

## STARTING OVER WITH A CLEAN SLATE: IN PRAISE OF A FORGOTTEN SECTION OF THE MODEL PENAL CODE

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*There has been surprisingly little recognition of the fact that our system of penal law is largely flawed in one of its most basic aspects: it fails to provide accessible or effective means of fully restoring the social status of the reformed offender. We sentence, we coerce, we incarcerate, we counsel, we grant probation and parole, and we treat—not infrequently with success—but we never forgive.<sup>1</sup>*

### INTRODUCTION

The collateral consequences of a criminal conviction linger long after the sentence imposed by the court has been served, depriving ex-offenders of the tools necessary to reestablish themselves as law-abiding and productive members of the free community. While most jurisdictions make some provision for eventual removal of these collateral penalties, relief mechanisms are generally inaccessible, or ineffective, or both. The result is that convicted felons have no realistic hope of satisfying their debt to society, or regaining a place in it.<sup>2</sup> A recent American Bar Association

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\* Inspiration for this Article came from my service as Chair of the ABA Criminal Justice Standards Committee Task Force on Collateral Sanctions, and as Pardon Attorney in the United States Department of Justice from 1990 to 1997.

1. Aidan R. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders*, 1966 WASH. U. L.Q. 147, 148. It has been said that “[a] theory of law which withholds the finality of forgiveness after punishment is ended is as indefensible in logic as it is on moral grounds.” AARON NUSSBAUM, *FIRST OFFENDERS, A SECOND CHANCE* 24 (1956).

2. This phenomenon has aptly been described as “invisible punishment.” Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE SOCIAL COSTS OF MASS IMPRISONMENT* 16 (Meda Chesney-Lind & Marc Mauer eds., 2002). Its consequence has been described as “internal exile.” See Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL’Y REV. 153, 157 (1999). Professor Demleitner identifies the three basic areas in which ex-offenders are permanently disadvantaged by collateral legal consequences: restricted access to the labor market; exclusion from the political

report concluded that:

[T]he dramatic increase in the numbers of persons convicted and imprisoned means that this half-hidden network of legal barriers affects a growing proportion of the populace. More people convicted inevitably means more people who will ultimately be released from prison or supervision, and who must either successfully reenter society or be at risk of reoffending. If not administered in a sufficiently deliberate manner, a regime of collateral consequences may frustrate the reentry and rehabilitation of this population, and encourage recidivism.<sup>3</sup>

If pressed, most Americans are uncomfortable with a justice system that is so unforgiving. And, as a practical matter, states are having second thoughts about the economic burdens such a system imposes.<sup>4</sup> It therefore seems timely to suggest that jurisdictions take steps to limit the scope and duration of collateral legal penalties, and find a way to welcome the repentant and rehabilitated offender back into the community.

This Article proposes a legal framework for accomplishing these objectives. This framework is premised on a notion that the goal of corrections must be the full and early reintegration of a criminal offender into free society, with the same benefits and opportunities available to any member of the general public. It institutionalizes this goal by integrating it into the sentencing scheme, and making it an important responsibility of the sentencing judge. It is concerned not only with the specific sanctions

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process; and denial of generally available social and welfare benefits. *Id.* at 156-58.

3. CRIMINAL JUSTICE STANDARDS COMM., AM. BAR ASS'N, REPORT TO THE ABA HOUSE OF DELEGATES ON PROPOSED STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS (3d ed. 2003) [hereinafter "Standards Report"]; see, e.g., Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 605 (1997) ("The more that convicted persons are restricted by law from pursuing legitimate occupations, the fewer opportunities they will have for remaining law abiding.").

4. See, e.g., RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT 3 (2002), available at <http://www.sentencingproject.org/news/rkmm-fnl.pdf> (last visited July 15, 2003). The wide net cast by law enforcement through the 1980s and 1990s has created a large cohort of "internal exiles" who neither participate fully in, nor contribute to society. Travis, *supra* note 2, at 19. It has recently been reported that "[m]ore than 47 million Americans (or more than a quarter of the adult population) have criminal records on file with federal or state criminal justice agencies." *Id.* at 18 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION: A COMPREHENSIVE REPORT 25 (1993)). Further, "[a]n estimated 13 million Americans are either currently serving a sentence for a felony conviction or have been convicted of a felony in the past." *Id.* (citing Christopher Uggen et al., Crime Class and Reintegration: The Scope of Social Distribution of America's Criminal Class (paper presented at the American Society of Criminology meetings in S.F., Cal. (Nov. 18, 2000))).

imposed by the legal system, but also with the degradation of social status often called “the stigma of conviction.”<sup>5</sup>

One thing that surprised me when I began working on the idea for this Article was how much had already been done and largely forgotten. On the theory that those who do not study the past are condemned to repeat it, Part I describes the law reform effort of the 1960s and 1970s, and the reformers’ vision of how rights and status could be restored to convicted criminals. Part II reviews the state of the law today, and concludes that restoration procedures in state and federal law have become less and less effective over the past twenty years. Part III advocates for the approach to restoration of rights in the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons,<sup>6</sup> and argues that it can best be implemented by the two-tiered mechanism in section 306.6 of the Model Penal Code. This mechanism seeks to accomplish an offender’s reintegration into society not by trying to conceal the fact of conviction, but by advertising the evidence of rehabilitation.

#### I. HISTORICAL BACKGROUND—BACK TO THE FUTURE

Forty years ago, in a time that now seems very far away, optimistic law reformers set out to build a legal framework to limit collateral penalties and provide for the early restoration of forfeited rights to those convicted of crimes. They believed in giving people a second chance, and that this was, in any event, the best way to reduce recidivism.<sup>7</sup> These reformers recognized that it was not enough simply to restore legal rights; they would also have to address the more subtle punishment represented by societal prejudice against the criminal offender that lingers long after the penalties

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5. See, e.g., *Parker v. Ellis*, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) (“Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities.”).

6. The ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed.) [hereinafter “ABA Collateral Sanctions Standards”], available at <http://www.abanet.org/leadership/recommendations03/103A.pdf> (last visited July 15, 2003). These Standards were approved by the ABA House of Delegates in August 2003, and their black letter is set forth in Appendix B. As of this writing, the commentary to these Standards had not yet been approved by the Standards Committee.

7. See Gough, *supra* note 1, at 148.

There is considerable evidence to indicate that the failure of the criminal law to clarify the status of the reformed offender impedes the objective of reintegrating him with the society from which he has become estranged. The more heavily he bears the mark of his former offense, the more likely he is to reoffend.

*Id.*

prescribed by law have been fully satisfied.<sup>8</sup> As will become clear in the following section, this second-level problem of restoring lost status proved a conceptual and practical challenge.

#### A. Early Restoration Proposals

In 1956, the National Conference on Parole, held under the joint auspices of the Attorney General of the United States, the United States Board of Parole, and the National Council on Crime and Delinquency (“NCCD”), called for the abolition of laws depriving convicted persons of civil and political rights, describing them as “an archaic holdover from early times.”<sup>9</sup> More radically, the conference called for the adoption of laws empowering a sentencing court, at the point of discharge from sentence or release from imprisonment, “to expunge the record of conviction and disposition, through an order by which the individual shall be deemed not to have been convicted.”<sup>10</sup>

At the time, a handful of states provided for automatic restoration of rights upon completion of sentence, but most relied upon a governor’s pardon.<sup>11</sup> The reformers felt that both of these approaches were of limited value: automatic restoration did not provide confirmation of good character so as to overcome occupational and professional licensing restrictions, and pardon was an inherently unreliable remedy, especially for those with limited means and few connections.<sup>12</sup> What they were looking for was an

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There is a latent, pervasive attitude in our society which stresses the generic unworthiness of the criminal—his permanent unfitness to live in “decent society.” He is seen as an unredeemable, permanently flawed, ever-threatening deviant. Proper citizens are felt to be menaced or degraded by consorting with him whether or not he has “paid his debt.”

Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 378, 389 (1970); see also Richard D. Schwartz & Jerome H. Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133, 136 (1962) (noting that conviction works a degradation of status that “continues to operate after the time when, according to the generalized theory of justice underlying punishment in our society, the individual’s ‘debt’ has been paid.”); Gough, *supra* note 1, at 148 (quoting Paul Tappan, *Loss and Restoration of Civil Rights of Offenders*, in NATIONAL PROBATION AND PAROLE ASSOCIATION 1952 YEARBOOK 86, 87 (1952)) (“when the juvenile or adult offender has ‘paid his debt to society,’ he ‘neither receives a receipt nor is free of his account.’”).

9. NAT’L PROB. & PAROLE ASS’N, *PAROLE IN PRINCIPLE AND PRACTICE* 136 (1957).

10. *Id.* at 137.

11. See SOL RUBIN ET AL., *THE LAW OF CRIMINAL CORRECTION* 721-22 (2d ed. 1973); Walter Matthews Grant et al., *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1143-48 (1970).

12. See Nat’l Council on Crime & Delinquency, *Annulment of a Conviction of Crime: A*

accessible and thorough-going mechanism by which the reformed offender could be returned to society's good graces.

The concept of expungement or sealing of convictions had developed in the 1940s in connection with specialized state sentencing schemes for youthful offenders, whose susceptibility to antisocial conduct was thought to be temporary and who were therefore considered "easier to rehabilitate than adults."<sup>13</sup> The idea was to minimize the legal consequences of conviction, and give youthful criminals "an incentive to reform" by "removing the infamy of [their] social standing."<sup>14</sup> In 1950, Congress extended the "clean slate" concept to federal offenders between the ages of eighteen and twenty-six, making them eligible to have their convictions "set aside" if the court released them early from probation.<sup>15</sup> While the federal courts were never able to agree about exactly what the "set-aside" provision in the Youth Corrections Act was supposed to accomplish,<sup>16</sup>

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*Model Act*, 8 CRIME & DELINQ. 97, 99-101 (1962) ("[T]he power of the administrative agency is not well known and the agency is ordinarily less accessible than a court"; pardon is "not a regular remedy available in the ordinary course of affairs to all offenders," and in any event "in many states the effect of a pardon does not achieve the annulment which is the goal of the model statute.").

13. Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 482.

14. Gough, *supra* note 1, at 162; *see* Grant et al., *supra* note 11, at 1149 (stating that youthful offenders should be permitted to "put their past behind them" through "the elimination of the penalties imposed by public opinion rather than those imposed by law.").

15. Federal Youth Corrections Act, ch. 1115, 64 Stat. 1085 (1950) (codified at 18 U.S.C. §§ 5005-5056 (1976) (repealed in 1984)); *see* Scott Fobes, *Expungement of Criminal Records Under the Youth Corrections Act*, 62 IOWA L. REV. 547, 565 (1976); Zacharias, *supra* note 13, at 477. In *Doe v. Webster*, the Court of Appeals explained the purpose of the Federal Youth Corrections Act ("YCA") in the following terms:

[Congress'] primary concern was that rehabilitated youth offenders be spared the far more common and pervasive social stigma and loss of economic opportunity that in this society accompany the "ex-con" label. While the legislative history offers little guidance as to the reasoning behind the drafters' choice of terminology, it is crystal-clear in one respect: they intended to give youthful offenders a fresh start, free from the stain of a criminal conviction, and an opportunity to clean their slates to afford them a second chance, in terms of both jobs and standing in the community.

