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The Debt that Can Never Be Paid: Report Card on Collateral Consequences of Conviction
By Margaret Colgate Love

In his 2004 State of the Union Address, speaking of the prospects of people returning home from prison, President George W. Bush described America as "the land of the second chance." But ex-cons know that this description mocks reality. The fact is that once a person has acquired the legal status of a convicted felon in the United States, it is next to impossible to regain the rights and status of an ordinary citizen, no matter what the crime, and no matter how heroic the person's rehabilitation.

In addition to permanent changes in a person's legal status as a result of conviction, the stigma of a criminal conviction invokes more subtle and wide-ranging forms of discrimination and shaming. Limited employment opportunities are perhaps the most troublesome of the secondary legal consequences of conviction, since an inability to get or keep a job has been identified as a major factor in recidivism. (*See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY at 196 (Oxford Univ. Press 2003; American Bar Association, Report of the Commission on Effective Criminal Sanctions, 2006, Part III at 3-4).

This phenomenon is hardly new; what is new is the scale of the problem. At a time when the front-end mechanics of the justice system have become increasingly efficient in processing people in, the mechanics of processing them out have become rusty with disuse. In almost every U.S. jurisdiction, offenders seeking to put their criminal past behind them are frustrated by a legal system that is complex and unclear and entirely inadequate to the task.

Something else that is new is the ease with which it is possible to delve anonymously into other people's past: a "Google" name search may bring up a surprise offer from a private screening company to do a criminal background check on the person for a nominal fee. More and more jobs requiring a license also require a criminal background check, and many private employers routinely run records checks on current and prospective employees. Even an arrest record that did not result in a conviction can derail a job opportunity. Quality control of public records systems is notoriously poor, and mistakes are common. Private screening companies are essentially unregulated. (See Report of the ABA Commission on Effective Criminal Sanctions, *supra*, Part IV.)

The American Bar Association Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons [hereinafter "Standards"] were adopted in 2003 on the premise that "legal penalties and disabilities resulting directly and immediately from the fact of conviction are in every meaningful sense 'sanctions' that should be accounted for explicitly in the context of the sentencing process." (See Standards, Introduction at 12.) Among other things, these standards provide that the legal disabilities and penalties that flow from the fact of conviction should be collected in a single place in a jurisdiction's criminal code, so that all actors in the system—including the defendant—can determine what they are. (See Standard 19-2.1) They also require that a court or administrative body should be empowered to waive or modify these legal penalties and disabilities in appropriate cases. (See Standards 19-2.5, 19-3.2.) In 2004, the ABA Justice Kennedy Commission (*available at* http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf) repeated the call for the identification and limitation of collateral consequences (*id*. at 82-83). A few state bars and law school clinics have accepted the challenge. (See, e.g., *Re-Entry and Reintegration: The Road to Public Safety*, Report and Recommendations of the New York State Bar Special Committee on Collateral Consequences of Criminal Proceedings, May 2006; studies cited at Report of the Commission on Effective Criminal Sanctions, *supra*, Report III at n.9.)

But in spite of a growing appreciation of the role of legal barriers in frustrating offender reentry, not a single U.S. jurisdiction has even begun a comprehensive assessment of its regime of collateral consequences. More to the point for this article, not a single jurisdiction has developed a reliable and accessible way for convicted persons to overcome or avoid these legal barriers to reentry and reintegration. Offenders generally don't understand the multiplicity of changes brought about in their legal status by virtue of a conviction, much less what can be done to regain the legal status of an ordinary citizen. For the most part, neither do the lawyers who prosecute and defend them, or the judges who sentence them. Corrections officials, including parole and probation officers, generally don't consider it their business.

As will become clear in the following pages, most offenders in most U.S. jurisdictions have no realistic prospect of ever being able to fully discharge their debt to society and start over with a clean slate. Notwithstanding our fond national self-image, ours is not a land of second chances, at least as far as the legal system is concerned.

