Forgiving, Forgetting, and Forgoing: Legislative Experiments in Restoring Rights and Status

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I. Introduction

The long-awaited revision of the sentencing articles of the Model Penal Code makes clear that discussions about sentencing reform must extend to the collateral consequences of arrest and conviction.[1] From now on, it will no longer be acceptable to address collateral consequences solely or even primarily as a matter of public safety in the immediate context of post-incarceration reentry. Rather, the larger criminal justice agenda must include a strategy for dealing with long-term legal and social discrimination based on criminal record as a matter of efficiency and fairness, a strategy in which courts must play a central role. The articles and primary materials in this Issue, which emerged from a Roundtable conference sponsored by the American Law Institute (ALI) and the National Conference of State Legislatures (NCSL) in January 2018, provide a range of perspectives and experiences that will be useful in developing that strategy going forward.[2] While their immediate focus is the legislative process, they also illuminate how collateral consequences affect civil and criminal practitioners, judges, and scholars. The Roundtable did not produce a specific set of recommendations, but a consensus emerged from its discussion around certain basic principles that should prove useful to all those concerned with legislative and judicial management of the problem of collateral consequences.

II. Background

One of the most difficult and consequential legacies of the war on crime is the sheer number of people in the United States who are now burdened with the long-term negative effects of a criminal record. The most recent federal government survey of state criminal history systems indicates that as much as a third of the adult population may fall into this category.[3] A criminal record results in potentially lifelong restrictions on employment, licensing, housing, and a variety of other opportunities and benefits, creating a sort of "internal exile"[4] for the millions of affected individuals. Related to this is the atrophy of legal mechanisms through which individuals may avoid or mitigate the consequences of having a record, whether formal legal restrictions or informal discrimination.[5] At the same time, advances in technology and a heightened aversion to risk have together produced a lively market for background screening, and an entire industry devoted to mining criminal records that operates almost entirely outside the law.[6]

In recent years, almost every state has tackled these problems, justifiably concerned about laws and attitudes that marginalize a substantial segment of the population in the workplace, in housing, and in access to a myriad of other benefits and opportunities.[7] With a new appreciation of how collateral consequences impact the economy, lawmakers in many states have worked to develop approaches to neutralizing collateral consequences, or avoiding them altogether, but there has emerged no consensus about how best to accomplish this. There has been almost no empirical research into outcomes of various relief schemes, many of which are still in their infancy.[8] As in an earlier period of law reform, there is a lively ongoing debate over whether it is more effective to limit public access to an individual's criminal record, or to showcase an individual's rehabilitation.[9]

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For many years, and until quite recently, I was a single-minded advocate for relief aimed at forgiving an offense (generally through executive pardon), as opposed to forgetting it (through sealing or expungement), for both practical and philosophical reasons.[10] Now I'm not so sure. I have become persuaded that an effective strategy for dealing with the legal restrictions and discrimination resulting from a criminal record requires a more nuanced and practical approach.

Most reformers now agree that courts are institutionally better suited than executive officials to dispense individualized relief from collateral consequences.[11] But legislatures have almost invariably proceeded cautiously to extend record-sealing provisions that have been on the books for decades, mindful of public safety concerns and a perceived need to manage risk on the part of employers, landlords, and other decision makers. As a result, judicial relief has rarely reached beyond minor offenses and records not resulting in conviction, and even in these cases it does not come easily, much less automatically.[12]

At the same time, national law reform organizations have developed proposals for court-managed relief from collateral consequences that do not depend upon limiting access to the record, but instead borrow from older models of judicial dispensation and vacatur.[13] To date, states have appeared unimpressed with this judicial "forgiving" approach, continuing to rely on "forgetting" strategies that have become familiar over the years. They have also expanded the availability of the "forgoing" approach by which prosecutors and courts steer some criminal cases out of the system entirely.[14] In addition, perhaps realizing the inefficiencies of individualized relief, some states are developing more systemic approaches, such as fair employment and licensing schemes, and regulation of background screeners (sometimes called data harvesters).[15]

A few states have been successful in combining features of several approaches. Indiana is singled out in this Issue as having one of the most creative features aimed at regulating consideration of criminal record in employment and licensing, limiting the kinds of records that will result in disqualification and the duration of restrictions, and imposing procedural protections intended to discourage arbitrary decision making.[16] Even the most functional relief systems grapple with resource and access issues, and with official resistance by prosecutors.

III. ALI/NCSL Roundtable on Restoration of Rights

To understand and give direction to the vibrant if diffuse law reform efforts underway across the country, the American Law Institute and the National Conference of State Legislatures convened a Roundtable conference in Washington in January 2018 to discuss current and possible legislative approaches to restoration of rights and opportunities. The centerpiece of the conference was the *Model Penal Code: Sentencing*, and its provisions for judicial management of collateral consequences. Participants in the Roundtable included judges, legislators, practitioners, advocates, and academics. Discussion was moderated by U.S. District Judge Paul L. Friedman (D.D.C.), Secretary of the ALI and an Adviser to the *MPC: Sentencing* project from its inception. Although the Roundtable did not produce a specific set of recommendations, a consensus emerged around some general principles that will hopefully provide some legislative guideposts for avoiding or mitigating the adverse effects of a criminal record. These principles, as interpreted by this writer, are set forth in the final section of this paper.

