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# The Oregon Second Chance Set-Aside Gap

Colleen Chien

# The Oregon Second Chance Set-Aside Gap

By: Colleen Chien, Navid Shaghagi, Hithesh Sekhar Bathala, and Alexandra George[1]

## Key Findings

People with criminal records: ~1.4M
People with conviction records | felony convictions record: ~695K | 280K[2]
Share of population (all) with convictions: ~17%
Share of population (Black) with convictions: ~60%
Share of population (all) with convictions eligible for set-aside: ~42%
Share of population (Black) with convictions eligible for set-aside: 41%
People with convictions eligible for set-aside: ~295K
**Uptake rate of *any* records relief: ~5.5%**
Cases given expungement and set aside relief in last year of data: ~3.8K (2019)
Years to clear the backlog based on current rates: 77
Estimated Reduction of the White-Black gap in people with conviction records: 39%
Estimated Reduction of the White-Black gap in people with felony conviction records: 19%
Estimated aggregate annual earnings loss associated with clearable convictions: $1.6B
*Does not include consideration of fines and fees

## I.    Abstract

Oregon Revised Statute 137.225 (2019) allows individuals whose criminal records meet certain conditions to expunge ("set-aside") their records. Ascertaining, then applying the law to a sample of ~121K criminal histories, and then extrapolating to the estimated population of up to 1.4M individuals in the state with criminal records[3], we estimate the share and number of people who are eligible for relief but have not received it and therefore fall into the "second chance set-aside gap," the difference between eligibility for and delivery of records relief.[4]  (We did not model legal financial obligations or other out of record criteria). Racial disparities are significant in the

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[1] Colleen Chien is a Professor at Santa Clara University School of Law, and founder of the Paper Prisons Initiative (paperprisons.org);  Hithesh Sekhar is a master's student in Information Systems at Santa Clara University; Jerry Huang is a master's student in Computer Science and Engineering at Santa Clara University; Alexandra George is a senior at Santa Clara University Majoring in Political Science. This report is based on the concept and definition of the "second chance gap" described in Colleen V. Chien, "America's Paper Prisons: The Second Chance Gap," 119 Mich. Law. Rev.359 (2020) Contact: colleenchien@gmail.com | www.paperprisons.org

[2] Based on actuals from the state database described in Appendix B taking into account mortality rates as provided by https://www.livescience.com/18835-race-lifespan-states.html but not taking into account people that may have moved.*Cf*. with Shannon et al, which reports a 2010 estimated felony population in Connecticut of 213K available at .http://users.soc.umn.edu/~uggen/Shannon_Uggen_DEM_2017.pdf. If the 2010 estimate is projected forward linearly using the CAGR growth rate from 2000-2010, the 2020 estimated felony population would be 268K.

[3] Becki Goggins et al; *Survey of State Criminal History Information Systems, 2020: A Criminal Justice Information Policy Report*, SEARCH (2020)  available at https://www.ncjrs.gov/pdffiles1/bjs/grants/255651.pdf, Table 1 (listing the total number of records in the OR repository in Dec 2018) an annual growth rate of 3% derived based on 10-years of actuals. As described in the Methodology section, this number likely includes some people who have moved out of state or are deceased.

[4] As defined in Chien (2020).

Oregon population of people with a criminal record, with an estimated 16% of white Oregonians but 60% of Black Oregonians having a conviction record.

*Table 1: Estimated Share of Oregon Population with Convictions - Pre and Post- expungement of All Eligible Records - Race Analyses[5]*