Executive pardon

Pardon is assigned an important role in the criminal justice system in almost every U.S. jurisdiction. Indeed, in most states, and in the federal system as well, pardon offers the only possibility of neutralizing the collateral consequences of conviction for most adult felony offenders. Even if other forms of relief exist, pardon is usually the most effective in removing legal barriers to jobs and other opportunities. Pardon is also evidence of good character, so that an employer or landlord or lending institution can

have some level of comfort in dealing with a pardoned individual. Some states go further and make pardon the occasion of expunging the record of conviction.

State pardons are given effect in federal law in several important areas, including immigration, firearms privileges, and employment in federally regulated industries like transportation and banking. For example, under regulations issued by the Transportation Safety Administration, conviction-related restrictions on a trucker's license, an airport security pass, or a job as a longshoreman, do not apply at all to an individual who has been pardoned, no matter what the crime.

The procedure for obtaining a pardon varies widely from jurisdiction to jurisdiction, depending upon the system established for its administration. The constitutions of 40 states place the pardon power in the governor alone, but 10 place it in an administrative board. Four of these pardon boards count the governor as a member, and six act entirely independent of the governor. Another eight state constitutions limit the governor's power to cases recommended by an administrative agency (usually the parole board), and five require non-binding consultation. Rhode Island and New Hampshire require ratification of all pardons by an elected body. The governor-alone model generally places no restrictions on the pardoning process, but in states that assign a central role to an administrative body the pardon process can be quite formal and complex. (Charts posted on The Sentencing Project's Web site show the characteristics of state pardoning authorities, and each state's pardon process is explained in the "profiles" also accessible on this site. See http://www.sentencingproject.org/rights-restoration.cfm. These charts and profiles are part of this author's State-by-State Resource Guide to restoration and relief mechanisms, published by William S. Hein & Co. in 2006.)

If the procedure for obtaining one varies widely from jurisdiction to jurisdiction, the likelihood of success is even more disparate. There are only about a dozen states in which more than a token number of pardons are granted each year. Some governors have issued no pardons at all in recent years, even where they have the support of a statutory administrative mechanism. For example, in Louisiana, Massachusetts, and Michigan, the legislature has authorized an administrative board to advise the governor pursuant to a regular administrative hearing process, but the incumbent governor has nonetheless to date chosen not to exercise the power. New York's governor has granted no post-sentence pardons to ordinary applicants for many years, perhaps because New York law provides an alternative way for offenders to regain their rights and demonstrate their rehabilitation. Pardons are "exceedingly rare" in Colorado, North Carolina, Tennessee, Vermont, West Virginia, and Wyoming—though there is no other relief mechanism in those states, even for the most minor offenders. In Mississippi, New Jersey, and Washington, it has become customary for governors to issue pardons only at the end of their term, and very few are granted even then. The federal pardoning process has also withered in the past 20 years, producing only a trickle of grants where once there was a steady stream.

The fact is that most chief executives no longer regard pardoning as an integral and routine function of their office, and members of the public regards pardoning with

deep suspicion and cynicism. They regard pardon like a winning lottery ticket or a favor bestowed on political contributors at the end of an administration, not a remedy that can reasonably be sought at any time by ordinary people who can meet an objective set of criteria.

With the new interest in facilitating offender reentry and "neutralizing" the effect of a criminal record in appropriate cases, the experience of the handful of states with a regular pardoning practice should be of interest. As will be seen, the key to making the pardon power operational appears to lie in two things: protection from the political process, and regular exercise.