606 F.2d 1226, 1234-35 (D.C. 1979).

16. *Compare Doe*, 606 F.2d at 1244-45 (holding that record of YCA conviction that has been set aside must be sealed, and the government must respond in the negative to all inquiries about the offense), *and* *United States v. Purgason*, 565 F.2d 1279, 1280 (4th Cir. 1977) (holding that a felony conviction that has been set aside cannot constitute a prior felony conviction for the purposes of the firearms crime for which the defendant was convicted), *with* *Bear Robe v. Parker*, 270 F.3d 1192, 1195 (8th Cir. 2001) (finding that a set-aside conviction may nonetheless serve as a basis for termination of employment), *and* *United States v. McMains*, 540 F.2d 387, 389 (8th Cir. 1976) (holding that the YCA set-aside provision does not authorize expungement).

mirroring a similarly ambivalent approach to state “expungement” laws,<sup>17</sup> the basic idea was to have a court grant relief that would be more complete than a pardon, and more respectable than an automatic or administrative restoration of rights.<sup>18</sup> The purpose of judicial expungement or set-aside was to both encourage and reward rehabilitation, by restoring social status as well as legal rights.<sup>19</sup>

It was perhaps inevitable, given the optimistic temper of the times, that reformers would seek to extend the “clean slate” concept to adult offenders. A model statute proposed in 1962 by the NCCD gave the sentencing court discretionary authority to “annul” adult convictions, the effect of which was to restore all civil rights and “enable an individual to say, in testifying or in filling out applications of various kinds, that he had not been convicted.”<sup>20</sup> The NCCD proposal dealt with the awkward issue of candor by proposing to limit what employers and licensing boards could ask: “Have you ever been arrested for or convicted of a crime which has not been annulled by a court?”<sup>21</sup> The NCCD report noted that while six states had enacted expungement statutes applicable to adult offenders, only Wyoming’s extended to those sentenced to a prison term.<sup>22</sup>

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17. See *infra* notes 74-75, 77-79, 82 and accompanying text.

18. See generally Fobes, *supra* note 15, at 557-63; Zacharias, *supra* note 13, at 489-90.

19. See Zacharias, *supra* note 13, at 489-90. Judicial restoration procedures are variously styled “sealing,” “annulment,” “set-aside,” or “vacation,” but these terms by themselves have no established legal meaning that would preclude using them more or less interchangeably in this context.

20. Nat’l Council on Crime & Delinquency, *supra* note 12, at 99. It also provided that the annulment would be effective only “[s]o long as annulment serves a rehabilitative purpose,” so that if the offender committed another crime the record of the annulled conviction could be used for sentence enhancement purposes.” *Id.* at 99-100. As to the burden on the court, “It is assumed that before issuing the order the court would make any necessary investigation, typically through the resources of the probation department available to it.” *Id.* at 100.

21. *Id.* at 101. The NCCD Report noted that:

Recently the news came out that Harry Golden had served a five-year prison term for fraud some years before he started publishing his notable periodical. When his record was disclosed, leading figures in the United States reaffirmed their faith in him. Carl Sandburg said, “This story ties me closer to him.” But the average ex-offender, faced with vital decisions by employers and others, has no public repute and no public figures to support him. He needs the help given by the model statute—as well as the understanding and support of individuals, officials, and agencies.

*Id.*

22. The five states that at the time authorized expungement for probationers were California, Delaware, Idaho, Utah, and Washington. *Id.* California’s expungement statute was criticized as ineffective in avoiding collateral consequences in 1977. Bryant H. Byrnes, *Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions*, 12 U. SAN. FRAN. L. REV. 155, 155-56 (1977). The

## B. The Model Penal Code Takes a Different Tack

In 1962, the same year that the NCCD report was issued, the American Law Institute's Model Penal Code ("MPC") proposed a more nuanced way of dealing with restoration of rights and status.<sup>23</sup> Under section 306.6 of the MPC, the sentencing court would be empowered, after an offender had fully satisfied the sentence,<sup>24</sup> to enter an order relieving "any disqualification or disability imposed by law because of the conviction."<sup>25</sup> After an additional period of good behavior,<sup>26</sup> the court could issue an order "vacating" the judgment of conviction.<sup>27</sup>

The effect of orders relieving disabilities or vacating the judgment of conviction, including the uses to which a conviction could still be put, was spelled out in detail.<sup>28</sup> *Inter alia*, the conviction itself could no longer

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California statute has since been so watered down and restricted that it has practically no significance. Interestingly, Wyoming has not only rescinded its broad expungement statute, but now actually bars its courts from issuing expungement orders. WYO. STAT. ANN. § 7-13-307 (Michie 1997).

23. Section 306.6 ("Order Removing Disqualifications or Disabilities; Vacation of Conviction; Effect of Order of Removal or Vacation") is set forth in its entirety in Appendix A. This section is part of Article 306 on "Loss and Restoration of Rights Incident to Conviction and Imprisonment," whose other sections are of historical interest only in the opinion of this writer. It does not appear that the approach of section 306.6 was widely adopted in the states, although the "vacation" procedure contained in Washington's criminal code has many of the same features. *See infra* note 81 and accompanying text.

24. Youthful offenders would be eligible only if released prior to expiration of their sentences, as under the Federal Youth Corrections Act. An early version of the Code's restoration provision was applicable only to youthful offenders and adults sentenced to probation, and was described by the MPC's Reporter as "consciously modeled" on the set-aside provisions of the YCA. Herbert Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 492 (1961). The MPC restoration provisions were extended to all adult offenders only in the final stages of drafting. *Compare* MODEL PENAL CODE § 301.5 (Tentative Draft No. 2 1954), *and id.* § 6.05 (Tentative Draft No. 7 1957), *with id.* § 306.6 (Proposed Final Draft No. 1 1961). Both of the more limited provisions were bracketed in Proposed Final Draft No. 1, in case the more general provision was not approved. *Id.* § 306.6 (Proposed Final Draft No. 1 1961).

25. *Id.* § 306.6(1) (2003).

26. Adult offenders would be eligible for an order vacating the judgment of conviction when they had "[f]ully satisfied the sentence and led a law-abiding life for [five] years." *Id.* § 306.6(2)(b). Youthful offenders would be eligible for such an order at the same time and under the same terms as for an order restoring rights, viz., upon early discharge from probation or parole. *Id.* § 306.6(2)(a).

27. *Id.* § 306.6(2).

28. *Id.* § 306.6(3). This section gives exactly the same legal effect to a restoration order under (1) and a vacation order under (2), which seems odd since by hypothesis an offender would not seek a vacation order if his rights had not already been restored. For a possible explanation of the difference between the two orders, see *infra* note 30. In any case, (3) provides that an order under (1) and (2) would have only prospective operation, and would not require the restoration of an offender to any office or employment lost because of the

serve as the basis for disqualification, through it could be used to prove the offense conduct if relevant to the sought-after benefit or opportunity. A distinguishing feature of the MPC approach was its treatment of the issue of candor: neither a restoration order under (1), nor a vacation order under (2) would “justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.”<sup>29</sup>

The MPC’s two-tiered process was evidently intended to accomplish the maximum by way of legal and social restoration for rehabilitated ex-offenders.<sup>30</sup> But it was specifically not intended to remove the conviction from the records, or indulge the fiction that the conviction had somehow never taken place.<sup>31</sup> Unlike the NCCD proposal, the MPC did not propose to rewrite history, but rather to confront history squarely with evidence of

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conviction. *Id.* § 306.6(3)(a). The conviction could still be used to enhance a sentence, and to impeach. *Id.* § 306.6(3)(e). The fact of the conviction could be used to prove the conduct for purposes of establishing rights of third parties, or:

whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order.

*Id.* § 306.6(3)(d); *see infra* note 31.

29. MODEL PENAL CODE § 306.6(3)(f).

30. Rather cryptically, Professor Wechsler justified the two-step restoration process, and explained the additional practical and legal function of the vacation order, in terms of the different effect given under the immigration laws to Minnesota’s expungement process (offender no longer deportable) and New York’s certificate of good conduct (offender remains deportable). *See AM. LAW INST., PROCEEDINGS OF THE 1961 ANNUAL MEETING* 312 (1961). While the black letter of section 306.6(3) does not appear to distinguish between restoration orders under section 306.6(a) and vacation orders under section 306.6(b), Professor Wechsler evidently thought that vacation orders should have some additional legal or at least symbolic significance.

31. Article 306 was explained by Professor Wechsler on the floor of the 1961 Annual Meeting. *See AM. LAW INST., supra* note 30, at 309-13. But no commentary was ever published. On the issue of candor, Professor Wechsler explained that “you can’t say, ‘I have never been convicted,’ but you can say ‘I haven’t been convicted because the judgment was vacated,’ and call attention to the order.” *Id.* at 310. He added that “the Council of the Institute differs markedly with the Council on Crime and Delinquency as to the policy of that provision.” *Id.* at 313.

As originally proposed to the Annual Meeting in Proposed Final Draft No. 1, subsection (f) included a phrase that qualified the obligation to disclose (“when the truthfulness of such a statement is in issue”). *Id.* at 311. Responding to a member’s concern that “that middle phrase would seem to justify somebody with a mind like Portia’s in lying in the first instance,” Professor Wechsler explained that the Reporters “didn’t want to seem to be legislating about how you can answer questions when nothing turns on the answer.” *Id.* He nonetheless agreed that “there is a problem on the drafting,” and the phrase disappeared in the final revisions. *Id.*

change.<sup>32</sup>

### C. The Reform Movement Peaks and Collapses

Over the next twenty years, national commissions and professional societies urged attention to the problem of collateral consequences and their effect on offender reintegration,<sup>33</sup> and more model laws and standards were proposed.<sup>34</sup> In 1981, the ABA and the American Correctional

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32. The MPC's vacation provision is similar in some respects to the process of "rehabilitation" in the French Code of Criminal Procedure, described by Mirjan Damaska in his 1968 survey of civil disabilities worldwide: the French Code process "vacates the judgment of conviction and puts an end to all disqualifications flowing therefrom." Mirjan R. Damaska, *Adverse Legal Consequences of Conviction and Their Removal: A Comparative Study (Part 2)*, 59 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 542, 565 (1968). Under French law, a vacated conviction is not removed from the criminal records. On the other hand, unlike the MPC proposal, under French law "a cancelled judgment cannot be used as a basis for adjudication of recidivism." *Id.*

