 2010, 2009, 2009, 2007, 2006, 2005) (reports last available on Jan. 23, 2022, https://www.tdcj.texas.gov/publications/statistical_reports.html). Even though the TDCJ places people in jail, prison, and the Substance Abuse Felony Punishment Facility (SAFP) Program in the same "on hand" category in its annual reports, we exclude the number of people in the SAFP Program from our estimate of the size of the state's prison and jail population.

35. Goggins & DeBacco, *supra* note 32, at 34, Tbl. 1 (listing the total number of records in the state repository as of December 2018).

36. *See infra* notes 43, 73.

37. *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES, https://niccc.nationalreentryresourcecenter.org/consequences [https://perma.cc/S95E-MY6E] (select "Texas" from dropdown).

projected occupations without a higher education requirement for individuals,[38] with wages from approximately $21,000 to $37,000,[39] is one of them.[40]

In an effort to give people a second chance and allow them to more easily find employment, the Texas Legislature passed Texas Government Code Chapter 411, creating two pathways for individuals to remove their past criminal records from public access.[41] The first pathway provides relief via an expunction, which occurs when all "information about an arrest, charge, or conviction [is removed] from [one']s permanent records."[42] Expunction is only available for felony and Class A, B, and C misdemeanor nonconvictions.[43] The second pathway, an OND, seals records from the general public while allowing certain employers and government agencies to "see through" the OND.[44] Sealing via OND is available to people convicted of first-time, low-level misdemeanor convictions as well as to those who completed deferred adjudication community supervision ("deferred adjudication") for low-level offenses.[45] This article focuses only on sealing of convictions because the earnings impact of a conviction is recognized to be much more significant than a nonconviction.[46] As such, we will use "sealing" throughout the remainder of the article to refer exclusively to record relief granted using the OND pathway.

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38. *Top Statistics - Texas - Projections - No Education Requirement, High School Diploma, or Postsecondary Non-Degree*, TEX. LAB. ANALYSIS, https://texaslaboranalysis.com/TopStatistics [https://perma.cc/UD3T-L489] (report generated Aug. 27, 2021).

39. *Demand Analysis - Occupational Detail - Texas - Security Guards (SOC 33-9032)*, TEX. LAB. ANALYSIS, https://texaslaboranalysis.com/Demand [https://perma.cc/GP6W-CVUP] (report generated Aug. 27, 2021).

40. NAT'L INVENTORY OF COLLATERAL CONSEQUENCES, *supra* note 37 (specify "private security, investigations, and locksmiths" as a keyword).

41. TEX. GOV'T CODE ANN. §§ 411.072, 411.0725, 411.073, 411.0731, 411.0735, 411.074; TEX. CODE CRIM. PROC. ANN. art. 55.01.

42. TEX. CODE CRIM. PROC. ANN. art. 55.01. For more on the legislature's intent for expunction to redress the harm associated with criminal justice involvement, see also State v. T.S.N, 547 S.W.3d 617, 623 (Tex. 2018) (noting that the state's expunction statute allows for expunction "in limited, specific circumstances . . . [with the] intent to, under certain circumstances, free persons from the permanent shadow and burden of an arrest record, even while requiring arrest records to be maintained for use in subsequent punishment proceedings and to document and deter recidivism").

43. TEX. CODE CRIM. PROC. ANN. art. 55.01.

44. TEX. YOUNG LAW. ASS'N & STATE BAR OF TEX., *Expunctions in Texas* 1, 5, (2019), https://www.texasbar.com/AM/Template.cfm?Section=Our_Legal_System1&Template=/CM/ContentDisplay.cfm&ContentID=23459 [https://perma.cc/B23E-E2ZU]; TEX. GOV'T CODE ANN § 411.0765. Thank you to Derek Cohen of the Texas Policy Lab for raising this to us in a comment on a previous draft.

45. TEX. GOV'T CODE ANN. § 411 Subchapter E-1.

46. *See generally* Robert Apel & Kathleen Powell, *Level of Criminal Justice Contact and Early Adult Wage Inequality*, 5 RUSSEL SAGE FOUND. J. SOC. SCI. 199–200 (Jan. 2019) (providing an overview of this literature).

In 2003, the Texas Legislature created a way for people with convictions to obtain orders of non-disclosure ("ONDs")[47] in an effort to remove impositions on a "person's ability to obtain a desired job or position for many years after the offense."[48] In 2015, the 84th Texas Legislature passed S.B. 1902 to "[give] reformed offenders a second chance, creating a safer Texas, and increasing the workforce with individuals who are no longer limited by their minor criminal histories" by making sealing of deferred adjudication dismissals "automatic."[49] This was followed two years later by H.B. 3016, which further expanded eligibility.[50]

Despite these revisions, the scope of Texas's record sealing law remains narrow. Offenses that are given deferred adjudication up to a maximum duration[51] are eligible for relief following successful completion of community supervision and dismissal.[52] First-offense misdemeanor convictions, after a two-year waiting period following sentence completion, are also generally eligible as long as there have been no prior convictions or deferred adjudications.[53] First-time driving while intoxicated ("DWI") offenses are eligible after a two-to-five-year waiting period.[54] Disqualified offenses, or those that are subject to longer waiting periods, include: violence besides simple assault, sex crimes, and a handful of other crimes,[55] as well as offenses that have been committed by individuals who have been convicted of certain crimes.[56]

There are two processes people can use to apply for record sealing. The first process, the petition route, is used for convictions, most misdemeanors, and

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47. *Id.*

48. Royce West, *C.S.S.B. 1477 Bill Analysis*, SENATE RSCH. CTR. 1 (May 8, 2003), https://capitol.texas.gov/tlodocs/78R/analysis/pdf/SB01477S.pdf#navpanes=0 [https://perma.cc/WEM7-4VUH].

49. Charles Perry, *S.B. 1902 Bill Analysis*, SENATE RSCH. CTR. 1 (Apr. 17, 2015), https://capitol.texas.gov/tlodocs/84R/analysis/pdf/SB01902I.pdf#navpanes=0 [https://perma.cc/CPA9-6DFM].

50. Senfronia Thompson et al., *C.S.H.B. 3016 Bill Analysis*, SENATE RSCH. CTR. (May 18, 2017), https://capitol.texas.gov/tlodocs/85R/analysis/pdf/HB03016S.pdf#navpanes=0 [https://perma.cc/24B5-R2K2].

51. A maximum of two years of community supervision following misdemeanors and ten years of community supervision for a felony. TEX. CODE CRIM. PROC. ANN. art. 42A.103.

52. *Id.* art. 42A.102; TEX. GOV'T CODE ANN. § 411.0725.

53. GOV'T §§ 411.073, 411.0735. Some convictions have a shorter waiting period, but for simplicity and to be conservative, we do not model these shorter periods, as described in the Appendix.

54. § 411.0736.

55. *See, e.g.*, TEX. PENAL CODE ANN. § 49.06 (boating while intoxicated); *see also id.* § 49.05 (flying while intoxicated); § 49.065 (assembling or operating an amusement ride while intoxicated); *id.* tit. 11, Ch. 71 (organized crime).

56. TEX. GOV'T CODE ANN. § 411.0735(c-1). People are ineligible to have their records sealed if they have ever been convicted of or received deferred adjudication for offenses including homicide, human trafficking, aggravated kidnapping, child or elder abuse, stalking, and offenses that require registration as a sex offender. *Id.* § 411.074(b). Payment of legal financial obligations, if required for sentence completion, is also required. *Id.* §§ 411.0735(b), 411.0736(b).

felonies given deferred adjudication.[57] The petition process starts with an individual submitting a petition and a fee to the "clerk of the court . . . that sentenced [them] or placed [them] on community supervision . . . or deferred adjudication . . . ."[58] Although the filing fee can vary by county,[59] "the petition must be accompanied by payment of a fee that generally applies to the filing of a civil petition."[60] After submitting a petition, the court holds a trial to determine whether the petitioner is eligible for sealing and whether sealing the petitioner's record "is in the best interests of justice."[61] If the court answers both questions affirmatively, relief is granted, and the record is sealed.[62]

The second process for sealing one's record—the submission route—is used only for nonviolent first-time misdemeanor offenses that received a deferred adjudication community supervision sentence that was completed and dismissed on or after September 1, 2017.[63] The submission route does not require a petition.[64] Instead, to initiate the process, the applicant must "[p]resent evidence necessary to establish that [they] are eligible to receive an order under Section 411.072," which typically involves filing a Letter Requesting an Order of Nondisclosure Under Section 411.072.[65] When submitting the Letter to the clerk, the applicant must also pay a $28 fee or request a fee waiver.[66] A judge will then review the evidence and seal the record if the applicant meets the eligibility criteria.[67] Despite the procedural differences between the two record sealing processes, both involve legal fees, court fees, and a petition initiated by the applicant, which requires awareness of both eligibility and the possibility of sealing.

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57. TEX. GOV'T CODE ANN. §§ 411.0735, 411.0725. *See also An Overview of Orders of Nondisclosure*, TEX. OFF. CT. ADMIN. 3, https://www.txcourts.gov/media/1454238/overview-of-orders-of-nondisclosure-2022.pdf [https://perma.cc/QB5Q-L4Y5] (Feb. 2022); TEX. OFF. CT. ADMIN., *What is an Order of Nondisclosure and How Do I Get One?*, TEX. L. HELP, https://texaslawhelp.org/article/what-is-a-nondisclosure-order-and-how-do-i-get-one [https://perma.cc/C384-SXKK].

58. TEX. OFF. CT. ADMIN., *supra* note 57, at 2, 14.

59. *Orders of Nondisclosure Overview*, TEX. OFF. CT. ADMIN. 5 (Apr. 2017), https://www.txcourts.gov/media/821650/order-of-nondisclosure-overview.pdf [https://perma.cc/RZZ5-SZNP].

60. TEX. GOV'T CODE § 411.0745(b).

61. *Texas: Restoration of Rights & Record Relief*, COLLATERAL CONSEQUENCES RES. CTR. (Feb. 3, 2022), https://ccresourcecenter.org/state-restoration-profiles/texas-restoration-of-rights-pardon-expungement-sealing/ [https://perma.cc/G7B8-CTED].

62. *Id.*

63. TEX. OFF. CT. ADMIN., *supra* note 57, at 10.

64. *Id.* at 10–11; *see also* Paul Saputo, *Texas Criminal Law: Orders of Nondisclosure*, SAPUTO L., https://saputo.law/criminal-law/record-clearing/orders-of-nondisclosure/ [https://perma.cc/2ZEA-X4R7] (also explaining that although some call this type of OND "automated," this is misleading because an individual must still initiate the process).

65. TEX. OFF. CT. ADMIN., *supra* note 57, at 11.

66. *Id.* at 11–12.

67. *Id.* at 11.

B. Driver's License Restoration: Occupational Driver's License

In Texas, individuals can lose their licenses for a variety of reasons, from minor (e.g., not having insurance, outdated registration, or not signaling[68]) to serious (e.g., "a habitually reckless or negligent operator of a motor vehicle"[69]) driving offenses. Individuals can also lose their driver's license for non-driving-related reasons, such as "fail[ing] to appear for a citation or fail[ing] to satisfy a judgment ordering the payment of a fine [or fee]."[70] Once an individual loses their driver's license, that person is faced with a difficult choice: find alternatives for basic tasks like driving to work or school or risk further criminalization if caught driving without a license.[71]

To redress the productivity-related harms associated with not having a driver's license,[72] Texas Transportation Code § 521 Subchapter L allows certain individuals to apply for an ODL to regain the right to drive to work and school.[73] The legislative history suggests that the goal of providing ODLs was to support employment. For instance, in 1969, Senator William T. Moore noted that "[t]he law relating to driver's licenses is now discriminatory in that it deprives many persons of the privilege of following their occupations and earning a living."[74] S.B. 743, which "provide[d] for the issuance of an occupational license to certain people who have had their license suspended," followed.[75] In 2015, the 84th Legislature passed H.B. 2246 to balance the need for public safety, vis-a-vis individuals with licenses suspended due to past intoxication, with the desire to help such individuals "continue

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68. Chris Abel, *Failure to Appear and Traffic Violations*, ABEL L. FIRM, https://www.flowermoundcriminaldefense.com/failure-appear-and-traffic-violations [https://perma.cc/G8PK-4SJ4].

69. TEX. TRANSP. CODE ANN. § 521.292(a)(2). *See also Driver's License Enforcement Actions*, TEX. DEP'T PUB. SAFETY, https://www.dps.texas.gov/internetforms/Forms/DL-176.pdf [https://perma.cc/X8P8-F8WV] (listing the reasons individuals can have their licenses revoked, suspended, and/or disqualified).

70. *Failure to Appear/Failure to Pay Program*, TEX. DEP'T PUB. SAFETY, https://www.dps.texas.gov/section/driver-license/failure-appearfailure-pay-program [https://perma.cc/K99D-JBSQ].

71. *Driven By Debt*, TEX. APPLESEED & TEX. FAIR DEF. PROJECT (Dec. 13, 2018), https://web.archive.org/web/20210603033032/https://report.texasappleseed.org/driven-by-debt/ [https://perma.cc/H85X-ALUP].

72. As recognized by the U.S. Supreme Court, see *Bell v. Burson*, 402 U.S. 535, 539 (1971).

73. TEX. TRANSP. CODE ANN. §§ 521.241–521.242.

74. William T. Moore, *S.B. 753 Bill Analysis*, SENATE RSCH. CTR. 8 (May 7, 1969), https://lrl.texas.gov/LASDOCS/61R/SB743/SB743_61R.pdf#page=8 [https://perma.cc/8F55-3BB7].

75. *Id.*

to support themselves and their families."[76] To effect this goal, ODLs were made available to individuals who installed an ignition interlock device in their vehicles.[77]

A more recent, related development to restore driver's licenses was the 2019 repeal of the Driver's Responsibility Program ("DRP"), which controversially imposed large fines for often minor traffic offenses (e.g., speeding or driving without insurance) to fund trauma centers in rural areas.[78] The program's end resulted in the restoration of thousands of licenses.[79] However, according to the ACLU, "an estimated 500,000 individuals' licenses remained suspended after their DRP surcharges were eliminated,"[80] a figure consistent with the data reported in this study.