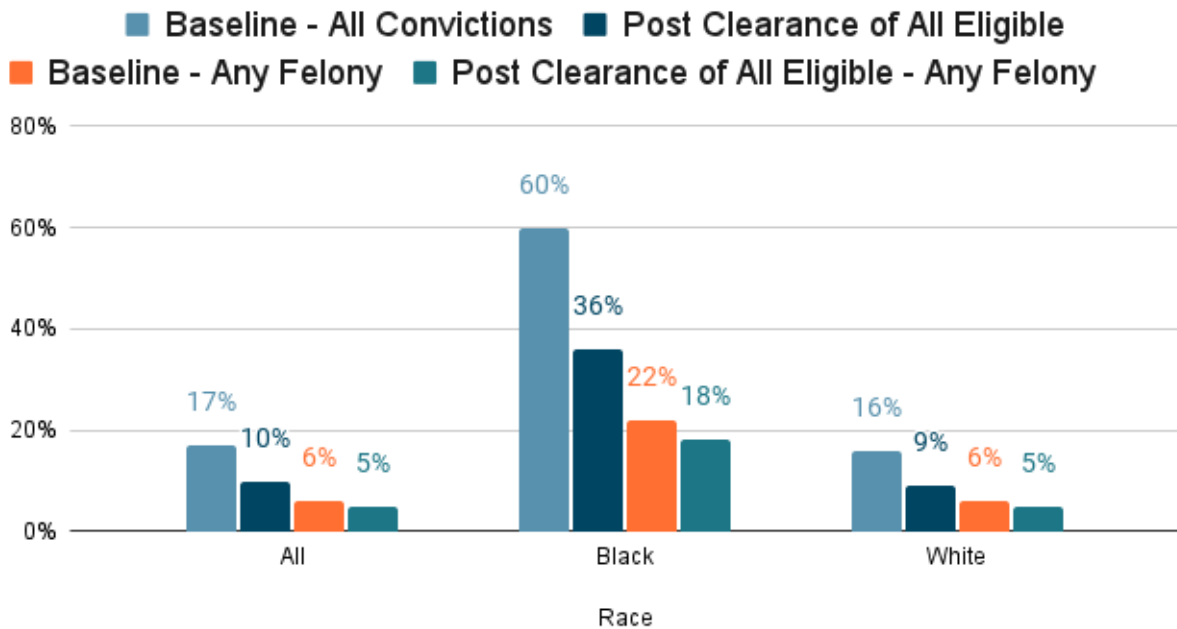| Metric | Conviction | | Felony Conviction | |
|---|---|---|---|---|
| Race | Baseline | Post Clearance of All Eligible | Baseline - Any Felony | Post Clearance of All Eligible - Any Felony |
| Black | 60% | 36% | 22% | 18% |
| White | 16% | 9% | 6% | 5% |
| All | 17% | 10% | 6% | 5% |
| Black -White Gap | 44% | 27% (reduction of 39%) | 16% | 13% (reduction of 19%) |

*Figure 1: Share of Oregon Population with Convictions - Pre and Post- expungement of All Eligible Records - Racial Gap Analysis[6]*
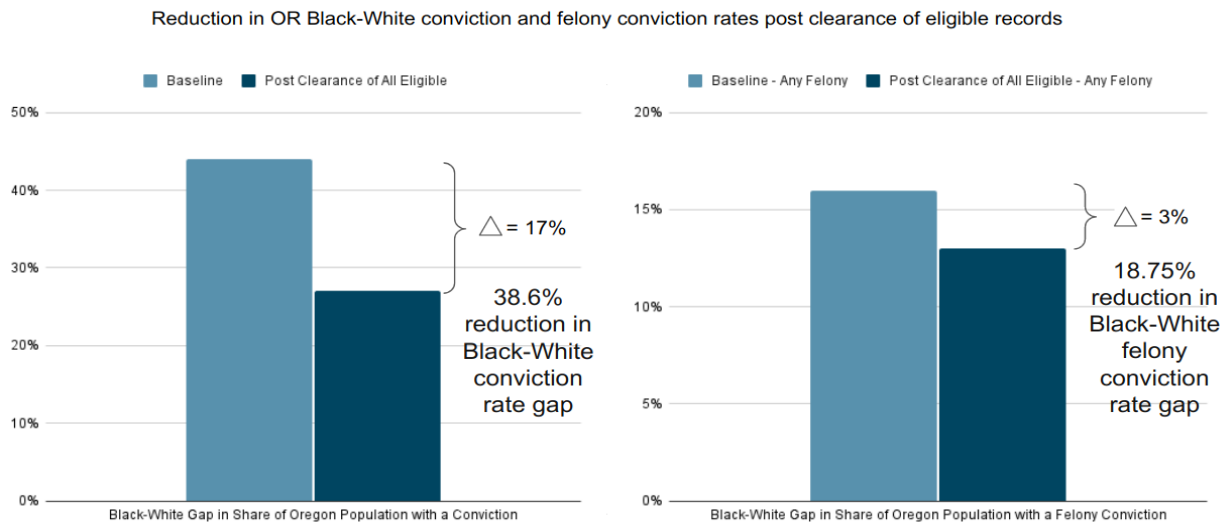


Reduction in OR Black-White conviction and felony conviction rates post clearance of eligible records

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Likelihood of having a Conviction Record in OR by race

Based on the method described above, we find that approximately 42% of individuals in our sample are eligible to clear their convictions, and 63% of individuals with records are eligible to clear their records. Extrapolating to the total number of people with records in Oregon, this yields an estimated 295K people with convictions that are eligible for convictions relief, 695K with records that are eligible for any relief but haven't received it.