Papers that served as the basis for discussion at the Roundtable, published in this Issue, analyze some of the reform efforts underway in the states, and some special issues of restoration law. The Appendix includes relevant provisions of the *MPC: Sentencing*, a report from the Collateral Consequences Resource Center summarizing state laws on restoration of rights and status as of April 2018, and a set of policy recommendations developed by the National Association of Criminal Defense Lawyers. Additional material on state reforms, and a preliminary report from one of the few research projects to study the effectiveness of a state relief system, are also included in the Appendix.

A. *Model Penal Code: Sentencing*

The revised sentencing articles of the Model Penal Code address collateral consequences as an integral part of the criminal case, both in dispositions aimed at avoiding convictions, and in provisions authorizing the dispensation of mandatory collateral consequences as an integral part of the sentencing process. Additional authority would allow a court to relieve all remaining collateral consequences and to certify an individual's rehabilitation through a "Certificate of Restoration of Rights." These provisions build upon the two-tiered architecture of the 1962 Model Penal Code,[17] while reflecting and extending the recent reform proposals of the American Bar Association[18] and Uniform Law Commission.[19] The resulting restoration scheme rests on three principles:

- **Collateral consequences should be managed in the first instance as part of the criminal case.** Like the 1962 Code, the *MPC: Sentencing* scheme makes the criminal court primarily responsible for

determining which collateral consequences should apply, by approving non-conviction dispositions[20] and by dispensing with specific mandatory consequences in the sentencing process.[21] By treating mandatory collateral consequences as part of the sentence, this means they will "necessarily be subject to the same tests of fairness and proportionality as the sentence imposed by the judge."[22] In this fashion, the *MPC: Sentencing* implicitly recognizes that statutory penalties triggered by conviction are part and parcel of punishment, both in theory and in practice.

- **The legislature should develop standards limiting the imposition of collateral consequences, and guiding courts in determining rehabilitation.** The *MPC: Sentencing* relies on legislatively determined principles of decision to avoid or mitigate mandatory collateral consequences both at and after sentencing.[23] In establishing legislative standards to guide judicial discretion, both during the criminal case and after it has concluded, the Code substitutes the rule of law for the "unstructured, unexplained discretion" of an elected executive official exercising the pardon power.

- **Courts should be authorized to restore rights and status on a reasonable schedule, to facilitate reentry and reintegration.** Like the 1962 Code, the *MPC: Sentencing* project recognizes that courts are institutionally best suited to restoring rights, not only at the front end of a criminal case but also when a defendant has some distance from it. Courts are in a good position to determine whether an individual is sufficiently rehabilitated to warrant full restoration of rights, based on legislatively determined standards that vary depending on the seriousness of the crime.[24] The eligibility waiting period is brief, and no offense or offender is entirely excluded from access to relief. The resulting certification by a responsible judicial official is intended to help decision makers assess the risk of offering a specific opportunity or benefit, since they ordinarily will not have either time or capacity to collect and assess relevant facts.[25] The *MPC: Sentencing* scheme therefore includes standards to guide the discretion of agency decision makers once mandatory restrictions have been lifted.[26]

Each of these Model Penal Code principles, with their specific implementing features, could improve the way most states currently deal with collateral consequences. For example, connecting relief from collateral consequences to the criminal case will avoid an individual's having to return to court and file a separate petition in proceedings styled "civil" in nature, hire separate counsel, and pay a filing fee. Less serious offenders, including those whose case ends without a conviction, will likely benefit the most by making relief available while the criminal case is still underway, or shortly after its conclusion. Establishing standards to guide a court's discretion in dispensing relief responds not only to legitimate concerns about judicial efficiency and fairness, but also to managing risk that may otherwise lead to unfair discrimination in the workplace and elsewhere.

Some of those involved in the *MPC: Sentencing* drafting process have suggested that its collateral consequences provisions may be among its most consequential, including those that authorize non-conviction dispositions like deferred adjudication. Still, the *MPC: Sentencing* collateral consequences provisions do not address several important issues that could enhance their effect. For example, a judicial process for certifying rehabilitation and good character can and should be supplemented by enforceable limits on considering an individual's past conduct, particularly in employment and licensing.[27] Or, judicial certification of rehabilitation could lead to the same full expungement of the record that follows executive pardon in some states.[28] Limiting public access to certain less serious criminal records, or at least prohibiting inquiry about them, now seems to me an important additional remedial step to accomplish true restoration of rights and reintegration.[29]

The articles in this Issue explore some of these themes, by demonstrating what works to advance reentry and reintegration, and what falls short.

B. American Criminal Record Exceptionalism

In the lead article in this Issue, Alessandro Corda adopts many of the features of the *MPC: Sentencing* project in the model of relief that he styles "forgetting through forgiveness." He describes the problems of inefficiency and unfairness created by widespread digital availability of criminal history records, pointing out that America's "criminal record exceptionalism" is not grounded in the same general recognition of individual privacy rights that animates analogous European policies. Essentially uninformed by privacy considerations, public access to criminal records in the United States "has acquired totemic importance largely derived from the symbolic significance of the First Amendment and increasing risk aversion toward individuals with a criminal past."[30]

Professor Corda argues that attempts to manage this risk through limiting public access to records will necessarily fall short unless they are coupled with a robust and reliable process for determining

rehabilitation that cannot depend simply on the passage of time. His solution is "judicially certified 'active redemption,'" in which "[r]estoration of rights is earned through positive actions." This judicial certification process would result not only in full restoration of rights, as proposed by the *MPC: Sentencing*, but also expungement of the record for both criminal and noncriminal justice purposes. In his scheme, "the conviction would disappear as if it never existed."

