

January 2013

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Joann M. Sahl

University of Akron School of Law, jsahl1@uakron.edu

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Recommended Citation

Joann M. Sahl, *Battling Collateral Consequences: The Long Road to Redemption*, 49 *Criminal Law Bulletin*, no. 3 (2013).

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BATTLING COLLATERAL CONSEQUENCES: THE LONG ROAD TO REDEMPTION

By Joann Sahl*

Some say the use of executive clemency in this country is “political suicide.”¹ Others characterize it as a “living fossil,”² and “all but useless in the internet age.”³ Those officials with the authority rarely grant clemency and to receive clemency is an “extraordinary feat.”⁴

* The author is an Assistant Clinical Professor of Law at the University of Akron School Of Law where she heads the Clemency Project. The author wants to thank the following colleagues for their valuable comments in publishing this article: Jane Aiken, J. Dean Carro, Art Garwin, Peter Joy, Margery Koosed, Marilyn Preston, and Jack Sahl. The author is also grateful for the diligent help of her research assistants: Matthew Onest, Abigail Pierce and Samantha Rutsky.

¹ Kathleen Ridolfi and Seth Gordon, *Gubernatorial Clemency Powers, Justice or Mercy*, 24 Criminal Justice 26, 33 (Fall 2009) (Urging the routine use of clemency as “an avenue for post-conviction relief.”) Former Mississippi Governor Haley Barbour’s 2012 pardons created a firestorm, and a number of the press articles noted the high political price he paid by issuing the pardons. Campbell Robertson, Robbie Brown and Whitney Boyd, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, The New York Times, January 11, 2012, at A13. *Departing Governor Draws Fire for Pardons*, Chicago Tribune, January 11, 2012, at C21; Patrik Jonsson, *Did Haley Barbour’s Pardon Spree Go Too Far?* The Christian Science Monitor, January 11, 2012, www.csmonitor.com/USA/2012/0111/Did-Haley-Barbour-s-pardon-spree-go-too-far. Guy Adams, *Pardon? Governor Sparks Outcry By Letting Off 200 Criminals*, The Independent (London), January 12, 2012, at 30. Richard Fausset, *Pardons Could Haunt Barbour; Mississippi’s Governor Grants More Than 200 Pardons or Releases, A Travesty Even to Supporters*, Los Angeles Times, January 13, 2012 at A1.

² Daniel Kobil, *Sparing Cain: Executive Clemency in Capital Cases: Chance and the Constitution in Capital Clemency Cases*, 28 Cap. U. L. Rev. 567, 568 (2000); Jim Dwyer, *Lessons in DNA and Mercy*, The New York Times, December 29, 2011, <http://www.nytimes.com/2011/12/30/nyregion/governor-can-improve-law-and-justice-in-one-stroke.html>. (Noting that the “power to pardon, which is a rare and absolute authority granted to the executive, has fallen into disuse since the early 1980s.”) Editorial Board, *The President’s Stingy Use of Pardons*, The Washington Post, January 8, 2012, http://www.washingtonpost.com/opinions/the-presidents-stingy-use-of-pardons/2011/12/22/gIQAHbj6jP_story.html (Recognizing that “Presidents increasingly neglect the pardon power, and on those rare occasions when they act they often do so with great timidity.”)

³ Margaret Colgate Love, *Lawyering: Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 758 (2011) (Urging the adoption of the relief mechanisms of the Uniform Collateral Consequences of Conviction Act to help those suffering from collateral consequences).

⁴ *Id.* at 536.

Yet, during his term in office, former Ohio governor Ted Strickland granted 319 clemency requests, nearly 20% of the 1615 clemency applications he considered.⁵ These grants included 280 pardons.⁶ According to Strickland's clemency counsel, the overwhelming majority of pardons granted by the governor were to ameliorate the collateral consequences suffered by the pardon applicants.⁷

Governor Strickland is not unique among governors in using the pardon power for this purpose. On January 10, 2012, Mississippi Governor Haley Barbour issued 193 controversial pardons.⁸ At the time he issued his pardons, he explained that "the pardons were intended to allow [the pardoned] to find gainful employment or acquire professional licenses as well as hunt and vote."⁹ Later, in response to the criticism directed at his decision, he penned an article in the Washington Post.¹⁰ He wrote "[f]or some who are rehabilitated and redeem themselves, the governor is the only person

⁵ Governor Strickland served as Ohio's governor from January 2007 to January 2011. Alan Johnson, *Strickland Clears Desk of Requests, Grants 152 Pardons*, The Columbus Dispatch, January 7, 2011, www.dispatch.com/live/content/local_news/stories/2011/01/07/strickland-clears-desk-of-requests-by-granting-152-pardons.html. The Ohio governor has the constitutional power to issue pardons, commutations and reprieves. Section 11, Article III, Ohio Constitution. Under Ohio law, a pardon "discharges the individual designated from all or some specified penal consequences of his crime. It may be full or partial, absolute or conditional. A full and absolute pardon releases the offender from the entire punishment prescribed for his offense, and from all the disabilities consequent on his conviction." *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 521 (quoting *State ex rel. Atty. Gen. v. Peters* (1885)). A commutation is "the change of a punishment to which a person has been condemned into a less severe one." *Id.* at 22. A reprieve is a temporary delay of a sentence. *Id.* at 520. Strickland's pardons were not without some controversy. Joe Guillen, *Former Gov. Strickland Pardoned Former Lorain City Official, Convicted of Obstruction, Just Before Leaving Office*, The Cleveland Plain Dealer, January 18, 2011, available http://www.cleveland.com/open/index.ssf/2011/01/former_gov_strickland_pardoned.html.

⁶ Charts from Governor Strickland's Office (2010-2011) (on file with author).

⁷ Interview with Zachary Swisher, Governor Strickland's clemency counsel from May 2010 - January 2011 (January 2, 2012).

⁸ Campbell Robertson, Robbie Brown and Whitney Boyd, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, The New York Times, January 11, 2012, at A13.

⁹ Richard Fausset, *Barbour Pardons Threatens Standing/Criticism Grows as Connections of Offenders Revealed*, Chicago Tribune, January 12, 2012 at C14.

¹⁰ Haley Barbour, *Why I Freed 26 Inmates*, The Washington Post, January 19, 2012, at A15.

who can give them a second chance. I am very comfortable giving such people that opportunity.”¹¹

Former Pennsylvania Governor Ed Rendell left office in 2010 having issued 1059 pardons, a record for Pennsylvania.¹² Most of those who sought a pardon from Governor Rendell did so for employment reasons.¹³

Others governors who issued a noteworthy number of pardons in 2010 included the governors of Alabama (305), Connecticut (215), Delaware (214), Florida (47), Maine (74), Nebraska (45), Nevada (25), South Dakota (44), Washington (17) and Wisconsin (177).¹⁴

These pardons represent a stark reality in this country - pardons are more than benevolent acts by governors. Governors are now using their pardon power to

¹¹ Haley Barbour, *Why I Freed 26 Inmates*, The Washington Post, January 19, 2012, at A15.

¹² Carolyn Kaster, *Gov. Ed Rendell grants 1,000+ pardons, more than twice any other Pennsylvania governor*, PennLive.com, Dec. 10, 2010, http://www.pennlive.com/midstate/index.ssf/2010/12/gov_ed_rendell_grants_1000_par.html

¹³ *Id.* As one author has noted, a “number of state pardon authorities reported a surge in pardon applications from people fired or refused employment because of their criminal record, often far in the past and involving relatively minor offenses.” Margaret Colgate Love, *A Debt that Can Never Be Paid*, 21 Crim. Just. 16, 19 (2006).

¹⁴ Telephone Conversation, Alabama Board of Pardons (Sept. 8, 2011) (on file with author); E-mail from Denise Jones, Director, Constituent Services, Office of Governor Daniel P. Malloy, Governor of Connecticut (July 28, 2011, 8:24 EST) (on file with author); Telephone Conversation, Office of Delaware Governor (Sept. 8, 2011) (on file with author); E-mail from Tammy Salmon, Communications/Legislative Affairs, Florida Parole Commission (Aug. 16, 2011, 2:53 EST) (on file with author); E-mail from Judy Leavitt, Maine Pardon Clerk, Customer Representative Associate II, Division of Corporations, UCC & Commissions, Department of the Secretary of State, Bureau of Corporations, Elections & Commissions (Sept. 15, 2011, 2:46 EST) (on file with author); E-mail from Sonya Fauver, Office of Governor of Nebraska (Sept. 29, 2011, 3:24 EST) (on file with author). E-mail from Brian Campolieti, Program Officer I, State of Nevada Parole Board (Aug. 8, 2011, 12:24 EST) (on file with author); E-mail from Kris Erickson, Office of the Governor of South Dakota (Aug. 30, 2011, 9:19 EST) (on file with author); E-mail from Terri Gottberg, Paralegal 2, Staff Person, Washington State Clemency & Pardons Board, Office of the Attorney General of Washington, Corrections Division (Aug. 25, 2011, 5:26 EST) (on file with author); E-mail from Karley Downing, Assistant Legal Counsel, Office of Governor Scott Walker, Wisconsin (Aug. 26, 2011, 10:20 EST) (on file with author).

ameliorate the impact of the civil consequences of criminal convictions.¹⁵ These “collateral consequences” often impede an ex-offender’s ability to obtain employment, to locate housing and to reintegrate into the community.¹⁶

The redemptive pardon plays a critical role for the millions of ex-offenders in this country who battle with collateral consequences.¹⁷ Part I of this article explores this ongoing battle and the proliferation of collateral consequences. As context for this discussion, Part I recounts the personal stories of two clients represented by the

¹⁵ As noted pardon expert Margaret Colgate Love writes in her book, “[i]n every U.S. jurisdiction, the legal system erects formidable barriers to the reintegration of criminal offenders into free society. When a person is convicted of a crime, that person becomes subject to a host of legal disabilities and penalties under state and federal law. These so-called collateral consequences of conviction may continue long after the court-imposed sentence has been fully served.” Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2008), http://www.sentencingproject.org/detail/publication.cfm?publication_id=115, p. 4. In 2003, the ABA enacted in its Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19.2.1. Those standards drew a distinction between the term “collateral sanction” and a “discretionary disqualification.” A collateral sanction is defined as a disability or disadvantage imposed automatically upon conviction. A “discretionary disqualification” is a penalty that an official is authorized but not required to impose on a ground related to the conviction. There is also a difference between direct and collateral consequences of a conviction. “Those consequences considered criminal, and, therefore, retributive in nature, are often called ‘direct’ consequences of conviction, as opposed to the collateral consequences.” Marlaina Freisthler and Mark A. Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. Tol. Rev. 525, 528 (2005). *Id.* at 526 (quoting Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. Gender Race & Just. 253, 253 (2002). (“Collateral consequences of conviction are ‘sanctions that are not imposed explicitly as part of the sentencing process, but by legislative creation of penalties applicable by operation of law to persons convicted of particular crimes.’”)

¹⁶ See *infra* note 37 and accompanying text for a more specific discussion of the collateral consequences that accompany convictions.

¹⁷ Anthony C. Thompson, *Clemency for our Children*, 32 Cardozo L. Rev. 2641, 2686 (2011). (“The redemptive conceptualization of clemency suggests that clemency serves as a tool to reward rehabilitation and foster reconciliation. Where an individual has demonstrated good conduct, has taken steps to improve herself in the period of time since her conviction, and perhaps after a lapse of time now deserves forgiveness, clemency would be appropriately exercised. This view of clemency does not require that the person convicted demonstrate that she did not commit the underlying offense. In fact, the correctness of the conviction is a given. But the clemency power exists to recognize the rehabilitative capacity of the individual and to enable the executive to grant mercy.”). Rehabilitative or redemptive clemency is distinguished from the retributivist view of clemency that “suggests that clemency should be used to ensure that offenders receive the precise punishment her actions merited.” *Id.* at 2685.

University of Akron Clemency Project,¹⁸ Ms. Smith and Ms. Jones,¹⁹ who Strickland pardoned in 2009. Told through the lens of Ms. Smith and Ms. Jones, Part I explores why collateral consequences exact such a high price on so many ex-offenders fighting for a second chance.

Part II of the article discusses the court process to seal criminal convictions and its failure to provide relief to those ex-offenders burdened by the collateral consequences of their convictions. This article uses Ohio's sealing process, known as expungement, as a model for this discussion.²⁰ This article recommends changes to Ohio's statute. These changes can be mirrored in other states to make judicial expungement a more effective remedy for the debilitating hardships of collateral consequences.

Part III discusses the pardon process, and why it constitutes a long road to redemption. Part III traces the three-year journey travelled by Ms. Smith and Ms. Jones from application to the grant of their pardons. While Part III reflects the struggles of Ms. Smith and Ms. Jones, their stories represent the journey of millions of ex-offenders who desperately seek a pardon in hope of a fresh start.

Part IV recommends that states eliminate collateral consequences. It uses Ohio's ongoing efforts to reduce its collateral consequences as an example other states can model. However, this article also recognizes that ex-offenders need more immediate

¹⁸ The Clemency Project assists low-income clients with filing for a pardon of their convictions. Volunteer law students at the University of Akron School of Law staff it. Community Legal Aid Services, Inc., the local legal aid organization, refers its clients.

¹⁹ The article has changed the clients' names to protect their privacy.

²⁰ Ohio law allows for judicial sealing a record of conviction pursuant to Ohio Rev. Code Ann. § 2953.31 (LexisNexis 2010). The judicial sealing process is also known as expungement. Although it is labeled "expungement," the court process does not purge the criminal record. The record only sealed. This article will use the terms expungement and sealing interchangeably.

relief in their ongoing struggle with collateral consequences. Part IV offers two recommendations that can provide this relief.

The first recommendation addresses the slow pace of pardon grants. There is a desperate need for governors to use expeditiously their pardon power for those who have proven their rehabilitation. The glacial pace of pardons undermines its effectiveness to ameliorate the burden of collateral consequences. This article offers a new process for governors to expedite redemptive pardons.

The second recommendation seeks to expand, beyond the redemptive pardon, the remedies available to ex-offenders to ameliorate the impact of collateral consequences. This article recommends that states offer a meaningful judicial sealing process for criminal convictions. It suggests changes to the Ohio expungement statute as a model that other states could adopt. The suggested changes are modest but would have a direct and positive impact for ex-offenders burdened with collateral consequences.

There is an immediate and pressing need to solve the problem of collateral consequences. Without some change to the current state of collateral consequences, criminal convictions will continue to serve as a “trailing shadow”²¹ or an “unannounced penalty”²² that may forever bar ex-offenders from reintegrating into their communities, and achieving a better life.

²¹ Laura Ofobike, *The Ex-Con's Problem – the Elusive Job Offer*, Akron Beacon Journal, February 17, 2009, at A8 (Discussing the importance of providing jobs to ex-offenders).

²² Laura Ofobike, *Collateral Damage on the Home Front*, Akron Beacon Journal, November 28, 2011, at A8 (Examining the issue of collateral consequences faced by ex-offenders).

I. THE NEVER-ENDING PUNISHMENT - COLLATERAL CONSEQUENCES

a. Collateral Consequences – Client Narratives

Ms. Smith contacted the University of Akron Clemency Project in October 2006.²³ She was forty-one years old and was preparing to graduate from college with her social work degree. She had learned that her criminal convictions,²⁴ which were over thirteen years old, would prevent her from obtaining a social work license.²⁵ She was also in imminent danger of losing a job she had held for two years because her employer had been awarded a contract to provide home care services, and that contract prohibited anyone with a criminal conviction from servicing the contract. Her employer had notified her that it had no choice but to terminate her from her position. Ms. Smith wanted a pardon so she could keep her job and be eligible to apply for a social work license.

Thirty-six year old Ms. Jones contacted the Clemency Project in October 2007. She was the mother of four children and had been an active volunteer in their schools.

²³ At the time, the Clemency Project was housed at Community Legal Aid Services, Inc. where the author was employed as a staff attorney. The Clemency Project moved to the University of Akron School of Law in March 2008.

²⁴ Ms. Smith was convicted of three misdemeanor counts of theft in 1991 when she was 22 years old. She had a felony conviction of receiving stolen property when she was 23 years old and a misdemeanor theft conviction when she was 28 years old. Ohio Rev. Code Ann § 2913.02 (LexisNexis 2011).

²⁵ Ohio Rev. Code Ann. § 4757.28 (LexisNexis 2002). Ohio law routinely allows a criminal conviction to be a basis to reject a license application or to suspend an existing license for a number of professions. These include accountants, architects, athletic trainers, audiologists, barbers, motor vehicle dealers, chiropractors, counselors, credit service organizations, dentists and dental hygienists, dietitians, emergency medical service workers, insurance administrators, engineers and surveyors, firework exhibitors, hearing aid dealers, horse race workers, insurance agents, livestock brokers/dealers, liquor license holders, lottery sales agents, therapists, salvage dealers, nurses, occupational therapists, opticians, optometrists, pharmacists, physical therapists, physicians, physician assistants, precious metal dealers, private investigators, real estate appraisers, real estate brokers, respiratory care professionals, school employees, security guards, social workers, speech pathologists, telephone solicitors and veterinarians. Marlaina Freisthler and Mark Godsey, *Going Home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. Tol. L. Rev. 525, 536-37 (2005). See also Ohio Rev. Code Ann. §3905.14 (LexisNexis 2005); Ohio Rev. Code Ann. § 4757.36(C)(5)(LexisNexis 2009).