Combining historical expungement and set-aside statistics with our eligibility calculations, an estimated 5.5% of people with records eligible for relief have received it, leaving behind over 94% of people of those eligible without relief. To ascertain the approximate annual earnings loss associated with Kenuckys' second chance convictions gap, we multiply the number of people in the convictions gap (295K) by $5,100, a conservative estimate for the average loss in earnings yearly due to the second chance gap.[7] We estimate that over $1.6 Billion in cumulative earnings are lost every year in Oregon due to convictions that could be, but have not been cleared.

**Racial gap analysis**

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[7] $5,100 is a national average that is associated with misdemeanors (see Id.), but the second chance gap in Oregon includes individuals with both misdemeanor and felony convictions which makes the number a conservative estimate for application in Oregon.

*Impact on people with convictions*

Currently, although 16% of White people have a conviction, the figure is nearly four times for Black people, 60%. However, if all eligible convictions were cleared, the White-Black gap in conviction rates would shrink from 44% (60-16%) to 27% (36%-9%), representing a 38.6% reduction in the White-Black conviction rate gap.

*Impact on people with felony convictions*

Among people with felony convictions, the gap is the same: 6% of White people have a felony while almost four times that share, 22% of Black people live with a felony conviction, contributing to a 16% gap in White-Black conviction and felony conviction rates. However, if all eligible convictions were cleared, the White-Black gap in conviction rates would shrink to 13% (18%-5%), representing an 18.75% reduction in the White-Black felony conviction rate gap.

Based on reported records, the State expunged or set aside about 3.8K cases in the last year of available data (2019). About half of counties granted 10 or fewer set-asides and nearly 80% of counties granted fewer than 50 set-asides in 2019. At this rate, it would take approximately 77 years to clear the current second chance set-aside gap backlog alone. If all records that were eligible for relief were cleared, it appears that racial disparities would significantly narrow (Table 1), the share of Black people with a conviction and with a felony conviction would decline from approximately 60% and 22% to approximately 36% and 18% of the population, respectively.

However, due to deficiencies in the data and ambiguities in the law uncovered during our analysis, including regarding disposition, chargetype, and sentence completion criteria, to provide relief through "Clean Slate" automated approaches would require significant data normalization and cleaning efforts. We include, in Appendix E, statute drafting alternatives to avoid some of these problems. Included in our report are our Methodology (Appendix A); Disposition Data Report (Appendix B); Common Charges (Appendix C); Detailed Expungement and Set-Aside Statistics (Appendix D); Clearance Criteria Challenges and Legislative Drafting Alternatives (Appendix E).

## II.   Summary

Every time a person is convicted of a crime, this event is memorialized in the person's criminal record in perpetuity, setting off thousands of potential collateral consequences, including being penalized in searches for employment, housing and volunteer opportunities.

To remove these harmful consequences, Oregon law allows people whose criminal records meet certain conditions to set-aside their records.[8] However, the "second chance gap" in Oregon "set-asides" - the share of people eligible for relief who haven't received it because of hurdles in the petition process - we suspect is large.  To estimate it, we used research, official guides to the law, and practice expertise to model the eligibility criteria for set-aside set forth in the law and applied it to a sample of records covering a random sample of records from 1999-2015 sourced from the Oregon Administrative Office of the State Court. To carry out our analysis, we ascertained charge eligibility based on reading the code, inferred whether a person had a charge pending, and made assumptions about the estimated date of completion of the sentence based on the passage of time derived from practice. Importantly, we did not account for outstanding fines or out of state charges which could potentially disqualify some individuals for relief, nor did we model criteria from whom eligibility was unascertainable from the available record.