The next series of articles describe the operation of relief schemes in five states in different parts of the country, showcasing emerging legislative trends and analyzing their limitations.

C. Indiana's Radical Reforms

Indiana gets its own separate section in this *FSR* Issue, based on its recent enactment of two unusually creative relief schemes. As recently as 2013, the Indiana Code made almost no provision for encouraging reentry and reintegration, and convicted individuals seeking relief from collateral consequences were left to the vagaries of the gubernatorial pardon process. This makes it all the more remarkable that in the space of just five years, from what appears to be a standing start, Indiana's legislature has enacted one of the most nuanced and comprehensive systems of individualized judicial relief in the country, as well as detailed judicially enforceable standards for occupational and professional licensing, which apply to agencies of local governments as well as to state agencies. Indiana's expungement law has been vigorously promoted by the Indiana court system, by legal service providers throughout the State, and—perhaps most surprisingly—by the elected prosecutor in the State's largest county. Although it is too early to determine the effect of the new licensing law, its early returns are promising. The aim of this dedicated section is to showcase what an otherwise conservative state can accomplish through enacting enlightened laws and administering them progressively.

The Indiana materials in this Issue include an article by Josh Gaines and myself describing how the State's expungement law has been implemented since its enactment. Back-up materials include a full description of the law, and an interview with its primary sponsor in the Indiana legislature that explains how he secured support for his controversial bill from a variety of unlikely allies. A decision of the Indiana Court of Appeals shows the direction it has given to the lower courts on applying its criteria for expungement. Finally, there is a section-by-section description of Indiana's comprehensive revision of its licensing law, which may be the only one in the country to regulate both state-wide and local licensing authorities. This 2018 law requires agencies to identify disqualifying laws with specificity, and to apply standards and procedures in making licensing determinations so as to limit arbitrary rejection based on criminal record.

D. Studies from Selected States

Four papers describe some less satisfactory recent attempts by state legislatures to address the problem of excessive collateral consequences. None of them is as comprehensive as Indiana's, and all involve incremental extensions of existing relief schemes rather than creation of new ones. Limited eligibility criteria and lengthy waiting periods appear inconsistent with legislative goals of promoting successful reentry. Moreover, all four systems raise access to justice issues that Indiana seems to have avoided through extensive public-private coordination. The most promising aspects of these state reforms is not individualized relief, but systemic efforts to impose enforceable fair employment and licensing standards to benefit people with a criminal record. Each of the four systems described illustrate some of the problems the *MPC: Sentencing* provisions are geared to avoid.

1. North Carolina. John Rubin reports that in recent years North Carolina has "cautiously expanded" its opportunities for relief: the State "forgets" through expungement, "forgives" through judicial certificates of relief, and "forgos" primarily through pre-plea and post-plea diversions. Expungement remains the most popular form of relief because it results in destruction of the record, but it is "complicated, substantively and procedurally," involving different criteria for different types of offenses, court hearings that require hiring counsel, and filing fees. "Some counties rarely hold hearings and may deny petitions without affording the petitioner an opportunity to be heard." As if more were required to render this relief scheme ineffective for most people and purposes, expungement is available only for minor nonviolent offenses, requires a lengthy 10-year waiting period, and has limited effect on private sector opportunities. Even dismissed cases require filing a separate petition with the court and a waiting period, which tends to discourage applications from indigent defendants.

North Carolina's judicial certificate process resembles the one in the *MPC: Sentencing*, and it involves a much shorter waiting period than expungement (one year as opposed to 10). However, certificates too are available only for a limited class of less serious offenses, and they have no binding effect on discretionary decision makers, public or private. Perhaps as a result, certificates have not gained much

traction in a population that appears to regard limiting access to the record as the most effective form of relief. Professor Rubin, who publishes annually a detailed guide to state relief, believes more research into the effectiveness of various types of relief would be helpful, though the difficulty of this enterprise is shown by how few studies have been done.

2. Tennessee. Joy Radice, describing her experience working on expungement cases with her law school clinic, flags the same access to justice problems that have frustrated relief in North Carolina. The Tennessee legislature has expanded eligibility for expungement on multiple occasions over the past several years, and evidently intends eligible individuals to be able to apply *pro se*.[31] However, navigating the judicial process alone—and sometimes over the prosecutor's objections—is simply beyond the ability and means of most Tennesseans who qualify for relief. "Even though the legislature intended simplicity and accessibility, the administrative process, the statute's complexity, its excessive fees, and the statewide resource disparities can create seemingly insurmountable hurdles for people of limited means who otherwise would be eligible to expunge charges from their criminal histories." The gravest resource disparity issue is in limited access to pro bono legal assistance in rural areas. Professor Radice suggests three things that could make Tennessee's scheme more efficient: (1) expanding eligibility categories and streamlining administration; (2) establishing standards to guide judicial discretion; and (3) providing fee waivers for persons of limited means.

