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ARTICLES

LEGISLATING FORGIVENESS: A STUDY OF POST-CONVICTION CERTIFICATES AS POLICY TO ADDRESS THE EMPLOYMENT CONSEQUENCES OF A CONVICTION

HEATHER J. GARRETSON*

Mass incarceration in America is creating an employment paradox that is the result of three facts: an estimated 65 million Americans have a criminal record, a criminal record significantly impairs job opportunities, and a job is a critical component of living a crime-free life. This paradox is perpetuated by thousands of legal and administrative barriers to employment and by employers' unwillingness to hire someone with a criminal record.

States have recently started addressing the employment paradox with legislation. This legislation authorizes an administrative relief mechanism – often a certificate of some kind – that is intended to lift employment barriers and encourage employers to consider applicants with a criminal record. Such legislation is on the rise: of the ten states that have certificate legislation, eight passed such legislation in the last five years. This passage comes without an understanding of the impact of certificates. The accessibility and relevance of certificates to employment has – until now – been assumed, but not examined.

New York State has the oldest and most robust certificate system, and is a model for much of the recent certificate legislation. This paper contains the first comprehensive research on New York's certificates. The research asks whether New York's certificates are accessible and relevant to employment. It combines statutory analysis with qualitative research. It is a study of how certificate legislation is supposed to work – and how it actually does. It examines a statutory scheme that is recently replicated but empirically empty. Through interviews with judges, people with certificates or those eligible but without one, attorneys, current and former probation officials, service providers, and advocates, this paper provides insights into the use of certificates, their challenges, and examines how legislating more of the same can effectively address the employment paradox.

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I. INTRODUCTION

Incarceration in the U.S. is unprecedented by both historical and international standards.¹ The U.S. has 5% of the world's population and 25% of its prisoners.² This is a relatively new development. Until the 1970s the incarceration rate in the U.S. was similar to that of other countries worldwide; then, it slowly began to rise.³ The increase in prison population was propelled by the war on drugs, changes in sentencing laws, "tough on crime" policies, and an explosion

¹ NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 36 (Jeremy Travis et al. eds., 2014), available at <http://www.nap.edu/read/18613/chapter/1>. Our per capita incarceration rate significantly exceeds the next largest per capita rates of Rwanda and Russia. *Id.* at 37 (citing *World Prison Brief*, INT'L CTR. FOR PRISON STUDIES (2013)).

² NAACP, *Criminal Justice Fact Sheet*, <http://www.naacp.org/pages/criminal-justice-fact-sheet> (last visited Aug. 1, 2015).

³ *Fact Sheet: U.S. Prison Population Trends*, THE SENTENCING PROJECT 1 (Apr. 2015), http://sentencingproject.org/doc/publications/publications/inc_Prison_Population_Trends_

of prison construction.⁴ Mass incarceration has become a tsunami that threatens to drown our criminal justice system.⁵ This wave of incarceration came as the prison population grew by over 700% since the 1970s.⁶ If current trends continue, one out of every fifteen Americans will be incarcerated in his or her lifetime.⁷

The fiscal cost to society of having an estimated 65 million U.S. adults with a criminal record is staggering.⁸ Corrections costs cripple state budgets and hurt the overall economy. The cost of corrections approaches \$70 billion a year – a 660% increase from 1982 to 2006.⁹ Because a criminal record significantly impacts an individual's employment opportunities, the United States loses an estimated \$57 to \$65 billion each year in productivity.¹⁰ The realization that the human and fiscal cost of the current system cannot be sustained has policy makers, politicians, journalists, advocates, and academics exploring reform.¹¹ Unique bipartisan coalitions consisting of these entities are currently working together on solutions.¹² Otherwise disparate organizations are examining ways to stem the tide, including the American Civil Liberties Union, Newt Gingrich Productions, the Obama administration, U.S. House Speaker John Boehner, and

fs.pdf. For the many reasons behind the exorbitant growth of incarceration, see NAT'L RESEARCH COUNCIL, *supra* note 2. Notably, an increase in crime is not one of them. *Id.* at 44.

⁴ NAT'L RESEARCH COUNCIL, *supra* note 1.

⁵ *Id.* at 36.

⁶ Byron Johnson et al., *Recidivism Reduction and Return on Investment: An Empirical Assessment of the Prison Entrepreneurship Program*, BAYLOR INST. FOR STUDIES OF RELIGION, 6 (2013), http://www.baylorisr.org/wp-content/uploads/PEP_final_reduced-size.pdf.

⁷ Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, U.S. DEP'T OF JUSTICE, 1 (2003), <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

⁸ Michelle Natividad Rodrigues & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employers*, NAT'L EMP'T LAW PROJECT, 27 n.2 (2011), http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf.

⁹ *Id.* at 3 n.7 (citing *Employment and Expenditure*, U.S. BUREAU OF JUSTICE STATISTICS (2008), <http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm>) ("The U.S. Bureau of Justice Statistics estimates that in 2006, the federal, state, and local governments combined spent over \$68 billion on corrections; in 1982, that figure was \$9 billion.").

¹⁰ John Schmitt & Kris Warner, *Ex-offenders and the Labor Market*, CTR. FOR ECON. & POLICY RESEARCH, 14 (2010), <http://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

¹¹ NAT'L RESEARCH COUNCIL, *supra* note 1, at 13; Jennifer Warren, et al., *One in 100: Behind Bars in America 2008*, PEW CTR. ON THE STATES, 3 (2008), http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/one_in100pdf.pdf.

¹² Maxwell Tani, *Democrats and Republican In Congress Actually Found Something to Agree On*, THE HUFFINGTON POST (Mar. 30, 2015, 3:30 PM), http://www.huffingtonpost.com/2015/03/30/bipartisan-summit-criminal-justice_n_6971242.html; Bipartisan Summit on Fair Justice, <http://www.cut50.org/events> (last visited Dec 28, 2015).

Right on Crime.¹³

Policies, however, must address more than the unprecedented number of people entering the criminal justice system. The reality is that those who go into the system, come out. More than 95% of the nation's state prisoners will return to the community.¹⁴ Yet, the more than 688,000 people who are released from prison each year return home to find that their sentence, although served, is far from over.¹⁵ After their criminal sentence is complete, these people begin to experience the additional legal and social penalties, barriers, and disabilities that result from a conviction.¹⁶

These "collateral consequences" are often more onerous than the sentence itself.¹⁷ Collateral consequences are also on the rise, increasing in number and complexity.¹⁸ Consequences once reserved for felonies are now extended to misdemeanors. State laws imposing collateral consequences have increased

¹³ See BIPARTISAN SUMMIT ON CRIMINAL JUSTICE REFORM, <http://www.bipartisansummit.org/> (last visited Aug. 1, 2015); Kevin Glass, *Conservative Efforts Draw Applause at Criminal Justice Reform Summit*, WATCHDOG.ORG (Mar. 27, 2015, 9:14 AM), <http://watchdog.org/208791/criminal-justice-reform-summit/>; *Remarks by the President at the NAACP Conference*, THE WHITE HOUSE (July 14, 2015, 4:54 PM), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference/>; *The Conservative Case for Reform*, RIGHT ON CRIME, <http://rightoncrime.com/the-conservative-case-for-reform/> (last visited Aug. 1, 2015); Jennifer Steinhauer, *Bipartisan Push Builds to Relax Sentencing Laws*, N.Y. TIMES (July 28, 2015), <http://www.nytimes.com/2015/07/29/us/push-to-scale-back-sentencing-laws-gains-momentum.html>.

¹⁴ Jeremy Travis et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry*, THE URBAN INST., 9 (2001), http://research.urban.org/UploadedPDF/from_prison_to_home.pdf.

¹⁵ Peter Wagner & Leah Sakala, *Mass Incarceration: The Whole Pie*, PRISON POLICY INITIATIVE (Mar. 12, 2014), <http://www.prisonpolicy.org/reports/pie.html>. This number does not include people who cycle through local jails, which is estimated to be in nearly 12 million people each year. *Id.*

¹⁶ See *infra* Section II.

¹⁷ AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS, 7 (3d ed. 2004). The term "collateral consequences" throughout criminal justice literature and in this paper is used to describe both the consequences that occur by operation of law at the time of conviction ("collateral sanctions") and those that occur as a result of a later event or discretionary decision ("discretionary disqualification"), such as the denial of an occupational license due to a criminal record. The term "collateral consequences" also refers to the social effects of incarceration. See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Media Chesney-Lind eds., 2002); John Hagan & Ronit Dinovitzer, *Collateral Consequences of Imprisonment for Children, Communities, and Prisoners*, 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 121 (Michael Tonry & Joan Petersilia eds. 1999).

¹⁸ Andrew von Hirsch & Martin Wasik, *Civil Disqualifications Attending Conviction: A Suggested Conceptual Framework*, 56 CAMBRIDGE L.J. 599, 603 (1997).

since the 1980s, as have employment restrictions.¹⁹

The collateral consequences of a conviction can include loss of occupational licenses, the right to vote, custody, housing, public benefits, eligibility for school loans, scholarships, and employment.²⁰ The perpetual punishment created by collateral consequences is now viewed by many as a permanent barrier to successful reentry into mainstream society.²¹ Given the estimated 65 million Americans living with criminal records and the resulting barriers to their successful reentry into society, criminal justice reform cannot focus solely on reducing the number of people who go into the system; it must also address the barriers faced by those who leave it.²²

This article proceeds in four sections. Section II outlines the employment paradox created by criminal records. It discusses how criminal records create barriers to employment and yet, how employment is central to an individual's success. This discussion focuses on the personal experiences of people with criminal records, the extensive collateral consequences that criminal records create, the resources expended to catalogue these records, and the importance of employment for reentering citizens.

Section III identifies certificate legislation that was enacted to address the employment paradox. It outlines New York's certificate legislation, which is the oldest in the United States and a model for similar legislation in other jurisdictions. This section also outlines the new certificate legislation that is proliferating as a solution to lifting the many employment barriers imposed due to a criminal record.

Section IV examines New York's certificate system for accessibility and its relevance in the employment context. Through interviews with local New York individuals who interact – or could interact – with certificates, I explore whether certificates are in the hands of people who can use them most. The inquiry then turns to the relevance of certificates to employment.

Section V reviews the research results from a policy perspective in order to identify any lessons that can be learned from studying the realities of New York's system. Information on whether, how, and to what end people actually access certificates can inform other jurisdictions that may be interested in passing similar measures. Understanding accessibility and relevance will enable

¹⁹ See Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 770 nn. 71 & 73 (2011).

²⁰ Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 458, 459 (May 2010); JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 247 (2015).

²¹ Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 720 n.16 (2012) (citing numerous academics that catalogue and criticize these punishments as impediments to reintegration).

²² RODRIGUES & Emsellem, *supra* note 8.

states to not only pass certificate legislation, but to enact it in ways that ensure its maximum impact.

II. THE EMPLOYMENT PARADOX CREATED BY CRIMINAL RECORDS

Americans embrace the quintessential “American Dream”: that individuals can determine their success through ambition, education, and hard work.²³ In theory, this dream extends to people who have a criminal history. They are expected to pay their debt to society, work hard, and become tax payers rather than tax burdens. But for people with a criminal history, is this an achievable expectation? The consequences that a criminal record has on employment are well documented by academics, journalists, and activists.

Rocky, a 49-year-old blind man was employed as a direct care specialist for special needs patients and as the administrator of an assisted living facility. After the passage of a state law that precluded people with convictions from working in care facilities, he could not work in his field due to his conviction – a marijuana charge that occurred when he was 19-years-old. Rocky was never incarcerated, served his three-year probation without incident, and thirty years later, is unemployed.²⁴ Louie lost his position in sales-management at a medical-technology company when his employer learned of his 14-year-old conviction for misreporting the status of a loan on the books of a bank where he formerly worked.²⁵

Jenny was working part-time at a bank and was encouraged to apply for a full-time job. She applied and was given the job – but was subsequently prohibited from taking it due to a shoplifting charge that was eventually dismissed. Although the charges against her were dismissed, federal law made her ineligible to work for the bank.²⁶ Luis committed a burglary at the age of 22. He was not incarcerated, released to his parents’ custody and sentenced to five years of probation, from which he earned an early release. Twenty years later, when his

²³ Econ. Mobility Project, *Economic Mobility and the American Dream-Where Do We Stand in the Wake of the Great Recession?*, THE PEW CHARITABLE TRUSTS, (2011), http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2011/Pew_EMP_Poll_Summary2011.pdf.

²⁴ Sharon M. Deitrich, *Criminal Records and Employment: Ex-Offenders Thwarted in Attempts to Earn a Living for Their Families*, in EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS 16–17 (Cmty. Legal Services Inc. & Ctr. for Law and Soc. Policy eds., 2002).

²⁵ Joe Palazzolo, *Criminal Records Haunt Hiring Initiative*, WALL ST. J., July 12, 2015, <http://www.wsj.com/articles/criminal-records-haunt-hiring-initiative-1436736255>.

²⁶ NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME 22 (2014); Steve Zeidman, Clinic Director, CUNY School of Law, Testimony at hearing before the National Association of Criminal Defense Lawyers Task Force on Restoration of Rights, Day 1, at 28 (May 15, 2013) (hereinafter “NACDL testimony”), available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32735>.

employer learned about his record, he was let go from his part-time position as a doorman at a building in the East Village of New York.²⁷

The dramatic adverse impact a criminal record has on employment recently prompted a federal judge to expunge a woman's 17-year-old non-violent offense.²⁸

Apple, Inc. refused to allow anyone who had been convicted of any felony within the previous seven years work on construction of its new corporate campus.²⁹

Former Attorney General Eric Holder recognized the difficulty that people with a criminal record have finding a job, noting that "if having a job is central to successful reentry, then it is no wonder that half of all released prisoners will be reincarcerated within three years."³⁰

A. Cataloguing Consequences

People with a criminal record in the U.S. face over 45,000 laws that significantly restrict their access to employment and other basic rights.³¹ Immeasurable resources are devoted to simply cataloguing these consequences.³² Some

²⁷ Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed for Life*, THE NATION (November 6, 2013), <http://www.thenation.com/article/boxed-how-criminal-record-keeps-you-unemployed-life/>.