With the start of the new school year, she learned that she would be subject to a criminal background check by the school to continue those activities.²⁶ That background check would reveal that she had been convicted of petty theft and misdemeanor theft fifteen years earlier.²⁷ When she discussed her criminal record with the school principal, he informed her that her convictions would prevent her from continuing as a school volunteer.²⁸ Ms. Smith wanted a pardon so she could continue to volunteer in her children's schools.

²⁶ Ohio schools routinely perform background checks on volunteers. Ohio law requires that any person who has "unsupervised access to a child" must be subject to a background check. Ohio Rev. Code Ann. §109.575 (LexisNexis 2000). If a background check reveals that the volunteer has been convicted of any offenses listed in Ohio Rev. Code Ann. § 109.572 (A)(1) [Aggravated murder, Murder, Voluntary manslaughter, Involuntary manslaughter, Felonious assault, Aggravated assault, Assault, Failing to provide for a functionally impaired person, Aggravated menacing, Patient abuse; neglect, Kidnapping, Abduction, Criminal child enticement, Rape, Sexual battery, Unlawful sexual conduct with minor, Gross sexual imposition, Sexual imposition, Importuning, Voyeurism, Public indecency, Compelling prostitution, Promoting prostitution, Procuring prostitution; Prostitution after positive HIV test, Disseminating matter harmful to juveniles, Pandering obscenity, Pandering obscenity involving a minor, Pandering sexually oriented matter involving a minor, Illegal use of minor in nudity-oriented material or performance, Aggravated robbery, Robbery, Aggravated burglary, Burglary, Unlawful abortion, Endangering children, Contributing to unruliness or delinquency of a child, Domestic violence, Carrying concealed weapons, Having weapons while under disability, Improperly discharging firearm at or into habitation; School-related offenses, Corrupting another with drugs, Trafficking in drugs, Illegal manufacture of drugs or cultivation of marihuana, Funding of drug or marihuana trafficking, Illegal administration or distribution of anabolic steroids, Placing harmful objects in food or confection, Felonious sexual penetration, Child stealing, and Possession of drugs], and the organization retains the volunteer, the organization must notify the parents of the conviction. Ohio Rev. Code Ann. § 109.576 (LexisNexis 2000).

²⁷ Ms. Jones was convicted in 1992 of Petty Theft and in 1993 of Misdemeanor Theft. Ohio Rev. Code Ann. §2913.02 (LexisNexis 1973).

²⁸ The principal's statement was legally incorrect. Jones convictions are not one of the disqualify offenses in Ohio Rev. Code Ann. §109.572 (A)(1) that would render her ineligible to volunteer. Ms. Jones' experience with the school system is not unique. One of the last to be pardoned by Governor Strickland was Kelly Prine. Mr. Prine had served as a wrestling coach with the Ashtabula Area Schools since 1991. When the school learned he had twenty-year-old theft convictions, he was informed that he could no longer coach the wrestling team. He sought and received a pardon so he could return to coaching. Margie Trax Page, *Strickland Grants Clemency to Ashtabula Man*, The Star Beacon, January 10, 2011, <http://starbeacon.com/local/x756277811/strickland-grants-clemency-to-ashtabula-man>. Ironically, while Ohio law requires a background check for school employees and volunteers, it has no such requirement for those elected to the school board. See Ohio Rev. Code Ann. §3319.39 (LexisNexis 2011).

Both Ms. Jones and Ms. Smith epitomize ex-offenders in this country who want to move past their convictions, but cannot because they continue to encounter the collateral consequences of their convictions.²⁹

b. The Daunting Numbers of Collateral Consequences

Ms. Jones and Ms. Smith are two of the estimated 1.9 million Ohioans, nearly 16 percent of the state, who have a felony or misdemeanor conviction.³⁰ Each year, Ohio releases twenty-four thousand inmates from its prisons.³¹

The national statistics are similarly dismal. At the end of 2010, approximately four million adults were on probation and another 890,700 were on parole in the United States.³² One in thirty-one Americans is under some type of correctional control - prison, jails, probation or parole.³³ And according to a 2008 report issued by the Pew

²⁹ The majority of arrests in this country are for minor, nonviolent offenses. In 2009, only 4% of the 14 million arrests were for serious violent crimes. Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm> at 2.

The crimes committed by Ms. Smith and Ms. Jones are consistent with other women offenders in this country. The “vast majority of women offenders prosecuted in federal or state court are nonviolent and commit property crimes or relatively low-level drug offenses.” Leslie Acoca and Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 Stan.L. & Pol’y Rev. 133, 135 (1999).

³⁰ Mary McCarty, *Criminal Records Keeping Millions of Ohioans Jobless*, Dayton Daily News, June 25, 2011, www.daytondailynews.com/news/crime/criminal-records-keeping-millions-of-ohioans-jobless-1193628.html.

³¹ Rick Armon, *Crime Can Have a Life Sentence of Joblessness*, Akron Beacon Journal, November 7, 2011, <http://www.ohio.com/news/local/ex-offenders-banished-for-life-from-some-jobs-1.244227>. From 2000 to 2008, Ohio experienced a growth in its prison population and those sentenced to probation. Jennifer Warren, *One in 100: Behind Bars in America 2008*, The Pew Charitable Trusts: http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (last visited December 23, 2011). In 2008, Ohio was ninth in the nation in its prison growth. William Sabol, Heather West and Matthew Cooper, *Bureau of Justice Statistics Bulletin, Prisoners in 2008*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/p08.pdf>.

³² Lauren Glaze and Thomas Bonczar, *Probation and Parole in the United State 2010*, Bureau of Justice Statistics Bulletin, November 2011, at 1.

³³ Jennifer Warren, *One in 100: Behind Bars in America 2008*, The Pew Charitable Trusts, http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (last visited December 23, 2011).

Center on States, one in one hundred Americans were incarcerated in prison,³⁴ and ninety-five percent of those who are incarcerated will eventually be released into society.³⁵

These grim statistics paint a troubling picture of the millions of people who live every day with the fact of a criminal conviction and the corresponding collateral consequences imposed because of those convictions. It is no surprise that collateral consequences have attracted significant attention in scholarly articles.³⁶ Collateral

³⁴ Jennifer Warren, *One in 100: Behind Bars in America 2008*, The Pew Charitable Trusts, http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf (last visited December 23, 2011). “[A]bout twenty-five percent of the nation’s adult population lives a substantial portion of their lives with a criminal record.” Debbi Mukamal and Paul Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 *Fordham Urb. L.J.* 1501, 1502 (2003). These numbers reflect the American justice system’s view on sentencing convicted offenders. It is harsher than its counterparts in incarcerating its offenders; America incarcerates “five times more people than Britain, nine times more than Germany and 12 times for than Japan.” *Too Many Laws, Too Many Prisoners, Rough Justice In America*, *The Economist*, July 24, 2010, <http://www.economist.com/node/16636027>.

³⁵ Susan K. Urhan, *State of Recidivism, The Revolving Door of America’s Prisons*, The Pew Charitable Trusts 32 (April 2011), http://www.pewcenteronthestates.org/uploadedFiles/Pew_State_of_Recidivism.pdf, p 32.

³⁶ A search of the term “collateral consequences” revealed 2799 law review articles in and journals in Westlaw, WESTLAWNEXT, [https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (browse “All Content”; follow “Secondary Sources” hyperlink; then follow “Law Reviews & Journals” hyperlink; then follow “Advanced Search” hyperlink; then search “Any of these terms” for “impriso! incarcera! convic! prison” and search “This exact phrase” for “ATLEAST1 (“collateral consequence”); then follow “Advanced Search” hyperlink, (searched December 22, 2011) and 1264 in LEXIS, Law Review and Journal Articles Referring to Collateral Consequences, LEXISNEXIS, www.lexisnexis.com/lawschool/research/default.aspx?ORIGINATION_CODE=00092&signoff=off (follow “Secondary Legal” hyperlink; the follow “US Law Reviews and Journals, Combined” hyperlink; then search “Terms & Connectors” for “imprison! or incarcera! or convic! or prison and “collateral consequences” and not corporat! or extradi!”; then follow “Search” hyperlink) (searched December 23, 2011). The topic of collateral consequences has been addressed by national commissions, professional societies, the American Bar Association, and the American Correctional Association. Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *Fordham Urban Law Journal* 1705, 1714 (2003). A recent symposium at Howard University School of Law was dedicated to a discussion of collateral consequences. See Andrew Taslitz, *Introduction to Symposium: Destroying the Village to Save It: The Warfare Analogy (or Dis – analogy?) and the Moral Imperative to Address Collateral Consequences*, 54 *How. L.J.* 501 (2011).

consequences are pervasive, wide reaching,³⁷ and have been characterized in the literature as an “unnavigable maze.”³⁸ Collateral consequences have also “grown more numerous and more disabling since the terrorist attacks of 9/11,”³⁹ and have developed into “an interconnected system of disadvantage that amplifies disparities in economic and social well-being.”⁴⁰

Ex-offenders do not learn about these consequences at the time of their sentencing, although some have argued that it should be required.⁴¹ Most ex-offenders have to discover their collateral consequences as they apply for a job, housing or public benefits.

³⁷ Collateral consequences affect employment, eligibility for public housing, eligibility for public assistance and food stamps, eligibility for educational assistance, voting rights, right to be adoptive and foster parents, and driver’s license privileges. Debbie A. Mukamal and Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501-16 (2003). One survey summarized the most common civil rights restricted after a felony conviction to include the right to vote, parental rights, divorce, public employment, right to serve as a juror, right to hold public office, right to own a firearm, criminal registration, and civil death. Kathleen Olivares, Velmar Burton, Francis Cullen, *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 Fed. Probation 10, 11-14 (1996).

³⁸ Deborah Archer and Kele Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-offenders*, 30 NYU Rev. L. & Soc. Change 527, 527 (2006).

³⁹ Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2008),

http://www.sentencingproject.org/detail/publication.cfm?publication_id=115, p. 4. James Jacobs and Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. Legis. & Pub. Pol’y 177 (2008). (The “September 11th terrorist attacks led to legislation mandating criminal history background checks for millions of people.”) Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 461 (2010). (“[C]ollateral consequences have increased in number, scope and severity since the 1980s.”)

⁴⁰ Christopher Uggen, Jeff Manza and Melissa Thompson, *Citizenship, Democracy, and the Civil Reintegration of Criminal Offenders*, *The Annals of the American Academy* 296 (May 2006). This article contains a summary chart of the collateral consequences potentially suffered by felons. These include employment, financial aid, firearm ownership, immigration status, jury service, marital dissolution, parental rights, privacy, public assistance, public housing, public office and voting. *Id.* at 297. The authors discuss the place of felons in our society by defining them as a distinct caste, class or status group. *Id.* at 299.

⁴¹ In her article *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L. J. 653 (2011), Margaret Colgate Love argues that the United States Supreme Court’s holding in *Padilla v. Kentucky* 559 U.S._____, 130 S.Ct. 1473 (2010) may be a reason to require the disclosure of collateral consequences to be disclosed during a plea colloquy. “The Padilla decision promises to transform the landscape of criminal representation in this country by requiring consideration of collateral consequences at the front end of a criminal case.” Margaret Colgate Love and Gabriel Chin, *Padilla v. Kentucky: The Right to Counsel and the Collateral Consequences of Conviction*, *The Champion*, May 2010, at 23.

Recognizing that ex-offenders need assistance in navigating the maze of collateral consequences, efforts are underway to help. The American Bar Association's Criminal Justice Section has launched the National Study of Collateral Consequences of Criminal Convictions.⁴² The results of this study will be posted to a website with a searchable database.⁴³ The website will allow the ex-offender to search for collateral consequences by state and by offense.⁴⁴

The number of collateral consequences the study has identified reveals the depth of the collateral consequences' problem. To date, the American Bar Association study has identified 38,012 collateral consequences in this country.⁴⁵ The sheer number of

⁴² ABA Criminal Justice Section Adult Collateral Consequences Project, <http://isrweb.isr.temple.edu/projects/accproject/index.cfm> (last visited January 4, 2012).

⁴³ *Id.*

⁴⁴ Ohio has a similar website that allows a search for collateral consequences imposed by Ohio law. <http://opd.ohio.gov/CIVICC> (last visited January 4, 2012). Ohio's first attempt to make collateral consequences more transparent was not so successful. In December 2008, the Ohio legislature passed Am. Sub. H.B.130 requiring any Ohio board, commission or agency to promulgate rules if they were going to deny, without hearing, a license or certification based on a criminal conviction. Ohio Rev. Code Ann. §4743.06 (LexisNexis 2011). The rules were to list the criminal offenses for which a license or certification could be denied and why the criminal offense "substantially relates" to the person's fitness and ability to perform the occupation, profession or trade at issue. Of the 59 Ohio boards, commissions and agencies that were covered by the law, not one has promulgated a set of rules. There have been previous national efforts to catalog collateral consequences. See *American Bar Association Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, (2003), Standard 19.2-1, available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_collateral_bk.html#1.2. (Urging state legislatures to "collect, set out or reference all collateral sanctions in a single chapter or section of the jurisdiction's criminal code."). *Uniform Collateral Consequences Act*. (2009), Section 4, available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2010final_amends.htm (mandating that the appropriate government official "identify or cause to be identified any provision in this state's Constitution, statutes, and administrative rules which imposes a collateral sanction or authorizes the imposition of a disqualification, and any provision of law that may afford relief from a collateral consequence.")

⁴⁵ American Bar Association Criminal Justice Section Adult Collateral Consequences Project, <http://isrweb.isr.temple.edu/projects/accproject/blog.cfm?RecordID=1> (last visited January 4, 2012). The project allows a search of collateral consequences by state, keyword or type of conviction. A similar survey of Ohio law found approximately 800 collateral consequences arising from criminal convictions. James Frank, Lawrence Travis, Angela Reitler, Natalie Goulette and Whitney Flesher, *Collateral Consequences of Criminal Conviction in Ohio*, A Research Report to the Ohio Office of Criminal Justice Services, available at <http://www.uc.edu/content/dam/uc/ccjr/docs/reports/Collateral%20Consequences%20Final%20Report.pdf> The report placed the collateral consequences in one of five categories: "(1) civil rights; (2) public employment and doing business with the State; (3) care, custody, and control of children and family; (4)

consequences reinforces the reality for ex-offenders – there is no escape from the collateral consequences of their convictions.

c. Collateral Consequences – An Analytical Overview

Certain ex-offenders disproportionately suffer the impact of collateral consequences. Those who most strongly feel their impact include minorities, women and children.

National incarceration rates explain, in part, why minority offenders face so many collateral consequences.⁴⁶ There is a great racial disparity in those who are incarcerated for their offenses. For convicted white offenders, only one in 106 is incarcerated.⁴⁷ By contrast, for Hispanic men convicted of an offense, one in 36 is incarcerated; and for African-American men who offend, one in fifteen is incarcerated.⁴⁸ Given that minority ex-offenders are more likely to be incarcerated for their offenses, it explains why a criminal record is more stigmatizing for an African-American job applicant than it is for a white applicant.⁴⁹

regulated professions, occupations, trades, industries, and business; and (5) a general category of other privileges.” *Id.* at 5. As two examples of the reach of collateral consequences in Ohio, an ex-offender may be ineligible to be a precinct election officer, *Id.* at 25, or a volunteer firefighter, *Id.* at 31.

⁴⁶ “[R]ace is significantly intertwined with current U.S. collateral consequence policies and practices.”

Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. Rev. 457, 461 (2010) “[C]ollateral sanctions are significant to the question of racial justice for several reasons. First, collateral consequences, such as felon disenfranchisement, were regularly used as a method of preventing African Americans from voting during the Jim Crow era. Second, some categories of behavior, such as drug use, were criminalized in part because of their association with disfavored minority groups.” Gabriel Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction* 6 J. Gender Race and Justice 253, 254 (2002). 3.9 million adults are permanently disenfranchised, and of that number, 1.4 million are African American men. *Id.* at 262-263.

⁴⁷ *From Jail to Jobless*, National Law Journal, August 8, 2011, at 1.

⁴⁸ *From Jail to Jobless*, National Law Journal, August 8, 2011, at 1.

⁴⁹ Jennifer Fahey, Cheryl Roberts and Len Engle, *Employment of Ex-Offenders: Employer Perspectives*, Crime and Justice Institute 1, 2 (2006), available at http://cjinstitute.org/files/ex_offenders_employers_12-15-06.pdf. (Authors conducted interviews with Massachusetts employers to understand better why employers choose not to hire ex-offenders.)