To obtain an ODL under Texas Transportation Code § 521 Subchapter L, one must demonstrate "an essential need" for the ODL, for example, the need to

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76. Jason Villalba et al., *H.B. 2246 Bill Analysis*, SENATE RSCH. CTR. (May 18, 2015), https://capitol.texas.gov/tlodocs/84R/analysis/pdf/HB02246E.pdf#navpanes=0 [https://perma.cc/U4ED-Y9YP].

77. W. Clay Abbott, *Legislative Changes to the Occupational Driver's License Statutes*, TEX. DIST. & CNTY. ATT'YS ASS'N (Sept.–Oct. 2015), https://www.tdcaa.com/journal/legislative-changes-to-the-occupational-drivers-license-statutes/ [https://perma.cc/3G2W-Z7F4]. *See also* TRANSP. § 521.244(e)(1), (2) (creating OND eligibility based on evidence of financial responsibility and proof of the installation of an ignition interlock device on each motor vehicle operated by the individual).

78. Morgan Smith, *To Pay for Trauma Centers, State Program Sinks Thousands of Texas Drivers Into Deep Debt*, TEX. TRIB. (Aug. 27, 2018), https://www.texastribune.org/2018/08/27/pay-trauma-centers-texas-sinks-thousands-drivers-deep-debt/ [https://perma.cc/SMD6-54VX] (describing how the program, originally intended to "hold bad drivers responsible for the damage they caused, with the license suspensions having the added benefit of keeping them off the roads" was eventually seen as a "massive failure"). *See also* Matthew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties*, BRENNAN CTR. FOR JUST. 26 (Nov. 21, 2019), https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines [https://perma.cc/Z49F-Z897].

79. Payton Weidman, *TOP 19: Ending of Driver Responsibility Program Clears Way for 1.5M Licenses to be Restored in Texas*, CBS (Dec. 20, 2019), https://www.cbs19.tv/article/news/ending-of-driver-responsibility-program-clears-way-for-15m-licenses-to-be-restored-in-texas/501-171e294f-a9cf-46ba-822b-7c600e312f27 [https://perma.cc/74J6-EKNX] (estimating that following the DRP repeal, about 635,000 Texans would automatically have their licenses restored, 350,000 would have their licenses restored after paying a reinstatement fee, and 398,000 "will be eligible to have their suspensions lifted after they resolve other non-DRP reasons for their license suspensions, such as failure to pay or appear"); *see also DRP Repeal Allows More Than 1.6 Million People to Drive Again*, TEX. ASS'N OF CNTYS. (Nov. 1, 2019), https://www.county.org/News/County-Issues/2019/November/DRP-Repeal-Allows-More-Than-1-6-Million-People [https://perma.cc/PXQ8-3NZL] (noting that when the program ended on September 1, 2019, "more than 1.6 million people have become eligible to apply for their driver's license.").

80. *Repeal of the Driver's Responsibility Program*, AM. CIV. LIBERTIES UNION, https://www.aclutx.org/en/know-your-rights/repeal-driver-responsibility-program&sa=D&source=docs&ust=1655359165007038&usg=AOvVaw3LvA2V_M7briaxvjwxxlXd [https://perma.cc/9B99-RH6A].

drive to work or to school and a lack of an alternative transportation option.[81] However, individuals are ineligible for ODLs if they have "lost [their] driving privileges because of a mental or physical disability," have "lost [their] driving privileges for failure to pay child support," have "received two ODLs in the past 10 years after a conviction," or "have a 'hard suspension' waiting period due to a prior DWI arrest or conviction."[82] ODLs are also unavailable to individuals who need a license to drive a commercial motor vehicle.[83]

To obtain an ODL, an eligible individual must complete a petition in accordance with local court requirements.[84] Next, the applicant must file the petition and submit a filing fee.[85] If the applicant's license was "automatically suspended or canceled following a conviction, [the applicant should] file the Petition in the same court that convicted [him or her]."[86] If not, the applicant can choose to file the petition "in the county where [the applicant] live[s] or where the offense occurred."[87] Following filing, there is a hearing where a judge reviews the petition and other paperwork of the petitioner, including a Certified Abstract of the petitioner's full driving record, an SR-22 Proof of Insurance from the petitioner's insurance company, and evidence that the petitioner needs the license to go to work, attend school, etc.[88] The judge will then decide whether to grant an ODL.[89]

C. Barriers to Relief Under Texas's Second Chance Laws

As discussed above, Texas enacted its record sealing and driver's relicensing laws with the goals of reducing the size of the criminal justice system and increasing access to second chances and workforce opportunities.[90] However, three administrative burdens placed on applicants by these laws limit the legislature's success in meeting these goals:[91] first, the petition process in both cases

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81. *Texas Occupational Driver's License* 1, https://www.co.chambers.tx.us/upload/page/0100/docs/Occupational%20DL/BrochureODL.pdf [https://perma.cc/EJF4-F5B4].

82. *Id.*; *see generally Occupational Driver's License*, TEX. L. HELP, https://texaslawhelp.org/guide/occupational-drivers-license/?toggle=1&toggle=2&toggle=3&toggle=4&toggle=5 [https://perma.cc/N2FJ-LZ7V] (last updated Apr. 13, 2022) (providing additional information on "hard suspension" waiting periods).

83. *Texas Occupational Driver's License*, *supra* note 81, at 1.

84. *See id.* at 2.

85. *See id.* at 3 (stating "if you filed an Affidavit of Indigency to waive the court filing fees, the court may require proof of income & expenses"); TEX. L. HELP, https://texaslawhelp.org/guide/occupational-drivers-license?tab=1&toggle=6&toggle=9 [https://perma.cc/RTC4-LJMC] ("Fill out this form only if you have a low-income, receive public assistance because you have a low income, or cannot pay the court filing fee.").

86. *Texas Occupational Driver's License*, *supra* note 81, at 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Supra* Part I.A and B.

91. *See generally* Julian Christensen et al., *Human Capital and Administrative Burden: The Role of Cognitive Resources in Citizen-State Interactions*, 80 PUB. ADMIN. REV. 127 (2020) (describing the ways in which "citizens with lower levels of human capital" experience greater administrative burdens, which contributes to reinforcing inequality);

requires an individual not only to prove they deserve a second chance but also to ascertain the law and fill out potentially confusing paperwork; second, the requirement that individuals seeking a second chance attend a hearing similarly burdens people with challenges ranging from getting a hearing on the calendar (which requires successfully submitting a petition) to attending a hearing (which can involve taking time off of work, traveling, etc.); and third, complex criteria that frequently evolve make it difficult for individuals to keep up with the law and determine their eligibility. These painstaking and administratively difficult processes not only stand in stark contrast with the automaticity of negative collateral consequences after a conviction or the suspension of a driver's license, they also contribute to the gap in delivery of record cleaning and license restoration, as quantified in the next Part.

II. ESTIMATING THE SIZE OF TEXAS'S SEALING AND DRIVER'S LICENSE RESTORATION SECOND CHANCE GAPS[92]

While Texas legislatures have passed second chance laws to advance a variety of goals, the benefits of second chance relief depend on the delivery of one's second chance. In this part, we estimate the "second chance gap" between eligibility and delivery of second chances. We begin below by profiling the people in each target population. Analyzing criminal convictions data from the state, we find individuals with convictions on average to be of working age (mid-40s) and have a last conviction from over a decade ago. The available evidence suggests that people with suspended licenses appear to be younger on average (30–40 years old) and have their licenses suspended on average for five years and seven months.[93]

To ascertain the number of people eligible to have their convictions sealed,[94] we applied a simplified version of the sealing law to criminal conviction records to estimate the size of Texas's "second chance sealing gap" and "second chance driver restoration gap."[95] Based on our analysis, we estimate that about 670,000 people are able to have their records cleared, 59,000 people completely, to

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PAMELA HERD & DONALD P. MOYINHAN, ADMIN. BURDEN: POLICYMAKING BY OTHER MEANS (2018) (arguing that administrative burdens are conscious policy choices); Elizabeth Linos et al., *Nudging Early Reduces Administrative Burden: Three Field Experiments to Improve Code Enforcement*, 39 J. POL'Y ANALYSIS & MGMT. 243 (Winter 2020) (using a field experiment to demonstrate that learning costs, compliance costs, and psychological costs help to explain why residents do not always take up programs for which they are eligible"); Cass R. Sunstein, *Sludge and Ordeals*, 68 DUKE L. J. 1843 (2019) (arguing that deregulation driven by data and behavioral information should be undertaken due to the 9.78 billion hours of "sludge" paperwork Americans completed in 2018 for the government, but notes that such deregulation will be filled with numerous tradeoffs).

92. *See* Colleen Chien et al., *The Texas Second Chance Non-Disclosure/Sealing Gap*, PAPER PRISONS INITIATIVE, https://www.paperprisons.org/states/TX.html [https://perma.cc/7W8G-E2BH].

93. *Infra* Tbl. A, p. 696.

94. *See* Chien, *supra* note 23.

95. *See What Is the "Second Chance Gap"?*, PAPER PRISONS INITIATIVE https://paperprisons.org/SecondChanceGap.html [https://perma.cc/5HX5-WXGC] (defining a second chance gap as "the difference between eligibility and delivery of a person's second chance").

achieve a "clean slate" under existing law (Table 1). For this eligible population, the average number of years since the last conviction is about 17 (median = 15 years). Furthermore, 430,000 people appear eligible to apply for an ODL to drive to work or school. These numbers translate into a 5% and 17% uptake rate of sealing and driver's license reinstatements, respectively (Table 1).

A. The Texas Criminal Population That Could Benefit from Sealing Relief

Before estimating the size of the population entitled to second chance relief, it is worth considering the current size and characteristics of the existing Texas criminal population, as reflected in the dataset upon which we rely for our records sealing analysis: the Texas Computerized Criminal History System ("CCH"). Maintained by the Texas Department of Public Safety, the CCH is a database containing all publicly available convictions for adults from 1976 to the date of extraction.[96] This database is quite large, containing over 5.2 million Texans who have publicly available conviction records.[97] However, the true size of Texas's current conviction population is smaller because the CCH data is not routinely purged of individuals who are deceased. To account for this, we removed all individuals over the age of 80 from the dataset on the basis that the average life expectancy for Americans is about 78.8 years.[98] After doing so, we estimate that approximately 4.8 million Texans (22% of the state's adult population in 2020) have publicly available conviction records.[99] This estimate is at best an approximation because it fails to account for the thousands of people who move in and out of the Lone Star State each year.[100] This database also does not include people with nonconviction and deferred-adjudication-only records, who are also eligible for records relief under the law.[101]

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96. *See generally About CCH: A Brief Guide to the Texas Computerized Criminal History System (CCH)*, TEX. DEP'T PUB. SAFETY, https://publicsite.dps.texas.gov/DpsWebsite/CriminalHistory/AboutCch.aspx [https://perma.cc/FK5A-924W]; *see also* email from Rochelle Torres, ADB Program Support Supervisor, Tex. Dep't Pub. Safety, to Colleen Chien (Aug. 10, 2021) (on file with editors) ("Computerized Criminal History (CCH) was created in 1976 and we began sending the conviction database in 1998. A person's criminal history is retained for 125 years from their date of birth.").

97. Authors' analysis of the CCH database.

98. Elizabeth Arias & Jiaquan Xu, *United States Life Tables, 2019*, 70 NAT'L VITAL STAT. REPS. 1 (Mar. 22, 2022), https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-19.pdf [https://perma.cc/2N39-D4BN].

99. America Counts Staff, *Texas Added Almost 4 Million People Last Decade*, U.S. CENSUS BUREAU (Aug. 25, 2021), https://www.census.gov/library/stories/state-by-state/texas-population-change-between-census-decade.html [https://perma.cc/3E4G-6PDJ]. This is approximately 16.4% of the state's population (4.8 million divided by Texas's adult population in 2020, which we calculated by multiplying the size of Texas's population in 2020 (29,145,055 people) by the percentage of the population over the age of 18 (75%)).

100. *See generally Estimates of the Total Populations of Counties and Places in Texas for July 1, 2019 and January 1, 2020,* TEX. DEMOGRAPHIC CTR. 2 (Nov. 2020), https://demographics.texas.gov/Resources/TPEPP/Estimates/2019/2019_txpopest_county.pdf [https://perma.cc/SF8S-NU9L] (describing the methodology for counting estimates and migratory populations).

101. *See infra* App. Tbl. 2, p. 698.

Analyzing a random sample selected from the convictions database of 150,000 people, we find that about 80% have felony convictions and 62% have misdemeanor convictions (Appendix Table 2). The most common charges include drug possession, driving while intoxicated, and felony burglary, as well as misdemeanor assault causing bodily injury to a family member (Appendix Table 1).

Table 1: The Population of People in Texas with Convictions

Estimated Number of People with Convictions	4.8 million
% Male	85%
Top Convictions - Felonies	poss cs pg 1 <1g (11.4%), DWI 3rd or more (4.2%), burglary (3.7%)
Top Convictions - Misdemeanors	poss marij <2oz (8.3%), DWI (5.6%), assault (3.7%)
Average Years since Last Conviction	12.6 (median = 11)
Average Age at First Conviction	28 (median =27)
Average Current Age of People with Convictions	45
White and Latinx % of People with Convictions (share in pop = 82%)	69%
Black % of People with Convictions (share in pop = 13%)	31%
Asian % of People with Convictions (share in pop = 5%)	1%

Source: Authors' analyses based on the Texas CCH database.

Consistent with general trends[102], the Texas convictions population is overwhelmingly male. But while the average age at first conviction is 28, the average current age of people in the sample is 45. On average, the last conviction of each person was 12.6 years ago. From an earnings perspective, this implies that the

102. *See, e.g.*, Mark Motivans, *Federal Justice Statistics, 2020*, BUREAU OF JUST. STAT. 8–9 (May 2022), https://bjs.ojp.gov/content/pub/pdf/fjs20.pdf [https://perma.cc/XW7W-DPNH] (noting that of the roughly 62,000 defendants charged in U.S. district courts in 2020, about 14% were female and 86% were male).

average age of people who live with convictions in Texas overlaps with the years in which workers typically hit their peak earnings.[103]

The racial disparities in Texas's criminal justice system are significant. For example, whereas Black people account for 13% of the state population[104] and make up 33% of the Texas prison population,[105] white people make up 44% of the state population but account for just 33% of the prison population.[106] As such, Black people are 3.4 times more likely to be imprisoned than white people in Texas.[107] In contrast, Latinx and Asian people are underrepresented in the prison population relative to their representation in the population in general.[108] The data we analyzed from the Texas Department of Public Safety suggests similar disparities in the breakdown of felony and misdemeanor convictions by race. While Black individuals represent 13% of Texas's population, they make up 30% of people with misdemeanor convictions and 31% of people with felony convictions in our database (Table 1). White and Asian people appear to be underrepresented in felony and misdemeanor convictions relative to their representation in the population in general.[109]

B. The Texas Population That Could Benefit from License Restoration Relief

In contrast to the population of people with criminal records, less is known about the demographic characteristics of people with suspended licenses. The populations are distinct, however, as driver's license suspensions are administrative penalties that, in Texas, generally follow noncompliance with court-ordered fines

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103. Julia Carpenter, *Millennials' High-Earning Years Are Here, but It Doesn't Feel That Way*, WALL ST. J. (Aug. 12, 2021), https://www.wsj.com/articles/millennials-high-earning-years-are-here-but-it-doesnt-feel-that-way-11628769603 [https://perma.cc/4NEE-7FBU] (indicating, based on figures from the Bureau of Labor Statistics, that workers typically experience peak earnings "between the ages of 35 and 54").