33. See, e.g., HUGH C. BANKS ET AL., CTR. FOR THE STUDY OF LEGAL & MANPOWER DISABILITIES, CIVIL DISABILITIES OF EX-OFFENDERS (1974); JAMES W. HUNT ET AL., AM. BAR ASS'N, LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK: A STUDY OF STATE LAWS RESTRICTING THE OCCUPATION LICENSING OF FORMER OFFENDERS (1973); NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS Standard 2.10, cmt., Standard 16.17, cmt. (1973); THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: CORRECTIONS ch. 8 (1967). Kogon & Loughery report that The National Advisory Commission on Civil Disorders recommended in its 1968 report, as part of its basic strategy for the use of employment to ameliorate civil disorders, the removal of "artificial barriers" to employment and promotion: "Government and business must consider for each type of job, whether a criminal record should be a bar." Kogon & Loughery, *supra* note 8, at 389 n.5. The Governor's Commission on the Los Angeles Riots urged "employers . . . to increase employment opportunities for persons with arrest records." *Id.*

34. The Commissioners on Uniform State Law proposed in 1964 that a certificate of discharge be given every offender at the end of his sentence, which would evidence the automatic restoration of the right to vote, the right to hold public office, and any other rights lost, "except as otherwise provided." COMM'N ON UNIF. STATE LAW, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAW AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS SEVENTY-THIRD YEAR 295 (1964) (citing Section 3 of the Uniform Act on the Status of Convicted Persons). In 1970, the National Commission on Reform of Federal Criminal Laws also adopted an automatic restoration model. See NAT'L COMM'N OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE §§ 3501-04 (1970) (providing for the termination of collateral disabilities or disqualifications five years after completion of sentence). In 1978, the National Conference of Commissioners on Uniform State Law ("NCCUSL") adopted a Model Sentencing and Corrections Act, which continued the automatic restoration of rights provisions of the 1964 act, but added provisions intended to address the problem of licensing restrictions and employment disqualifications. These provisions required that any such restriction or disqualification must be justified by a finding of a direct relationship between the activity in which the offender seeks to engage and the offense conduct. See Josephine R. Potuto, *A Modest Proposal to Avoid Ex-Offender Employment Discrimination*, 41 OHIO ST. L.J. 77, 88-91 (1980).

Association jointly issued the long-awaited Standards on the Legal Status of Prisoners, which urged jurisdictions to adopt “a judicial procedure for expunging criminal convictions, the effect of which would be to mitigate or avoid collateral disabilities.”<sup>35</sup> Expungement under these Standards was to have very broad effect: according to the commentary, it “annuls the fact of conviction and, thus, invalidates adverse actions taken . . . on the basis of the conviction.”<sup>36</sup> The problem of whether and how the offender should disclose his conviction was not addressed.

In the states, efforts had been underway since the 1960s to dismantle the statutory apparatus of “civil death,” and by the end of the 1970s, a majority of states provided for automatic restoration of civil rights upon completion of sentence.<sup>37</sup> Somewhat more cautiously, states also began to respond to the more subtle problems of social and professional discrimination against convicted persons.<sup>38</sup> A number of courts struck down on constitutional grounds laws excluding convicted felons from certain occupations.<sup>39</sup> By

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35. STANDARDS FOR CRIMINAL JUSTICE, LEGAL STATUS OF PRISONERS Standard 23-8.2 (1983). The ABA had earlier endorsed expungement for probationary sentences. *See* STANDARDS RELATING TO PROBATION § 4.3 cmt. (Approved Draft 1970). The commentary to the 1981 Standards noted that “limiting expungement to persons sentenced to probation reserves the remedy to those who least need assistance in readjusting to society.” *Id.* § 8.

36. *Cf.* MODEL PENAL CODE § 306.6(3)(a) (2003) (“Orders relieving collateral disabilities have only prospective operation and do not require the restoration of the defendant to any office, employment or position”). Notwithstanding its broad effect, the commentary to Standard 23-8.2 does provide that records of an expunged conviction should remain available to law enforcement agencies, and that there should be no bar to the use of a prior conviction for sentence enhancement. *See* STANDARDS FOR CRIMINAL JUSTICE, *supra* note 35, Standard 23-8.2 cmt. n.1. Offering a nostalgic snapshot of the times, the commentary observed that “[a]s the number of disabilities diminishes and their imposition becomes more rationally based and more restricted in coverage, the need for expungement and nullification statutes decreases.” *Id.*

37. In England and other parts of the world, there was a similar trend toward replacing automatic (punitive) disqualifications with discretionary (utilitarian) disqualifications. *See* Damaska, *supra* note 32, at 567. Under the English Rehabilitation of Offenders Act, an offender would be “free of any handicap” resulting from a criminal conviction after a certain period of crime-free behavior. KATHLEEN DEAN MOORE, PARDONS, JUSTICE MERCY AND THE PUBLIC INTEREST 224 (1989). In recent years, however, discretionary disqualification from employment in England has tended to increase. *See* von Hirsch & Wasik, *supra* note 3, at 603 (noting the “clear trend” in English law for employment disqualifications “to increase in number and complexity.”).

38. By 1982, “at least nine” states had enacted some form of protection against automatic disqualification from employment and licensing based solely on a criminal conviction. *See* H.R. REP. NO. 98-1017, at 134 n.6 (1984) (citing laws from Connecticut, Florida, Hawaii, Minnesota, New York, South Dakota, Washington, and Wisconsin).

39. *See* Miller v. Carter, 547 F.2d 1314, 1315 (7th Cir. 1977) (holding that a city ordinance barring convicted persons from obtaining chauffeur’s license violates the Equal Protection Clause); Smith v. Fussenich, 440 F. Supp. 1077, 1081 (D. Conn. 1977) (holding that a state law barring felony offenders from employment with a licensed private detective

the early 1980s, there appeared to be a “consensus that arbitrary restrictions on the rights of former offenders should be eliminated.”<sup>40</sup>

The high water mark of restoration reform efforts came in 1984, when the House Committee on the Judiciary reported a sentencing reform bill that contained a chapter on “Restriction on Imposition of Civil Disabilities.” This bill prohibited unreasonable restrictions on eligibility for federal benefits and programs, and for state or federal employment, based on a federal conviction.<sup>41</sup> It also extended the judicial “set-aside” provisions of the Federal Youth Corrections Act to all federal first offenders.<sup>42</sup> The bill purported to settle the judicial disagreement about the legal effect of a “set-aside” order under the YCA, specifically providing that such an order restores all rights and privileges, seals the criminal record for most purposes, and “grants the offender the right to deny the conviction.”<sup>43</sup> The “goal” of this legislation was “to restore the convicted person to the same position as before the conviction.”<sup>44</sup> It dealt with the ticklish problem of candor by providing that an individual granted a set-aside “is not guilty of an offense for failure to admit or acknowledge such conviction.”<sup>45</sup>

In the end, federal sentencing reform took a very different path with the passage of the rival Senate bill as the Sentencing Reform Act in 1984.<sup>46</sup>

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agency violates the Equal Protection Clause); *Butts v. Nichols*, 381 F. Supp. 573, 582 (S.D. Iowa 1974) (holding that an Iowa statute barring convicted persons from public employment violates the Equal Protection Clause because it requires no direct relationship between the conduct underlying the conviction and duties of job); *see also* *Vielehr v. State Personnel Bd.*, 32 Cal. App. 3d 187, 194 (1973) (holding that a state employee could not be fired solely because of his conviction for possession of marijuana, without a showing of relationship between the job and conviction); *Miller v. D.C. Bd. of Appeals & Review*, 294 A.2d 365, 370 (D.C. App. 1972) (holding that an agency could not refuse to issue a street vendor’s license to a convicted person who had presented evidence of his rehabilitation). *Cf. DeVeau v. Braisted*, 363 U.S. 144, 161 (1960) (holding that a decision to bar a convicted person from a waterfront union office was reasonable in light of extensive evidence of corruption and organized crime on the waterfront). *See generally* ROBERT PLOTKIN, AM. BAR ASS’N, NAT’L CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, CONSTITUTIONAL CHALLENGES TO EMPLOYMENT DISABILITY STATUTES (1974).

40. H.R. REP. NO. 98-1017, at 134.

41. *See* H.R. REP. NO. 98-1017, at 26-27; H.R. 6012, 98th Cong. §§ 4391-4392 (1984).

42. H.R. REP. NO. 98-1017, at 138-42.

43. *Id.* at 139 (approving the interpretation of the YCA in *Doe v. Webster*); *see* discussion *supra* note 15.

44. H.R. REP. NO. 98-1017, at 142. The House report pointed out that very little had been done at the federal level to relax restrictions on ex-offenders, and listed the numerous statutes disqualifying convicted persons from employment or licenses. *See id.* at 133-34 n.2.

45. *See* Sentencing Revision Act of 1984, H.R. 6012, 98th Cong. §§ 4391-4392.

46. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. 2, ch. 2, 98 Stat. 1837, 1987-2040 (1984). The sentencing reform bill that had passed the Republican-controlled

Developments in the world of politics had found a convenient ideology in the “nothing works” misanthropy of the “new retributivism,” and the work of the American reformers was brought to an abrupt halt.<sup>47</sup> Rather than extend or clarify the Youth Corrections Act, Congress repealed it altogether.<sup>48</sup> States were encouraged to follow suit.<sup>49</sup>

For the next two decades, the official government position would be that criminals were to be labeled and segregated for the protection of society, not reclaimed and forgiven. Along with increased reliance on prison to carry out militant anti-crime policies during the 1980s and 1990s, new collateral sanctions and disqualifications were introduced into state and federal laws to augment and reinforce what remained of the old.<sup>50</sup> Permanent changes in a criminal offender’s legal status served to emphasize his “other-ness.” Other more subtle discriminations multiplied, so that a person with a felony conviction was now barred from many employment and business opportunities.<sup>51</sup> New technologies made it almost impossible to hide a criminal record.<sup>52</sup> At the federal level, Congress took collateral consequences to a new level of irrationality, making a single criminal conviction grounds for automatic exclusion from a whole range of welfare benefits under the federal social safety net.<sup>53</sup>

Not surprisingly, as punitive penalties and disqualifications increased, mechanisms for relief became less reliable and accessible. Governors and presidents became more and more reluctant to pardon, and state legislatures began to cut back on expungement provisions enacted in the 1970s. Even automatic restoration provisions were riddled with exceptions and

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Senate in the fall of 1983, was ultimately accepted by the House, in lieu of the sentencing reform bill reported by the House Judiciary Committee in the fall of 1984. See S. REP. NO. 98-225 (1983); see *supra* notes 37-45 and accompanying text.

47. The interplay of crime and politics in the late 1970s and 1980s is described in MARC MAUER, *RACE TO INCARCERATE* 56-80 (1999).

48. See Sentencing Reform Act § 218(a)(8), 98 Stat. at 2027.

49. See MAUER, *supra* note 47.

50. See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROB. 10 (1996) (documenting an increase in state disabilities over a ten year period between 1986 and 1996).