Women ex-offenders also face a similar landscape of debilitating collateral consequences. The United States has a higher incarceration rate for women than all of Western Europe.⁵⁰ Women ex-offenders struggle to support their children because they have difficulty finding employment after their release from prison. One study revealed that only forty percent of women are able to find employment one year after their release from prison.⁵¹ Their convictions may also make them ineligible to apply for public assistance⁵² or subsidized housing.⁵³ These resources are important tools that allow women ex-offenders to support their families.

Collateral consequences directly impact family solidity for the children of ex-offenders.⁵⁴ In 2009, roughly twelve million children had parents who were either incarcerated or under some form of supervision by the criminal justice system.⁵⁵ “For African-American children, that number is one in nine.”⁵⁶ Even more tragically, “twenty-

⁵⁰ “The United States incarcerates approximately ten times more women than those imprisoned in all of Western Europe. Leslie Acocha and Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 Stan. L. & Pol. Rev. 133, 134 (1999).

⁵¹ The Sentencing Project Research and Advocacy for Reform, *Women In The Criminal Justice System: Barriers to Reentering The Community*, (May 2007), www.sentencingproject.org/doc/File/Women%20in%20CJ/women_barriers.pdf.

⁵² “Low-income women often need transitional income to increase their access to employment and educational opportunities that will help raise their socioeconomic status.” The Sentencing Project Research and Advocacy for Reform, *Women In The Criminal Justice System: Barriers to Reentering The Community*, (May 2007) www.sentencingproject.org/doc/File/Women%20in%20CJ/women_barriers.pdf. “Because of the enforcement strategies used in the war on drugs, Latina and African-American women and their families in particular are the victims of the lifetime welfare ban.” Nora Demleitner, *New Voices in the War on Drugs: “Collateral Damage”: No Re-Entry for Drug Offenders*, 47 Vill. L. Rev. 1027, 1044, (2002).

⁵³ *Id.* at 59. As the author notes, to “those living in poverty, the margin of survival is precariously narrow.” *Id.* at 62.

⁵⁴ “Convictions also diminish family stability, because felons are less appealing marriage prospects and the incarcerated cannot contribute child support and supervision.” Darryl Brown, *Cost-Benefit Analysis in Criminal Law*, 92 Cal. L. Rev. 323, 325 (2003).

⁵⁵ Laura Ofobike, *Collateral Damage on the Home Front*, Akron Beacon Journal, November 28, 2011, at A8.

⁵⁶ Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/solomon.cfm?renderforprint=1, at 3.

five percent of African Americans born after 1990 will witness their father being sent to prison by their 14th birthday.⁵⁷ Not surprisingly, the impact of collateral consequences on families has a ripple effect on the larger community that suffers high unemployment and family instability.⁵⁸

Collateral consequences also influence the ex-offender's path to higher education.⁵⁹ "[H]igh-quality education" is not readily available to ex-offenders because some colleges conduct background checks and deny admission based on those criminal histories.⁶⁰ The fact that an ex-offender cannot pursue a college degree is devastating to the offender and her community because "education offers a path to

⁵⁷ Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/solomon.cfm?renderforprint=1, at 3.

⁵⁸ Many communities to which drug offenders return suffer disproportionately from lack of cohesion, unemployment, homelessness and family instability. By increasing the number of obstacles facing ex-offenders, their chances of succeeding in this environment are further reduced, with detrimental consequences for these communities." Nora Demleitner, *New Voices on the War on Drugs: "Collateral Damage": No Re-Entry for Drug Offenders*, 47 Vill. L. Rev. 1027, 1047 (2002). "Incarceration is also a geographically concentrated phenomenon. A large number of prisoners come from – and return to – a relatively small number of already disadvantaged neighborhoods." Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/solomon.cfm?renderforprint=1, at 3.

⁵⁹ One survey found that 66% of colleges collect criminal justice information. *The Use of Criminal History Records in College Admissions Reconsidered*, Center for Community Alternatives (2010) at 8, <http://communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>. Of those that responded to the survey, 55% use the criminal background information in the admissions process. *Id.* at 9.

⁶⁰ Diana Brazzell, Anna Crayton, Debbie Mukamal, Amy Solomon and Nicole Lindahl, *From Classroom to the Community, Exploring the Role of Education During Incarceration and Reentry*, Roundtable Monograph, The Urban Institute, (2009), at 2. Even if a college admits an ex-offender, the ex-offender may be ineligible for student loans. "Though eligibility for some forms of federal financial aid for postsecondary education, such as Pell Grants, is revoked during incarceration, for the vast majority of inmates eligibility is reinstated upon release. Those with drug-related convictions, however, may still be disqualified from receiving federal financial aid for postsecondary education even after their release." *Id.* at 39.

increased employment, reduced recidivism, and improved quality of life.”⁶¹ A college graduate will pay eighty percent more in taxes each year than a high school graduate.⁶² This increased earning potential not only paves the way to a better life for the ex-offender, but also redounds to the benefit of the ex-offender’s community.

Nowhere is the impact of collateral consequences felt more strongly than in the employment arena.⁶³ A survey of collateral consequences funded by the National Institute of Justice found that 82% of those consequences were employment related.⁶⁴ Two other studies by the National Institute of Justice determined that a criminal record “reduces the likelihood of a job callback or offer by 50%.”⁶⁵

Ex-offender employment produces, as a social good, reduction in crime. It is generally accepted that a history of employment, or lack thereof, is one of the “best predictors of future criminality.”⁶⁶ Gainfully employed ex-offenders contribute to their

⁶¹ Diana Brazzell, Anna Crayton, Debbie Mukamal, Amy Solomon and Nicole Lindahl Crayton, *From Classroom to the Community, Exploring the Role of Education During Incarceration and Reentry*, Roundtable Monograph, The Urban Institute, (2009), at 2.

⁶² Sandy Baum, and Kathleen Payea, *Education Pays: The Benefits of Higher Education for Individuals and Society* (2010), http://trends.collegeboard.org/downloads/Education_Pays_2010.pdf at 10.

⁶³ “Arrest, conviction, and incarceration impose immediate wage penalties and alter long-term earnings trajectories by restricting access to career jobs.” Christopher Uggen, Jeff Manza and Melissa Thompson, *Citizenship, Democracy, and the Civil Reintegration of Criminal Offenders*, *The Annals of the American Academy* 298 (2006) “For their participation in nonviolent crimes, ex-offenders are effectively barred from job opportunities that they otherwise may have had. Collectively, legal restrictions contribute to an unemployment rate for ex-offenders as high as 60% one year after their release.” Harrison and Schehr, *Offenders and Post-Release Jobs: Variables Influencing Success and Failure*, 39 *Journal of Offender Rehabilitation* 35, 45 (2004).

⁶⁴ “The Collateral Consequences of Conviction Project funded by the National Institute of Justice found in its survey of seventeen states, that 82% of the collateral consequences relate to employment.” Written testimony of Professor Stephen Salzburg, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/Salzburg.cfm?renderforprint=1, at 2. ABA Collateral Consequences of Conviction Project, *available at* <http://isrweb.isr.temple.edu/projects/accproject/blog.cfm?RecordID=1>

⁶⁵ Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/solomon.cfm?renderforprint=1, at 1.

⁶⁶ Paul Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 *Harv. L. Rev.* 1429, 1439 (2003).

families and their communities.⁶⁷ As one columnist has noted “[m]ore than anything, the citizen with a prison record needs a job and an income – just like everybody else – to be able to feed, house and clothe himself or herself and to meet all the obligations of a responsible adult in society.”⁶⁸

Notwithstanding the economic benefits and social good associated with ex-offender employment, employers are reluctant to hire those with a criminal record.⁶⁹ According to one study, employers are less willing to hire ex-offenders than any other disadvantaged group.⁷⁰ Employer hesitancy is rooted in the need to ensure a safe work environment and to reduce their own liability for negligent hiring.⁷¹ This hesitancy has produced a strange tension among employers. They are torn between “wanting to

⁶⁷ See notes 54, 58, and accompanying text discussing the familial and community benefits of employment for ex-offenders.

⁶⁸ Laura Ofobike, *The Ex-Con's Problem – the Elusive Job Offer*, Akron Beacon Journal, February 17, 2009, at A8.

⁶⁹ There are a number of reasons why employers choose not to hire ex-offenders. “For employers, a criminal history may signal an untrustworthy employee who may break rules, steal or deal poorly with customers. Employers’ reluctance to hire such individuals may be prompted by law or by fear of litigation.” Harry J. Holzer, Steven Raphael, and Michael Stoll, *How Willing are Employers to Hire Ex-Offenders?* 23 Focus, 40, 41 (2004). “Some employers cannot legally hire persons with criminal records for some jobs. Other employers eschew ex-offenders for fear that customers or other workers would sue them if the ex-offender harmed them during work activities.” Richard Freeman, *Can We Close the Revolving Door? Recidivism vs. Employment of Ex-Offenders in the U.S*, Urban Institute Reentry Roundtable 10 (2003). http://www.urban.org/UploadedPDF/410857_freeman.pdf. Employers lost 60% of all negligent hiring/supervision jury trials in 1999. The average settlement was more than 1.6 million dollars. Mark Terry, *Employer background checks: Protection or violation?* Bankrate.com, Sept. 6, 2005, <http://www.bankrate.com/brm/news/career/20050822a1.asp>. As early as 1960, the United States Supreme Court mentioned, “[b]arring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas.” *De Veau v. Braisted*, 363 U.S. 144, 158-59 (1960).

⁷⁰ Jennifer Fahey, Cheryl Roberts and Len Engle, *Employment of Ex-Offenders: Employer Perspectives* Crime and Justice Institute 1, 2 (2006), http://cjinstitute.org/files/ex_offenders_employers_12-15-06.pdf. Examples of disadvantaged groups include low-income workers and welfare recipients. Harry Holzer, Steven Raphael, and Michael Stoll, *Employment Barriers Facing Ex-Offenders*, (2003), Urban Institute Reentry Roundtable at 11, available at http://www.urban.org/uploadedPDF/410855_holzer.pdf.

⁷¹ See Society for Human Resources Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010) at 3.

believe in rehabilitation and second chances, and not wanting to jeopardize workplace safety or business image.”⁷²

Employer hesitancy to hire ex-offenders is not uniform. A Massachusetts survey reported that employers who had hired ex-offenders had positive experiences.⁷³ The employers in the survey described the ex-offenders as “on time,” “eager,” and “motivated” to work.⁷⁴ They also found that the ex-offenders were enthusiastic and had a “desire to succeed” and an “appreciation and loyalty for being given a chance.”⁷⁵

The Massachusetts survey clearly reveals that there are examples where employers have given ex-offenders a chance, and those ex-offenders have proven their merit as valuable employees. The challenge for those who advocate for ex-offender employment is to make sure that ex-offenders get a chance to prove their employment skills and merit for the position. One way to ensure this chance is to eliminate the “criminal history” question from the job application. This initiative is known as “ban the box” because the job application removes the criminal history box an ex-offender would normally check.

“Ban the box” efforts are gaining acceptance in this country.⁷⁶ The state of Massachusetts and some major U.S. cities have removed the criminal history question

⁷² Jennifer Fahey, Cheryl Roberts and Len Engle, *Employment of Ex-Offenders: Employer Perspectives*, (2006), Crime and Justice Institute 20, http://cjinstitute.org/files/ex_offenders_employers_12-15-06.pdf. at 20.

⁷³ *Id.* at ii.

⁷⁴ *Id.* at 12.

⁷⁵ *Id.*

⁷⁶ National League of Cities Institute for Youth, Education, & Families & NELP, *Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records* (2010) at 1. For examples of legislative “ban the box” efforts, see N.M. STAT. ANN. §28-2-3 (West 2011). MINN. STAT. ANN. §364.021 (West 2011).

from their employment applications.⁷⁷ Ohio also is considering whether it will “ban the box” and eliminate the criminal history question.⁷⁸ Employers who have removed the criminal history question recognize that criminal convictions should not automatically eliminate qualified ex-offenders from employment opportunities.⁷⁹

Another method to encourage reluctant employers to hire ex-offenders is to offer financial incentives to the employers. Given the importance of employment for ex-offenders, it is important to find ways to incentivize employers to hire ex-offenders.

⁷⁷ Mass. Gen. Laws ch. 256, §§ 2-37 (2010). The cities or counties that have removed the criminal history question include Alameda County, Austin, Baltimore, Berkeley, Boston, Bridgeport, Cambridge, Chicago, Cincinnati, Detroit, Hartford, Jacksonville, Kalamazoo, Memphis, Minneapolis, New Haven, Norwich, Oakland, Philadelphia, Providence, San Francisco, Seattle, St. Paul, Travis County, TX, Washington DC and Worcester. *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*, National Employment Resource Guide, (July 2011), http://nelp.3cdn.net/7677c73949232155e3_1bm6briwd.pdf. For examples of other legislative efforts, see N.M. STAT. ANN. §28-2-3 (West 2011). MINN. STAT. ANN. §364.021 (West 2011).

⁷⁸ Rick Armon, *Ex-Offenders Banished for Life from Some Jobs*, Akron Beacon Journal, November 7, 2011 at A4, <http://www.ohio.com/news/local/ex-offenders-banished-for-life-from-some-jobs-1.244227>.

⁷⁹ The EEOC is considering whether it will revise its current background-check guidelines for employers. *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964*, as amended 42 U.S.C. §2000e et seq. (1982) (February 4, 1987 Statement) and EEOC Policy Statement on the Use of Statistics Involving the Exclusion of Individuals with Conviction Records from Employment (July 29, 1987 Statement). Those guidelines, adopted in 1987, restrict any employer from basing an employment decision on a conviction absent a business necessity. The EEOC conducted a forum on July 26, 2011 “to identify and highlight employers’ best practices, ways in which arrest and conviction records have been used appropriately, and current legal standards.” www1.eeoc.gov/eeoc/newsroom/release/7-26-2011.cfm. (Last visited December 19, 2011). The revision of the guidelines may be driven by the EEOC’s concern that the current guidelines adversely affect minorities because minorities have higher incarceration rates.

Ohio offers such incentives through the Federal Bonding Program,⁸⁰ and the Work Opportunity Tax Credit Program.⁸¹

The Ohio Department of Rehabilitation and Corrections administers the Federal Bonding Program.⁸² It provides a \$5000.00 bond to employers who hire ex-offenders who meet certain criteria.⁸³ The bond is effective for the first six months of employment, and insures the employers for any theft, larceny or embezzlement committed by the ex-offender.

⁸⁰ The U.S. Department of Labor created the Federal Bonding Program 1966 as solution to the problem of employers refusing to hire “at-risk” job seekers. Employers generally have the option of taking out Fidelity Insurance to cover employee’s bad acts committed during employment. These Fidelity Bonds are low-cost policies to indemnify employers from sustaining losses caused by employees. However, individuals with criminal records, welfare recipients, and those with bad credit are often seen as “at-risk” and therefore not bondable. The Federal Bonding Program provides Fidelity Bonds that cover “at-risk” employees at no cost to the employer or the job seeker. The Fidelity Bond can cover any job, at any employer, in any state. US Department of Labor, The Federal Bonding Program, Highlights of Federal Bonding Program, www.bonds4jobs.com/program-backgrounds.html (last visited Dec. 12, 2011).

⁸¹ Congress created the Work Opportunity Tax Credit Program to give tax incentives to private-sector companies that hire individuals belonging to nine targeted groups. The goal of the program is to provide an incentive to companies to hire those relying on government assistance in hopes of providing financially stable jobs that lead to independence from government aid. Employers must hire individuals from the nine groups outlined in the program, as individuals in these groups traditionally face consistent barriers to employment. The nine groups are, long-term TANF recipients (Temporary Assistance for Needy Families), other TANF recipients, veterans, 18-39 year old SNAP recipients (food stamps), 18-39 year old designated community residents (Empowerment Zones and Rural Renewal Counties), vocational rehabilitation referrals, ex-felons, and SSI recipients (Supplemental Security Income). Companies participating in the program can receive as much as \$2,400 generally for each new adult hire, \$1,200 for each summer youth hire, \$4,800 for each new disabled veteran hire, and \$9,800 for each new long-term TANF recipient hired over a two-year period. In order to receive the credit, the employer only has to complete two IRS forms, a Department of Labor form, and mail the forms to the state’s agency coordinator within 28 days after the individual is hired. US Department of Labor, Business, Industry, and Key Sector Initiatives, Work Opportunity Tax Credit Program, Work Opportunity Tax Credit, www.doleta.gov/business/incentives/opptax/ (last visited Dec. 12, 2011). US Department of Labor, EMPLOYERS: 9 Ways to Earn Income Tax Credits for Your Company, The Work Opportunity Tax Credit (WOTC): An Employer-Friendly Benefit for Hiring Job Seekers Most in Need of Employment (2011), http://www.doleta.gov/business/incentives/opptax/PDF/WOTC_Fact_Sheet.pdf.

