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Administering Justice: Removing Statutory Barriers to Reentry

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ADMINISTERING JUSTICE: REMOVING STATUTORY BARRIERS TO REENTRY

JOY RADICE*

After years of swelling prison populations, the reentry into society of people with criminal convictions has become a central criminal justice issue. Scholars, advocates, judges, and lawmakers have repeatedly emphasized that, even after prison, punishment continues. State and federal statutes impose severe civil penalties on anyone with a conviction. To alleviate the impact of these punishments, individuals from the ivory tower to the legislative floor have increasingly endorsed state legislation that creates Certificates of Rehabilitation, administratively-issued certificates that legally remove statutory bars to employment, housing, and other benefits. Several states currently offer these post-conviction certificates, and five additional states have proposed and one passed such legislation in 2011. Many look to New York's statute as the archetypal model because it is the oldest and most robust. Yet no article has examined New York's experience with Certificates of Rehabilitation.

This Article draws lessons from the fifty-year history of New York's Certificates of Rehabilitation to describe an ideal administrative mechanism for removing statutory barriers to reentry. I argue that a model Certificate of Rehabilitation statute should have a strong enforcement mechanism and clear directives for administering authorities, like a sentencing court or state agency. Successful implementation also requires committed administrative leadership and a means for making certificates accessible to people with

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convictions. Certificates of Rehabilitation do not erase a person's criminal history, but they do offer legal and social recognition that after a criminal conviction a person deserves a second chance.

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INTRODUCTION

President Barack Obama recently applauded the owner of the Philadelphia Eagles for giving all-star quarterback Michael Vick a second chance after his release from federal prison.¹ Vick served twenty-three months after pleading guilty to participating in a dogfighting ring.² President Obama said, “[i]t’s never a level playing field for prisoners when they get out of jail.”³

Thousands of civil punishments stand in the way of giving people who served their criminal sentences a true second chance. These punishments are often referred to in academic literature as “collateral consequences”⁴ because they are not part of the penal sanction in sentencing laws; rather, they are “scattered throughout a variety of state and federal statutes and regulations, and increasingly in local laws.”⁵ In December 2010, the American Bar Association released preliminary findings from a national study identifying over 38,000 statutes and regulations that contain a collateral consequence of a criminal conviction.⁶ These consequences take two forms.⁷ One is a sanction that is triggered automatically by a civil statute because of a conviction. The other is a discretionary

1. See Perry Bacon, Jr., *Obama Weighs in on Michael Vick, and Other Cultural Issues*, WASH. POST (Dec. 28, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/27/AR2010122704579.html>.

2. *Vick Released from Federal Custody*, ESPN (July 21, 2009), <http://sports.espn.go.com/nfl/news/story?id=4340597>.

3. Bacon, *supra* note 1.

4. State and federal civil laws that permit discrimination on the basis of a conviction have been called “invisible punishments,” “hidden sentences,” and “collateral consequences” because, even after a person completes her criminal sentence, there are additional penalties that make the debt owed to society seem to be unending. See JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* 64 (2005).

5. Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 678 (2008); see also Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 639 & n.91 (2006).

6. ABA, *ABA Criminal Justice Section Consequences Project*, INST. FOR SURV. RES.—TEMPLE U., <http://isrweb.isr.temple.edu/projects/acproject> (last visited Feb. 28, 2011) [hereinafter ABA Demonstration Site]. Visitors can search for statutes by state or key words/phrases. *Id.*

7. See ABA, *ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS* 1 (3rd ed. 2004) (showing that collateral consequences take two forms: collateral sanctions and discretionary disqualifications).

disqualification related to a conviction that a civil court or administrative agency “is authorized but not required” to impose on a person.⁸ Consider the following examples:

- A man convicted of assault served twelve years in prison where he became the state prison’s head barber. When he was released, he applied for a barber’s license. State laws permitted the licensing agency, in its discretion, to deny his application because of his single felony conviction.⁹
- An eighteen-year-old was fined and received a summons for illegally selling tickets outside Yankee Stadium. The unpaid summons ultimately resulted in a misdemeanor conviction. Even though the student eventually paid the fine and completed community service, the conviction triggered a federal law requiring his father’s application for public housing to be denied, and they continued living in a shelter.¹⁰
- A university student convicted of a drug possession misdemeanor completed her sentence at a drug-treatment program. Her financial aid award for college, however, was automatically cut under a mandate of the federal Higher Education Act.¹¹

8. *Id.*

9. The Legal Action Center conducted a nationwide study of collateral consequences and ranked each state by the number of civil punishments catalogued in state statutes and regulations. *See* LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY—A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS: 2009 UPDATE 21–24 (2009), <http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry—2009.pdf>. On employment issues, most states allow employers and licensing agencies to even consider arrests that did not lead to a conviction in an application determination. *See id.* at 10. Twenty-six states have no standards for occupational licensing agencies to consider when determining how to consider a criminal record in denying an applicant. *See id.*

10. *See id.* at 11–12. An overview of public housing roadblocks can be found at *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: Public Housing*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=6> (last visited Nov. 21, 2011) (noting that thirty state housing authorities make decisions about eligibility based on arrests that never led to a conviction).

11. *See* LEGAL ACTION CTR., *supra* note 9, at 2. In 2005, the Higher Education Act was amended to make only individuals who receive a drug conviction *while* receiving student aid ineligible for federal financial assistance—a modification of the previous ban that made all students convicted of a drug-related offense

Federal and state-triggered statutory barriers, like those in the above examples, are rarely just collateral to a conviction. They can be more punitive and permanent than a person's actual criminal sentence.¹² Unlike Michael Vick, most people with convictions face severe barriers to employment. This is especially troubling because criminology studies show that employment has the potential to decrease crime and encourage successful reentry.¹³

A major aim of reentry¹⁴ reform over the past two decades has been to make these invisible punishments visible.¹⁵ Numerous academics have catalogued and critiqued these punishments as permanent impediments to successful

ineligible to receive federal financial assistance whether or not the student was receiving aid at the time of conviction. *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: Student Loans*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry/main.php?view=law&subaction=7> (last visited Feb. 24, 2012). States do not have the ability to alter this federal statute. No other criminal offense—including violent felonies, sex offenses, or alcohol-related offenses—prompts automatic ineligibility. *Id.* For a historical perspective of the Higher Education Act's application to people with drug convictions, see *id.*

12. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999) ("Despite their innocuous name, for many convicted offenders, and especially those who never serve any prison time, these 'collateral' consequences 'are . . . the most persistent punishments that are inflicted for [their] crime'" (quoting Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION, Sept. 1987, at 52, 52)). The Supreme Court has historically found that civil consequences do not implicate the Eighth Amendment proportionality doctrine even if the civil sanction appears more punitive than the criminal sentence. Eva S. Nilssen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 174 (2007) (arguing that barriers to reentry should have to be justified as rational, but that the Supreme Court has said that the "Eighth Amendment has nothing to say about such collateral consequences").

13. See, e.g., Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483, 484 (2006).

14. I adopt the definition of reentry as the "process of leaving prison and returning to society." See TRAVIS, *supra* note 4, at xxi. As Travis points out, "[r]eentry is not a form of supervision, like parole. Reentry is not a goal, like rehabilitation or reintegration. Reentry is not an option." *Id.* The vast majority of people who are incarcerated will return to society. *Id.* at xxii.

15. See generally ANTHONY A. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* (2008) (providing a comprehensive discussion about collateral consequences under state and federal law).

reintegration.¹⁶ State and national bar associations have issued reports and standards in an attempt to combat the negative impact that these consequences have on reentry efforts.¹⁷

In 2010, scholars, advocates, and lawmakers characterized the Supreme Court's decision in *Padilla v. Kentucky* as a watershed event for collateral consequences. In *Padilla*, the Supreme Court identified deportation as a severe civil penalty of a conviction, and held that under the Sixth Amendment right to counsel, defense attorneys must advise defendants whether a "plea carries a risk of deportation."¹⁸ For the first time, the Court recognized the need to inform defendants of a consequence that is not directly a part of the criminal sentence.¹⁹ Since *Padilla*, lower courts have held that other collateral consequences, such as civil commitment, employment termination, and loss of retirement pensions, fall under *Padilla*

16. Since 2000, an explosion of research on collateral consequences has commented on the far-ranging impact of civil punishments, from denying individuals the right to vote, to limiting employment opportunities. *See id.*; TRAVIS, *supra* note 4; *see also* Regina Austin, "The Shame of It All": Stigma and the Political Disenfranchisement of Formerly Convicted and Incarcerated Persons, 36 COLUM. HUM. RTS. L. REV. 173 (2004); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); Demleitner, *supra* note 12; Alec C. Ewald, "Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States, 2002 WIS. L. REV. 1045; Marc Mauer, *Introduction: The Collateral Consequences of Imprisonment*, 30 FORDHAM URB. L.J. 1491 (2003); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006); Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-offender Reentry*, 45 B.C. L. REV. 255 (2004); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 15–36 (Marc Mauer & Meda Chesney-Lind eds., 2002).

17. *See, e.g.*, 2007 COLLATERAL SANCTIONS COMM., MINN. LEGISLATURE, CRIMINAL RECORDS AND EMPLOYMENT IN MINNESOTA (2008); ABA COMM. ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009); SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, N.Y. STATE BAR ASS'N, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY (2006).

18. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

19. *See* Gabriel J. Chin & Margaret Colgate Love, *The "Major Upheaval" of Padilla v. Kentucky: Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 36, 37 (finding that the *Padilla* decision now requires defense attorneys to consider the collateral consequences of their clients' criminal convictions and predicting that "the 'Padilla advisory' may become as familiar a fixture of a criminal case as the *Miranda* warning").

and raise a duty to advise defendants of collateral consequences prior to taking a plea.²⁰

As scholars, courts, and lawmakers consider ways to alleviate the burden of collateral consequences, one approach has been recommended repeatedly: administrative relief mechanisms.²¹ A state-issued certificate can legally remove some or all statutory barriers to employment, housing, higher education, and other benefits.²² As far back as 1962, the American Law Institute's Model Penal Code proposed a comprehensive approach to "restoration of rights and status" that included an order of relief that could be issued by the sentencing court.²³ The ABA's Commission on Effective Criminal Sanctions has urged states to "enact laws providing for certificates of rehabilitation The legal effect of such a certificate should be made clear in each case: the certificate 'may declare that an individual is eligible for all employment, and other benefits and opportunities.'"²⁴ Several states²⁵ have

20. See, e.g., *Bauder v. Dep't. of Corr.*, 619 F.3d 1272, 1273 (11th Cir. 2010) (holding that an attorney was ineffective for giving bad advice about possible civil commitment as a result of a plea); *Taylor v. State*, 698 S.E.2d 384, 385 (Ga. Ct. App. 2010) (holding that counsel was ineffective for failing to inform defendant that a guilty plea to child molestation required sex offender registration); *Commonwealth v. Abraham*, 996 A.2d 1090, 1095 (Pa. Super. Ct. 2010) (holding that counsel needed to inform defendant of the loss of his teacher's pension as a consequence of pleading guilty), *rev'd*, 9 A.3d 1133 (Pa. 2010).

21. See generally COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS'N, *SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES* (2007); TRAVIS, *supra* note 4; Margaret Colgate Love, *Starting over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URB. L.J.* 1705 (2003); Pinard, *supra* note 16.

22. See ABA STANDARDS FOR CRIMINAL JUSTICE, *COLLATERAL SANCTIONS AND ADMINISTRATIVE DISQUALIFICATION OF CONVICTED PERSONS* 9–10 (3d ed. 2003); see also MARGARET LOVE & APRIL FRAZIER, *ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, CERTIFICATES OF REHABILITATION AND OTHER FORMS OF RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION: A SURVEY OF STATE LAWS* 4, 5 n.14 (2006), http://meetings.abanet.org/webupload/commupload/CR203000/otherlinks_files/convictionsurvey.pdf.

23. Love, *supra* note 21, at 1711–12.

24. Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on Collateral Consequences of Conviction*, *CRIM. JUST.*, Fall 2006, at 16, 22; see also ABA COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, *CRIMINAL JUSTICE SECTION NAT'L LEGAL AID & DEFENDER ASS'N, REPORT TO THE HOUSE OF DELEGATES ON REPRESENTATION RELATING TO COLLATERAL CONSEQUENCES* (2007); JUSTICE KENNEDY COMM'N, *REPORT TO THE ABA HOUSE OF DELEGATES ON PUNISHMENT, INCARCERATION, AND SENTENCING* 65 (2004) (urging "bar associations to establish programs to encourage and train lawyers to assist prisoners in applying for pardon, restoration of legal rights and privileges, relief from other collateral sanctions, and reduction of sentence").

established administrative relief mechanisms, but none are as old and robust as New York's statutes, which were passed fifty years ago.²⁶

In the late forties, New York legislators created two statutes, which I refer to collectively as "Certificates of Rehabilitation," aimed at reducing employment barriers for people with criminal records.²⁷ In support of the legislation's expansion in 1976, New York Governor Hugh Carey wrote:

The great expense and time involved in successfully prosecuting and incarcerating the criminal offender is largely wasted if upon the individual's return to society, his willingness to assume a law-abiding and productive role is frustrated by senseless discrimination.

Providing a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime.²⁸

Governor Carey recognized in 1976 what reentry scholars and advocates are saying today—unless a person is relieved of statutory barriers, the person's likelihood for recidivism increases and the person's attempts to reintegrate into society are frustrated. The unique part of the statutory framework created in New York in the seventies is a two-tier horizontal relief mechanism. For individuals with minor convictions, certificates granted at sentencing were seen as a *means* to rehabilitation. Relieving statutory barriers made reintegration easier. For individuals with multiple and serious felony convictions, the state required a waiting period prior to applying for a certificate. For those individuals, the certificate served as *proof* of rehabilitation. Much of today's conversation about Certificates of Rehabilitation revolves around the latter approach. New York's dual approach offers two different rationales for how these relief mechanisms can work most effectively.

The Certificates of Rehabilitation statutes authorize two administering bodies, the sentencing court and the Department

25. The states include California, Illinois, Mississippi, Nevada, and New Jersey. See LOVE & FRAZIER, *supra* note 22, at 2; Love, *supra* note 24, at 22.

26. See N.Y. CORRECT. LAW §§ 700, 702–03 (McKinney 2011).

27. See *id.* §§ 700–706. Receiving a Certificate of Rehabilitation relieves an eligible person "of any forfeiture or disability" and "remove[s] any bar to [his or her] employment, automatically imposed by law by reason of [his or her] conviction." 1945 N.Y. Sess. Laws 64–65 (McKinney).

28. 1976 N.Y. Sess. Laws 2459 (McKinney).

of Corrections and Community Supervision (DCCS),²⁹ to issue certificates.³⁰ An applicant with any number of misdemeanors and up to one felony can apply to the sentencing court for a certificate as early as the applicant's sentencing date.³¹ The department of probation investigates the application and makes a recommendation to the court about whether an individual should be awarded a certificate.³² The DCCS investigates and awards certificates to individuals who do not fall within the limited category of those who apply to the sentencing court.³³

New York's Certificates of Rehabilitation statutes have served as a model administrative relief mechanism. In 2006, Illinois's certificate statute, co-authored by then State Senator Barack Obama, was based on New York's statute.³⁴ The Uniform Law Commission (ULC),³⁵ in response to the ABA commission's recommendation, drafted a model state statute,³⁶

29. The Division of Parole and the Department of Correctional Services merged in 2011. See *Fact Sheet: Merger of Department of Correctional Services and Division of Parole*, N.Y. ST. DEPT CORRECTIONS & COMMUNITY SUPERVISION, <https://www.parole.ny.gov/merger-factsheet.html> (last visited Apr. 1, 2012) [hereinafter *Merger Fact Sheet*].

30. See *infra* Part I.A.1–2.

31. See *infra* Part I.A.1–2.

32. See *infra* Part I.A.1–2.

33. See *infra* Part I.A.1–2.

34. See 730 ILL. COMP. STAT. 5/5-5-5(i) (2011). Many of the features of the Illinois statute are closely connected to New York's statute. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 779 n.114 (2011) (stating that the New York statute “was the model for the Illinois certificate program”). Originally, Illinois law featured stricter eligibility requirements and limited the number of agency licenses to which the law applied. In 2006, it was expanded to broaden those who are eligible and to lift the bars on more licensing statutes, but it still falls short of New York's certificates statute. See COMP. STAT. 5/5-5-5(i)(1)–(27).