## Key Findings:

Using the approach described briefly above and in detail in Appendix A we find that:

- In the state of Oregon, up to 1.4M out of approximately 4.1M state residents have criminal records.
- Of those with conviction records, an estimated 42%, or about 280K people are eligible for set-aside of their convictions, and an estimated 63% of people with any record, or 695KK are eligible for set-aside of part or all of their record under the current law (not taking into account fines and fees and out of state charges).
- Based on the assumption that our sample is representative of people with criminal records in Oregon, we estimate that the current felony population in Oregon is approximately 280K people.[9] The share of people with felonies eligible for convictions relief is 21%, or 60K people.
- Based on records obtained from the sources disclosed in Appendix D, and methods disclosed in Appendix A, we estimate, conservatively, that the state issued approximately 51K set-asides over the last 10 years. Based on these numbers and the calculations above, we estimate 5.5% of people eligible to clear any record have done so, leaving over 94% of people in the set-aside uptake gap.
- At current rates of set-aside, it would take around 77 years to clear the existing backlog of eligible charges using current methods.
- If all eligible convictions were cleared, the White-Black gap in conviction rates in the population would be reduced by 38.6%, and the White-Black gap in felony convictions would be reduced by 18.75%.
- We estimate the aggregate earnings loss of the approximately 295K people with convictions in the Oregon second chance gap is about $1.6B.

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[8] Described in "Rules" Section of Appendix A.
[9] Based on actuals, *cf*.

## III.    Conclusion

Based on our analysis, Oregon's set-aside laws allow for approximately 63% of those who live burdened with records to get records relief and 42% to get relief from convictions. But to date, we estimate that 5.5% of people eligible have gotten set-asides, leaving over 94% of eligible people in the set-aside gap. The conviction second chance gap translates into a cumulative annual earnings loss to the state of about $1.6 Billion. If all eligible convictions were cleared, the White-Black gap in conviction rates in the population would be reduced by 38.6%, and the White-Black gap in felony convictions would be reduced by 18.75%.

## Appendix A: Methodology

To estimate the number and share of people eligible for but not receiving relief in each state, we proceeded as follows, implementing the approach developed in Colleen V. Chien, *America's Paper Prisons: The Second Chance Gap* (2020) ((Chien (2020)).

First, we ascertained the relevant records relief laws and developed rules logic, using legal research to develop lists of ineligible and eligible charges. Next, we obtained and cleaned the data sample and collected information on the state's criminal population. Where possible, we also obtained administrative data on the number of expungements granted historically. Next, we developed flow logic to model the laws. Next we applied the flow logic to the data sample to estimate eligibility shares in the sample. Finally we extrapolated from the population in the sample to the total criminal population in the state overall to calculate number and share of individuals in the "current gap" (people with currently records eligible for relief) as well as the "uptake gap" (share of people eligible for expungement over time that have not received them). The descriptions below disclose several shortcomings in our approach, including our inability to account for outstanding fines or out of state charges which could potentially disqualify some individuals for relief, failure to model criteria from whom eligibility was unascertainable from the available record, the existence of missing data for which we assumed a lack of eligibility, and our inability to be sure that our sample was representative of all with criminal records in the state.

*Ascertaining the Law and Developing Rules Logic*

Based on the court guidelines, statutes, and guides from non-profits listed above we discerned the law and determined its internal logic, with respect to the charge grade (e.g. misdemeanor or

felony), offense type (e.g non-violent or domestic violence charge), time (e.g 3-year waiting period), disposition type (e.g. nolo contendere) and person conditions (e.g. a lifetime limit of 2 convictions) that define eligibility. These are disclosed in every report in the RULES section.

From these rules, we created lists of eligible and ineligible offenses. To do so, we reviewed the relief rules for disqualified classes of charges and then searched the criminal code for the corresponding statute name or number corresponding with each class of charges. We then used these statutes to identify the characteristics of each potentially eligible offense: their charge type (e.g. felony, misdemeanor), degree, and the maximum possible duration of incarceration/amount to be fine for each offense. Once we had assembled the characteristics of each potentially ineligible offense, we cross referenced each offense and its characteristics against the eligibility statute. If a specific statute section was outside the prescribed characteristics of any category of eligibility (e.g., class of offense, degree, maximum duration of incarceration/amount to be fined, etc.), the offense was deemed ineligible for expungement. The offenses that were within each of the eligibility requirements after this process were deemed eligible for expungement. We did not consider the eligibility of offenses that fulfilled the unmodeled criteria referenced above, making our estimate under-inclusive and over-inclusive.

### *Obtaining the Data Sample and Collecting Data on the State Population of Individuals with Criminal Records and the Number of Expungements Granted*

From a data vendor, we obtained court records from the data source indicated below. Where not already available, we used Name+DOB to create unique person IDs and created state-specific criminal histories for each person. Profile information on the analyzed population is provided below in every report in Appendix B.