⁸² http://www.drc.ohio.gov/web/OJL_bonding.htm (last visited January 9, 2012).

⁸³ The ex-offenders criminal history must be verifiable; The ex-offender cannot be self-employed or on a personal service contract; the employment must be full time with payroll tax deductions and the job must be verified and the request for bonding occur before the first day of employment. <http://www.bonds4jobs.com/highlights.html> (last visited December 23, 2011).

The Ohio Department of Job and Family Services administers the Work Opportunity Tax Credit Program.⁸⁴ The program provides a tax credit to employers who choose to hire ex-felons. The ex-offender must be hired no later than one year after the person was convicted or released from prison.⁸⁵ The employer can receive a credit of at least \$2,400.00.⁸⁶

By all measures, the two programs have been successful. Nationally, the Federal Bonding Program has led to over 42,000 job placements.⁸⁷ Since 2003, 102 Ohio employers have participated in Federal Bonding program resulting in 160 jobs for ex-offenders.⁸⁸ The ex-offenders placed through the Federal Bonding Program have performed well for their employers. The Federal Bonding program boasts a 99% success rate meaning that it has only issued bonds to 1% of the employers who hired ex-offenders.⁸⁹ Ohio has a 100% success rate; it has not had to issue one bond to any employer who hired an ex-offender since 2003.⁹⁰

The Work Opportunity Tax Credit has similarly impressive numbers. Since 2003, 5585 Ohio employers have participated in the program and hired ex-offenders.⁹¹

⁸⁴ <http://jfs.ohio.gov/wotc/index.stm> (last visited January 9, 2012).

⁸⁵ Target Groups: Work Opportunity Tax Credit (WOTC) Program, <http://jfs.ohio.gov/wotc/TargetGroups.stm> (last visited January 5, 2012).

⁸⁶ Work Opportunity Tax Credit (WOTC) Program, <http://jfs.ohio.gov/wotc/> (last visited January 5, 2012).

⁸⁷ US Department of Labor, The Federal Bonding Program, Highlights of Federal Bonding Program, www.bonds4jobs/program-backgrounds.html (last visited Dec. 12, 2011).

⁸⁸ E-mail from Brigitte Puckett, Executive Secretary, Central Ohio School System, to author, January 11, 2012, 4:25 p.m. EST, on file with author.

⁸⁹ US Department of Labor, The Federal Bonding Program, Highlights of Federal Bonding Program, www.bonds4jobs/program-backgrounds.html (last visited Dec. 12, 2011).

⁹⁰ E-mail from Brigitte Puckett, Executive Secretary, Central Ohio School System, to author, January 11, 2012, 4:25 p.m. EST, on file with author.

⁹¹ E-mail from Michael Valentine, Assistant Chief, Employment and Training Programs, Office of Workforce Development, Ohio Department of Job and Family Services, to author (January 25, 2012, 5:01 p.m. EST) (on file with author).

Notwithstanding these efforts to encourage and to incentivize employers to hire ex-offenders, employment statistics reveal that in 2008, an estimated twelve to fourteen million ex-offenders of working age increased the national male unemployment rates by 1.5 to 1.7 percent.⁹²

For those ex-offenders fortunate enough to have found employment, their conviction may still interfere with their job security or promotion. Ms. Smith's case is a perfect example of this problem. She had found employment and had worked for her employer for two years. She was a good employee, and her employer wanted to keep her "forever."⁹³ But two years into her employment, her employer received a contract to provide home care services. One of the provisions of that contract prohibited the employer from servicing the contract with employees with criminal convictions. Her employer had no choice but to terminate Ms. Smith.

Ms. Smith's story is not unique. Most of the clients who come to University of Akron's Clemency Project do so for employment reasons. Some have no employment, but the majority is employed. For those who are employed, some have never told their employer about their convictions. Their convictions hover like the sword of Damocles, placing them in constant fear that their employers will learn about their convictions and terminate them. Others are underemployed because their convictions prevent them from getting a job for which they are qualified. Still others are like Ms. Smith, where their

⁹² Mary McCarty, *Records Keeping Millions of Ohioans Jobless*, Dayton Daily News, June 25, 2011, <http://www.daytondailynews.com/news/crime/criminal-records-keeping-millions-of-ohioans-jobless-1193628.html>. "Those ex-offenders who do find employment will suffer an 11 percent reduction in hourly wages." Written testimony of Professor Stephen Salzburg, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/Salzburg.cfm?renderforprint=1, at 2.

⁹³ Letter from Ms. Smith's employer to Ohio Parole Board (January 18, 2007) (on file with author).

employers know about their convictions, but the terms of their employment change and cause them to lose their jobs.

The Clemency Project stories reflect the ongoing national problem of collateral consequences. Ex-offenders are staggering under the weight of these consequences. There must be remedies that give the ex-offender a chance to escape some of their impact so they may reintegrate into their communities; unfortunately, the existing options are very limited.

II. MYTH OR REALITY: THE COURT SEALING PROCESS

Ohio and eighteen other states offer a judicial process to seal or expunge criminal convictions.⁹⁴ These statutes vary in their requirements but relief is usually limited to those who have committed one offense or those who have committed low-level offenses.⁹⁵

⁹⁴ Ohio Rev. Code. Ann. § 2953.31 (LexisNexis 2011). (Florida (Fla. Stat. ch. 943.059), Kansas (Kan. Stat. Ann. § 21-4619(a)-(b) (2010)), Louisiana (La. Rev. Stat. Ann. § 44:9(F)-(G) (LexisNexis 1970)), Massachusetts (Mass. Gen. Laws ch. 276, § 100A.), Michigan (Mich. Comp. Laws § 780.621 (1982)), Mississippi (Miss. Code Ann. § 99-19-71(1986)), Nevada (Nev. Rev. Stat. § 179.245 (1971)), New Hampshire (N.H. Rev. Stat. Ann. § 651:5 (2011)); New Jersey (N.J. Stat. Ann. § 2C:52-2 (West 1979)), Oklahoma (Okla. Stat. tit. 22, § 18(7) (1987)), Oregon (Or. Rev. Stat. § 137.225 (1971)), Rhode Island (R.I. Gen. Laws § 12-1.3-3 (1983)), South Carolina (S.C. Code Ann. §§ 22-5-910 (1992), 34-11-90 (1962)), South Dakota (S.D. Codified Laws §23A-27-17 (1975)), Washington (Wash. Rev. Code. § 9.94A.030 (2010)), West Virginia (W.Va.Code § 5-1-16a (1999)), Wisconsin (Wis. Stat. § 973.015 (2011)) and Wyoming (Wyo. Stat. Ann. § 7-13-301 (1910)). For an excellent discussion of judicial expungement or sealing remedies available in the United States, see Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* (2008), http://www.sentencingproject.org/detail/publication.cfm?publication_id=115, p. 4Expungement began in the 1940s when Congress enacted the Youth Corrections Act to allow juvenile offenders to seal their convictions so they could have a fresh start. Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 Fordham Urb. L. 1705, 1709 (2003). Judicial expungement exists “to both encourage and reward rehabilitation, by restoring social status as well as legal rights.” 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, 1710 (2003).

⁹⁵ “Judicial procedures for avoiding or mitigating collateral disabilities and penalties are found in more than half the states, and sometimes are accompanied by expungement or sealing of the record. In most

These restrictive requirements make it impossible for most ex-offenders to use the judicial sealing process as a mechanism of relief for their collateral consequences. Ohio's statute is representative of this problem. Ohio's expungement statute applies only to "first offenders."⁹⁶ The statute defines "first offender" as "anyone who has been convicted of an offense in this state or any other jurisdiction and who previously or subsequently has not been convicted of the same or a different offense in this state or any other state."⁹⁷ The statute also limits the offenses that a "first offender" may seal. The "first offender" may not apply to seal a conviction for a first or second-degree felony, any conviction involving a mandatory prison term, a first-degree misdemeanor or a felony involving an offense of violence, or a conviction where the victim is under the age of eighteen.⁹⁸

states, however, these procedures are made available only to first offenders, to minor offenders, or to misdemeanants." Margaret Colgate Love, *Relief from Collateral Consequences*, (July 2005) at 9. <http://sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf>.)

⁹⁶ Ohio Rev. Code Ann. § 2953.31 (LexisNexis 2011). For other states requiring that the person applying be a "first offender," See Michigan (Mich. Comp. Laws § 780.621 (1982)), New Jersey (N.J. Stat. Ann. § 2C:52-2(a) (2010)), Rhode Island (R.I. Gen. Laws § 12-1.3-3(b)(1)(1983)), and Wyoming (Wyo. Stat. Ann. § 7-13-301 (2011)).

⁹⁷ Ohio law provides an exception to the one offense rule. See Ohio Rev. Code Section 2953.31(A) Even if the person commits more than one offense, they may still qualify as a first offender if their convictions "result from or are connected with the same act or result from offenses committed at the same time," or "[w]hen two or three convictions result from the same indictment, information, or complaint, from the same plea of guilty, or from the same official proceeding, and result from related criminal acts that were committed within a three-month period but do not result from the same act or from offenses committed at the same time." The court may choose to disregard these exceptions. See Ohio Rev. Code Ann. § 2953.32 (LexisNexis 2011).

⁹⁸ Ohio Rev. Code Ann. § 2953.36 (LexisNexis 2011). Expungement does not "apply to any of the following: (A) Convictions when the offender is subject to a mandatory prison term; (B) Convictions under section 2907.02, 2907.03, 2907.04, 2907.05, 2907.06, 2907.321, 2907.322, or 2907.323, former section 2907.12, or Chapter 4507., 4510., 4511., or 4549. of the Revised Code, or a conviction for a violation of a municipal ordinance that is substantially similar to any section contained in any of those chapters; (C) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01 or 2917.31 of the Revised Code that is a misdemeanor of the first degree; (D) Convictions on or after the effective date of this amendment under section 2907.07 of the Revised Code or a conviction on or after the effective date of this amendment for a violation of a municipal ordinance that is substantially similar to that section; (E) Convictions on or after the effective date of this amendment under section 2907.08, 2907.09, 2907.21, 2907.22, 2907.23, 2907.31, 2907.311

An eligible “first offender” may seek to have their Ohio misdemeanor or felony conviction sealed after the statutory waiting period ends: one year for a misdemeanor and three years for a felony.⁹⁹ If sealed, the court’s order “restores the person who is the subject of the order to all rights and privileges” and the person may not be asked on an employment application about the sealed conviction unless it “bears a direct and substantial relationship to the position for which the person is being considered.”¹⁰⁰

Few Ohio ex-offenders meet the narrow requirements of the statute.¹⁰¹ Most are not first-time offenders. One Ohio legal aid organization, Community Legal Aid Services, Inc. (CLAS),¹⁰² reports that of those clients who seek CLAS’s assistance with judicial expungement, 95% are ineligible for the process because they are not first offenders.¹⁰³

CLAS refers some of these ineligible clients to the University of Akron’s Clemency Project. The Clemency Project serves one county in Ohio with a poverty

[2907.31.1], 2907.32, or 2907.33 of the Revised Code when the victim of the offense was under eighteen years of age; (F) Convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony; (G) Convictions of a felony of the first or second degree; (H) Bail forfeitures in a traffic case as defined in Traffic Rule 2.”

⁹⁹ Ohio Rev. Code Ann. § 2953.32 (LexisNexis 1973). Ohio law has three classifications of offenses: minor misdemeanors, misdemeanors and felonies. A minor misdemeanor is an offense where the penalty does not exceed a fine of one-hundred fifty dollars. Ohio Crim. R. 4.1. Ohio law defines a misdemeanor as an offense where the punishment is less than one year in prison. Ohio Rev. Code Ann. §2901.02(F) (LexisNexis 2011). It defines a felony as an offense where the punishment results in imprisonment for more than one year. Ohio Rev. Code Ann. § 2901.02(E) (LexisNexis 2011). While Ohio allows for sealing of misdemeanor and felony offenses, some states only seal misdemeanor convictions including Mississippi (Miss. Code Ann. § 99-19-71), Oklahoma (Okla. Stat. tit. 22, § 18(7)), South Carolina (S.C. Code Ann. §§ 22-5-910, 34-11-90), South Dakota (S.D. Codified Laws § 23A-27-17), and Wisconsin (Wis. Stat. § 973.015).

¹⁰⁰ Ohio Rev. Code Ann. § 2953.33 (LexisNexis 2011).

¹⁰¹ For a further explanation of Ohio’s expungement process for qualified applicants, see Pierre Bergeron and Kimberly Eberwine, *One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records* 36 U.Tol.L. Rev. 595, 599-600 (2005).

¹⁰² Community Legal Aid Services, Inc. provides free legal assistance for clients in eight counties in Ohio: Summit, Stark, Portage, Medina, Trumbull, and Mahoning. The poverty population for this area according to the 2000 census is 267,865. U.S. Census Bureau, STATE AND CNTY QUICKFACTS: OHIO, uickfacts.census.gov/qfd/states/39000.html (last visited October 13, 2011).

¹⁰³ Interview with Sara Strattan, Executive Director, Community Legal Aid Services, Inc. (January 27, 2011).

population of 80,183.¹⁰⁴ Since March 2008, CLAS has referred over 500 people to the Clemency Project.¹⁰⁵ These numbers translate to approximately one new client for every four days the project has been in existence. This number of referrals reveals the broad extent of the statute's ineligibility problems.

Ohio's expungement law as originally enacted was not the restrictive statute that now exists. The Ohio legislature passed the first expungement statute in 1974.¹⁰⁶ It contained a "first offender" requirement but only excluded from sealing those offenses ineligible for probation,¹⁰⁷ and certain traffic offenses.¹⁰⁸

Fourteen years after its initial enactment, the Ohio legislature began its march to tighten the requirements for sealing by adding offenses that were now ineligible for expungement.¹⁰⁹ In 1988, the Ohio legislature added to the exempt offenses any traffic

¹⁰⁴ U.S. Census Bureau, STATE AND CNTY QUICKFACTS: OHIO, uickfacts.census.gov/qfd/states/39000.html (last visited October 13, 2011).

¹⁰⁵ This need by low-income clients has been documented in other areas of the country as well. In 2009, Chicago's Cabrini Green Legal Aid's Criminal Records Program reported that that in three and one half years it had served over 14,000 visitors seeking assistance for an expungement of their criminal record or for assistance with a pardon. Robert B. Acton, *I Breathe Again*, The Expungement Help Desk, Pro Bono Week 2009 1, (Oct. 23, 2009), *available at* <http://www.cgla.net/sites/all/files/feature%20on%20expungement%20by%20rob%20acton.pdf>. Eighty-two percent of those visitors wanted their record sealed to assist with employment. *Id.*

¹⁰⁶ The American Bar Association has urged each jurisdiction in this country to have a judicial procedure for expunging criminal convictions. It did this as early as 1981, when it jointly issued with the American Correction Institute the Standards on the Legal Status of Prisoners, which urged jurisdictions to adopt "a judicial procedure for expunging criminal convictions." ABA Section of Criminal Justice, *ABA Standards for Criminal Justice: Legal Status of Prisoners*, 2 ABA Standards for Criminal Justice, Standard 23-8.2, 2 (1983),

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_status.html.

It reiterated this position in the ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons Standard 19-1.2(vi) ABA Section of Criminal Justice, *ABA Standards for Criminal Justice: Collateral Sanctions and Discretionary Disqualification of Convicted Persons* 3 ABA Standards for Criminal Justice 1 (2004),

<http://www.abanet.org/crimjust/standards/collateralsanctionwithcommentary.pdf>.

http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_status.html.

¹⁰⁷ Ohio Rev. Code Ann. § 2953.36 (LexisNexis 1974).

¹⁰⁸ *Id.*; The traffic offenses include having no valid operator's license and driving while intoxicated.

¹⁰⁹ This amendment to the statute occurred during the tough-on-crime period in the late 1980s. Alan Johnson, *Sentencing-Overhaul Law to Reduce Ohio's Prison Population*, The Columbus Dispatch, June

case that involved bail forfeiture.¹¹⁰ In 1996, the legislature included nine new exempt offenses including any offense that carried a mandatory prison term and sexually-oriented offenses.¹¹¹ Again, in 2000, the Ohio legislature increased the list with the addition of three more exemptions.¹¹² Ohio law now exempts twenty offenses from the statutory expungement process.¹¹³

At the same time the Ohio legislature was narrowing the list of offenses eligible for expungement, it was also enlarging the class of persons who could access the expunged and sealed record. In the original 1974 statute, the only parties having access to sealed records were those responsible for future charging decisions, law enforcement officers, or prosecuting attorneys.¹¹⁴ In 1984, the Ohio legislature expanded the list of persons to include parole and probation officers, the person who is the subject of the

30, 2011, <http://www.dispatch.com/content/stories/local/2011/06/30/sentencing-overhaul-to-reduce-prison-population.html>.

¹¹⁰ Ohio Rev. Code Ann. Section 2953.36 (LexisNexis 1988).