There are 10 states in which executive pardon is still treated as an integral part of the criminal justice process. Each of these states issues a substantial number of pardons each year, and grants a high percentage of the applications filed. It is no coincidence that in all 10 of these states the pardon process is regulated by law and operates with a reasonable degree of transparency. In Alabama, Connecticut, Georgia, Idaho, and South Carolina, the pardon power reposes in an appointed board, and the governor has no role (except a peripheral one in capital cases). In Nebraska, the authority to grant pardons is vested in a board of pardons that is composed of the governor, secretary of state, and attorney general. In Delaware, Pennsylvania, and Oklahoma, an appointed board makes binding recommendations to the governor, without which the governor may not act. In Arkansas the legislature requires the governor to consult with the parole board and obtain its non-binding recommendation in each case, and to report regularly on the number of grants and the reasons for each. (Chart # 4 on The Sentencing Project's Web site shows the characteristics of the most active state pardoning authorities. Idaho does not appear on this chart because of the comparatively low absolute number of grants, but it is included here because its Board of Pardons acts favorably on two-thirds of the applications it receives.)

In each of the 10 states where the pardon power is actually operational, it is administered through a public application process. In all but two, the board responsible for administering the power is required by law to hold public hearings at regular intervals, and to notify the prosecutor and victim. (The Georgia Board of Pardons and Paroles generally considers cases on a paper record, as does the Arkansas Parole Board, though both have the authority to conduct public hearings.) Most of the pardoning authorities in these states are required to defend their grants by reporting them annually to the legislature, along with a statement of the reasons for each grant. In Arkansas, the governor may not issue a pardon unless he or she first issues a public notice that provides a statement of reasons for the proposed grant, and gives the public an opportunity to comment. This regulation seems to give the pardoning authority in each of these states sufficient protection from the political process to make them comfortable in exercising the power.

Illinois and South Dakota also hold public pardon hearings at regular intervals, but are not counted among the 10 "operational" boards either because of recent irregularities in the pardon process, or a sluggish pardoning rate by the current governor,

or both. The current governors of Maryland and Hawaii have shown a commendable interest in pardoning despite not having the benefit of a statutory administrative apparatus that would give them a regular stream of reliable recommendations and a measure of political protection.

Particularly since 9/11, there has been increased pressure on the pardoning mechanism in the states where it provides the only way most offenders can avoid the automatic rejection that generally follows discovery of their criminal record. A number of state pardon authorities reported a surge in pardon applications from people fired or refused employment because of their criminal record, often far in the past and involving relatively minor offenses. Employers increasingly rely on criminal background checks to winnow out undesirable employees, sometimes because they are required to by law, but more often simple because they are risk averse and criminal record information is readily available.

Yet, relatively speaking, even in the jurisdictions that have reasonably functional pardon procedures, surprisingly few people make use of them. For example, Georgia grants more pardons than any other state, but the numbers involved are still relatively small: in 2004, the Georgia Board of Pardons and Parole granted 422 pardons (including 39 "immigration pardons"), acting favorably on between 35 percent and 50 percent of applications received. South Carolina and Connecticut each granted about 200 pardons in 2004, about 65 percent and 25 percent of all applications filed, respectively. It is unclear whether so few people apply because of the time and expense involved, the perceived uncertain prospects of success, the availability of alternative relief mechanisms, the belief that a pardon won't make much of a difference—or some combination of these factors.

For example, the pardon process in Pennsylvania appears to be both fair and accessible. It is administered by capable professionals, is presided over by elected officials who seem committed to the enterprise, and is the only relief available under that state's law. Moreover, a high percentage of those who apply for pardon in Pennsylvania are ultimately successful. Yet the process involves a lengthy and burdensome application process even for misdemeanants and "summary" offenders, including a full background investigation and two public hearings in the state capital. It requires a substantial investment of time and energy each month from the five members of the clemency board, which include the lieutenant governor and state attorney general, and the numerous state employees responsible for its administration. A similar seriousness of purpose and formality of process is characteristic of all of the states where pardon remains operational. Perhaps there could be a less cumbersome and expensive alternative for individuals whose offenses are minor and dated, but who are still being denied jobs, loans, and other opportunities because of them.