51. Sharon M. Dietrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in AMY E. HIRSCH ET AL., CMTY. LEGAL SERVS., INC. & CTR. FOR LAW & POLICY, *EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS* 13, 14 (Cmty. Legal Serv., Inc. & Ctr. for Law & Soc. Policy eds., 2002).

52. *Id.* at 19.

53. See, e.g., Amy E. Hirsch, *Parents with Criminal Records and Public Benefits: “Welfare Helps Us Stay in Touch with Society,”* in *EVERY DOOR CLOSED*, *supra* note 51 at 27, 29 (2002).

qualifications. The following Section describes the messy and dysfunctional situation at the time of this writing.

## II. SNAPSHOT OF EXISTING RELIEF MECHANISMS IN STATE AND FEDERAL LAW

Just as there is no comprehensive catalogue of the collateral consequences of a felony conviction under the laws of the fifty states, or under federal law,<sup>54</sup> there has been no effort to systematically identify and analyze the procedures available in each jurisdiction by which lost rights may be regained and disqualifications lifted.<sup>55</sup> A cursory review of state codes reveals a hodge-podge of inaccessible and over-lapping provisions, riddled with qualifications and exceptions, and of uncertain effect. Only a very few states have even attempted to implement a coherent statutory scheme by which offenders may fully regain their rights of citizenship, much less their standing in the community. It seems that reintegration of offenders is neither encouraged nor expected.

Even basic civil rights are hard to regain in many states. While all but eight states now restore the right to vote automatically upon release from prison or completion of sentence,<sup>56</sup> in many of these, full restoration of

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54. The partial studies that have been undertaken in the past fifteen years suggest that such an undertaking would be truly heroic. *See, e.g.*, OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, CIVIL DISABILITIES OF CONVICTED FELONS: A STATE-BY-STATE SURVEY (1996) [hereinafter OPA STATE-BY-STATE SURVEY]. The federal law section of the OPA Survey alone, as updated in November 2000, is twenty-two pages long. OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION (2000) [hereinafter OPA FEDERAL STATUTES], available at [www.usdoj.gov/pardon/collateral\\_consequences.pdf](http://www.usdoj.gov/pardon/collateral_consequences.pdf) (last visited July 15, 2003). A recent compilation by the Librarian of the Texas State Law Library identifies over 200 Texas statutes restricting the rights of persons with a felony conviction, located in twenty-two different civil codes, ranging from the agriculture code to the water code. *See* FRIENDS OF THE STATE LAW LIBRARY, STATUTORY RESTRICTIONS ON CONVICTED FELONS IN TEXAS (2002). Merely identifying the licensed activities and employments from which convicted people are barred by statute in each jurisdiction would be a difficult and time-consuming task, and this would not even begin to reveal the myriad circumstances in which a criminal conviction is enough to trigger discretionary disqualification from employment, licensing, and many other benefits and opportunities. The rules are different in every state, and are constantly changing. For example, as this Article was being written, Michigan enacted a provision permanently disqualifying felons from jury service as part of a package of acts increasing juror compensation. *See* Public Act 739 of 2002.

55. State restoration procedures are summarized in the OPA Survey, but this is now somewhat dated. OPA STATE-BY-STATE SURVEY, *supra* note 54, at A1 to A6. Even more dated is the survey of state clemency procedures undertaken by the National Governors Association in 1988. *See* NAT'L GOVERNORS' ASS'N, GUIDE TO EXECUTIVE CLEMENCY AMONG THE AMERICAN STATES 163-72 (1988).

56. Only two states (Maine and Vermont) permit prisoners to vote, though fifteen states and the District of Columbia restore the right to vote automatically upon release from

rights is available only through an administrative procedure, or by pardon from the governor.<sup>57</sup> At least a dozen states allow some adult offenders to obtain judicial orders expunging or sealing their criminal record, but this relief is of uncertain effect and, in any event, is generally limited to certain categories of offenses and offenders. Some states impose a lengthy waiting period before rights can be restored, some afford more lenient treatment to first offenders, and some have different eligibility rules for what are evidently regarded as more serious offenses. Firearm rights are often subject to an entirely separate administrative restoration regime.<sup>58</sup>

Of greater practical significance for offender rehabilitation, licensing and employment-related restrictions are generally not affected when civil rights are restored, whether automatically or by administrative process. The easy availability of criminal background checks in a risk-averse environment has multiplied the likelihood that someone with a criminal conviction, often in the distant past, will lose a job or business opportunity solely for that reason.<sup>59</sup> An inability to get or keep a job has been

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prison. OPA STATE-BY-STATE SURVEY, *supra* note 54, at A1 to A6. Twenty-four states restore the vote upon discharge from sentence (four of which allow probationers to vote), and Delaware and Wyoming provide for restoration after a five-year wait. Michael J. Gottlieb, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1942-43, 1948 (2002). Arizona, Maryland, and Nevada impose greater restrictions on second offenders. *Id.* at 1948. In Alabama, Florida, Iowa, Kentucky, Mississippi, and Virginia, the right to vote can be regained only through a pardon or other executive action by the Governor himself. *Id.* at 1943-47. In Nevada and Wyoming the right to vote is restored only to certain non-violent offenders. See The Sentencing Project, *Felony Disenfranchisement Laws in the United States*, at <http://www.sentencingproject.org/pdfs/1046.pdf> (last visited July 15, 2003).

57. Gottlieb, *supra* note 56, at 1943-47. In twenty-five states, a pardon is required to regain one or more of the basic rights of citizenship. In addition to the six states that require a pardon to regain the right to vote, seventeen other states require a pardon to serve on a jury or hold public office. Arkansas, California, Georgia, New Jersey, Pennsylvania, and Oklahoma restore the right to vote automatically upon completion of sentence, but require a pardon for other civil rights. See OPA STATE-BY-STATE SURVEY, *supra* note 54, at A-1 to A-3, A-7. Alaska, Colorado, Indiana, Michigan, and Wisconsin restore the right to vote and serve on a jury, but require a pardon to hold office. *Id.* at A-2 to A-3. Hawaii, Louisiana, Missouri, and South Carolina vary this pattern by exempting jury rights instead of public office from automatic restoration. *Id.* at A-2 to A-3, A-5. Mississippi restores the right to sit on a jury automatically five years after conviction, but requires a pardon to vote and hold office. *Id.* at A-3. Massachusetts and Connecticut both have a seven-year waiting period for regaining the right to serve on a jury, and Rhode Island has a three-year waiting period before a convicted person may run for office. *Id.* at A-1, A-3, A-5.

58. See OPA STATE-BY-STATE SURVEY, *supra* note 54, at 14-18, B-1 to B-12.

59. Dietrich, *supra* note 51, at 18-19. See, e.g., Bill Schackner, *Exposed Teacher at PSU Resigns*, Pittsburgh Post-Gazette, August 2, 2003 (professor forced to resign when university learned of his teenage murder conviction, for which he had served 15 years and been released on parole 24 years before).

identified as a major factor in recidivism.<sup>60</sup>

Each of the four general approaches to restoration of rights identified above—automatic statutory restoration, administrative process, executive pardon, and judicial expungement—has its drawbacks.

#### A. Automatic Restoration

Statutes that provide for the automatic restoration of rights lost as a result of conviction make relief accessible and even-handed, freely available to state and federal offenders alike. But they may not give offenders much help when they need a reliable indicator of good character for purposes of employment or licensing. Moreover, precisely because automatic restoration does not take into account a particular offender's situation, it is likely to be limited to basic rights that arguably should not have been lost to begin with, such as voting.

#### B. Administrative Restoration

Administrative restoration schemes are not much more effective for offenders seeking not just to regain their legal rights but also to reestablish their credit in the community. For example, Georgia's Board of Pardons and Paroles will issue a certificate after five years of law-abiding conduct, restoring basic civil rights and relieving licensing restrictions imposed upon convicted persons under state law.<sup>61</sup> In Nevada, an offender may apply to the Division of Parole and Probation for restoration of rights upon successful completion of parole.<sup>62</sup> In New York, a first offender may obtain a Certificate of Relief from Disabilities from the Parole Board upon release from prison (or from the sentencing court if no prison term was imposed), and a Certificate of Good Conduct from the Board of Parole after a certain period of law-abiding conduct.<sup>63</sup> To the extent that these processes certify only to a failure to commit further crime, they do not provide the sort of individualized assessment of genuine rehabilitation that might be useful in avoiding discretionary disqualification based on criminal conduct, or otherwise opening the doors that close upon conviction.

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60. See MILES D. HARER, FED. BUREAU OF PRISONS, *RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987*, at 28-30 (1994), available at <http://www.bop.gov/orepg/oreprrecid87.pdf> (last visited July 15, 2003).

61. OPA STATE-BY-STATE SURVEY, *supra* note 54, at 44-45.

62. NEV. REV. STAT. §§ 213.155, 213.157 (2001).

63. N.Y. CORRECT. LAW §§ 700-705 (2003); see OPA STATE-BY-STATE SURVEY, *supra* note 54, at 100 ("The certificates, with certain exceptions, preclude reliance on the conviction as an automatic bar or disability, but do not preclude agencies from considering the conviction as a factor in licensing or other decisions.").

### C. Executive Pardon

Pardons have a broader restorative effect than automatic or administrative procedures, insofar as they not only relieve legal disabilities, but also signal that an offender has been rehabilitated. But pardons are hard to come by, especially for the poor. The criteria for granting a pardon vary widely from state to state, and within a given state from time to time as a governor may be more or less generous than the one before him.

In recent years, as governors have become increasingly reluctant to issue pardons for fear of reprisal at the ballot box, the pardon application process has become increasingly complex, time-consuming, and unreliable. Sometimes it is positively intimidating; in Alabama, for example, persons convicted of a felony must submit to the taking of a DNA sample as a mandatory condition of pardon.<sup>64</sup> In many jurisdictions, pardon applicants must fill out lengthy applications, supply copies of dated judicial records, and elicit recommendations from law enforcement officials who may have long since died or retired, and submit to intrusive background investigations. The pardon process may take years to complete, and often results in an unexplained denial.

While the administration of the pardon power by an appointed body like the Parole Board may provide some greater degree of predictability and uniformity, the pardon power remains mysterious and unreliable as long as it is exercised by an elected politician. Indeed, any discretionary executive restoration scheme tends to be biased in favor of the wealthy and politically connected, and inaccessible as a practical matter to those without means.

Moreover, the effect of a pardon varies from jurisdiction to jurisdiction. In a few states, a pardon is followed automatically by executive expungement or sealing,<sup>65</sup> but a pardon ordinarily does not permit an

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64. ALA. CODE § 36-18-25(f) (1975).