35. The Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.” *About the ULC*, UNIFORM L. COMMISSION, <http://www.nccusl.org/Narrative.aspx?title=About%20the%20ULC> (last visited Feb. 28, 2011). “ULC members must be lawyers, qualified to practice law.” *Id.* They consist of practicing lawyers, judges, legislators, legislative staff, and law professors who have been appointed by state governments as well as the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to research, draft, and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical. *Id.*

36. See NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2010) [hereinafter UCCCA], http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.pdf; see also Love, *supra* note 34, at 784–85.

drawing “upon the procedures utilized in New York, the only state with comprehensive procedures to relieve the restrictions imposed by collateral consequences.”³⁷ North Carolina passed a version of the ULC’s model,³⁸ and five additional states introduced similar legislation in 2012.³⁹

This spotlight on creating administrative relief mechanisms creates an important moment for examining Certificates of Rehabilitation. Although scholars, bar associations, and advocates have endorsed the creation of an administrative relief mechanism, and one based on New York’s certificates statutes specifically, no one has examined how New York’s certificates have actually worked. This Article adds to the academic literature on administrative relief mechanisms⁴⁰ by identifying the strengths and shortcomings of New York’s Certificates of Rehabilitation statutes. New York’s experience should inform the larger national debate about how to create a legally robust mechanism for removing the numerous and interminable statutory barriers to reentry.

Part I of this Article examines the legislative history of New York’s statutes.⁴¹ The evolution of Certificates of Rehabilitation in the sixties and seventies reveals that today’s concern about relieving collateral consequences in the reentry literature is not new. Although the impact of certificate statutes waned during the decades of “law and order” politics,⁴² they have tremendous potential for revival in New York and should be replicated as states refocus their political attention and resources on successful reentry.

37. *Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 89 (2010) (statement of Richard T. Cassidy, Burlington, VT).

38. N.C. GEN. STAT. ANN. § 15A-173.1 to 173.6 (West 2011).

39. As of 2012, a version of the UCCCA has been introduced in Minnesota, New York, Vermont, West Virginia, and Wisconsin. *Collateral Consequences of Conviction Act*, UNIFORM L. COMMISSION, <http://www.nccsl.org/Act.aspx?title=Collateral%20Consequences%20of%20Conviction%20Act> (last visited Apr. 1, 2012).

40. See, e.g., Love, *supra* note 21, at 1711–12 (advocating for restoration of rights through the two-tiered mechanism in section 306.6 of the Model Penal Code).

41. See *infra* Part I.

42. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 9 (2001) (“In the last twenty years, however, we have seen the reappearance of ‘just deserts’ retribution as a generalized policy goal . . .”).

Part II examines the strengths of a Certificate of Rehabilitation model.⁴³ I argue that this relief mechanism is the most politically attractive because it does not remove a criminal record, and thus is the most viable mechanism for removing collateral consequences when compared to the alternatives of executive pardons and expungement. Certificates can create a legal mechanism for guaranteeing that statutory barriers are lifted. New York's Certificate of Rehabilitation model is the only one that creates a legally enforceable rebuttable presumption of rehabilitation, an important burden-shifting mechanism. Additionally, certificates can offer a range of relief and be crafted for each individual applicant. In their complete capacity, they can lift statutory bars to state licenses, remove obstacles to private employment, reestablish access to public benefits, and restore voting rights, which are critical to both economic and civic reintegration.

Part III identifies and discusses legal, administrative, and social limitations of New York's Certificates of Rehabilitation.⁴⁴ Legally, the statute is too vague and discretionary, requiring no oversight of administering authorities and offering no means for appeal. Administratively, applications for Certificates of Rehabilitation suffer from serious agency delay and have no clear criteria for their evaluation. Part of the problem is that the supervisory and punitive priorities of the administering authorities, probation and parole, conflict with the rehabilitative goals of the certificates. Socially, Certificates of Rehabilitation have not entered the mainstream process of reentry. Potential applicants have not heard about them and find it difficult to navigate the application procedures.

Part IV addresses how other states can learn from this fifty-year history.⁴⁵ New York's experience points to the need for a Certificate of Rehabilitation statute with clear legislative directives and a strong enforcement mechanism. Successful implementation also requires committed administrative leadership and an effective means for making certificates accessible to the population they serve.

43. *See infra* Part II.

44. *See infra* Part III.

45. *See infra* Part IV.

I. REDISCOVERING A REMNANT OF THE REHABILITATION IDEAL

A. *One Goal, Two Certificates*

New York legislators created two different administrative relief mechanisms: Certificates of Relief from Disabilities (Certificates of Relief)⁴⁶ and Certificates of Good Conduct, which I collectively refer to as “Certificates of Rehabilitation.”⁴⁷ Both certificates have virtually identical legal force.⁴⁸ Either certificate can be awarded to lift a specific disability, like the automatic bar to a security guard license or a bus driver license.⁴⁹ Or they can be general and lift all civil bars and disabilities.⁵⁰

Both New York certificates are legally enforceable because they create a presumption of rehabilitation⁵¹ that an employer or licensing agency must consider in evaluating the impact of an applicant’s criminal conviction.⁵² Applicants may not be discriminated against solely because of criminal convictions.⁵³

46. See N.Y. CORRECT. LAW §§ 701–703 (McKinney 2011). A Certificate of Relief

may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.

Id. § 701(1).

47. See *id.* §§ 703-a, 703-b.

48. See *id.* § 701(1) (issuing a certificate grants the eligible person relief from “any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law”); see also *id.* § 703-a(1).

49. See, e.g., N.Y. VEH. & TRAF. LAW § 509-cc(1)(a)(i) (McKinney 2011) (disqualifying a person permanently from operating a school bus in New York for certain felony convictions). However, the disqualification may be waived provided that (1) five years have passed since the applicant was imprisoned for the disqualifying offense, and (2) the applicant has been granted a Certificate of Relief from Disabilities or a Certificate of Good Conduct. *Id.*

50. See CORRECT. § 701.

51. See *id.* § 753(2) (“In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”).

52. See *People v. Honeckman*, 384 N.Y.S.2d 657, 657 (N.Y. Sup. Ct. 1976). Issuing a Certificate of Relief only guarantees that a conviction will not create an automatic forfeiture of license, permit, or employment under section 701. *Id.* An administrative, judicial, or licensing body “may rely on the conviction as a basis for exercising discretion to refuse to renew any license, permit [sic] or privilege.” *Id.*

53. See CORRECT. § 753.

The major difference between the two certificates is the timing of eligibility, which is based on the seriousness of an applicant's criminal convictions. People with any number of misdemeanors and up to one felony conviction can apply for a Certificate of Relief immediately at sentencing.⁵⁴ People with more than one felony conviction are eligible for a Certificate of Good Conduct and can only apply after satisfying a mandatory waiting period upon the completion of their sentence.⁵⁵

1. Certificates of Relief

In 2007, the granting of a Certificate of Relief at sentencing drew media attention. Giuseppe Cipriani and his seventy-five-year-old father, Arrigo, well known New York restaurateurs,⁵⁶ were charged with evading \$3.5 million in state and city taxes.⁵⁷ They pleaded guilty to corporate tax fraud and agreed to pay \$10 million in restitution and penalties.⁵⁸ Giuseppe was sentenced to three years of probation, and his father was given a conditional discharge.⁵⁹ The judge granted the restaurateurs Certificates of Relief to help them keep their liquor license for the Rainbow Room.⁶⁰ Without it, the state liquor licensing agency would have automatically revoked the Ciprianis' license,⁶¹ making it difficult for them to maintain their business and repay the taxes. By granting the certificates immediately at sentencing, the judge guaranteed that the collateral consequences of their convictions did not outweigh the severity of their criminal sentences or stand in their way of fulfilling their court-imposed

54. *See id.* §§ 700(1)(a), 702.

55. *Id.* § 703-b(3).

56. The Ciprianis owned the famous Rainbow Room atop Rockefeller Center in Manhattan. Charles V. Bagli, *Rainbow Room's Lease Terminated*, N.Y. TIMES (Jan. 9, 2009), <http://www.nytimes.com/2009/01/10/nyregion/10rainbow.html>.

57. *See* Gretchen Morgenson & Charles V. Bagli, *Father and Son Restaurateurs in New York City Plead Guilty to Tax Evasion*, N.Y. TIMES (Aug. 1, 2007), <http://www.nytimes.com/2007/08/01/nyregion/01fraud.html>.

58. *See id.*

59. *See* Anemona Hartocollis, *Ciprianis Avoid Prison Time and Are Allowed to Keep Liquor License*, N.Y. TIMES (Oct. 11, 2007), <http://www.nytimes.com/2007/10/11/nyregion/11cipriani.html>.

60. *See id.*

61. *See In re Application of Restaurants & Patisseries Longchamps, Inc.*, 68 N.Y.S.2d 298, 301 (N.Y. App. Div. 1947) (holding that the State Liquor Authority properly denied a license renewal application because the petitioners' officers attempted to evade income taxes, were convicted of felonies, and made false entries into corporate records).

obligation to pay the back taxes. For first-time and low-level offenders, Certificates of Relief provide an administrative mechanism that offers notice about collateral consequences and enables these civil penalties to be more proportionate to the crime committed. But this case also highlights that sentencing courts have great discretion in issuing certificates.

As in the Ciprianis' case, a person with only one felony conviction and any number of misdemeanor convictions can apply for a Certificate of Relief as early as sentencing.⁶² Sentencing judges, under a rule that is rarely followed, must either grant a certificate at sentencing or inform defendants of their eligibility to apply in the future.⁶³ The lack of a waiting period is significant because only Certificates of Relief can prevent statutory forfeitures. A person's occupational license may be automatically revoked when convicted of any felony and certain enumerated misdemeanors unless a Certificate of Relief is granted.⁶⁴ One catch to this statutory construction is that a certificate will not automatically bar a license revocation if the statute allows discretionary (not automatic) revocation.⁶⁵ There are also a few exceptions to the automatic forfeiture rule. A Certificate of Relief does not remove driver's license suspensions⁶⁶ or overcome the automatic license forfeiture

62. See N.Y. CORRECT. LAW § 702(1) (McKinney 2011) ("Such certificate may be issued (i) at the time sentence is pronounced, in which case it may grant relief from forfeitures, as well as from disabilities, or (ii) at any time thereafter, in which case it shall apply only to disabilities.").

63. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011) ("In all criminal causes, whenever a defendant who is eligible to receive a certificate of relief from disabilities under article 23 of the Correction Law is sentenced, the court, in pronouncing sentence, unless it grants such certificate at that time, shall advise the defendant of his or her eligibility to make application at a later time for such relief."); see also BRONX DEFENDERS, CERTIFICATES THAT PROMOTE REHABILITATION: WHY THEY ARE SO IMPORTANT AND HOW TO GET THEM 2 (2011).

64. See CORRECT. § 702(1) ("Such certificate . . . may grant relief from forfeitures . . ."); see also MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION, at NY3–NY4 (2007), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/NewYork.pdf> (discussing how New York's Certificates of Relief can prevent automatic forfeitures).

65. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1983, at 254 (1983) (explaining that "Section 701 of the Corrections Law prohibits the automatic forfeiture of a license, upon the granting of a certificate of relief," but not when revocation is discretionary for the licensing authority).

66. See N.Y. VEH. & TRAF. LAW § 1193(1)(d)(1) (McKinney 2011) ("Notwithstanding anything to the contrary contained in a certificate of relief from disabilities or a certificate of good conduct . . . where a suspension or revocation . . . is mandatory pursuant to paragraph (a) or (b) of this subdivision, the magistrate, justice or judge shall issue an order suspending or revoking such

resulting from felony convictions for hospital and nursing home operation violations.⁶⁷

If a Certificate of Relief is not awarded at sentencing, a person can apply for a certificate for each qualifying offense any time thereafter by filing an application with either the sentencing court or the DCCS.⁶⁸ An applicant who has never served a sentence in a state correctional facility applies to her original sentencing court as permitted by section 702 of the New York Corrections Law.⁶⁹ Each sentencing court determines its own procedures for making application determinations.⁷⁰ Many judges defer to the Department of Probation, as permitted by statute, to investigate the applicant and issue a written report and recommendation.⁷¹ After the investigation, trial judges may schedule a hearing at which the applicant may present an argument for the certificate.⁷² Some courts choose simply to mail a decision to the applicant based on the investigation alone.⁷³

A person who has served time in a state correctional facility can apply to the DCCS while incarcerated or upon release.⁷⁴ The Certificate Review Unit under the DCCS investigates the case. This unit was historically under the Board of Parole, but was moved in 2011 when the Board of

license upon sentencing, and the license holder shall surrender such license to the court.”).

67. See N.Y. PUB. HEALTH LAW § 2806(5) (McKinney 2011).

68. CORRECT. §§ 702–703.

69. See *id.* § 702(1) (“Any court of this state may, in its discretion, issue a certificate of relief from disabilities to an eligible offender for a conviction that occurred in such court, if the court either (a) imposed a revocable sentence or (b) imposed a sentence other than one executed by commitment to an institution under the jurisdiction of the state department of corrections and community supervision.”).

70. Interview with Vincent Schiraldi, Comm’r, N.Y.C. Dep’t of Prob., in N.Y.C., N.Y. (Mar. 2, 2011). For example, the boroughs of Manhattan, Brooklyn, and the Bronx defer to the Department of Probation to make a recommendation about granting or denying a Certificate of Relief as a part of their preparation of the defendant’s pre-sentencing reports. Queens’s sentencing judges consider Certificate of Relief applications without deferring to probation.

71. See CORRECT. § 702(3) (“The court may, for the purpose of determining whether such a certificate shall be issued, request its probation service to conduct an investigation of the applicant Any probation officer requested to make an investigation . . . shall prepare and submit to the court a written report in accordance with such request.”).

72. Telephone Interview with Kate Rubin, Coordinator, Reentry Net, N.Y.C., N.Y. (Apr. 6, 2010).

73. *Id.*

74. Interview with Frank Herman, Dir., Exec. Clemency, in Albany, N.Y. (Feb. 4, 2011).

Parole merged with the Department of Corrections.⁷⁵ A confidential written report prepared by the Certificate Review Unit as mandated under section 703 of the New York Corrections Law provides each applicant with an explanation of the Certificate Review Unit's determination.⁷⁶ When the Board of Parole decides to release a person, the Certificate Review Unit may recommend and issue a temporary certificate that becomes permanent when parole is complete.⁷⁷ These certificates offer the same degree of finality as certificates issued by the sentencing court. Certificates issued by the DCCS are "deemed a judicial function" and are not reviewable.⁷⁸

One often confusing and onerous addition to this application procedure is that an applicant must apply for a separate Certificate of Relief for each conviction, including misdemeanors, in order to completely eliminate collateral consequences of a conviction.⁷⁹ The sentencing court or the DCCS makes an individualized determination for each conviction.⁸⁰ Therefore, a person with four misdemeanors and one felony conviction must apply for five Certificates of Relief to lift all statutory barriers. If this applicant applies only for a certificate for the felony conviction, she will only be relieved of barriers triggered by this specific felony. Her misdemeanors can still bar her from employment licenses, public housing, and other benefits. In addition, there is a ban on holding public office that can only be lifted by a Certificate of Good Conduct.⁸¹

75. See *Merger Fact Sheet*, *supra* note 29.

76. Interview with Frank Herman, *supra* note 74.

77. See N.Y. CORRECT. LAW § 703(4) (McKinney 2011) (stating that a certificate issued under the department's supervision is temporary and may be revoked by the board for violations of parole or release, but, "[i]f the certificate is not so revoked, it shall become a permanent certificate upon expiration or termination of the department's jurisdiction over the individual"). This rule also applies to Certificates of Relief issued by the court under section 702(4) when the court issues a revocable sentence. *Id.* § 702(4).

78. See *id.* § 703(5) ("In granting or revoking a certificate of relief from disabilities the action of the department shall be deemed a judicial function and shall not be reviewable if done according to law.").

79. See *id.* § 701(1) (stating that a Certificate of Relief applies to forfeitures and disabilities imposed by "conviction of the crime or of the offense specified therein," and each offense is treated separately).

80. See BRONX DEFENDERS, *supra* note 63, at 1–2.

81. See CORRECT. § 701(1). A Certificate of Relief is limited in that it does not apply "to the right of such person to retain or to be eligible for public office," but no such limitation is imposed on Certificates of Good Conduct.

