

# Expungement

## *Criminal records as reentry barriers*

*By NIJ Communications Staff*



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**R**esearch has long established that, for individuals completing their criminal sentences, immediate challenges such as unstable housing options and discouraging job prospects can

pose significant barriers to successful reentry into society. And poor prospects for a secure living situation and steady work bring a heightened risk of recidivism, starting the cycle of engagement with the justice system all over again.

Often overlooked, however, is the significant reentry barrier posed by an individual's criminal record. A permanent record can thwart efforts to address those other, seemingly

more immediate needs. "Successful reentry is measured over time and the ability of a person to expunge their criminal record, where appropriate, can be critical to their ability to move forward," said Nancy La Vigne, Ph.D., Director of the National Institute of Justice (NIJ).

Expunging a criminal record can help open the door to a second chance at life. But even where the law allows and the justice system machinery enables some degree of criminal record clearing, barriers persist in the form of:

- Unequal access to justice among those eligible to have their records cleared.
- The posting of individual criminal record information on public, and often monetized, websites.
- The fact that significant amounts of publicly accessible criminal record data are inaccurate, incomplete, and inconsistently maintained.
- Debates about the ultimate value to government and society of erasing accurate crime information from the public record and memory.

NIJ is the research, evaluation, and development agency of the U.S. Department of Justice and has worked to forge an improved, evidence-based understanding of the role that having a criminal record plays as a distinct barrier to reentry; a criminal record's impact on an individual's ability to lead a law-abiding life; and the pros and cons of strategies designed to remove or minimize the negative impact of a criminal record. As NIJ's then-Acting Director, Jennifer Scherer, Ph.D., noted at an April 2022 NIJ webinar on the hidden costs of reentry, "We understand the impact a criminal record has on employment and housing options.<sup>1</sup> We also know that not having a job and stable housing increases the likelihood of recidivism."

To better understand the impacts of those barriers, NIJ has funded several recent studies on reentry and recidivism. This article primarily touches on two of those studies:

1. An ongoing evaluation of expungement and its effects on recidivism, housing, and employment. Initial findings offer preliminary insights on the availability, viability, and impact of criminal-record-clearing processes.
2. A completed study on the permanency and accuracy of criminal records in the digital age.

This article also offers a broader discussion, derived from an NIJ-hosted webinar, of the difficulty of clearing criminal records in the digital age. It considers the need to balance the competing interests of people who desire an expungement

of their criminal records, which may contain dated or misleading information, and the law enforcement community, who argue that retaining accurate information regarding a person's past criminal activity serves an essential public safety purpose.

## **Researchers from Harvard Law School are using a powerful social science evaluation tool, the randomized controlled trial, or RCT, to study the impact of expungement on long-term reentry outcomes.**

### **Expungement and the value of legal representation**

Researchers from Harvard Law School are using a powerful social science evaluation tool, the randomized controlled trial, or RCT, to study the impact of expungement on long-term reentry outcomes.<sup>2</sup> They are comparing the ability of two statistically identical study subpopulations in Kansas to have eligible portions of their criminal records expunged by

petitioning the court. One group was offered professional legal assistance to seek an expungement. The other group, after being offered self-help guidance, was on their own.

Kansas Legal Services provides legal help for those seeking to petition for expungement of criminal records. However, the supply of such services does not meet petitioner demand. If those services are critical to record expungement, then that shortfall could be a significant barrier to successful reentry. This study looks to provide the scientific data needed to establish the benefit, if any, of legal services in support of petitions for expungement.

The Harvard expungement research project will produce findings for years to come. Researchers will survey subjects every three weeks for 10 years, said D. James Greiner, Ph.D., principal investigator and Professor of Public Law and Faculty Director at the Access to Justice Lab, Harvard Law School. The surveys will cover housing security, employment status, and overall happiness, he said. They will also address identity concerns, such as whether subjects are seeking record clearing because they believe they are no longer the person reflected in their criminal records. The RCT study in Kansas was close to completion as of spring 2022, Greiner reported. Other study elements, including the long-term surveys and review of administrative records, were continuing.

Preliminary results, reported at the April 2022 webinar, suggest a significant advantage for people who receive formal legal help in pursuing expungement. Of those in the Kansas study group assigned full-scope

legal representation, 70% or more were able to achieve some measure of record clearing within a six- to seven-month period. Of those individuals, researchers found that 9 out of 10 were eventually able to clear their criminal records completely. In contrast, only about 13% of subjects in the self-help group were able to clear their equivalent criminal records. Greiner stated that the disparity in expungement results between legally represented and unrepresented study subjects revealed “a serious access-to-justice problem.”