¹¹¹ This list includes any conviction where the offender was subject to a mandatory prison term; or any conviction under section 2907.02 (Rape), 2907.03 (Sexual Battery), 2907.04 (Unlawful Sexual Conduct with Minor), 2907.05 (Gross Sexual Imposition), 2907.06 (Sexual Imposition), 2907.321 (Pandering Obscenity Involving a Minor), 2907.322 (Pandering Sexually Oriented Matter Involving a Minor), 2907.323 (Illegal Use of Minor in Nudity-Oriented Material or Performance), and former section 2907.12 (Felonious Sexual Penetration). Ohio Rev. Code Ann. § 2953.36 (LexisNexis 1996).

¹¹² The added exceptions: (C) Convictions of an offense of violence when the offense is a misdemeanor of the first degree or a felony and when the offense is not a violation of section 2917.03 of the Revised Code and is not a violation of section 2903.13, 2917.01 and 2917.31 of the Revised Code that is a misdemeanor of the first degree; (D) Convictions of an offense in circumstances in which the victim of the offense was under eighteen years of age when the offense is a misdemeanor of the first degree or a felony; and (E) Convictions of a felony of the first or second degree." Ohio Rev. Code Ann. § 2953.36 (LexisNexis 2000).

¹¹³ Ohio Rev. Code § 2953.36 (LexisNexis 2011).

¹¹⁴ Ohio Rev. Code § 2953.32(D) (LexisNexis 1974) provided that "[i]nspection of the records included in the order may be made only by any law enforcement officer, prosecuting attorney, city solicitor, or their assistants, for purposes of determining whether the nature and character of the offense with which a person is to be charged would be affected by virtue of such persons having previously been convicted of a crime or upon application by the person who is the subject of the records and only to such persons named in his application." Ohio Rev. Code § 2953.32(D) (LexisNexis 1974).

sealed record, and any law enforcement officer who needs the sealed record as a defense in a civil action.¹¹⁵

By 1989, the Ohio legislature, for the first time, allowed access to sealed records to those outside the criminal justice system.¹¹⁶ A number of entities could now access the sealed record if the ex-offender sought employment with them including a board of education of any school district, any county board of mental retardation and developmental disabilities, a chartered nonpublic school, a home health agency, a child day-care center or type A, B or C family day care home, head start entity, public children services agency, any position involving the direct care of an older adult, and positions subject to a criminal history check by the Ohio Bureau of Criminal

¹¹⁵ Ohio Rev. Code Ann. § 2953.32(D): “Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes: (1) By any law enforcement officer or any prosecutor, or his assistants, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person’s having previously been convicted of a crime; (2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while he is on parole or probation and in making inquiries and written reports as required by the court or adult parole authority; (3) Upon application by the person who is the subject of the records, by the persons named in his application; (4) To a law enforcement officer who was involved in the case, for use in the officer’s defense of a civil action arising out of the officer’s involvement in that case.”

¹¹⁶ Ohio Rev. Code Ann. § 2953.32(D) (West 1992): “Inspection of the sealed records included in the order may be made only by the following persons or for the following purposes: (1) By any law enforcement officer or any prosecutor, or his assistants, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person’s having previously been convicted of a crime; (2) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while he is on parole or probation and in making inquiries and written reports as requisite by the court or adult parole authority; (3) Upon application by the person who is the subject of the records, by the persons named in his application; (4) To a law enforcement officer who was involved in the case, for use in the officer’s defense of a civil action arising out of the officer’s involvement in that case; (5) By an prosecuting attorney or his assistants to determine a defendant’s eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code; (6) By any law enforcement officer or any authorized employee of a law enforcement agency as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer; (7) By any law enforcement agency or any authorized employee of a law enforcement agency, for the purposes set forth in, and in the manner provided in, section 2953.321 {2953.32.1} of the Revised Code; (8) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of providing information to a board or person pursuant to division (F) of section 109.57 of the Revised Code.”

Investigation.¹¹⁷ This statutory amendment alone creates 65 different circumstances where these listed employers have access to the sealed record.¹¹⁸

Who really benefits from the current iteration of Ohio's expungement law? Few offenders meet the "first offender" requirement and have an offense eligible for expungement. Moreover, if they seek to have their record sealed for employment purposes, it may be meaningless. The statute might allow the employer to see the sealed record anyway, with devastating results. It is unlikely the employer will offer the job to the ex-offender once the employer sees the criminal record.¹¹⁹

Moreover, the reach of a court's sealing order is confined to those who maintain the "official records pertaining to the case."¹²⁰ There is no legal requirement that others

¹¹⁷ Ohio Rev. Code Ann. § 109.57 (F)(2)(a) and (G) (LexisNexis 1989). The statute now contains a list of twelve separate reasons to allow access to sealed records that potentially and dramatically undermine the sealing of a conviction. The additional reasons added to the statute since 1989 include: "(9) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of performing a criminal history records check on a person to whom a certificate as prescribed in section 109.77 of the Revised Code is to be awarded; (10) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of conviction a criminal records check of an individual pursuant to division (B) of section 109.572 [109.57.2] of the Revised Code that was requested pursuant to any of the sections identified in division (B)(1) of that section; (11) By the bureau of criminal identification and investigation, an authorized employee of the bureau, a sheriff, or an authorized employee of the sheriff in connection with a criminal records check described in section 311.41 of the Revised Code; (12) By the attorney general or an authorized employee of the attorney general or a court for purposes of determining a person's classification pursuant to Chapter 2950 of the Revised Code." Ohio Revised Code § 2953.32 (D) (LexisNexis 2011).

¹¹⁸ *Id.*

¹¹⁹ See note 69 and accompanying discussion on employer's reticence to hire ex-offenders. 2009 Survey Conducted by Society for Human Resource Management. See Society for Human Resources Management, *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010) at 3. *From Jail to Jobless*, the National Law Journal, August 8, 2011, at 1. The Society for Human Resource Management Survey revealed that employers would not extend a job offer if the applicant had the following criminal record: Violent felony (95%); Nonviolent Felony (74%); Violent misdemeanor (58%); Nonviolent misdemeanor (22%) and Arrest record only (5%). Collectively, legal restrictions contribute to an unemployment rate for ex-offenders as high as 60% one year after their release." Byron Harrison and Robert Schehr, *Offenders and Post-Release Jobs: Variables Influencing Success and Failure*, 39 Journal of Offender Rehabilitation 35, 45 (2004).

¹²⁰ Ohio Rev. Code Ann. § 2953.31 (LexisNexis 2011). Official records are defined as "all records that are possessed by any public office or agency that relate to a criminal case, including, but not limited to: the notation to the case in the criminal docket; all subpoenas issued in the case; all papers and

who do not “officially” maintain those same criminal records must remove them from their databases. For example, for-profit companies that conduct criminal background checks for employment are not a “public office or agency” under the statute.

This creates a huge gap in the governmental effort to seal convictions. Employers routinely conduct criminal background checks as part of the hiring process. A recent survey reported that 92% of employers conduct a criminal background check for certain positions and 73% do for every position.¹²¹ Employers use private companies to conduct these checks. Two large companies that conduct such checks, First Advantage and Hire Right, have reported four billion dollars in revenue.¹²² This greatly complicates an ex-offender’s chance at a fresh start. As one author has noted, “in the age of Google, it is very difficult to clear one’s name.”¹²³

documents filed by the defendant or the prosecutor in the case; all records of all testimony and evidence presented in all proceedings in the case; all court files, papers, documents, folders, entries, affidavits, or writs that pertain to the case; all computer, microfilm, microfiche, or microdot records, indices, or references to the case; all index references to the case; all fingerprints and photographs; all records and investigative reports pertaining to the case that are possessed by any law enforcement officer or agency, except that any records or reports that are the specific investigatory work product of a law enforcement officer or agency are not and shall not be considered to be official records when they are in the possession of that officer or agency; and all investigative records and reports other than those possessed by a law enforcement officer or agency pertaining to the case. “Official records” does not include records or reports maintained pursuant to section 2151.421 of the Revised Code by a public children services agency or the department of job and family services.” Ohio Rev. Code Ann. §2953.51(D) (LexisNexis 2011).

¹²¹“Each year, about nine million criminal background checks are generated by the FBI for civil purposes, mostly for employment.” Written testimony of Professor Stephen Salzburg, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, www1.eeoc.gov/eeoc/meetings/7-26-2011/Salzburg.cfm?renderforprint=1, p. 2.

¹²² Louis Prieto, Persis S. Yu and Jason Hoge, *Using Consumer Law to Combat Criminal Record Barriers to Employment and Housing Opportunity*, 44 Clearinghouse Rev. 471, 471 (Jan/Feb. 2011).

¹²³ Clay Calvert and Jerry Bruno, *When Cleansing Criminal History Clashes with the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age*, 19 CommLaw Conspectus 123, 147 (2010) (quoting Paul Silva, Signs of Life-No Escape from Google’s Grip, BEACH REP., December 30, 2009, available on LexisNexis Academic.) One author has identified as a digital “scarlet letter” the criminal backgrounds that are easily located on the internet. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One’s Name*, 2009 BYU L. Rev. 1277, 1316 (2009).

The judicial expungement or sealing process offers little relief from the ubiquitous collateral consequences that plague so many. Because it applies to so few ex-offenders, the redemptive pardon remains the only viable remedy to ameliorate the impact of collateral consequences.

III. THE “REAL” LAST CHANCE: THE PARDON PROCESS

Executive clemency serves the “crucial purpose of being the criminal justice system’s fail-safe.”¹²⁴ The redemptive pardon serves an unequalled role in the battleground of collateral consequences. As one author noted, “forty-two states and the federal government make pardon the exclusive remedy for most criminal offenders seeking to mitigate the collateral penalties and disqualifications that flow from a criminal conviction.”¹²⁵

For those ex-offenders who are successful in receiving a pardon, the road to redemption is long and arduous. The cumbersome process has ex-offenders often waiting years for a governor’s pardon decision. This article traces the journey of Ms. Smith and Ms. Jones, from their applications for a pardon to the governor’s ultimate decision to grant their pardons, in the hope of better understanding the trials and tribulations of the pardon process. Their journeys highlight the benefits and shortcomings of the redemptive pardon process.

¹²⁴ Margaret Stapleton and Marie Claire Tran, *Increasing the Use of Executive Clemency to Help Low-Income People with Criminal Records*, 42 *Clearinghouse Rev. Journal of Poverty Law and Policy* 374, 379 (Nov-Dec. 2008).

¹²⁵ Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 *Litigation* 25 (Winter 2006). Notwithstanding the important power the governor possesses to grant pardons, one governor has noted that it is the power for “which there is the least training or preparation.” Richard F. Celeste, *Forgiveness & the Law: Executive Clemency and the American System of Justice: Executive Clemency: One Executive’s Real Life Decisions*, 31 *Cap. U. L. Rev.* 139, 139 (2003).

a. A National Model – Ohio’s Pardon Process

Ohio’s governor has the exclusive constitutional power to pardon, albeit with some statutory constraints.¹²⁶ Ohio’s general assembly has constructed a regulatory scheme to govern the manner and procedure for applying for a pardon.¹²⁷ That scheme requires that all pardon applicants file a written application with the Ohio Adult Parole Authority (OAPA).¹²⁸ The OAPA’s application requires certain information, including a

¹²⁶ Section 11, Article III, Ohio Constitution: “The Governor shall have power, after conviction, to grant reprieves, commutations, and pardons, for all crimes and offenses, except treason and cases of impeachment, upon such conditions as the Governor may think proper; subject, however, to such regulations, as to the manner of applying for commutations and pardons, as may be prescribed by law. Upon conviction for treason, the Governor may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the General Assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve. The Governor shall communicate to the general assembly, at every regular session, each case of reprieve, commutation, or pardon granted, stating the name and crime of the convict, the sentence, its date, and the date of the commutation, pardon, or reprieve, with the Governor’s reasons therefor.”

¹²⁷ *Id.* See also *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 518-19 (1994), where the Ohio Supreme Court confirmed the legislature’s power to regulate the governor’s pardon power. (“The exercise of the pardoning power involves two distinct elements -- the application process and the consideration process. The phrase “manner of applying” for pardons includes the entire application process, which encompasses the filing of the application itself, the investigation, the recommendation, and the full report compiled by the APA. We find that the General Assembly’s authority to regulate the application process extends to the time just before the Governor reaches a substantive decision concerning a pardon. Once this point is reached, the General Assembly’s constitutionally granted authority to regulate procedurally the pardoning power of the Governor is at its end.”) *Id.* The decision in *Mauer* was driven in large measure by former Governor Celeste’s commutation of six death row inmates. He commuted five of the sentences to life in prison with no possibility of parole. The sixth person received a life sentence with the possibility of parole. The governor issued his decision without the Ohio Parole Authority conducting an investigation and issuing a recommendation to him. After this decision, on January 1, 1996, Ohio amended its constitution to provide that commutations may also be subject to legislative regulation. *Coleman v. Ohio Adult Parole Authority*, 115 Ohio App.3d 212, 216, n. 2 (1996).

¹²⁸ “[A] clemency application must be made to and acted on by the Adult Parole Authority before the Governor may grant clemency.” *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 523. (1994). There are five different clemency methods in the United States: 1) the governor possesses the sole authority to grant clemency; 2) The governor may only grant clemency after a recommendation from a board; 3) the governor grants clemency after a non-binding recommendation by a board; 4) a board decides clemency; and 5) the governor sits on a board that makes the clemency decision. Leona Jochnowitz, *Public Access to Clemency Petitions*, 44 *Crim. L. Bulletin*, 2, 5 (2008). Ohio is one of seven states that requires an independent board to consider the clemency application before the governor may grant a pardon (Arkansas, Illinois, Iowa, Kansas, Michigan, Missouri and New Hampshire). Margaret Colgate Love, *Relief from Collateral Consequences*, Table 1 (July 2005), available at <http://sentencingproject.org/doc/File/Collateral%20Consequences/table1.pdf>.

list of the offenses for which clemency is requested, the applicant's arrest record, the applicant's employment history and the reason she is requesting a pardon.¹²⁹

Ms. Smith and Ms. Jones followed the statutorily mandated process for seeking their pardons. Both filed clemency applications.¹³⁰ Ms. Smith completed her pardon application in January 2007. Her pardon packet contained her application and a letter to the governor explaining the circumstances of her convictions, how she had changed her life since her convictions, and why she was requesting a pardon.¹³¹ She also submitted letters from her former employers, her mother, sister and pastor. All urged the governor to pardon her.

Ms. Jones filed her pardon application with the OAPA in 2007. She too submitted a letter to the governor as part of her pardon packet.¹³² The letter explained how her convictions prevented her from volunteering at her children's school, and how they precluded her from obtaining a job in the medical field.¹³³ Ms. Jones also included in her packet a number of letters of support from the members of her community urging the governor to pardon her.

The OAPA must conduct an investigation upon receipt of a completed pardon application.¹³⁴ Both Ms. Smith and Ms. Jones' applications were referred to the Akron OAPA office for investigation. An investigator conducted an interview of each. Ms. Smith's interview was by telephone and Ms. Jones' interview was conducted at her

¹²⁹ *Id.*

¹³⁰ A form clemency application and the corresponding instructions are available at the Ohio Parole Board website, www.drc.ohio.gov/web/ExecClemency.htm.

¹³¹ Application on file with author.

¹³² Letter on file with author.

¹³³ *Id.*

¹³⁴ Ohio Rev. Code Ann. § 2967.07 (LexisNexis 2011).

home. Both interviews consisted of a series of questions about the crimes, about the changes the interviewee had made in her life, and what she was doing to make a positive contribution to society.

After the OAPA completes its investigation, the OAPA “prepares a report on the details of the crimes, the applicant's adjustment to prison or the community, and the support available to the applicant in the community.”¹³⁵ The OAPA then sends its report to the Ohio Parole Board (OPB).¹³⁶ The OPB takes an initial vote on the application to determine whether to immediately recommend against granting clemency or to conduct a hearing.¹³⁷ If the OPB decides to conduct a hearing, “notice is sent to the local Prosecutor, the sentencing Judge, and those victims or victims' family members designated to receive notice.”¹³⁸ Those who are required to be notified then have approximately three weeks to submit their opinions on whether the applicant should receive clemency.¹³⁹

A panel of the OPB conducts the hearings. For most hearings, at least six members of the clemency board attend the hearing. During the hearing, the board considers any testimony given by the applicant, any statement by the victim,

¹³⁵ *State ex rel. Maurer v. Sheward*, 71 Ohio St.3d 513, 530, n 7 (1994).

¹³⁶ The Ohio Parole Board currently has eight members but it may have as many as twelve. Ohio Rev. Code Ann. 5149.10 (LexisNexis 2011). The members of the board are appointed by the director of the Ohio Department of Rehabilitation and Correction. For a full description of the board's duties, see <http://www.drc.ohio.gov/web/parboard.htm>.