3. California. Eliza Hersh and Jack Chin write about California's "ramshackle" relief system, which they analogize to the State's fabled "Winchester Mystery House" in its complexity and redundancy: "[Y]ear after year policymakers have tacked on layer upon layer of disjointed relief measures, often without accounting for their relationship to existing law. However well-intended, these measures trap many in a ramshackle maze of overlapping and frequently inconsistent provisions." Although California has a variety of avoidance and restoration mechanisms that are managed by the courts, the State "has never adopted a systematic plan to regulate imposition of collateral consequences or provide for their relief in appropriate cases." They identify a variety of access-to-justice barriers that make it difficult for individuals to obtain relief, not the least of which is the absence of a consolidated statewide system of record keeping and long waits for attention from an underfunded court system.

Hersh and Chin recommend a "complete redesign" of the restoration scheme, with a unitary record keeping and relief system similar to Indiana's, automatic purging of records after a period of time, and strengthening of state law limitations on reporting of criminal history. One bright spot they identify in California's recent law-making is enactment of a comprehensive scheme for regulating consideration of criminal record in employment. However, they are concerned that "[t]his new law's right-to-sue protections keep much of the enforcement burden on prospective employees, [so that] its success requires an investment in community and employer education, and accessible civil reentry legal advocacy around the state."

4. Nevada. Nevada State Senator Tick Segerblom and Legislative Counsel Nick Anthony describe the extensive criminal justice reforms enacted in that state in 2017, which include expanding the scope of Nevada's sealing law, already among the most comprehensive in the country. Waiting periods were reduced, and the law now contains "a rebuttable presumption in favor of sealing if all statutory eligibility criteria are satisfied." But Nevada's most significant reform seems to be its expansive new law regulating consideration of criminal history by public employers, which limits pre-employment inquiries into conviction until after a conditional offer of employment has been made, and establishes specific standards and procedures that apply thereafter. If an applicant's criminal history serves as the basis for rescinding a conditional offer of employment, such rescission is required to: (1) be made in writing; (2) specify that the criminal history was the reason for the rejection; and (3) provide an opportunity to discuss the rescission with the human resources director for the employing agency. Finally, the new law makes failure to comply with these established procedures an unlawful employment practice subject to enforcement by the Nevada Equal Rights Commission. It is possible that this important reform measure will soon be extended to cover private employment, following the example of California's new fair employment law.

E. Two Approaches to Federal Restoration

Alone among all U.S. jurisdictions, the federal legal system makes almost no provision for restoration of rights, so that those with federal convictions are remitted to the extraordinary (and unreliable) mechanism of a presidential pardon. This circumstance has frustrated and challenged federal courts, some of whom have created informal work-arounds at the front end of the justice system.[32] The two opinions reprinted here represent the unusual case in which a federal judge relied upon his inherent power to address collateral consequences long after the criminal case was concluded.

In the first of the two cases reprinted here, *Doe v. United States* ("Doe I"), U.S. District Judge John Gleeson granted a request for expungement from a woman he had sentenced many years before for her role in an insurance fraud scheme, who had had difficulty in finding and keeping employment after background checks turned up her criminal record. In granting the relief this "Jane Doe" had requested, Judge Gleeson memorably noted that "I sentenced her to five years of probation supervision, not to a lifetime of unemployment."[33]

The following year Judge Gleeson chose a different remedial approach in response to a similar request from one of the first Jane Doe's codefendants, whose circumstances he did not believe presented the "extreme circumstances" that would warrant expungement. Nonetheless, the extraordinary strides Jane Doe II had made toward rehabilitation "merit a lesser form of relief."

> Most prospective employers do not have the time or resources to gain a comprehensive understanding of who Doe is, and then to figure out what weight, if any, her conviction should play in the hiring process. So I have done that for them. I have reviewed each page of Doe's trial transcript, presentence report, probation reports, deposition transcript, and other documents she and the government provided to me for a holistic view of her character and competency today. I find that there is no relationship between Doe's conviction and her fitness to be a nurse. . . . Any legitimate impact that her fraudulent actions more than 15 years ago may have had on her suitability for employment no longer exists. Jane Doe is rehabilitated.[34]

Judge Gleeson appended to his opinion an ornate green and gold "Certificate of Rehabilitation" created for the occasion, signed by him and by the U.S. Probation Officer, which he evidently anticipated would give prospective employers, if otherwise willing to take a chance on someone with a felony record, concrete reassurance about Jane Doe II's good character and trustworthiness. It also appears to give Judge Gleeson's order legal effect under New York human rights law.[35] The case will hopefully encourage other federal judges to follow his example.[36] At the least, it is an advertisement for enacting *MPC: Sentencing* § 7.06 into federal law.

F. Special Law Reform Issues

Douglas Berman and Nora Demleitner, respectively, discuss special subsets of collateral consequences concerns: decriminalized marijuana offenses, and sex offender registration and notification.