2. Certificates of Good Conduct

Although the two certificate statutes serve different populations, the legal effect of the relief mechanisms is identical. In 2004, Johnnie Britt, Jr., who was twice convicted of felony drug crimes,⁸² applied for a Certificate of Good Conduct after completing his sentence and waiting longer than the statutory three-year waiting period.⁸³ He wanted to be employed as a school bus driver,⁸⁴ but a New York Vehicle and Traffic law barred people with convictions from applying.⁸⁵ In 2004, the Board of Parole awarded Britt a Certificate of Good Conduct to overcome the statutory employment hurdle.⁸⁶

As the *Britt* case demonstrates, Certificates of Good Conduct lack the immediacy of Certificates of Relief, but offer people with more serious repeat offenses a vehicle to remove or mitigate civil penalties after a statutorily defined waiting period. These certificates mean that statutory barriers to reintegration are not permanent for individuals with longer criminal histories. Because of the waiting period, an additional burden is placed on the applicant to prove conduct “in a manner warranting such issuance.”⁸⁷ People with more than one felony conviction must show a period of good conduct, which ranges from one to five years based on a person’s most

82. *Britt v. Dep’t of Motor Vehicles*, No. 400339/09, slip op. at 1 (N.Y. Sup. Ct. May 5, 2009). Britt was “convicted and sentenced for attempted third degree criminal sale of a controlled substance (a Class C Felony)” in 1992 and “was convicted of fifth degree criminal sale of a controlled substance (a Class D Felony)” five years later in 1997. *Id.*

83. *See id.*

84. *See id.*

85. *See* N.Y. VEH. & TRAF. LAW § 509-cc(1) (McKinney 2011) (creating an automatic bar for certain convictions). The statute bars people specifically with Britt’s conviction of attempted third degree criminal sale of a controlled substance. *See id.* at § 509-cc(4)(b). Interestingly, this case arose because Britt was denied the position and argued that if a person with a Certificate of Relief can qualify, so should a person with a Certificate of Good Conduct. *Britt*, No. 400339/09, slip op. at 2. Until 2010, the statute explicitly stated that only a person with a Certificate of Relief was not automatically barred. VEH. & TRAF. § 509-cc. The statute was amended in 2010 to include Certificates of Good Conduct. *Id.* § 509-cc(1)(a)(iii).

86. *Britt*, No. 400339/09, slip op. at 1; *see also* CORRECT. § 703-a(1) (“A certificate of good conduct may be granted as provided in this section to relieve an individual of any disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein.”).

87. CORRECT. § 703-b(1)(a).

serious conviction.⁸⁸ The period begins once a person's sentence is completed, including the discharge from parole and the payment of fines.⁸⁹ For misdemeanors and other minor offenses, the waiting period is one year.⁹⁰ For class C, D, and E felonies, the waiting period is three years.⁹¹ And for class A and B felonies, the waiting period is five years.⁹² Regardless of the number of convictions, a person applies for only one Certificate of Good Conduct that covers all convictions. If a person reoffends during the period of good conduct, he must calculate the waiting period from the completion of the new sentence using the timing set by the statute for the most serious conviction.⁹³

For Certificates of Good Conduct, applicants must apply to the DCCS, which is responsible for investigating each application and rendering a decision.⁹⁴ Incomplete applications are returned with a cover letter identifying missing information.⁹⁵ Once a file is complete, the Certificate Review Unit under the DCCS assigns the file to a local parole office near the applicant's residence.⁹⁶ A parole officer conducts an investigation, which can take four to six weeks, including a background check, interview of the applicant, and a home visit.⁹⁷ The investigation evaluates evidence of desistance from crime, which the Certificate Review Unit interprets as the essential requirement for this certificate.⁹⁸ Once the investigative report is complete, the Certificate Review Unit in Albany issues a decision.⁹⁹ Then, a confidential written report is mailed to the applicant explaining the DCCS's decision to approve or defer the application.¹⁰⁰ No internal guidelines or deadlines govern any part of this process, which takes an average of eighteen months to complete.¹⁰¹

88. *See id.* § 703-b(3).

89. *See id.*

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.* § 703-b(1); *see also* Interview with Frank Herman, *supra* note 74.

95. Interview with Frank Herman, *supra* note 74.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

B. The Evolution of New York's Certificate Statutes

New York state legislators created Certificates of Rehabilitation in the mid-forties, and they continued to evolve into the mid-seventies. During this period, the rehabilitation ideal shaped the state's approach toward criminal justice reform.¹⁰² Reformers of the penal system viewed a criminal sentence as more than punishment. They saw sentencing as an opportunity for a "rehabilitative intervention" that would change a person's inclination toward criminal behavior.¹⁰³

Throughout the nation, states prioritized the penal goal of rehabilitation, whenever possible, over punishment and deterrence.¹⁰⁴ New York, considered to be ahead of the curve, reformed its prisons around the "new" rehabilitative model designed to "prepare the offender for that day when he leaves the institution."¹⁰⁵ In 1970, the New York State Correctional Association explained the dramatic shift in focus:

A primary difference between the "old" and the "new" is to be found in the group of employees who are most numerous in the institutions: the "keepers" and "guards" of a century ago and the "correction officers" of today. This is far more than a change in title. The rehabilitation-oriented correction officer is an integral part of the rehabilitative services of the

102. See N.Y. CORR. HISTORY SOC'Y, 40 YEARS AGO NYS CORRECTION CELEBRATED ACA'S CENTENNIAL WITH '100 YEARS OF PROGRESS' BOOKLET (1970) [hereinafter N.Y. STATE CORRECTIONS BOOKLET], available at <http://www.correctionhistory.org/auburn&osborne/miskell/100yearsnydocs/1970-NYS-Correction-100-Years-of-Progress-Part-1.html>. This booklet explained the great strides New York "has taken over the past 100 years to rehabilitate rather than to merely punish those who have broken its laws A century ago reformers were at work gradually introducing the emphasis of rehabilitation which was to mark . . . the growth of the whole system of 'reformatories' and 'correctional institutions.'" *Id.*

103. GARLAND, *supra* note 42, at 34 (explaining that the "basic axiom" of penal-welfarism was that "penal measures ought, where possible, to be rehabilitative interventions rather than negative, retributive punishments"); see also TONY WARD & SHADD MARUNA, REHABILITATION 8 (2007).

104. GARLAND, *supra* note 42, at 35 (describing the rehabilitation ideal as "not just one element among others" but "the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure and made sense of it for practitioners"); see also EDWARD RHINE, WILLIAM SMITH & RONALD JACKSON, PAROLING AUTHORITIES: RECENT HISTORY AND CURRENT PRACTICE 16–17 (1991) ("There was a growing belief that rehabilitation should be the primary purpose of imprisonment. The rehabilitative ideal was to exercise an ideological hegemony over the field of corrections.").

105. See N.Y. STATE CORRECTIONS BOOKLET, *supra* note 102.

modern correctional institution and exerts crucial influence on the inmates.¹⁰⁶

The state viewed itself as having an instrumental role in reducing recidivism by reforming people with convictions.¹⁰⁷ The legislature combined prison and parole services under one state agency to create a unified system of rehabilitation and to ensure a “close liaison between the work done in correctional institutions and that of parole officers.”¹⁰⁸ It was in this climate that Certificates of Rehabilitation were created.

The earliest certificate statute dates back to the mid-forties, when a more conservative version of today’s Certificate of Good Conduct was first incorporated into New York’s Executive Law.¹⁰⁹ A person with any level of conviction was eligible for a Certificate of Good Conduct.¹¹⁰ The legislature granted the Board of Parole broad discretion to issue a certificate, provided that they did so within “a reasonable time period.”¹¹¹ In the forties, a Certificate of Good Conduct removed “one or more disabilities created by law.”¹¹² Unlike the certificates in the current statutory regime, these Certificates of Good Conduct were granted only if they would end a specific disability affecting the applicant.¹¹³ The statute was not aimed

106. *See id.*

107. *See id.* (“The Division of Correctional Industries aims to teach the inmates modern trades and occupations, and to develop skills and good work habits under the same working conditions and production tempos found in private industries. The inmates are placed in a desirable position in the free labor market so that they may legally and gainfully support themselves and their dependents upon their release.”).

108. PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND THE REALITY OF RETRIBUTIVE JUSTICE 23 (1991) (quoting 1970 N.Y. Sess. Laws 2943 (McKinney)).

109. *See* 1945 N.Y. Laws 123; *see also* Memorandum from Danielle D’Abate, Summer Intern, on Legislative History of Certificate Statutes to Alan Rothstein, Corporate Counsel for the N.Y.C. Bar Ass’n (Aug. 11, 2006) (on file with author). The Certificate of Good Conduct statute was amended twice prior to its incorporation into Article 23. The first amendment to the statute extended the certificate to individuals with convictions outside New York but required that a person had to also reside in New York for five years before applying for a Certificate of Good Conduct (in addition to the five-year post-conviction waiting period). This change was intended to prevent forum shopping. Then, in 1963, the statute was amended to clarify that issuing a certificate required three votes from members of the Board of Parole. Memorandum from Danielle D’Abate to Alan Rothstein, *supra*.

110. 1945 N.Y. Laws 123.

111. *Id.* at 123–24.

112. *Id.*

113. *Id.*

at complete civil reintegration. The changes in the early fifties required applicants to show deserving conduct, a burden that no longer exists.¹¹⁴ Additionally, the statute required good conduct for a “period of five consecutive years” after the completion of a criminal sentence or payment of a fine, regardless of the severity of the conviction.¹¹⁵

In 1966, the state legislature’s growing concern about rehabilitating people with criminal records fueled the passage of a more easily obtainable and immediate certificate—a Certificate of Relief from Disabilities for “first offenders,” which was added as Article 23 of New York’s Corrections Law (Article 23).¹¹⁶ Governor Rockefeller’s Special Committee on Criminal Offenders initiated the creation of a bill to preserve the right to vote and prevent the forfeiture of other rights, “such as the right to retain or to apply for licenses, which would otherwise follow automatically upon conviction.”¹¹⁷ Rockefeller viewed the legislation as “an important step beyond the previous system of automatic, indirect sanctions following upon a conviction without regard to the merits of the individual involved.”¹¹⁸ The Certificate of Relief committee report listed a number of automatic forfeitures imposed without concern for whether the offense “bears on an individual’s fitness.”¹¹⁹ Many of them are still imposed today, like the forfeiture of licenses to work as an x-ray technician, a real estate broker, an undertaker, an

114. 1951 N.Y. Sess. Laws 1285–86 (McKinney). The Board of Parole in the forties required a unanimous vote to award a certificate. This changed over the next decade. By 1951, only a majority was necessary; by 1960, a majority of three members of the Board was acceptable; and in 1963, a unanimous vote of three board members was required to grant a Certificate of Good Conduct. The Certificate of Good Conduct statute explained that such certificates had different legal force than pardons: “Nothing contained in this subdivision shall be deemed to alter or limit or affect the manner of applying for pardons to the governor, nor shall the certificate issued hereunder be deemed or construed to be a pardon.” See 1963 N.Y. Sess. Laws 513–14 (McKinney); 1960 N.Y. Sess. Laws 609–10 (McKinney); 1951 N.Y. Sess. Laws 1285–86 (McKinney).

115. 1951 N.Y. Sess. Laws 1285–86 (McKinney). The statute also made clear that a person could not get a Certificate of Good Conduct while on parole, which is still true today. Fines and fees imposed by the court have their own detrimental impact on reintegration, which is described in detail by a recent Brennan Center Report. ALICIA BANNON, MITALI NAGRECHA & REBEKAH DILLER, BRENNAN CTR. FOR JUSTICE, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 27–29 (2010).

116. See N.Y. LEGISLATIVE SERV., INC., *NEW YORK STATE LEGISLATIVE ANNUAL 1966*, at 18–19 (1966).

117. 1966 N.Y. Sess. Laws 3003 (McKinney).

118. *Id.*

119. N.Y. LEGISLATIVE SERV., INC., *supra* note 116, at 19.

insurance adjuster, or a private investigator.¹²⁰ The report further explained that the bill would “assist the individual in his rehabilitation process. It would enable certain first offenders to receive immediate consideration for available opportunities for which they are qualified, and thus to complete rehabilitation more rapidly and to contribute to the community in civic, social, economic and professional endeavors.”¹²¹

With no waiting period, a Certificate of Relief could offer immediate relief to first-time offenders at the time of sentencing or anytime thereafter to remove the “automatic rejection and community isolation that often accompany conviction of crimes.”¹²² The standard for the newly-created Certificate of Relief was easier to satisfy than the proof required for a Certificate of Good Conduct. Identical to the current standard, a Certificate of Relief could be issued if the court found that granting the certificate was consistent with the rehabilitation of the first offender and with the public interest.¹²³ The language of the statute, the legislative record, and the Governor’s report show that Certificates of Rehabilitation were seen as a *means* to rehabilitation.¹²⁴ They were not developed solely for those who were *already* rehabilitated.

The legislature, while endorsing rehabilitation, was not unrealistic about the potential danger to public safety that certifying offenders as rehabilitated could pose.¹²⁵ In addition to requiring a showing that the certificate was a tool for rehabilitation, the statute gave significant discretion to judges to ensure that issuing a Certificate of Relief would be consistent with the public interest.¹²⁶ The statute went even further by providing clear authority to state licensing agencies

120. *Id.*

121. *Id.*

122. *Id.* at 349.

123. *See* 1966 N.Y. Laws 1420.

124. *See* N.Y. LEGISLATIVE SERV., INC., *supra* note 116, at 19.

125. In making an employment determination for a previously convicted person, a public or private employer must consider several factors including “[t]he public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses,” N.Y. CORRECT. LAW § 753(1)(a) (McKinney 2011), and “[t]he legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public,” *id.* § 753(1)(h). This reflected the language in the statute in 1966, which stated that the relief granted by the certificate be “consistent with the public interest.” 1966 N.Y. Laws 654.

126. 1966 N.Y. Laws 654.

to deny an application even to persons with a Certificate of Rehabilitation.¹²⁷

In 1972, a major amendment to Article 23 expanded the “first offender” scope of Certificates of Relief by granting eligibility to any individual with no more than one felony conviction.¹²⁸ The change dramatically enlarged the number of individuals eligible for immediate certificates.¹²⁹ In recommending this amendment, State Senator John Dunne emphasized the advantages of Certificates of Relief compared to Certificates of Good Conduct:

[R]estrictions can be removed after five years of good conduct by the offender . . . but the *intervening* period is clearly the most critical in the rehabilitation process Since our experience with the certificate of relief from disabilities has thus far been satisfactory, it is prudent that we take a step forward by expanding those qualified to receive the certificate.¹³⁰

Dunne recognized that without full restoration of rights at sentencing or upon release, people with convictions hit roadblocks to reintegration during the critical five-year waiting period.¹³¹ These statutory roadblocks exist when people with convictions are at their greatest risk of recidivism.¹³²

127. See CORRECT. § 701(3). Awarding a state license is a highly individualized determination, and Article 23 provided ultimate discretion to administrative decision-makers saying that a certificate “shall not . . . in any way prevent any judicial, administrative, licensing or other body . . . from relying upon the conviction” as a basis for exercising its discretion to deny or refuse to renew any license or other privilege. *Id.*

128. 1972 N.Y. Sess. Laws 763–66 (McKinney). In 1974, the scope of Certificates of Relief was further enlarged to allow the Board of Parole to issue a certificate to an individual “whose judgment of conviction was rendered by a court in any other jurisdiction.” 1974 N.Y. Sess. Laws 630–31 (McKinney).

129. The percentage of people with misdemeanor convictions far exceeds the percentage with felony convictions. Senator Dunne stated: “This bill broadens employment opportunities for persons convicted of crimes by expanding the number of persons eligible to obtain a certificate of relief.” N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1972, at 13 (1972). To illustrate how expansive this population is, consider recent data: In 2010, arrests in the state of New York resulted in 56,476 felony sentences and 155,933 misdemeanor sentences. N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., DISPOSITIONS OF ADULT ARRESTS (2011), <http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/nys.pdf>.

130. N.Y. LEGISLATIVE SERV., INC., *supra* note 129, at 13–14 (emphasis added).

131. *Id.*

132. See Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 528 (2006).

Individuals with any number of misdemeanor convictions and up to one felony conviction were immediately given the opportunity for a certificate to reduce their likelihood of recidivism. A sponsor of the amendment, State Senator Ralph Marino, added:

This legislation would undoubtedly remove many of the barriers facing ex-offenders in obtaining employment Unemployment is the greatest deterrence to rehabilitation as statistics indicate that many of the ex-offenders return to lives of crime because other employment is not available.¹³³

The rationale behind this statute—engaging individuals in work *immediately* after a conviction as a *means* of reducing recidivism—is consistent with more recent studies showing that if an individual is employed she is less likely to commit a crime.¹³⁴

In 1976, the state legislature brought both certificates together under Article 23 of the Corrections Law and made a Certificate of Good Conduct even easier to obtain.¹³⁵ Waiting times for Certificates of Good Conduct were reduced to present-day requirements, and the eligibility standards no longer focused on proof of rehabilitation. Both certificates were intended to “lift job restrictions from rehabilitated [individuals] now deprived of over 125 licensing and employment categories because of their criminal records.”¹³⁶ A wide range of agencies and organizations backed the 1976 certificate expansion, including the State Division of Human Rights, the Department of Labor, the American Bar Association, the New York State Bar Association, and the New York Civil Liberties Union.¹³⁷

As the certificate statutes evolved from the mid-forties to the mid-seventies, New York legislators repeatedly made clear that they intended to make certificates as accessible as possible in two different ways. First, the change in eligibility requirements from demanding that a person with convictions

133. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1976, at 50 (1976).