It is unfortunate that in so many states pardoning has become an almost vestigial function, in light of its critical gate-keeping function for people struggling to overcome the lingering disabilities that come with having a criminal record. As a criminal record is becoming both more common and more disabling, it is essential to have a reliable and accessible way for individuals to overcome the legal barriers to reintegration, and to

reassure employers and other members of the public of their rehabilitation. This surely has important benefits for the community as well as for the individuals involved. A well-administered pardon process can accomplish a great deal in closing the loop on an individual's experience in the criminal justice system, symbolizing a sort of "graduation" back to the legal status of an ordinary citizen.

Yet it may be too much to ask of pardon that it serve as the primary mechanism for relief from collateral consequences, at least in those jurisdictions where it remains the sole responsibility of the chief executive. The judicial and administrative mechanisms discussed in the next sections may provide more reliable and realistic alternatives.

Judicial expungement and sealing

More than half the states authorize their courts to expunge or seal some adult criminal records after the sentence has been fully served. The effect of an expungement or sealing order varies from state to state, but people whose convictions have been expunged or sealed can usually expect that their court record will not be available to the general public. (It is not clear what effect a judicial expungement or sealing order has where records exist in systems other than the court's, even assuming proper notification.) Persons whose convictions have been sealed or expunged are usually permitted by law to deny having been convicted in the first place, and sometimes civil and even criminal penalties are imposed for dissemination of expunged or sealed records. On the other hand, an expunged or sealed conviction remains available to law enforcement, and may be used in subsequent criminal proceedings. Indeed, in some states expunged convictions must still be reported in connection with certain job or license applications.

New Jersey's first offender expungement law is typical: if expungement is granted, the conviction or related proceedings are "deemed not to have occurred, and the [person] may answer any questions related to their occurrence accordingly," except when applying for a job in the judicial branch or in law enforcement. (N.J. Stat. Ann. § 2C:52-27.) In Kansas, expungement "erases" the conviction, except that it must be reported in connection with licensing decisions. (Kan. Stat. Ann. § 21-4619(g).)

Terminology can be something of a trap where judicial sealing orders are concerned. Some states (Arkansas, for example) use the terms "expunge" and "seal" interchangeably, while other states (Illinois, for example) regard sealing as a more modest remedy than expungement. New Hampshire uses the term "annulment" to describe its judicial expungement orders. To further complicate matters, many states authorize a court to "set aside" or "vacate" a conviction, which may also have the effect of cleansing a person's record. For example, when a Washington court "vacates" a conviction, "the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense. For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime." (Wash. Rev. Code § 9.94A.640

(1), (3).) On the other hand, a judicial "vacation" order in Arizona releases the person from penalties and disabilities, but does not remove the conviction from the person's criminal record and it must still be reported in response to any inquiry.

In all but a handful of jurisdictions, expungement and/or sealing are available only to first offenders, to minor offenders sentenced to probation, or to misdemeanants. In the few states that provide a broad expungement remedy, serious and violent offenses are generally ineligible. Generally states impose a waiting period of from one to 10 years, and sometimes longer, depending upon the gravity of the offense.

Sometimes expungement and sealing of the record are authorized in the context of a deferred adjudication scheme. Typically, an eligible individual pleads guilty and the adjudication of guilt (or sentencing) is withheld, subject to the satisfactory completion of a period of probation with conditions. Upon completion of probation, the charges are dismissed or the record of conviction is "set aside," "nullified," or "vacated," so that the defendant can truthfully say that he or she has no record of conviction. These preemptive front-end schemes are aimed at keeping certain types of offenders from incurring a criminal record in the first place, and hold great promise for ameliorating the situation created by the growing number of people whose criminal records are effectively relegating them to the margins of society. Access to deferred adjudication is generally controlled by prosecutors, which suggests the need to persuade prosecutors of the public safety benefits of expanding use of these programs.