104. *Incarceration Trends in Texas*, VERA INST. OF JUST. 1 (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-texas.pdf [https://perma.cc/E6SR-UNA4].

105. *Id.* at 2.

106. *Id.*

107. *Id.*

108. See *supra* Tbl. 1, p. 692 for a snapshot of the Texas criminal population, by race.

109. Based on our analysis of the data received from the Texas Department of Public Safety and statistics from the U.S. Census Bureau, Black people comprise 30% of people with misdemeanor convictions and 31% of people with felony convictions in the database, as compared to their approximate 13% share of the 2020 population, while white and Asian people appear to be underrepresented in felony and misdemeanor convictions relative to their representation in the population in general. *Quick Facts: Texas*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/TX [https://perma.cc/VE2P-SZDT].

and fees or requests to appear.[110] This means that license suspensions often impact people who haven't committed serious crimes[111] or even been accused of them.

Other studies have considered license suspension programs in Texas, North Carolina, and New Jersey.[112] Though the details of each suspension program are unique, the available studies described below suggest that individuals with suspended licenses tend to come disproportionately from low-income urban communities and that license suspensions particularly harm the Black community.

Carnegie et al.'s study of New Jersey drivers from 2007 reports that "only 16.5 percent of New Jersey licensed drivers reside in lower income zip codes, while 43 percent of all suspended drivers live there."[113] A later study by Joyce et al.[114] of all suspended licenses in New Jersey from 2004 to 2018 found that the median household income for people with non-driving-related suspensions was about $78,000,[115] which is about $14,000 lower than the median household income of $85,245 between 2016 and 2020.[116] In contrast, the median household income for people who did not have suspensions was nearly $105,000, about $23,000 above

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110. Notably, "[m]ost often, people are charged with a fine-only offense when they receive a ticket written by a law enforcement officer. The ticket instructs them to pay the fine and court costs, or alternatively, to appear in court on or by a certain date. Only people who cannot pay immediately or want to contest the ticket must show up in court." Deborah Fowler et al., *Pay or Stay: The High Cost of Jailing Texans for Fines & Fees*, TEX. APPLESEED & TEX. FAIR DEF. PROJECT 6 (Feb. 2017), https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf [https://perma.cc/BB3B-5A6R].

111. *See* Justin Wm. Moyer, *More than 7 Million People May Have Lost Driver's Licenses Because of Traffic Debt*, WASH. POST (May 19, 2018), https://www.washingtonpost.com/local/public-safety/more-than-7-million-people-may-have-lost-drivers-licenses-because-of-traffic-debt/2018/05/19/97678c08-5785-11e8-b656-a5f8c2a9295d_story.html [https://perma.cc/BX6T-FAJN] (noting that "[d]river's license suspensions were criticized by anti-poverty advocates after a 2015 federal investigation, focused on Ferguson, Mo., revealed that law enforcement used fines to raise revenue for state and local governments").

112. *See generally* Jon A. Carnegie et al., *Driver's License Suspensions, Impacts and Fairness Study*, N.J. DEP'T TRANSP. (Aug. 2007) https://www.nj.gov/transportation/business/research/reports/FHWA-NJ-2007-020-V1.pdf [https://perma.cc/GDV3-GM33]; Nina R. Joyce et al., *Individual and Geographic Variation in Driver's License Suspensions: Evidence of Disparities by Race, Ethnicity, and Income*, 19 J. TRANSP. & HEALTH 1 (2020); *Driven by Debt Dallas*, TEX. FAIR DEF. PROJECT & TEX. APPLESEED 5 (Nov. 2019), https://www.texasappleseed.org/sites/default/files/Driven%20By%20Debt%20Dallas.pdf [https://perma.cc/K5Z2-K39Q]; *Driven by Debt Houston*, TEX. FAIR DEF. PROJECT & TEX. APPLESEED 4 (July 2020), https://www.texasappleseed.org/sites/default/files/DrivenByDebt-Houston-July2020.pdf [https://perma.cc/RFP3-WDBJ]; William E. Couzier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L. J. 1585 (2020).

113. Carnegie et al., *supra* note 112, at 66.

114. Joyce et al., *supra* note 112, at 6.

115. *Id.*

116. *Quick Facts: New Jersey*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/NJ/SBO001212 [https://perma.cc/J2HD-ENEY].

New Jersey's median household income.[117] Although estimates of the average or median income of people with suspended licenses are unavailable for Texas, researchers for the Texas Fair Defense Project and Texas Appleseed found a negative correlation between the number of license suspensions and household income in both Houston[118] and Dallas: "[A]s zip code income increased, the number of holds decreased."[119]

Both studies from New Jersey find people with suspended licenses are disproportionately from urban areas. Carnegie et al. note that "[a]lthough only 43 percent of New Jersey licensed drivers reside in urban areas, 63 percent of suspended drivers live there."[120] More recent research similarly reports that 4% of people who had any non-driving-related suspensions lived in rural areas, compared to 5.7% of people with no suspension.[121]

Racial disparities among drivers with suspended licenses are significant. The Texas studies referenced earlier, for example, find that in Dallas, Black people account for only 11% of the driving population and yet account for 28.6% of people who cannot get their licenses renewed due to having a hold in OmniBase, a program that suspends licenses for failure to pay court-related expenses or failure to appear ("FTA").[122] A similar trend is present in Houston, where Black people make up only 22% of the city population, but comprise 40% of the people with OmniBase license holds from the Houston Municipal Court.[123] Couzier and Garrett's study of suspensions in North Carolina finds that Black people make up 21% of drivers and account for 50.5% of license suspensions, whereas white people account for 65% of drivers and 36.3% of license suspensions.[124]

Insofar as lost earnings are concerned, it is worth considering the age of people with suspended licenses and the average number of years their licenses are suspended. Couzier and Garrett's North Carolina study finds that the average age of people at the time of license suspension was 28 to 29, and the average length of hold ranges from five to ten years.[125] Joyce et al.'s study of all New Jersey drivers with a

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117. Joyce et al., *supra* note 112, at 6.

118. *See Driven by Debt Houston,* supra note 112, at 5 ("The zip code with the most holds per resident is 77026, an area in Northeast Houston covering the Kashmere Gardens neighborhood, with 344 holds per every 1,000 residents. This zip code has more than one third of its residents living below the poverty level and a majority of its residents (52%) are black. The median income is over $20,000 less than the citywide median income. Profiles of other heavily affected zip codes are similar. The ten zip codes with the highest rates of holds all have people living in poverty at higher rates than the city's overall poverty rate and most have median incomes below the city's median income. Six of these ten zip codes have a population that is more than 50% people of color.").

119. *Driven by Debt Dallas*, *supra* note 112, at 5; *Driven by Debt Houston*, *supra* note 112, at 4.

120. Carnegie et al., *supra* note 112, at 66.

121. Joyce et al., *supra* note 112, at 6 (also finding that 6.7% of people with driving-related suspensions lived in rural areas).

122. *Driven by Debt Dallas*, *supra* note 112, at 6.

123. *Driven by Debt Houston*, *supra* note 112, at 5.

124. Couzier & Garrett, *supra* note 112, at 1607–08.

125. *Id.* at 1607; *see also Driven by Debt Dallas*, *supra* note 112, at 5–6 (average length of time with OmniBase hold was five years and seven months); *Driven by Debt*

suspended license from 2004 to 2018 documented an average driver age of 39.4.[126] Most relevant for our purposes, the reports by the Texas Fair Defense Project and Texas Appleseed report an average hold length of five years and seven months based on 2018 data acquired from the Department of Public Safety.[127] A summary of this information is available in Table A.

Table A: Demographic Information About the Population of Texans with Suspended Driver's Licenses

Study	Jurisdiction	Age	Average Length of Hold	Source of Estimates
Texas Fair Defense Project and Texas Appleseed (2019 and 2020)	Dallas and Houston	– –	5 years and 7 months (statewide estimate from 2018 DPS data)	Pages 5–6
Joyce et al. (2020)	New Jersey	39.4 (mean age of people with any non-driving-related suspension)	– –	Table 1
Crouzier and Garrett (2020)	North Carolina	28.67 (median age at time of offense)	10.1 years (median)	Table 2

C. Sizing Texas's Second Chance Sealing Gap

Having provided an overview of Texas's criminal population, we begin by calculating the second chance sealing gap—the difference between eligibility and delivery of sealing relief to people with criminal convictions. We use the gap-sizing methodology devised by one of us[128] to determine the following: (1) the current gap—the number and share of individuals with records that could qualify for relief;

Houston, *supra* note 112, at 4–5 (majority of OmniBase holds (57.5%) were issued more than nine years ago); Joyce et al., *supra* note 112, at 6.

126. Joyce et al., *supra* note 112, at 4.

127. *Driven by Debt Dallas*, *supra* note 112, at 5; *Driven by Debt Houston*, *supra* note 112, at 5.

128. *See* Chien, *supra* note 23, at 542–43.

(2) the uptake gap—the share of people eligible for a given second chance that have obtained it[129]; and (3) based on the same data used to calculate the current and uptake gaps—how many years, at current rates, it would take to clear the existing backlog.

First, we ascertained and modeled Texas's OND law. Next, we applied the model of the laws to a sample of criminal histories obtained from the state to identify the number of individuals eligible for a given second chance. Once we had estimated the number of people eligible for a given second chance, we calculated the "current gap," the uptake rate, and the pace of record relief using the following steps. To estimate the current gap, we divided the number of people eligible for a given second chance by the number of people in our sample. To estimate the population eligible for relief, we multiplied the current gap by the total population, which was estimated using state data. Next, using the Texas Computerized Criminal History System convictions database from the state described previously in Part II.A., we calculated the estimated relief granted over the past five to ten years by adding the number of second chances granted to the product of (i) the number of second chances granted in the earliest year of data and (ii) the number of years left to reach five or ten years of data (whichever was closest to the actual number of years of data the state provided). Then, to calculate the uptake rate, we divided the estimated historical relief rate by the number of people eligible for relief plus the estimated historical relief rate. After calculating the current gap and the uptake gap, we estimated the number of years it would take to clear the backlog by dividing the population eligible for relief by the number of people who were granted a second chance in the most recent full year of data.

There are several weaknesses with our methodology. First, we do not account for eligibility requirements related to fines and fees due to a lack of data, making our estimates potentially generous. Our database also does not permit the removal of people who have died or moved out of state. In the other direction, we also do not include eligibility for expungements of nonconvictions, which depress, potentially dramatically, our estimates of the number of people that fall into the records relief gap. Second, the underlying criminal history provided by the state at times was missing sentence expiration dates. When that data was missing, we inferred expiration dates based on data where expiration dates were present.[130] Finally, as detailed in the Appendix, certain eligibility provisions contained ambiguities that we were unable to resolve despite multiple consultations with local criminal law experts.[131] These challenges introduce inaccuracies that cause our estimates to be both over- and under-inclusive.

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129. *Id*. at 541–42.

130. Based on our analysis, we assumed expiration date equaled sentence start date plus 2.9 years for misdemeanors and 3.2 years for felonies. *See infra* App. A(1), p. 718.

131. *See id.*

Table 2: Estimated Eligibility and Uptake of Texas Record Sealing and Drivers Restoration

	Order of Nondisclosure (Sealing)	Occupational Driver's License (Restoration)
Total Population (Eligible + Ineligible)	4,826,860	N/A
Population Eligible for Relief	676,845	438,000
Population Eligible for a Clean Record (No Conviction)	58,501	N/A
Relief Granted in Last Available Year	2,650 (2019)	16,350 (2019)
Estimated Relief Granted	36,409 (10 years)	87,027 (5 years)
Uptake Rate (Estimated Share of People Eligible for a Given Second Chance That Have Obtained It)	~5%	~17%
Years It Would Take to Clear the Backlog	255	27
Current Gap (Estimated Share of All People with Records That Are Eligible for Relief)	14%	N/A

Based on taking the steps described above,[132] we estimate that around 677,000 people with misdemeanor convictions or deferred adjudications are eligible for sealing relief under Texas Government Code Chapter 411 and 59,000 for a clean record. We further find that 18,593 people had their records sealed between fiscal years 2014 and 2019. Based on this, we project that, at most, about 36,000 people sealed their records over the past ten years. Combining these historical figures with our eligibility calculations, we estimate that approximately 5% of people eligible for relief have received it, leaving 95% of people in the "Texas Second Chance Sealing Gap." Based on administrative data, 2,650 people sealed their records in the last year

132. *Id.*

of available data (2019).[133] At this rate, it would take 255 years to clear the sealing backlog. The profile of individuals that could get a "cleaner" or "completely cleaned" record is similar to that of the average profile of a person with a conviction, except that the average years since the last conviction is 17 and 19 years, respectively.[134]

D. Sizing Texas's Second Chance Driver's License Restoration Gap

We applied a similar "second chance gap" approach to quantifying the number of people in Texas who appear eligible for but have not received an occupational driver's license "restoration" based on Texas Transportation Code § 521 Subchapter L.[135] Doing so requires an understanding of how driver's licenses are suspended in Texas in the first place. Practitioners have generally described two main, non-driving-related causes of a license suspension: failure to pay criminal court-related fines, fees, and surcharges; and failure to appear ("FTA").[136] FTAs in Texas result, in turn, when a person is summoned to court for a range of offenses, ranging from traffic citations to felonies, but does not appear for their trial or hearing.[137] The consequences can be severe. For instance, FTA can result in the issuance of an arrest warrant.[138] Individuals can also lose their driver's license under Texas Transportation Code 706, which allows the state to "deny renewal of the driver's license of a person who fails to appear for a complaint or citation or fails to pay or satisfy a judgment ordering payment of a fine and cost . . . in a matter involving any [criminal] offense."[139]

Using this as a foundation, we focus on people who lost their licenses under the OmniBase Program, which suspends licenses for failure to pay court-related

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133. Email from Linda Boline, Sr. Manager, Tex. Dep't of Pub. Safety, to Emily Gerrick, Pol'y Dir., Tex. Fair Def. Project (Sept. 29, 2020, 02:32 CST) (on file with authors); *see infra* App. Tbl. 7, p. 728 ("Breakdown of Record Relief Granted Per Year in Texas" provides annual sealing data from the Department of Public Safety).

