

The New York Second Chance Sealing Gap

By: Colleen Chien, Navid Shaghghi, Evan Hastings, and Hithesh Sekhar Bathala¹

Key Findings

Population with convictions: ~2.3M people

Share of people with convictions eligible to apply for sealing: ~34%

Population with convictions eligible to apply for sealing: ~600K+

Uptake rate of relief: <0.5%

Records sealed per year: 1,175 (2019)

Years to clear the backlog based on current rates: ~500+ Years

*not including consideration of outstanding fines and fees

Abstract

New York State Criminal Procedure Law (CPL) 160.59 allows individuals whose criminal records meet certain conditions to seal their records. Applying relevant New York statutes to a sample of criminal histories of individuals applying for gig worker jobs,² we estimate the share and number of people who are eligible for this remedy though have not yet taken advantage of it. Approximately one-third of the people in our sample are eligible for sealing their records and thereby falling into the “second chance sealing gap.”³ Extrapolating this share to the estimated number of people with convictions in the state of New York (at least ~2.3M individuals), we estimate that at least 600K people fall into the said gap. According to official state records, since the passage of CPL 160.59 in October of 2017 through Oct 2020, 2,348 people have sealed their records.⁴ 1,175 people sealed their record in 2019. At this rate of sealing, it would take 500+ years to clear the existing second chance sealing gap.

Approach

Subject to some statutory exceptions and additional conditions, New York State Criminal Procedure Law (CPL) 160.59 permits applications for record sealing for those with no pending criminal charges or open warrants after a 10-year waiting period from the imposition of their

¹ Colleen Chien is a professor at Santa Clara University’s School of Law and founder of the Paper Prisons Initiative; Navid Shaghghi is a professor in the department of Mathematics and Computer Science (MCS) of the College of Arts and Sciences and the department of Computer Science and Engineering (CSEN) of the School of Engineering at Santa Clara University; Evan Hastings is a Graduate Fellow with the Santa Clara University School of Law; Hithesh Sekhar Bathala is a Graduate Fellow at Leavey School of Business - Santa Clara University. We thank the Community Service Society of New York and for their input. 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. 519 (2020) Contact: colleenchien@gmail.com, www.paperprisons.org.

² See description of sample in id.

³ As defined in Chien (2020), *supra* note 1.

⁴ NY Division of Criminal Justice Services publication, “Raise the Age Sealing Provision Report”, dated October 2020 and available at <https://www.criminaljustice.ny.gov/crimnet/ojsa/Raise-the-Age-Provision-Sealing-Report.pdf>

sentence, not including time incarcerated. Commission of any one of the following offenses render a person ineligible for record sealing:

- Sex offenses under New York Penal Law §§130 and 263
- Felony offenses under New York Penal Law §125
- Violent felonies and Class A Felonies under New York Penal Law §70.02
- Any Class A felonies under New York Penal Law
- Conspiracy to commit felony offenses under New York Penal Law §105 where the underlying offense is not an eligible offense.
- Attempts to commit an offense that is not an eligible offense if the attempt is a felony
- Offenses for which registration as a sex offender is required pursuant to New York Consolidated Laws, Correction Law Article 6-C

Furthermore, eligible individuals must not have more than a total of two convictions (only one of which may be a felony) on their criminal record.

Finding the current gap share within a sample

To find the current gap, or the share of people with records that are eligible for sealing, we started with 1,787 criminal records obtained from a background check company⁵ representing a sample of 1310 individuals with criminal histories in NY that applied for gig jobs in 2017 and 2018. We then developed algorithms to model the eligibility rules based on the statute codes identified in CPL 160.59, court eligibility guidelines, and consultations with practicing attorneys from Community Service Society of New York and Legal Action Center. We compensated for dirty data using the approaches described below in the “assumptions” section. We did take into account the full criminal history, including out of state charges. Applying these algorithms to the data yielded the share of people with records eligible for relief, in the sample, that have not taken advantage of it.

Estimating the total number of people in the current gap based on the sample

We estimated the total number of people in the current gap by applying the share derived from the sample to the estimated total number of people with convictions records (details below on how this total was derived). Since the sample’s population’s age skews younger than the criminal population at large, and since eligibility depends on the passage of time since sentence completion, *ceteris paribus*, the population in the sample is less eligible for sealing their records than people in the criminal population at large. This assumption could be wrong however; hence we are seeking better, more representative data in order to further examine it.⁶ In the absence of better data, however, we believe our assumption is reasonable for developing an approximate total number of people currently in the gap.

Estimating the uptake rate

⁵ For a description of the sample see Chien, id.

⁶ Our initial request for a true sample of criminal history data from the DJCS was denied but we have appealed it.

To get the uptake rate, we combined actual data on who has received sealings with our estimate of the total number of people who could seal their records to get an estimate of uptake.