Professor Berman describes the movement to legalize marijuana, and points out that recent laws decriminalizing marijuana offenses have frequently not been accompanied by mechanisms for remedying past convictions: "Only a handful of states have enacted laws specifically designed to redress past and enduring harms resulting from marijuana criminalization, and only one state, California, has made a substantial commitment in both law and practice to ensure its marijuana reform efforts meaningfully impact those previously burdened by punitive enforcement of marijuana prohibition." Even in California, only a fraction of the population eligible for judicial dismissal of decriminalized marijuana offenses has actually applied for this relief, largely due to burdensome procedural requirements. Recently, prosecutors in some California counties have taken the initiative in identifying and helping to vacate eligible convictions, and their proactive stance has been held up as an example by advocacy groups in other states in which marijuana has been decriminalized.

But Professor Berman goes further, proposing "a more structural and systemic approach" to delivering relief through "leveraging" of the new resources produced by marijuana reform: "A new criminal justice institution could be funded by the taxes, fees, and other revenues generated by marijuana reforms and tasked with proactively working on policies and practices to minimize and ameliorate undue collateral consequences for people with criminal convictions." He urges that people whose convictions stem from conduct that is no longer a crime should not have to wait for relief, and they should not have to file a petition in court.

Professor Demleitner highlights the negative effect of current registration schemes in terms of cost and public safety, reviewing research challenging preconceptions about the risk of recidivism and the need for lengthy periods of supervision. She argues that it is important to enable individual offenders to petition for removal from registries, as in Canada, and shows how this might be done by implementing the relief provisions set out in Article 7 of the ALI *Model Penal Code: Sentencing*. She concludes that to enhance public safety and reintegrate sex offenders, the United States would be better served by moving away from public notification, limiting registries, and investing more heavily in prevention and the treatment of convicted sex offenders.

These two articles together support the following general principles: relief from collateral consequences should be automatic in certain circumstances, and that even those who have committed

serious crimes should have a chance to terminate restrictions when they no longer serve a public safety purpose.

G. Three Principles for a Functional System of Restoration of Rights

The ALI/NCSL Roundtable conference of January 2018 did not produce a specific set of recommendations on how rights should be restored, which should not be surprising given the complexity and, for many, the novelty of the issues. However, largely because of Judge Friedman's moderating skill, there emerged from the Roundtable discussion something approaching consensus on three principles, as set forth below, and some proposals for their implementation.[37]

Principle #1. Jurisdictions should re-examine and revise laws and policies that restrict rights and opportunities because of a criminal record.

- A legislature should not impose a mandatory collateral consequence for an offense unless it "cannot reasonably contemplate any circumstances in which the conduct constituting the offense would not justify the consequence."[38] In addition, in the rare case where a mandatory consequence is justifiable, the legislature should authorize courts in their discretion to eliminate the consequence when considerations of public safety no longer warrant it.
- A legislature should establish standards and procedures for decision makers imposing discretionary consequences, including those affecting employment and occupational licensing, and provide for administrative enforcement of those standards. Licensing agencies should be required to specify what crimes will be disqualifying and for how long, prohibited from considering non-conviction records, and required to give reasons in writing for a refusal to license that is based on conviction.

Principle #2. Jurisdictions should provide effective judicial mechanisms for restoration of rights and opportunities that apply to all offenses and that are readily accessible to persons of limited means.

- A legislature should provide statutory authority by which courts may afford individuals an opportunity to avoid a conviction record, through deferred prosecution and deferred adjudication, as well as through completion of programs offered by specialized courts. The records of these non-conviction dispositions should be sealed upon completion of the case.
- A legislature should authorize criminal courts to relieve mandatory penalties as early as sentencing, and throughout the duration of the criminal case. Thereafter, relief should be available from courts of general jurisdiction where an individual resides.
- A legislature should authorize courts to restore rights and certify rehabilitation for all offenses. Eligibility waiting periods should be brief and may be graduated depending upon the seriousness of the offense, and subject to waiver for good cause. Filing fees, if any, should be commensurate with those applicable in civil actions, and waivable in the case of indigency. In the event of convictions in more than one county, consolidation of proceedings in one court should be available.
- Assistance through the courts should be provided for those seeking restoration of rights, particularly in areas where there are few providers of free legal services.

Principle #3. Jurisdictions should limit use of criminal records, and public access to records in at least some cases, to give individuals a fair shot at restoration and reintegration.

- A legislature should provide for judicial sealing of non-conviction records upon final disposition of the case, without the need for filing a petition with the court. Arrest records not followed by charges should be automatically deleted from a records system after one year.
- A legislature should regulate background screening companies and other data harvesters, which should be required to limit their reporting to convictions occurring within seven years. Reporting of records not resulting in conviction should be prohibited.

IV. Conclusion

Many states are legislating with the principles and objectives described above in mind, although there remain problems of scope and accessibility that must be dealt with if relief measures are to make restoration and reintegration a realistic possibility for most people. Too frequently, as illustrated by the articles in this Issue, individualized relief is limited to the least serious crimes (sometimes with complex eligibility criteria and lengthy waiting periods), with complex procedures that put relief out of reach for people of limited means who cannot afford either counsel or filing fees. Courts and state records systems

could make better use of automation in purging dated records or records of offenses that are no longer crimes.