134. *See infra* App. A. Tbl. 1, p. 722.

135. TEX. TRANSP. CODE ANN. §§ 521.241–521.53 (West) (Subchapter L Occupational License).

136. *See Driven by Debt*, *supra* note 71; *Driven by Debt: The Failure of the Omnibase Program*, TEX. APPLESEED & TEX. FAIR DEF. PROJECT 3 (Aug. 2021), https://www.texasappleseed.org/sites/default/files/OmniBaseRevenueReport-Aug11-Final.pdf [https://perma.cc/K6R3-BPTA] ("Holds on license renewals are triggered when license holders either fail to pay fines and costs or fail to appear in court, usually for traffic offenses. However, eventually all OmniBase Holds are incurred due to an inability to pay because the only way to lift a hold is to completely pay off all underlying debt"); *Driven by Debt Dallas*, *supra* note 112, at 1 ("The vast majority of criminal cases in Texas are fine-only misdemeanors, which are the lowest level of criminal offenses in Texas and intended to be punished by fines alone and no jail time. Fine-only misdemeanors include most traffic offenses, city ordinance violations and other Class C misdemeanors such as public intoxication.").

137. *See* Fowler et al., *supra* note 110 and accompanying text.

138. *Id.* at 7.

139. TEX. TRANSP. CODE ANN. § 706.004 (West 2021).

expenses or FTA.[140] We acquired data provided by the Texas Department of Public Safety to ascertain the number of people that presumably met the FTA criteria for ODL relief by virtue of having an FTA on their driver's license, which was 438,000 individuals.[141] To complement our analysis, we relied on statistics from the Department of Public Safety on the number of people who received an ODL under the OmniBase Program, which reports that 47,449 ODLs were granted between September 2017 and February 2020.[142]

There are a few limitations to our approach. First, we were unable to obtain data by which we could determine the bases for license suspension and, therefore, could not model the "inability to pay" criteria.[143] We excluded people qualifying for occupational licenses based on these criteria from our estimate, depressing it. That said, we note that there is likely substantial overlap between the universe of individuals who qualify under each criterion, particularly because a major cause of an FTA is a lack of transportation to attend one's hearing.[144] Second, we did not model the requirement for receiving an ODL of having driver's insurance because we do not have access to this information. In operation, this requirement is likely to act as a significant hurdle to ODL restoration by the subset of people with FTAs that are based on poverty.[145] Additionally, although individuals with FTAs are unlikely to have the traits in general which would disqualify them for ODL relief,[146] it remains the case that "a small percentage [of the people who have an FTA] may have other suspensions that make them ineligible for an ODL, such as [that their license was] also revoked for a medical reason, a hard suspension/waiting period because of an alcohol or drug offense, or their driver license is revoked because of

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140. *Failure to Appear/Failure to Pay Program*, TEX. DEP'T PUB. SAFETY, https://www.dps.texas.gov/section/driver-license/failure-appearfailure-pay-program [https://perma.cc/GX4R-EJZC]; *see also* TEX. TRANSP. CODE ANN. § 706.004.

141. Email from Linda Boline to Emily Gerrick, *supra* note 133.

142. *See Driver License Division High Value Set*, TEX. DEP'T PUB. SAFETY, https://www.dps.texas.gov/section/driver-license/driver-license-division-high-value-data-sets [https://perma.cc/27UT-LMFG]. Data used from: Feb. 2020, Jan. 2020, Dec. 2019, Nov. 2019, Oct. 2019, Sept. 2019, Aug. 2019, July 2019, June 2019, May 2019, Apr. 2019, Mar. 2019, Feb. 2019, Jan. 2019, Dec. 2018, Nov. 2018, Oct. 2018, Sept. 2018, Aug. 2018, July 2018, June 2018, May 2018, Apr. 2018, Mar. 2018, Feb. 2018, Jan. 2018, Dec. 2017, Nov. 2017, Oct. 2017, Sept. 2017.

143. *Driven by Debt*, *supra* note 71.

144. *See* Fowler et al., *supra* note 110, at 7; *see also Driven by Debt: The Failure of the Omnibase Program*, *supra* note 136, at 1 ("Holds on license renewals are triggered when license holders either fail to pay fines and costs or fail to appear in court, usually for traffic offenses. However, eventually all OmniBase Holds are incurred due to an inability to pay, because the only way to lift a hold is to completely pay off all underlying debt.").

145. *See* Fowler et al., *supra* note 110, at 5–6.

146. For example, on the basis of hard suspension waiting periods due to DWIs, which are Class B misdemeanors or more serious offenses. *See Know Your Rights: Traffic Tickets and Other Class C Misdemeanors*, ACLU TEX., https://www.aclutx.org/en/know-your-rights/know-your-rights-traffic-tickets-and-other-class-c-misdemeanors [https://perma.cc/XNK2-5RVX]; *see also* TEX. PENAL CODE ANN. § 49.04 (statute for DWI); *Id.* § 49.06 (statute for driving a boat while intoxicated).

non-payment of child support."[147] Once again, these methodological weaknesses cause us to both underestimate and overestimate the second chance driver's license restoration gap.

Based on the methods, data sources, and caveats described above and further elaborated in the Appendix, we estimate that around 438,000 people with suspended licenses in Texas due to FTA are eligible for an occupational driver's license.[148] Using the data sources described above, we project that the Texas Department of Public Safety granted 87,027 ODLs over the past five years. Combining these historical ODL figures with our eligibility calculations, we estimate that 16.58% of people eligible for relief have received it, leaving 83.42% of people in the "Texas Second Chance Driving Relicensing Gap." Based on reported records, the state granted 16,350 ODLs in the last year of fully available data (2019).[149] At this rate, it would take nearly three decades (27 years) to clear the ODL backlog.

III. THE EMPLOYMENT AND EARNINGS IMPACTS OF TEXAS'S SECOND CHANCE GAPS

A. Summary of Results

Employment and earning opportunities are limited for persons who have criminal records or who lack driver's licenses compared to those without such restrictions. Though second chance laws make it possible to remove these barriers to work through record sealing or license restoration, our analysis of Texas's criminal justice system in the previous Part finds that only a fraction of those apparently eligible for relief are accessing it, with over a million people falling into either the second chance sealing or occupational driver's license gap. While second chance reforms are often generally motivated by a desire to expand economic opportunity, no study of which we are aware has yet attempted to specify the cost to society, in aggregate earnings and employment losses, associated with the second chance gap. The following paragraphs detail our attempts to do so, with the results of our analysis shown in Table 3 below.

147. Email with contact at Tex. Fair Def. Project (on file with authors); *Texas Occupational Driver's License*, *supra* note 81, at 1.

148. TEX. TRANSP. CODE ANN. §§ 521.241–521.53 (described in Part I.B).

149. *Infra* App. Tbl. 7, p. 728 (basing our estimate on 2019 rather than 2020 data due to COVID).

Table 3: The Size and Annual Earnings Losses Associated with Texas's Second Chance Sealing and Driver's License Gaps

Orders of Nondisclosure		Driver's License Restoration	
Estimate of Annual Wage Loss	$5,100	Estimate of Annual Wage Loss (Lower Bounds Estimate)	$12,696
People Estimated in the Second Chance ODL Gap (Total Clearance)	676,845	Estimate of Annual Wage Loss (Upper Bounds Estimate)	$23,552
		People Estimated in the Second Chance ODL Gap (Total Clearance)	438,000
Estimate of Annual Earnings Loss	**$3.5B**	Estimate of Annual Earnings Loss (Lower Bounds)	**$5.6B**
		Estimate of Annual Earnings Loss (Upper Bounds)	**$10.3B**

B. Estimating the Earnings Effect of Incarceration and Conviction

A great deal of empirical work on the impact of contact with the criminal legal system on employment and earnings is limited to incarceration, although a growing body of studies is beginning to push the point of contact up to conviction and even arrest.[150] There are challenges with these kinds of studies, namely, adjusting for the distinct possibility that individuals who have contact with the criminal legal system would experience employment problems or wage erosion even in the absence of that contact. This is known as the selection problem, and it is exemplified by socioeconomic profiles indicating that individuals who have contact with the criminal legal system tend to be drawn from lower rungs of the socioeconomic ladder. For example, Harlow reports that just 35% of state prison inmates have a high school diploma, compared to 82% of the general population that had finished the 12th grade.[151] It is for this reason that Wakefield and Uggen characterize the criminal legal system partly as a social filter that absorbs marginal

150. *See, e.g.,* Apel & Powell, *supra* note 46, at 198, 199–200 (presenting a literature review about key studies related to lost earnings and criminal justice contact and noting "[t]his rich research tradition is mixed with respect to legal jurisdictions, types of contact, age and representativeness of the samples, measurement sources, research designs, and methodological rigor").

151. Caroline Wolf Harlow, *Education and Correctional Populations* (NCJ 195670), BUREAU OF JUST. STAT. 3 (Jan. 2003), https://bjs.ojp.gov/content/pub/pdf/ecp.pdf [https://perma.cc/P57C-QNJR].

and marginalized populations.[152] Furthermore, individuals who experience more punitive forms of contact with the criminal legal system (e.g., conviction with incarceration as opposed to conviction with probation) tend to have even more disadvantaged profiles.[153] This would seem to call into question whether employment difficulty could be interpreted as the causal effect of contact with the criminal legal system experience or a spurious artifact. Despite that challenge, many studies have taken great care to deal with the selection problem using several kinds of quasi-experimental designs.[154] There are many such studies, but we focus our attention on the few that are directly relevant to our purpose.

Studies of large national surveys in the United States consistently indicate incarceration, even a very short spell of confinement, is highly disruptive to an individual's employment prospects. Apel and Ramakers review many of them and conclude that formerly incarcerated individuals have a 10–20% lower likelihood of employment than their non-incarcerated peers.[155] This means that if the baseline employment-to-population ratio is 60%, individuals who have been incarcerated have a comparable ratio of 48–54%.[156] Moreover, among individuals who are employed, the wage gap tends to be on the order of 5–30%, meaning when judged against a baseline wage of $10 per hour, otherwise similar, but formerly incarcerated individuals who find employment earn $7–$9.50 per hour.[157] Assuming a 40-hour work week, this would amount to a penalty of $1,040 to $6,240 per year, compared to an annual baseline of $20,800.[158]

The "disruption" effect of incarceration is distinct from, but in many cases, further compounded by, the "marking" effect of having a criminal record—in particular, a conviction—on earnings and employment. Craigie and her coauthors provide the most recent estimates of the impact of misdemeanor and felony convictions and incarceration on earnings, which we use as a starting point.[159] They rely on self-reported criminal justice contact in a large, representative, and longitudinal sample of individuals who were in their 30s the last time they were interviewed.[160] Their design entails matching individuals who experienced criminal justice contact to their peers who share the same demographic profile and regional

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152. Sara Wakefield & Christopher Uggen, *Incarceration and Stratification*, 36 ANN. REV. SOCIO. 387, 388–91 (2010).

153. *Id.* at 392; *see also Reducing Racial Disparity in the Criminal Justice System: A Manual for Policymakers and Practitioners*, THE SENTENCING PROJECT 1, 15 (2008) (discussing causes of racial disparity in the criminal justice system, how these disparities manifest, and what practitioners and policymakers can do to address these disparities).

154. *See, e.g.*, Apel & Powell, *supra* note 46, at 198.

155. Robert Apel & Anke Ramakers, *Impact of Incarceration on Employment Prospects,* 3 HANDBOOK ON THE CONSEQUENCES OF SENTENCING AND PUNISHMENT DECISIONS 85, 90 (2018).

156. *See id.*

157. *Id.*

158. *See id.*

159. Terry-Anne Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, BRENNAN CTR. FOR JUST. (Sept. 15, 2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal [https://perma.cc/9LBT-P4EA].