65. In Massachusetts, the governor orders the records of a conviction sealed after he has issued a pardon, and the recipient may thereafter deny that he has been convicted. MASS. GEN. LAWS ANN. ch. 127, § 152 (West 1989). Similarly, in Minnesota, a “pardon extraordinary” issued by the Board of Pardons has the effect of setting aside and nullifying the conviction, so that the recipient need not disclose it, except in a judicial proceeding or in an application for a job as peace officer. MINN. STAT. § 638.02 (2003). The Board of Pardons consists of the Governor, the Chief Justice of the State Supreme Court, and the Attorney General. *See id.* § 638.01. A person is eligible for a “pardon extraordinary” five years after discharge (ten years for a person convicted of a crime of violence) if he has not been convicted in the interim. Minnesota courts also claim an inherent power to expunge. *See Barlow v. Comm’r of Pub. Safety*, 365 N.W.2d 232, 234 (Minn. 1985). In South Dakota, a Governor’s pardon seals the records of the conviction (including, oddly, the record of the pardon) and permits the recipient thereafter to deny the conviction. S.D. CODIFIED LAWS § 24-14-11 (Michie 2002); *see* Associated Press, *Disclosures of Secret Pardons Touch Off Uproar in South Dakota*, N.Y. TIMES, Mar. 22, 2003, at A12.

offender to deny the fact of conviction.

Finally, while a federal pardon will avoid disabilities imposed under state law,<sup>66</sup> a state pardon ordinarily will not avoid disabilities imposed by federal law.<sup>67</sup> Accordingly, state offenders have no way of avoiding such federal collateral consequences as disqualification from military service, loss of eligibility for citizenship, national security clearances and federal contracts, and a myriad of federal licensing restrictions.<sup>68</sup> Only a presidential pardon will restore rights and avoid collateral penalties imposed under federal law, and this relief is not available to state offenders.<sup>69</sup>

Conversely, in states where a governor's pardon or judicial expungement is the only way to avoid or mitigate state law disabilities based on state convictions, federal offenders subject to the same state law disabilities will often have to look to federal law for relief.<sup>70</sup> Because there is no general

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66. See Effects of a Pardon on Authority to Deport, Firearms Disability, and Remission of Restitution, 19 Op. Off. Legal Counsel (Preliminary Print 1995), 1995 WL 861816 (O.L.C.), reprinted in 13 FED. SENTENCING REP. 211, 214 (2001) (opining that a presidential pardon relieves a federal offender of disabilities imposed under state law if the imposition of disabilities negates the power of the pardon).

67. A few federal statutes specifically give effect to state provisions for pardon or restoration of rights. For example, under the Firearms Owners Protection Act of 1986, state convictions that have been expunged, set aside, or pardoned, or for which a person has had civil rights restored, do not constitute "convictions" for purposes of prosecution as a felon in possession. 18 U.S.C. § 921(20) (2000); James W. Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 ST. JOHN'S L. REV. 73, 99 (1992). Courts have generally held that an offender's rights must have been substantially restored under state law. See *United States v. Metzger*, 3 F.3d 756, 758 (4th Cir. 1993); *United States v. Gomez*, 911 F.2d 219, 220-21 (9th Cir. 1990); see also *Caron v. United States*, 524 U.S. 308, 318 (1998) (suggesting that all civil rights must be restored, though affirmative act not required).

In certain cases, an alien may avoid deportation based on conviction if he is pardoned. See Elizabeth Rapaport, *The Georgia Immigration Pardons: A Case Study in Mass Clemency*, 13 FED. SENTENCING REP. 184, 184 (2001). A felony offender is disqualified from serving on a federal jury "if his civil rights have not been restored." 28 U.S.C. § 1865(b)(5) (2000). *But see United States v. Hefner*, 842 F.2d 731, 732 (4th Cir.) (holding that automatic restoration statutes will not remove federal jury service disability; rather, "some affirmative act recognized in law must first take place to restore one's civil rights to meet the eligibility requirements of section 1865(b)(5)."). The federal prohibitions relating to involvement in labor organizations and employee benefit plans last up to thirteen years, but may be removed earlier if an individual's civil rights have been "fully restored." 29 U.S.C. §§ 504, 1111 (1998). A few federal disabilities are subject to waiver. See OPA FEDERAL STATUTES, *supra* note 54, at 15-16. Presumably a state pardon would also relieve any disqualifications from federal health and welfare benefits that are imposed under state law.

68. See generally OPA FEDERAL STATUTES, *supra* note 54.

69. The President's pardon power under the Constitution extends only to "offences against the United States." U.S. CONST. art. II, cl. 2.

70. See OPA STATE-BY-STATE SURVEY, *supra* note 54, at 2.

federal statutory procedure for restoring rights or expunging a record,<sup>71</sup> presidential pardon is the only mechanism available to a federal offender seeking to regain lost rights, or relief from the stigma of conviction. This system sets up a curious inequality of opportunity between state and federal criminal offenders, disadvantaging state offenders where federal rights are concerned, and vice versa.<sup>72</sup>

#### D. Judicial Restoration of Rights and Expungement

A number of state codes offer a judicial restoration of rights procedure that generally includes a provision for expunging, sealing, or annulling the conviction itself. Judicial relief is functionally similar to pardon insofar as it is predicated on a finding of good character,<sup>73</sup> and judicial relief mechanisms are generally superior to pardon insofar as they tend to be more accessible and reliable.

But judicial restoration provisions originally adopted or expanded in the 1970s have been steadily cut back over the past fifteen years. Most

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The disabilities imposed upon felons under state law generally are assumed to apply with the same force whether the conviction is a state or federal one . . . In at least 16 states, federal offenders cannot avail themselves of the state procedure for restoring one or more of their civil rights, either because state law restored that right to state offenders only through a pardon, or because a state procedure to restore rights to state offenders is unavailable to federal offenders.

*Id.* A few states give federal offenders access to state pardon or judicial restoration remedies, including Alabama, Massachusetts, Tennessee, and Wisconsin. *See, e.g.,* TENN. CODE ANN. §§ 40-29-101 to 40-29-105 (2002); OPA STATE-BY-STATE SURVEY, *supra* note 54, at 20, 72, 142. In Florida, Iowa, Kentucky, North Carolina, Texas, Virginia, Washington, and Wyoming, federal offenders are eligible for restoration of rights but not a pardon. *See id.* at 20.

71. The Federal Youth Corrections Act was repealed by the Sentencing Reform Act of 1984. *See supra* note 46 and accompanying text. The only remaining provision for expungement in federal law, 18 U.S.C. § 3607, permits a court to impose probation without entry of a judgment of conviction for violations of 21 U.S.C. § 844 (possession of marijuana), and to expunge official records relating to the charge upon the satisfactory completion of a term of probation.

72. Residents of different states may also be subject to unequal treatment under federal laws that incorporate state restoration provisions. *See supra* note 67 and accompanying text. In *Beecham v. United States*, the Supreme Court held that such disparate treatment does not offend the Constitution, at least where federal offenders are concerned: the fact that federal offenders may not regain firearms rights through state restoration procedures leaves them "no worse off than a person convicted in a court of a State that does not restore civil rights." 511 U.S. 368, 373 (1994).

73. For example, in Tennessee, an offender seeking restoration of rights must demonstrate to the court that "ever since the judgment of disqualification, the petitioner has sustained the character of a person of honesty, respectability and veracity, and that he is generally esteemed as such by the petitioner's neighbors." TENN. CODE ANN. § 40-29-102.

2003] *STARTING OVER WITH A CLEAN SLATE* 119

expungement statutes now limit relief to first offenders<sup>74</sup> or probationers,<sup>75</sup> and almost all exclude serious or violent crimes.<sup>76</sup> Even New Hampshire's once-comprehensive "annulment" statute has been nibbled away, and very recently was restricted to first offenders.<sup>77</sup> In several states, expungement

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74. Several states have a broadly applicable statutory expungement procedure that is limited to first offenders. Alaska permits judges to suspend imposition of sentence and "set aside" the conviction after successful completion of a period of probation. ALASKA STAT. § 12.55.085(e) (2002). Arizona allows some first offenders to petition the court after discharge to have their conviction "set aside," a process that releases the person "from all penalties and disabilities resulting from the conviction," but does not relieve the offender from having to report the conviction if asked. ARIZ. REV. STAT. ANN. § 13-907(A) (West 2001); *Russell v. Royal Maccabees Life Ins. Co.*, 974 P.2d 443, 449 (Ariz. Ct. App. 1999). In New Jersey and Rhode Island, expungement is available to first offenders ten years after conviction or completion of parole. N.J. STAT. ANN. § 2C:52-2(a) (West 1995); R.I. GEN. LAWS § 12-1.3-4(a) (2002). In New Jersey, the conviction is "deemed not to have occurred" for purposes of reporting the conviction—though an expunged conviction may be used in a subsequent prosecution. N.J. STAT. ANN. § 2C:52-2(9). In Rhode Island, the expunged conviction must be disclosed in connection with application for certain jobs and licenses. R.I. GEN. LAWS § 12-1.3-4(b). Ohio also has a first offender expungement provision with similar limitations. OHIO REV. CODE ANN. §§ 2953.31- 2953.35 (West 2002). In Utah, first offenders are eligible for judicial expungement after seven years, but recidivists must wait twenty years. *See* UTAH CODE ANN. §§ 77-18-11, 77-18-12 (1999). *See infra* note 77, for New Hampshire's recent restriction of relief to first offenders.

75. *See, e.g.*, ARK. CODE ANN. § 16-93-302 (1987) (first offender probationer); CAL. PENAL CODE § 1203.4(a) (2003) (probationer). Under the Arkansas model, the conviction is automatically expunged upon successful completion of probation, but in California the offender must apply to the court for expungement. *Id.* A California offender whose conviction has been expunged must disclose the conviction in an application for public office or license. In both states, an expunged conviction may be used in a subsequent prosecution. *Id.* A popular variant on the first offender expungement statute is deferred adjudication or sentencing, where the record may be expunged after successful completion of a period of probation. *See, e.g.*, ARK. CODE ANN. §§ 16-93-302(a)(1), 16-93-303(a)(1), 16-90-901-905 (1987) (deferring adjudication for first offenders); GA. CODE ANN. § 48-8-62 (2002) (same); HAW. REV. STAT. § 853-1 (2000) (deferring acceptance of guilty pleas); MD. CODE ANN. art 27, § 641 (1996) (stating procedure for probation prior to judgment); N.M. STAT. ANN. § 31-20-9 (Michie 1997) (deferred adjudication available in all cases except those involving a first degree felony); N.D. CENT. CODE § 12.1-32-07(1) (1997) (imposition of sentence deferred, plea may be withdrawn after successful completion of probation); S.D. CODIFIED LAWS § 23A-27-13 (Michie 1998) (deferred adjudication for first offenders); TEX. CRIM. PROC. CODE art. 42.12, § 5 (a), (c) (2003) (deferred adjudication); VT. STAT. ANN. tit. 13, § 7041 (1974) (deferred sentencing). A few states also permit a felony conviction to be "knocked down" to a misdemeanor after successful completion of probation, so as to avoid imposition of legal disabilities. *See, e.g.*, IDAHO CODE § 19-2604(1) (1997); MINN. STAT. § 609.13 (2003); N.D. CENT. CODE § 12.1-32-02(9).