¹³⁷ *State ex rel. Maurer v. Sheward* (1994), 71 Ohio St.3d 513, 530, n.7 (Robie Resnick, J., dissenting). There are cases where the OAPA denies clemency at the application stage with no hearing. See Ohio Adult Parole Authority Parole Board Report Fiscal Year 2011 where OPB denied 202 pardons without a hearing. *Available at*

<http://www.drc.ohio.gov/web/Reports/ParoleBoard/Fiscal%20Year%202011%20Report.pdf>.

¹³⁸ *Id.*; Ohio Rev. Code Section 2967.03 (LexisNexis 2011); Ohio Adm. Code 5120:1-1-15 (2010).

¹³⁹ *Maurer*, 71 Ohio St.3d at 530, n. 7.

prosecuting attorney and sentencing judge, and the results of the OAPA's investigation.¹⁴⁰

The OPB notified Ms. Smith in June 2007 that it wished to conduct a hearing on her clemency application.¹⁴¹ Ms. Smith appeared before the OPB on June 26, 2007. Similarly, the OPB notified Ms. Jones in October 2007 that she would have a hearing on her clemency application. She appeared before the OPB on October 18, 2007.

The only attendees at both Ms. Smith and Ms. Jones' hearings were the applicants, their witnesses, and counsel.¹⁴² One board member conducts the clemency hearing.¹⁴³ The board member asks the applicant to discuss the facts of each offense, and what positive changes each has made in their lives. The board also asks each applicant to articulate a specific reason why they want a pardon. Once the board member finishes his or her questions, the remaining board members are provided an opportunity to ask follow-up questions. These questions solicit more details on the topics raised at the hearing.

The hearing process is very emotional for all involved. In both Ms. Smith and Ms. Jones' hearings, the applicants and their witnesses cried as they explained how they

¹⁴⁰ *Maurer*, 71 Ohio St.3d at 530, n. 7; Ohio Rev. Code Section 2967.12 (LexisNexis 2011).

¹⁴¹ It takes the parole board four to seven months to investigate a pardon application. Laura Bischoff *Governor Strickland Plans to Decide on 1200 Clemency Requests before Leaving Office*, Dayton Daily News, Nov. 19, 2010, Available at www.daytondailynews.com/news/ohio-news/gov-strickland-plans-to-decide-on-1200-clemency-requests-before-leaving-office-1007353.html.

¹⁴² The University of Akron Clemency Project represented both clients at their hearings. Students volunteering in the project assist the clients with preparing their clemency applications and forwarding them to the OAPA. When the clients receive notice of their hearings, the students and the clinic supervisor meet with them to prepare for the hearing. This preparation includes updating their applications since they were filed with the OAPA and identifying witnesses to appear at the hearing. The clinic's role at the hearing is very limited. The supervising attorney or law student offers an opening and closing statement. They also will answer any questions asked by the members of the board.

¹⁴³ The clemency hearing allows for any interested party, the prosecutor, victim or trial judge to appear at the hearing and make a statement about the propriety of any pardon. Ohio Rev. Code Ann. § 2967.03 (LexisNexis 2011). The hearings are very informal. No one is placed under oath.

had changed their lives. They both testified about the burden of living with their convictions. Ms. Smith testified that she could not pursue her career choice. Ms. Smith really wanted to become a social worker so she could work with children and make a difference in their lives.

Ms. Jones testified that she was devastated that she could no longer volunteer at her children's schools, which was a central part of her life and her children's lives. Volunteering at her children's school represented a critical piece of her perception of a good mother. Both Ms. Jones and Ms. Smith talked about the embarrassment associated with their convictions, and their humiliation each time they disclosed their convictions.

The OPB was very supportive of the applicants during the hearing. It congratulated Ms. Smith and Ms. Jones on the changes they had made in their lives and the persuasiveness of their presentation. Each board member ended the hearing by saying something positive to each of the Clemency Project clients. In Ms. Jones' case, one board member spoke to her after the hearing and again congratulated her on the life changes she had accomplished.

The clemency hearing process had a positive impact on the applicants. It gave them the opportunity to express remorse and to demonstrate to powerful people the changes and successes in their lives.¹⁴⁴ These clemency hearings in general reflect the cathartic nature of the clemency process. This process gives offenders a chance to take

¹⁴⁴ In her article, *Trauma, Forgiveness and the Witnessing Dance: Making Public Spaces Intimate*, Pumla Gobodo-Madikizela, discusses her experiences on South Africa's Truth and Reconciliation Commission. She explains that the "process that entails granting forgiveness is more pertinent" than "the 'act' of forgiveness as such." 53 *Journal of Analytical Psychology*, 169, 178 (2008). This is particularly true of the clemency process.

responsibility for their crimes. It allows them to show their maturation and their moral transformation. In short, applicants have the opportunity to display the positive steps they have taken in overcoming their convictions.

The cathartic nature of the clemency hearing is consistent with the literature on apology and remorse in the criminal justice process.¹⁴⁵ “Genuine apologies and expressions of remorse...dissociate oneself from one’s wrongful past and make a plea for reconciliation.”¹⁴⁶ By apologizing, they “feel better about themselves as persons”¹⁴⁷ and “make amends with their victims and the community.”¹⁴⁸ “A well-administered pardon process can accomplish a great deal in closing the loop on an individual’s experience in the criminal justice system, symbolizing a sort of ‘graduation’ back to the legal status of an ordinary citizen.”¹⁴⁹

On September 28, 2007, the OPB unanimously recommended that Ms. Smith’s convictions be pardoned.¹⁵⁰ The OPB’s report listed a number of reasons why Ms. Smith was “most deserving of a pardon.”¹⁵¹ It noted that Ms. Smith “has demonstrated a credible, verifiable employment-related need for a pardon” and “[t]he ongoing

¹⁴⁵ An apology has been recognized to contain the following elements: “(i) an expression of remorse or regret, such as ‘I’m sorry’; (ii) an overt acceptance of responsibility for the harmful act; (iii) some type of offer of compensation, repair, or restitution; and (iv) a promise to avoid such behavior in the future.” C.J. Petrucci, *Apology in the Criminal Justice Setting: Evidence for Including Apology as an Additional Component in the Legal System*, 20 Behav.Sci. & L. 337, 341 (2002).

¹⁴⁶ Stephanos Bibas and Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 Yale L.J. 85, 113 (2004-2005).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 103. Redemption is a popular theme in our culture. It is reflected in a long line of movies where the characters are offered a second chance. These include *A Christmas Carol* (MGM 1938), *Hoosiers* (MGM 1986), *How the Grinch Stole Christmas* (MGM Television 1966), *The Natural* (TriStar Pictures 1984), and *Walk the Line* (FOX 2005).

¹⁴⁹ Margaret Colgate Love, *The Debt that Can Never Be Paid*, 21 Crim. Just. 16, 19 (2006).

¹⁵⁰ The board’s vote is confidential and is not disclosed to the applicant until after the governor renders his decision. Ms. Smith received a copy of the board’s report after the governor issued a decision on her pardon. The report is on file with the author.

¹⁵¹ Ohio Parole Board Report (Sept. 28, 2007) (on file with author).

debilitating effects of Ms. [Smith's] collateral punishment [undue restrictions on her ability to fully pursue her social worker's license and to work with selective populations] are no longer deserving and should be remitted."¹⁵²

The OPB also unanimously recommended a pardon for Ms. Jones on November 15, 2007. It found that

[h]er post-conviction character has been beyond reproach and she is very deserving of a Pardon which will allow her to work as a volunteer in her children's school and also to work in the medical field as a Nurse upon completion of her degree. Ms. [Jones] has proven through the years that she is now a contributing member of society and a person of integrity.¹⁵³

The OPB forwards its written report to the governor.¹⁵⁴ The governor's legal staff reviews each clemency case.¹⁵⁵ The staff may contact the court, the prosecutor, defense counsel, victims, witnesses and law enforcement officials for any support or opposition to the pardon.¹⁵⁶ The staff also reviews the court records from any

¹⁵² *Id.* The other reasons listed by the board included the following: " Her offenses are neither violent nor weapons-related; Her offenses are not recent and are the result of a conquered history of substance abuse; The factors leading to her offense behavior are not likely to recur; Her post-conviction conduct, character & reputation have been exemplary; Significant & strong testimonials of her good character and notable accomplishments were submitted in writing from distinguished officials, employers, educators and others in the Akron community; She has demonstrated an ability to lead a responsible and productive life for a significant period after conviction; There is clear evidence of her successful rehabilitation; She has accepted full responsibility for her offenses and has expressed strong remorse." *Id.*

¹⁵³ Ohio Parole Board Report (November 15, 2007) (on file with author).

¹⁵⁴ *Id.* Once the governor receives the APA's recommendation, he may grant or deny the pardon. The governor may grant a pardon "upon such conditions as he [sees] proper," *Libby v. Nicola* 21 Ohio St. 414, 419 (1871), and he "has ultimate substantive discretion whether to grant or deny a pardon." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 526 (1994). See also *Knapp v. Thomas* 39 Ohio St. 377, 392 (1883). The Governor's exercise of clemency is subject to judicial review only to "consider whether constitutionally authorized limitations on the clemency power have been respected." *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d at 518 n.3.

¹⁵⁵ *Gov. Strickland Announces Clemency Decisions*, US Fed. News (November 24, 2009), available at 2009 WLNR 23676093.

¹⁵⁶ *Id.*

prosecution and appeal, as well as the board report and any other documents relevant to the case.¹⁵⁷

The governor's legal staff prepares findings of the investigation for the governor's review.¹⁵⁸ The staff engages in a thorough discussion of each case with the governor.¹⁵⁹ Only after this stage of the long process will the governor grant or deny clemency.¹⁶⁰

Governor Strickland issued Ms. Smith's pardon on November 23, 2009.¹⁶¹ This was nearly three years after she had applied for clemency, and over two years after she appeared at the OPB hearing. Her pardon states, "[a]fter careful and diligent examination of the totality of the materials available to me, I believe that ... [Ms. Smith] has demonstrated that she has been rehabilitated and has assumed the responsibilities of citizenship."¹⁶²

Governor Strickland issued Ms. Jones's pardon on November 23, 2009.¹⁶³ This was nearly three years after she had applied for clemency, and over two years after she

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* This process is very time-consuming. On November 24, 2009, Governor Strickland announced his clemency decision for 296 applications. His office estimated that it had spent in excess of 1000 hours reviewing these cases. *Id.*

¹⁶¹ Aaron Marshall, *Gov. Ted Strickland Grants Clemency to 78 People*, Cleveland Plain Dealer, Nov. 23, 2009, http://blog.cleveland.com/metro/2009/11/gov_strickland_grants_clemency.html; Alan Johnson, *Strickland Grants Clemency to 78*, Columbus Dispatch, Nov. 23, 2009, http://www.dispatch.com/live/content/local_news/stories/2009/11/23/strickland-clemency.html. Under Ohio law, a full and unconditional pardon places the recipient in the position as if the crime had never occurred. *State ex rel. Gordon v. Zangerle*, 136 Ohio St. 371, 376 (1940). It also relieves the disabilities that attend the pardoned conviction. *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 650 (1885). See *Ex parte Garland*, 71 U.S. 333, 380-81 (1866).

¹⁶² November 23, 2009 Warrant of Pardon (on file with author). Since the governor's pardon, Ms. Smith has filed a Motion to Seal her pardoned convictions in each court where the conviction occurred. Under Ohio law, the governor files the warrant of pardon with the court where the pardoned conviction arose. Ohio Rev. Code Ann. § 2967.09 (LexisNexis 2011). The trial court then has the authority to seal the record of the pardoned conviction under its inherent judicial power. *Pepper Pike v. Doe*, 66 Ohio St.2nd 374, 376 (1981).

¹⁶³ Aaron Marshall, *Gov. Ted Strickland Grants Clemency to 78 People*, Cleveland Plain Dealer, Nov. 23, 2009, http://blog.cleveland.com/metro/2009/11/gov_strickland_grants_clemency.html; Alan Johnson,

appeared at the OPB hearing. Her pardon states, “[a]fter careful and diligent examination of the totality of the materials available to me, I believe that ... [Ms. Smith] has demonstrated that she has been rehabilitated and has assumed the responsibilities of citizenship.”¹⁶⁴

Both clients learned of their pardons from counsel who had read about the pardon grants in a local newspaper. Upon being told that they had been pardoned, both clients broke down and began crying.¹⁶⁵ They were disbelieving that the process was finally over. They celebrated the news of their pardon and marveled at how long the process had taken. Ironically, the issuance of the pardons themselves continued to raise for both clients the embarrassing issue of their convictions. Since the newspaper published their names and convictions, their criminal record was available for all to see.

Ms. Smith and Ms. Jones were two of the 280 people who received pardons from Governor Strickland. This was a significant number of pardons for one governor to issue. It was nearly the same number of all pardons granted in Ohio in the 40 years before Strickland took office.¹⁶⁶

Strickland Grants Clemency to 78, Columbus Dispatch, Nov. 23, 2009, http://www.dispatch.com/live/content/local_news/stories/2009/11/23/strickland-clemency.html.

¹⁶⁴ Warrant of Pardon (November 23, 2009) (on file with author).

¹⁶⁵ Author Margaret Colgate Love characterizes pardon as the “gold standard” because it not only removes legal barriers but also confirms good character. “It is this use of the redemptive pardon that will have such a tremendous impact on millions of Americans in this country who labor under the shadow of a conviction.” Margaret Colgate Love, *Lawyering: Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 Howard L.J. 753, 758 (2011).

¹⁶⁶ Ohio governors issued 270 pardons during that forty-year period. 1971 -1972(11) State of Ohio: Legislative Acts Passed and Joint Resolutions Adopted 1971-1972 Ohio Laws 2558-59; 1973-1974 (19) 1973-1974 Ohio Laws 3182-3183; 1975-1976 (46) 1975-1976 Ohio Laws 12-14; 1977-1978 (16) 1977-1978 Ohio Laws 15-16; 1979-1980(7) 1979-1980 Ohio Laws 18; 1981-1982 (11) 1981-1982 Ohio Laws 18; 1983-1984 (9) 1983-1984 Ohio Laws 18; 1985 -1986 (13) 1985-1986 Ohio Laws 18; 1987-1988 (11) 1987-1988 Ohio Laws 16; 1989-1990 (31) 1989-1990 Ohio Laws 20-21; 1991-1992 (18) 1991-1992 Ohio Laws 20-21; 1993-1994 (5) 1993-1994 Ohio Laws 29; 1995-1996 (19) 1995-1996 Ohio Laws 18-19;

Nearly twenty-five percent of the 280 pardons Strickland granted involved misdemeanor convictions.¹⁶⁷ Nearly half of the pardons granted involved crimes that were at least fifteen years old at the time of the pardon.¹⁶⁸ For those who sought a pardon from Strickland, the overriding reason was to escape the collateral consequences of their convictions so they could better their lives. Strickland's clemency counsel identified relief from collateral consequences as "at the top of [Strickland's] list" of reasons to grant clemency.¹⁶⁹

Strickland did not use his pardon power to focus on the famous or the politically well-connected as is sometimes the case.¹⁷⁰ Rather, his grant of pardons reflected a

1997-1998 (19) 1997-1998 Ohio Laws 18-21; 1999 – 2000 (13) 1999-2000 Ohio Laws 18-21. Governor Bob Taft, 41 pardons (January 2001- December 2006), Biennial Report of the Ohio Pardon and Parole Commission of Pardons, Commutations and Reprieves, 124th General Assembly, 125th General Assembly, 126th General Assembly. Current Governor Kasich took office in January 2011. He has granted fourteen pardon requests since coming to office. E-mail from Kim Kutschbach, Clemency Counsel to Governor Kasich (February 14, 2012, 1:37 EST) (on file with author);

¹⁶⁷ Chart from Governor Strickland's Office (2011) (on file with author).

¹⁶⁸ Chart from Governor Strickland's Office (2011) (on file with author).

¹⁶⁹ Telephone Interview with Zachary Swisher (Jan. 2, 2012).