²⁸ Doe v. United States, No. 14-MC-1412(JG), 2015 WL 2452613 (E.D.N.Y. May 21, 2015).

²⁹ Elias Isquith, *America's Criminal Justice Disgrace: How Apple's Ban of Former Felons Reveals the Long Road to Real Reform*, SALON (Apr. 15, 2015, 8:00 AM), http://www.salon.com/2015/04/15/americas_criminal_justice_disgrace_how_apples_ban_of_former_felons_reveals_the_long_road_to_real_reform/. Apple's policy was met with public outcry and eventually changed.

³⁰ Eric H. Holder, Jr., Former U.S. Attorney General, Speech at the European Offenders Employment Forum (Oct. 8, 2010), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-speaks-european-offenders-employment-forum>. Recidivism is measured in various ways including the number of probation violations or incarceration for a new crime. NATIONAL INSTITUTE OF JUSTICE, MEASURING RECIDIVISM (2008), <http://www.nij.gov/topics/corrections/recidivism/pages/measuring.aspx>. However it is measured, research shows that nearly half of those who exit incarceration will return to serve another sentence. PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1994 (2002), <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>.

³¹ Am. Bar Ass'n, *National Inventory of the Collateral Consequences of Conviction*, ABA COLLATERAL CONSEQUENCES, <http://www.abacollateralconsequences.org/> (last visited Aug. 1, 2015); NAT'L EMP'T LAW PROJECT ET AL., STATE REFORMS PROMOTING EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS: 2010-2011 LEGISLATIVE ROUNDUP, NAT'L EMP'T LAW PROJECT 1 (Dec. 2011), <http://www.nelp.org/content/uploads/2015/03/PromotingEmploymentofPeoplewithCriminalRecords.pdf>; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 26, at 31.

³² The ABA recognized the inefficient and punitive impact of collateral sanctions found throughout the civil code, licensing authorities, and throughout society. As a result, it pro-

consequences are mandatory – meaning they apply automatically as a matter of law.³³ Others are discretionary, such as when an agency or official is authorized but not required to impose the consequence.³⁴ In the employment arena, discretionary consequences are often seen in “good moral character” clauses in occupational licensing.³⁵ The collateral consequences of a criminal conviction affect jobs and licenses in a way that may have seemed prudent and logical when enacted, but in effect make it nearly impossible for someone with a criminal record to leave their past behind.³⁶ Laws imposing collateral consequences are widespread and can be arbitrary because often the consequences are not related to the crime.³⁷ For example, in New York anyone convicted of a misdemeanor or felony is barred from getting a license to rehabilitate wildlife for three years after his or her conviction – regardless of whether his or her conviction involved animal cruelty.³⁸

In addition to the statutory and regulatory barriers to employment, employers are reluctant to hire people with a criminal history and routinely use background checks to sort applicants.³⁹ Surveys reveal that up to 92% of employers

posed that legislatures should collect and identify the type, severity and duration of collateral sanctions for an offense. AM. BAR ASS’N, *supra* note 17, at 21. It subsequently developed the National Inventory of Consequences, <http://www.abacollateralconsequences.org/>. Ohio has a database on the civil impact of criminal convictions. Ohio Justice & Policy Ctr., *Civil Impacts of Criminal Convictions Under Ohio Law*, CIVICC, <http://civiccoho.org/> (last visited Aug. 1, 2015). North Carolina has a collateral consequences assessment tool. *Collateral Consequences Assessment Tool*, UNC SCH. OF GOV’T, <http://ccat.sog.unc.edu/> (last visited Aug. 1, 2015). See generally COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/> (last visited Aug. 1, 2015) (collecting resources related to the collateral consequences of criminal convictions).

³³ NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 26, at 19.

³⁴ *Id.*

³⁵ *Id.* (giving, as an example of a discretionary consequence, the denial or revocation of a real estate license based on a finding by the licensing board that the convicted applicant lacks “good moral standing”).

³⁶ *Id.* at 9.

³⁷ Frank Thurston Green, *NY’s Certificates Offer Catch-22 to People Convicted of Crimes*, CITY LIMITS (Feb. 17, 2015), <http://citylimits.org/2015/02/17/nys-certificates-offer-catch-22-to-people-convicted-of-crimes/>.

³⁸ Frank Thurston Green, *Certificate Confusion Puts Focus on Convictions’ Consequences*, CITY LIMITS (Feb. 17, 2015), <http://citylimits.org/2015/02/17/certificate-confusion-puts-focus-on-convictions-consequences/>. See N.Y. COMP. CODES R. & REGS. tit. 6, § 184.3(a)(2) (2015).

³⁹ See Amy L. Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry*, URBAN INST. (2004), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/411097-From-Prison-to-Work.PDF>; Harry J. Holzer et al., *Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles*, URBAN INST. (2003), available at <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/410779-Employer-Demand-for-Ex-Offenders.pdf>; NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *supra* note 26.

use criminal background checks in their hiring decisions and that a criminal record reduces the likelihood of a callback by 50%.⁴⁰ The likelihood of a callback for a black male with a record is even less.⁴¹ One study revealed that the effect of a criminal record is more pronounced for blacks than it is for whites.⁴² Another found that two-thirds of employers would not hire applicants with a criminal history.⁴³

B. *The Necessity of Employment*

Stable employment is an important factor in keeping people out of the criminal justice system.⁴⁴ Employment helps lower recidivism.⁴⁵ Not surprisingly, the more barriers one has to holding legitimate jobs, the fewer opportunities he or she has to remain a law-abiding citizen.⁴⁶ Also, participation in the labor economy is central to one's identity.⁴⁷ Jobs enable people to contribute financially to their families, which can produce more positive relationships, enhance

⁴⁰ Megan Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending*, 5 CRIMINOLOGY & PUB. POL'Y 484 (2006); RODRIGUES & Emsellem, *supra* note 8, at 1 (citing *Background Checking: Conducting Criminal Background Checks*, SOC'Y FOR HUMAN RES. MGMT. 3 (Jan. 22, 2010), http://www.shrm.org/Research/SurveyFindings/Articles/Documents/Background_Check_Criminal.pptx); Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937 (2003).

⁴¹ Pager, *supra* note 40, at 959.

⁴² *Id.* The study also found that white men with prison records were likely to receive more offers for entry-level jobs in New York City than black men with identical records. *Id.* White men with records were also offered jobs more often than black men who have never been arrested. *Id.* See Paul von Zeilbauer, *Study Shows More Job Offers for Ex-Convicts Who Are White*, N.Y. TIMES, June 17, 2005, at B5. The problem with black men who have a criminal record being considered for employment at such low rates is compounded by the fact that those same men represent a disproportionately larger number of people with criminal records – and not a disproportionately larger amount of people who commit crimes. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLOR BLINDNESS* (2010); LANGAN & LEVIN, *supra* note 30 (finding that black men are about six times more likely than whites to be sent to prison and are likewise overrepresented among released prisoners); NAT'L RESEARCH COUNCIL, *supra* note 1, at 50 (noting that by 1989, the drug arrest rates for blacks was more than four times that for whites, despite studies showing that drug use among blacks is consistently lower than among whites).

⁴³ Harry J. Holzer, *WHAT EMPLOYERS WANT: JOB PROSPECTS FOR LESS-EDUCATED WORKERS* (1996). The survey was given to over 3,000 employers in four major metropolitan areas. *Id.*

⁴⁴ RODRIGUES & Emsellem, *supra* note 8.

⁴⁵ RODRIGUES & Emsellem, *supra* note 8, at 3. See Kurlychek et al., *supra* note 40, at 484 (“Although it is important not to overstate the evidence supporting a link between work and crime, most researchers do conclude that employment is at least moderately helpful in the desistance process.”).

⁴⁶ Von Hirsch & Wasik, *supra* note 18, at 605.

⁴⁷ Deitrich, *supra* note 24, at 14.

self-esteem, and improve mental health.⁴⁸ Employment is a linchpin to successful reentry and to full and productive participation in society.⁴⁹ Additionally, for every person who is employed rather than incarcerated, society saves not only the cost of incarceration, but yields benefits to the economy through the individual's increased earnings.⁵⁰ The need for employment does not, however, translate into being employed. The reality is that up to 60% of people released from prison are unemployed a year after their release.⁵¹

Admittedly, different people coming home from incarceration have different employment needs. Some held legitimate jobs before their incarceration and only need assistance finding an employer who will hire them now that they have a criminal record.⁵² For others, poor work history and limited job skills makes their employment search more difficult.⁵³ In any case, it is clear that a criminal record has a significant negative impact on employment opportunities, even for those with otherwise appealing characteristics.⁵⁴ Notably, employment

⁴⁸ Joe Graffam, Alison Shinkfield, Barbara Lavelle, and Wenda McPherson, "Variables Affecting Successful Reintegration as Perceived by Offenders and Professionals," *Journal of Offender Rehabilitation* 40, no. 1/2 (2004): 147–171.

⁴⁹ See Mark Berg & Beth Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 383, 387 (2011); Deitrich, *supra* note 24, at 14; See Christy A. Visser et al., *Ex-offender Employment Programs and Recidivism: A Meta-Analysis*, 1 J. EXPERIMENTAL CRIMINOLOGY 295 (2005) [hereinafter Visser et al., *Meta-Analysis*]; CHRISTY VISHNER ET AL., URBAN INST., RETURNING HOME: UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY 34 (2004) [hereinafter VISHNER ET AL., RETURNING HOME], available at http://www.urban.org/research/publication/returning-home-understanding-challenges-prisoner-reentry/view/full_report (stating that finding and keeping a job after release can reduce the chances of re-offending); JENNIFER FAHEY ET AL., MASS. EXEC. OFFICE OF PUB. SAFETY, EMPLOYMENT OF EX-OFFENDERS: EMPLOYER PERSPECTIVES (2006), available at http://b3cdn.net/crjustice/da82caa12e532880ef_3km6b5z95.pdf.

⁵⁰ NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 26, at 26 (quoting the deputy mayor for public safety in Philadelphia).

⁵¹ THE INDEP. COMM. ON REENTRY & EMPLOYMENT, REPORT AND RECOMMENDATIONS TO NEW YORK STATE ON ENHANCING EMPLOYMENT OPPORTUNITIES FOR FORMERLY INCARCERATED PEOPLE 3 (2006).

⁵² Visser et al., *Meta-Analysis*, *supra* note 49, at 311.

⁵³ *Id.* It should be noted that former prisoners face significant challenges with employment including limited work experience, being out of the labor market while incarcerated, low levels of education and limited vocational skills. But the systematic barriers to employment is a factor in keeping people with a record unemployed. See AMY L. SOLOMON ET AL., URBAN INST., UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE'S PRISONER REENTRY PORTFOLIO 2 (2006), <http://www.urban.org/research/publication/understanding-challenges-prisoner-reentry> (discussing the many challenges to reentry); Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility, and Prospects*, 47 CRIM. L. BULL. 189 (2011).

⁵⁴ DEVAH PAGER & BRUCE WESTERN, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 4 (2009).

barriers exist even though research shows that the risk of offending for people with criminal records is – after a certain period of time – no greater than that of a person without one.⁵⁵

III. LEGISLATING RELIEF

One method of dealing with the collateral consequences of a criminal record, especially in the employment arena, is for legislatures to create a statutory mechanism that lifts them. Statutory relief mechanisms can include certificates intended to help relieve the disabilities and barriers that a criminal history creates.⁵⁶

New York has the “oldest and most robust” certificate system.⁵⁷ Other states are recognizing that unless they are willing to live with a growing class of “internal exiles,” they must develop a path for people to successfully reenter society.⁵⁸ For some states, this path is being paved with certificates.⁵⁹ New certificate legislation from a bipartisan consensus has exploded onto the legislative scene, driven by the belief that a past crime should not forever preclude someone from employment.⁶⁰

New York’s certificate scheme is a model for such legislation throughout the country.⁶¹ Yet, while New York’s legislation is impacting laws in other states, the effects of New York’s certificates have not been studied. This paper changes that. It outlines New York’s certificate legislation, identifies similar legislation in other states, and then examines how legislators can use this data to address the employment paradox completely and expediently.

⁵⁵ The risk converges around 10-13 years depending on the nature of the crime and the age of the offender. See Shawn D. Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27 (2011); Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); Kurlychek et al., *supra* note 40; Megan C. Kurlychek et al., *Enduring Risk?: Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 64 (2007).

⁵⁶ N.Y. STATE BAR ASS’N, “RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY”: REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS 61 (2006), <http://www.nysba.org/workarea/DownloadAsset.aspx?id=26857>. See FAHEY ET AL., *supra* note 4948, at 28 (noting that the expansion of Illinois certificate legislation was related to returning offenders to employment).

⁵⁷ Radice, *supra* note 21, at 721.

⁵⁸ Love, *supra* note 19, at 792; See also COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS’N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES (2007).

⁵⁹ See *infra* Section III.B.

⁶⁰ Eli Hager, *Forgiving vs. Forgetting*, THE MARSHALL PROJECT (March 17, 2015), <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting>.

⁶¹ Radice, *supra* note 21, at 721; Love *supra* note 19, at 779 n.114.

A. *Certificate Legislation in New York*

1. Purpose

Employment barriers are numerous and diverse. New York's certificate legislation is aimed at "reducing employment barriers for people with criminal records."⁶² And there are a number of them. Over 100 occupations in New York require some type of license or certification by a state agency.⁶³ There are 1,159 employment-licensing bars in the state.⁶⁴ Some employment restrictions are mandatory. For example, a criminal record automatically excludes an individual from being employed as a security guard, notary public, firefighter, real estate broker, or alcohol retailer.⁶⁵ Other restrictions are discretionary; a criminal history may make a person ineligible for a license to be an electrician, radiologist, milk dealer, or funeral director.⁶⁶ A criminal record can prohibit employment as a fiduciary, junk dealer, bus driver, or sanitation worker.⁶⁷ Most licensing bodies use a "good moral character" requirement when considering an applicant's criminal record.⁶⁸ In sum, thousands of employment bars and discretionary barriers exist throughout state laws, licensing regulations, and regulatory rules.⁶⁹

Certificates are consistent with New York's public policy goals to license and employ people with a criminal history.⁷⁰ Employment opportunity was the

⁶² Radice, *supra* note 21, at 720 (citing N.Y. CORRECT. LAW §§ 700–706 (McKinney 2015)) (outlining with meticulous detail the history of New York's certificate legislation); 1945 N.Y. Sess. Laws §§ 64–65 (McKinney 2015).