76. In addition to the states listed *supra* note 65, Oregon now permits expungement only for relatively minor offenses. OR. REV. STAT. § 137.225(5) (1998).

77. N.H. REV. STAT. ANN. § 651:5 (2003). New Hampshire originally followed the scheme put forward by the National Council on Crime and Delinquency in 1962. *See supra* note 12 and accompanying text. Its relief is no longer available to those convicted of crimes of violence or obstruction, or sentenced to an extended term of imprisonment. If eligible, a person convicted in New Hampshire may seek "annulment" of the conviction from the

is available only if the offender has first been pardoned.<sup>78</sup> Nevada's unique scheme provides for judicial sealing of most convictions after a waiting period, but restoration of rights in that state apparently depends upon a separate administrative restoration proceeding or a pardon.<sup>79</sup> Washington appears to have the most comprehensive restoration scheme, following the Model Penal Code in some (though not all) respects.<sup>80</sup> A few states have effectively repealed their expungement statutes.<sup>81</sup>

All in all, the variety and complexity of approaches among the states is bewildering. Of equal concern, the effect of an expungement order is often not spelled out in the law, and varies widely from jurisdiction to

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sentencing court when he has completed his sentence and served a specified period of law-abiding conduct, ranging from one to ten years. N.H. REV. STAT. ANN. § 651:5. Civil rights are restored automatically upon discharge from sentence. *Id.* § 607-A:2(1)(a) & (b) (noting that an imprisoned person may not vote or become a candidate for office); *Id.* § 607-A:3 (noting that imprisoned persons do not suffer civil death). Upon entry of the annulment order the offender "shall be treated in all respects as if he had never been arrested, convicted, or sentenced," except that the annulled crime may later be taken into account for sentencing purposes. *Id.* § 651:5. In any application for employment or licensing, or as a witness, "a person may be questioned about a previous criminal record only in terms such as "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?" Nat'l Council on Crime & Delinquency, *supra* note 12, at 100.

78. In Maryland, a person who has been pardoned by the Governor may petition a court for expungement of the record of conviction. MD. CODE ANN. § 10-105(a)(8). In Indiana and Pennsylvania, the courts have inherent power to expunge after a gubernatorial pardon has been granted. *See* *State v. Bergman*, 558 N.E.2d 1111, 1114 (Ind. App. 1990); *Commonwealth v. C.S.*, 534 A.2d 1053, 1054 (Pa. 1987). Several states provide for executive expungement or sealing as a matter of law after a pardon. *See, e.g.*, OPA STATE-BY-STATE SURVEY, *supra* note 54, at 85-86 (Montana), 117 (Pennsylvania).

79. *See* NEV. REV. STAT. § 179.245 (2001) (sealing); *id.* §§ 213.090(2), 213.155, 213.157 (restoration of rights).

80. *See* WASH. REV. CODE § 994A.640(2)(b) (2003). Washington's scheme, adopted in 1981, provides for automatic restoration of civil rights to all offenders upon discharge by the sentencing court. *See id.* § 994A.637. After discharge, offenders (other than those convicted of violent offenses or crimes against the person) are eligible to have their records of conviction "vacated," which permits them to state in an employment application that they have "never been convicted of a crime." *Id.* § 994A.640(3). To obtain this relief, the offender must have no subsequent convictions and no charges then pending against him, and he must also satisfy certain other eligibility requirements (five or ten years depending upon the seriousness of the crime). *Id.* § 9.994A.230(2). Once a court vacates a record of conviction, the conviction will not count for purposes of calculating criminal history in any subsequent conviction, though it may be used in a subsequent prosecution. *Id.* § 9.94A.640.

81. The broad sealing authority given Colorado courts in the 1977 Criminal Justice Records Act was limited in 1988 to allow courts to seal a criminal record only where the charges were completely dismissed or the person acquitted. *See* COLO. REV. STAT. § 24-72-308(1) (2001); *see also* *People v. D.K.B.*, 843 P.2d 1326, 1328 (Colo. 1993); Paula Ison & Tom Blumenthal, *Sealing Criminal Records in Colorado*, 21 COLO. LAW. 247, 247 (1992). Wyoming, noted in the 1962 NCCD report as the only state that then made expungement available by statute to persons sentenced to a prison term, now affirmatively prohibits its courts from expunging criminal records. *See* WYO. STAT. ANN. § 7-13-307 (Michie 1997).

jurisdiction. For example, in some states offenders whose records have been expunged may deny that they were ever convicted, but in other states they may not, or they may deny for some purposes and not for others.<sup>82</sup> Moreover, far from being literally obliterated, “expunged” records almost always remain available for use by law enforcement agencies and the courts, and in some states they may be accessible to other public agencies and even to private investigative services hired to perform criminal background checks for employers.<sup>83</sup> An expunged conviction may generally be used to enhance a subsequent sentence and to impeach, and in some states it may even be used to deny employment or a license.<sup>84</sup>

Though expungement still finds its occasional champion in the academic literature, in theory and practice it is an unsatisfactory solution to the problem of restoring rights and status.<sup>85</sup> There are at least four reasons for this, and all relate to its reliance on concealment and denial. First, the concept of “expungement” requires a certain willingness to “rewrite history” that is hard to square with a legal system founded on the search for truth.<sup>86</sup> Second, to the extent expungement involves an effort to conceal an individual’s criminal record from public view, it tends to devalue legitimate public safety concerns. Third, the expungement concept ignores the technological realities of the information age; a process whose benefits depend upon secrecy will surely be frustrated by the trend toward broader public posting and private dissemination of criminal history information. Finally, because it is premised on a fiction, expungement fails to afford an opportunity for the offender to be reconciled to the community and “helps society to evade its obligation to change its views toward former offenders.”<sup>87</sup> In light of all these objectionable features, it is not surprising

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82. See *supra* notes 74-75, 77-77 and accompanying text.

83. See, e.g., WASH. REV. CODE § 43.43.815(1).

84. See, e.g., *id.* § 9.96A.020(3)-(4).

85. See *infra* notes 86-81 and accompanying text.

86. Expungement statutes have been criticized as both “ineffective” and “too costly in both moral and legal terms.” Marc A. Franklin & Diane Johnsen, *Expunging Criminal Records: Concealment and Dishonesty in an Open Society*, 9 HOFSTRA L. REV. 733, 735 (1981); see T. Markus Funk, *A Mere Youthful Indiscretion? Reexamining the Policy of Expunging Juvenile Delinquency Records*, 29 U. MICH. J.L. REFORM 885, 913-33 (1996); Michael D. Mayfield, *Revisiting Expungement: Concealing Information in the Information Age*, 1997 UTAH L. REV. 1057, 1058-60. Moreover, the legal effect of expungement varies widely from jurisdiction to jurisdiction. See Diehm, *supra* note 67, at 102-05. Indeed, the federal courts were never able to agree about what the “set-aside” provision in the Federal Youth Corrections Act actually accomplished. See *supra* note 16 and accompanying text.

87. See Kogon & Loughery, *supra* note 8, at 378. These two veteran probation officers conclude:

It is a profound mistake to mix in with redemptive legislation any provision for concealing the records. To help the ex-offender by restoring rights and removing

that so many states have taken steps to eliminate or restrict expungement options.

### III. AN INTEGRATED AND FUNCTIONAL APPROACH TO RESTORATION OF RIGHTS—THE ABA STANDARDS AND THE MODEL PENAL CODE

#### A. The ABA Standards on Collateral Sanctions

The new ABA Standards on Collateral Sanctions and Discretionary Disqualification are the first effort since the 1970s to address the collateral legal consequences of a conviction in a coherent and comprehensive fashion.<sup>88</sup> The Standards build on the normative approach of the “Civil Disabilities” provisions of the 1981 Standards on the Legal Status of Prisoners,<sup>89</sup> but their analytical framework and enforcement mechanisms are grounded in criminal sentencing theory and practice.<sup>90</sup>

The Standards begin by drawing a distinction between “collateral sanctions,” which are legal penalties imposed by law automatically upon conviction, without any individualized inquiry, and “discretionary disqualification,” which contemplates subsequent administrative action to disqualify an offender based on the conduct underlying the conviction. Examples of collateral sanctions are Pennsylvania’s exclusion of all persons with a criminal record from employment in any health care facility,<sup>91</sup> Louisiana’s disqualification of convicted persons from serving as executors of estates,<sup>92</sup> Alabama’s rule requiring forfeiture of public office

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disabilities is an absolute necessity. Alteration or destruction of the record, however, only protects the body politic from confrontation regarding its own aberrant attitudes and the necessity to change. It basically corrupts the fundamental correctional objective of rehabilitating offenders.

*Id.* at 391.

88. *See* App. B.

89. *See supra* note 35 and accompanying text.

90. The report accompanying the new Standards makes clear their reliance on the principles and structure of the ABA Sentencing Standards (3d ed. 1991). *See* Standards Report, *supra* note 3 at 12-16. In this regard, it is significant that the new Standards are removed from the Legal Status of Prisoners chapter and relocated to a previously reserved chapter 19 immediately following the Sentencing Standards. The close physical relationship of these two chapters evidences a conceptualization of collateral penalties as criminal punishment rather than civil regulation.

91. 35 PA. CONS. STAT. § 10225.508(1) (2002) (providing that nursing homes, home health care agencies, residential mental health and mental retardation facilities and other health care facilities prohibited from employing an individual who was convicted at any time during his or her lifetime of any one of a broad range of enumerated misdemeanors and felonies); *see Nixon v. Commonwealth*, 789 A.2d 376, 377 (Pa. Commw. Ct. 2001) (holding that restrictions on employment of convicted persons in 35 PA. CONS. STAT. ANN. § 10225.508(1) violate the state constitution).

92. LA. CODE CIV. PROC. ANN. art. 3097(A)(3) (West 1985).

upon conviction,<sup>93</sup> and the federal government's disqualification of drug offenders from eligibility for food stamps and Temporary Assistance to Needy Families benefits.<sup>94</sup> Examples of discretionary disqualification based on conviction abound in state licensing and professional regulatory schemes,<sup>95</sup> public employment laws,<sup>96</sup> and regulations governing federally funded public housing.<sup>97</sup>

With respect to collateral sanctions, the Standards seek to accomplish four things: 1) to limit collateral sanctions to those clearly warranted by the conduct underlying the offense;<sup>98</sup> 2) to ensure that defendants are fully aware, at the time of a guilty plea or sentencing, of all relevant collateral sanctions that will automatically come into play as a result of a conviction;<sup>99</sup> 3) to give the sentencing judge an opportunity to factor in

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93. ALA. CODE § 36-9-2 (1975); *cf.* State Highway Dep't v. State Pers. Bd., 628 So. 2d 878, 880 (Ala. Civ. App. 1993) (holding middle level EEO officer did not hold "office of trust or profit" so as to automatically forfeit employment under state constitutional provision).