A chart from my forthcoming book that is posted on The Sentencing Project's Web site shows what each state provides by way of judicial relief from collateral penalties and disabilities. (See http://www.sentencingproject.org/rights-restoration.cfm.) Only eight jurisdictions have general judicial sealing or expungement schemes that apply to most adult felony convictions (Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Puerto Rico, Utah, Washington). Indiana has a sealing statute that is administered by the state police. Even in these jurisdictions, sealing or expungement is ordinarily not available in the case of serious and violent crimes or sex offenses, and it does not preclude reliance on the conviction in a subsequent prosecution or sentencing. Oregon's expungement remedy applies only to minor (Class C) felonies, and several states permit sealing or expungement of misdemeanors. Most of these schemes include an eligibility waiting period, which in several cases is quite lengthy (for example, 15 years for felonies in Indiana and Massachusetts).

Puerto Rico has by far the broadest expungement statute of any U.S. jurisdiction, authorizing "elimination" of all offenses from the criminal records after a waiting period ranging from one to 20 years in the case of violent felonies, upon a showing of "a good moral reputation in the community." Kansas and Utah also have broad statutory schemes, presuming expungement for most felonies if eligibility requirements are met. Minnesota appears to be the only state whose courts have generally applicable common law expungement authority, but it is exercised quite conservatively.

Four states (Michigan, New Jersey, Ohio, and Rhode Island) make some form of expungement or sealing available to some or all first offenders upon completion of sentence, including those sentenced to prison. Rhode Island's expungement provisions are widely used, with 4,201 misdemeanors and 490 felonies expunged in 2004 alone. Ohio's sealing statute is also widely used, but applies only to nonviolent offenses that are not subject to a mandatory prison term. Nevada provides for automatic sealing of the record of a probationary sentence three years after discharge, and also after successful completion of reentry program and for minor drug possession cases. Missouri provides for the sealing of records where a prison sentence is suspended. Georgia provides for first offender "exoneration" following completion of sentence (including a prison sentence), which restores all rights but does not expunge or seal the record.

A number of states have statutory deferred adjudication schemes that lead to eventual expungement of the record after successful completion of a period of probation. In a majority of these states, only nonviolent first offenders are eligible for this relief. Twelve states (Arkansas, Connecticut, Hawaii, Iowa, Louisiana, Maryland, Mississippi, Oklahoma, Pennsylvania, South Dakota, Vermont, Washington), the District of Columbia, and the Virgin Islands authorize expungement of the record following successful completion of probation as part of their deferred adjudication schemes. Montana and Missouri limit public access to records after successful completion of probation, but do not expunge. Other states permit certain types of minor convictions to be set aside upon successful completion of a period of probation, but make no provision for expungement or sealing of the record (for example, Alaska, Florida, Georgia, Idaho, Kentucky, Nebraska, and New Mexico). California, Minnesota, and North Dakota authorize courts to "knock down" a felony conviction to a misdemeanor upon successful completion of probation, thus avoiding imposition of legal disabilities, but do not authorize expungement or sealing of the record. North Carolina and South Carolina permit deferred adjudication only for minor drug offenses, and authorize expungement of records only for youthful offenders. The District of Columbia Code authorizes deferred adjudication and expungement only for persons charged with drug use or possession.

In 12 states, executive pardon provides a statutory basis for judicial expungement or sealing the record of conviction. In three of those states, expungement or sealing is automatic upon a governor's pardon (Massachusetts, South Dakota, Washington). In nine others, a pardon recipient may petition a court for expungement or sealing (Arkansas, Connecticut, Indiana, Pennsylvania, Texas, Maryland, Oklahoma for nonviolent first offenders only, and West Virginia for nonviolent offenders after a long waiting period). None of these states require that the pardon be for innocence. In Minnesota a "pardon extraordinary" has the effect of "setting aside and nullifying" the conviction, but it does not authorize expungement of the judicial record.

There is no general federal expungement authority (the set-aside provision in the federal Youth Corrections Act was repealed in 1984). The only provision for expunging a federal criminal record is the very narrow authority in 18 U.S.C. § 3607 relating to minor marijuana possession offenses.