One promising emerging trend involves development of standards and procedures to regulate licensing boards, requiring them to identify disqualifying convictions and apply certain standards and procedures in reaching licensing determinations, to limit arbitrary rejection not reasonably related to qualifications. The scheme recently enacted in Indiana, described in the materials in that State's dedicated section, provides a model approach. The new laws regulating consideration of criminal records by employers in California and Nevada are similarly interesting models that other jurisdictions might consider.

I am hopeful that the energy and creativity recently shown by a few state legislatures in facilitating restoration of rights and status, combined with the evident desire in many others to tackle this downstream product of the "tough on crime" era, will continue to manifest itself in broadly applicable laws and policies, whether their purpose is to forgive, to forget, or to forgo. The collateral consequences provisions of the *Model Penal Code: Sentencing* provide an effective and efficient framework within which all three approaches can be realized.

Notes

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1 *See* Model Penal Code: Sentencing, Article 7 ("Collateral Consequences of Criminal Conviction") (American Law Institute, Approved Final Draft 2017) [hereinafter MPC: Sentencing]. Collateral consequences are generally defined broadly to include both the formal legal restrictions and informal social discrimination that result from a criminal record. *See generally* Margaret Love, Jenny Roberts, & Cecelia Klingele, Collateral Consequences of Criminal Conviction: Law, Policy and Practice §§ 1:1, 1:6 (West/NACDL, 2d ed. 2016).

2 The Roundtable conference was held in Washington, D.C., on January 12, 2018. Its participants included judges, legislators, practitioners, advocates, and academics. Roundtable discussion was moderated by U.S. District Judge Paul L. Friedman (D.D.C.), Secretary of the ALI and an Adviser to the *MPC: Sentencing* project from its inception.

3 State criminal history record repositories of all fifty states reported that at year-end 2016, there were as many as 110,235,200 people with a criminal history record on file, although this number includes individuals who have records in more than one state. *See* U.S. Dept. of Justice, Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2016, at tbl. 1 (2018), *available at* https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf. According to recent estimates, people with a felony conviction in the United States account for 8 percent of the overall population (nearly twenty-five million people), s*ee* Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 Demography 1795 (2017), and misdemeanants account for many millions more. *See* Megan T. Stevenson & Sandra G. Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. Rev. (forthcoming 2018) (estimating that 13.2 million misdemeanor cases are filed in the United States per year), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3146057.

4 *See* Nora Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11Stan. L. & Pol'y Rev. 153, 153 (1999) (noting that "upon release from prison or discharge from non-incarcerative sentences, many ex-offenders find themselves internally exiled. They are saddled with restrictions that exclude them from major aspects of society"). If formal legal restrictions were not enough to discourage reintegration, people with a criminal record are also subject to pervasive informal discrimination. See Wayne A. Logan, *Informal Collateral Consequences*, 88 Wash. L. Rev. 1103 (2013).

5 *See* Love et al., Collateral Consequences, *supra* note 1, at § 7:1 (noting that "at this point, only a very few states have a coherent statutory scheme by which offenders may fully regain their rights and status"); s*ee also* National Association of Criminal Defense Lawyers, *Collateral Damage: America's Failure to Forgive or Forget in the War on Crime: An Action Plan to Restore Rights and Status to People with a Criminal Record* 42–47 (2014), http://www.nacdl.org/restoration/roadmapreport/.

6 *See* Alessandro Corda, *Beyond Totem and Taboo: Toward a Narrowing of American Criminal Records Exceptionalism*, 30 Fed. Sent'g Rep. 241–251 (2018) ("The commodification of criminal records has multiplied the negative ramifications of the attachment of the 'criminal' label."); *see also* Sharon Dietrich, *Regulation of Commercial Criminal History Reports under the Federal Fair Credit Reporting Act,* in Love et al., Collateral Consequences, *supra* note 1, at §§ 5:14–5:31.

7 *See* Collateral Consequences Resource Center, *Second Chance Reforms in 2017: Roundup of New Expungement and Restoration Laws* (2017), http://ccresourcecenter.org/wp-content/uploads/2017/12/Second-Chance-Reforms-in-2017-CCRC-Dec-2017.pdf; Collateral Consequences Resource Center, *Four Years of Second Chance Reforms, 2013–2016: Restoration of Rights & Relief from Collateral Consequences* (2017), http://ccresourcecenter.org/wp-content/uploads/2017/02/4-YEARS-OF-SECOND-CHANCE-REFORMS-CCRC.pdf. *See generally* Margaret Love, Josh Gaines, & Jenny Osborne, Collateral Consequences Resource Center, *Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement* (Apr. 2018, rev. ed.), *available at* http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Apr-2018.pdf, and partially republished in the Appendix to this Issue.

[8] One of the few empirical studies of a relief mechanism tracked 235 Californians who had had their charges dismissed or their offense level reduced, finding after three years that average real earnings had increased by roughly a third. *See* Jeffrey Selbin, et al., *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. Crim. L. & Criminology 34 (2017). *See also* Sonja Starr & J.J. Prescott, *Evaluating the Impact of Criminal Record Set-Aside Laws on Recidivism and Socioeconomic Outcomes,* http://grantome.com/grant/NSF/SES-1023727#panel-institution, reprinted in the Appendix to this Issue (finding that setting aside and sealing an individual's record of conviction is associated with "a significant increase in employment and average wages" and with a low recidivism rate).