94. See 21 U.S.C. §§ 862a(a), (b), (d)(2) (1994).

95. See generally OPA STATE-BY-STATE SURVEY, *supra* note 54, at i-v. Thirty years ago, an ABA catalogue of the licensed occupations and professions under the laws of the fifty states documented the wide variation among the states, and within each state, and whether denial or revocation of a permit or license was mandatory or discretionary. See HUNT ET AL., *supra* note 33, at 1-3. The more recent OPA survey, though far less comprehensive, shows that there remains considerable variation among states.

96. See, e.g., HAW. REV. STAT. § 831-3.1(a-c) (2003) (providing that a person may not be denied public employment solely by reason of conviction, but a conviction may be considered as possible grounds for refusal, suspension, or revocation of employment); ILL. COMP. STAT. ch. 20, § 415/b.4 (1993) (providing that a person convicted of a felony may be denied state employment when the offense involved "disgraceful or infamous conduct").

97. See 42 U.S.C. § 1437(d)(1)(B)(iii) (2003) (providing that any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises is cause for eviction).

98. ABA COLLATERAL SANCTIONS STANDARDS, *supra* note 6, Standard 19-2.2 ("Limitation on collateral sanctions") places a heavy burden of justification on the legislature where automatic collateral penalties are concerned:

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

*Id.* Under this Standard, there are only a few situations where a collateral sanction will be so clearly appropriate, given the nature of the offense, that the costs of making a discretionary case-by-case decision at the time of sentencing cannot be justified. In this respect, Standard 19-2.2 could be said to create a narrowly tailored exception to the individualized approach of the Sentencing Standards. See note 90, *supra*. Of the four examples of collateral sanctions given in the text, only Alabama's rule would likely survive scrutiny under this Standard.

99. Standard 19-2.3 ("Notification of collateral sanctions before plea of guilty")

collateral penalties in considering the overall sentence;<sup>100</sup> and 4) to provide judicial or administrative mechanisms for obtaining relief from collateral sanctions.<sup>101</sup>

The relief mechanisms called for by Standard 19-2.5 are conceived as an integral part of the sentencing process itself.<sup>102</sup> Without attempting to dictate to jurisdictions exactly how these mechanisms should be constructed, the Standards contemplate both a sanction-specific remedy, and a more general restoration process: under paragraphs (a) and (b), an individual ought to be able to obtain “timely and effective relief” from any *particular* collateral sanction imposed by the law of that jurisdiction (whether or not the individual was convicted in that jurisdiction).<sup>103</sup> Under paragraph (c), an individual ought to be able to obtain general relief from *all* applicable collateral sanctions.<sup>104</sup> The distinction between these two

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requires a court to ensure that a defendant has been notified by counsel of “all applicable collateral sanctions” before accepting a guilty plea. Paragraph (b) of Standard 19-2.4 (“Consideration of collateral sanctions at sentencing”) requires a similar assurance at the time of sentencing.

100. Standard 19-2.4(a) requires the court to consider collateral sanctions when imposing a sentence.

101. Standard 19-2.5 (“Waiver, modification, relief”) provides as follows:

- (a) The legislature should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.
- (b) Where the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction.
- (c) The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.
- (d) An order entered under this Standard should:
  - (i) have only prospective operation and not require the restoration of the convicted person to any office, employment or position forfeited or lost because of the conviction;
  - (ii) be in writing, and a copy provided to the convicted person; and
  - (iii) be subject to review in the same manner as other orders entered by that court or administrative body.

102. The Standards do not require that the sentencing judge be given authority in every case to tailor collateral sanctions to fit an individual’s particular situation. Because the Standards strictly limit the circumstances in which collateral sanctions are appropriate in the first instance, any collateral sanction that survives scrutiny under these provisions will by hypothesis be an appropriate and necessary adjunct of the court-imposed sentence itself. Standard 19-2.5.

103. Standard 19-2.5(a)-(b).

104. Standard 19-2.5(c).

types of relief is significant: the first provides specific relief that might take place at the time of sentencing or sometime shortly thereafter. The second offers the prospect of a much more comprehensive restorative process that would address the issues of stigma and lost status.

As a practical matter, if relief from specific collateral sanctions under Standard 19-2.5(a) is to be “timely and effective,” it should, in some cases, be available at the time of sentencing. Mandatory deportation is a good example. For many years it was considered appropriate and efficient to have the sentencing judge make binding recommendations against an individual’s mandatory deportation as a result of conviction, an authority exercised by state and federal courts until the repeal in 1990 of the so-called “JRAD” provision of the Immigration and Nationality Act.<sup>105</sup> Assuming that deportation of criminal aliens remains virtually automatic absent a waiver, compliance with Standard 19-2.5(a) might require Congress to return the power to waive deportation to sentencing judges, or to give that power to immigration judges at a subsequent administrative hearing. There may be other automatic penalties (such as deprivation of a drivers’ license or an employment-related disqualification) that would be unreasonable and inappropriate considering the offense conduct involved, and might jeopardize the offender’s ability to make a living. Authority to relieve such penalties is most sensibly put in the hands of the sentencing judge, or in the hands of the relevant licensing agency.

The more general relief contemplated in Standard 19-2.5(c) has a broader purpose, and is rather in the nature of a forgiveness than a specific remedy for an unreasonable or inappropriate sanction. In creating an additional opportunity for an individual to obtain an order relieving “all

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105. In the 1917 statute that made aliens convicted of certain crimes in the United States subject to deportation, Congress authorized state and federal sentencing judges to issue a judicial recommendation against deportation (“JRAD”), a binding determination that deportation was not warranted on the facts of the case. Act of Feb. 5, 1917, § 19(a), 39 Stat. 874, 889-90; Immigration and Nationality Act of 1952, § 241(a), 66 Stat. 163 (repealed 1990). Sentencing judges had responsibility for making these JRAD determinations in most cases until the repeal of this statute in 1990. See Margaret H. Taylor & Ronald Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1143 (2002). The black letter law proposed by the drafting Task Force specifically approved the traditional role of the sentencing judge in this context, on the theory that, like other sanctions, deportation should be imposed on a case-by-case basis as part of a criminal sentence. The Standards Committee decided against including a specific provision addressing the court’s authority to grant relief from deportation, in part because such authority must derive in the first instance from federal immigration laws. It was aware, however, that the ABA had expressed support for broad JRAD authority in a 1975 resolution of the House of Delegates. (“[R]elief from deportation upon grant of a pardon or judicial recommendation against deportation, now restricted to convictions for crimes involving moral turpitude, should be made applicable to deportability predicated on any criminal conviction.”).

collateral sanctions,” beyond the specific relief provided for in subparagraph (a), the Standards aim to provide an opportunity for criminal offenders to certify their rehabilitation and good character. In this fashion, the general restoration provision in subparagraph (c) would function to restore social status.

Structuring this relief poses the same conceptual and practical problems that faced the reformers of the 1960s and 1970s: How does one devise and enforce a legal remedy for what is essentially a problem of social attitude? At least, the Standards reject the expungement approach chosen by the Legal Status of Prisoners Standards; the drafters of the Standards specifically rejected relief premised on concealment and denial, both as a theoretical and practical matter. Beyond this, however, the black letter of subparagraph (c) does not express any preference for the form its more general relief might take. All that can be told from the black letter is that this section is designed to accomplish more than the removal of specific legal disabilities, which is already provided for in subparagraph (a).

The drafters of the ABA Standards at one point considered incorporating the judicial restoration provisions in the Model Penal Code into the black letter of subparagraph (c), but opted instead to discuss specific implementing approaches in commentary. While the black letter of the Standards now expresses no preference for any particular process for implementing its general relief, a strong case can be made for section 306.6 of the MPC.

#### B. Implementation of Standard 19-2.5(c)—Section 306.6 of the Model Penal Code

The two-tiered process in MPC section 306.6<sup>106</sup> offers a conceptually sound and practical way of implementing Standard 19-2.5(c), for, as described earlier in Part I, it accomplishes both a general restoration of rights and a symbolic restoration of status.<sup>107</sup> Under section 306.6(1), the sentencing court may issue an order relieving all legal disabilities after an offender has satisfied his sentence: “so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime.” Under section 306.6(2), after a

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106. See App. A; see also *supra* notes 23-32 and accompanying text.

107. The author does not intend to extend the same endorsement to those provisions of Article 306 governing loss of rights. Among other things, they appear to place no normative limits on the statutory penalties and disabilities a jurisdiction may impose solely on account of conviction. See, e.g., MODEL PENAL CODE § 306.1(1)(c) (2003).

2003] *STARTING OVER WITH A CLEAN SLATE* 127

further period of law-abiding conduct (suggested as five years), the sentencing court may issue an order “vacating” the conviction.

In the first step of the process spelled out in section 306.6(1), a judge is given authority to grant relief from all legal penalties and disqualifications to an offender who has fully served his sentence and remained law-abiding since his conviction. If applicable collateral sanctions are properly narrow in the first place, as required by Standard 19-2.2, then it will ordinarily not inappropriately disadvantage the individual to have them remain in effect while he is still under sentence.

The comprehensive approach to restoration of rights in section 306.6(1) has important conceptual and practical advantages. Conceptually, it treats collateral sanctions as part of the sentence itself, even though they are imposed by operation of law and not by judicial order. This means that they will necessarily be subject to the same tests of fairness and proportionality as the sentence imposed by the judge. As a practical matter, because relief is essentially automatic upon a showing of a clear record, rich and poor alike have equal access. At the same time, because it requires the personal action of a judge, restoration under section 306.6(1) carries with it a certain imprimatur of official respectability that automatic restoration and administrative procedures do not have. Finally, it offers offenders both incentive and reward for rehabilitation, even as it returns to them the tools necessary to fully reintegrate into the free community.

But the MPC does not stop with restoring legal rights. Section 306.6(2) offers an offender the additional opportunity to have his conviction “vacated” after a further period of law-abiding conduct, suggested as five years. Presumably, during this period the offender would have an opportunity to demonstrate his entitlement to be recognized as a fully rehabilitated member of the community. Presumably, this record of rehabilitation would be before the court in considering a petition to vacate the conviction.