134. TRAVIS, *supra* note 4, at 168–69 (“[A range of studies show that] unemployment and crime go hand in hand If someone has a legitimate job, he or she is less likely to be involved in criminal activity.”).

135. See N.Y. CORRECT. LAW § 703-a(2) (McKinney 2011).

136. Memorandum of Sen. Marino, Bill Jacket, In Support of ch. 931 (1975) (on file with author).

137. N.Y. LEGISLATIVE SERV., INC., *supra* note 133, at 931; see also Memorandum from Danielle D’Abate to Alan Rothstein, *supra* note 109, at 4.

demonstrate conduct warranting a certificate to requiring that the certificate be merely “consistent” with rehabilitation constituted a major shift. Second, eligibility for a Certificate of Relief expanded to include a larger number of people because a waiting period of good conduct did not stand in their way. These changes made certificates within reach for the general population with convictions. Previously, certificates were available only to the few who could earn them after spending five years accumulating proof of an abnormal and perhaps unrealistic level of rehabilitation. These expanded certificate statutes relieved a catch-22: A period of good conduct established that a person was leading a law-abiding life, but leading a law-abiding life would be difficult with legal barriers to work, housing, and other civil benefits. These changes reflected the legislature’s view that certificates were not rewards for rehabilitation but vehicles that enabled rehabilitation.

Despite this historical support for Certificates of Rehabilitation, they rarely have been awarded since they were created. Between 1972 and 2003, on average, only 3200 certificates a year were granted.¹³⁸ The situation for Certificates of Good Conduct was even bleaker: Between 1972 and 2003, only 1826 Certificates of Good Conduct were granted.¹³⁹ This is an extremely small fraction of the individuals who were eligible during that thirty year period. To put that number in perspective, in 2003 alone, 65,000 people were incarcerated in state facilities and over 126,000 were under the supervision of the Department of Probation.

C. The Rise and Fall of the Rehabilitation Ideal

The commitment to rehabilitation programs, nationally and in New York, began a dramatic decline in the late seventies because of a confluence of political, economic, and social forces.¹⁴⁰ The most cited turning point was a 1974 article by Robert Martinson analyzing the data from over 230 studies

138. Telephone Interview with Kate Rubin, *supra* note 72.

139. *Summary of State Laws*, LEGAL ACTION CENTER (Apr. 2009), http://www.lac.org/toolkits/certificates/summary_state_laws.htm.

140. See GARLAND, *supra* note 42, at 9 (“In the last twenty years, however, we have seen the reappearance of ‘just deserts’ retribution as a generalized policy goal . . .”).

of the effectiveness of rehabilitation programs.¹⁴¹ Martinson's title asked "What Works?," and his answer, according to numerous press accounts about the article, was "nothing."¹⁴² Although his findings were more nuanced, his article contributed to a dramatic decline in political support for rehabilitation programs, "ushering in an era of 'nothing works' pessimism and 'lock'em up' punitiveness."¹⁴³

Beginning in the late seventies, as Certificates of Rehabilitation statutes grew more robust, New York's criminal justice system shifted its penal focus from rehabilitation to retribution.¹⁴⁴ The state separated parole from the Department of Corrections, a symbolic shift to the more punitive approach of incapacitation. From 1973 to 2009, New York's prison population skyrocketed by nearly 388%.¹⁴⁵ Defendants received "determinate" sentences—sentences authorized by strict guidelines with no judicial discretion, and virtually no opportunity for parole.¹⁴⁶ This determinate ideal was endorsed by strange bedfellows—liberal defense advocates and conservative law-and-order advocates.¹⁴⁷ The former wanted a fairer, more uniform sentencing system to reduce disparities in criminal sentences and remove judicial discretion; the latter pushed for an unforgiving, retributist determinate sentencing model.¹⁴⁸

Many forces, including new laws with mandatory sentencing provisions, contributed to the inmate population growth. New York's Rockefeller drug laws are one example of

141. *Id.* at 58; Jerome G. Miller, *The Debate on Rehabilitating Criminals: Is It True That Nothing Works?*, WASH. POST., Mar. 1989, available at <http://www.prisonpolicy.org/scans/rehab.html> ("An articulate criminologist, Martinson had become the leading debunker of the idea we could 'rehabilitate' criminals.").

142. PETER RAYNOR & GWEN ROBINSON, REHABILITATION, CRIME AND JUSTICE 65–66 (2005). For an extensive argument about the crisis of penal modernism, see GARLAND, *supra* note 42, at 55–68.

143. WARD & MARUNA, *supra* note 103 at 8; *see also* GARLAND *supra* note 42, at 69.

144. *See* GRISET, *supra* note 108, at 61.

145. CORR. ASS'N OF N.Y., WOMEN IN PRISON FACT SHEET 1 (2009), http://www.correctionalassociation.org/publications/download/wipp/factsheets/Wome_in_Prison_Fact_Sheet_2009_FINAL.pdf; *see also* GRISET, *supra* note 108, at 89 (noting that prison crowding had reached dangerous levels according to one New York commission report).

146. GRISET, *supra* note 108, at 2, 61; *see also* SCOTT CHRISTIANSON, WITH LIBERTY FOR SOME: 500 YEARS OF IMPRISONMENT IN AMERICA 277–78 (1998).

147. GRISET, *supra* note 108, at 31–32.

148. *Id.*

the state's more retributive approaches.¹⁴⁹ Until 2004, they required a minimum sentence of fifteen years to life for possession of four ounces or more of a narcotic substance.¹⁵⁰ The sentence was mandatory regardless of the arrested individual's background or criminal history.¹⁵¹ Judges had no discretion over whether to incarcerate or divert individuals to drug treatment programs.¹⁵² As a result, by the nineties over forty percent of the state prison population was incarcerated for drug offenses.¹⁵³ Similar drastic prison population shifts were occurring throughout the country.¹⁵⁴

In addition to tougher drug sentencing, other factors led to more punitive criminal justice practices. During the seventies, people housed in state correctional facilities could be released by the Board of Parole, which set minimum sentences.¹⁵⁵ New determinate sentencing legislation, fueled also by federal legislation,¹⁵⁶ resulted in longer prison stays.¹⁵⁷

Throughout the country, increases in violent crime led to swift policy changes. Public opinion polls showed that people were worried about rising crime rates.¹⁵⁸ The public debate

149. See CHRISTIANSON, *supra* note 146, at 277. New York's Rockefeller drug laws were passed in 1973 with Governor Carey's endorsement—the same governor who expanded Certificates of Rehabilitation. *Regarding Lessons Learned from the Rockefeller Drug Laws After Thirty-Five Years: Hearing Before the N.Y. State Assemb. Comms. on Codes, Judiciary, Corr., Health, Alcoholism & Drug Abuse, & Soc. Servs.*, 2007 Leg., 230th Sess. (N.Y. 2007) (statement of Harry G. Levine, Department of Sociology, City University of New York), <http://www.drugpolicy.org/docUploads/HarryGLEvineQueensCollegeCUNY.pdf>; see also GRISET, *supra* note 108, at 64–66.

150. Madison Gray, *A Brief History of New York's Rockefeller Drug Laws*, TIME (Apr. 2, 2009), <http://www.time.com/time/nation/article/0,8599,1888864-1,00.html>.

151. See *id.* “It was thought that rehabilitative efforts had failed; that the epidemic of drug abuse could be quelled only by the threat of inflexible, and therefore certain, exceptionally severe punishment.” *People v. Broadie*, 37 N.Y.2d 100, 115 (1975) (citations omitted).

152. GRISET, *supra* note 108, at 65.

153. Ernest Drucker, *Population Impact of Mass Incarceration Under New York's Rockefeller Drug Laws: An Analysis of Years of Life Lost*, 79 J. URB. HEALTH 434, 434–35 (2002), <http://www.prisonpolicy.org/scans/rockefeller.pdf>.

154. See CHRISTIANSON, *supra* note 146, at 278–79.

155. GRISET, *supra* note 108, at 74 (“Allocating such vast discretion to the parole board was intended to provide the flexibility needed to make deferred sentencing decisions based on their expert opinion of the offender's readiness for release.”).

156. PAULA DITTON ET AL., U.S. DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 1–3 (1999), <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

157. GRISET, *supra* note 108, at 75 (“[T]here were an increasing number of people coming to state prison with a minimum sentence set by the judge.”).

158. TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 50 (2007).

therefore had no one to defend the status quo.¹⁵⁹ The debate was about how long sentences should be.¹⁶⁰ “Super predators” who committed egregious violent crimes commanded the media’s attention at this time.¹⁶¹ Partially in response to accusations of horrible violent crimes perpetrated by teenagers, New York passed the first law in the country allowing children as young as thirteen to be tried as adults.¹⁶²

By the nineties, one out of every four African-American men in New York was incarcerated.¹⁶³ Studies showed that seventy-five percent of the state’s inmates came from seven of the poorest neighborhoods in New York City.¹⁶⁴ Prison was no longer intended to “transform, reform or rehabilitate prisoners.”¹⁶⁵ Rehabilitation prison programs—including educational classes, job training programs, and drug counseling—were dramatically cut from the budget.¹⁶⁶

As the goals of criminal punishment transformed from the seventies through the nineties, Certificates of Rehabilitation statutes remained on the books, but they were no longer a priority of the penal system. The state legislature systematically chipped away at the statutes because certificates did not support the retributive policies in effect.

For example, in 1983, New York’s Article 23 and the Public Health Law were amended to require automatic mandatory suspension of nursing home operator licenses when a person was convicted of an industry-related felony, regardless of whether the person held a Certificate of Relief.¹⁶⁷ The

159. *Id.* at 51.

160. *Id.*

161. SHADD MARUNA, MAKING GOOD: HOW EX-CONVICTS REFORM AND REBUILD THEIR LIVES 5 (2001). Research findings “constantly contradict” this “myth that drives incarceration mania.” *Id.* at 6.

162. See Aaron Kupchik, Jeffrey Fagan & Akiva Liberman, *Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis*, 14 STAN. L. & POL’Y REV. 57, 69 (2003); see also GRISET, *supra* note 108, at 71 (describing how the New York juvenile offender law played a role in the “flip-flop” from rehabilitation to retribution).

163. CHRISTIANSON, *supra* note 146, at 281.

164. *Id.* at 299.

165. *Id.* at 312.

166. See JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 4–5 (2003). Although corrections consume four percent of states’ budgets, the resources are directed not at prison programs but to staff, construction, and health care costs. In fact, “public sentiment and political rhetoric have also forced the reduction of many programs.” *Id.* at 5.

167. See N.Y. PUB. HEALTH LAW § 2806(5) (McKinney 2010); N.Y. CORRECT. LAW § 701(2) (McKinney 2010).

legislature was responding to *Hodes v. Axelrod*,¹⁶⁸ which had permitted a certificate to lift the automatic forfeiture.¹⁶⁹ In 1985, the legislature followed with an amendment preventing Certificates of Relief from removing the automatic suspension of a driver's license when a person was convicted of driving while intoxicated.¹⁷⁰ A similar statute was passed for bus driving licenses.¹⁷¹ Throughout the eighties, the legislature passed amendments that removed the power of certificates to lift automatic licensing bars.¹⁷²

Also in 1985, the New York state legislature made it more difficult for an applicant with out-of-state convictions to get an employment license.¹⁷³ The applicant had the burden to show a necessity for a New York certificate that "bears a rational relationship to an interest within New York."¹⁷⁴ In its statement of support, the State Division of Parole argued that the amendment was necessary to prevent people with convictions from moving to New York because New York certificates made finding employment easier.¹⁷⁵ Although the standard has softened, the current statute still makes it more onerous for people with out-of-state convictions because they must prove a necessity for a certificate.¹⁷⁶

168. *Hodes v. Axelrod*, 56 N.Y.2d 930, 932 (1982) (holding that New York Corrections Law section 701 barred automatic revocation of a license where the holder has been issued a Certificate of Relief from Disabilities pursuant to Article 23 of the Corrections Law).

169. N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1983, at 584 (1983) (memorandum of Department of Health). After a discussion of *Hodes*, the memorandum explains that the amendment will "assist in the Department's continuing efforts to remove convicted felons from the operation and provision of health care services." *Id.* The new amendment's "limitation on the scope of the certificate of relief would resurrect the revocations" of a hospital operating certificate. *Id.*

170. Memorandum of Sen. Levy, reprinted in N.Y. LEGISLATIVE SERV., INC., NEW YORK STATE LEGISLATIVE ANNUAL 1985, at 258 (1985).

171. See 1985 N.Y. Laws 2876 (codified at N.Y. VEH. & TRAF. LAW § 509-cc (McKinney 2011)).

172. In its memorandum in support of the amendment, the State Department of Health noted that the amendment was simply restoring the law to what it had been prior to the court's decision in *Hodes v. Axelrod*. N.Y. LEGISLATIVE SERV., INC., *supra* note 169, at 254–55. This limiting of Article 23 only related to the automatic revocations contained in the Public Health Law.

173. 1985 N.Y. Sess. Laws 3090–91 (McKinney).

174. *Id.*

175. *Id.*

176. N.Y. CORRECT. LAW § 703-b(2) (McKinney 2010) ("The department shall have the power to issue a certificate of good conduct to any person previously convicted of a crime in any other jurisdiction, when the department is satisfied that: (a) The applicant has demonstrated that there exist specific facts and

Minor amendments throughout the eighties and nineties shrunk the breadth of the certificate statutes, reflecting a waning belief in rehabilitation and the certificate's original purpose. Some statutes today continue to prevent people with criminal histories from applying for state licenses even if they earned a Certificate of Rehabilitation.

D. A New Climate for Certificates of Rehabilitation

Since 2000, the exponentially growing numbers of individuals being released from prison has sparked a new national focus on issues of prisoner reentry. New York state is no exception. Currently, New York has the fourth largest state prison population in the country¹⁷⁷ and released more than 25,000 people from state and federal prison in 2010 alone.¹⁷⁸ With a steadily increasing prisoner population returning home, communities have begun to recognize that reentry is a reality that can no longer be ignored. This renewed focus on reintegration within the criminal justice system may spark a rejuvenation of Certificates of Rehabilitation as a means to successful reentry.

New York has been viewed as a national leader in reentry efforts.¹⁷⁹ In 2004, New York was ranked as the state with the fewest “unfair and counterproductive barriers” in a study comparing collateral consequences in all fifty states and Puerto Rico.¹⁸⁰

circumstances, and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York.”).

177. Only California, Florida, and Texas have larger prison populations. PEW CTR. ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS 7 (2010), http://www.pewcenteronthestates.org/uploadedFiles/Prison_Count_2010.pdf.

178. PAUL GUERINO ET AL., U.S. DEPT OF JUSTICE, PRISONERS IN 2010, at 24 (2012), <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>.

179. *After Prison: Roadblocks to Reentry:—A Report on State Legal Barriers Facing People with Criminal Records*, LEGAL ACTION CENTER, <http://www.lac.org/roadblocks-to-reentry> (last visited Feb. 2, 2012).

180. *Id.* In 2004, the Legal Action Center (LAC) completed and published *After Prison: Roadblocks to Reentry*, a comprehensive analysis and grade report of state laws and policies that serve as legal barriers to reentry in the areas of employment, public housing, public benefits, voting, access to criminal records, adoptive and foster parenting, and drivers' licenses. In 2009, LAC issued the *After Prison Report: 2009 Update* to highlight states' progression or regression in improving opportunities for people with criminal histories to successfully reintegrate into society to become productive, law-abiding citizens. *Id.* New York ranked near the top in both reports. It ranked second in 2009 because Illinois

New York opted out of federal bans on public assistance, food stamps, and student loans for people with convictions.¹⁸¹ In addition, voting rights are automatically restored upon release from state prison.¹⁸² People with misdemeanor convictions can vote even while in jail, and those with felony convictions can vote while on probation or once their sentence is complete.¹⁸³

In 2006, the New York legislature strengthened its commitment to reforming the criminal justice system by passing an amendment that added reentry and reintegration as a new goal for sentencing.¹⁸⁴ In addition to the four traditional sentencing goals of rehabilitation, deterrence, retribution, and incapacitation, the state endorsed the goal of promoting the “successful and productive reentry and reintegration into society” of those with criminal convictions.¹⁸⁵

New York has been at the forefront of implementing protections for employers who hire people with convictions.¹⁸⁶ A recently passed negligence-in-hiring law gives immunity to employers who comply with antidiscrimination laws when hiring people with criminal records.¹⁸⁷ Any evidence of an

reduced more barriers to reentry. New York is not without its roadblocks to reentry, however. It has catalogued over 1000 barriers in state statutes and agency regulations. ABA Demonstration Site, *supra* note 6. Yet, the sheer number does not tell the entire story. New York also has passed legislation that is some of the most progressive in the country.