160. *Id.* at 31–32.

economic characteristics but who did not experience criminal justice contact.[161] They estimate lost annual earnings due to misdemeanor convictions to be $5,100, which is a 16% difference relative to baseline annual earnings of $32,000, and lost earnings from a felony conviction to be $6,400 (a 22% decline relative to a baseline of $29,400).[162] These represent the effects of misdemeanor and felony convictions relative to no conviction, the latter mostly reflecting no criminal justice contact, although it could include some number of individuals who experienced forms of criminal justice processing that did not culminate in a conviction (e.g., arrest or booking).[163] Slightly larger are the lost earnings from incarceration, which the authors estimate to be $7,100 per year (a 52% decline relative to a baseline of $13,800).[164] This estimate compares individuals who experienced any post-conviction sentence of incarceration to individuals who did not experience criminal justice contact, as well as individuals who might have experienced other forms of criminal justice processing (possibly even those held in jail awaiting processing) but were not sentenced to incarceration.[165]

The evidence that is most relevant for our purpose comes from Harris County, Texas. Mueller-Smith takes advantage of the fact that misdemeanor and felony defendants are randomly assigned to a courtroom, which determines both the judge that presides over their case as well as the prosecution team.[166] Because randomization ensures there is no systematic tendency for defendants with certain characteristics to be assigned to a particular courtroom, variation in incarceration arises solely from the assigned courtroom.[167] In that sense, variation in punishment due to the preferential leanings of individual judges can be thought of as being as good as randomly assigned. The analysis merges administrative data from law enforcement, the court, the correctional system, and the labor department to pool together individuals who are incarcerated for the first time with individuals who have prior incarceration spells and to compare them to those who could have been incarcerated but were not because they were randomly assigned to a less punitive courtroom.[168] Mueller-Smith estimates that, during incarceration, individuals sentenced for misdemeanors and felonies are less likely to be employed by more than 30 percentage points.[169] Following incarceration, their quarterly employment probability remains lower by 4–5 percentage points, and their quarterly earnings are lower by 30–40% relative to their peers who were not incarcerated.[170] In terms of lost earnings, he estimates the annual earnings gap to be $1,864 due to incarceration for a misdemeanor and $4,706 due to a two-year incarceration spell for a felony.[171] As a further sign of their difficulty in attaining financial self-sufficiency following

161. *Id.* at 31–33.
162. *Id.* at 15.
163. *See id.* at 14.
164. *Id.* at 17.
165. *Id.* at 17–19.
166. Michael Mueller-Smith, *The Criminal and Labor Market Impacts of Incarceration*, UNIV. OF MICH., ANN ARBOR (2015) (unpublished manuscript).
167. *Id.* at 2, 7–9.
168. *Id.* at 17–19.
169. *Id.* at 28.
170. *Id.* at 28–31.
171. *Id.* at 47, Tbl. 7.

incarceration, formerly incarcerated individuals rely more heavily on government programs (e.g., food stamps, cash welfare, etc.) after their release.[172]

A more recent study by Mueller-Smith and Schnepel focuses on two policy changes in Harris County related to court use of diversion for certain groups of criminal defendants: one in 1994 that reduced the use of diversion (for certain property and drug defendants) and another in 2007 that expanded the use of diversion (for certain low-risk defendants).[173] In this study, diversion refers to deferred adjudication of guilt, whereby defendants evade a felony conviction by completing a period of community supervision.[174] This type of sanction is akin to probation, but whereas probation is an alternative to prison that follows a formal conviction for low-level offenses, deferred adjudication avoids a conviction outright.[175] The study speaks directly to the impact on employment of a felony conviction record because the marginal defendant is one who is most likely to be sentenced to community supervision, meaning the only difference is whether they acquire a felony conviction in the process.[176] Their analysis takes advantage of the fact that these two deferred adjudication policies were implemented abruptly—abrupt changes like this are frequently referred to as natural experiments because they allow comparison of individuals who would have received the same sanction but for the policy change and who instead receive different sanctions that are arguably as good as being randomly assigned.[177] The authors estimate that individuals who benefit from deferred adjudication have a higher quarterly employment likelihood by at least 15 percentage points (an almost 50% increase over baseline in both years).[178] They also have substantially higher total earnings—the authors estimate the average annual earnings loss from a felony conviction to be as high as $8,500 (1994) and at least $4,100 (2007).[179] These employment and earnings effects are long-lasting, as they persist for ten years after deferred adjudication and, after the 1994 change, for an astonishing 20 years.[180]

In light of their careful design, these two Harris County studies provide credible estimates of the causal impact of incarceration and conviction on employment and earnings. What is notable about both studies is that not only do conviction and incarceration worsen short- and long-term employment and earnings prospects, but they also increase the likelihood of further entanglement with the criminal legal system.[181] This seems to be especially likely among individuals with

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172. *Id.* at 30, 32.

173. Michael Mueller-Smith & Kevin T. Schnepel, *Diversion in the Criminal Justice System*, 88 J. ECON. STUD. 883, 884–86 (2021).

174. *Id.* at 883.

175. *Id.* at 885.

176. *Id.* at 884–85.

177. *Id.*

178. *Id.* at 900.

179. *Id.* at 901, Tbl. 4.

180. *Id.* at 883, 902.

181. Mueller-Smith, *supra* note 166, at 24 ("Once defendants are released from incarceration . . . they are more likely to be involved in criminal activity especially those returning after longer incarceration sentences."). *Id.* at 28–29 ("For each additional year of incarceration, felony defendants were 3.6 percentage points less likely to be employed and

no prior felony convictions, for whom the impacts of a felony conviction on recidivism and employment are largest.[182] This implies that the state of Texas pays not only in terms of lost wage-related revenue but also in the cost of additional crime and legal processing, as well as the cost of government programs from which affected individuals seek relief.

Table B provides a summary of the estimates of different forms of criminal justice sanctions on annual earnings obtained from the studies described above. The estimates are comparable even though they derive from different samples and different quasi-experimental designs. Our particular interest is in lost earnings from conviction, estimates of which are broken down by misdemeanor and felony convictions.

Table B. Estimates of Lost Annual Earnings from Conviction and Incarceration

Study	Jurisdiction	Impact of Conviction	Impact of Incarceration	Source of Estimate
Craigie et al. (2020)	National	Misdemeanor: $5,100 Felony: $6,400	$7,100	Table 3
Mueller-Smith (2015)	Harris County, TX	– –	Misdemeanor: $1,864 Felony: $4,786	Table 7
Mueller-Smith and Schnepel (2021)	Harris County, TX	Felony (1994): $8,536 Felony (2007): $4,144		Table 4

Note: The felony incarceration estimate in Mueller-Smith (2015) assumes a two-year sentence of incarceration, as he allows the impact to differ by duration of sentence.[183] The estimates from Mueller-Smith and Schnepel (2021) relate to deferred adjudication policy reforms through which individuals are able to avoid a conviction record by completing community supervision.[184]

earned 0.34 less log income."). *Id.*, Tbl. 6 ("Impact of incarceration on committing new types of offenses"). *Id.*, Tbl. 7 ("Impact of incarceration on labor market outcomes").

182. Mueller-Smith & Schnepel, *supra* note 173, at 902, 911.

183. Mueller-Smith, *supra* note 166, at 12–13, 44.

184. Mueller-Smith & Schnepel, *supra* note 173, at 885.

C. Estimating the Earnings Impact of the Texas Second Chance Expungement (Sealing) Gap

We specifically use the estimates from Craigie et al. because this is the only study to estimate the impact of both misdemeanor and felony convictions and because its estimate of earnings loss from a felony conviction is the midpoint of the two estimates provided by Mueller-Smith and Schnepel.[185] This leads us to conclude the national average impact of a misdemeanor conviction on earnings is about $5,100 per year, and the impact of a felony conviction is about $6,400 per year. The Mueller-Smith study also relies on a control group that includes only first-time convictions. Because studies indicate that the binary step of going from having to not having a conviction record, or vice versa, is most significant,[186] we conservatively include in our calculation only people who would be able to seal their records entirely of convictions—a smaller number than who could receive *any* relief under sealing law. It is important to note that these studies, and our figures, are drawn from national calculations that may not accurately predict the outcomes of Texans with convictions.[187] Thus, though we use the estimates above to carry out our exercise, we heavily caveat its precise total for at least this reason.

Multiplying the number of individuals that could entirely clear their records, 58,501, by $5,100 yields a conservative estimate of approximately $300 million annually in lost earnings. If we change our estimate to include all in our sample who could get sealing relief (676,845), an approach that is consistent with the Mueller-Smith and Schnepel research design of comparing people with various records who received deferred adjudications with those who did not, the cumulative annual earnings loss balloons to approximately $3.5 billion. These figures represent forgone earnings due to having one additional criminal conviction relative to no criminal conviction—in economic parlance, it represents lost earnings on the extensive margin.

One might wonder whether these wages are permanently lost in light of evidence that a criminal record stigmatizes individuals in the labor market and sustained time out of the labor market erodes human capital even further. This suggests that initial demand-side barriers to work have the capacity to become self-sustaining as they crystallize into experience gaps that make it even more difficult to secure gainful employment. With respect to the latter possibility, surveys of employers indicate they are less likely to want to hire individuals with a "spotty work record" as opposed to individuals with only a GED, and even compared to individuals who have been unemployed for a year or more.[188] Although employers are least likely to want to hire someone with a criminal record, criminal record expungement might not suffice to fully recover lost earnings because experience gaps that accumulate over time due to the criminal record cannot be fully remedied.

Even if some employment erosion is permanent, there are compelling reasons to believe that expungement policy can lead to the recovery of some fraction

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185. *See supra* Tbl. B, p. 706.

186. Mueller-Smith & Schnepel, *supra* note 173, at 911.

187. Thank you to Craigie et al. for raising this point with us.

188. Harry J. Holzer et al., *Perceived Criminality, Criminal Background Checks, and the Racial Hiring Practices of Employers*, 49 J. L. & ECON. 451 (2006).

of lost earnings. This is especially likely to be the case for lost earnings that are due to, for example, restrictions on occupational licensing for individuals with a conviction record, employers' refusal to interview or hire individuals who have a conviction record (either by requiring it on a job application or via background check), or employers' channeling of individuals with conviction records into lower-paying positions. One relevant finding from the Mueller-Smith and Schnepel study is that individuals who benefitted from deferred adjudication were more likely to find work in industries that were otherwise closed off to individuals with conviction records (e.g., retail trade, health care, educational services).[189] Additional evidence comes from the immediate employment and wage gains that accrue to individuals with a criminal record who obtain expungement.[190] These findings suggest that some amount of lost earnings because of employer stigma and legal barriers are indeed recoverable.

D. The Earnings Effect of a Suspended Driver's License

The research base on the economic impact of driver's license suspension is less well developed, but we wish to draw attention to this work despite its provisional status. A study of driver history records in New Jersey found, remarkably, just 10% of license suspension orders were for driving-related behavior that could be construed as a road safety concern (e.g., driving under the influence, points accumulation from moving violations, uninsured driving, reckless driving, etc.).[191] The lion's share of suspensions was either for financial reasons (40%, e.g., for failure to pay motor vehicle authority surcharge, comply with a court-ordered installment plan, or pay child support) or for nonappearance in court to satisfy a summons (32%).[192] In the same study, a survey of drivers with suspended licenses sought to understand the collateral effects of license suspension. Among more than 300 respondents, 40% reported they were unable to keep their job after their suspension, with low-income individuals far more likely to suffer job loss (64% of those with income under $30,000).[193] Almost one-fifth (17%) of the sample reported not only losing their job but also being unable to find a new one.[194] Among those who were able to find another job, almost all reported negative effects on their income, but regrettably, the estimated amount of lost income was not included in the survey.[195] In a separate study, Pawasrat and Quinn assessed the impact of having a valid driver's license among welfare recipients as part of the administration of a training program carried out in Milwaukee.[196] They report that among program participants with less than 12 years of education, individuals with a valid driver's

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189. Mueller-Smith & Schnepel, *supra* note 173, at 900–01.

190. Prescott & Starr, *supra* note 24, at 2527; Jeffrey Selbin et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 46 (2018).

191. Carnegie et al., *supra* note 112, at 33.

192. *Id.* at 33, Tbl. 9.

193. *Id*. at 55–57.

194. *Id.*

195. *Id.* at 56.

196. John Pawasrat & Lois M. Quinn, *The EARN (Early Assessment and Retention Network) Model for Effectively Targeting WIA and TANF Resources to Participants*, 60 ETI PUBL'NS 1, 6 (2007).

license were "four times more likely to show earnings above the poverty level, compared to those without a current license."[197]

The single study we found that attempted to specifically quantify the impact on earnings of lacking a license was from the city of Phoenix's "Compliance Assistance Program" ("CAP"), which for a period of time reinstated driving privileges of individuals with civil traffic violations and unpaid fines and fees.[198] The program restored licenses along with waiving some fees in exchange for enrolling in a payment plan.[199] From in-person and mail surveys of 75 program enrollees, 31% of those who were employed reported losing their job as a direct consequence of their suspended license and 57% reported working fewer hours.[200] Across the sample, the median income loss was estimated at $36,800 (with a range of $1,200 to $300,000).[201]

The estimates provided here should be regarded as descriptive and, therefore, highly provisional. We rely on the Phoenix study to estimate the impact of license suspension on income, and although some of the needed information is not provided in the study, it is the only study to date that attempts to quantify income loss. Because the sample comprises individuals who enrolled in the CAP program, they might have been especially motivated to do so because of job difficulty.[202] Acknowledging these and other limitations, we take at face value the estimate of lost annual income for the typical (median) person with a suspended license to be $36,800 but scale this downward to account for individuals who were not working or whose work was not disrupted by suspension. We note that 36% of the sample was not working at the time of license suspension, and among the workers, we estimate that 72% experienced disruption either because of job loss (31%) or reduction in hours (57%), with 72% representing our effort to adjust for double counting.[203] Using this information, we conservatively estimate that license suspension results in about $12,700 in lost annual earnings.[204] Multiplying this by the number of people eligible for an occupational driver's license (438,000) yields

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197. John Pawasrat & Lois M. Quinn, *Research Brief on ETI Driver's License Studies*, 186 ETI PUBL'NS 1, 4 (2017).

198. *Compliance Assistance Program (CAP)*, CITY OF PHX., https://www.phoenix.gov/court/cap [https://perma.cc/V7KX-F2WX].

199. *Id.*

200. *The City of Phoenix Municipal Court's Compliance Assistance Program, 2016: An Economic Assessment*, L. WILLIAM SEIDMAN RSCH. INST. 19, 22 (June 2, 2017), https://finesandfeesjusticecenter.org/content/uploads/2018/11/Phoenix-license-restoration-pilot-THE-CITY-OF-PHOENIX-MUNICIPAL-COURT%E2%80%99S-COMPLIANCE-ASSISTANCE-PROGRAM.pdf [https://perma.cc/S4AS-7K75].

201. *Id.* at 22.

202. Indeed, the authors shy away from using the analysis "for statistical analysis or inferences." *See id.* at 11.

203. *See id.* at 20.

204. We attempt to be conservative in our use of the information reported in the Phoenix CAP study. Our estimate assumes 36% of the sample was not working and lost $0; 18% of the sample was working but did not experience disruption and lost $0; 23% of the sample was working and lost $18,400 (the midpoint of $0 and the median $36,800); and 23% of the sample was working and lost $36,800. Using the percentages as weights for lost income, the mean is $12,696.

an estimate of around $5.5 billion in lost earnings yearly due to not having a driver's license.[205]

While further research is sorely needed, recent qualitative studies and accounts of "unlicensing" support an impact on earnings that is at least as large, if not larger, than the estimate we report above. Job loss and job disqualification, and lower-wage job options, appear to be the main mechanisms. For example, through semi-structured phone interviews conducted in 2020 and 2021, Sartin and her co-authors found suspended license "employment challenges" to present in several ways: directly, by preventing subjects from applying for the numerous jobs that mandated licenses on or off the job, and indirectly, in terms of the type of work and level of pay available to persons without licenses.[206] Dindial and her co-authors, also interviewing subjects across states, concluded that suspended licenses "creat[ed] obstacles to finding or keeping paid work."[207] Jobs unavailable to people without licenses include driving for Uber and Lyft, delivery and driving-related jobs, automobile sales and services, home healthcare aides, and the construction trade.[208] Positions including retail security officer (pay: $10.55 per hour), caregiver for the disabled ($10 per hour), eye-care associate, administrative assistant, and deli clerk have also been reported to require a license.[209] Studies show that employers also use licenses as screens[210] or a positive signal: "[P]ositions use a driver's license as a proxy for whether you're employable."[211]

In Texas, 20.8% of civilian jobs in 2016 required driving a passenger vehicle.[212] The state's size and infrastructure have meant that 80% (+/- 0.2) of workers in Texas at least 16 years old drove alone (i.e., did not carpool or rideshare) to work in 2016.[213] When a license is reinstated, it can quickly translate into an

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205. If we instead use $23,500 as our estimate of in lost earnings annually, based on assuming that all 64% of people working at the time of the suspension had income around the median ($36,800 x .64 = $23,552), our estimate of lost earnings balloons to $10B.