[9] *See* 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, 1707-15 (2003).

[10] Practical reasons for objecting to expungement have to do with the technological realities of the information age, and a devaluation of public safety concerns. Philosophical reasons have to do with a certain resistance to "rewriting history," as well as the loss of "an opportunity for the offender to be reconciled to the community" and for the community "to change its views toward former offenders." *Id.* at 1726. *See also* Demleitner, *supra* note 4, at 162 ("[E]x-offenders should have access to a ceremony marking their official reintegration into the community and the end of their exclusion and degradation."); Bernard Kogon & Donald L. Loughery Jr., *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. Crim. L., Criminology & Police Sci. 378, 390 (1970) ("The pursuit of record manipulation practices results in our deluding ourselves, and, worse, in deluding offenders who have made a good adjustment.").

[11] There are a dozen states in which executive pardon remains routinely available, constituting the primary way of restoring rights and status. *See* Restoration of Rights Project, Chart 3 ("Characteristics of Pardon Authorities"), http://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities/. In a few of these states (e.g., Arkansas, Connecticut, Pennsylvania, and South Dakota), pardon is followed by judicial expungement.

[12] The experience of California in the wake of its 2016 decriminalization of marijuana is instructive in this regard: "despite considerable efforts by advocacy groups to publicize the opportunity to seek court relief" from past convictions for now-legal conduct, "early data has again suggested that only a small portion of eligible past offenders" have done so. Douglas A. Berman, *Leveraging Marijuana Reform to Enhance Expungement Practices*, 30 Fed. Sent'g Rep. 305–316 (2018), citing Rob Kuznia & Katie Zezima, *Convicted of a Marijuana Crime in California? It Might Go Away, Thanks To Legal Pot*, Wash. Post, Dec. 17, 2017 (*citing data available at* http://www.courts.ca.gov/documents/Prop64-Filings.pdf).

[13] See MPC: Sentencing, *supra* note 1, Article 7 ("Collateral Consequences on Criminal Conviction"); Uniform Law Commission, *Uniform Collateral Consequences of Conviction Act* (2010) [hereinafter Uniform Act]; American Bar Association, ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed. 2004) [hereinafter ABA Standards].

[14] *See* Love et al., *Forgiving and Forgetting*, *supra* note 7, at 13–15. *See also* MPC: Sentencing, *supra* note 1, at § 6.03 ("Deferred Prosecution") and § 6.04 ("Deferred Adjudication"), reprinted in the Appendix of this Issue; Love et al., Collateral Consequences, *supra* note 1, at § 7:22 ("Deferred Adjudication and Other Non-Conviction Dispositions").

[15] *See, e.g.*, material on fair employment and licensing laws recently enacted by Indiana and California is reprinted in this Issue at pp. 252–266 (Indiana) and p. 363 (California).

[16] A model licensing law developed by the Institute of Justice appears to have influenced both the Indiana licensing law signed into law in March 2018, and the more limited law enacted by Illinois in August 2017. *See* Institute for Justice, Model Occupational Licensing Review Law, http://ij.org/activism/legislation/model-legislation/model-economic-liberty-law-1/. This law followed the Institute's comprehensive study of licensing barriers. *See* Dick M. Carpenter, Ii, et al., License to Work: A National Study of Burdens from Occupational Licensing (2d ed. 2017), http://ij.org/report/license-work-2/.

[17] *See* Love, *supra* note 9, at 1729–31 (noting that "MPC section 306.6 . . . accomplishes both general restoration of rights and a symbolic restoration of status").

[18] *See id.* at 1727–31 (describing the relief provisions of the ABA Standards, *supra* note 13, as "an integral part of the sentencing process itself"):

> As a practical matter, if relief from specific collateral sanctions under Standard 19-2.5(a) is to be "timely and effective," it should, in some cases, be available at the time of sentencing. . . . The more general relief contemplated by Standard 19-2.5(c) has a broader purpose, and is rather in the nature of a forgiveness than a specific remedy for an unreasonable or inappropriate sanction.

Id. at 1730.

[19] *See* Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L. J. 753, 783–85 (2010) ("The relief provisions of the [Uniform Act] follow the basic two-tiered architecture of the [ABA Standards], providing immediate relief from specific status-generated legal barriers that might impede a convicted person's ability to live in the community, and more complete relief from all such barriers after a period of law-abiding conduct.") .

[20] *See* MPC: Sentencing, *supra* note 1, at § 6.03 ("Deferred Prosecution") and § 6.04 ("Deferred Adjudication").

[21] *See id.* §§ 7.04 and 7.05.

[22] See Love, *supra* note 9, at 1732 (describing the implications of the relief scheme of § 306.6 of the 1962 Code).

[23] *See* MPC: Sentencing, *supra* note 1, at § 7.02 (role of the sentencing commission), §§ 7.04 through 7.06 (role of court in dispensing mandatory consequences at sentencing, and subsequently restoring rights and certifying rehabilitation).

[24] *See id.* § 7.06.