181. ALICE KING, JUSTICE ACTION CTR., COLLATERAL CONSEQUENCES OF CONVICTION: FIVE STATE RESOURCE GUIDE 19 (2007), http://www.nyls.edu/user_files/1/3/4/30/59/65/68/capstone060704.pdf (explaining that federal law prohibits anyone convicted of a drug-related felony from receiving federally funded cash assistance and food stamps). “The law also prohibits states from providing assistance, food stamps, or supplemental security income (‘SSI’) to anyone in violation of their parole or probation. This is a lifetime ban.” *Id.* New York opted out. *Id.* For a more comprehensive discussion of federal legislative barriers to reentry, see generally THOMPSON, *supra* note 15.

182. Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1512 (2003).

183. See *Voting as an Ex-offender*, NONPROFIT VOTE, <http://www.nonprofitvote.org/voting-as-an-ex-offender.html> (last visited Mar. 10, 2011).

184. N.Y. PENAL LAW § 1.05(6) (McKinney 2010).

185. *Id.*

186. N.Y. EXEC. LAW § 296(15) (McKinney 2010).

187. *Id.* This provision states:

[T]here shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such

employee's convictions is excluded from a negligent hiring lawsuit.¹⁸⁸

In 2010, Governor Patterson signed eight new reentry bills into law.¹⁸⁹ One reversed the legislature's course by amending over twenty statutes to permit both Certificates of Relief and Certificates of Good Conduct to remove automatic licensing bars.¹⁹⁰ Criminal information will be posted on the state's Department of Corrections online lookup database for only five years after release.¹⁹¹ Another statute made it easier for people with federal convictions to apply for a Certificate of Rehabilitation.¹⁹² One statute offers inmates free copies of their birth certificates; another statute offers free record of arrests and prosecutions (RAP) sheets.¹⁹³

A 2011 change in the structure of parole signals a return to New York's rehabilitative approach. In the seventies, New York combined parole and corrections to endorse a uniform system of confinement and rehabilitation.¹⁹⁴ During the retributive era, they were divided.¹⁹⁵ In 2011, the state again

employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.

Id.

188. See, e.g., *New York Adds Further Employment-Related Protections for Individuals with Criminal Conviction Record*, JACKSON LEWIS (Nov. 12, 2008), <http://www.jacksonlewis.com/legalupdates/article.cfm?aid=1554>; *New York Employment Law Update*, SULLIVAN & CROMWELL (Oct. 16, 2008), http://www.sullcrom.com/files/Publication/f3fe6330-745e-42fe-8229-0f2890543617/Presentation/PublicationAttachment/ab9c3cf2-addc-4817-9909-0ffe03a941fa/SC_Publication_New_York_Employment_Law_Update.pdf.

189. *Recent Reports and Legislation*, FORTUNE SOC'Y, <http://fortunesociety.org/get-involved/advocate-for-change/drcpp/recent-reports-legislation/> (last visited Jan. 3, 2012).

190. For a summary of the statutes, see *NY: 8 Re-entry Bills in State Budget Signed into Law*, LEGAL ACTION CENTER, <http://www.lac.org/index.php/lac/520> (last visited Apr. 4, 2012).

191. N.Y.C. BAR, REPORT ON LEGISLATION BY THE CORRECTIONS COMMITTEE AND THE LABOR & EMPLOYMENT LAW COMMITTEE (2010), http://www.nycbar.org/pdf/report/DOCS_Corrections&Employment_Report051409.pdf. Conviction information on the Department of Corrections website will be expunged five years after the expiration of sentence of imprisonment and period of parole or post-release supervision. However, when a person is committed to the Department of Corrections, any prior conviction information is available on the website and will remain available until five years after expiration of the most recent commitment to the Department of Corrections.

192. See *NY: 8 Re-entry Bills in State Budget Signed into Law*, *supra* note 190.

193. See *id.*

194. GRISET, *supra* note 108, at 23.

195. See 1970 N.Y. Sess. Laws 2943 (McKinney).

merged parole and the Department of Corrections, which oversees prison administration, and formed the Department of Corrections and Community Supervision.¹⁹⁶ The primary aim is “to create a more seamless, more comprehensive operation through a continuum of care from the moment an offender enters the correctional system until he or she successfully completes the required period of community supervision.”¹⁹⁷

This discussion offers only a snapshot of how New York is reordering its criminal justice priorities to focus on reentry. Yet, it is not meant to overstate reality. New York has increased its statutory barriers from 125 in 1976 to over 1000 in force today.¹⁹⁸ These reentry barriers continue to counter the positive measures the state is taking.

Certificates of Rehabilitation are part of New York’s complex and contradictory set of state laws that create both legal obstacles and relief for people with criminal convictions. The legislative landscape reflects a cautious approach to reentry that attempts to balance community safety with the state’s role in restoring rights to enable full reintegration of people after their convictions. Certificates of Rehabilitation offer a politically attractive and administratively effective mechanism for achieving that balance.

As evidence of this, the Certificate Review Unit has recently issued a significantly higher number of certificates annually.¹⁹⁹ Whereas only 380 certificates were granted by the Board of Parole in 2003, over 1000 certificates have been issued each year since 2007, with 3046 issued in 2008 alone.²⁰⁰

II. THE POTENTIAL OF NEW YORK’S CERTIFICATE PROGRAM

A. *Political Viability*

Certificates of Rehabilitation are politically attractive forms of relief for people facing collateral consequences. The main alternatives, pardons and expungement, have gained little traction over the past fifty years.²⁰¹ Pardons and expungements result in a greater degree of finality than

196. *Merger Fact Sheet*, *supra* note 29.

197. *Id.*

198. ABA Demonstration Site, *supra* note 6.

199. Interview with Frank Herman, *supra* note 74.

200. *Id.*

201. See LOVE & FRAZIER, *supra* note 22, at 2, 7.

certificates, virtually erasing a person's convictions and the collateral consequences that stem from them.²⁰² Those benefits, however, also make them a far greater political liability for politicians to endorse.

Federal and state pardons are extremely rare and have declined over the past four decades.²⁰³ In most states, a pardon establishes "good moral character" and is the only means for lifting legal barriers to licenses and jobs.²⁰⁴ The odds of receiving a pardon are minuscule in the forty states that constitutionally vest the pardon power solely in the governor.²⁰⁵ New York is one such state. Often, it is customary for governors to issue pardons only at the end of their term.²⁰⁶ In 2010, immediately before leaving office, Governor Patterson issued over twenty pardons to immigrants facing deportation.²⁰⁷ Prior to that, less than a handful of applications were granted in New York each year.²⁰⁸ In 2006, the year New York Governor Pataki left office, he refused to grant even one pardon.²⁰⁹ In the year prior, he only granted one.²¹⁰ The sharp contrast between the number of pardons issued by the past two New York governors exemplifies the extremely discretionary nature of the pardon and its political vulnerability. It is not

202. *See id.*

203. *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153, 153 (2009) ("Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the president. The number of pardons has decreased, and commutations are particularly rare, with the president and the vast majority of states governors granting only a handful of commutations in the past decade—all while the number of people being sentenced escalates at a rapid rate.").

204. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 7 (2005), <http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf> (explaining that a pardon in "most jurisdictions . . . is the *only* mechanism by which adult felony offenders can avoid or mitigate collateral penalties and disabilities").

205. *See* Love, *supra* note 24, at 17–18 (finding that "most chief executives no longer regard pardoning as an integral and routine function of their office, and members of the public regards [sic] pardoning with deep suspicion and cynicism").

206. *See* Cathleen Burnett, *The Failed Failsafe: The Politics of Executive Clemency*, 8 TEX. F. ON C.L. & C.R. 191, 193 (2003) (stating that "the great majority of clemencies are granted at the end of the executive term, suggesting a clear connection between political considerations and the denial of clemency").

207. *Twenty-Four Immigrants Pardoned by Governor*, N.Y. TIMES (Dec. 25, 2010), <http://www.nytimes.com/2010/12/25/nyregion/25pardon.html>.

208. *See New York Clemency Decisions*, N.Y. ST. DEFENDERS ASS'N, <http://www.nysda.org/clemency.html> (last visited Mar. 13, 2011).

209. *Id.*

210. *Id.*

surprising that the public regards receiving a pardon as equivalent to “a favor bestowed on political contributors at the end of an administration, [or] winning [a] lottery ticket rather than a remedy that can reasonably be sought by ordinary people.”²¹¹

The remaining ten states give the pardon power to administrative bodies that act as a political buffer, resulting in higher pardoning rates.²¹² Even these numbers, which are higher than those for gubernatorial pardons, represent only a tiny fraction of the population with criminal histories. Overall, pardons are politically unpopular, exposing politicians, especially governors, to the public critique of being “soft on crime” if a pardoned individual reoffends.²¹³

Expunging records also does not fit into tough-on-crime rhetoric and exposes its political supporters to criticism if a person with an expunged record commits another crime. Expungement usually removes a conviction from the public record after a certain period of time following the completion of a criminal sentence.²¹⁴ It permits a person to deny that he has been convicted, even on job applications.²¹⁵ Over the past fifty years, expungement efforts have declined, and under federal law virtually no record is expunged.²¹⁶ While endorsed by some as an effective and necessary reentry tool, its detractors argue that expungement runs counter to the compelling interest of protecting the public from repeat offenders.²¹⁷ Expungement also has been criticized for perversely revising history, saying that a conviction did not happen when it did.²¹⁸

As criminal records become more accessible to employers through criminal background checks, however, a pardon or expungement no longer guarantees that employers will not

211. See Love, *supra* note 24, at 18.

212. *Id.*

213. See Barkow, *supra* note 203, at 153.

214. 21A AM. JUR. 2D *Criminal Law* § 1219 (2011) (“Expungement of a criminal record requires physical destruction of the record by whomever and in whatever depository the record is maintained, such that all traces of the criminal process relating to that offense are destroyed. ‘Expungement’ means to erase all evidence of the event as if it never occurred.”).

215. Love, *supra* note 24, at 20.

216. *Id.* at 21.

217. Pinard, *supra* note 16, at 529 (arguing that opponents of expungement claim “that expungement ‘seeks to rewrite history, establishing that something did not happen although it really did,’ and, by essentially erasing the conviction from public view, ‘devalue[s] legitimate public safety concerns’”).

218. *Id.*

discover a person's criminal history.²¹⁹ Three decades ago, either a pardon or an expungement would mean that an individual could start over with a clean slate. Today, states have made criminal records more accessible by posting searchable criminal record databases online and by allowing individuals to purchase criminal history records.²²⁰ A growing industry of private companies that conduct background checks purchase and store criminal records in their databases without any mechanism for removing expunged records.²²¹ The massive accessibility of criminal history information dilutes the purpose and benefit of political pardons and expunging records.²²²

New York's Certificates of Rehabilitation, on the other hand, remove civil barriers without denying the existence of a criminal conviction. A person's official criminal history report actually indicates that a Certificate of Relief or a Certificate of Good Conduct has been granted. Because certificates are administered by the sentencing court or the DCCS, they are further distanced from legislative or executive decision-making. Therefore, the administering body is insulated from potential political backlash should a certificate holder be convicted again. Theoretically, certificates should be issued at a higher rate and to more people than pardons. Certificates offer the most politically palatable and administrable state-authorized stamp of approval that one's debt to society has been paid and that the person's rights are fully restored.²²³

B. Legal Robustness

Other states have certificates that purport to relieve collateral consequences, but not one provides a mechanism for a certificate recipient to enforce that relief. In California, the certificate process is simply the first step in the pardon

219. James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177, 186 (2008).

220. The New York Office of Court Administration (OCS) centralizes all criminal cases from state courts. Although the full database is accessible only to personnel, such as judges with passwords, OCS sells criminal records to the public. See PUB. REC. CENTER, <http://www.publicrecordcenter.com/newyorkpublicrecord.htm> (last visited Jan. 3, 2012); see also Jacobs & Crepet, *supra* note 219, at 186–87.

221. Jacobs & Crepet, *supra* note 219, at 186.

222. *Id.* at 185–86.

223. See Love, *supra* note 24, at 22.

process.²²⁴ Certificates create no change in legal status, and pardons are only granted in rare cases.²²⁵ New Jersey provides certificates only to people who have been paroled.²²⁶ Parolees comprise only a small portion of the U.S. population with criminal records.²²⁷ In Nevada, a state board can issue a certificate only after five years of release.²²⁸ Because certificates are the functional equivalent of a pardon and completely erase a conviction, Nevada has not issued a certificate in years.²²⁹ Mississippi's certificates serve one purpose—to grant gun permits to people with convictions.²³⁰

Even the model certificate provisions under the ULC's Uniform Collateral Consequences of Conviction Act do not offer any legal force to discourage agencies or employers from making adverse decisions based on an applicant's criminal history.²³¹ As a result, the value of these certificates is largely symbolic.

By contrast, New York's Certificates of Relief and Good Conduct establish a legally enforceable rebuttable presumption of rehabilitation.²³² The presumption affects decisions by government licensing agencies, other administrative bodies, and private employers.²³³ For example, in New York, the public housing authority imposes waiting periods on people with convictions.²³⁴ The certificate is evidence of rehabilitation, and the presumption shifts the evidentiary burden to an employer

224. See CAL. PENAL CODE §§ 4852.01-.21, .13 (West 2011); see also Love, *supra* note 24, at 22.

225. Between 1991 and 2004, California Governors granted only sixteen pardons. See Press Release, Governor Arnold Schwarzenegger, Governor Schwarzenegger Grants Three Pardons (Dec. 22, 2004) (on file with author).

226. See N.J. ADMIN. CODE § 10A:71-8.2 (2011).

227. In 2009, it was estimated that there are almost six times as many adults on state probation in the United States (4,221,563) than on parole (727,824). See LAUREN E. GLAZE ET AL., U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 23 app. tbl.2, 33 app. tbl.12 (2010).

228. See NEV. ADMIN. CODE § 213.140 (2011).

229. See LOVE & FRAZIER, *supra* note 22, at 5.

230. See MISS. CODE ANN. § 97-37-5(1), (3) (West 2010).

231. See UCCCA, *supra* note 36.

232. N.Y. CORRECT. LAW § 753(2) (McKinney 2011) ("In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.").

233. See *id.*

234. N.Y.C. HOUS. AUTH., TENANT SELECTION AND ASSIGNMENT PLAN app. at 5-7 (2011), <http://home2.nyc.gov/html/nycha/downloads/pdf/TSAPlan.pdf>.

or agency decision-maker, like the housing authority, to rebut. If the presumption is ignored, a person can file a petition in the New York Supreme Court challenging the decision as impermissible discrimination based on the person's criminal history.

The certificates have force partly because Article 23-A of New York's Correction Law prohibits discrimination against a person solely on the basis of a criminal conviction without conducting an eight-factor inquiry.²³⁵ Under Article 23-A, an employer may deny a license or employment application because of a criminal conviction only (1) when there is a "direct relationship" between a previous conviction and the license or position, or (2) when granting the license or job would involve an "unreasonable risk" to property or public safety.²³⁶ To make that determination, an employer or agency must consider eight independent factors including: "[t]he specific duties and responsibilities necessarily related to the license or employment," "[t]he time which has elapsed since the occurrence of the criminal offense," "[t]he seriousness of the offense," and "[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct."²³⁷

235. CORRECT. § 752. The law states:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

Id. § 753(2).

236. *Id.* § 752.

237. *Id.* § 753(1). The law states:

In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

- (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.

Article 23-A states that an employer “*shall also* give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant,” and that the certificate creates a “presumption of rehabilitation.”²³⁸ The presumption applies with equal force whether an employer denies an application based on either a direct relationship or unreasonable risk.²³⁹ New York courts have also held that the protections for employees under Article 23-A apply both to convictions prior to employment and convictions during the course of employment.²⁴⁰

Courts have been clear that the presumption of rehabilitation “imposes a burden on respondents to come forward with evidence to rebut it.”²⁴¹ Shortly after the inception of the eight-factor analysis, the New York Supreme Court held that failing to consider all of the factors in Article 23-A or neglecting to rebut the presumption of rehabilitation resulted in an arbitrary and capricious denial of employment or a state license.²⁴²

Courts retreated from this forceful language in the late eighties by saying that certificates satisfy only “1 of 8 factors to be considered,” namely, that the applicant be rehabilitated.²⁴³

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Id.

238. *Id.* § 753(2) (emphasis added).

239. See *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 614 (1988) (finding that the “presumption of rehabilitation which derives from a certificate of good conduct or certificate of relief from civil disabilities, has the same effect, however, whether the employer or agency seeks to deny the application pursuant to the direct relationship exception or the unreasonable risk exception”).