206. Emma B. Sartin et al., *Impacts of Non-Driving Related License Suspensions on Quality of Life: A Qualitative Study*, APPLIED RSCH. IN QUALITY OF LIFE 1, 11 (2022).

207. *Reckless Lawmaking: How Debt-Based Driver's License Suspension Laws Impose Harm and Waste Resources*, ACLU 26 (2021), https://www.aclu.org/sites/default/files/field_document/reckless_lawmaking_aclu_final_4.19.21.pdf [https://perma.cc/C7AS-SVXS].

208. Carnegie et al., *supra* note 112, at 3.

209. Joseph Shapiro, *How Driver's License Suspensions Unfairly Target the Poor*, NPR (Jan. 5, 2015), https://www.npr.org/2015/01/05/372691918/how-drivers-license-suspensions-unfairly-target-the-poor [https://perma.cc/858A-EMLK].

210. Carnegie et al., *supra* note 112, at 66.

211. Alana Semuels, *No Driver's License, No Job*, ATLANTIC (June 15, 2016), https://www.theatlantic.com/business/archive/2016/06/no-drivers-license-no-job/486653/ [https://perma.cc/T8RS-SGRT].

212. BUREAU OF LAB. STAT., U.S. DEP'T LAB., *30 Percent of Civilian Jobs Require Some Driving in 2016*, ECON. DAILY (June 27, 2017), https://www.bls.gov/opub/ted/2017/30-percent-of-civilian-jobs-require-some-driving-in-2016.htm [https://perma.cc/CD5H-NGM8].

213. U.S. CENSUS BUREAU, *Percent of Workers 16 Years and Over Who Traveled to Work by Car, Truck, or Van—Drove Alone*, AM. CMTY. SURV., https://www.census.gov/acs/www/data/data-tables-and-tools/geographic-comparison-tables/ [https://perma.cc/V3ZS-RTYZ].

earnings opportunity, as the experience of 47-year-old John Blackwell illustrates.[214] Once Blackwell got his license back, Blackwell, who works as a carpenter foreman, could earn "an additional $2 an hour [with the ability to] . . . drive a company truck."[215] Assuming that Blackwell works 40 hours per week, the extra $2 per hour adds up to $4,160 in wages per year.[216]

E. Comparing the Cumulative Earnings Effect of Texas's Paper Prisons with the Out-of-Pocket Cost of Texas's Physical Prisons

Aggregating the most conservative estimates of lost earnings associated with the second chance sealing and second chance relicensing gaps described above yields a total that ranges from $5.6 billion (assuming complete overlap) to $6 billion (assuming no overlap). By way of comparison, the entire 2022 operating budget for the Texas Department of Criminal Justice was $3.7 billion.[217]

Taken at face value, our calculations suggest, strikingly, that the cost of Texas's "paper prisons," in terms of lost earnings, is as large as, if not larger than, the out-of-pocket cost of its physical prisons. Individuals lose out on economic opportunities and higher earnings as they are shut out of a range of positions due to their expungable records and suspended licenses. The loss of income and related collateral impacts not only the person in the gap but also the state, whose taxable income base is also reduced by the earnings gap, and whose public service expenditures are likely to rise to fill the gaps left by limited economic opportunity.[218]

In sum, our proof-of-concept analysis of the fiscal cost of "paper prisons" underscores that although often motivated by considerations of fairness, missed second chances have significant and overlooked earnings and employment consequences and also plausibly translate into lost taxes and higher costs—and therefore economic consequences—for the state.

IV. AUTOMATION AND POLICY PILOTS

The previous Part considered the order-of-magnitude effects, in terms of lost earnings, associated with the failed delivery of second chances in Texas. What this exercise underscores is not only the large number of people for whom second chances appear to have largely been missed chances, but also the large economic and earnings impact associated with the second chance gap and the potential to reverse, at least partially, these economic losses with policies that close the gaps. Ways to both narrow the second chance gap and the gap in understanding its economic impact are discussed in this Part. We start by considering the drivers of Texas's second chance gaps, then the reforms that could narrow them. We

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214. Angie Jackson, *Penalized for Being Poor: Michigan Drivers Could Get Break on License Suspensions*, DET. FREE PRESS, https://www.freep.com/story/news/local/michigan/2020/08/01/michigan-drivers-license-suspensions/4819150002/ [https://perma.cc/ZY2S-8ZYC].

215. *Id.*

216. $2/hour x 40 hours per week x 52 weeks per year = $4,160.

217. *Operating Budget for Fiscal Year 2022*, TEX. BD. CRIM. JUST. 2 (Dec. 1, 2021), https://www.tdcj.texas.gov/documents/bfd/FY2022_Operating_Budget_LBB.pdf [https://perma.cc/6QWQ-CY6Y].

218. *See* Mueller-Smith & Schnepel, *supra* note 173 at 899.

recommend the use of policy pilots to both introduce policy interventions and provide the research infrastructure for observing their outcomes.

A. Drivers of Texas's Second Chance Gaps

Why don't more people seek to clear their criminal convictions or reinstate their lost driver's licenses, given their negative impact on earnings and employment? The processes of obtaining relief presented in Part I confirm a number of the same barriers to relief documented by others, including lack of awareness, unclear criteria, burdensome application processes, and fines and fees[219] to impede the uptake of the relief offered in Texas.

Texas law puts the impetus on the individual to initiate the process of relief-seeking through a petition. But in many cases, there is a *lack* of awareness about the second chances to which one may be entitled. The awareness gap is particularly acute when a second chance opportunity is first introduced or changes are made to its eligibility. There is typically no specific advertising or communications budget allocated for alerting eligible citizens that they can apply for relief—indeed, to specify such a budget would likely reduce the chances of enactment in a climate of fiscal austerity. This is a problem particularly in the case of record-relief provisions, which are often updated frequently. Since record sealing was introduced in 2003, legislative acts in 2015[220] and 2017[221] have changed who is eligible, making it difficult for even the diligent to know when and if the law may apply to them. Similarly, very few people are aware that ODLs are an option that would allow them to drive to work or take care of other essential tasks.[222] As one report stated, "most people with . . . [driver's license] holds do not know that ODLs are an option and do not apply for them."[223] Even for those that are aware, the process of applying for an ODL has been described as "labyrinthine . . . . [J]ust determining which court to file in can be impossible for many people to figure out on their own."[224] Insufficient information about how to reinstate licenses has also been cited as a barrier to application in a number of states with programs similar to Texas.[225]

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219. *See* Chien, *supra* note 23.

220. S.B. 1902, 2015 Leg., 84th Sess. (Tex. 2015) (relating to the eligibility of criminal defendants for an order of nondisclosure of criminal history record information; authorizing a fee).

221. H.B. 3016, 2017 Leg., 85th Sess. (Tex. 2017) (relating to the eligibility of a criminal defendant for an order of nondisclosure of criminal history record information).

222. *Driven by Debt, supra* note 71.

223. *Id.*

224. *Id.*

225. *See Reckless Lawmaking: How Debt-Based Driver's License Suspension Laws Impose Harm and Waste Resources*, ACLU 20 (2021), https://www.aclu.org/sites/default/files/field_document/reckless_lawmaking_aclu_final_4.19.21.pdf [https://perma.cc/Z3ZW-4YN2] ("Some felt the steps and procedures were unclear, while others had to do their own research to figure out what to do, contacting several different agencies and even going back and forth to several locations while legally prevented from driving.").

Ambiguous or undefined criteria[226] and discretion-based processes also contribute to the gap. They discourage uptake because they make the payoff from the application process uncertain. This is particularly a problem because of the costly, burdensome, and informationally intensive processes described in Part I.[227]

Petition filing fees,[228] as well as the requirement to satisfy unpaid fines, fees, and surcharges, also present substantial barriers. Indeed, the requirement that

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226. For example, people convicted of first-time misdemeanors punishable by fine only and misdemeanors carrying a sentence of incarceration are ineligible to have their records sealed if the misdemeanor in question was a violent crime or a crime of a sexual nature, with the exception of offenses under Penal Code § 22.01. *See* TEX. GOV'T CODE ANN. § 411.0735 (2017). But Code of Criminal Procedure § 59.01(3) defines a crime of violence as " . . . (A) any criminal offense defined in the Penal Code or in a federal criminal law that results in a personal injury to a victim . . . [or] (B) an act that is not an offense under the Penal Code involving the operation of a []vehicle [] that results in injury or death . . . ," facts that are impossible to evaluate without delving into the court record. TEX. CODE CRIM. PROC. art. 59.01(3) (2022). Additionally, although some offenses like rape are obviously of a sexual nature, we could not find any clear definition of a crime of a sexual nature in the penal code. As a result, determining whether an offense is of a violent or sexual nature is not straightforward. The phrase the "same criminal episode" has also raised statutory interpretation challenges:

> A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court, a court of appeals, or the court of criminal appeals, if the offense for which the person was acquitted arose out of a criminal episode, as defined by Penal Code § 3.01, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

Id. art. 55.01(c) (2021). Oddly, two offenses can be considered to have occurred under the same criminal episode regardless of how many years apart the offenses occurred. *HB 2684 (Canales): Clean Slate Eligibility*, CLEAN SLATE TEX., https://de203503-6f74-4104-bc1d-dc9fde7da5dd.filesusr.com/ugd/413c6c_54294486d6644a2194cd9577f4799d35.pdf [https://perma.cc/DLV7-YR6Q] (last visited Aug. 24, 2021). In cases such as *In re Expunction of M.T.R.*, 606 S.W.3d 288 (Tex. App. 2020), Texas courts have recently interpreted this to mean that "if a person is convicted of one offense, then later is acquitted of a 'same or similar offense,' the acquitted case is ineligible for expunction," an outcome that advocates have described as leading to "absurd results." *Id.* Determining whether an offense is the same or similar insofar as expunction eligibility is concerned makes the process of determining whether someone should get a second chance more involved and costly.

227. As one of us has previously written:

> In the same way that the accused remain innocent until proven guilty in the U.S. criminal justice system, many second chance programs require defendants to 'prove' that they deserve second chances before awarding them. As such, getting one's second chance through petition-based processes may include enduring a bureaucratic and expensive process, amassing information through a variety of sources, and being evaluated by an adjudicative or administrative body.

Chien, *supra* note 23, at 540–41.

228. For example, the cost of expungement is $750 to $2,500, not including the cost of traveling to the hearing as well as filing fees, which, if not waived, can add an additional $200 and $400. *Fees and Costs*, DALL. EXPUNCTION ATT'YS, https://www.dallas-expunction-attorney.com/fees-and-costs/ [https://perma.cc/DMU9-JNE3]. Based on other research,

fines and fees be paid off may be the most important barrier to restoring driver's licenses. One prime example of this is the OmniBase Program, which has no fee-waiving mechanism.[229] "OmniBase holds aren't lifted even when somebody appears in court and gets on a payment plan or begins assigned community service. The only way to lift a hold is to satisfy the fines and costs in full."[230] This lack of a fee-waiving mechanism is critical because "[m]ore than one in four OmniBase holds between 2013 and 2017 were a result of poverty-related offenses such as driving without insurance, displaying expired license plates, driving with an invalid license, or no driver's license at all."[231]

B. Narrowing Texas's Second Chance Gaps

The most impactful way to improve the administration of second chances would be to eliminate fines and fee requirements, as other states have done,[232] and to streamline delivery through automation. Due to different administrative aspects of the laws, automation would look slightly different for each type of second chance. For instance, automatically sealing records would ideally follow the clean slate model, which uses computer queries to identify eligible individuals and then automatically seals those people's records.[233] A similar program could automatically look at whether individuals meet the ODL eligibility criteria and invite eligible individuals to apply.

Automation makes the application process less burdensome in four ways. First, automation would reduce the awareness gap for individuals seeking second chances because it would not only identify eligible individuals but also either invite individuals eligible for relief to apply or provide relief to eligible individuals. Second, automation makes it so that people seeking to seal their records do not need to complete a petition, thereby "streamlin[ing] petition-based record clearing—a

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getting an expunction could be slightly less expensive than sealing one's record. See Ruthie Goldstein, Note, *Moving Forward: Proposals for Expanding and Simplifying Expungements in Texas*, 98 TEX. L. REV. ONLINE 144, 158–59 (2020) ("Because expunctions can only be granted after filing a petition with the court and because drafting the petition typically requires the assistance of an attorney, the cost of an expunction can total between $500 and $2,500, not including filing fees. Filing fees typically total between $200 and $400, but can be waived for indigency.").

229. Gerrick & Mergler, *supra* note 33.

230. *Id.*

231. *Driven By Debt: How Driver's Licenses Suspensions for Unpaid Fines and Fees Hurt Texas Families*, TEX. FAIR DEF. PROJECT & TEX. APPLESEED (Mar. 2, 2019), https://finesandfeesjusticecenter.org/articles/license-suspensions-hurt-texas-families/ [https://perma.cc/Q5BQ-5JZN]. For a full report, see *Driven By Debt*, *supra* note 71.

232. *See* H.B. 440, 2019 Leg., Reg. Sess. (Pa. 2019), (eliminating, in 2020, the requirement in Pennsylvania that fines and fees be paid off prior to receiving "clean slate" relief; *see also* Aaron Moselle, *Pa. Residents with Court Debts Could Have Their Records Automatically Sealed Under New Bill*, WHYY (Oct. 22, 2020), https://whyy.org/articles/pa-residents-with-court-debt-could-have-their-records-automatically-sealed-under-new-bill/ [https://perma.cc/DF88-P8HC].