⁶³ See *Occupations Licensed or Certified by New York State*, N.Y. STATE DEP'T OF LABOR, <https://labor.ny.gov/stats/lstrain.shtm> (last visited Aug. 1, 2015); LEGAL ACTION CTR., NEW YORK STATE OCCUPATIONAL LICENSING SURVEY (2006), <http://lac.org/wp-content/uploads/2014/12/Occupational-Licensing-Survey-2006.pdf>.

⁶⁴ Margaret Love, NACDL Testimony Day 3, p. 112 (May 17, 2013) (stating that 518 come from federal law and 641 come from New York law), available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

⁶⁵ N.Y. GEN. BUS. LAW § 74 (McKinney 2015) (security guard); N.Y. EXEC. LAW § 130 (McKinney 2015) (notary public); N.Y. CIV. SERV. LAW § 15-103 (McKinney 2015) (firefighter); N.Y. REAL PROP. LAW § 440-a (McKinney 2015) (real estate broker); N.Y. ALCO. BEV. CONT. LAW § 110 (McKinney 2015) (distributor of alcohol).

⁶⁶ N.Y. ADMIN. CODE § 27-3016(1)(vii) (McKinney 2015) (electrician); N.Y. PUB. HEALTH CODE § 3510 (McKinney 2015) (radiologist); N.Y. AGRIC. & MKTS. AGM.LAW § 258-c(i) (McKinney 2015) (milk dealer); N.Y. PUB. HEALTH CODE § 3454 (McKinney 2015) (funeral director).

⁶⁷ N.Y. SURR. CT. PROC. ACT § 707(1)(d) (McKinney 2015) (fiduciary); N.Y. GEN. BUS. LAW § 61 (McKinney 2015) (junk dealer); N.Y. VEH. & TRAF. LAW § 509-c (McKinney 2015) (bus driver); N.Y. CITY ADMIN. CODE § 16-106 (Westlaw through 2014 ch. 1. 1-106)

⁶⁸ N.Y. STATE BAR ASS'N, *supra* note 56, at 60.

⁶⁹ *New York Employment and Licensing Filter*, ABA COLLATERAL CONSEQUENCES, <http://www.abacollateralconsequences.org/search/?jurisdiction=35> (last visited Aug. 1, 2015).

⁷⁰ N.Y. CORRECT. LAW § 753(1)(a) (McKinney 2015) (recognizing that it is the public

impetus for New York's original certificate legislation in the 1940s.⁷¹ The statute's expansion in the 1970's was also specifically aimed to provide an individual with a criminal record the opportunity for a job.⁷² For public and private employers today, the statutes create a "presumption of rehabilitation" with regard to an applicant's criminal past.⁷³

2. Structure

New York law provides for two different certificates: a Certificate of Relief from Disabilities and a Certificate of Good Conduct.⁷⁴ Eligibility, type, and timing all depend on the applicant's criminal history, incarceration, and the type of consequence being addressed.⁷⁵ Certificates of Relief from Disabilities are available to a person with any number of misdemeanors but no more than one felony, while Certificates of Good Conduct are available to individuals with more than one felony after a certain waiting period.⁷⁶ In effect, both Certificates remove a mandatory legal bar and restore an applicant's right to be considered, but do not guarantee that a license or job will be offered.⁷⁷

Certificate of Relief from Disabilities

Anyone with one felony and any number of misdemeanors is eligible for a Certificate of Relief from Disabilities ("CRD").⁷⁸ A Certificate is required for each conviction.⁷⁹ The CRD is intended to relieve most automatic consequences imposed due to the conviction.⁸⁰ A CRD does not, however, prevent a

policy of New York State to "encourage the licensure and employment of persons previously convicted of one or more criminal offenses").

⁷¹ 1976 N.Y. Sess. Laws § 2459 (McKinney).

⁷² Radice, *supra* note 21, at 722 (citing 1976 N.Y. Sess. Laws § 2459 (McKinney)).

⁷³ N.Y. CORRECT. LAW § 753(2) (McKinney 2015). This is consistent with the recently added purpose of the penal law which is to aid "reentry and reintegration." N.Y. PENAL LAW § 1.05(6) (McKinney 2015).

⁷⁴ N.Y. CORRECT. LAW §§ 700–705 (McKinney 2015).

⁷⁵ Regardless of one's crime, only a Certificate of Good Conduct enables a person with a criminal history to hold public office. *Id.* § 703-a.

⁷⁶ *Id.* § 703-b. Waiting period is based on the most serious crime of which an individual was convicted and in the case of a misdemeanor is one year, with a C, D, or E felony it is 3 years, and with B and A felonies it is five years. *Id.* § 703-b(3). Time runs from the date of the payment of any fine, the suspension of sentence, release from custody, or termination of the sentence. *Id.*

⁷⁷ A conviction may be considered in accordance with New York's anti-discrimination statute and is a presumption of rehabilitation for employers. *Id.* §§ 752–753. *See infra* Section V.

⁷⁸ *Id.* § 700(1)(a). For counting purposes, two or more convictions of felonies charged in separate counts of one indictment or information is counted as one conviction. *Id.* § 700(2)(a).

⁷⁹ *Id.* § 700(1)(a).

⁸⁰ *Id.* § 753(2). Licenses that are automatically revoked – even if the holder has a Certificate – include the license to carry a firearm and to operate a hospital. *Id.* § 701(2); N.Y.

licensing body or employer from relying on the conviction to revoke or refuse to issue a license or job.⁸¹ If an individual's sentence did not include commitment to an institution under the jurisdiction of the state Department of Corrections and Community Supervision ("DOCCS") – that is, if the defendant did not get sentenced to prison – the sentencing court may issue a CRD.⁸² In such instances, the sentencing court may issue a CRD at the time of sentencing or any time thereafter, as long as the CRD is "consistent with the rehabilitation" of the applicant and consistent with the public interest.⁸³ The statute encourages granting a CRD at sentencing and all pre-sentence reports must contain information regarding the defendant's eligibility and a recommendation as to whether a CRD is appropriate.⁸⁴ Courts that do not sentence a defendant into custody must, according to a 2011 statutory amendment, consider an individual's fitness for a CRD.⁸⁵ This change was made with the belief that a CRD issued at sentencing "can prevent eviction, loss of a job and loss of an occupational license."⁸⁶

If the sentencing court cannot issue a CRD because the defendant was sentenced to state prison, sentenced by a court out-of-state, or has a federal conviction, then only DOCCS can issue a certificate.⁸⁷

Certificates of Good Conduct

A Certificate of Good Conduct ("CGC") may relieve all or specified disabilities and employment bars imposed due to a conviction.⁸⁸ Only DOCCS has the power to issue a CGC and it may do so after it finds: (1) the applicant's behav-

PENAL LAW § 400(11) (McKinney 2015), N.Y. PUB. HEALTH LAW § 2806(5) (McKinney 2014).

⁸¹ N.Y. CORRECT. LAW § 701(3) (McKinney 2011).

⁸² *Id.* § 702(1). In the words of the statute, the applicant was not sentenced to "an institution under the jurisdiction of the state department of corrections and community supervision." *Id.* This could mean a sentence of probation, conditional discharge, suspended sentence, or city jail. See BRONX DEFENDERS, THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, A GUIDE FOR CRIMINAL DEFENSE ATTORNEYS, CIVIL LEGAL SERVICE ATTORNEYS, AND OTHER REENTRY ADVOCATES (2014).

⁸³ N.Y. CORRECT. LAW § 702(2) (McKinney 2011).

⁸⁴ Uniform Rules for Trial Courts (22 NYCRR) § 200.9.

⁸⁵ N.Y. CORRECT. LAW § 702(1) (McKinney 2011).

⁸⁶ MEMORANDUM IN SUPPORT, ASSEMB. 7597, 235th Leg., Reg. Sess. (N.Y. 2011), available at http://assembly.state.ny.us/leg/?default_fld=&bn=A07597&term=2011&Memo=Y.

⁸⁷ N.Y. CORRECT. LAW § 703 (McKinney 2015). In 2010, the Certificate of Relief legislation was specifically amended to account for handling federal cases. Act of June 22, 2010, 2010 N.Y. Laws, ch. 56, pt. OO, § 3 (codified as amended at N.Y. CORRECT. LAW § 703(7) (McKinney 2015)). The federal probation office may recommend to DOCCS that a CRD be granted to an individual convicted of a federal crime and on supervision. N.Y. CORRECT. LAW § 703(7) (McKinney 2015).

⁸⁸ *Id.* § 703-a (McKinney 2015). Like the CRD, the CGC removes the automatic barrier, but a decision maker is still entitled to consider the conviction in accordance with New York's anti-discrimination law. *Id.* § 703-a(3).

ior warrants the certificate, (2) granting it is consistent with the applicant's rehabilitation, and (3) granting it is consistent with the public interest.⁸⁹ CGC may be granted to people with convictions from other jurisdictions and all CGC are subject to the following waiting periods according to the most serious crime: a misdemeanor, one year; Class C, D, or E felony, three years; Class A or B felony, five years.⁹⁰

Both certificates may be issued while an individual remains under DOCCS's supervision (it remains temporary until supervision is complete, at which time it becomes a permanent certificate), and both may be revoked.⁹¹ Additionally, either the sentencing court or DOCCS may order an investigation of the applicant before it issues a certificate.⁹² Investigations are conducted by local parole officers, and include background checks, home visits, and interviews.

Neither certificate precludes employers or licensing agencies from considering the conduct underlying a conviction as a factor in their decision making. Employers and licensing agencies must, however, consider applicants in accordance with New York's antidiscrimination statute, which precludes an application for a license or employment from being rejected solely because of an individual's criminal offense.⁹³ Under the antidiscrimination statute, an employer or agency must consider various factors such as the nature of the offense, date since occurrence, and duties related to the requested license or employment.⁹⁴ Employers and agencies must also consider certificates as evidence of rehabilitation.⁹⁵

B. *Certificate Legislation in Other Jurisdictions*

Ten states now have certificate legislation and policy leaders recommend it nationwide.⁹⁶ The following discussion outlines state legislation that creates a certificate system aimed at relieving the collateral consequences of a conviction.⁹⁷ It identifies which states are getting on the certificate bandwagon, who is

⁸⁹ *Id.* § 703-b.

⁹⁰ *Id.* § 703-b(3).

⁹¹ *Id.* § 702(4), § 703(6).

⁹² *Id.* § 702(4), § 703(6).

⁹³ N.Y. CORRECT. LAW § 752 (McKinney 2015).

⁹⁴ *Id.* § 753.

⁹⁵ *Id.* § 753(2).

⁹⁶ Nine states have passed this legislation in the last 5 years. *Infra*, pp. 14–21; *Legal Action Center Policy Recommendation*, LEGAL ACTION CENTER, <http://lac.org/what-we-do/criminal-justice/reducing-criminal-record-barriers-to-employment> (last visited Aug. 1, 2015) (“Governments should provide opportunities for people to receive Certificates of Rehabilitation or Certificates of Good Conduct. These certificates should relieve them of employment barriers.”).

⁹⁷ The statutory schemes discussed here do not include California's Certificate of Rehabilitation because it does not exist to address the collateral consequences of a conviction. Rather, the certificate is the first step in the pardon process and provides very limited relief

the issuing authority, the certificate's purpose, and certificate eligibility.⁹⁸

Colorado

Through legislation passed in 2013, Colorado judges may issue an "Order of Collateral Relief" to defendants not sentenced into custody.⁹⁹ This certificate may be issued to preserve or enhance the defendant's employment or employment prospects, and to "improve the defendant's likelihood of success."¹⁰⁰ The certificate may relieve the holder of "any collateral consequence of the conviction" or any disqualification that the court specifies, except those imposed by law for licensure in designated areas, such as education and the judiciary.¹⁰¹ A certificate may be granted if the court finds that (1) it is consistent with the applicant's rehabilitation, and (2) it would improve the applicant's likelihood of

from licensing disqualifications. CAL. PENAL CODE §§ 4852.06, .13, .16, .19 (West 2015); *People v. Moran*, No. G048100, 2014 WL 1326044 (Cal. Ct. App. Apr. 3, 2014) (stating that when the trial court grants a certificate of rehabilitation, it is essentially making a personal representation to the Governor that the person is worthy of a pardon); CAL. HEALTH & SAFETY CODE § 1522(g)(1)(A)(ii) (West 2015) (home health); and CAL. CODE REGS. tit. 10 § 3723 (West 2015) (real estate license). See *Newland v. Bd. of Governors*, 566 P.2d 254 (Cal. 1977). For a summary of the California certificate statute, see MARGARET COLGATE LOVE, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, CALIFORNIA, RESTORATION OF RIGHTS RESOURCE PROJECT (June 17, 2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ca.pdf.