Greiner placed the expungement evaluation research in context by addressing several constraining factors:

1. The inherent difficulty of completely removing any information in the public record in the digital age. Even suppressing access to a record can be very challenging.
2. The fact that different jurisdictions have distinctive approaches to record clearing or expungement, notably including:
  - a. The emergence of “Clean Slate” laws that require a state government to develop technology to automatically expunge minor criminal records for qualifying individuals.
  - b. The more common method of expungement by petition, for which the individual must take the initiative to petition the court to clear part or all of a criminal record.
3. The proliferation of for-profit enterprises collecting and

maintaining online personal information, including criminal record data, that may or may not be accurate, complete, or up to date.

4. Concerns about whether removal of true and accurate information from a criminal record maintained by a governmental agency, or removal or restriction of public access to that record, is ultimately in the interest of the government or the public.

Private actors are often behind the reported proliferation of inaccurate public record information made available on the internet. A common question is what would be the legal basis for remedying that activity, said Greiner. To date, the legal justification employed in some lawsuits to address inaccurate information derived from public records comes from the Fair Credit Reporting Act, which requires certain holders of information to follow “reasonable procedures” to ensure accuracy.

As the Harvard expungement study continues, it is expected to generate more information that can aid efforts to address issues that are central to reentry and recidivism.

### Permanency and accuracy of criminal records

Past NIJ-supported research has examined inconsistencies in criminal record content and private sector use of those records, as well as difficulties clearing criminal records.<sup>3</sup> An investigator on two of those projects, Sarah Lageson, Ph.D., Associate Professor at the School of Criminal Justice, Rutgers



### IS “CRIMINAL RECORD” A MISLEADING TERM?

Both Greiner and Lageson believe the common use of the term “criminal record” is misleading. “My view is that there is no such thing as a person’s criminal record,” said Greiner. “That just doesn’t exist. Instead, what exists are packets and pieces of information held by different government agencies, accumulated at different times, some of which are factually non-overlapping.

“The agencies each have their own policies and legal procedures to respond to requests or orders to suppress or destroy information. They often act inconsistently. Their computer systems aren’t designed to talk with each other,” said Greiner, who continued by stating, “Since our criminal justice system is disaggregated, it is often five or six or seven or eight criminal justice agencies that hold such records.”

Concurring, Lageson noted that “[m]illions and millions of records are being produced. And, of course, they’re being produced for different reasons with different rationales. But it leads to this unevenness in data quality in just the way that data are prepared and shared.”

University-Newark, told the NIJ webinar audience that a significant part of her current work is focusing on the harms that come to people when records created for a law enforcement function or other public function are transformed into an internet data commodity and attached to a person's name.

The two main sources of such record data, Lageson said, were arrest and charge data that are scraped from or sold by third-party websites.

Lageson noted that the variation in type and sophistication of criminal record data collection systems used by local jurisdictions makes it difficult to coordinate and synthesize data across agencies. Yet that kind of coordination is crucial to effective record clearance.

Lageson lamented the fact that public records often show cases that are old, outdated, or misleading. "There's a mismatch with people's names or birthdates and somebody's record is tied to somebody else's alias," she noted. "And so it gets very messy very quick."

Lageson also observed that data brokers who commoditize information from the public record are largely unregulated.

Greiner identified a larger question overhanging the discussion of whether, and to what degree, allowing government destruction or suppression of truthful, factually accurate information about a key government function — criminal justice — is a good idea. He acknowledged an argument that "the entire effort to oversee or study policing in the criminal justice system would be made substantially more difficult by the suppression

or destruction of factually-accurate information about police behavior or prosecutor behavior and court behavior."

That core question suggests a need going forward for policymakers and researchers to examine pathways that protect individuals from outdated, inaccurate criminal records. That type of record clearing can create a true second chance without compromising public, agency, and court access to meaningful crime data needed to enforce criminal laws and to manage and evaluate the criminal justice system. ♦

#### ENDNOTES

<sup>1</sup> NIJ hosted the webinar "The Hidden Costs of Reentry: Understanding the Barriers to Removing a Criminal Record" on April 20, 2022. Watch a recording and read the transcript. <https://nij.ojp.gov/events/hidden-costs-reentry-understanding-barriers-removing-criminal-record>

<sup>2</sup> The project is known as "The Final Stage Reentry Project: An RCT of Expungement and its Effect on Recidivism, Housing and Employment," NIJ Award No. 2019-RY-BX-0001, awarded to the President and Fellows of Harvard College.

<sup>3</sup> The research included the following reports: "Criminal Record Questions in the Era of the Black Box," M. Vuolo, S. Lageson, C. Uggen, *Criminology & Public Policy*, vol 16 issue 1 (2017), ps. 139-165, NIJ Award No. 2007-IJ-CX-0042; and "Legal Ambiguity in Managerial Assessments of Criminal Records," S. Lageson, M. Vuolo, C. Uggen, *Law & Social Inquiry* (Winter 2015), ps. 175-204, NIJ Award No. 2007-IJ-CX-0042



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