[25] *See* Doe v. United States, 168 F. Supp. 3d 427, 441 (E.D.N.Y. 2016) (Gleeson, J.) ("Most prospective employers do not have the time or resources to gain a comprehensive understanding of who Doe is, and then to figure out what weight, if any, her conviction should play in the hiring process. So I have done that for them.") The *Doe* decision is reprinted in relevant part in this Issue at pp. 300–304.

[26] *See* MPC: Sentencing, *supra* note 1, at § 7.04(3) (A discretionary decision-maker must determine that the conduct underlying the conviction is "substantially related" to the opportunity or benefit at issue, and must give written reasons for a denial based upon the conviction.).

[27] *See, e.g.*, the provision in California's fair employment law, described in the Appendix to this Issue at p. 363, which prohibits employer inquiry into and consideration of convictions that have been set aside by the court, a prohibition enforced by the state's Fair Employment and Housing Administration.

[28] *See* note 11, *supra*. Although the 1962 Code explicitly rejected expungement, it was promulgated long before broad public access to criminal records was facilitated and encouraged by digital technology and the professional self-interest of data harvesters. *See* Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 Howard L.J. 1, 33–40 (2016).

[29] *See* Corda, *supra* note 6, at ___ (recommending a "forgetting through forgiving" model that "recognizes a 'right to reintegration' to all convicted individuals under which rehabilitation is not automatic but rather merit-based"). *See generally* James B. Jacobs, The Eternal Criminal Record 113–32 (2015) (reviewing practical and philosophical objections to record-sealing).

[30] Corda, *supra* note 6, at 241–251. Corda finds support for a constitutional right of access to criminal records in caselaw governing public access to judicial proceedings in criminal cases, *see, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980), though he recognizes that the Supreme Court has "never addressed the question of whether there is a constitutional right of access . . . to court records," quoting from David S. Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 840 (2017).

[31] District attorneys' offices in Tennessee are tasked by statute with "creat[ing] a simple form to enable a lay person to petition the court for expunction," and they are directed to assist in developing and filing petitions. Professor Radice admirably describes the ethical pitfalls inherent in such a representational role for prosecutors, particularly in cases they may wish to oppose.

[32] A recent report from the U.S. Sentencing Commission (USSC) catalogues various programs managed by federal courts that are geared to avoiding a prison sentence. *See* Federal Alternative-to-Incarceration Court Programs (Sept. 2017), https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs. This report describes generally analogous state problem-solving court programs, but it does not focus on statutory deferred adjudication options aimed at avoiding conviction and generally leading to expungement of the record. Perhaps because federal law contains only one narrow authority for deferred adjudication (18 U.S.C. § 3607, sometimes referred to as the Federal First Offender Act), the USSC report does not address non-incarceration outcomes that avoid a conviction record. Curiously, it does not suggest the potential usefulness of such outcomes in reducing recidivism, nor propose further study of these issues.

[33] Doe v. United States, 110 F. Supp. 3d 448, 454 (E.D.N.Y. 2015) ("Doe I"). The government appealed Judge Gleeson's expungement order, and it was subsequently vacated by the Court of Appeals based on the court's lack of jurisdiction to expunge a valid conviction. *See* Doe v. United States, 833 F.3d 192 (2d Cir. 2016).

[34] Doe v. United States, 168 F. Supp. 3d 427, 441–42 (E.D.N.Y. 2016) ("Doe II"). Note that the government did not appeal Judger Gleeson's subsequent order issuing Jane Doe II a "certificate of rehabilitation," though the case appears to present the same jurisdictional issues, particularly considering the legal effect given his order under New York State law. *See* N.Y. Correct. Law §§ 703(7), 752.

[35] The signature of the U.S. Probation Office on the certificate seems to create a presumption of eligibility for a state Certificate of Relief from Disabilities (CRD). *See* N.Y. Correct. Law § 703(7) ("Where a certificate of relief from disabilities is sought . . . on a judgment of conviction rendered by a federal district court in this state and the department is in receipt of a written recommendation in favor of the issuance of such certificate from the chief probation officer of the district, the [Department of Corrections and Community Supervision] shall issue the requested certificate, unless it finds that the requirements of paragraphs (a), (b) and (c) of subdivision three of this section [regarding the rehabilitation of the applicant and the public interest] have not been satisfied; or that the interests of justice would not be advanced by the issuance of the certificate."). In turn, a CRD creates a "presumption of rehabilitation" that must be given effect in deciding whether there is a disqualifying "direct relationship" between a crime and an employment or license under Article 23-A of the New York Corrections Law, N.Y. Correct. Law §§ 752, 753(2), which may be enforced through the courts or through the New York State Human Rights Law. *See* New York profile in the Restoration of Rights Profile, http://ccresourcecenter.org/state-restoration-profiles/new-york-restoration-of-rights-pardon-expungement-sealing/.

[36] *See* Nora V. Demleitner, *Judicial Challenges to the Collateral Impact of Criminal Convictions—Is True Change in the Offing?*, 91 N.Y.U. L. Rev. Online 150 (Nov. 2016), http://www.nyulawreview.org/online-features/judicial-challenges-collateral-impact-criminal-convictions-true-change-offing.

[37] As set forth here, these principles were developed by this writer, and they have not been approved by participants in the Roundtable, including Judge Friedman.

[38] *See* ABA Standards, *supra* note 13, Standard 19-2.2.