Additionally, because this discussion focuses on statutes that provide relief from more than one specific collateral consequence, Alabama's certificate is not included. Alabama requires the Parole Board to issue a "Certificate of eligibility to register to vote" to qualifying individuals with a criminal history. ALA. CODE § 15-22-36.1 (2015). Arizona and Hawaii have statutory schemes that restore rights after a conviction but not through certificates. In sum, Arizona permits convicted persons to have their convictions "set aside" by the court which restores all rights and relieves the disabilities incurred from a conviction. ARIZ. REV. STAT. ANN. § 13-907 (2015). In Hawaii, the Uniform Act on the Status of Convicted Persons prohibits the State from disqualifying people for employment based on their criminal histories over 10 years old. HAW. REV. STAT. § 378-2(a)(1) (West 2015). For a comprehensive overview of how each state addresses restoration of rights, pardons, expungements, licensing, and firearm privileges for people with a criminal history, see Margaret Colgate Love, *Jurisdictional Profiles, Restoration of Rights Project*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, <https://www.nacdl.org/rightsrestoration/> (last visited Aug. 1, 2015) [hereinafter Love, *Jurisdictional Profiles*]. Finally, there is no discussion of Washington D.C.'s certificate statute because while it authorizes the Mayor to issue certificates, the certificates do not lift collateral consequences. Rather, the certificate reflects only the holders' criminal records and "shall not be construed as a statement of the individual's character." D.C. CODE § 24-1304(b)(5)(2013).

⁹⁸ "Eligible offenders" vary by each state and often the commission of certain crimes makes people ineligible for a certificate. For an in-depth review of the eligibility exclusions in each state, see Love, *Jurisdictional Profiles*, *supra* note 97.

⁹⁹ COLO. REV. STAT. §§ 18-1.3-107, -1.3-123, -1.3-303 (2013).

¹⁰⁰ *Id.* § 18-1.3-107(1).

¹⁰¹ *Id.* §§ 18-1.3-107(3), (4).

success in reintegrating into society and is in the public interest.¹⁰²

Connecticut

The Connecticut Board of Pardons and Parole may issue a “Certificate of Rehabilitation” under a provisional pardon law passed in 2014.¹⁰³ The certificate is also labeled a “Certificate of Employability” or a “Certificate of Suitability for Licensure.”¹⁰⁴ The certificates relieve automatic collateral penalties.¹⁰⁵ Such relief enables individualized consideration of an applicant in accordance with Connecticut’s nondiscrimination statute, which prohibits an employer from denying an applicant solely on the basis of a prior criminal conviction.¹⁰⁶ Employers may not discriminate against a job applicant who has a Certificate of Rehabilitation solely because of the applicant’s criminal history and must consider the certificate as evidence of rehabilitation.¹⁰⁷ A Certificate of Rehabilitation may be issued to eligible offenders at any time after sentencing if: (1) doing so promotes the public policy of rehabilitation through employment, and (2) the relief is consistent with public safety.¹⁰⁸

Georgia

In 2014, Georgia passed legislation authorizing the Board of Corrections to create a “Program and Treatment Completion Certificate.”¹⁰⁹ The certificate is intended to symbolize an “offender’s achievements toward successful reentry into society.”¹¹⁰ The Board was tasked with creating rules and regulations to govern the Certificate, including eligibility.¹¹¹ To date, eligibility requirements, rules, and regulations have not been issued.

¹⁰² *Id.* § 18-1.3-107(I), (II).

¹⁰³ CONN. GEN. STAT. §§ 54-108f, 54-130e, 54-301 (2015).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* § 54-103e.

¹⁰⁶ *Id.* The provisional pardon still exists for the same purpose but will likely be replaced by certificates of rehabilitation. MARGARET COLGATE LOVE, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, CONNECTICUT, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT 2 (March 28, 2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_ct.pdf; CONN. GEN. STAT. § 31-52i(d) (2015).

¹⁰⁷ CONN. GEN. STAT. §§ 31-51i(e), 46a-80(c).

¹⁰⁸ *Id.* §§ 54-130e(a)(3), -130e(c), -130a(d)(1)–(3). Note that the Board may also issue provisional pardons to relieve a conviction’s collateral consequences. *Id.* Provisional pardons have the same effect as Certificates. A full pardon – the issuance of which has increased significantly in recent years – goes much farther and allows records to be erased. CONN. GEN. STAT. § 54-142a(e); LOVE, *supra* note 97, at 4.

¹⁰⁹ GA. CODE ANN. § 42-2-5.2(c) (West 2015).

¹¹⁰ *Id.* Georgia also authorizes a “Restoration of Civil and Political Rights.” This is not a certificate but it does restore certain civil rights lost because of a conviction, including the right to run for and hold public office, sit on a jury, and be a Notary Public. *See Pardons & Restoration of Rights*, STATE BOARD OF PARDONS AND PAROLES, <http://pap.georgia.gov/pardons-restoration-rights> (last visited Aug. 1, 2015).

¹¹¹ GA. CODE ANN. § 42-2-5.2(c) (West 2015).

Illinois

Illinois' certificate system most closely resembles New York's. It authorizes two certificates, a Certificate of Relief from Disabilities and a Certificate of Good Conduct, and was passed to help job-seekers overcome employment barriers.¹¹²

Illinois courts may issue a Certificate of Relief at the time of sentencing or any time after to lift certain automatic licensing bars and enable the licensing authority to make an individual determination of licensing applicants with a Certificate.¹¹³ Employers are protected from civil liability if they hire an individual with a record and a Certificate.¹¹⁴ Certificates may be issued to eligible offenders if issuing it is "consistent with the rehabilitation" of the applicant and consistent with the public interest.¹¹⁵

Certificates of Good Conduct are slightly broader. Courts may issue this Certificate to relieve an eligible offender of any automatic employment bar.¹¹⁶ Employers who hire individuals with a Certificate of Good Conduct are also protected from civil or criminal liability for an act of any employee who has the Certificate.¹¹⁷ The court may issue a certificate to eligible offenders who demonstrate full rehabilitation after a finding that (1) the applicant warrants the issuance, (2) granting the certificate is consistent with the rehabilitation of the applicant, and (3) the relief granted is consistent with the public interest.¹¹⁸ CGCs have a waiting period – referred to as a minimum period of good conduct – that is imposed based on the severity of the crime the individual committed.¹¹⁹

Michigan

Effective January 1, 2015, the Michigan Department of Corrections is authorized to issue a "Certificate of Employability."¹²⁰ In civil actions seeking damages caused by the individual, an employer who knew about the certificate

¹¹² 730 ILL. COMP. STAT. 5/5-5.5-15, 5-5.5-25 (2015); COUNCIL OF ADVISORS TO REDUCE RECIDIVISM THROUGH EMP'T, SAFER FOUNDATION, CERTIFICATES OF RELIEF FROM DISABILITIES IMPLEMENTATION AND TRACKING: FULL REPORT 6 (2006); Michael Lorden, *Removing Roadblocks: Certificates of Good Conduct and Relief from Disabilities*, 18 PUB. INT. L. REP. 107, 109 (2013).

¹¹³ 730 ILL. COMP. STAT. 5/5-5-5(a), (h), (i).

¹¹⁴ *Id.* § 5/5-5.5-15(f). Employers are not civilly or criminally liable for the actions on an employee who has a Certificate except for a willful or wanton act. *Id.*

¹¹⁵ *Id.* § 5/5-5.5-15(a), (b).

¹¹⁶ *Id.* § 5/5-5.5-25(a).

¹¹⁷ *Id.* § 5/5-5.5-25(c) ("An employer is not civilly or criminally liable for an act or omission by an employee who has been issued a certificate of good conduct, except for a willful or wanton act by the employer in hiring the employee who has been issued a certificate of good conduct.").

¹¹⁸ *Id.* §§ 5/5-5.5-25(a-6), 5-5/5-30(a).

¹¹⁹ *Id.* § 5/5-5.5-30(c).

¹²⁰ MICH. COMP. LAWS § 791.234d(c)(2) (2015).

when hiring an applicant may use the certificate as evidence of due care in hiring.¹²¹ The Department may issue a certificate to a currently incarcerated individual no more than 30 days before release if the prisoner (1) successfully completed a career and technical education course, (2) received no major misconducts during the two years preceding his or her release, (3) received no more than three minor misconducts during the two years preceding his or her release, and (4) received a silver level or better on his or her national work-readiness certificate, or a similar score as determined by the department on an alternative job skills assessment test administered by the department.¹²² The Certificate is valid for 4 years after issuance.¹²³

New Jersey

Pursuant to legislation passed in 2010, New Jersey authorizes courts at sentencing to issue a certificate suspending disabilities, forfeitures, bars to employment, or a professional license.¹²⁴ If the defendant is sentenced to serve time in custody, the certificate may not be issued until three years from the completion of the sentence.¹²⁵ The certificates are intended to relieve bars to public employment.¹²⁶ Certificates also provide evidence to a licensing authority that the holder has “achieved a degree of rehabilitation,” and indicate that engaging in the proposed employment is compatible with the welfare of society.¹²⁷ This is intended to preclude a licensing authority from disqualifying or discriminating against an applicant but, like all certificates, it does not prohibit the licensing authority from considering the underlying conduct.¹²⁸

If the defendant is not sentenced to incarceration, a certificate may be issued upon a showing that (1) a licensing or employment disqualification exists that may endanger employment opportunities, (2) the applicant has no pending criminal charges, and (3) granting the certificate is consistent with the public interest.¹²⁹ If a defendant was incarcerated and later applies for a certificate, the supervising authority may issue it (1) to an eligible applicant who has not been convicted of a crime since the conviction for which he or she is under supervision, (2) if issuing the certificate will not pose a substantial risk to public safety, and (3) if such issuance will assist in successful reintegration and is consistent with the public interest.¹³⁰ A certificate issued at this point may suspend all

¹²¹ *Id.* § 600.2956a.

¹²² *Id.* § 791.234d(2).

¹²³ *Id.* § 791.234d(3). The statute does not provide a mechanism for renewal. *Id.* § 791.234d.

¹²⁴ N.J. STAT. ANN. §§ 2A:168A-71, 168A-8 (West 2015).

¹²⁵ *Id.* §§ 2A:168A-8b, 2A:168A-8d.

¹²⁶ *Id.* § 2A:168A-7(b)(1).

¹²⁷ *Id.* § 2A:168A-3.

¹²⁸ *Id.* A certificate only applies to the specific disability or bar specifically described in it. *Id.* § 2A:168A-8(a)(2).

¹²⁹ *Id.* § 2A:168A-8.

¹³⁰ *Id.* § 2A:168A-8(b).

applicable bars or may be limited to those specifically stated in the certificate.¹³¹

North Carolina

In 2011, North Carolina passed legislation authorizing courts to issue certificates.¹³² A certificate relieves most collateral sanctions – defined as penalties or disabilities imposed by law upon conviction.¹³³ Disqualifications due to a conviction (penalties that an agency, official, or court may impose because of a conviction) are not automatically lifted by a certificate, but the certificate may be considered favorably in deciding whether to impose the disqualification.¹³⁴ A certificate is a bar to any action alleging lack of due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting with a person to whom the certificate was issued if the certificate was known about at the time of the alleged negligence.¹³⁵ Certificates are available to individuals with no more than two lower-level felonies or misdemeanors a year after the completion of a criminal sentence if (1) the applicant is engaged in or seeking employment, training, education, rehabilitation, or has a lawful source of support, (2) the applicant has complied with all requirements of a criminal sentence and has no pending charges, and (3) granting the certificate would not pose a safety risk.¹³⁶

Ohio

Ohio has two different certificates, created at different times, and with different purposes.¹³⁷ In 2011, Ohio created Certificates of Achievement and Employability, which may be issued by the Department of Rehabilitation and Corrections (“DRC”) or the Adult Parole Authority.¹³⁸ These certificates indicate that a soon-to-be-released inmate has “performed exceptionally while under DRC’s control” and are issued to “enhance the ability” of recently released inmates to get a job.¹³⁹ The certificates relieve mandatory barriers to licensure and require individualized consideration of an applicant, essentially converting the mandatory barrier to a discretionary one.¹⁴⁰ They also provide employers

¹³¹ *Id.* § 2A:168A-8(b)(2).

¹³² N.C. GEN. STAT. § 15A-173.2 (West 2015).

¹³³ *Id.*

¹³⁴ *Id.* §§ 15A-173.1(3), 15A-173.2. See John Rubin, *Relief from a Criminal Conviction: A Digital Guide to Expunctions, Certificates of Relief, and Other Procedures in North Carolina*, UNIV. OF N.C. SCH. OF GOV’T, <http://www.sog.unc.edu/node/2588> (last visited Aug. 1, 2015).

¹³⁵ N.C. GEN. STAT. §§ 15A-173.2, -173.5.

¹³⁶ *Id.* § 15A-173.2.

¹³⁷ See *infra* notes 139 – 153.

¹³⁸ OHIO REV. CODE ANN. § 2961.21–24 (West 2011).

¹³⁹ CERTIFICATE OF ACHIEVEMENT AND EMPLOYABILITY BROCHURE, OHIO DEP’T OF REHAB. & CORR. (2012), <http://drc.ohio.gov/OCSS/AandEbrochure.pdf>.

¹⁴⁰ OHIO REV. CODE ANN. § 2961.21(D)(1) (West 2011); MARGARET COLGATE LOVE, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, OHIO, NACDL RESTORATION OF RIGHTS RE-

with a defense to negligent hiring claims.¹⁴¹ They are only issued to prisoners and parolees who satisfactorily complete in-prison vocational programs, demonstrate exemplary performance, complete community service hours, and demonstrate evidence of achievement and rehabilitation.¹⁴²

In 2012, Ohio created a Certificate of Qualification for Employment.¹⁴³ These certificates lift an automatic bar and enable a decision maker to make an individualized consideration of individuals applying for an occupational license or job.¹⁴⁴ Possession of this certificate also provides employers with a defense to negligent hiring claims.¹⁴⁵ These may be issued by a court to residents of Ohio who were convicted in Ohio and are subject to a “collateral sanction” because of that conviction.¹⁴⁶ There is a one-year (felony) or six-month (misdemeanor) waiting period after release to apply for this certificate.¹⁴⁷

Rhode Island

Rhode Island’s certificate legislation went into effect in July 2014 and provides the parole board with the ability to issue a “Certificate of recovery and re-entry” to individuals with non-violent convictions.¹⁴⁸ The certificate’s purpose is to relieve a person of “some of the collateral consequences of a conviction.”¹⁴⁹ The certificate is evidence of successful recovery and re-entry, and is one factor for a decision maker in determining a person’s ability to obtain a job, license, housing, or other benefit.¹⁵⁰ It is intended to assure employers of a person’s reliability, but employers who deny employment to a certificate holder cannot be held liable for civil damages on that basis.¹⁵¹ The waiting period to apply for a certificate is one year for a misdemeanor conviction and three years for a felony.¹⁵²

Tennessee

Tennessee’s 2014 certificate legislation provides the court with the ability to

SOURCE PROJECT 9 (March 28, 2015), https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_oh.pdf.