If a vacation order under subsection (2) has no additional legal effect for the offender who has already had his rights fully restored under subsection (1), because subsection (3) gives exactly the same effect to an order under either section, one might well ask why an offender would even bother to return to the court to obtain a second order “vacating” the conviction. The answer must be that a vacation order has the additional symbolic effect of certifying that an offender is truly rehabilitated.<sup>108</sup> Unlike some

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108. Professor Wechsler’s explanation of the difference between the two orders evidences an expectation that a “vacation” order would have the effect of vouching for an offender’s good moral character, a finding required under the immigration laws to avoid deportation. *See supra* note 30 and accompanying text.

expungement statutes, the MPC's vacation provision does not purport to wipe out or hide the existence of the conviction; indeed, it specifically contemplates "proof of the conviction as evidence of commission of the crime" in several different contexts. And the MPC specifically rejects an approach that would allow an offender affirmatively to deny that he had been convicted.<sup>109</sup> Instead, a vacation order seems intended to operate as a sort of advertisement of rehabilitation and reintegration, the very sort of comprehensive restoration of status contemplated in Standard 19-2.5(c). Consistent with a broad purpose of making forgiveness accessible and reliable, the MPC contemplates a key role for the sentencing court in signaling that the convicted person has paid the full price for his crime and has earned the right to return to responsible membership in society. It is, in effect, a way of "celebrating the negotiation—or survival—of the perilous correctional experience."<sup>110</sup>

#### CONCLUSION

The law reformers of the 1960s and 1970s imagined a world where the public attitudes engendered by criminal conviction could be overcome by enlightened laws. They had some reason to be optimistic, given the energy with which many state legislatures embraced reform of their criminal codes and dismantled the ancient apparatus of civil death. But the political and social climate changed profoundly in the early 1980s, and the law would change with it. Today we are essentially right back where the reformers of the 1960s started, where criminal conviction works such a degradation of status that one's debt to society is never fully paid. The law on restoration of rights in the states is pretty much in shambles, and there is effectively no way for either state or federal offenders to regain rights lost under federal law. The situation cries out for a fundamental change in approach.

If their efforts were defeated or undone in the war on crime of the 1980s and 1990s, the reformers of the 1960s left behind a body of work that provides useful guidance to a new generation of reformers. The ABA Standards on Collateral Sanctions seek to capture and rationalize the "invisible punishment" of collateral consequences within the framework of criminal sentencing. But it is the venerable Model Penal Code that supplies

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109. See *supra* note 31 and accompanying text.

110. Kogon & Loughery, *supra* note 88, at 390; see Demleitner, *supra* note 2, at 162 ("ex-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation."). Kogon & Loughery remark that: "We solemnize the offender's induction into the system. When he successfully concludes the program, though, we fail to institutionalize his departure correspondingly. It's fun to catch the fish but hard to let him go." Kogon & Loughery, *supra* note 8, at 390.

2003]            *STARTING OVER WITH A CLEAN SLATE*            129

the essential implementing features.

The resulting scheme provides the offender both incentive and reward for rehabilitation, and satisfies the community's need for a ritual of reconciliation. In relying primarily on the sentencing judge, it provides a more reliable and accessible process than pardon or other executive restoration devices, and a more respectable one than automatic statutory provisions. In contrast to expungement, it does not sacrifice the legitimate concerns of law enforcement or undermine respect for the value of truth in our legal system. It does not fly in the face of technological reality, or encourage either the offender or the community to evade their respective responsibilities for coming to terms with mistakes in the past. In short, it allows the offender to start over with a clean slate.

## APPENDIX A

## MODEL PENAL CODE

ARTICLE 306 – LOSS AND RESTORATION OF RIGHTS  
INCIDENT TO CONVICTION OR IMPRISONMENTSection 306.6 Order Removing Disqualifications or Disabilities; Vacation  
of Conviction; Effect of Order of Removal or Vacation

(1) In the cases specified in this Subsection the Court may order that so long as the defendant is not convicted of another crime, the judgment shall not thereafter constitute a conviction for the purpose of any disqualification or disability imposed by law because of the conviction of a crime:

(a) in sentencing a young adult offender to the special term provided by Section 6.05(2) or to any sentence other than one of imprisonment; or

(b) when the Court has theretofore suspended sentence, or has sentenced the defendant to be placed on probation and the defendant has fully complied with the requirements imposed as a condition of such order and has satisfied the sentence; or

(c) when the Court has theretofore sentenced the defendant to imprisonment and the defendant has been released on parole, has fully complied with the conditions of parole and has been discharged; or

(d) when the Court has theretofore sentenced the defendant, the defendant has fully satisfied the sentence and has since led a law-abiding life for at least [two] years.

(2) In the cases specified in this Subsection, the Court which sentenced a defendant may enter an order vacating the judgment of the conviction:

(a) when an offender [a young adult offender] has been discharged from probation or parole before the expiration of the maximum term thereof]; or

(b) when a defendant has fully satisfied the sentence and has since led a law-abiding life for at least [five] years.]

(3) An order entered under Subsection (1) or (2) of this Section:

(a) has only prospective operation and does not require the restoration of the defendant to any office, employment or position forfeited or lost in accordance with this Article; and

(b) does not preclude proof of the conviction as evidence of the

2003]            *STARTING OVER WITH A CLEAN SLATE*            131

commission of the crime, whenever the fact of its commission is relevant to the determination of an issue involving the rights or liabilities of someone other than the defendant; and

(c) does not preclude consideration of the conviction for purposes of sentence if the defendant subsequently is convicted of another crime; and

(d) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant to the exercise of the discretion of a court, agency or official authorized to pass upon the competency of the defendant to perform a function or to exercise a right or privilege which such court, agency or official is empowered to deny, except that in such case the court, agency or official shall also give due weight to the issuance of the order; and

(e) does not preclude proof of the conviction as evidence of the commission of the crime, whenever the fact of its commission is relevant for the purpose of impeaching the defendant as a witness, except that the issuance of the order may be adduced for the purpose of his rehabilitation; and

(f) does not justify a defendant in stating that he has not been convicted of a crime, unless he also calls attention to the order.

## APPENDIX B

ABA STANDARDS FOR CRIMINAL JUSTICE (THIRD EDITION)  
COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF  
CONVICTED PERSONS  
(AUGUST 2003)

## PART I. DEFINITIONS AND OBJECTIVES

## STANDARD 19-1.1 DEFINITIONS

For purposes of this chapter:

- (a) The term “collateral sanction” means a legal penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person’s conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence.
- (b) The term “discretionary disqualification” means a penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to the conviction.

## STANDARD 19-1.2 OBJECTIVES

- (a) With respect to collateral sanctions, the objectives of this chapter are to:
  - (i) limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense;
  - (ii) prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person’s chances of successfully reentering society;
  - (iii) provide the means by which information concerning the collateral sanctions that are applicable to a particular offense is readily available;
  - (iv) require that the defendant is fully informed, before pleading guilty and at sentencing, of the collateral sanctions applicable to the offense(s) charged;
  - (v) include collateral sanctions as a factor in determining the appropriate sentence; and
  - (vi) provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.
- (b) With respect to discretionary disqualification of a convicted person,

2003] *STARTING OVER WITH A CLEAN SLATE* 133

the objectives of this chapter are to:

- (i) facilitate reentry into society, and reduce recidivism, by limiting situations in which a convicted person may be disqualified from otherwise available benefits or opportunities;
- (ii) provide that a convicted person not be disqualified from benefits or opportunities because of the conviction unless the basis for disqualification is particularly related to the offense for which the person is convicted; and
- (iii) create a mechanism for obtaining review of, and relief from, discretionary disqualification.

## PART II. COLLATERAL SANCTIONS

### STANDARD 19-2.1 CODIFICATION OF COLLATERAL SANCTIONS

The legislature should collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code. The chapter or section should identify with particularity the type, severity and duration of collateral sanctions applicable to each offense, or to a group of offenses specifically identified by name, section number, severity level, or other easily determinable means.

### STANDARD 19-2.2 LIMITATION ON COLLATERAL SANCTIONS

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

### STANDARD 19-2.3 NOTIFICATION OF COLLATERAL SANCTIONS BEFORE PLEA OF GUILTY

(a) The rules of procedure should require a court to ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged.

(b) Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for withdrawing the plea of guilty, except where otherwise provided by law or rules of procedure, or where the failure renders the plea constitutionally invalid.

### STANDARD 19-2.4 CONSIDERATION OF COLLATERAL SANCTIONS AT SENTENCING

- (a) The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence.
- (b) The rules of procedure should require the court to ensure at the time of sentencing that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law. Except where notification by the court itself is otherwise required by law or rules of procedure, this requirement may be satisfied by confirming on the record that defense counsel has so advised the defendant.
- (c) Failure of the court or counsel to inform the defendant of applicable collateral sanctions shall not be a basis for challenging the sentence, except where otherwise provided by law or rules of procedure.

#### STANDARD 19-2.5 WAIVER, MODIFICATION, RELIEF

- (a) The legislature should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.
- (b) Where the collateral sanction is imposed by one jurisdiction based upon a conviction in another jurisdiction, the legislature in the jurisdiction imposing the collateral sanction should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from the collateral sanction.
- (c) The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.
- (d) An order entered under this Standard should:
  - (i) have only prospective operation and not require the restoration of the convicted person to any office, employment or position forfeited or lost because of the conviction;
  - (ii) be in writing, and a copy provided to the convicted person; and
  - (iii) be subject to review in the same manner as other orders entered by that court or administrative body.

#### STANDARD 19-2.6 PROHIBITED COLLATERAL SANCTIONS

Jurisdictions should not impose the following collateral sanctions:

- (a) deprivation of the right to vote, except during actual confinement;
- (b) deprivation of judicial rights, including the rights to:
  - (i) initiate or defend a suit in any court under one's own name under procedures applicable to the general public;

2003] *STARTING OVER WITH A CLEAN SLATE* 135

- (ii) be eligible for jury service except during actual confinement or while on probation, parole, or other court supervision; and
  - (iii) execute judicially enforceable documents and agreements;
- (c) deprivation of legally recognized domestic relationships and rights other than in accordance with rules applicable to the general public. Accordingly, conviction or confinement alone:
- (i) should be insufficient to deprive a person of the right to contract or dissolve a marriage; parental rights, including the right to direct the rearing of children and to live with children except during actual confinement; the right to grant or withhold consent to the adoption of children; and the right to adopt children; and
  - (ii) should not constitute neglect or abandonment of a spouse or child, and confined persons should be assisted in making appropriate arrangements for their spouses or children;
- (d) deprivation of the right to acquire, inherit, sell or otherwise dispose of real or personal property, except insofar as is necessary to preclude a person from profiting from his or her own wrong; and, for persons unable to manage or preserve their property by reason of confinement, deprivation of the right to appoint someone of their own choosing to act on their behalf;
- (e) ineligibility to participate in government programs providing necessities of life, including food, clothing, housing, medical care, disability pay, and Social Security; provided, however, that a person may be suspended from participation in such a program to the extent that the purposes of the program are reasonably being served by an alternative program; and
- (f) ineligibility for governmental benefits relevant to successful reentry into society, such as educational and job training programs.

PART III. DISCRETIONARY DISQUALIFICATION  
OF CONVICTED PERSONS

STANDARD 19-3.1 PROHIBITED DISCRETIONARY DISQUALIFICATION

The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities, including housing, employment, insurance, and occupational and professional licenses, permits and certifications, on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.

**STANDARD 19-3.2 RELIEF FROM DISCRETIONARY DISQUALIFICATION**

The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification.

**STANDARD 19-3.3 UNREASONABLE DISCRIMINATION**

Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise. In addition, each jurisdiction should enact legislation prohibiting the denial of insurance, or a private professional or occupational license, permit or certification, to a convicted person on grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for denial even if the person had not been convicted.