233. *See Introducing Clean Slate*, CLEAN SLATE INITIATIVE, https://www.cleanslateinitiative.org/#:~:text=A%20new%20bipartisan%20policy%20model,be%20able%20to%20get%20ahead [https://perma.cc/T3Q3-AA6P] (defining the clean slate model and discussing the movement in states across the United States).

costly and time-intensive process that prevents the vast majority of eligible people from ever obtaining needed relief."[234] Third, automation could reduce the number of individuals who need an attorney to help them navigate complicated application processes. Fourth, automation, coupled with the elimination of fines and fees, would remove the financial obstacles to getting a second chance. Notably, however, the reduction of fines and fees would apply only to record sealing, at least based on the policy changes this Article proposes. As such, the driver's relicensing gap might remain large until policymakers find a way to either make fee waivers more accessible or eliminate filing fees.

There are at least three types of concerns that relate to automating second chances. One is that developing the systems needed to identify and notify eligible individuals requires time, money, and oversight.[235] These are real costs that must be accounted for but should also be balanced against our roughly estimated loss of up to $3.5 billion annually in lost earnings and associated state revenue (for example, in terms of sales tax), just from the second chance sealing gap. This may be why a financial report for H.B. 3601, a proposed clean slate bill from the 87th Legislature, reported that "[n]o significant fiscal implication to the State is anticipated."[236] Indeed, the state revenue associated with the more efficient allocation of labor and the reduction of unemployment or underemployment plausibly could be net revenue positive in the long term relative to the status quo.[237]

The second concern about automating second chances is that automating the current law cannot actually be done effectively due to the unclear criteria and data deficiencies highlighted earlier in this Article. For instance, some scholars express concern that automating expunctions might not be realistic:

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234. *Clean Slate Toolkit: Frequently Asked Questions*, CTR. FOR AM. PROGRESS (Nov. 15, 2018), https://www.americanprogress.org/issues/poverty/reports/2018/11/15/460907/clean-slate-toolkit/ [https://perma.cc/KH9U-XKT8]. Several states have implemented clean slate policies with great success. For example, Pennsylvania's 2018 clean slate bill sealed over 47 million offenses and helped an estimated 1.1 million people within one year of its launch. Laurie Mason Schroder, *In One Year, Pa.'s Clean Slate Law Has Erased 35 million Crimes. What's Next?*, MORNING CALL (June 30, 2020), https://www.mcall.com/news/breaking/mc-nws-pennsylvania-clean-slate-law-one-year-20200630-ges77qb3ffahhiznbjzjtelq7q-story.html [https://perma.cc/5M6P-Q2AY].

235. *See* Goldstein, *supra* note 228, at 159–60 ("Ultimately, in a state as large as Texas, it might not be financially feasible to require that expunctions become automatic.") However, recognizing that fees pose a barrier to people seeking expunction, Goldstein proposes waiving filing fees as an alternative to automation. *Id.*

236. LEGIS. BUDGET BD., FISCAL NOTE, 87th Leg., Reg. Sess. 1 (Tex. 2021), https://capitol.texas.gov/tlodocs/87R/fiscalnotes/pdf/HB03601I.pdf#navpanes=0 [https://perma.cc/6V2V-BTTW].

237. Roger Wilkins, *The Consequences of Underemployment for the Underemployed*, 49(2) J. INDUS. RELS. 247, 264–65 (2007), https://journals.sagepub.com/doi/abs/10.1177/0022185607074921 [https://perma.cc/FZ7Z-CNEW] ("Not only does underemployment represent a failure to utilize a significant share of the economy's available labour resources, it is also associated with considerable adverse consequences for individuals who are underemployed.").

> [In Texas] expunctions cannot be granted until the statute of limitations has passed. Statutes of limitation vary by crime and class of crime, and keeping track of their expiration would put a significant burden on counties, which would most likely be responsible for processing the automatic expunctions. Additionally, assuming an "automatic expunction" [or automatic sealing] bill is retroactive, it would be extremely time-consuming for counties to look back into their old records, determine what can be expunged, and go through the expunction process.[238]

Such concerns are likely true for record sealing and ODLs. However, we note that although automating second chances "would require significant data normalization and cleaning efforts,"[239] reforming the law to make it implementable at scale can provide a path forward. To illustrate this, we discuss clearance criteria challenges and legislative drafting alternatives to overcome these challenges in Appendix 8. This could serve as a foundation for starting to adjust Texas's laws to the reality of Texas's data.

The third concern is more general—it is about the effectiveness of records relief as a way to achieve the policy aims of public safety, job growth, and equity. Specifically, statistical discrimination could replace records-based exclusion, a lack of knowledge of sealed records could render the policy devoid of impact, and the risk of automating relatively minor crimes could intensify the earnings penalty for people with more significant records.[240]

C. Narrowing Knowledge Gaps About the Earnings Impact of Sealing and Driver's License Restoration

The introduction of an intervention to narrow the second chance gap at the county or state level presents a chance not only to narrow the second chance gap but also to narrow the knowledge gap about the associated earnings impact. Policy pilots, which temporarily change or observe a change in law or policy in part so that lawmakers and scholars can learn from doing so,[241] can provide an excellent way to overcome "the knowledge gap and risk aversion in policy development."[242]

There are at least two ways that policy pilots could improve the delivery of second chances. First, carrying out an automation trial could help lawmakers identify ambiguity in the existing statute and pinpoint how it needs to be adjusted to support records clearance at scale. Second, policy pilots could be used to study the impact on earnings of newly available second chance relief, for example, in order to carry out the cost–benefit analysis of such a policy to the state. Such policy pilots would not only provide valuable information about the true cost of Texas's second chance gaps but would also provide lawmakers with additional information to ensure that they pursue cost-effective policy solutions.

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238. Goldstein, *supra* note 228, at 160.
239. Chien et al., *supra* note 92, at 2.
240. Chien, *supra* note 23, at 585.
241. Colleen V. Chien, *Rigorous Policy Pilots: Experimentation in the Administration of Law*, 104 IOWA L. REV. 2313, 2316 (2019).
242. *Id.*

The best prospect would be for a study conducted at the individual level involving the matching of administrative records from multiple agencies. This might include the state law enforcement agency that maintains a criminal history repository with arrests and charges, and local and county courts that retain data on convictions and sentences along with nonpenal sanctions such as fines and fees. Other relevant agencies include the state motor vehicle authority with data on license suspensions and traffic violations and state labor and welfare agencies that collect data on earnings and transfer payments. To ensure that the impact of closing a second chance gap can be discerned using experimental or quasi-experimental methods, local policy labs such as the Texas Policy Lab at Rice University or the Texas Public Policy Foundation think tank could be appointed to consult on the policy's roll-out.[243] Upstream attention to implementation will support downstream learning about interventions to boost the workforce.

CONCLUSION

This Article provides an estimate of the annual earnings loss associated with a conviction, finding it to be on the order of $5,100 to $6,400 per year, as well as a provisional estimate of the annual earnings loss associated with a suspended driver's license, conservatively estimating it to be approximately $12,700. Using Texas as a case study, it quantifies the size of the state's second chance sealing and occupational driver's license gaps, estimating that around 670,000 Texans could seal their misdemeanor convictions and about 438,000 Texans are eligible for ODLs. Mechanically aggregating these figures results in an earnings loss estimate of $3.5 billion in connection with the second chance sealing gap and $5.5 billion from the second chance ODL gap in Texas, in comparison with the $3.6 billion operating budget of Texas's correctional system. This suggests not only that the costs of paper prisons could exceed the cost of physical prisons but also that closing paper prisons, through automation, like closing physical prisons, can have fiscal benefits that have not yet been accounted for, although rigorous evaluation and research are needed to see whether this is the case.

243. *Id.*

APPENDIX

A. Rules

To estimate the number and share of people eligible for but not receiving sealing, compassionate release, and driver's license restoration in Texas, we used the methodology established in Part II. For more information about our approach, please see Colleen V. Chien, *America's Paper Prisons: The Second Chance Gap*, Michigan Law Review (2020).

1. Sizing the Texas Sealing Second Chance Gap

To estimate the number of Texans eligible for records sealing, we focused narrowly on the subset of people that could, if eligibility criteria were automatically applied to them, transition from having a misdemeanor conviction or deferred adjudication to not having a conviction or deferred adjudication under Texas Government Code Chapter 411.[244] To conduct our analysis, we acquired the CCH from the Texas Department of Public Safety.[245] To support our analysis of the uptake rate of sealing, the DPS also sent us administrative data containing historical information about the number of people who had their records sealed annually.

We imported and then inner joined the data to create unique IDs for each person. Once we had created unique IDs, we randomly selected 153,674 individuals for our sample. To make sure our data was consistent, we removed about 40 individuals whose sentence expiration dates were earlier than their sentence start dates, leaving us with a random sample of 153,632 individuals. We then turned to cleaning the data, focusing first on categorizing disposition data.[246] Likewise, we categorized the following dispositions as nonconvictions: not guilty, dismissed, mistrial, abandoned charges, waived, acquitted, community supervision expired, deferred, unadjudicated, dead, pending, dismissed, and mentally incompetent. After categorizing the dispositions, we turned to cleaning the sentencing data. Though 2,041,483 records in our sample had sentence completion data, for 554,444 records, the data was missing. Rather than exclude these records from our analysis, we instead calculated, from the cases where the data was present, the average lag between sentencing and sentence completion, added these numbers (2.9 years after the date of sentencing and 3.2 years for misdemeanors and felonies, respectively), and used this to roughly estimate sentence completion dates.

To be conservative in our estimates about the number of individuals eligible for record sealing, we made a number of assumptions when conducting our analysis. First, because we could not easily determine whether offenses were of a violent or sexual nature, we manually determined whether 14 offenses would be

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244. TEX. GOV'T CODE ANN. § 411.072 (2017).

245. *About CCH: A Brief Guide to the Texas Computerized Criminal History System (CCH)*, *supra* note 96.

246. Based on consultation with criminal law experts, we categorized the following dispositions as convictions: convicted, multiple charges, commuted, amend probation, convicted – appeal pending, pardoned, probation discharge, probation revocation, sentence modified, convicted – lesser charge, and mistrial.

ineligible due to being offenses of a violent or sexual nature.[247] When in doubt after reading the statutes associated with these 14 offenses, we assumed that they were ineligible to be conservative in our estimates.[248] Second, we assumed that offenses that appeared in the data as misdemeanors but had a statute indicating an enhancement to a state jail felony or a felony were ineligible.[249] Third, if someone has ever been convicted of an offense listed in Tex. Gov. Code 411.074(b), that person cannot have any of the offenses on their record sealed. Most of those offenses were easy to model, but some depended on facts of the case that we did not have access to. In these cases, we assumed that anyone convicted of these offenses was ineligible.[250] Finally, we assumed that someone was incarcerated if the number of days between the disposition date and the sentence expiration date was greater than two years.[251] When the data contains both sentence expiration date and a parole date for the same person and offense, we assume that any sentence expiration date that is greater than the parole-until date indicates time in prison.

Despite our efforts to be conservative, there is a further noteworthy limitation to our analysis. While we only model sealing for adults, the sealing data that we acquired from the Department of Public Safety includes the aggregate number of sealings for juveniles and adults. As such, it is likely that we overestimate the pace of relief provided under the current, application-based method, and overestimate the uptake rate and underestimate the Current Gap.

2. Rules[252]*

<u>Orders of Nondisclosure and Expunction</u>

Primary Sources: Texas Gov. Code Chap. 411 | Sec. 411.072 | 411.0725 | 411.073 | 411.0731 | 411.0735 | 411.074 | Art. 55.01(2019)

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247. Although we did our best with the data cleaning, it is always worth noting that the dirty nature of the data could have impacted our findings and is thus a weakness. Also, when identifying whether convictions were of a violent or sexual nature, we relied on the following resource: TEX. OFF. CT. ADMIN., *supra* note 57.

248. For instance, we assumed that TEX. LAB. CODE § 51.031 (2021) (child labor law) and TEX. PENAL CODE § 22.02(a)(2) (aggravated assault with a deadly weapon) were ineligible.

249. Examples of such offenses in our dataset include TEX. PENAL CODE §§ 49.045(b), 49.09(b-4), 49.07(c).

250. For instance, an individual convicted of § 30.02 (Burglary), Penal Code, is ineligible if "the offense or conduct is punishable under Subsection (d) of that section and the actor committed the offense or engaged in the conduct with intent to commit a felony listed in Paragraph (A) or (C)." TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(D); TEX. PENAL CODE § 411.074(b) (2017). We do not have access to this data, so we assume that all individuals convicted of burglaries are ineligible.

251. *Statutory Wrongdoing and its Consequences*, TEX. POL. PROJECT (Jan. 8, 2022), https://texaspolitics.utexas.edu/archive/html/just/features/0201_01/crimeandp.html [https://perma.cc/K97K-MNMH].

252. Reprinted with permission. *Thank you to Hithesh Sekhar Bathala, Obie Reynolds, and Ahmanda Lee for contributing the concise statement as well as the shorter version of this article, published at paperprisons.org.

Secondary Sources: University of Texas Guide (2019) | Texas CCRC (12/3/2021) | App | Texas Law Help OND Prep Guide

A. CONVICTIONS

Any first-time misdemeanor conviction if it is the person's only conviction or deferred adjudication after a two-year waiting period (in which the person cannot get an additional conviction or deferred adjudication) following sentence completion (Sec. 411.0735).[253]

In addition to universal disqualifiers, ineligible offenses under this section include misdemeanor offenses that are:

Violent or sexual in nature (with the exception of § 22.01, Penal Code)

Convictions under § 106.41 Alcoholic Beverage Code

Driving While Intoxicated (Penal Code § 49.04)

Boating while Intoxicated (Penal Code § 49.06)

Assembling or operating an amusement ride while intoxicated (Alcoholic Beverage Code § 49.065)

Organized crime (Chapter 71, Penal Code)

Any DWI conviction under Section 49.04, Penal Code, if it is the person's only offense (conviction or deferred adjudication) after a two- to five-year waiting period (in which the person cannot get additional convictions deferred adjudications) (Sec. 411.0736).[254] (In our model, we default to five years in order to be conservative in our estimates.)

In addition to universal disqualifiers, ineligible offenses include 49.04(d), Penal Code (driving while intoxicated with a BAC greater than 0.15).