¹⁴¹ OHIO REV. CODE ANN. § 2961.23(B) (West 2011).

¹⁴² *Id.* § 2961.22(A)(1).

¹⁴³ *Id.* § 2953.25.

¹⁴⁴ *Id.* § 2953.25(D).

¹⁴⁵ *Id.* § 2953.25(G). Certain collateral consequences cannot be lifted, such as restrictions on employment with law enforcement, in healthcare, with driver’s licenses, and jury service. *Id.* §§ 92953.25(C)(5), 2961.02(B).

¹⁴⁶ *Id.* §§ 2953.25(A)(6), (B)(1), (B)(5). The court may order a report or investigation prior to issuing a Certificate. *Id.* § 2953.25(C)(1).

¹⁴⁷ *Id.* § 2953.25(4).

¹⁴⁸ R.I. GEN. LAWS § 13-8.2-6 (West 2015).

¹⁴⁹ *Id.* § 13-8.2-1.

¹⁵⁰ *Id.* §§ 13-8.2-1, 13-8.2-2(5).

¹⁵¹ *Id.* §§ 13-8.2-1, 13-8.2-8.

¹⁵² *Id.* § 13-8.2-4.

issue a "Certificate of Employability."¹⁵³ The purpose of the certificate is to obtain employment.¹⁵⁴ The certificate lifts automatic barriers to employment and licensing that occur due to a criminal record, but requires a decision maker in those instances to individually consider an applicant with a criminal record.¹⁵⁵ These certificates provide employers with immunity from negligent hiring claims and limit employer liability for other claims.¹⁵⁶ They may be issued to applicants who establish: (1) a character of honesty, respectability, and veracity and are "generally esteemed as such by the petitioner's neighbors," (2) that granting the certificate will materially assist in obtaining a job or license, (3) a substantial need for the certificate in order to live a law-abiding life, and (4) that granting it would not pose any risk to public safety.¹⁵⁷

Vermont

Effective January 1, 2016, Vermont will have legislation that both lifts mandatory bars and creates a certificate of restoration of rights.¹⁵⁸ The law requires the state to compile and publish all collateral consequences and disqualifications that a conviction would cause and provide this information to defendants in the pretrial phase of their case.¹⁵⁹ Vermont's law authorizes the court to issue an "Order of Limited Relief" any time after sentencing to relieve a specific mandatory sanction related to employment, education, housing, public benefits, or occupational licensing.¹⁶⁰ The statute also authorizes a "Certificate of Restoration of Rights," which is more comprehensive.¹⁶¹ It relieves most mandatory sanctions and is available five years from release or the most recent conviction, whichever is later.¹⁶² The certificate in Vermont, as in most states, instructs decision makers to consider a person individually rather than

¹⁵³ TENN. CODE ANN. § 40-29-107 (West 2015).

¹⁵⁴ *Id.* § 40-29-107(j).

¹⁵⁵ *Id.* § 40-29-107(m).

¹⁵⁶ *Id.* § 40-29-107(n)(2)–(3). Immunity for negligent hiring is provided to employers who knew of the certificate at the time of the alleged negligent hiring. *Id.*

¹⁵⁷ *Id.* § 40-29-107.

¹⁵⁸ 13 VT. STAT. ANN. §§ 8001–8014 (West 2015).

¹⁵⁹ *Id.* §§ 8004–8006. The law is based on the Uniform Collateral Consequences of Conviction Act issued by the Uniform Law Commission. *Id.* § 8004. See Press Release, Uniform Law Commission, Vermont First State to Enact Uniform Collateral Consequences of Conviction Act (June 10, 2014), <http://www.uniformlaws.org/NewsDetail.aspx?title=Vermont%20First%20State%20to%20Enact%20Uniform%20Collateral%20Consequences%20of%20Conviction%20Act>.

¹⁶⁰ 13 VT. STAT. ANN. § 8010 (West 2015). The order of limited relief may be granted after the applicant establishes that it will (1) materially assist in obtaining employment, education, housing, public benefits, or occupational licensing, (2) there is a substantial need for the relief in order to live a law-abiding life, and (3) granting it would not pose a risk to the public. *Id.*

¹⁶¹ *Id.* § 8011.

¹⁶² *Id.* §§ 8011–8012 (listing the crimes for which a certificate of restoration of rights may not be issued).

automatically denying a job, home, or benefit based on their criminal past.¹⁶³ The orders and certificates are evidence of due care in a negligence proceeding if the person accused of acting negligently in hiring, licensing, or otherwise conducting business with someone with a certificate knew of the certificate at the time of the alleged negligence.¹⁶⁴

A certificate may be issued after an individual establishes that he or she (1) is engaged in or is seeking employment, training, education or rehabilitation programs, or otherwise has a lawful source of support, (2) is in compliance with the terms of any criminal sentence or that there is justification for a failure to comply, (3) has no current pending criminal charges, and (4) that granting the certificate would not pose “an unreasonable risk to the public or any individual.”¹⁶⁵

IV. EMPLOYMENT PARADOX: WHERE DO CERTIFICATES FIT IN?

A. *Goals of Certificate Legislation*

In general, states with newly enacted certificate legislation aim to get certificates into the hands of people who can use them to address the collateral consequences of a conviction. More specifically, much of the state certificate legislation is intended – like New York’s – to encourage the employment of people with criminal records. But simply creating the opportunity for granting certificates in a jurisdiction will not aid in successful reentry unless the certificates are issued to those who are eligible and relevant to decision makers.¹⁶⁶ This research, therefore, examines how New York’s certificates, which have been offered for over 50 years, have gotten into the hands of eligible individuals and how relevant they have been to their employment. If new legislation is to follow in New York’s footsteps, states can use lessons learned from the accessibility and relevance of New York’s certificate system to increase the efficacy of their own laws.

B. *Examining Certificates in Practice: A Case Study*

This research examines the accessibility and relevance of New York’s certificates through the eyes of the individuals who may access and consider them. This article begins by providing numerical evidence demonstrating that the accessibility of New York’s certificates appear to differ significantly in practice from their stated intent. An empirical inquiry follows, deriving from qualitative

¹⁶³ *Id.* § 8011(e).

¹⁶⁴ *Id.* § 8014.

¹⁶⁵ *Id.* § 8011(b).

¹⁶⁶ See Radice, *supra* note 21, at 766 (noting that New York’s certificates could be on the books but would not increase the likelihood of successful reentry if they are not issued, publicly recognized, and enforced).

interviews with over 30 individuals throughout New York City.¹⁶⁷ The study's focus is New York City because it has the highest concentration of courts, attorneys, advocates, returning citizens, and employers in the state.¹⁶⁸ This portion of the inquiry explores multiple interactive relationships between people, application and issuance systems, and certificates.¹⁶⁹ By considering different actors in the certificate system, I explored the relationship between the goal of getting certificates into the hands of people who can use them and the reality of this experience. The multiple perspectives also provide insight into certificates' intended and actual relevance in employment.

The research is not purely empirical, but also includes scholarly work about certificates and other published accounts of peoples' interaction with them. I provide no quantitative data as to the statistical impact certificates have on society. Rather, I utilized qualitative methods to understand how people who interact – or could interact – with certificates, do so. These findings can be used to improve New York's certificate system and to inform other jurisdictions considering the same.

The analysis begins by asking if certificates are accessible. It then shifts to examine the relevance of certificates in obtaining employment. The employment inquiry specifically examines what happens in the employment arena if an individual does access a certificate, particularly with regards to a certificate's relevance in private employment and with occupational licensing.

1. Access

*I'm sure if you check the numbers, you'll find that for years the percentage of people who applied or received those documents are like the tiniest of the tiny.*¹⁷⁰

In New York between 1972 and 2003, an average of 3,200 Certificates of

¹⁶⁷ See ROBERT K. YIN, CASE STUDY RESEARCH DESIGN AND METHODS (5th ed. 2014); ROBERT S. WEISS, LEARNING FROM STRANGERS (1994).

¹⁶⁸ I interviewed federal judges, federal probation officers, state judges, state probation officers, people with certificates, people eligible for certificates but without, advocates, attorneys, direct service providers, and employment agencies.

¹⁶⁹ I audiotaped, transcribed, and analyzed and coded these interviews to identify recurring themes and patterns across respondents. To interpret the data, the transcripts were also blind coded by an academic with a Master of Science degree in Educational Research Methods and a PhD in Education. See MATTHEW B. MILES & A. MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS (2d ed. 1994).

¹⁷⁰ Interviewee, formerly incarcerated individual, current direct service provider. The interviews were all conducted from September 2014 – May 2015 in New York. The interviews are confidential. Each person interviewed signed a consent form that outlined the purpose of the research, procedures, possible risks and benefits, alternatives to an interview, an acknowledgment that the interview was voluntary, and a notice that the interviews are confidential.

Relief (“CRD”) were granted yearly.¹⁷¹ In 2003 alone, 108,738 individuals were convicted of misdemeanors.¹⁷² CRDs apply to misdemeanors, and while it may be unrealistic to suggest that even half of those convicted of a misdemeanor will later get a certificate, these numbers reveal that less than 3% of one year’s worth of misdemeanor convictions received a CRD in that same year. Even fewer Certificates of Good Conduct were granted during that same period: a total of 1,826 were issued between 1972 and 2003.¹⁷³

In 2005, it became policy to issue Certificates of Relief to eligible incarcerated individuals who were released on parole.¹⁷⁴ The rationale was that a person eligible for parole should also be eligible for a certificate.¹⁷⁵ In 2005, 13,875 people were paroled; the Parole Board awarded 380 total certificates.¹⁷⁶ In 2006, 12,070 people were granted parole and the Board issued a total of 657 certificates.¹⁷⁷ The greatest number of certificates were granted in 2008 when a total of 11,265 people were released on parole and 3,046 certificates were issued.¹⁷⁸ Again, because a CRD may only be issued to someone with *one* felony, not every person released on parole will be eligible for a CRD. It is hard to fathom, however, that the difference in the number of people who were paroled and those who received a certificate – over 7,000 people in one year – was solely due to eligibility.¹⁷⁹

¹⁷¹ Radice, *supra* note 21, at 739.

¹⁷² Statistics from N.Y. State Division of Criminal Justice Services to author (July 24, 2015) (on file with author).

¹⁷³ Radice, *supra* note 21, at 739.

¹⁷⁴ It was the policy of the Board of Parole who, at that time, issued certificates. *Id.* at 775.

¹⁷⁵ Testimony of Angela B. Jimenez, Deputy Comm’r for Community Supervision, N.Y. State Dep’t of Corrections and Community Supervision, to Nat’l Association of Criminal Defense Lawyers Task Force on Restoration of Rights and Status after Conviction, 186 (May 17, 2013) <http://www.nacdl.org/criminaldefense.aspx?id=32720>. See also Radice, *supra* note 21, at 775.

¹⁷⁶ STATE OF N.Y., DEP’T OF CORR. SERV’S., PAROLE BOARD AND PRESUMPTIVE RELEASE DISPOSITIONS, CALENDAR YEAR 2006, http://www.doccs.ny.gov/Research/Reports/2007/Parole_Board_Dispositions_2006.PDF [hereinafter PAROLE BOARD]. See also Radice, *supra* note 21, at 776.

¹⁷⁷ PAROLE BOARD, *supra* note 176. See also Radice, *supra* note 21, at 776.

¹⁷⁸ Radice, *supra* note 21, at 776; STATE OF N.Y., DEP’T OF CORR. SERV’S., PAROLE BOARD AND PRESUMPTIVE RELEASE DISPOSITIONS, CALENDAR YEAR 2008, http://www.doccs.ny.gov/Research/Reports/2009/Admissions_and_Releases_2008.pdf.

¹⁷⁹ Requests to the Department of Corrections and Community Supervision (DOCCS) for interviews and data on these and similar statistics have not been granted. In December 2014 the author began correspondence with DOCCS to start the process of gathering statistical information about certificates and for permission to interview DOCCS Clemency Bureau employees about the certificate process. Pursuant to Directive 0403, the author made a formal request for the same on February 12, 2015. On April 7, 2015, the author was informed the data request was “in the queue.” On May 29, 2015, a request for the information was

These numbers reveal that the Board was not granting many certificates; however other data reveals that people were not requesting them either. Between 2007 and 2011, there were less than 1,500 yearly applications total for both types of certificates.¹⁸⁰ In 2011, DOCCS received only 1,285 total combined applications.¹⁸¹ In 2013, that number increased to 1,435 combined applications, yet the number of CRGs granted declined.¹⁸² The low number of certificates issued compared to the eligible population suggests that people do not know about them or have difficulty applying for them.¹⁸³ The next sections address each of these possibilities.

a. *Knowledge of Certificates*

Throughout the criminal justice system, there are many opportunities for individuals who are eligible for certificates to learn about them. Legal advocates and former probation officials, however, believe that very few people who are in a position to educate people about certificates know about certificates themselves.¹⁸⁴ Many people interviewed echoed this belief.

Attorneys

According to attorneys, many are unaware of the collateral consequences of

made under the New York Freedom of Information Law, N.Y. Pub. Off. Law §§ 84–90 (McKinney 2014), for the information. The FOIL request sought: (1) the number of CRD's applied for in each year from 2005–2013, (2) the number of CRD's granted in each year from 2005–2013, (3) the reasons for denying CRD's, (4) the number of people who are eligible for CRD's when leaving DOCCS system, and (5) the number of people who receive a CRD when leaving DOCCS system. Under N.Y. Pub. Off. Law § 89(3)(a), the government agency has five business days to grant or deny access, or if more time is needed, to acknowledge the request and indicate an approximate response date usually not more than 20 additional business days from the acknowledgment. On June 15, DOCCS stated it anticipated replying to the data request by July 1, 2015. On July 17, DOCCS stated it expected to respond to the request by August 7. As of October 9, 2015, DOCCS responded to these requests with one set of numbers: applications received between 2005–2013 for both CRDs and CGCs and the number of CGCs granted in that time. No other information has been provided. Records of the above communication and Freedom of Information Law request are on file with author.