Based on a random sampling of jurisdictions, judicial restoration mechanisms are evidently perceived as both more effective and more attainable than pardon, and are widely utilized where available. For example, the circuit court in Multnomah County, Oregon, issued almost 700 set-aside orders in 2004. During the same year, the Rhode Island courts expunged 4,201 misdemeanors and 490 felonies, and the Utah courts expunged 335 felonies and more than 700 misdemeanors. More than half the applications filed were granted.

On balance, at least until there is a sea change in public attitudes, the expungement or sealing of a conviction may offer the most effective form of relief from the collateral consequences of conviction. Certainly the fear generated in employers and others by a criminal record makes it convenient to indulge the fiction that it does not exist. And, the courts as decision-makers offer the necessary accessibility, reliability, and respectability to make their relief at least as effective as an executive pardon.

On the other hand, it is generally more expensive for a criminal offender to hire a lawyer to go to court to seek expungement, than it is to file an application for pardon, which can generally be done pro se. Moreover, the limited and/or uncertain legal effect of expungement in some jurisdictions, the general unreliability of criminal record systems and the additional uncertainties introduced by new information-sharing technologies, and the anxiety necessarily produced by a system built upon denial, all combine to raise questions about the usefulness of expungement as a restoration device. In short, in an age where it is difficult to control access to information of any kind, such an old-fashioned effort to un-ring the bell seems fraught with peril.

Certificates of rehabilitation

Although a number of state evidence codes and licensing statutes give effect to "certificates of rehabilitation" or "certificates of good conduct," very few states actually provide for the issuance of such certificates by their courts or administrative agencies. Indeed, it appears that only New York has a fully developed and broadly applicable administrative scheme that allows criminal offenders to apply for—and reasonably hope to obtain—an official document restoring their rights as citizens and evidencing their rehabilitation. For first offenders not sentenced to prison, this document is known as a Certificate of Relief from Disabilities (CRD), and it is available from the sentencing court as early as imposition of sentence. For first offenders sentenced to prison, and for all out-of-state and federal offenders, the CRD is issued by the Board of Parole. People who have been convicted of more than one felony are ineligible for a CRD, but they may apply to the parole board for a certificate of good conduct after a short waiting period. These certificates are intended to restore all legal rights, but they are subject to numerous statutory overrides, and are of uncertain value where it comes to discretionary employment decisions.

A handful of other states have certificate programs, but none appears as comprehensive as New York's. Illinois recently passed a law modeled on New York's, but eligibility is limited and its effectiveness remains to be seen. California's certificate of rehabilitation plays a role in a few licensing schemes, but functions primarily as an

application for gubernatorial pardon, and in any event is subject to a 10-year eligibility waiting period. Mississippi's certificate of rehabilitation lifts firearms disabilities and rehabilitates witnesses, but appears to have no additional legal effect. New Jersey's certificate of rehabilitation is available only after a person has been rejected for an occupational license.

The certificate of rehabilitation appears to be legally straight-forward and potentially easy to administer, so it is not clear why more states have not adopted it. Upon the recommendation of its Commission on Effective Criminal Sanctions, the ABA has now adopted policy urging jurisdictions to enact laws providing for certificates of rehabilitation, and to establish standards for determining when an individual has become rehabilitated. The legal effect of such a certificate should be made clear in each case: the certificate "may declare that an individual is eligible for all employment, and other benefits and opportunities, or it may contain specific limitations, *e.g.*, designating particular employments for which the individual remains ineligible." Evidence of an individual's conviction should be inadmissible in any action alleging an employer's negligence or wrongful conduct based on hiring, as long as the employer relied on a certificate of rehabilitation when hiring. The National Conference of Commissioners of Uniform State Laws is also working on a uniform law on collateral sanctions that includes a certificate of rehabilitation.

An administrative certificate of rehabilitation is only as useful to a criminal offender as it is reliable to employers and others who are asked to give it effect. Therefore, it is essential that the procedure for investigating and approving applications for these certificates be carefully developed and administered.