We approximated the number of people with criminal charges using a few methods. If state criminal population information was available directly from the state, we relied on it. When it wasn't available, we considered two sources. First, we consulted public records provided by SEARCH (2018), a listing of criminal subject counts provided by the repositories of each state. We then adjusted for growth in the number of people with records using a 3% CAGR average based on 10 years of historical data. As a sanity check, we compared this number with the estimated number of people with criminal records derived based on taking the population of people in the state from the Census and then multiplying the "national average" share of ~25% of Americans having a criminal record (derived from  331M individuals and 80M people with criminal records). When the difference was large (i.e. more than ~25%), we used the population-derived number. The raw numbers derived from SEARCH records and from the state include multi-state offenders, people who did not live in the state at the time of the crime, and also, people that may have since their disposition left the state. Regardless of the source, the raw

numbers do not account for deported or deceased people. As described in the report, where possible we made adjustments to take into account these factors, but it should be reiterated that from these reasons, the population numbers provided are estimates.

We further accounted for people with uncharged arrests as described in Chien (2020) based on an analysis prepared by Professor Robert Apel of Rutgers University based on the NLSY97, an ongoing U.S. Bureau of Labor Statistics survey tracking 7,335 randomly selected people starting in their 20's by removing them from our eligibility analysis, which is based on court records.

In addition to researching the number of individuals with criminal histories, we sought from state sources administrative data on the number of expungements granted historically. When public reports were not available, we filed records requests or consulted other sources of information. We used this data to calculate the "uptake rate" and number of years it would take to clear the backlog.

*Applying the Law to the Sample Data to Obtain an Eligibility Share*

To apply the law to data, we used the methods described in Chien (2020) to first prepare the data by cleaning and labeling dispositions and charges data. We report the share of charges missing dispositions or chargetypes in Appendix B of each report. We then applied the logic to the sample to obtain a share of people eligible for records relief in the sample. When relevant data was missing, we assumed, conservatively, that the charge or incident was ineligible for relief.

To approximate "sentence completion" we used recorded sentences where available, assuming that the sentence had been carried out, and where not available, an assumption that the sentence was completed 2.5 years after the disposition date for misdemeanor charges, and 3.5 years after the disposition date for felony charges where sentence completion was not readily available. Importantly, we did not account for outstanding fines or out of state charges which could potentially disqualify some individuals for relief per the summary of the rules.

When the eligibility of frequently occurring charges wasn't addressed directly by the "top down" methodology described above, of researching eligibility or ineligibility based on the rules, we used a "bottom up" approach of researching these charges and ascertaining their eligibility one by one.

*Applying the Eligibility Share to the Criminal Population and State History of Relief to Estimate the Number of People in the Second Chance Gap*

To develop a total state eligibility estimate based on the shares derived in the steps above we assumed that the sample was representative enough of the criminal population that we could use its eligibility shares as the basis for a state estimate. We then applied these shares to the estimated number of people with court criminal records in the state, developed using the approach described above. This yielded our estimation of the number and share of individuals in the "current gap" (people with currently records eligible for relief) as well as, in combination with the expungement actuals mentioned above, the "uptake gap" (share of people eligible for expungement over time that have not received them).


## **RULES**

### **Oregon Set-Aside Rules**
Primary Sources: Oregon Revised Statute ORS 137.225 (2019)
Secondary Sources: Oregon Court guidance on Class C or below (No date) | Oregon state guidance on Class B (no date) | Oregon CCRC Profile (4/7/2020)

CONVICTIONS:
1. Misdemeanors: Set aside if **misdemeanor** (as defined in statute under - 161.555) upon petition, after 3 year wait-period from conviction if clean (here meaning no convictions in 10 years/arrests in 3 years prior to filing petition and no pending criminal charges). ORS 137.225(1)(a), (1)(b), (7), (8)
2. Felonies:
    a. Set aside if **Class C felony** (felony classes defined in statute under 161.525), upon petition, after a 3 year wait-period starting from conviction, if clean (here meaning no convictions in 10 years/arrests in 3 years prior to filing petition) and no pending criminal charges. (Probation revocations require a 10-year wait period). ORS 137.225(1)(a), (1)(b), (7), (8)
    b. Set aside if **Class B felony** if not under ORS § 166.429, 20 years clean after sentence completion, and not a person felony as defined in § 213-003-0001 (14). § 137.225(5)(a) - Unicorn Rule
3. Not Eligible: traffic, sex, and violent offenses (defined, at (6)) not eligible. **Elder and Child Abuse** (defined 6(b)), **Class C criminally negligent homicide**, **Class B firearms** used in a felony (defined, at (5)(a)) or any crime classified as a "**person felony**" (definition) by OCJC
4. Lifetime and Other Limits: n/a.
5. Treatment of Multiple Convictions from the same Incident: n/a.
6. LFO Payment Required for Sentence Completion: LFO payment required for sentence completion: n/a.
7. Other Unmodeled Criteria or Details:
    a. Marijuana Convictions: Certain felonies can be reduced to misdemeanors under § 137.222. Convictions prior to 2015 require no wait period § 137.226.
    b. Pending criminal charges