¹⁸⁰ Data from Legislative Analysts, Correction Committee, New York State Assembly to author (May 15, 2015) (on file with author).

¹⁸¹ Data provided by DOCCS on October 9, 2015. On file with the author. The numbers are more dire in Illinois, which had nearly 4 million people with criminal histories in 2012 and issued 24 certificates that same year. Michael Lorden, *Removing Roadblocks: Certificates of Good Conduct and Relief from Disabilities*, 18 PUB. INT. L. REP. 107, 109 (Spring 2013).

¹⁸² According to data provided by DOCCS on October 9, 2015, in 2012 there were 1,341 applications for both CRDs and CGCs and 462 CGCs were granted. In 2013, 1,435 total applications were received and 459 CGCs were granted. Data on file with author.

¹⁸³ Radice, *supra* note 21, at 766.

¹⁸⁴ *Id.* at 765 (citing interviews with a lawyer and probation official).

a conviction or the certificates that can lift them.¹⁸⁵ People eligible for certificates reinforced this in their interviews – many stated that their attorneys never mentioned certificates.¹⁸⁶ Judges commented that the defense bar has a varied knowledge of certificates, reporting that some attorneys are completely unaware of certificates and that others routinely request them.¹⁸⁷ From the bench's perspective, the attorneys most aware of certificates are the indigent-based attorneys and public defenders.¹⁸⁸ This observation is reinforced by the public activities of such agencies around certificates, including testimony about certificates and publications that explain them.¹⁸⁹

DOCCS

Individuals could learn about certificates while incarcerated and in the custody of DOCCS. Some do. Some formerly incarcerated interviewees reported learning about certificates from booklets provided by legal service organizations, while others said their information came from advocacy groups who volunteered in the prisons.¹⁹⁰ Others learned about certificates from fellow inmates or in the prison law library.¹⁹¹ Some received no information on certificates at all while incarcerated and still others reported hearing about certificates in DOCCS's Phase III Program, which is intended to prepare inmates for reentry.¹⁹²

All inmates at DOCCS facilities are offered the Transitional Services Program, a three phase program designed to assist people in preparing for reentry into their community.¹⁹³ Phase III of the program is mandatory for all inmates

¹⁸⁵ Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067, 1077–81 (2004) (noting that judges and prosecutors are similarly unaware of collateral consequences and that judges and defense attorneys have no statutory duty to ensure the defendant is aware of these consequences); Frank Thurston Green, *NY's Certificates Offer Catch-22 to People Convicted of Crimes*, CITY LIMITS, February 17, 2015. Until recently, prosecutors gave very little thought to the collateral consequences of a conviction – let alone how they are addressed. See Sarah B. Berson, *Beyond the Sentence – Understanding Collateral Consequences*, NIJ JOURNAL, Issue No. 272, 26, (September 2013).

¹⁸⁶ See interview information *supra* notes 168–170.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See Judy Whiting, Gen.Counsel, Cmty. Serv. Soc'y, NACDL Testimony, Day 2 p. 116–228 (May 16, 2013) available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32736&libID=32705>; Legal Action Center, Lowering Criminal Record Barriers, Certificates of Relief/Good Conduct and Record Sealing, (2013); Civil Action Practice, *The Consequences of Criminal Proceedings in New York State*, THE BRONX DEFENDERS, (Aug. 2014), <https://www.prisonlegalnews.org/media/publications/Consequences%20of%20Criminal%20Proceedings%20in%20NY%20Legal%20Guide%20Bronx%20Defenders%202014.pdf>.

¹⁹⁰ See interview information *supra* notes 168–170.

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ *Phase Three*, DEP'T OF CORR. AND CMTY SUPERVISION, TRANSITIONAL SERV. PRO-

and intended to prepare them to enter society as “crime free, productive citizens in possession of a fully developed portfolio that contains personal documents, educational and vocational certificates, service referral information, and employment related materials.”¹⁹⁴ Much of Phase III emphasizes employment, but the Phase III curriculum does not include education about Certificates of Relief and Certificates of Good Conduct.¹⁹⁵ Phase III’s portfolio of “relevant documents for employment” does not include certificates.¹⁹⁶

This research reveals that education about certificates while incarcerated is inconsistent throughout facilities and among inmates. But a policy regarding certificates that has been in place for a decade could, if implemented, provide a more uniform experience. The policy, started in 2005, is to issue certificates to eligible inmates when they are paroled.¹⁹⁷ In 2011, the Department of Parole merged with the Department of Corrections – creating DOCCS – which then assumed the responsibility of granting certificates.¹⁹⁸ DOCCS maintained this policy of issuing certificates to eligible individuals when they are paroled. According to the former Deputy Commissioner for Community Supervision at DOCCS, people serving sentences who are eligible for a CRD are to be awarded one “right at the door on their way out.”¹⁹⁹ This policy is reflected in DOCCS Directives, which state that the Department will “prepare a certificate for each eligible offender approved for release.”²⁰⁰

Implementation of this policy has been sporadic at best. Most advocates, attorneys, and direct service providers interviewed stated that they are unaware of DOCCS’ “out the door” policy.²⁰¹ And many interviewees who were eligible for a certificate at parole reported that they did not receive one at the time they were paroled.²⁰² One eligible interviewee, when asked if he was issued a certificate when paroled, replied “absolutely not” and stated that that he

GRAM, <http://www.doccs.ny.gov/ProgramServices/transitional.html#pse3> (last visited Aug. 10, 2015).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Radice, *supra* note 21, at 775.

¹⁹⁸ *Merger of Department of Correctional Services and Division of Parole*, DEP’T OF CORR. AND CMTY. SUPERVISION (April 2011), <http://www.doccs.ny.gov/FactSheets/DOCS-Parole-Merger.html>.

¹⁹⁹ Angela Jimenez, Deputy Comm’r for Cmty. Supervision, N.Y. State Dep’t of Corr. and Cmty. Supervision, NACDL Testimony Day 3, at 186 *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

²⁰⁰ Directive No. 8400, STATE OF NEW YORK DEP’T OF CORR. AND CMTY. SUPERVISION I (June 2013). Directive No. 9104, issued June 2, 2015, references 8400 and again provides detailed instruction and procedures to parole officers and DOCCS employees regarding the issuance of CRDs to eligible inmates upon release or sometime after.

²⁰¹ *See* interview information *supra* notes 168–170.

²⁰² *Id.*

did not know anyone who had.²⁰³ The reality of these statements is reflected by the numbers. In 2011, DOCCS granted 2,359 Certificates of Relief at the time of release from incarceration.²⁰⁴ The same year, 8,323 people were released on parole.²⁰⁵

Parole

For those who were paroled but who did not receive a certificate – either because the out-the-door policy was not utilized or because the parolee was eligible for a Certificate of Good Conduct after a waiting period – their parole officer could be a source of information about getting a certificate. According to information from advocates and parolees, this opportunity is not consistently taken.²⁰⁶ Advocates note difficulties in overcoming the unwillingness of some parole officers to accept applications from parolees.²⁰⁷ Interviews revealed a wide range in parole officers' participation in obtaining certificates for parolees.²⁰⁸ One parolee reported that her officer took care of everything necessary for her to get a certificate.²⁰⁹ The officer collected the necessary information, filled out the certificate application, and called to congratulate her when she was issued a certificate.²¹⁰ Yet another certificate-eligible parolee reported that his parole officer – in direct contravention to the statute and DOCCS policy – told him he was ineligible for a certificate while on parole, but that one would arrive within 30 days after his parole ended.²¹¹ After being off parole for five months, his has yet to arrive.

²⁰³ *Id.*

²⁰⁴ Data from Legislative Analysts, Correction Committee, New York State Assembly (May 15, 2015) (On file with author).

²⁰⁵ *Admissions and Releases Calendar Year 2011*, STATE OF NEW YORK DEP'T OF CORR. AND CMTY. SUPERVISION, http://www.doccs.ny.gov/Research/Reports/2012/Admissions_and_Releases_2011.pdf. Updated numbers and requests for interviews were requested but not provided. See Radice *supra* note 21. Again, because CRDs are only issued to people with no more than one felony, not everyone who makes parole is going to be eligible. The difference, however, of nearly 6,000 people who were paroled and those who were granted a certificate is the unlikely result of eligibility. More information on these numbers was requested but not provided by DOCCS. See discussion *supra* note 179.

²⁰⁶ See interview information *supra* notes 168–170.

²⁰⁷ Letter from Coalition of Reentry Advocates to Deputy Commissioner, New York State Department of Corrections and Community Supervision, (July 16, 2013). The same was not reported for individuals on federal supervision. For eligible individuals with a federal conviction, a CRD may be requested upon the recommendation from the chief probation officer pursuant to N.Y. CORRECT. LAW § 703(7). People formerly on federal supervised release and federal probation officers reported finding this process efficient and accessible. See interview information *supra* notes 168–170.

²⁰⁸ See interview information *supra* notes 168–170.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ N.Y. CORRECT. §§ 702(4), 703(6) (McKinney 2015).

Probation

People who are not incarcerated are often sentenced to probation.²¹² Probation officers therefore have the chance to educate the non-incarcerated population about certificates. Because of its one-felony only criteria, probationers are often eligible for Certificates of Relief from Disabilities (CRD).²¹³ In the last six years, the New York City Probation Department (Probation) increased efforts to get CRDs into the hands of eligible probationers.²¹⁴ In interviews, judges and advocates both noted Probation's interest in providing as many CRDs as possible to qualified probationers.²¹⁵ One attorney commented that Probation seems to have "a really good grasp on educating people" about certificates.²¹⁶

Probation uses various methods to educate probationers about CRDs. One such method is the implementation of "COR dates."²¹⁷ On these days, Probation invited eligible people to the courthouse, explained the CRDs to attendees, and had probation officers on hand to help with paperwork.²¹⁸ Probation sent the applications, en masse, to the courts for judicial signatures. In 2012, CRD days resulted in the dispersal of 2,000 CRDs to eligible individuals.²¹⁹

Probation also promotes certificate issuance through its policy of recommending a certificate for eligible defendants in every pre-sentence report.²²⁰ Issuing a CRD at sentencing allows the person leaving court with a conviction to depart with a certificate that can lift the barriers created by a conviction. Information provided by probation officers and probationers, however, reveals that there remains a disconnect between the office's goal of increasing the distribution of certificates, and the bench's willingness to issue them.²²¹ Some judges do not follow the statute mandating that they rule on requested certificates at sentencing and provide a reason if the certificate is not issued.²²² Failure to issue certificates at sentencing may stem from the judge's misinterpretation of a certificate's purpose.

The legislature intended certificates to be vehicles for rehabilitation – not

²¹² See *General Frequently Asked Questions*, N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, http://www.criminaljustice.ny.gov/opca/general_faq.htm#1 (last visited Aug. 10, 2015) (stating that in New York, probation is a sentence imposed by a criminal court that releases individuals into the community while parole follows a term of incarceration).

²¹³ See discussion *supra* Section III.A.2.

²¹⁴ See interview information *supra* notes 168–170.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ COR is short for Certificate of Relief. Vinny Schiraldi, Comm'r, N.Y. Dep't of Prob., NACDL Testimony, Day 3 at 22, *available at* <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Radice, *supra* note 21, at 774.

²²¹ See interview information *supra* notes 168–170.

²²² Radice, *supra* note 21, at 774.728; N.Y. CORRECT. § 702(1) (McKinney 2015).

rewards for its achievement.²²³ The legislature's intent is reflected in the statute's 2011 amendment, which provides that a judge must determine if an eligible defendant should be issued a CRD at sentencing by examining whether the relief the certificate may bring is (1) consistent with rehabilitation and (2) consistent with the public interest.²²⁴ The goal of this amendment was to provide more certificates to eligible defendants at sentencing so the certificates could assist with rehabilitation.²²⁵ While the Probation Department views certificates as tools to aid rehabilitation, judges may not.²²⁶

Judiciary

*If the judge is a former defense attorney, he'll probably sign it and if he was a former prosecutor, he probably won't.*²²⁷

There is a reported dichotomy in the courtroom between whether the certificates are tools to aid in rehabilitation or evidence of rehabilitation itself. Practitioners claim that some courts are disinclined, even resistant, to certify rehabilitation at the sentencing stage.²²⁸ Some judges believe that certificates must be earned, while others want people to serve time under supervision before they issue a certificate.²²⁹ One judge has a self-imposed one-year-after-sentencing rule and will only consider a certificate application after that time.²³⁰ In contrast, some judges reported granting every certificate they were given. One judge noted an inability to "think of a case where I wouldn't give it."²³¹

Accessibility at sentencing fluctuates. These findings reinforce a former New York City Probation Commissioner's comments that getting a CRD is "completely roulette" – if you're lucky enough to get an attorney who pays attention to it or a judge who knows about it, you may get one.²³²

²²³ Radice, *supra* note 21, at 739.

²²⁴ N.Y. CORRECT. § 702(1) (McKinney 2015).

²²⁵ *Id.*; Memorandum in support of Bill No A07597A, <http://www.communityalternatives.org/pdf/2011-amend-Corr-L-702.pdf>.

²²⁶ Radice, *supra* note 21, at 776. *See also* Vincent Schiraldi, *A Powerful Tool for Rehabilitation*, N.Y. L.J., (2012). The former Commissioner of Probation spoke to how this may sound counter-intuitive, asking "how can someone prove they've been rehabilitated when they haven't even begun serving their sentence?" The answer, he writes, is found in the legislative history, which makes clear that certificates are intended to aid in rehabilitation, not be a reward for it. *Id.*

²²⁷ Interviewee, former state probation officer. *See* interview information *supra* notes 1678–16970.