We found

- Within our sample, ~34% of people with convictions (405 out of 1206 people) were eligible for sealing their records under the current law (not taking into account ineligibility due to fines and fees since sentence completion conditions were not ascertainable with certainty) but have not yet sealed their records;
- Gov. Cuomo's office has reported that 2.3M⁷ people have a criminal conviction. However, this may be an underestimate. In a report prepared pursuant to a grant by the Bureau of Justice Statistics by the consortium SEARCH,⁸ approximately 8.7M New Yorkers are estimated to have a criminal record, 80% of them with a criminal charge based on the analysis by Robert Apel of NLSY data reported in Chien (2020). (8.7M * 80% = 6.6M) Because New York law bars reporting of non-convictions, this number must be scaled to get the total number of people with a record. If we estimate, based on observations of other states in Chien 2020, that the share of people with a conviction comprises 60% to 90% of the share of people criminally charged, this would imply that ~4.2-6.3M New Yorkers over time have had convictions, not accounting for people who have left the state.
- Extrapolating eligibility from the sample to the estimated number of people with convictions yield an estimate that at least ~600K-780K people in New York are eligible for sealing but have not taken advantage of it, falling into the second chance sealing gap. If ~4.2-6.3M⁹ people are assumed to have a criminal conviction instead of ~2.3M, the number of New Yorkers in the second chance sealing gap would be upwards of 1.4-2.1M.
- 2,348 people have received relief since 2017. This implies an uptake rate among those eligible for sealing of less than 0.5%.
- In 2019, 1,175 took advantage of sealing.¹⁰ At this rate, it would take 650+ years to clear the backlog alone.

⁷ As reported by Governor Cuomo's Office

(<https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-regulation-prohibit-insurance-companies-denying-coverage>). Possible sources of the discrepancy include that the SEARCH data does not take into account people moving out of state or deaths.

⁸ 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 NY repository as of 12/2018 as 8,227,600) We then applied a 3% annual growth rate calculated based on 10-years of actuals from SEARCH.

⁹ As reported by Governor Cuomo's Office

(<https://www.governor.ny.gov/news/governor-cuomo-announces-first-nation-regulation-prohibit-insurance-companies-denying-coverage>). Possible sources of the discrepancy include that the SEARCH data does not take into account people moving out of state or deaths.

¹⁰ NY Division of Criminal Justice Services publication, "Raise the Age Sealing Provision Report", dated March 20, 2020 and available at

<https://www.criminaljustice.ny.gov/crimnet/ojsa/Raise-the-Age-Provision-Sealing-Report.pdf>

Key Assumptions:

- Normalization of the charge and disposition of each record was based on the methodology described in the Second Chance Gap article.
- The sample of gig workers considered were as likely or less likely to be eligible for relief than New Yorkers with criminal histories as a whole.
- When a range was provided for a jail sentence in the data, the maximum was conservatively assumed to be the sentence. For example: “Imprisonment of 18 months to 3 years” was assumed to be associated with 3 years of jail term.
- All incarceration periods were assumed to be served concurrently. For example: if a person was sentenced to 5 years and 10 years of imprisonment, the total sentence time was considered to be 10 years.
- Multiple sentences for the same incident were resolved considering the highest conviction. For example: given sentences of 30 days imprisonment and 1 year imprisonment for the different charges of the same incident, a 1 year sentence was assumed.
- Sentences that included both monetary penalties and incarceration were evaluated with respect to the time element alone. For example: an individual charged for 4th degree criminal possession of a weapon and sentenced to \$250 fine or 30 days in prison is assumed to have served 30 days in prison.
- Records with insufficient information on charge type and/or sentences were removed and the most conservative scenarios were assumed.

Calculation of the Second Chance Gap

1. Share and numbers of the people in New York in the second chance gap:

People eligible = $P_e = S_e \times CP = 0.34 * CP$ where S_e = Share Eligible and CP = New York’s Population of People with Convictions (2.3M)¹¹

People eligible = 600K+

Uptake Rate = $C_1 / (P_e + C_1) = <1\%$

C_1 = number of people that have cleared in the last year

2. Number of years it would take to clear the existing backlog:

600K+ cases / 1,175 (cases resolved in 2019) = 500+~ **Years**

¹¹ We estimated the number of people in NY with convictions as a range of based on multiplying the total number of people with criminal histories estimated as described above by 80%, representing the share of people arrested with criminal charges as derived from actuals as described in Chien (2020) and by 60%-90%, representing the range of share of people with charges that have convictions.

Conclusion

Based on our analysis, New York's sealing laws allow for approximately 30 % of those who live burdened with criminal conviction records to potentially receive relief. However, only less than 0.1% of those with convictions eligible for relief have actually received the remedy.

Descriptive Statistics Based on the Sample:

Number of Guilty charges: 2,129

Number of people eligible for sealing: 405

Number of expugnable incidents: 427

Top 6 Charges:

1. DRIVING WHILE INTOXICATED
2. PETIT LARCENY
3. DWI
4. CRIMINAL POSSESSION CONTROLLED SUBSTANCE 5TH DEGREE
5. GRAND LARCENY 4TH DEGREE
6. GRAND LARCENY 3RD DEGREE

Average Subject Profile:

The average age: 43 Years

The average number of incidents: 1.78

The most common residence: Erie County

Appendix

Scripts link :

https://drive.google.com/drive/folders/14RU6YbE_glJICBpIjfUtJLsZagMq7B7a?usp=sharing