      c.   Probation revocations require a 10-year wait period

NON-CONVICTIONS

1. <u>Acquittals or Dismissals</u>: Set aside for acquittals or dismissals with no waiting period, if no convictions within 10 years (cannot model arrests).  ORS <u>137.225(1)(b)</u>
2. <u>Not modeled</u>
   a. Arrests or charges if no accusatory instrument filed, upon petition, after 1 year waiting-period starting from date of arrest or charge, if no arrests within 3 years and no convictions within 10 years.
   b. Pending criminal charges

## Appendix B: Data Sample Description

Our data comprised a sample of criminal histories covering a random sample of records from 1999-2015 sourced from the Oregon Administrative Office of the State Court.

| Data Statistics | |
|---|---|
| **Number of People in the Sample** | 120,706 |
| **Share of People with Convictions** | 62% |
| **Share of People with Felony Convictions** | 41% |
| **Share of People with Misdemeanor Convictions in the Sample** | 62% |
| **Share of People with Felony Charges in the Sample** | 41% |
| **Share of Charges Missing Dispositions** | 3% |
| **Share of Charges Missing Chargetypes** | 0% |

## Appendix C: Common Charges

    A.  Top 10 Charges in our Dataset

| <u>Charges</u> | <u>Number of Charges</u> | <u>Percentage of Charges</u> |
|---|---|---|
| driving under the influence of intoxicants | 19,104 | 7% |
| assault in the fourth degree | 13,014 | 5% |
| harassment | 10,791 | 4% |
| theft in the second degree | 10,212 | 4% |
| theft in the first degree | 7,840 | 3% |
| identity theft | 7,818 | 3% |
| poss controlled sub 2 | 7,462 | 3% |

| | | |
|---|---|---|
| theft in the third degree | 7,394 | 3% |
| reckless driving | 7,006 | 3% |
| possession of methamphetamine | 6,810 | 3% |
| **Total share and charges associated with top 10 charges** | **97,451** | **36%** |

B. Top 10 Expungeable Charges in our Dataset

| **Expungeable Charges** | **Number of Charges** | **Percentage of Charges** |
|---|---|---|
| Theft in the Second Degree | 3,664 | 10.82% |
| Assault in the Fourth Degree | 2,558 | 7.55% |
| Theft in the Third Degree | 2,234 | 6.60% |
| Harassment | 2,110 | 6.23% |
| DUII | 1,607 | 4.75% |
| Criminal Mischief in the Second Degree | 1,329 | 3.93% |
| Reckless Driving | 1,302 | 3.85% |
| Criminal Trespass in the Second Degree | 1,138 | 3.36% |
| Recklessly Endangering Another Person | 914 | 2.70% |
| Menacing | 757 | 2.24% |
| **Total share and charges associated with top 10 expungeable charges** | **17,613** | **52.02%** |

# Appendix D: Set-Aside and Expungement Statistics

We obtained set-aside statistics from the Oregon Judicial Branch, which reported that 19,303 set-asides and expungements were granted in the four years from January 1, 2016- September 1, 2019 as detailed below. To estimate the 2019 set-aside and expungement number of 3,840, we extrapolated based on 8 months of data.