²²⁸ Runa Rajagopal, Supervising Attorney, Civil Action Practice, Bronx Defenders, NACDL Testimony, Day 3, at 242–47, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

²²⁹ *Id.* at 245–46.

²³⁰ *Id.* at 243.

²³¹ *See* interview information *supra* notes 168–170.

²³² Schiraldi, *supra* note 226, at 20–22.

Direct Service Providers

Failure to disperse certificates to eligible individuals not only leaves people without the benefits of a certificate, it is a missed opportunity to educate others. Direct service providers in the reentry field work to meet clients' needs in many areas, including housing, medical care, job training, and counseling. Direct service providers include not for profit agencies that provide supportive programming and they are in a unique position to utilize and educate others about certificates. Repeatedly, interviewees who are eligible for certificates and who work in reentry services stated they "knew no one" with a certificate.²³³ One interviewee reported working with over 200 people a year who have a criminal record.²³⁴ Another worked with 90 people with criminal records in the proceeding eight months.²³⁵ If these direct service providers who are eligible for certificates themselves had one, they could educate the eligible individuals they work with and share their experiences on getting and using certificates.

Necessity

The need for a certificate prompts educating oneself about one: necessity was a consistent way that people learned about certificates.²³⁶ Judges, probation officers, advocates, and attorneys all reported that people who ask about getting a certificate are usually motivated by questions of employment or licensure.²³⁷ The relevance of a certificate to employment and occupational licenses is examined below in Section IV.B.2.

b. Application

Accessibility requires both knowledge that certificates exist and the ability to acquire one. As discussed above, knowledge about certificates can come from various sources. This inquiry focuses on the process of obtaining a certificate once an individual knows about its existence.

For many in New York, the process of obtaining a certificate is an insurmountable roadblock.²³⁸ Attorneys and eligible individuals reported that it is challenging to figure out which certificate people are eligible for, where to apply, and how to complete the complex DOCCS application form.²³⁹

Eligibility

The two-certificate system can be confusing. Individuals are either eligible for a Certificate of Relief from Disabilities or a Certificate of Good Conduct.²⁴⁰

²³³ *See id.*

²³⁴ *See id.*

²³⁵ *See id.*

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *Id.*

²³⁹ *See id.*

²⁴⁰ *See discussion supra* Section III.A.2.

This can lead to confusion for agencies, applicants, and the courts.²⁴¹ Legislation proposed in 2015 would have changed the two-certificate system.²⁴² The proposed legislation provides for one certificate – a Certificate of Restoration – to be issued after various waiting periods, depending on the crime committed.²⁴³ The legislation was drafted in response to complaints about the two-certificate system, but has not received further legislative support or an outpouring of community support.²⁴⁴

Process

Individuals may obtain a certificate of relief from the sentencing court or DOCCS.²⁴⁵ For misdemeanors, individuals need a separate CRD for each conviction, which is time consuming and requires an applicant to go to each sentencing court that had jurisdiction over each misdemeanor.²⁴⁶ When there are multiple misdemeanors, this process may be confusing.²⁴⁷ Each courthouse throughout the city operates differently regarding certificates. The Probation Department created a guide to assist applicants, which reveals the complicated and varied processes used in each courthouse.²⁴⁸ The application for a CRD from the sentencing court is one page²⁴⁹ and the application for the same certificate from DOCCS is 12 pages.²⁵⁰

The DOCCS application process has been described as confusing, time-consuming, and onerous.²⁵¹ The requirements – which include a list of all resi-

²⁴¹ Radice, *supra* note 21, at 770.

²⁴² N.Y. Bill A4280-2015 was introduced by N.Y. State Assemblyman J. Aubury. In January, 2015, the bill was referred to the Committee on Codes, N.Y. Bill A03993 (New York Assembly Bill 3993) (2015–2016); New York Senate Bill 74 (2015–2016 session).

²⁴³ *Id.*

²⁴⁴ Telephone interview with Tana Agostini and Dianna Goodwin, New York State Assembly Correction Committee (May 26, 2015).

²⁴⁵ N.Y. Corr. Law §§ 702(1), 703(1)(a) (McKinney 2015).

²⁴⁶ See Legal Action Center, *Lowering Criminal Record Barriers*, at 22, (noting that “each Certificate of Relief from Disabilities only covers one conviction. You must apply for a separate Certificate of Relief from Disabilities for each misdemeanor or felony conviction.”), http://lac.org/wp-content/uploads/2014/12/LoweringCriminalRecordBarriers_rev3.pdf.

²⁴⁷ Radice, *supra* note 21, at 730.

²⁴⁸ *Obtaining Certificates of Relief from Disabilities through NYC Court Probation Offices, Application Procedure by Borough*, NYC DEP’T OF PROBATION (Sept. 2008), www.reentry.net/ny/library/attachment.141105.

²⁴⁹ *State of New York Application by an Eligible Offender for Certificate of Relief from Disabilities*, www.nycourts.gov/courts/10jd/suffolk/dist/pdf/DPCA-52.pdf.

²⁵⁰ Andrew M. Cuomo & Anthony J. Annucci, *Department of Corrections and Community Supervision Certificate of Relief from Disabilities – Certificate of Good Conduct Application and Instructions*, NEW YORK STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, https://www.pardone.ny.gov/pdf/DOCCS-CRD-Application_Instructions.pdf.

²⁵¹ Ms. Patricia Warth, Co-Director of Justice Strategies, Center for Community Alternatives, NACDL Testimony, Day 2 at 43, available at <http://www.nacdl.org/WorkArea/>

dences, a detailed employment record for the preceding five years, and submission of tax returns and W-2 forms - discourage potential applicants.²⁵² The overwhelming application creates a slow and burdensome process.²⁵³

Advocates have long sought a more efficient application.²⁵⁴ In June 2015, DOCCS issued a new application with a format that clarifies the instructions and includes names and phone numbers of agencies that can assist with the application process.²⁵⁵ The application itself, however, remains largely unchanged. The most significant change is that the new application requires that the applicant list only out of state convictions, not both New York and out of state convictions, as required by the old application.²⁵⁶

2. Relevance

A stated purpose of the certificates is to promote employment.²⁵⁷ Theoretically, a certificate can do a “great deal to mitigate the seriousness of a conviction in an employer’s mind.”²⁵⁸ But there is skepticism over whether employers

DownloadAsset.aspx?id=32736&libID=32705; National Employment Law Project, the National H.I.R.E. Network, *State Reforms Promoting Employment of People with Criminal Records: 2010–2011 Legislative Roundup*, at 7.

²⁵² Special Comm. On Collateral Consequences of Criminal Proceedings, N.Y. State Bar Ass’n Re-Entry and Reintegration: The Road to Public Safety 105 (2006); Coalition of Re-entry Advocates, Letter to Deputy Commissioner, New York State Department of Corrections and Community Supervision, July 16, 2013 (on file with the author); Fortune Soc’y, Applying for Certificates of Relief from Disabilities and Certificates of Good Conduct: Obstacles and Challenges (2010) (on file with the author).

²⁵³ Frank Thurston Green, *NY’s Certificates Offer Catch-22 to People Convicted of Crimes*, CITY LIMITS (February 17, 2015), <http://citylimits.org/2015/02/17/nys-certificates-offer-catch-22-to-people-convicted-of-crimes/>. In September 2015, Governor Cuomo accepted and adopted the recommendations from the Council on Community Re-Entry that included the suggestion that there be a streamlined application process for certificates, noting that the “process of applying for these certificates has historically been burdensome and slow.” *low.ss of applying for these certificates has historically been burd-actions-reduce-barriers-new-yorkers-criminal-convictions Id.*

²⁵⁴ Coalition of Reentry Advocates, Letter to Deputy Commissioner, New York State Department of Corrections and Community Supervision, May 12, 2012; Coalition of Reentry Advocates, Letter to Deputy Commissioner, New York State Department of Corrections and Community Supervision, July 16, 2013 (on file with the author).

²⁵⁵ Cuomo & Annucci, *supra* note 250.

²⁵⁶ *Id.* at 9 (noting on the application that there is no reason to ask an applicant for his or her New York criminal history as the Department has access to New York conviction information).

²⁵⁷ Radice, *supra* note 21, at 738 (quoting State Senator Ralph Marino, who sponsored expanding the certificate eligibility).

²⁵⁸ Daniel J. Salemsen, David Jason Fischer, Louis D. Miceli, *Getting the RAP Down, Employment Strategies for New Yorkers with Criminal Records*, 17 (August, 2010), https://workforceprofessionals.org/resources/documents/Getting_the_RAP_Down.pdf.

know what certificates are or how to use them in employment decisions.²⁵⁹ Many unanswered questions exist about how employers actually use certificates in their decision making.²⁶⁰ This section addresses those questions.

a. *Private employers*

*Certificates are irrelevant to a lot of employers. A lot of employers.*²⁶¹

The empirical evidence reveals a gap between the use of a certificate for gaining employment and an employer who knows what a certificate is. All interviewees were asked about certificates and employment.²⁶² Their responses were remarkably similar and reflected private employers' lack of knowledge about certificates.²⁶³ Scholars surmise that certificates are of limited value because employers are unwilling to rely on them.²⁶⁴ It is possible however, that rather than being unwilling to rely on them, employers are unable to because they simply do not know what certificates are.

The following is a representative sampling of the interviewees' comments when asked about certificates and private employers:²⁶⁵

- Employers do not ask about certificates.
- I've never encountered where it helped anyone with employment.
- In over a decade of placing people with criminal records in jobs, I've never had an employer ask if a candidate has a certificate.
- I cannot remember a time a certificate made a difference for an employer.
- I've never seen a certificate of relief where an employer says, "Okay, let me see that, and it shows me that you're on the right path and I can work with you." I haven't seen that.
- Employers don't even know that certificates exist.
- The average employer doesn't know what it means.

A lack of employer knowledge about the existence of certificates not only impedes employers' ability to consider certificates as evidence of rehabilitation, it frustrates certificate holders who initially viewed the certificate as a useful tool for securing employment. One respondent who has a certificate stated that it "just tends to add more confusion to me because people are not educated on

²⁵⁹ Warth, *supra* note 251, at 42.

²⁶⁰ Radice, *supra* note 21, at 767.

²⁶¹ Interviewee, direct service provider, eligible for certificate.

²⁶² See interview information *supra* notes 168–170.

²⁶³ See *id.*

²⁶⁴ MARGARET COLGATE LOVE, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, NEW YORK, NACDL RESTORATION OF RIGHTS RESOURCE PROJECT (January 28, 2015).

²⁶⁵ See interview information *supra* notes 168–170, specifically from interviews with direct service providers who assist with job placement, employment agencies, and individuals with criminal records (with and without certificates).

what it is. I don't know what it is."²⁶⁶ This comment reflects a common theme revealed in the research – even certificate holders are confused about what certificates are and how to use them.²⁶⁷

The practicality of using a certificate to obtain employment is also reportedly challenging. One respondent with a certificate noted that there is simply no place on a paper or on-line application to tell a potential employer about the certificate.²⁶⁸ Another reported that he has had a certificate for two years but has yet to use it because employers "don't know what I'm talking about."²⁶⁹

Employment agencies reported that rather than asking for an applicant with a certificate, employers want someone who is motivated and competent.²⁷⁰ These reported desires do not necessarily reflect what employers want when an applicant has a criminal record.²⁷¹ There is ample research showing employer bias against applicants with criminal records.²⁷² Certificates appear to be most helpful in overcoming this bias when used in conjunction with anti-discrimination laws as discussed below in section V.

b. *Occupational Licensing*

*I'd say the number one use for them is gonna be occupational licensing.*²⁷³

Nearly all respondents stated that certificates are invaluable in obtaining an occupational license. Many professions have either mandatory or discretionary bars for people with criminal records.²⁷⁴ According to the statutes, certificates must be considered by the licensing authority as evidence of rehabilitation.²⁷⁵ When asked where the certificates mattered, the professions mentioned most often by interviewees were health care, real estate agent, and security guard.²⁷⁶

The healthcare field has many barriers for people with a criminal record.²⁷⁷ One attorney recounted using a certificate to overcome these barriers and save a

²⁶⁶ *See id.*

²⁶⁷ *See id.*

²⁶⁸ *See id.*

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ *See id.*

²⁷² *See* Harry Holzer, Steven Raphael, and Michael Stoll, *Will Employers Hire Former Offenders? Employer Preferences, Background Checks and Their Determinants*, in *IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION*, 205 (Bruce Western et al. eds., 2004).

²⁷³ Interviewee, advocate, legal service provider. *See* interview information *supra* notes 168–170.

²⁷⁴ *See* discussion *infra* section II.A.

²⁷⁵ N.Y. CORRECT. LAW §§ 752, 753 (McKinney 2007).

²⁷⁶ *See* interview information *supra* notes 168–170.

²⁷⁷ In 2005, the New York Department of Health issued mandatory guidance to its operators, which included nursing homes and assisted living facilities that barred individuals convicted of serious crimes from being employed in a nursing home or home care service agen-

client's job in the healthcare field.²⁷⁸ The attorney recalled a client who worked in healthcare for many years before her employer implemented background checks.²⁷⁹ When the client's record was discovered, she was fired.²⁸⁰ The attorney helped the client get a certificate of relief from disabilities, which they then used to get the client's job back.²⁸¹

For individuals convicted of certain crimes, there is a mandatory bar to real estate agent and security guard licenses.²⁸² These bars may be lifted with a certificate.²⁸³ Security guard and real estate licenses are issued by the New York Department of State's Licensing Services.²⁸⁴ If the Department denies a license, the matter may be heard by an Administrative Law Judge, who determines whether an applicant was properly denied the requested license.²⁸⁵

In this hearing, the certificate is considered, but it does not guarantee that a license will be issued.²⁸⁶ The certificate creates a presumption of rehabilitation.²⁸⁷ Evidence of a certificate is factored along with applicants' comments regarding their criminal record, how long ago the crime occurred, what the applicant has done since the crime occurred, character references, and the statutory requirements for the specific license requested.²⁸⁸ These factors are consid-

cy. The State of New York, Department of Labor, *The Road to Re-Entry* 9 (2014), <http://labor.ny.gov/workforcenypartners/toolkits/the-road-to-reentry-supplemental-guide.pdf>.