Nondiscrimination based on conviction

A full two-thirds of the states have laws in place that prohibit the arbitrary denial of public employment and/or occupational licensure "solely" on grounds of a criminal conviction. Rather, a conviction must be "reasonably related" (or "directly" or "substantially" related) to the particular occupation or profession before termination or refusal to hire is permitted. Some states define "reasonable relationship" in terms of the circumstances of the offense, the amount of time since conviction, and the individual's demonstrated rehabilitation. A few states presume rehabilitation after a specified number of years. Even states that do not have a generally applicable "nondiscrimination" law recognize that a "reasonable relationship" test is appropriate for at least some occupations. The intended effect of these laws is to cut back on categorical disqualifications because of conviction, and substitute a system of case-by-case discretionary decision making based upon individual circumstances.

But it is not clear how helpful these nondiscrimination laws have been as a practical matter in allowing people with convictions to get their foot in the door in the workplace. Although the laws look good on paper, only a few states have any mechanism for their enforcement, and they have been narrowly interpreted by the courts. In a few states they have been enacted as a part of the state's fair employment practices scheme, and a few laws make reference to the state administrative procedure act. But in most states the laws are free-standing with no mechanism for administrative enforcement.

Perhaps the greatest obstacle to the effective enforcement of state nondiscrimination laws is that so few states have adopted standards for determining when an offender has become rehabilitated, or made independent provision for certifying rehabilitation outside of the pardon process. These days, risk avoidance by administrative agencies reinforces an understandable reluctance to vouch for character that has proved unreliable in the past.

Moreover, every state separately regulates numerous employments and occupations, and in this connection may permit (or require) consideration of conviction without regard to their general nondiscrimination laws. Federal law now compels background checks, and mandates (at least impliedly) disqualification based on conviction, for a wide variety of employments, including education, healthcare services, child and elder care, financial institutions, and transportation. In addition to such obvious areas as law enforcement and banking institutions, jobs in education and health care are often closed to people with convictions without regard to what they actually did and how long ago they did it. Any ambiguity in coverage is usually resolved against the convicted person. The natural reluctance to hire people with a criminal record has been exacerbated since the 9/11 terrorist attacks, so that it is now more likely than ever that a criminal record will be discovered, and that it will result in loss of a job or other professional opportunity.

Yet in spite of exceptions and lax enforcement, general nondiscrimination laws are an important expression of a state's public policy that can be built upon by law reformers.

Four states (Hawaii, New York, Pennsylvania, and Wisconsin) regulate consideration of a conviction in public and private employment and occupational licensure. Twelve states (Arizona, California, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, and Washington) prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. One state (Kansas) prohibits disqualification from public and private employment but does not regulate occupational licensing decisions. Eleven states (Arkansas, Delaware, Indiana, Maine, Michigan, Montana, North Dakota, Oregon, South Carolina, Texas, and Virginia) limit consideration of conviction in connection with occupational licensing but not employment. Six states (Illinois, New Hampshire, Ohio, Oklahoma, Massachusetts, and West Virginia) limit consideration of a felony conviction in licensing and/or employment only when rights have otherwise been restored by a pardon or the conviction vacated or expunged by a court. Of the 17 states that do not have a general nondiscrimination law, many nevertheless apply the "direct" or "rational" relation test in the context of at least one regulatory or licensing scheme, often in the context of disciplinary actions.

As a general matter, federal law prohibits discrimination in employment on the basis of conviction only insofar as it involves discrimination on some basis that is otherwise forbidden under federal civil rights laws. In addition, federal law requires criminal history checks and limits the employment of people with criminal records in a number of occupational areas, including banking, education, healthcare, and transportation. In some cases, however, notably in the transportation industry, federal law requires disqualification only for certain offenses, and only for a limited period of time.

Transportation regulations give effect to state pardons and expungements, and also permit administrative waivers.