¹⁷⁰ "The fact is that most chief executives no longer regard pardoning as an integral and routine function of their office, and members of the public regard pardoning with deep suspicion and cynicism. Pardon to them is a favor bestowed on political contributors at the end of an administration, winning lottery ticket rather than a remedy that can reasonably be sought by ordinary people." Margaret Colgate Love, *A Debt that Can Never Be Paid*, 21 Crim.Just. 16, 19 (2006). The pardon grants for the famous are well known. They include Jimmy Hoffa, George Steinbrenner, Marc Rich *Notorious Presidential Pardons*, TIME, <http://www.time.com/time/specials/packages/completelist/0,29569,1862257,00.html>, Merle Haggard, Johnny Cash, Ricky Walters (Slick Rick), and Huddie Ledbetter. Deborah Hastings, *Jim Morrison Pardon: Five Other Music Stars Who Got Clemency*, AOL News Surge Desk (Dec. 9, 2010, 1:35 PM), <http://www.aolnews.com/2010/12/09/the-jim-morrison-pardon-5-other-music-stars-who-got-clemency/>. In December 2010 then Florida governor Charlie Crist pardoned The Doors front man Jim Morrison for an indecent exposure conviction. Susan Candotti, *Doors Singer Jim Morrison Wins Indecent Exposure Pardon*, CNN Entertainment (Dec. 2, 2010), http://articles.cnn.com/2010-12-09/entertainment/ent.jim.morrison.pardon_1_jim-morrison-exposure-charge-indecent-exposure?_s=PM:SHOWBIZ. There has been no shortage of controversial clemency decisions issued by U.S. Presidents for political reasons. These include Jimmy Hoffa (Richard Nixon), Richard Nixon (Gerald Ford), G. Gordon Liddy (Jimmy Carter), George Steinbrenner (Ronald Reagan), Casper Weinberger and Robert McFarlane (George H.W. Bush), Mark Rich and Susan McDougal (William Clinton), Lewis "Scooter" Libby (George W. Bush). Darcie Andreas, *The Most Controversial Pardons Ever* (July 10,

recognition that those who suffer collateral consequences must have a second chance. The number of pardon requests that Strickland received while governor, 742, reflects, in part, the magnitude of the collateral consequences problem.¹⁷¹ This was the largest number of pardon requests to an Ohio governor since 1934.¹⁷² It equaled all of the pardon requests received by Ohio governors in the twenty years before Strickland took office.¹⁷³

According to Strickland's clemency counsel, the uptick in applications was directly attributable to two factors: 1) The governor's grant of pardons early in his term encouraged others to apply; and 2) The issue of background checks being used by employers for those ex-offenders who were already employed.¹⁷⁴ Strickland's clemency counsel identified one case of note involving a man who had worked for thirty years as a school maintenance man.¹⁷⁵ In conducting a newly required background check, the school uncovered his 1960 conviction for possession of drugs. He would have lost his job if the governor had not pardoned him.¹⁷⁶ This case is strikingly similar to the story of

2007), available at, <http://voices.yahoo.com/the-most-controversial-presidential-pardons-ever-430098.html?cat=75>.

¹⁷¹ The yearly requests were as follows; 2007 (88 requests, 51 received board hearings); 2008 (74 requests, 28 board hearings); 2009 (132 requests, 15 board hearings) and 2010 (448 requests, 159 board hearings). *Ohio Parole Board Fiscal Year Reports*, available at <http://www.drc.ohio.gov/web/Reports/reports7.asp>. (Last visited February 1, 2012) Since 9/11, pardon authorities have seen an increase in applications from those whose criminal record (old and minor offenses) serves as an obstacle to employment. Margaret Colgate Love, *The Debt that Can Never Be Paid*, 21 Crim. Just. 16, 19 (2006).

¹⁷² In 1934, Ohio governor White granted 595 pardons to those convicted of liquor law violations when the 18th Amendment was repealed. Jefferson E. Holcomb, *The Use of Executive Clemency in Ohio: A Historical Assessment*, Ohio Corrections Research Compendium (2004) at 128, available at, <http://www.drc.ohio.gov/web/Reports/compendium2004.pdf>.

¹⁷³ Ohio Parole Board Calendar Year Reports (1986 – 2006) (on file with author). In those twenty years, the OPB recommended that the governor grant 135 out of the 742 pardon requests. *Id.*

¹⁷⁴ Telephone interview with Zachary Swisher (Jan.2, 2012).

¹⁷⁵ *Id.*

¹⁷⁶ Telephone interview with Zachary Swisher (Jan. 2, 2012).

Ms. Smith's loss of her job and her corresponding need for a pardon.¹⁷⁷ It emphasizes the need for the redemptive pardon to allow employed ex-offenders to keep their jobs.

In issuing his 280 pardons, Governor Strickland recognized the unique role that the redemptive pardon power plays in giving ex-offenders a second chance. When he issued the last of his pardons in January 2011, Strickland stated, "[t]his critical process in our justice system offers mercy to individuals who have illustrated that they are ready to regain positions as productive and responsible citizens in our society."¹⁷⁸ He offered similar comments with his November 2009 clemency decisions stating:

I believe the clemency power should be used judiciously to give a second chance to those who have demonstrated they deserve it...I do not intend my clemency decisions to be seen as a determination that mistakes were made by judges, prosecutors, police officers or others in the criminal justice system. These decisions are another part of the overall system of justice that attempts to hold individuals responsible for their behavior while recognizing that ours is a society able to forgive, and welcome back, those who demonstrate they have earned, and can responsibly handle, society's mercy and forgiveness.¹⁷⁹

Strickland is not the first Ohio governor to recognize that his pardon power could remedy a societal ill. In 1927, Ohio Governor Donahey pardoned persons who had been sentenced to the workhouse to pay off their fines for liquor law violations.¹⁸⁰ In 1934, after the repeal of the 18th Amendment, Governor White pardoned those applicants

¹⁷⁷ However, unlike Ms. Smith who lost her job, the school allowed the maintenance man to keep his job until the governor pardoned him. Telephone interview with Zachary Swisher, (Jan. 2, 2012). *Id.*

¹⁷⁸ Alan Johnson, *Strickland Commutes Six Sentences, Pardons 37*, The Columbus Dispatch, Jan. 4, 2011, <http://www.dispatch.com/content/stories/local/2011/01/04/04-clemency-requests.html>.

¹⁷⁹ *Gov. Strickland Announces Clemency Decisions*, US Fed. News (Nov. 24, 2009), available at 2009 WLNR 23676093.

¹⁸⁰ Jefferson E. Holcomb, *The Use of Executive Clemency in Ohio: A Historical Assessment*, Ohio Corrections Research Compendium (2004), at 225, available at, <http://www.drc.ohio.gov/web/Reports/compendium2004.pdf>.

whose convictions involving liquor violations.¹⁸¹ In addition, in 1990, Governor Celeste pardoned women who suffered from battered women's syndrome but had not been able to raise the defense at trial.¹⁸²

Ohio's experience regarding collateral consequences and the use of pardons to address them has improved the lives of many ex-offenders and advanced the state's interests such as the reduction in crime. Although not perfect, Ohio's experience is a beacon of hope for many ex-offenders and offers a model for other states to follow.

b. Pardons: The Evolving National Perspective

The pardon power has been described as a "mysterious, alien presence that hovers outside the legal system,"¹⁸³ and "is capricious, unaccountable, inaccessible to ordinary people, easily corrupted, and regarded with deep suspicion by politicians and the public alike."¹⁸⁴ Against this definitional backdrop, many authors have remarked on the national decline in the use of the pardon power.¹⁸⁵ This decline, in part, may be

¹⁸¹ *Id.*

¹⁸² Governor Celeste granted clemency to 25 battered women who had killed or assaulted their abusers. Evan Stark, *Re-Presenting Woman Battering: From Battered Women Syndrome to Coercive Control*, 58 Alb. L. Rev. 973, 1026 (1995).

¹⁸³ Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 *Litigation* 25 (Winter 2006).

¹⁸⁴ *Id.*

¹⁸⁵ Margaret Stapleton and Marie Claire Tran, *Increasing the Use of Executive Clemency to Help Low-Income People with Criminal Records*, 42 *Clearinghouse Rev. Journal of Poverty Law and Policy* 374, 375-377. ("Grants of executive clemency, one of the president's broadest and most important powers in the criminal justice system, used to be more common and not limited to the political insiders about who the American public has grown cynical. But, as Justice Anthony Kennedy notes, '[t]he pardon process, of late, seems to have been drained of its moral force...A people confident in its laws and institutions should not be ashamed of mercy.") "The power to pardon, which is a rare and absolute authority granted to the executive, has fallen into disuse since the early 1980s." Jim Dwyer, *Lessons in DNA and Mercy*, *New York Times*, Dec. 30, 2011, at A17. "Pardons are granted on more than a token basis in only 13 states and are a realistically available remedy in only about half of those." Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, 32 *Litigation* 25, 26 (Winter 2006). For a review of clemency decisions, see Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 *Fed.Sent. R.* 153 (2009).

linked to the infamous Willie Horton case.¹⁸⁶ Willie Horton had been out of jail on a weekend furlough. During his furlough, he committed assault and rape. Since that case, “politicians have been cautious to the point of paralysis when it comes to criminal justice issues.”¹⁸⁷

Many chief executives are clearly unwilling to grant pardons.¹⁸⁸ Before President Obama issued his first clemency decision in December 2010, he was harshly criticized for his unwillingness to grant pardons. One editorial entitled “Turkeys 2, humans 0” drew attention to the fact that the Thanksgiving turkey was more likely to be pardoned than any human applicant.¹⁸⁹

¹⁸⁶ Willie Horton had been out of jail on weekend furlough. During his furlough, he committed assault and rape. Wicker, Tom, Bush League Charges, New York Times OPINION, In The Nation (June 24, 1988), <http://www.nytimes.com/1988/06/24/opinion/in-the-nation-bush-league-charges.html?src=pm>.

¹⁸⁷ Margaret Colgate Love, *Goodbye to Willie Horton*, National Law Journal, Jan. 11, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437746827&Goodbye_to_Willie_Horton.

¹⁸⁸ As one author has noted, the exercise of the pardon power used to be perceived as a sign of “enormous political strength.” Kathleen M. Ridolfi, *Not Just An Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. Rev. L. and Soc. Change 43, 48 (1998). No longer is that the case. “Although attacks on chief executives are nothing new in our history, never before has mere anticipation of attack succeeded in shutting down the pardon power altogether. With a few notable exceptions, recently governors and presidents alike have let their constitutional power atrophy, fearful of being labeled soft on crime or of being held personally responsible for a heinous act that might even tenuously be linked to them.” Id. Only one governor has ever been impeached for misusing his pardon power. In 1920, Oklahoma Governor J.C. Walton was removed from office for selling pardons. Elizabeth Rapaport, *Symposium on Law, Psychology, and the Emotions: Retributions and Redemption in the Operation of Executive Clemency*, 74 Chi-Kent L. Rev. 1501, 1517 (2000).

¹⁸⁹ Molly Gill, *Turkeys 2, Humans 0*, Washington Post, Nov. 27, 2009. President Obama granted nine pardons after nearly two years in office. Charlie Savage, *In a First for Obama, Nine Pardons are Granted*, The New York Times, Dec. 3, 2010. Since taking office, President Obama has granted 22 pardons. *Pardons Granted by President Barack Obama*, The U.S. Dep’t of Justice, www.justice.gov/pardon/obamapardon-grants.htm#top (last visited Dec. 20, 2011).

Governor Haley Barbour was criticized for his 193 pardon grants in January 2012.¹⁹⁰ Many believed his pardon decisions permitted 193 people to walk out of prison, when in fact only twenty-six people were released from prison. The remaining 167 people were “out for many years” and the governor used his pardon power to give them a second chance.¹⁹¹

The enormous political backlash experienced by Governor Barbour explains why chief executives are reticent to use their pardon power. This reticence should not extend to the redemptive pardon. Redemptive pardons are granted to ex-offenders who have shown they have been rehabilitated by remaining crime free for some period. As Governor Barbour explained in using his redemptive pardon power, “[t]hese folks are no more a threat to society now than they were the week before I gave them clemency.”¹⁹² The circumstances surrounding this type of pardon makes it the most politically palatable.

Although the redemptive pardon power serves a vital role, some have criticized the governors’ use of the pardon for this reason. The redemptive pardon has been

¹⁹⁰ Campbell Robertson, Robbie Brown and Whitney Boyd, *Mississippi Governor, Already Criticized on Pardons, Rides a Wave of Them Out of Office*, The New York Times, January 11, 2012, at A13. *Departing Governor Draws Fire for Pardons*, Chicago Tribune, January 11, 2012, at C21; Patrik Jonsson, *Did Haley Barbour’s Pardon Spree Go Too Far?* The Christian Science Monitor, January 11, 2012, www.csmonitor.com/USA/2012/0111/Did-Haley-Barbour-s-pardon-spree-go-too-far. Guy Adams, *Pardon? Governor Sparks Outcry By Letting Off 200 Criminals*, The Independent (London), January 12, 2012, at 30. Richard Fausset, *Pardons Could Haunt Barbour; Mississippi’s Governor Grants More Than 200 Pardons or Releases, A Travesty Even to Supporters*, Los Angeles Times, January 13, 2012 at A1.

¹⁹¹ Haley Barbour, *Why I Freed 26 Inmates*, The Washington Post, January 19, 2012, at A15

¹⁹² Haley Barbour, *Why I Freed 26 Inmates*, The Washington Post, January 19, 2012, at A15

labeled¹⁹³ as a “trivial way to rehabilitate the records of former offenders,”¹⁹⁴ and as a “boon benevolently bestowed on the blessed at random.”¹⁹⁵

Notwithstanding this criticism, a “pardon still provides the most thorough and respectable form of relief from legal disabilities. Pardon also has a powerful symbolic value in restoring an offender’s status in the community that even judicial restoration mechanisms do not share.”¹⁹⁶ It benefits both the applicant and society as a whole. Pardons give ex-offenders a second chance and allow them to reintegrate into society. This second chance and reintegration is important for the health of the ex-offenders, their families, and their communities. Every chief executive in this country should use the pardon power to give a second chance to those who have proven their rehabilitation. Pardons are a way to “be willing and able to recognize ‘redemption from the mark of the crime.’”¹⁹⁷

IV. COLLATERAL CONSEQUENCES – THE DRUMBEAT FOR CHANGE

This article has examined the pervasive nature of collateral consequences and the long road to redemption faced by ex-offenders. Society needs to find a better way to provide a second chance for those ex-offenders who have proven their rehabilitation.

¹⁹³ “The executive clemency power has been used as far back as the 1950s primarily as a means of rehabilitating the criminal record of those who have long since been released from prisons, rather than as a way of assuring that justice is served.” Daniel Kobil, *the Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 Texas Law Review 569, 602 (1991); “[P]residential clemency has been so trivialized that it is now used almost exclusively to cleanse the records of federal criminals after they have managed to stay out of trouble for the requisite five or seven years.” *Id.* at 605.

¹⁹⁴ *Id.* at 614.

¹⁹⁵ *Id.* at 611.

¹⁹⁶ Report of the American Bar Association Justice Kennedy Commission, p. 8. “The executive’s power to pardon is often the only means by which offenders can remove or limit legal restrictions to enable them to reenter and reintegrate into society.” Rachel Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 Fed.Sent. R. 153 (2009).

¹⁹⁷ Margaret Colgate Love, *Lawyering: Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 Howard L.J. 753, 758 (2011).

The following subsections reveal a renewed national focus on eliminating collateral consequences. It also recommends several ways to end the burden of collateral consequences.¹⁹⁸

a. End the “Invisible Punishment”¹⁹⁹

There is national support to eliminate collateral consequences. The American Bar Association (ABA) has called for an end to collateral consequences. It did so after Supreme Court Justice Anthony Kennedy spoke to the ABA in 2003 and urged its members to take up a number of criminal justice issues, including collateral consequences.²⁰⁰ The ABA formed the Kennedy Commission and the Commission ultimately recommended, “barriers to employment, housing, treatment and general

¹⁹⁸ “[T]here is a strong case to be made that society should not only permit, but should encourage, that person to make a positive contribution to society.” American Bar Association Justice Kennedy Commission, *Reports with Recommendations* 11 (2004) available at, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf.

¹⁹⁹ Marc Mauer and Medna Chesney-Lind, *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* (2002).

²⁰⁰ “During the 2003 ABA Annual Meeting Opening Assembly, keynote speaker Justice Anthony Kennedy challenged the American Bar Association to evaluate the American penal system. The scope of Justice Kennedy’s challenge was broad, implicating a number of criminal justice issues including mandatory minimum sentencing schemes, disparate sentencing rates among racial and ethnic groups, the availability of judicial discretion, prison conditions, correction practices, and objectives of incarceration. Justice Kennedy implored that we would be “startled” by “the hidden world of punishment.” President Archer immediately accepted Justice Kennedy’s challenge, promising to build on existing ABA policy on these topics by undertaking a comprehensive evaluation of the matters implicated with a report to the American people by the time of the ABA Annual Meeting in August 2004.” American Bar Association Justice Kennedy Commission, *Reports with Recommendations* (2004) available at, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf. The report was issued in August 2004: http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf. The Kennedy Commission report recommended a number of sentencing actions that would reduce the prison population. These included eliminating minimum sentences, offering diversion programs to less serious offenders, and using tiered sanctions for those who violate their probation or parole. *Id.*

public benefits must be eliminated to the greatest possible extent in order to have greater opportunity for successful re-entry for those with a criminal conviction.”²⁰¹

Attorney General Eric Holder has joined the call to eliminate collateral consequences. In April 2011, he sent a letter to each state’s attorney general encouraging them “to evaluate the collateral consequences” in their state “to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated.”²⁰² General Holder further explained that “[i]n evaluating the efficacy of your state’s collateral consequences, you have the opportunity to ease the burden on families and communities in your state by ensuring that people who have paid their debt to society are able to live and work productively.”²⁰³

Ohio has begun the process to restrict the number of collateral consequences. Its efforts can serve as a model to other states. Ohio governor Kasich has called for legislation to curb the number of collateral consequences in Ohio.²⁰⁴ He appeared on November 28, 2011, a statewide Collateral Sanction Forum, and, in his opening address, acknowledged the devastating impact that collateral consequences are having in Ohio. He then asked those participating in the forum to draft legislation addressing

²⁰¹ Kelly Salzmann & Margaret Colgate Love, *Internal Exile, Collateral Consequences of Conviction in Federal Laws and Regulations* 7 note 13 (2009),

<http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>.