"Oregon Judicial Department Expungements and Set Asides by Court Location and Year Entered between January 1, 2016 - September 1, 2019 Prepared by: Business and Fiscal Services Division - 10/4/19 Note: Report does not include confidential cases"

| Court Location | 2016 | 2017 | 2018 | 2019 | Grand Total |
|---|---|---|---|---|---|
| Baker | 15 | 12 | 9 | 0 | 36 |
| Benton | 19 | 26 | 39 | 19 | 103 |
| Clackamas | 6 | 31 | 57 | 44 | 138 |
| Clatsop | 3 | 33 | 34 | 17 | 87 |
| Columbia | 3 | 20 | 14 | 11 | 48 |
| Coos | 5 | 34 | 42 | 33 | 114 |
| Crook | 33 | 48 | 95 | 1 | 177 |
| Curry | 2 | 12 | 2 | 7 | 23 |
| Deschutes | 59 | 89 | 69 | 49 | 266 |
| Douglas | 3 | 20 | 17 | 15 | 55 |
| Gilliam | 1 | 0 | 5 | 3 | 9 |
| Grant | 4 | 6 | 3 | 0 | 13 |
| Harney | 0 | 1 | 0 | 0 | 1 |
| Hood River | 6 | 7 | 3 | 7 | 23 |
| Jackson | 430 | 586 | 629 | 344 | 1989 |
| Jefferson | 5 | 9 | 14 | 1 | 29 |
| Josephine | 4 | 44 | 33 | 21 | 102 |
| Klamath | 1 | 46 | 37 | 15 | 99 |
| Lake | 1 | 5 | 2 | 2 | 10 |
| Lane | 17 | 355 | 465 | 304 | 1141 |
| Lincoln | 18 | 27 | 36 | 25 | 106 |
| Linn | 27 | 53 | 42 | 27 | 149 |
| Malheur | 10 | 11 | 6 | 5 | 32 |
| Marion | 80 | 105 | 130 | 175 | 490 |
| Morrow | 0 | 0 | 0 | 4 | 4 |
| Multnomah | 3792 | 4343 | 2522 | 1006 | 11663 |
| Polk | 5 | 3 | 19 | 16 | 43 |
| Sherman | 0 | 2 | 0 | 1 | 3 |
| Tillamook | 11 | 6 | 12 | 7 | 36 |
| Umatilla | 59 | 9 | 14 | 10 | 92 |
| Union | 10 | 7 | 7 | 12 | 36 |
| Wallowa | 1 | 1 | 2 | 1 | 5 |
| Wasco | 10 | 10 | 6 | 9 | 35 |
| Washington | 299 | 625 | 653 | 307 | 1884 |
| Yamhill | 53 | 52 | 95 | 62 | 262 |
| Grand Total | 4992 | 6638 | 5113 | 2560 | 19303 |

# Appendix E: Clearance Criteria Challenges and Legislative Drafting Alternatives[10]

| Criteria | Administrability Challenge | Example | Drafting Alternative |
|---|---|---|---|
| Sentence completion | 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 paid, and whether have been. | Records relating to a first conviction ...voided upon the petitioner's successful completion of the sentence will be sealed by the court. KRS §§ 218A.276(1), (8), (9).<br><br>Record...can be sealed by the court one year after sentence completion if the petitioner has no subsequent charges or convictions. Colo. Rev. Stat. § 24-72-705(1)(c)(I), (1)(e)(I). | Disposition Date (+ X Years) |
| First conviction; qualifying conditions | Lack of unique identifier across precludes determination | | Bless commercial identification approximation technique |
| Personal demographic trait such as age, military status, or other condition | Information may not be easily ascertainable / available on the record or charge category condition | Records relating to an offense committed by current and former military personnel ,,,can be dismissed Cal. Pen. Code § 1170.; A record relating to a matter sealed pursuant to section 781 is destroyed ...when the person reaches 38 years of age. Cal. Welf. & Inst. Code §781(d). Cal. Welf. & Inst. Code § 781(d). | Specify an identification strategy that can be implemented at scale or do not include demographic traits |
| Class or grade condition | Missing class, grade or category information | Records relating to a charge or conviction for a petty offense, municipal ordinance violation, or a Class 2 misdemeanor as the highest charge can be removed from the public record after 10 years, if all court-ordered conditions are satisfied. S.D. Codified Laws § 23A-3-34. | Explicitly specify the qualifying crimes |
| Court-ordered conditions | Require individual review /check for any "court-ordered" conditions and compliance re: same | | Do not include court-ordered conditions |
| Laundry list disposition criteria | Vulnerable to changes to definitions, requires detailed clean data | Records of arrest are destroyed within 60 days after detention without arrest, acquittal, dismissal, no true bill, no information, or other exoneration. R.I. Gen. Laws § 12-1-12(a), (b). | Simple description e.g. "All records that do not end in a conviction" |

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[10] Adapted from Chien (2020)