The 33 general nondiscrimination laws range all the way from simple one-sentence declarations, to complex regulatory schemes covering many pages in the statute book. Arkansas, Michigan, and Washington all state the public policy sought to be served by the law as intended to "encourage and contribute to the rehabilitation of offenders" and "to assist them in the assumption of the responsibilities of citizenship." New York and New Jersey focus on employment and training as an aid to rehabilitation. Connecticut and New Mexico both link nondiscrimination with public safety ("the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens"). Colorado's statute appears to be aimed at rewarding offenders who have already achieved rehabilitation ("to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society").

State nondiscrimination laws take very different approaches to establishing an offender's rehabilitation. Minnesota requires consideration of rehabilitation as part of the test for determining the relationship of the conviction to employment; Virginia and New Jersey incorporate the extent of rehabilitation into the relationship test; Michigan makes rehabilitation the basis for rebuttal of an administrative determination that an applicant lacks good moral character. Arkansas, Minnesota, and New Mexico presume that an offender is rehabilitated if the sentence has been served and a specified number of years have passed without further adverse encounters with the law.

A number of states require an employer or licensing agency to give specific reasons, in writing, for denial or termination of employment or licensure on grounds related to conviction. Some states prohibit employer inquiries about pardoned or expunged offenses, or arrests not leading to conviction. In New Jersey, a person may overcome an adverse decision by a licensing board by obtaining a "certificate of rehabilitation" from the parole board. Colorado, Delaware, New Mexico, and North Dakota incorporate their general nondiscrimination test verbatim into dozens of individual licensing statutes, while other states exempt many of the same professions. Kansas appears to be the only state that addresses employer concerns about liability for negligent hiring, and Hawaii uniquely permits an employer to inquire about an applicant's criminal record only after an offer of employment has been made.

Conclusion

Many people who commit a crime—or even many crimes—at some point will try to turn their lives around and stay out of further trouble with the law. It is only a matter of common sense that our legal system should encourage them to do so. Where convicted people encounter legal barriers to their rehabilitative efforts, it would seem sensible to offer a way to avoid or mitigate the effect of these barriers. It is particularly important to provide an effective way of demonstrating rehabilitation where employment and licensing opportunities are concerned, because of an understandable reluctance on the part of employers to take a chance on someone with a criminal record. The widespread availability of criminal record information has made it easier to identify and reject people

with a criminal record. Since 9/11, people with convictions have been disqualified from many job opportunities in health care, education, and transportation.

And yet, even as more and more people are acquiring a criminal record, relief from the lingering disabilities and stigma of conviction has never seemed more elusive. Our "laboratories of democracy" have produced a wide variety of mechanisms by which people convicted of crime can in theory regain the rights and status of ordinary citizens, but as a practical matter not many of them work very well. This is either because people who might benefit from them are not aware of them or cannot afford to take advantage of them, or because those responsible for their administration are reluctant to take any risks, and as a result impose daunting bureaucratic hurdles to relief.

In a few states, deferred adjudication schemes and judicial sealing mechanisms appear to be effective in giving first offenders or probationers a genuine second chance. In a handful of other states, administrative pardons or "certificates of rehabilitation" appear to provide a reasonably accessible and reliable way to remove legal disabilities and avoid the automatic rejection that generally accompanies the discovery of a criminal record. But in most of the states and for federal offenders, it has become almost impossible for persons who have committed a crime to pay their debt to society and put their past behind them. Nondiscrimination laws appear to have some potential for helping people with convictions reestablish themselves in the workforce, but they too are subject to significant exceptions and are not well enforced.

If reintegration of criminal offenders is a desirable social goal, as well as an important means of ensuring public safety, it is critical to begin serious discussion of the growing contrary pressures that seem to consign all persons with a criminal record to the margins of society, and to a permanent outcast status in the eyes of the law. In particular, we must find a way to persuade employers and others in a position to control access to benefits and opportunities that it is safe to go behind the fact of a criminal record, to deal with individuals rather than stereotypes and generalities. The most effective way to accomplish this is to find a way to recognize when a person has completed their journey through the criminal process, and to make the record itself reflect their graduation.