²⁰² Letter from Eric Holder, U.S. Attorney General to State Attorneys General (Apr. 18, 2011) *available at*, [www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry Council AG Letter.pdf](http://www.nationalreentryresourcecenter.org/documents/0000/1088/Reentry_Council_AG_Letter.pdf).

²⁰³ *Id.*

²⁰⁴ Rick Armon, *Ex-offenders Banished for Life From Some Jobs*, Akron Beacon Journal, Nov. 7, 2011, at A4, <http://www.ohio.com/news/local/ex-offenders-banished-for-life-from-some-jobs-1.244227>.

the issue, and to have the proposed legislation on his desk by June 2012.²⁰⁵ He reiterated his commitment to this issue in his February 2012 State of the State Address.²⁰⁶

Kasich's initiative is supported in Ohio among those who work most closely with ex-offenders – judges, prosecutors, criminal defense attorneys and parole and probation officers. A recent survey of these criminal justice professionals found that nearly sixty percent of them agreed or strongly agreed, “some collateral consequences should be repealed or eliminated.”²⁰⁷ The survey's participants also agreed that “collateral consequences should [not] last forever” and that “[a]ll defendants should have the chance to restore [their] rights after a certain period of time.”²⁰⁸

It is critical that every jurisdiction in this country undertake its own process to eliminate collateral consequences. This call to action will ensure that ex-offenders have

²⁰⁵ Governor Kasich's request as to the content of the legislation was not specific. The specifics of the legislation will come from action items identified by the working groups who attended the forum. Interview with Timothy Young, Ohio Public Defender (December 12, 2011).

²⁰⁶ “I've asked [Secretary of State] Jennifer Brunner to help us on collateral sanctions. Ladies and gentlemen—you don't know this, the legislature does—do you know that if you have a felony conviction, you serve your time and you come out of prison, do you know that you are prohibited from cutting hair or driving a truck? We can't have that. We're going to fix that, and I've asked Jennifer to help. [Ohio Department of Rehabilitation and Correction Director] Gary Mohr convened a meeting—and early morning—and [State Representative] Shirley Smith, who is hugging me—that's why I believe in God. (Audience laughter). I said to those who are the hard core right wing, lock them up forever—can't do that. I said to the left wing, get out of jail free card. We're talking about human beings. We got to give people a chance here. You can't be in a position where you paid your price and you want to get back. You can't get a commercial driver's license. That's one of the most needed things in the area of oil and gas today; you've got to drive a truck. So, we're going to get this done. Right, [State Representative] Ross [McGregor]? We're going to get this done, and we're going to get some. [State Representative Lynn] Slaby, you got another assignment to do.”
<http://governor.ohio.gov/Portals/0/2012%20State%20of%20the%20State%20Address%20Transcript.pdf>
at 7).

²⁰⁷ The survey included responses from judges, defense attorneys, prosecutors, and probation and parole officers. James Frank, Lawrence Travis, Angela Reitler, Natalie Goulette and Whitney Flesher, *Collateral Consequences of Criminal Conviction in Ohio*, A Research Report to the Ohio Office of Criminal Justice Services 15, available at,

<http://www.uc.edu/content/dam/uc/ccjr/docs/reports/Collateral%20Consequences%20Final%20Report.pdf>

²⁰⁸ *Id.* at 157.

a true chance to reintegrate into society and become contributing members of their communities.

Until the complete abolition of collateral consequences occurs however, states need to provide ex-offenders with effective remedies to ameliorate the impact of collateral consequences. These remedies should include expediting the pardon process and expanding the eligibility for the judicial expungement process.

b. Expediting the Redemptive Pardon Process

The redemptive pardon process is too slow to serve as an effective remedy for ex-offenders. As this article has chronicled through the experiences of Ms. Smith and Ms. Jones, it took three years for them to receive their pardons after they submitted their applications. Ms. Smith lost a job during that three-year period.²⁰⁹ Although this long waiting period is not uncommon, it is devastating to ex-offenders whose criminal records impede their ability to get a job or housing.²¹⁰

Governors should expedite the pardon process for rehabilitated offenders. Their offices can establish a rubric where in certain cases the pardon is granted as soon as the pardon materials reach the governor's desk. For example, a governor could apply the expedited process where the ex-offender has been crime free for a certain number

²⁰⁹ See note 93 and accompanying text.

²¹⁰ Carolyn Kaster, *Gov. Ed Rendell grants 1,000+ pardons, more than twice any other Pennsylvania governor*, PennLive.com, Dec. 10, 2010, http://www.pennlive.com/midstate/index.ssf/2010/12/gov_ed_rendell_grants_1000_par.html (Pennsylvania Board of Pardons has a three year backlog on clemency applications). Azam Ahmed and Ashley Weihle, *Blagojevich Scolded For Pardon Backlog*, The Chicago Tribune, June 23, 2008, http://articles.chicagotribune.com/2008-06-23/news/0806230096_1_pardon-clemency-petitions-executive-clemency (Discussing some pardon applicants had been waiting four years for a decision from former Governor Rod Blagojevich).

of years and there is no opposition to the pardon. In misdemeanor cases, the expedited process might require the applicant to be crime free for ten years. In felony cases, the applicant may need to wait fifteen years or more depending on the severity of the offense.

This expedited process would be simple for a governor to institute because it would be based on type of offense and the number of years the applicant has been crime free. More importantly, the process would eliminate the long waiting period currently experienced by pardon applicants, and the related negative effects they suffer during that time.

c. Expanding the Judicial Expungement Process and Restricting Those Who Can Access the Sealed Conviction

The pardon process is straining under the pressure of those who seek a pardon to remediate the impact of their collateral consequences. A pardon cannot continue to be the only remedy available to ex-offenders. States must expand the eligibility requirements for judicial expungement so more ex-offenders may find relief in this process.²¹¹

This section recommends changes to Ohio's judicial expungement statute as a model for other states to replicate. The most critical change the legislature can implement is to eliminate the "first offender" requirement for nonviolent

²¹¹ Noted clemency expert Margaret Colgate Love has also endorsed the need for an effective expungement process. "On balance, at least until there is a sea change in public attitudes, the expungement or sealing of a conviction may offer the most effective form of relief from the collateral consequences of conviction. Certainly the fear generated in employers and others by a criminal record makes it convenient to indulge in the fiction that it does not exist. And, the courts as decision makers offer the necessary accessibility, reliability, and respectability to make their relief at least as effective as an executive pardon." Margaret Colgate Love, *The Debt that Can Never Be Paid*, 21 Crim.Just. 16, 21-22 (2006).

misdemeanors.²¹² The legislature should replace this “first offender” requirement with an increased waiting period for a misdemeanant to apply for expungement. The waiting period should be increased from its current one year to five years. This change would allow an ex-offender with multiple nonviolent misdemeanors, who has remained crime free for five years, to petition to have their misdemeanor convictions sealed.

Applicants who have remained crime free for five years are unlikely to reoffend. Recidivism studies show that most recidivism “occurs within three years of an arrest and almost certainly within five years” of arrest.²¹³ This small change to the statute will benefit many people.²¹⁴ Twenty-five percent of the pardons Ohio Governor Strickland granted were for people with misdemeanor convictions.²¹⁵

This statutory change would make those with nonviolent misdemeanors “eligible” to apply for expungement. The sealing would not be automatic. Under the current Ohio statute, the trial judge would still need to “weigh the interests of the applicant in having the records pertaining to the applicant's conviction sealed against the legitimate needs, if any, of the government to maintain those records.”²¹⁶ The trial judge would still be

²¹²The impact of collateral consequences is not limited to those with felony convictions. This was recently recognized by one of the justices of the Ohio Supreme Court, “[g]one are the days when a misdemeanor conviction resulted in little or no real collateral consequences. Rather, the collateral consequences resulting from a misdemeanor conviction today are real and significant.” *Cleveland Hts. v. Lewis*, 2011-Ohio-2673, 129 Ohio St. 3d 389, 395. (Lundberg Stratton concurring).

²¹³ Alfred Blumstein and Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, 263 NIJ Journal 10, 11 (2009) available at <https://www.ncjrs.gov/pdffiles1/nij/226872.pdf>.

²¹⁴ Ohio could look to Arkansas’ recent amendment to its sealing statute. Arkansas Code Section 16-90-904(a) now allows expungement for multiple misdemeanor offenses after a five-year waiting period unless there is “clear and convincing evidence” that the misdemeanor convictions should not be expunged. Ark. Code. Ann. Section 16-90-904(a)(2010).

²¹⁵ See note 167 and accompanying text.

²¹⁶ Ohio Rev. Code Ann. § 2953.32(C)(1)(5)(LexisNexis 2010).

responsible for guarding any interest society had in maintaining a record of the misdemeanor convictions.²¹⁷

The Ohio legislature should consider a second amendment to the expungement statute. It should reevaluate the statutory list of employers who are permitted access to sealed convictions.²¹⁸ For example, is it important to know that a person applying to be the executive officer of a credit union²¹⁹ or for the position of regional long-term care ombudsman²²⁰ was convicted of vandalism twenty years earlier?²²¹ Ohio should consider adopting the ABA's Commission on Effective Criminal Sanctions' recommendation that private employer access to criminal background information be strictly limited.²²² In those cases where an employer has no statutory obligation to conduct the criminal background check, it must prove its interest in the criminal record outweighs the ex-offenders privacy in maintaining the sealed record.²²³

²¹⁷ The bipartisan Ohio Ex-Offender Reentry Coalition has recognized the need for this legislative change. In its 2010 Report, the Coalition, through its Ex-Offender Employment Workgroup recommend an expansion of those persons eligible for expungement of criminal records. Ohio Ex-Offender Reentry Coalition, 2010 Annual Report 15 (2010), <http://www.reentrycoalition.ohio.gov/docs/Ohio%20Ex-Offender%20Reentry%20Coalition%20-%20Annual%20Report%20-%202010.pdf> at 15.

²¹⁸ Ohio Rev. Code Ann. § 2953.32 (D).

²¹⁹ The divulging of a sealed conviction for this position is authorized by Ohio Rev. Code Ann. §2953.32(D) (LexisNexis 2010), Ohio Rev. Code Ann. §109.572 (LexisNexis 2011) and Ohio Rev. Code Ann. §1733.47 (LexisNexis 2008).

²²⁰ The divulging of a sealed conviction for this position is authorized by Ohio Rev. Code Ann. § 2953.32(D)(10) (LexisNexis 2010), and Ohio Rev. Code Ann. § 109.572 (LexisNexis 2011).

²²¹ Vandalism is a felony in Ohio. Ohio Rev. Code Ann. § 2909.05 (LexisNexis 2011).

²²² "We believe that jurisdictions should require (to the extent the law permits) all individuals and agencies seeking access to an individual's criminal record to rely upon an officially approved system of records. Private individuals seeking access to an individual's criminal record from such a records system should be required to demonstrate that the public interest in disseminating such information clearly outweighs the individual's interest in security and privacy. Certain individuals and entities, such as employers or agencies that have a statutory obligation to conduct background checks on applicants for employment or licenses, would be excepted from this obligation." *Second Chances in the Criminal Justice System*, American Bar Association Commission on Effective Criminal Sanctions 31 (2007), http://www.pardonlaw.com/materials/rev_2ndchance%283%29.pdf.

²²³ *Id.*

Even if Ohio, and other states, do not restrict employer access to sealed records, they should place a time limit on the convictions employers use to make hiring decisions. Massachusetts has recently taken such a step. In May 2012, Massachusetts will begin offering to all employers an online criminal records database that contains Massachusetts convictions.²²⁴ However, excluded from this database will be any criminal conviction that has been sealed, any felony conviction over ten years old and any misdemeanor over five years old.²²⁵ To entice employers to use this database, the statute protects employers from liability if they rely on the database to make their hiring decisions.²²⁶

The state legislatures in this country are in a unique position to assist the ex-offender with his or her battle with collateral consequences. Each legislature must find a way to expand the judicial expungement process so more ex-offenders may seal their criminal record. In addition, the legislature must limit access to the sealed records to give meaning to this process. Elected representatives should not abdicate their roles for fear that the public will perceive them as soft on crime. As one expert has noted, “[y]ou’re not saying that these people didn’t commit the offense... You’re saying they

²²⁴ Mass. G.L. C. 151B, §21(3) (2010).

²²⁵ *Id.*

²²⁶ Mass. G.L. C. 151B, §30(e)(2010) (“No employer or person relying on volunteers shall be liable for negligent hiring practices by reason of relying solely on criminal offender record information received from the department and not performing additional criminal history background checks, unless required to do so by law; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the subject’s identifying information consistent with the requirements set forth in this section and in the department’s regulations. No employer shall be liable for discriminatory employment practices for the failure to hire a person on the basis of criminal offender record information that contains erroneous information requested and received from the department, if the employer would not have been liable if the information had been accurate; provided, however, that the employer made an employment decision within 90 days of obtaining the criminal offender record information and maintained and followed policies and procedures for verification of the individual’s information consistent with the requirements set forth in this section and the department’s regulations.”)

paid, they paid in full, and they've been out long enough after their sentence to show they're good citizens, so they ought to have a chance to get full citizenship."²²⁷

CONCLUSION

There must be a concerted effort in this country to end collateral consequences. As one editorial proclaimed, "the dilemma is not the ex-offenders' or employers' alone. The dilemma is ours, as communities, to balance distrust with the imperative to reintegrate a growing number of ex-offenders."²²⁸ Ex-offenders are no longer a "fringe population."²²⁹ Rather, given the millions of ex-offenders in this country, they are "our brothers, our fathers, our sons, our neighbors, and our friends."²³⁰

This article has examined the problem of collateral consequences and the ex-offender's road to redemption through the lens of the Ohio experience. Ohio is viewed as a bellwether state for so many issues, and the problem of collateral consequences is no different.²³¹ Ohio is sixth in the nation in the number of adults who are under

²²⁷ Linda Ammons, *Why Do You Do the Things You Do? Clemency for Battered Incarcerated Women*, *A Decade's Review*, 11 Am.U.J. Gender Soc. Pol'y & L 533, 540 (2003).

²²⁸ Laura Ofobike, *The Ex-con's Problem – the Elusive Job Offer*, Akron Beacon Journal, February 17, 2009, at A8.

²²⁹ Written testimony of Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Meeting of July 26, 2011 – EEOC to Examine Arrest and Conviction Records as a Hiring Barrier 5 (July 26, 2011) <http://www.eeoc.gov/eeoc/meetings/7-26-11/solomon.cfm>.

²³⁰ *Id.*

²³¹ Jim Provance, *Issue 2 Puts Ohio Back in Spotlight*, The Toledo Blade, (November 6, 2011), <http://www.toledoblade.com/Politics/2011/11/06/Issue-2-puts-Ohio-back-in-spotlight.html> (Discussing Ohio's attempts to limit collective bargaining of public workers."); Bruce Drake, *Ohio Battleground: Bellwether State Has Mixed Results in Senate, Governor Races*, (September 28, 2010), available at <http://www.politicsdaily.com/2010/09/28/ohio-battleground-bellwether-state-has-mixed-results-in-senate/> ("Ohio is near the top of the list when it comes to bellwether states closely watched for which way the country is headed in elections.")

John P. Sahl, *The Public Hazard of Lawyer Self-Regulation: Learning from Ohio's Struggle to Reform its Disciplinary System*, 68 U.Cinn. L. Rev. 65, 70, n. 14 (1999) (arguing that Ohio's lawyer discipline structure is a reflective model for the country).

correctional control,²³² and Ohio law contains nearly 800 collateral consequences. With so many ex-offenders suffering the impact of collateral consequences, Ohio's reform efforts can serve as a model for other states.

It is critical that the reform efforts continue in Ohio and begin in other states. Without some reform to the state of collateral consequences, a conviction will be "the trailing shadow that will not go away years after the fact."²³³ Society needs to find a way to make the path easier for the millions of ex-offenders in this country who have been rehabilitated and want a second chance.²³⁴

²³² *1 in 31: the Long Reach of American Corrections*, (2008), available at http://www.pewcenteronthestates.org/uploadedFiles/8015PCTS_Prison08_FINAL_2-1-1_FORWEB.pdf

²³³ *Id.*

²³⁴ "[T]here is a strong case to be made that society should not only permit, but should encourage, that person to make a positive contribution to society." American Bar Association Justice Kennedy Commission, Report to House of Delegates, Salzburg, at 11.