240. See *Branesch v. Scully & Scully, Inc.*, No. 103534/2009, slip op. at 3 (N.Y. Sup. Ct. Sept. 8, 2009) (citing *Ass’n of Surrogates v. State of N.Y. Unified Court Sys.*, 48 A.D.3d 228 (N.Y. App. Div. 2008); *Rosa v. City Univ.*, 13 A.D.3d 162, 163 (N.Y. App. Div. 2004)).

241. See *Soto v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, 907 N.Y.S.2d 104, *8 (N.Y. Sup. Ct. 2010) (citing *Marra v. City of White Plains*, 96 A.D.2d 17, 24 (N.Y. App. Div. 1983); *Arrocha v. Bd. of Educ.*, 93 N.Y.2d 361, 365 (1999); *Peluso v. Smith*, 540 N.Y.S.2d 631 (N.Y. Sup. Ct. 1989)).

242. See *Maloney v. Waterfront Comm’n of N.Y. Harbor*, 96 Misc. 2d 688, 691 (N.Y. Sup. Ct. 1978).

243. *Bonacorsa*, 71 N.Y.2d at 614 (“[A]lthough rehabilitation is an important factor to be considered by the agency or employer in determining whether the license or employment should be granted, it is only 1 of 8 factors to be considered.”) (citation omitted); see also Jocelyn Simonson, *Rethinking “Rational*

Denying an applicant based on a prior conviction without considering the factors is not sufficient to overcome or rebut a certificate's presumption of rehabilitation.²⁴⁴ However, if the employer "considers all eight factors . . . it need not in every case produce independent evidence to rebut the presumption of rehabilitation" before denying a license or employment.²⁴⁵ In *Arrocha v. Board of Education*, the Board of Education denied an applicant a license to teach high school Spanish following a nine-year-old conviction for the sale of a ten-dollar bag of cocaine.²⁴⁶ The Board considered all eight factors but did not offer any evidence to rebut the applicant's Certificate of Relief from Disabilities.²⁴⁷ The court held that "the Board was not obligated to rebut the presumption of rehabilitation and was entirely justified in considering the nature and seriousness of this particular crime . . . of overriding significance when issuing a high school teaching license."²⁴⁸

In recent opinions, however, New York appellate courts seem to be reviving the diluted power of the presumption of rehabilitation by clarifying that an agency or employer cannot superficially refer to the eight factors to rebut a certificate's presumption of rehabilitation without providing evidence.²⁴⁹ In *Matter of El v. New York City Department of Education*, the court found that the Board's decision denying an applicant's substitute teacher application was arbitrary and capricious for failing to consider all of the eight factors under Article 23-A and neglecting to consider the petitioner's Certificate of Relief from Disabilities.²⁵⁰ In 2010, a New York Supreme Court also

Discrimination" Against Ex-offenders, 13 GEO. J. ON POVERTY L. & POL'Y 283, 286, 303 (2006).

244. See *Peluso*, 540 N.Y.S.2d at 635.

245. *Bonacorsa*, 71 N.Y.2d at 614.

246. *Arrocha*, 93 N.Y.2d at 366.

247. *Id.*

248. *Id.*

249. See *Boatwright v. N.Y. State Office of Mental Retardation & Dev. Disabilities*, No. 0100330/2007, slip op. at 6 (N.Y. Sup. Ct. Apr. 18, 2007) (distinguishing *Arrocha*, stating that "in that case, the Board did evaluate and analyze each element of the statute and did not just issue a cavalier denial as appears to be the case here").

250. *In re El*, No. 401571/08, 2009 WL 1271992, at *5 (N.Y. Sup. Ct. Apr. 1, 2009) ("[T]his Court finds that respondent's decision denying petitioner's substitute teacher application is arbitrary and capricious and must be annulled. The Board of Education failed to consider petitioner's Certificate of Relief from Disabilities and has not adequately demonstrated that it considered all eight of the statutorily-required factors in light of the specific evidence presented by petitioner in this case.").

held that merely referring to the eight factors does not amount to rebutting or justifying a rejection of the presumption of rehabilitation established by a certificate.²⁵¹ The state of the law on the certificate's rebuttable presumption is in flux, but the presumption at the very least satisfies one of the eight Article 23-A factors—proof of rehabilitation.²⁵²

C. Immediate Restoration of Political Rights

In New York, certificates encourage civil reintegration by restoring the right to vote to parolees and restoring the right to hold public office for anyone with a conviction. People with misdemeanor convictions²⁵³ and people with felony convictions who are on probation retain the right to vote.²⁵⁴ New York disenfranchises more than 108,000 people with felony convictions who are in state prison or on parole.²⁵⁵ However, a Certificate of Relief granted to a person on parole automatically restores that person's right to vote.²⁵⁶ Many scholars argue that disenfranchisement is one of the most severe invisible punishments because it removes a right of citizenship.²⁵⁷ By restoring the right to vote, Certificates of Rehabilitation offer a

251. *Soto v. N.Y. State Office of Mental Retardation*, No. 3010/09, 2010 WL 334857, at *8 (N.Y. Sup. Ct. Jan. 29, 2010).

252. See N.Y. CORRECT. LAW § 753(1)(g) (McKinney 2011) ("Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.")

253. A person with a misdemeanor who is incarcerated does not lose the right to vote and can vote by absentee ballot. No data is available about how many people in local jails exercise this right. BRENNAN CTR. FOR JUSTICE, N.Y. UNIV. SCH. OF LAW, *THE VOTING RIGHTS OF PEOPLE WITH CRIMINAL CONVICTIONS IN NEW YORK* 4, http://www.brennancenter.org/page/-/d/download_file_9371.pdf.

254. *After Prison: Roadblocks to Reentry—A Report on State Legal Barriers Facing People with Criminal Records: New York*, LEGAL ACTION CTR., <http://www.lac.org/roadblocks-to-reentry/main.php?view=profile&subaction1=NY> (last visited Dec. 15, 2011); *Voting Rights of People in N.Y. with Criminal Records*, LEGAL ACTION CTR., <http://www.lac.org/index.php/lac/381> (last visited Dec. 15, 2011); see also N.Y. ELEC. LAW § 5-106(2) (McKinney 2011).

255. ERIKA WOOD ET AL., BRENNAN CTR. FOR JUSTICE, *JIM CROW IN NEW YORK* 5 (2009). Eighty percent of that group is black or Hispanic, and half of the 108,000 are released but currently on parole. *Id.*; see also John Eligon, *Racial Roots Underlie Debate on Felon's Voting Rights*, N.Y. TIMES BLOG (Feb. 12, 2010, 11:14 AM), <http://cityroom.blogs.nytimes.com/2010/02/12/a-call-for-voting-rights-for-parolees>.

256. Telephone Interview with Glenn Martin, Vice President of Policy and Dev., Fortune Soc'y (Jan. 7, 2011). Glenn Martin stated the he has never heard of a person on parole receiving a certificate to vote.

257. Pinard, *supra* note 16, at 524.

formal mechanism for returning a person to full citizenship status upon release from incarceration, even while on parole.²⁵⁸

III. LIMITATIONS OF NEW YORK'S CERTIFICATE PROGRAM

Given that so few certificates have been issued since their inception even counting the recent uptick, Certificates of Rehabilitation in New York have not achieved their potential to meaningfully relieve statutory barriers for people with convictions. The major hurdles to successful administration of Certificates of Rehabilitation stem from three sources: legislative, administrative, and social obstacles. First, the statutory language is vague in defining the burden of proof for awarding certificates, unclear about how to interpret the presumption of rehabilitation requirement in conjunction with Article 23-A, and lacks a mechanism for appeal or any check on the administering authority's discretion. Second, the primary administering agencies that have been responsible for issuing certificates—parole and probation—present an institutional bias because of their law enforcement missions that evolved during the “tough on crime” decades of the eighties and nineties. The lack of attention to certificates by both agencies seems to have led to a lack of clearly established regulations, especially in defining the burden of proof for applicants, resulting in serious agency delays in issuing certificates. Third, Certificates of Rehabilitation are not an integral part of the reentry landscape—no one within the criminal justice system educates people about the possibility of a certificate, few people with convictions apply, and the application process is burdensome.

A. Legal Obstacles

1. A Highly Discretionary Standard

Although Certificates of Relief and Good Conduct lift automatic bars to thousands of licenses and other benefits, they overcome only an initial hurdle. Article 23 gives licensing agencies broad discretion to use convictions to justify the denial of a license, like those for dental hygienists, boiler inspectors,

258. *Id.*

or doctors.²⁵⁹ On the one hand, Article 23 states that with a certificate a conviction on a criminal record will not

be deemed to be a conviction within the meaning of any provision of law that imposes, by reason of a conviction, a bar to any employment, a disability to exercise any right, or a disability to apply for or to receive any license, permit, or other authority or privilege.²⁶⁰

The certificate holder can apply for a license or job without automatic denial. On the other hand, the statute gives discretion to government agencies to rely on a conviction in deciding whether to suspend, revoke, or not issue a license, or deny a civil right.²⁶¹ The statute sends a conflicting message about the legal significance of either certificate. Without a certificate, many licenses are not an option because of a statutory bar; however, with a certificate, the license, even if not statutorily barred, is only a possibility.²⁶²

259. See N.Y. CORRECT. LAW § 701(3) (McKinney 2011). Article 23 provides ultimate discretion to administrative decision-makers: A certificate “shall not . . . in any way prevent any judicial, administrative, licensing or other body . . . from relying upon the conviction” as a basis for exercising its discretion to deny or refuse to renew any license or other privilege. *Id.*

260. *Id.* § 701(2). The statute has a few exceptions, including not permitting certificates to relieve the statutory bar for gun licenses under section 400 of the penal code for people convicted of an “A-I felony” or “violent felony offense” under section 70.02 of the penal code.

261. *Id.* § 701(3) (“A certificate of relief from disabilities shall not, however, in any way prevent any judicial, administrative, licensing or other body, board or authority from relying upon the conviction specified therein as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or refuse to renew any license, permit or other authority or privilege.”).

262. The certificate statutes themselves do not aid agency decision-makers in how the certificates fit into the agency’s decision-making process. Rather, agencies must look to Article 23-A to determine permissible discrimination on the basis of a conviction. Leaving such discretion to the agencies may not inherently be problematic because applicants with certificates can appeal agency license denials through an administrative hearing process. For a more general discussion of the problems with agency discretion in administering justice, see Rachel Barkow, *The Ascent of the Administrative State and the Rise of Mercy*, 121 HARV. L. REV. 1332, 1334 (2008) (arguing that “[t]he expansion of the administrative state has showcased the dangers associated with the exercise of discretion, and without a check on the power of agencies, benefits could be bestowed and sanctions imposed on the basis of an array of inappropriate factors”).

2. Statutory Vagueness

Although the legislative history describes a Certificate of Relief as a *means* to rehabilitation,²⁶³ the language of both section 702 and section 703 requires that either certificate be issued only if the relief granted by the certificate is both “consistent with the rehabilitation” of the applicant and “consistent with the public interest.”²⁶⁴ The statutes therefore authorize an individualized determination for granting either certificate that implies some showing, but what the determination is evaluating and whether it is the same for both certificates is unclear. The investigation for a Certificate of Relief can be done by either the Certificate Review Unit of the DCCS²⁶⁵ or the sentencing court,²⁶⁶ which usually asks probation to conduct an investigation. For Certificates of Good Conduct, all applicants apply to the Certificate Review Unit of the DCCS.²⁶⁷ Therefore, the sentencing court or the Certificate Review Unit must balance the benefits of granting the certificate to enable successful reintegration of the applicant with any potential risk the applicant poses to the public based on the conviction. For example, if a person is convicted of defrauding homeowners, a sentencing court balancing both objectives might grant a Certificate of Relief that lifts all statutory bars to licenses with the exception of a real estate license because the criminal conviction is closely linked with that benefit. For a person convicted of marijuana possession, the balancing may result in a full certificate so a person can apply for a license in cosmetology assuming that the relationship between the conviction and cosmetology is tenuous. For some applicants, like the former, where a conviction may be highly correlated with a particular public safety risk, this discretion can enable the applicant to receive a limited certificate with only a few statutory barriers. For the latter, it can mean that a person is able to remove all barriers to enable full reintegration.

But the language of the statute offers no specific guidance as to how a decision maker should balance “the rehabilitation

263. See *supra* text accompanying note 124.

264. CORRECT. §§ 702(2), 703(3), 703-b(1).

265. *Id.* § 703.

266. *Id.* § 702.

267. *Id.* § 703-b.

of the eligible offender” and “the public interest.”²⁶⁸ The default could be two very different approaches—to deny a certificate unless the applicant offers extraordinary proof of rehabilitation or to grant a certificate unless the applicant presents serious aggravating circumstances. The latter favors issuing certificates while the former does the opposite. Nothing in the statute or regulations guides local probation officers, sentencing courts, or the DCCS Certificate Review Unit. In addition, nothing in the statute or regulations provides for an emergency certificate process for individuals who need a certificate for certain licenses, job applications, or benefits. The statute is not clear about how long an applicant must wait for reapplication. For each of these issues, the sentencing court or the DCCS may have a standard answer or respond on a case-by-case basis, but nothing transparent has been promulgated under the regulations to help applicants or their advocates.²⁶⁹ This vacuum could lead to vastly different interpretations of the statute and result in disparate treatment of applicants based on where one lives geographically or which authority is issuing the certificate. For example, an applicant in northern New York could face different evaluative criteria than an applicant in the Bronx.

The language for Certificates of Relief also could be interpreted to discourage granting certificates at sentencing. The statute states that a Certificate of Relief “shall *not* be issued by the court *unless*” the court or the Certificate Review Unit is satisfied that the person is eligible and the relief granted is consistent with rehabilitation and the public interest.²⁷⁰ Simply using the negative, *not*, in the sentence may suggest that the default for the sentencing court is not to grant certificates to eligible defendants.²⁷¹ Evidence in New York City indicates that sentencing courts, which rarely issue Certificates of Relief, may interpret the language as discouraging their issuance.²⁷² The Department of Probation found that even if a presentencing report recommended a certificate, the sentencing judge rarely granted it.²⁷³ This

268. *Id.* § 702(2)(b)–(c) (certificate issued by courts); *id.* § 703(3)(b)–(c) (certificate issued by the DCCS).

269. Letter from reentry.net to Martin F. Horn, Comm’r, N.Y.C. Dep’t of Corr. & Prob. (Apr. 15, 2008) (on file with author).

270. CORRECT. § 702(2) (emphasis added); *see also id.* § 703(3).

271. CORRECT. §§ 702(2), 703(3).

272. Interview with Vincent Schiraldi, *supra* note 70.

273. *Id.*

interpretation may be supported by the fact that the language is different for issuing Certificates of Good Conduct, which states that the DCCS “shall have the power to issue a certificate of good conduct . . . *when the department is satisfied*” that the certificate is consistent with the rehabilitation of the applicant and the public interest.²⁷⁴ The two objectives of the balancing test are the same, but the affirmative language encourages the DCCS to grant a Certificate of Good Conduct.

The statute also implies that a showing of rehabilitation is required because it permits an individualized investigation for each certificate determination. Yet, the statute does not explain the purpose of the investigation or its evaluative criteria, opening the door to different evaluation standards by the two issuing authorities.²⁷⁵ For example, the Certificate Review Unit has historically interpreted “investigation” to mean that a local parole officer must interview the applicant, complete a home visit, inquire about work history, and consider evidence of rehabilitation.²⁷⁶ Probation’s report to the sentencing court does not require such an onerous investigation. The more intensive inquiry suggests that a showing of rehabilitation—a stable home, contacts in the community, and employment—is required. Consequently, applicants often are advised to submit certificates of completion for drug treatment programs, General Equivalency Degrees, letters of recommendation, and evidence of community service.²⁷⁷ But the statute does not state that “evidence of rehabilitation” is a prerequisite for a certificate. In fact, it is difficult to imagine how a person could immediately be granted a Certificate of Relief at sentencing if such a showing is required. The statute is silent, though, leaving the answer to the discretion of the sentencing court and the DCCS, which can result in inconsistent and arbitrary outcomes.

3. Barriers to Appeal

The statute does not provide a mechanism for administrative review of certificate decisions. The statute is clear: “In granting or revoking a certificate of relief from

274. CORRECT. § 703-b(1) (emphasis added).

275. *Id.* § 702(3) (allowing a court to “conduct an investigation of the applicant” in order to determine “whether such certificate shall be issued”); *id.* § 703(6) (“For the purpose of determining whether such certificate shall be issued, the department may conduct an investigation of the applicant.”).