B. DEFERRED ADJUDICATIONS

Any felony that is sentenced to deferred adjudication community supervision after a five-year waiting period starting from community supervision completion and offense dismissal (in which the person cannot get additional convictions deferred adjudications) (Sec 411.0725).

In addition to universal disqualifiers, ineligible offenses include:

Driving While Intoxicated (Penal Code §49.04)

Any misdemeanor that is sentenced to deferred adjudication community supervision after up to a two-year waiting period starting from community supervision completion and offense dismissal (in which the person cannot get additional convictions deferred adjudications) (Sec 411.0725) including offenses under 49.04 and 49.06 (411.0726).

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253. Please note that all offenses have a two-year waiting period except for those punishable by fine only, which do not have a waiting period. We do not model this nuance because we use the longest waiting period to be conservative in our estimates.

254. Some offenses have a two-year waiting period rather than a five-year waiting period. However, we default to five years in order to be conservative in our estimates.

C. UNIVERSAL DISQUALIFIERS

Ineligible per 411.074(b) if an individual has any convicted or deferred adjudication offense:

Requiring registration as a sex offender (Section 62.001(5))

Involving aggravated kidnapping (Section 20.04)

Involving homicide (Sections 19.02, 19.03)

Involving human trafficking (Sections 20A.02, 20A.03)

Involving child/elder abuse (Sections 22.04, 22.041)

Involving family violence (Sections 25.07, 25.072, 71.004)

Involving stalking (Section 42.072)

Flying while Intoxicated (Penal Code § 49.05)

D. UNMODELED CRITERIA

Did not model expunctions eligibility for nonconvictions. (Art. 55.01(a))

Did not model shorter waiting period for certain deferred adjudication community supervision under 411.072 (first-time nonviolent misdemeanor offenses) or 411.0726 (deferred adjudication for DWI)

Did not include sealing eligibility for individuals that successfully complete veteran's treatment court (Sec. 411.0727)

Did not include sealing eligibility by individuals that are victims of trafficking (Sec. 411.0728)

Did not model expunction eligibility for Class C Misdemeanors sentenced to community supervision (Article 55.01(a)(2)).

Did not model whether LFOs were repaid

Did not model whether certain deferred adjudication offenses eligible for OND/sealing had "affirmative finding under Article 42A.105(f), Code of Criminal Procedure . . . filed in the papers of the case" (411.072(a)(1)(b), 411.0726(a)(2))

Did not model whether certain deferred adjudication offenses otherwise eligible for OND/sealing had findings under "former Section 5(k), Article 42.12, Code of Criminal Procedure . . . filed in the papers of the case" (411.072(a)(1)(b)).

Did not model certain offenses requiring registration as a sex offender (62.05(D), 62.05(E), 62.05(G), 62.05(H), 62.05(I)), that would be universally ineligible.

Appendix Table 1: Detailed View of The Texas Second Chance Gap

Population	People in the Criminal Population	People Eligible for Any Records Relief	People Eligible for Sealing of All Convictions
Estimated Number of People with Convictions	4.8 million	675,305	59,663
% Male	85%	87%	85%
Top Felony Deferred Adjudication Community Supervision	poss cs pg 1 <1g (11.4%), DWI 3rd or more (4.2%), burglary (3.7%)	poss cs pg 1 <1g, driving while intoxicated 3rd or more iat	
Top Convictions - Misdemeanors	poss marij <2oz (8.3%), DWI (5.6%), assault (3.7%)	driving while intoxicated, poss marij <2oz, driving while intoxicated 2nd	driving while intoxicated, poss marij <2oz, assault causes bodily injury family member
Average Years Since Last Conviction	12.6	17	19
Share of People Whose Last Conviction Was 10+ Years Ago	~50% (2,407,274)	66% (446,545)	49,537 (83%)
Average Age at First Conviction	28	28	28
Average Current Age of People with Convictions	45	47	46
Median Years Since Last Conviction	11	15	20
White and Latinx % (Share in Pop. = 82%)	0.69	0.73	0.69
Black % (Share in Pop. = 13%)	0.31	0.26	0.3
Asian % (Share in Pop. = 5%)	0.01	0.01	0.01

Appendix Table 2: Data Sample Description[255]

Data Statistics	
Number of People in Dataset	4,826,860
Sample Size	153,674
OND Sample Data Statistics	
Number of People with Misdemeanor Convictions in Sample	94,403 (61.45%)
Estimated Number of People with Misdemeanor Convictions in Population	2,966,662
Number of People with Felony Convictions in Sample	122,611 (79.81%)
Estimated Number of People with Felony Convictions in Population	3,853,113
Average Age of Misdemeanor Convictions	46 years old

B. Common Charges[256]

A. Top 10 Charges in Our Dataset

B. Top 10 Misdemeanor Convictions in Sample

C. Top 10 Felony Convictions in Sample

D. Top 10 Charges Eligible for OND in Our Dataset

255. A shorter version of this article is available at paperprisons.org.
256. A shorter version of this article is available at paperprisons.org.

Appendix Table 3: Top 10 Charges in Sample

Charges	Number of Records	Percentage of Charges	Number of People with Charges
poss cs pg 1 <1g	335,265	12.97%	36,232
poss marij <2oz	238,491	9.22%	34,202
driving while intoxicated	147,550	5.71%	27,365
burglary of habitation	116,005	4.49%	13,836
driving while intoxicated 3rd or more iat	111,187	4.3%	12,627
assault causes bodily injury family member	103,171	3.99%	17,562
poss cs pg 1 >=1g<4g	95,857	3.71%	12,585
assault causes bodily inj	75,109	2.9%	12,107
burglary of building	72,598	2.81%	8,004
unauth use of vehicle	67,916	2.63%	8,311

Appendix Table 4. Top 10 Misdemeanor Convictions in Sample

Charges	Number of Records	Percentage of Charges	Number of People with Charges
poss marij <2oz	215,379	8.33%	34,166
driving while intoxicated	145,373	5.62%	27,335
assault causes bodily injury family member	95,485	3.69%	17,521
assault causes bodily inj	69,788	2.7%	12,079
driving while intoxicated 2nd	55,722	2.15%	10,659
fail to id fugitive intent give false info	53,855	2.08%	8,688

resist arrest search or transport	53,052	2.05%	8,812
driving w/lic inv w/prev conv/susp/w/o fin res	39,245	1.52%	6,796
poss cs pg 3 < 28g	27,195	1.05%	5,233
evading arrest detention	26,269	1.02%	5,500

Appendix Table 5. Top 10 Felony Convictions in Sample

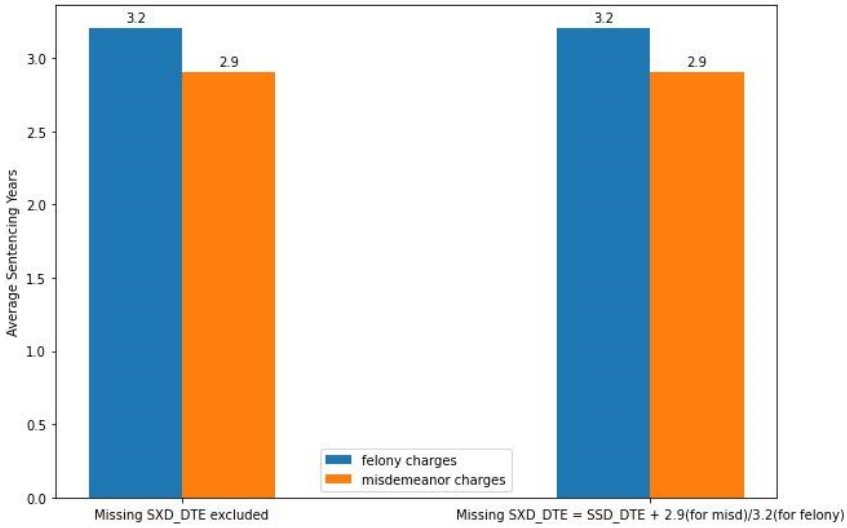
Charges	Number of Records	Percentage of Charges	Number of People with Charges
poss cs pg 1 <1g	295,925	11.44%	35,970
driving while intoxicated 3rd or more iat	108,898	4.21%	12,573
burglary of habitation	95,745	3.7%	13,789
poss cs pg 1 >=1g<4g	81,261	3.14%	12,557
burglary of building	64,327	2.49%	7,864
unauth use of vehicle	61,414	2.37%	8,236
man del cs pg 1 <1g	54,832	2.12%	5,957
forgery financial instrument	54,563	2.11%	7,046
man del cs pg 1 >=4g<200g	50,568	1.96%	8,240
poss cs pg 1 >=4g<200g	41,772	1.62%	6,936

Appendix Table 6. Top 10 Misdemeanor Conviction Charges Eligible for OND in our Dataset

Charges Eligible for OND	Number of Records	Percentage of Charges	Number of People with Charges
poss marij <2oz	10,315	0.4%	10,315
assault causes bodily injury family member[257]	4,648	0.18%	4,648
assault causes bodily inj	3,651	0.14%	3,651
driving while intoxicated 2nd	3,169	0.12%	3,169
fail to id fugitive intent give false info	2,372	0.09%	2,372
resist arrest search or transport	2,217	0.09%	2,217
poss cs pg 3 < 28g	1,041	0.04%	1,041
evading arrest detention	1,027	0.04%	1,027
theft prop >=$100<$750	579	0.02%	579
poss dangerous drug	444	0.02%	444

257. In Texas, assault is not considered a violent felony as listed in Section 411.0735(c-1). TEX. GOV'T CODE ANN. § 411.0735(c-1) (2017).

Robustness Test and Histogram for Sentence Expiration Date Assumptions



The two bars on the left show the average number of years in jail when records with missing sentence expiration dates are excluded. The blue bar shows the average number of years for felony charges, and the orange bar shows the average number of years of misdemeanor charges.

The two bars on the right show the average number of years in jail when records with missing sentence expiration dates are assumed to be sentence start dates + 2.9 years for misdemeanor convictions and + 3.2 years for felony convictions.

Detailed Record Relief Statistics[258]

We obtained OND statistics from the Texas Department of Public Safety, which reports that 18,593 ONDs were processed between fiscal years 2014 and 2019. In addition, we obtained the number of ODLs granted from the Texas Department of Public Safety, which reports that 44,812 ODLs were granted between September 2017 and February 2020.[259] A breakdown of each type of relief granted by year is available in Table H below.

258. A shorter version of this information is available at paperprisons.org.
259. *See* TEX. DEP'T PUB. SAFETY, *supra* note 142.

Appendix Table 7. Breakdown of Record Relief Granted Per Year in Texas

Year	ONDs Processed in Fiscal Year	ODLs Granted in Calendar Year
2020	N/A	2,637*
2019	2,650	16,350
2018	2,558	15,831
2017	2,313	12,631+
2016	2,360	N/A
2015	4,258	N/A
2014	4,454	N/A

*ODLs granted for 2017 are from September 2017 - December 2017

+ODLs granted for 2020 are from January 2020 - February 2020

Appendix Table 8: Clearance Criteria Challenges and Legislative Drafting Alternatives[260]

Criteria	Administrative Challenge	Example	Drafting Alternative
Sentence Completion (OND)	Not tracked in court data and hard to infer as clean sentencing data is often not available; it also is often unclear whether or not outstanding fines and fees must be	"Notwithstanding any other provision of this subchapter or Subchapter F, a person described by Subsection (a) who completes the person's sentence, including any	Disposition Date (+ X Years)

260. Chien et al., *supra* note 92, at 10; Chien, *supra* note 23.

	paid, and whether they have been.	term of confinement imposed and payment of all fines, costs, and restitution imposed, may petition the court that imposed the sentence for an order of nondisclosure of criminal history record information under this section . . . " (Tex. Gov't Code § 411.0735(b))	
First conviction; qualifying conditions (OND)	Lack of unique identifier across precludes determination		Bless commercial identification approximation technique
Personal demographic trait such as age, military status, or other condition (OND)	Information may not be easily ascertainable / available on the record or charge category condition	"(a) This section applies only to a person who successfully completes a veterans treatment court program under Chapter 124 or former law. (b) Notwithstanding any other provision of this subchapter or Subchapter F, a person described by Subsection (a) is entitled to file with the court that placed the person in the veterans treatment court program a petition for an order of nondisclosure of criminal history record	Specify an identification strategy that can be implemented at scale or do not include demographic traits

		information under this section . . . " (Tex. Gov't Code § 411.0727)	
Class or grade condition (OND)	Missing class, grade, or category information	"A person may petition the court that imposed the sentence for an order of nondisclosure of criminal history record information under this section only on or after: (1) the date of completion of the person's sentence, if the offense of which the person was convicted was a misdemeanor punishable by fine only; or (2) the second anniversary of the date of completion of the person's sentence, if the offense of which the person was convicted was a misdemeanor other than a misdemeanor described by Subdivision (1)." (Tex. Gov't Code § 411.0735(d))	Explicitly specify the qualifying crimes
Court-ordered conditions (OND and ODL)	Require individual review /check for any "court-ordered"	"All reinstatement fees must be paid prior to applying for, renewing, or	Do not include court-ordered conditions, waive fees repayment, or

	conditions and compliance re: same	upgrading a driver license. This includes applying for an occupational or interlock driver license." (Texas Department of Public Safety, Driver's License, Section 7: Reinstatement Fees)	allow for garnishing of wages
Laundry list of disposition criteria (OND)	Vulnerable to changes to definitions, requires detailed clean data	"A person may not be granted an order of nondisclosure of criminal history record information under this subchapter . . . if: (1) the person requests the order of nondisclosure for, or the person has been previously convicted of or placed on deferred adjudication community supervision for: (A) an offense requiring registration as a sex offender under Chapter 62, Code of Criminal Procedure; (B) an offense under Section 20.04, Penal Code, regardless of whether the	Simple description, e.g., "All records that do not end in a conviction"

		offense is a reportable conviction or adjudication for purposes of Chapter 62, Code of Criminal Procedure; (C) an offense under Section 19.02, 19.03, 20A.02, 20A.03, 22.04, 22.041, 25.07, 25.072, or 42.072, Penal Code; or (D) any other offense involving family violence, as defined by Section 71.004, Family Code; or (2) the court makes an affirmative finding that the offense for which the order of nondisclosure is requested involved family violence, as defined by Section 71.004, Family Code." (Tex. Gov't Code §411.074(b)	