²⁷⁸ See interview information *supra* notes 168–170.

²⁷⁹ See *id.*

²⁸⁰ See *id.*

²⁸¹ See *id.*

²⁸² N.Y. REAL PROP. LAW § 440-a (McKinney 2010); N.Y. GEN. BUS. LAW § 74 (McKinney 2011).

²⁸³ N.Y. GEN. BUS. LAW § 74 (McKinney 2011); N.Y. Real Prop. Law § 440-a (McKinney 2010). For a comprehensive overview of the impact of a criminal record on occupational licenses, see LEGAL ACTION CTR., NEW YORK STATE OCCUPATIONAL LICENSING SURVEY (2006), <http://lac.org/wp-content/uploads/2014/12/Occupational-Licensing-Survey-2006.pdf>.

²⁸⁴ Department of State Division of Licensing Services, (last accessed January 21, 2016), (date) <http://www.dos.ny.gov/licensing/>.

²⁸⁵ Department of State Division of Licensing Services, (last accessed January 21, 2016), (date) <http://www.dos.ny.gov/ooah/guide1.html>, see State Administrative Procedure Act, § 401 (2010).

²⁸⁶ A certificate lifts the bar only. Without it, an application for a license with mandatory bars will not be considered. See James Story, *State of New York, Department of State, Office of Administrative Hearings* 140 DOS 93. (November 18, 1993), available at http://docs.dos.ny.gov/ooah/decisions/non_indexed/STORY.htm.

²⁸⁷ N.Y. CORRECT. LAW §§ 752, 753 (McKinney 2007); Jack N. Ferguson, *State of New York, Department of State, Office of Administrative Hearings* 605 DOS 08 (April 30, 2008) (first citing *Matter of Bonacorsa*, 71 N.Y.2d 605 (1988),; then citing *Hughes v. Shaffer*, 154 A.D.2d 467 (1989)), available at http://docs.dos.ny.gov/ooah/decisions/Real_estate/Ferguson_Jack.htm.

²⁸⁸ Decisions issued by the Department of State, Office of Administrative Hearings, are available at <http://www.dos.ny.gov/ooah/decisions.htm>.

ered in accordance with New York's anti-discrimination law.²⁸⁹ The research revealed that this combination of certificates and New York's anti-discrimination law is the most effective use of the certificate system.

V. CERTIFICATES AND ANTI-DISCRIMINATION LEGISLATION COMBINED

The research above examined certificate accessibility and relevance in employment. This section moves past findings in these categories and identifies the re-occurring theme that came up throughout the research: certificates are significantly more impactful when paired with anti-discrimination legislation.

Scholars and practitioners find that certificate programs are most effective when supported by strong nondiscrimination standards.²⁹⁰ Currently, New York and Connecticut have such laws.²⁹¹ This legislation prohibits discrimination based on a criminal record and when used in conjunction with certificates, gives certificates a necessary backbone.²⁹²

New York's anti-discrimination statute, referred to as Article 23A, prohibits discrimination based on a criminal history in applications for a license or employment unless (1) there is a direct relationship between the offense and specific license or employment sought, or (2) the license or employment would involve an unreasonable risk.²⁹³ In examining a direct relationship and unreasonable risk, decision makers must consider specific factors, including whether the applicant has a certificate.²⁹⁴ Merely having a certificate does not guarantee that an applicant will get a license or a job, but the law mandates that the certificate be viewed as evidence of rehabilitation in the decision making process.²⁹⁵

This combination, according to advocates, attorneys, scholars, direct service providers, and people with criminal records – makes a difference in employment.²⁹⁶ Case law also demonstrates the effectiveness of this combination: employers must consider certificates as evidence of rehabilitation and if they do not, subject their decisions to reversal on the ground that they were arbitrary,

²⁸⁹ N.Y. CORRECT. LAW § 752 (McKinney 2007).

²⁹⁰ See Love, *supra* note 19, at 779; *infra* pp. 44–46.

²⁹¹ N.Y. CORRECT. LAW § 753 (McKinney 2007); CONN. GEN. STAT. §§ 31-51i(e), 46a-80(c).

²⁹² See interview information *supra* notes 168–170.

²⁹³ N.Y. CORRECT. LAW § 752 (McKinney 2007).

²⁹⁴ N.Y. CORRECT. LAW § 753 (McKinney 2007).

²⁹⁵ Bonacorsa v. Van Lindt, 514 N.Y.S.2d 370 (N.Y. App. Div. 1987) (finding that petitioner's Certificate of Good Conduct lifted the bar for an occupational license but because there was a direct relationship between the crime and license sought, denial of the license was not arbitrary and capricious).

²⁹⁶ Matter of El v. New York City Dept. of Educ., 886 N.Y.S.2d 70 (N.Y. Supp. 2009) (finding the school board failed to properly consider an applicant's rehabilitation as evidenced by her Certificate of Relief from Disabilities).

capricious, and an abuse of discretion.²⁹⁷

In practice, employment barriers based on an individual's criminal record can be overcome with a combination of anti-discrimination legislation and certificates. Attorneys report that employers "have to care" about certificates when they learn that not doing so violates New York's anti-discrimination statute.²⁹⁸ These attorneys described a common scenario: an individual does not get hired and believes it is due to his or her criminal record.²⁹⁹ The individual then contacts an attorney.³⁰⁰ The attorney contacts the employer to ask whether it considered the Article 23A factors in the hiring decision, and the employer replies with "what are you talking about?"³⁰¹ Once the employer is educated on the anti-discrimination law, attorneys report "a lot of success just getting people hired."³⁰²

Attorneys and advocates, however, report a high level of ignorance of Article 23A among employers.³⁰³ People with criminal records looking for employment also report being unfamiliar with the law.³⁰⁴ One individual related his experience of applying to approximately 50 employers after getting out of prison.³⁰⁵ Each turned him down right away.³⁰⁶ Unaware of the anti-discrimination law, he was unable to utilize it.³⁰⁷

VI. POLICY IMPLICATIONS

A. *The Employment Paradox*

The paradoxical employment state for individuals with a criminal record puts them in a seemingly inescapable catch-22: their criminal record significantly impairs their opportunity to get a job, but getting a job significantly improves their opportunity to live a successful life. States are attempting to address this

²⁹⁷ See *In the Matter of the Application of Soto v. New York State Office of Mental Retardation and Developmental Disabilities*, 2010 WL 334857 (N.Y. Supp. Ct. 2010); *Exum v. New York City Health and Hospitals Corp.*, 2012 WL 5456393 (N.Y. Supp. Ct. Oct. 23, 2012). Employers who comply with Article 23 not only avoid reversal of their decisions, but are protected from negligent hiring claims under N.Y. Human Rights Law § 296(15). Advocates are also working to pair negligent hiring protections with certificates. Ms. Meyers, Director, National HIRE Network, NACDL Testimony, Day 1 at 38–39, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32735&libID=32704>.

²⁹⁸ See interview information *supra* notes 168–170; N.Y. CORRECT. LAW § 753 (McKinney 2007).

²⁹⁹ See interview information *supra* notes 168–170.

³⁰⁰ See *id.*

³⁰¹ See *id.*

³⁰² See *id.*

³⁰³ See *id.*

³⁰⁴ See *id.*

³⁰⁵ See *id.*

³⁰⁶ See *id.*

³⁰⁷ See *id.*

paradox with certificate legislation that individuals can use to overcome their record and expand their employment opportunities. To be useful, these certificates must be accessible and relevant.³⁰⁸

1. Access

Knowledge of certificates and an understandable application process are critical to getting people certificates. Knowledge about certificates can come at any stage in the criminal justice system, but does not. As the research demonstrates, there are many entities that need to know about certificates: those who issue, ask for, and rely on certificates all need education.³⁰⁹ Outside the formal criminal justice system, advocates and reentry programs can also educate applicants and the public.³¹⁰

States with, or considering, certificates should recognize that education about certificates is critical to their success. As the New York research demonstrates, departments that dedicate time and effort into educating the eligible community about certificates are the ones that get certificates into people's hands; departments don't.³¹¹ When certificates are no one's job, they are sporadically accessed. Jurisdictions may, therefore, benefit from identifying specific departments, agencies, and individuals who have the responsibility for educating the population about them.

Reports that New York's two-certificate system is confusing and that a laborious application process puts off potential applicants is also informative.³¹² A single certificate would provide more clarity – the only distinction would be the timing of issuance depending on the extent of the person's criminal record.³¹³ And a simplified application process can improve accessibility. States desiring an efficient and accessible application should consider this feedback in crafting their applications.³¹⁴

For jurisdictions that currently have or are considering certificates that can be issued at sentencing, accessibility would dramatically increase if certificates

³⁰⁸ See discussion *supra* Section IV regarding the difficulties people have in accessing and using certificates.

³⁰⁹ In Chicago, certificate education for employers is underway through Cabrini-Green Legal Aid, who is reaching out to explain certificates to employers because it believes that certificates are impactful only when employers know what they are. Eli Hager, *Forgiving vs. Forgetting*, THE MARSHALL PROJECT, March 17, 2015, <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting>.

³¹⁰ Radice, *supra* note 21, at 777–78.

³¹¹ See discussion on various New York departments and their use of certificates *supra* Section IV.

³¹² See discussion on process *supra* Section IV.

³¹³ Radice, *supra* note 21, *Id.* at 771. See also Legal Action Center Model Legislation, <http://lac.org/toolkits/certificates/Model%20legislation%20-%20certificates.pdf>.

³¹⁴ See discussion *supra* Section IV.B.1.a.

were presumptively granted at sentencing.³¹⁵ Judges may favor this because of the convenience of immediate issuance.³¹⁶ Prosecutors also endorse the imposition of a presumption.³¹⁷ Critics of this suggestion argue that certificates are only credible because they are hard to obtain.³¹⁸ This line of reasoning presumes that certificates would lose their significance if everyone had one.³¹⁹ A response to this criticism is that issuing a certificate at sentencing reinforces the fact that the individual has already received their sentence and need not be punished further by the imposition of bans and barriers unrelated to their criminal record.³²⁰

Proponents and opponents of the presumption-at-sentencing structure embody the tension New York experiences between those who view certificates as tools for rehabilitation and those that view certificates as a reward for it.³²¹ According to New York's statutes, certificates exist to do both.³²² Certificates are not treated this way in practice, however,³²³ and the differing views reflect an underlying criminal justice policy conundrum that certificate legislation alone may not be capable of addressing: does a criminal sentence conclude society's punishment of an individual for a crime or should society enact policies that, unless lifted, punish in perpetuity?

2. Relevance

For employment, certificates are most impactful when used in conjunction

³¹⁵ Vinny Schiraldi, Comm'r, N.Y. Dep't of Prob., NACDL Testimony, Day 3, at 27, 50–51, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

³¹⁶ Judge D'Emic, New York State Supreme Court, NACDL Testimony, Day 3 at 34, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

³¹⁷ Mr. Lance Ogliste, Counsel to District Attorney Charles J. Hynes, Kings County, NACDL Testimony, Day 3, at 114, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

³¹⁸ Frank Thurston Green, Certificate Confusion Puts Focus on Convictions' Consequences (February 17, 2015).

³¹⁹ Eli Hager, *Forgiving vs. Forgetting*, The Marshall Project, March 17, 2015, <https://www.themarshallproject.org/2015/03/17/forgiving-vs-forgetting>; Frank Thurston Green, *NY's Certificates Offer Catch-22 to People Convicted of Crimes*, City Limits (February 17, 2015); James Jacobs, Professor of Law, NACDL Testimony, Day 3, at 174 (May 17, 2013), available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

³²⁰ Divine Pryor, Executive Director, The Center for NuLeadership on Urban Solutions, NACDL Testimony, Day 3 at 289, available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=32737&libID=32706>.

³²¹ See *supra* Section IV.

³²² See discussion *supra* Section III.A; N.Y. CORRECT. LAW §§ 700–706 (McKinney 2015).

³²³ See discussion *supra* Section IV.

with anti-discrimination laws. New York practitioners reported that the anti-discrimination statute is necessary to certificate usefulness.³²⁴ It is what attorneys “have to stand on” when making their claims.³²⁵ This is useful for New York because it highlights the need to continue to educate employers about both certificates and Article 23A. It can be useful for other jurisdictions with – or considering – certificate legislation because it introduces one way of increasing certificates’ impact.

For licensing, certificates are invaluable to lift bars that accompany a criminal record. While this is an effective way to use certificates, the thousands of automatic licensing restrictions on individuals with criminal records puts into question the efficiency of the licensing system itself. Jurisdictions may want to consider that repealing restrictions on licensing consequences would be more efficient than creating certificates to relieve the restrictions. This may be an unlikely solution. It is considered much more viable to talk about relief of the barriers than removal.³²⁶ To relieve such barriers, certificates are essential.

C. *More Than a Placebo*

One interviewee lamented that certificates may only be “a placebo for a world that’s not willing to forgive.”³²⁷ That may be true and the comment invites us to be introspective about the purpose of collateral consequences and what motivates policies that refuse to forgive. As a practical matter, however, it’s important to understand whether certificates – even if enacted as a placebo – can be transitioned into effective treatment for those suffering in the employment paradox. I believe that the research shows that they can. As the recent series of certificate legislation makes clear, policy makers are enacting legislation they hope will promote the success of over 65 million people with criminal records. In order to make this hope a reality, certificate legislation must exist with a strong education component, an expectation of use, and be utilized with legislation that gives certificates teeth. If enacted with these concepts in mind, certificates can be more than a band-aid and part of a cure.

³²⁴ See discussion *supra* Section V.

³²⁵ See discussion *supra* Section V.

³²⁶ Frank Thurston Green, Certificate Confusion Puts Focus on Convictions’ Consequences, *CITY LIMITS* (February 17, 2015).

³²⁷ See interview information *supra* notes 168–170, interviewee with a criminal record.