276. Interview with Frank Herman, *supra* note 74.

277. BRONX DEFENDERS, *supra* note 63, at 2.

disabilities the action of the department shall be deemed a judicial function and shall not be reviewable if done according to law.”²⁷⁸ To challenge a denial, a person must file a petition in state court with the onerous burden of showing that the decision was arbitrary and capricious or an abuse of discretion.²⁷⁹ This procedure may be especially difficult, costly, and time consuming for a pro se litigant. Therefore, the discretion of the sentencing court and the DCCS Certificate Review Unit to make certificate determinations goes essentially unchecked. In sharp contrast, most government agency decisions can be reviewed by an administrative law judge in a hearing where a person can be represented by counsel or attend the hearing pro se.²⁸⁰ For example, all licensing decisions within New York’s Department of State can be appealed to an independent office that conducts administrative hearings.²⁸¹ Decisions adverse to a licensee can be further appealed to the Secretary of State, and the Secretary of State’s determinations are subject to judicial review. Therefore, an applicant for a license has two levels for appeal before filing in court. A private employer’s decision can also be challenged as unlawful discrimination on the basis of a criminal conviction through a hearing before the state or local human rights commission.²⁸² There is no such right to appeal certificate decisions of the sentencing court or the DCCS.

B. Administrative Obstacles

1. Administrative Delay

The most fundamental administrative hurdle facing certificate applicants is the excessive delay in making certificate determinations. The certificate statutes give the

278. CORRECT. § 703(5).

279. Using Article 78, a person can challenge that “a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” N.Y. C.P.L.R. § 7803 (McKinney 2011).

280. See *Mission*, DEP’T OF STATE, OFF. OF ADMIN. HEARINGS, <http://www.dos.state.ny.us/ooah/index.htm> (last visited Apr. 11, 2012).

281. *Id.*

282. *How to File a Complaint*, N.Y. STATE DIV. HUMAN RTS., http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited Dec. 15, 2011); *Employment*, N.Y.C. COMM’N ON HUMAN RTS., <http://www.nyc.gov/html/cchr/html/employment.html> (last visited Dec. 15, 2011).

DCCS expansive discretion with no review procedure and no requirement to collect data on its decisions.²⁸³ The sentencing courts often cede investigative authority over certificate applications to probation, as permitted by statute.²⁸⁴ Probation officers who write sentencing reports offer an initial recommendation with the submission of their investigation to the court.²⁸⁵ For either certificate, the administering body schedules interviews with applicants to review their applications and also investigates their cases.²⁸⁶ The waiting time for decisions from the DCCS is over eighteen months.²⁸⁷ For Certificates of Good Conduct, applicants add this waiting period onto the current good conduct waiting periods ranging from one to five years.²⁸⁸ Because sentencing courts do not collect data on certificates, it is difficult to evaluate the delay, although anecdotal evidence suggests that the process can take months.²⁸⁹ The lengthy waiting period may indicate that insufficient resources are devoted to certificate determinations.

2. No Standard of Proof

Neither the sentencing court nor the DCCS has promulgated rules or regulations to guide local offices on how to evaluate certificate applications. Therefore, applicants have no notice about what constitutes a showing that a certificate is “consistent with the rehabilitation of the eligible offender” or “consistent with the public interest.”²⁹⁰ The statute does not instruct the court or the DCCS to collect detailed data on how many certificates are granted, to whom, and for what reasons. Because clear guidelines would erode the vast discretion granted to both administering bodies, neither the sentencing court nor the DCCS has any incentive to develop public

283. Under Article 23, both the courts and the DCCS have the same authority to issue Certificates of Relief from Disabilities. CORRECT. §§ 702–703, 703-b. Only the DCCS issues Certificates of Good Conduct. *Id.* § 703-b(1).

284. *Id.* § 702(3) (providing that a court may, for the purpose of determining whether a Certificate of Relief will be issued, request probation to conduct an investigation of the applicant).

285. *See id.*

286. Local divisions of parole have excluded legal counsel from advocating for clients at these interviews.

287. Telephone Interview with Kate Rubin, *supra* note 72; *see also* BRONX DEFENDERS, *supra* note 63, at 2.

288. CORRECT. § 703-b(3).

289. Telephone Interview with Kate Rubin, *supra* note 72.

290. CORRECT. §§ 702(2), 703(3).

regulations that can be used to challenge determinations. But the lack of concrete criteria for making a certificate determination leaves applicants uninformed about the proof they must submit. Consequently, applications can be denied because of insufficient evidence of rehabilitation without a clear standard of proof.²⁹¹

3. Mission Conflict

Nationwide, the mission of parole and probation has changed dramatically over the past fifty years,²⁹² and New York has been no exception.²⁹³ The culture of both administrative bodies shifted from a predominantly case management and rehabilitative model in the sixties to a more punitive policing model in the eighties and nineties.²⁹⁴ The shift mirrors the dominant tough-on-crime approach discussed in Part I and has had a lasting impact on both administrative bodies. Parole violations constitute forty percent of all state prison admissions in the country, “a number that has more than doubled since 1980 and tripled over the last 50 years.”²⁹⁵ The increase in conviction and incarceration rates in New York overburdened parole and probation, which responded in the eighties by focusing more on monitoring the conditions of parolees and probationers than on helping them find services, employment, and housing.²⁹⁶

The mission of parole and probation in New York throughout the eighties and nineties emphasized protecting the public over rehabilitating those who had been convicted. The core mission of the New York Division of Parole (prior to its

291. See Letter from reentry.net to Martin F. Horn, *supra* note 269.

292. LEANNE FIFTAL ALARID ET AL., COMMUNITY-BASED CORRECTIONS 6 (7th ed. 2008); PETERSILIA, *supra* note 166, at 88 (“[P]arole was originally designed to make the transition from prison to community more gradual and, during this time, parole officers were to assist the offender in addressing personal problems and searching for employment and a place to live Increasingly, however, parole supervision has shifted away from providing services to parolees and more toward providing surveillance activities, such as drug testing, monitoring curfews, and collecting restitution.”).

293. ALARID ET AL., *supra* note 292, at 294.

294. *Id.*

295. *Id.* at 291.

296. See SCOTT M. STRINGER, BREAKING PAROLE: AN ANALYSIS OF THE NEW YORK STATE DIVISION OF PAROLE’S CASELOAD MANAGEMENT GUIDELINES 3 (2006) (“Between 1980 and 1995, the [Division of Parole] focused primarily on the use of parole releases in an effort to help manage the ever-expanding state prison population.”).

merger with the Department of Corrections) was “[t]o promote public safety by preparing inmates for release and supervising parolees to the successful completion of their sentence.”²⁹⁷ Similarly, the State Department of Probation was “committed to improving practices that promote public safety, ensure offender accountability, provide restitution to victims and reduce recidivism.”²⁹⁸ These mission statements show that both agencies have moved away from a rehabilitative caseworker model toward a policing and supervision model. The success of a parole or probation officer is evaluated by evidence that the parolee or probationer is being supervised and complying with conditions, a focus that does not encourage efficient and effective administration of certificate applications.

Under bureaucracy theory, this tension is an example of mission conflict. If an agency task is not a core part of its mission, the task is “often performed poorly or starved for resources.”²⁹⁹ When agency tasks are only vaguely defined, the front line agency operators, the probation or parole officers, will understand their role in a manner that is “consistent with their predispositions,”³⁰⁰ which in this context is supervision and crime control. The task of issuing Certificates of Rehabilitation or encouraging parolees and probationers to apply for these certificates runs counter to the historical mission of parole and probation. Acknowledging that a person with convictions is rehabilitated or should be relieved of statutory bars, especially for employment, may be viewed as antithetical to the agency’s mission and how its officers prioritize tasks of supervising probationers and parolees.

Given this conflict between mission and task, it is not surprising that few applications have been granted and application rates are correspondingly low despite the thousands of eligible applicants. Probation and parole officers who interact directly with potential certificate applicants are not required to educate their probationers or parolees about these reentry resources. Because of their punitive focus, the officers who conduct investigations and make recommendations for awarding or denying a certificate may be overly harsh on

297. N.Y. STATE DIV. OF PAROLE, ANNUAL REPORT 1 (2010), <https://www.parole.ny.gov/pdf/parole-annual-report-2010.pdf>.

298. See N.Y. STATE OFF. OF PROBATION & CORRECTIONAL ALTERNATIVES, <http://www.criminaljustice.ny.gov/opca/> (last visited Apr. 11, 2012).

299. JAMES Q. WILSON, BUREAUCRACY 110 (1989).

300. *Id.*

applicants. Advocates report that parole and probation officers are poorly trained on certificates and provide inaccurate information when questioned about them.³⁰¹ For example, certificates have been denied because an evaluating parole officer incorrectly believed that an applicant must be actively applying for a license or a specific job for which a certificate is needed.³⁰² Some certificate denials state inaccurately that the statute permits the lifting of only specific employment bars, not all statutory barriers.³⁰³ One applicant's certificate was denied for using an incorrect application even though that application was downloaded from the department's website.³⁰⁴ All of these reasons for denial directly contradict the statutory mandate.

Thus, the decision-making process can be highly influenced by the punitive approach toward parolees and probationers. Discretion can lead to unequal and arbitrary treatment of applicants. And a lack of agency oversight over decisions made by local parole or probation officers can result in rejected applications after serious delay, without any administrative remedy for appeal.

C. *Social Obstacles*

Few people file certificate applications each year because potential applicants either do not know about certificates or they find the process too daunting.³⁰⁵ A number of institutional actors within the criminal justice system can educate people about certificates—judges, prosecutors, and defense attorneys, as well as parole and probation officers. All of these individuals interact with potential applicants at some stage in the criminal justice system, from arraignment through conviction and during the reintegration process. Yet few of these actors actually know that Certificates of Rehabilitation exist.³⁰⁶

301. Letter from reentry.net to Martin F. Horn, *supra* note 269.

302. *Id.*

303. *Id.*

304. *Id.*

305. 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) (“[T]he option of using a certificate of rehabilitation to assist in obtaining employment is either unknown to many potential applicants or too difficult for an applicant to complete without assistance.”).

306. Telephone Interview with Kate Rubin, *supra* note 72; Interview with Vincent Schiraldi, *supra* note 70.

By law, judges are required to inform defendants at sentencing about the existence of Certificates of Relief from Disabilities.³⁰⁷ The sentencing colloquy could easily and routinely include a discussion about preventing forfeiture of benefits and restoring civil rights. But many criminal court judges do not know about this rule or choose not to follow it. A recent study surveyed people with convictions about whether they knew about the existence of Certificates of Rehabilitation.³⁰⁸ Of the participants who did, ninety percent learned about them through postconviction reentry organizations,³⁰⁹ revealing that there were many missed opportunities throughout the criminal justice process to educate people about certificates.

The two types of certificates create great confusion for applicants.³¹⁰ Although they differ only in who is eligible for them, the two certificates have different application forms and procedures.³¹¹ Potential applicants find it difficult to locate the applications using the easiest source, the Internet, and even more applicants find it difficult to understand which one they qualify for.³¹²

Additionally, both applications are difficult to read. Researchers have found that the applications are written at a “13th grade” (beyond high school) reading level.³¹³ The average adult reading level in the country is eighth grade, and seventy percent of people with convictions function below a sixth grade level.³¹⁴

Applying for a certificate also has hidden costs. Applicants must first retrieve a copy of their conviction record to accompany their application. This official conviction record has to be retrieved from a separate state agency (Department of

307. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011) (“In all criminal causes, whenever a defendant who is eligible to receive a certificate of relief from disabilities under article 23 of the Correction Law is sentenced, the court, in pronouncing sentence, unless it grants such certificate at that time, shall advise the defendant of his or her eligibility to make application at a later time for such relief.”).

308. See FORTUNE SOC’Y, APPLYING FOR CERTIFICATES OF RELIEF FROM DISABILITIES AND CERTIFICATES OF GOOD CONDUCT: OBSTACLES AND CHALLENGES 9 (2010).

309. *Id.*

310. *Id.* at 14–15.

311. See *id.* at 5; see also *supra* Part I.A.1–2.

312. FORTUNE SOC’Y, *supra* note 308, at 11–14.

313. *Id.* at 15–16.

314. *Id.*

Criminal Justice Services) and in many cases these records are full of mistakes.³¹⁵ Arrests that have not led to a conviction are improperly listed.³¹⁶ Cases that have been closed are listed as unresolved and convictions are often misreported.³¹⁷ Applicants must comb through their RAP sheets, which are difficult to read, to identify all of these problems.³¹⁸ After making corrections, applicants must request a corrected RAP sheet before applying for a certificate.³¹⁹ In New York City, this process can take months, further extending an applicant's waiting period.³²⁰

People with convictions have no incentive to apply for a certificate if they perceive it as offering them nothing more than a piece of paper. Many unanswered questions exist about how employers actually use certificates in their decision making. If the court decisions described above are any indication, the consideration may be minimal at best. Fighting a job or license denial is a time and resource intensive struggle. Having these statutes on the books does nothing to restore rights if the certificates are not issued, publicly recognized, and enforced.

IV. THE FUTURE OF CERTIFICATE PROGRAMS: LEGISLATIVE REFORM, ADMINISTRATIVE LEADERSHIP, AND SOCIAL REINTEGRATION

The above discussion about the potential and limitations of New York's Certificates of Rehabilitation statutes adds a new perspective to the academic literature. Statutes creating administrative mechanisms like certificates are no guarantee that intractable civil punishments will be relieved and

315. One study found that 87% of New York Division of Criminal Justice Services RAP sheets contained at least one mistake or omission, and 41% contained more than one error. Some errors included unsealed cases, missing or inaccurate disposition information, and un-recorded vacated warrants. LEGAL ACTION CTR., STUDY OF RAP SHEET ACCURACY AND RECOMMENDATIONS TO IMPROVE CRIMINAL JUSTICE RECORDKEEPING 3 (1995) [hereinafter LEGAL ACTION CTR., RAP SHEET ACCURACY]; see also LEGAL ACTION CTR., SETTING THE RECORD STRAIGHT 3–5 (2001), http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf (discussing the most common mistakes found in New York criminal records that total more than 4 million records since 1890).

316. LEGAL ACTION CTR., RAP SHEET ACCURACY, *supra* note 315.

317. *Id.*

318. *Id.*

319. *Id.*

320. See BRONX DEFENDERS, *supra* note 63, at 2.

reintegration will be successful. As administrative mechanisms like Certificates of Rehabilitation gain traction, and as many states continue to look to New York as a model, New York's experience offers lessons for how legislative, administrative, and social improvements can better integrate Certificates of Rehabilitation into the current criminal justice system before sentencing or release from prison.

A. Legislative Direction

In 2010, the New York legislature acknowledged its commitment to Certificates of Rehabilitation by amending additional licensing statutes to allow certificates to lift their immediate bars for convictions. These amendments were consistent with New York's recent addition of reentry to its criminal justice goals. Even while endorsing certificates in this way, state legislators have not looked at whether Certificates of Relief or Certificates of Good Conduct effectively serve this purpose given their discretionary nature. As other states look to the statutory construction of Article 23, the discussion of its historical development in Part I and its limitations in Part III raise questions about how the statutory construction plays a direct role in its effectiveness. Can the statutes be clearer about their intent? Is there a need for two types of certificate statutes? How can the statutes better guide administering authorities?

1. Nomenclature and Statutory Intent

The nomenclature for Certificates of Rehabilitation can obscure their purpose. New York's legislative history shows that Certificates of Rehabilitation were intended to lift legal barriers created by state statutes, like licensing bars, and to restore legal rights that were lost upon conviction. The legislature required that awarding a certificate be "consistent with rehabilitation," but did not require proof of rehabilitation.³²¹ If Certificates of Relief are intended to immediately lift legal barriers that are not substantially connected to the conviction, the term "rehabilitation" may imply too much.

321. N.Y. CORRECT. LAW §§ 702(2), 703(3), 703-b(1) (2003).

Similarly, for Certificates of Good Conduct, the requirement of “consistent rehabilitation” may suggest that evidence of rehabilitation must be presented in addition to the waiting period of three to five years. A showing of three to five years without an additional conviction should be sufficient proof of good conduct without additional evidence.

If the purpose of a certificate is to aid in the reintegration process, the name and requirements should reinforce that goal. “Rehabilitation” may be too forceful of a term and may imply that to be awarded a certificate applicants must offer concrete evidence that they are rehabilitated. If such a showing is not required, using a name like Certificates of Restoration of Rights or Certificates of Relief from Disabilities without referring to rehabilitation would be clearer.

On the other hand, state legislatures may think that a showing of “rehabilitation” should be made to justify the certificate. The New York statutes permit an investigation of the applicant, which could suggest an inquiry into whether there is evidence of rehabilitation. If the legislative purpose is to require an applicant to show rehabilitation, the statutory language should be explicit or require the administrative agency to promulgate regulations that define the criteria for showing rehabilitation. If proposed legislation includes such criteria, lawmakers should recognize that such criteria may undermine the state’s interest in offering immediate relief of bars to encourage successful reintegration. The longer the applicant must wait to apply for or qualify for a certificate, the more difficult reentry will be.

Regardless of whether the legislative intent is to require evidence of rehabilitation, the language of the statutes should be clear. Currently, the discretion left to administrative bodies means that applicants may need to meet different standards depending on whether they are applying to the Certificate Review Unit of the DCCS or the sentencing court.

2. Legal Robustness

If proposed legislation does not define the legal force of the certificate, a Certificate of Rehabilitation can be reduced to a symbolic piece of paper, severely limiting its ability to help a person apply for a license, employment, housing, or other benefits. Currently, model Certificates of Rehabilitation, even those modeled on New York, do not establish a legal standard

that can help agencies or employers understand the legal force of the certificates. As described in Part II, the impact of New York's presumption of rehabilitation is not entirely clear. The courts initially interpreted a certificate as prima facie evidence that a conviction should not be used against a certificate holder unless evidence to rebut the presumption was offered.³²² Over time, the New York Court of Appeals has weakened this interpretation and limited the effect of the presumption. The presumption of rehabilitation only satisfies one of eight Article 23-A factors—a showing of rehabilitation.³²³ Other factors, such as the type of conviction, the length of the sentence, and the time passed since the conviction could override the presumption of rehabilitation without any specific evidence that rebuts the presumption.³²⁴ Although New York courts have clarified that employers and agencies cannot ignore the certificate, courts have left open how to weigh the certificate.

The presumption of rehabilitation would be more forceful if it automatically shifted the burden from the applicant to the employer or agency, requiring the employer or agency to present evidence that rebuts the presumption. For example, if a person with previous drug convictions tested positive for drugs as part of a job application, that would serve to rebut the presumption of rehabilitation. Evidence that there is a *substantial* connection between a previous conviction and the duties of the job or license which would create an *unreasonable risk* to public safety could also be sufficient to rebut the presumption. For example, a person who was convicted of a bank robbery could be denied a security guard license.

The New York legislature is currently considering an amendment to Article 23-A to include language that could act as a model for certificate legislation.³²⁵ Under Article 23-A, a person can be denied a job or a license if “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual,”³²⁶ or the person poses an “unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”³²⁷ The amendment would refine the

322. See *supra* Part II.B.

323. See *supra* Part II.B.

324. See *supra* Part II.B.

325. *Amendment to Article 23-A*, NEWYORKSENATE.GOV, <http://open.nysenate.gov/legislation/bill/S4368B-2009>. (last visited Mar. 9, 2012).

326. N.Y. CORRECT. LAW § 752(1) (McKinney 2011).

327. *Id.* § 752(2).

language to limit the number of denials.³²⁸ Evidence of a direct relationship would require a showing that there is a “substantial connection” between the crime and the duties of the job or license *and* an unreasonable risk to public safety.³²⁹ This amendment heightens the burden of proving a “substantial connection” before denying a job, license, or other opportunity to an applicant with a conviction.³³⁰ The lawmakers’ justification for the 2010 amendment applies equally to the need for creating a robust rebuttable presumption of rehabilitation for certificates: “Unfortunately, many employers maintain blanket barriers to employment based solely on criminal conviction records even when the conviction may be completely unrelated to the job sought and no threat to the public or property is present.”³³¹

3. One Goal, One Certificate

The New York experience raises the question: Is there a need for two types of certificates if they both have the same legal force? Having two certificates in New York appears to lead to unnecessary confusion for administering agencies, eligible applicants, and private employers. It may also dilute their social impact and create the appearance of a legal distinction when there is none. One certificate can function effectively the same way as New York’s two versions by requiring different eligibility requirements based on the seriousness of a person’s convictions. A single certificate would create greater clarity—a single application process with uniform requirements. The only distinction would be the timing of a person’s application depending on the extent of the person’s criminal record.

The Legal Action Center’s model legislation for a Certificate of Rehabilitation is an example of one certificate with two different eligibility criteria.³³² If a person is convicted of a crime but not sentenced to a state prison, the person is immediately eligible to apply to the sentencing court for a certificate at sentencing, which prevents automatic forfeitures

328. *Amendment to Article 23-A*, *supra* note 325.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Certificate of Rehabilitation Model Legislation*, LEGAL ACTION CENTER, <http://www.lac.org/toolkits/certificates/Model%20legislation%20-%20certificates.pdf> (last visited Mar. 10, 2012).

and disabilities.³³³ If a person is sentenced to more than one year at a state facility, the person can apply to the equivalent of the Certificate Review Unit for a certificate.³³⁴ A certificate issued upon release while a person is on parole is temporary until parole is completed.³³⁵ This model removes the waiting periods of New York's Certificates of Good Conduct.³³⁶ The intent is clear: Certificates are immediate mechanisms that can be granted upon sentencing or release from incarceration. The model gives administering agencies discretion only to make an individualized determination about which statutory barriers should not be lifted. All other unrelated statutory bars are removed to better enable an applicant's successful reentry.³³⁷

4. Oversight of Certificate Administration

A certificate statute should include provisions to ensure that the agencies administering the certificate will exercise their discretion in a manner that is consistent with the legislature's intent. The statute could easily include reporting requirements, a definition of three months to clarify a "reasonable time" for issuing a certificate, and a process for administrative appeal of a certificate decision. Another administrative body, like the State Division of Human Rights or the Reentry Department of the DCCS, could be tasked with evaluating the data collected and issuing a report to the legislature at the end of each year to ensure proper administration of certificates.

Lawmakers should also consider how certificates are a part of the criminal justice process. How and when should defendants learn about certificates? Lawmakers should extend the *Padilla*³³⁸ obligation by requiring defense counsel to inform clients about a wider range of collateral consequences and the availability of certificates to relieve some of them.³³⁹ This

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

339. *See Chin & Love, supra* note 19, at 37.

requirement could also encourage more defense attorneys to ask for Certificates of Relief at sentencing when their clients are eligible.

Amendments to the statutes should also create an enforcement mechanism to guarantee that sentencing judges follow the rule requiring judges to inform defendants about both Certificates of Relief and Certificates of Good Conduct.³⁴⁰ Currently, the rule only requires judges to tell defendants about Certificates of Relief.³⁴¹

Integrating required disclosure about certificates into sentencing is consistent with New York's recent inclusion of reentry and reintegration as sentencing goals. Many defendants only appear before a judge for sentencing and are released without serving time in a state prison, without being supervised by probation or parole, and without reentry social services. For these individuals, the sentencing process and their defense counsel provide the only opportunity to learn about certificates. And given that these individuals are typically convicted of minor offenses, collateral consequences are usually severely disproportionate to their conviction, making them exactly the type of applicant whom the legislature intended to benefit from a Certificate of Rehabilitation.

B. Administrative Leadership

In addition to the sentencing court, the DCCS and probation stand in the front lines of implementing New York's new sentencing goals of reentry and reintegration. Both agencies need to consider how to make their mission statements conform to these goals, and, more specifically, how the goals translate into tasks for their front-line officers. Without adding concrete tasks, front-line officers, who have embraced their punitive law enforcement roles, have no incentive to engage in activities that assist in reentry.³⁴² Organizations consistently resist change.³⁴³ Therefore, leaders are critical to the success of innovative measures that alter an

340. See N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2011).

341. *Id.*

342. Interview with Vincent Schiraldi, *supra* note 70.

343. WILSON, *supra* note 299, at 222 ("Changes that are consistent with existing task definitions will be accepted; those that require redefinition of those tasks will be resisted.").

agency's mission.³⁴⁴ To encourage the administration of Certificates of Rehabilitation, the DCCS and probation will need strong leadership that defines tasks to incorporate this as part of the front-line officers' day-to-day practices.

One nod in the right direction comes from the merging of the state's Division of Parole and the Department of Corrections into a Department of Corrections and Community Supervision.³⁴⁵ Reminiscent of the parole merger in the sixties, the purpose of this merger was to create a clear continuum of services for individuals who are incarcerated. The new department's mission is to "improve public safety by providing a continuity of appropriate treatment services in safe and secure facilities where offenders' needs are addressed and they are prepared for release, followed by supportive services under community supervision to facilitate a successful completion of their sentence."³⁴⁶ This type of structural shift (merging the departments), combined with a mission that aligns more with the state's reentry goals, can positively impact the tasks performed by front-line DCCS parole officers. Assisting in the application for and awarding of Certificates of Rehabilitation would have a natural connection to the mission of "supportive services under community supervision."³⁴⁷ The interesting part of the new mission is that it pulls together potentially contradictory purposes—supervision and services. Only time will tell how meaningful this merger can be for people with convictions.

The New York City Department of Probation provides a different example—how to prioritize issuing certificates through strong leadership. Under its current, innovative commissioner, Vincent Schiraldi, the Department of Probation has adopted a policy of recommending a certificate in every presentencing report for every eligible defendant unless a certificate application presents aggravating circumstances.³⁴⁸

344. *See id.* at 227 ("As persons responsible for maintaining the organization it is executives who identify the external pressures to which the agency must react. . . . Almost every important study of bureaucratic innovation points to the great importance of executives in explaining change.").

345. *See supra* Part I.D.

346. *Departmental Mission*, N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, <http://www.doccs.ny.gov/mission.html> (last visited Apr. 12, 2012).

347. *Id.*

348. IMPROVEMENT TEAM ON COLLATERAL CONSEQUENCES, N.Y.C. DEP'T OF PROB., A REPORT TO COMMISSIONER VINCENT N. SCHIRALDI 21 (2010) [hereinafter REPORT TO THE COMMISSIONER] (stating that Department of Probation "policy for more than a year has been to recommend certificates with each PSI

Consistent with the language of Article 23 and its legislative history, the department views certificates as tools that aids rehabilitation.³⁴⁹ Accordingly, the department's investigations do not require evidence of rehabilitation, but presume that a Certificate of Relief is appropriate at sentencing unless "aggravating circumstances" apply.³⁵⁰ This practice reflects the commissioner's belief that enabling successful reentry is one of the agency's core goals.³⁵¹

Even prior to its merger with Corrections, the Division of Parole offered another example of how the prioritization of administering certificates can result in a jump in the number of certificates awarded. In August 2005, the agency decided to incorporate issuing Certificates of Relief into the parole hearing process.³⁵² If a person was paroled and eligible for a Certificate of Relief, a temporary certificate would be granted to the parolee.³⁵³ The members of the Parole Board, in 2005, decided that a person eligible for parole should also be eligible for a certificate to enable reintegration when paroled back to the community.³⁵⁴ As Table 1 shows, the numbers of certificates issued by the Board of Parole increased since the policy changed.

[presentencing report] . . . unless aggravating circumstances exist, such as a threat to public safety"); *see also* Interview with Vincent Schiraldi, *supra* note 70.

349. REPORT TO THE COMMISSIONER, *supra* note 348, at 21.

350. *Id.* ("The current statute [referring to Article 23 and 23A] does not require that evidence of rehabilitation be demonstrated in order to issue a certificate of relief from disabilities In fact there is no waiting period to issue a [certificate].").

351. Interview with Vincent Schiraldi, *supra* note 70.

352. Interview with Frank Herman, *supra* note 74.

353. *Id.* Only Certificates of Relief can be granted without a post sentence waiting period. *See supra* Part I.A.

354. *Id.*

Table 1: Combined Certificates of Good Conduct and Certificates of Relief from Disabilities Awarded by the Board of Parole from 1995 – 2010.

YEAR	CERTIFICATES GRANTED
1995	321
1996	263
1997	259
1998	222
1999	251
2000	292
2001	223
2002	219
2003	223
2004	219
2005	380
2006	657
2007	1637
2008	3046
2009	1857
2010	1621

Administering authorities should also consider how to streamline the application process, making it more accessible to potential applicants. For example, should parole and probation officers be tasked with providing each parolee or probationer with information about Certificates of Rehabilitation? Should these front-line officers help prepare applications? As Commissioner Schiraldi recognizes, an organization's culture shifts when its officers are given incentives to complete a task.³⁵⁵ Ensuring that a person complies with rules has an impact on an officer's performance evaluation.³⁵⁶ If helping prepare certificates is part of a parole or probation officer's annual performance review, then that officer will be more inclined to prioritize the task.³⁵⁷ The administering authorities have a tremendous role to play in the success of a Certificates of Rehabilitation program. Only if certificates are endorsed as part of the agency's mission will

355. Interview with Vincent Schiraldi, *supra* note 70.

356. *Id.*

357. *Id.*

they be integrated into the day-to-day functioning of the agency.

C. Social Reintegration

For Certificates of Rehabilitation to enable successful reintegration, they must be more than a symbolic piece of paper. They must actually overcome civil barriers for people with criminal records. The relatively low number of certificates issued since 1976 calls their effectiveness into question. Certificates have yet to become a socially recognized end to a person's involvement with the criminal justice system.

Current evidence indicates that most people who are eligible for certificates do not apply for them.³⁵⁸ The low number of applications stems from a combination of factors: a lack of information, a lack of capacity, and a lack of belief in their effectiveness. The administrative and legislative changes discussed above will make certificates more accessible to the applicant pool. But they will do little to affect an applicant's belief in a certificate's effectiveness until these administrative mechanisms become a socially integrated solution to reentry barriers.

If the criteria for certificates are set too high, certificates will only be awarded to people who can show exemplary evidence of rehabilitation. This could create two tiers of people with convictions. Only a select few will be relieved of civil punishments, and the vast majority will continue to face an unending debt to society. In this context, certificates could do more harm than good. Employers will begin to ask for certificates and only consider candidates who have earned this higher status.

Reentry advocates and social service organizations have an important role to play in integrating Certificates of Rehabilitation into the reentry process. Reentry programs in particular can be rich resources for pilot certificate projects where agencies can study the experiences of certificate applicants and learn how to make certificates more accessible.

Certificates are only meaningful if they are widely recognized by employers, agencies, and other individuals who deny benefits because of criminal records. A stronger presumption of rehabilitation will help, even if it is not an

358. FORTUNE SOC'Y, *supra* note 308, at 10.

immediate answer to the problem. Serious enforcement of the presumption, however, will require litigation.

Public education initiatives also would support the integration of certificates into the reentry discourse. For example, legislation that requires all employers to add information about Certificates of Rehabilitation to their hiring process, such as including this information on job applications, could serve the dual purpose of educating employers and informing applicants about certificates. New York recently passed legislation requiring employers to post Article 23-A in every workplace.³⁵⁹ Public education can begin with instructing employers who routinely but incorrectly believe that they can indiscriminately deny individuals job opportunities because of their criminal convictions.

For Certificates of Rehabilitation to succeed, they must serve as legal and social recognition that people with convictions deserve a second chance.

CONCLUSION

This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can't find work, or a home, or help, they are much more likely to commit crime and return to prison. . . . America is the land of second chance, and when the gates of the prison open, the path ahead should lead to a better life.³⁶⁰

—President George W. Bush, State of the Union Address, January 2004.

[T]here are people who've made mistakes . . . [I] think one of the great things about America is that we give people second chances. . . . [Y]ou reduce the recidivism rate, they pay taxes, it ends up being smart for taxpayers to do.³⁶¹

—President Barack Obama at a town hall meeting, January 22, 2010.

359. N.Y. LABOR LAW § 201-f (McKinney 2003). On August 5, 2008, Governor Paterson signed an amendment, which took effect on February 1, 2009, requiring employers to post “a copy of article twenty-three-A of the correction law” in a “visually conspicuous manner” in an accessible location in the workplace. N.Y. LABOR LAW § 201-f (McKinney 2011).

360. President George W. Bush, State of the Union Address (Jan. 20, 2004).

361. President Barack Obama, Remarks at a Town Hall Meeting (Jan. 22, 2010).

Over the past decade, the country has shifted its thinking about tough-on-crime politics. We are at a unique moment in evaluating what happens on the back end of the criminal justice system when people are released. This prioritization of reentry initiatives makes sense on both sides of the political aisle from a normative and economic perspective.

Bar associations, politicians, advocates, and scholars have shined a spotlight on state-issued certificates because they can remove the myriad unending civil punishments that attach to even the most minor criminal convictions. This attention recognizes that the state, which has set up these legal barriers to reentry, has a reciprocal obligation to play its part in their removal. In our technologically advanced society, where criminal records can be retrieved easily on the Internet, removing all memory of a criminal record is futile. As New York's experience with Certificates of Rehabilitation shows, a certificate does not wipe away the reality of the past. It merely stands for the proposition that a person with a conviction still has a future. Certificates of Rehabilitation can be administered to ensure that the impact of collateral consequences is proportionate to the crime and to offer protection against persistent discrimination. Certificates can help us reshape the purpose of our criminal justice system toward a more forgiving reintegration ideal.