

CLEAN SLATE: EXPANDING EXPUNGEMENTS AND PARDONS FOR NON-VIOLENT FEDERAL OFFENDERS

*Lahny R. Silva**

Over the past forty years, the United States Congress has passed legislation expanding the federal criminal code intruding into an area typically reserved to the states. The “tough on crime” rhetoric of the 1980s and 1990s brought with it the enactment of various legislative initiatives: harsh mandatory minimum sentences for non-violent federal offenders, “truth in sentencing” laws that restricted or abolished parole and early release, and strict liability disqualifications from employment and federal benefits based solely on the fact of conviction. The effect of this legislation was the creation of a new criminal class: a federal prison population. However, unlike the states the federal government does not have a legal mechanism in place adequately reintegrating federal offenders back into the American polity. This has contributed to soaring federal incarceration rates, rising government costs for corrections, and a historically high rate of criminal recidivism. This is a price tag the United States can no longer afford to pay.

This Article argues that individuals who have served their sentences and abided by the law for some period afterward should be given the opportunity to rid their slates of their criminal histories. Such expungement of criminal convictions for individuals who demonstrate that they will abide by the law are likely to reduce the costs of the criminal justice system and improve the lives of ex-offenders. First, this Article examines post-conviction penalties and contemporary recidivism trends. Second, this Article investigates the law governing federal pardons and judicial expungements, finding that the doctrines and their applications lack consistency, making it difficult for non-

* J.D. University of Connecticut 2007; Hastie Fellow and LLM Candidate University of Wisconsin. I would like to extend special thanks to my team who graciously reviewed multiple drafts of this piece: Professor Peter Carstensen, Professor Kaaryn Gustafson, Clinical Professor Meredith Ross, Assistant Professor Cecelia Klingele, and fellow Hastie Michael Oeser. I would also like to thank Professor Howie Erlanger, Professor David Schwartz, Karen DeMeola, Jane Sampeur, and Professor Thomas Mitchell. Thanks to my family for always believing in me. In addition, I owe the idea for this piece to Greater Hartford Legal Aid, Professional Image, J. Silva, and C. Lee. Thank you for the inspiration.

violent offenders to re-enter mainstream society. This Article argues that simply eliminating post-conviction disabilities would be extremely complex and perhaps not practically or politically feasible. Moreover, the two existing federal post-conviction remedies—pardons and judicial expungements—are not designed to, and cannot as a practical matter, provide systematic relief from post-conviction disabilities. Using state post-conviction mechanisms as examples, this Article argues that congressionally sanctioned expungements are an attractive alternative to relieve non-violent offenders of the effects of post-conviction disabilities. I propose that the United States Sentencing Commission (U.S.S.C.) create a Second Chance Advisory Group to determine how best to ameliorate the collateral consequences of federal convictions. With a Second Chance Advisory group, the U.S.S.C. could be used as a vehicle for researching and recommending legislative policy initiatives that will effectively slash incarceration, recidivism, and opportunity costs.

I. INTRODUCTION

In 2003, the United States Federal Government spent \$5.5 billion on federal corrections alone.¹ This represents a 925% increase in direct and intergovernmental expenditures on federal corrections compared to 1982.² From 1982 to 2003, corrections expenditures grew at an average annual percentage rate of 11.2%, and they continue to swell.³ A major contributing factor to the increasing cost of federal corrections is the historically high rate of criminal recidivism.⁴ It is estimated that approximately 650,000 men and women are released annually from state and federal penal facilities.⁵ Many releasees will eventually return to prison, either by violating conditions of their release or by committing a new offense.⁶ It is estimated that two-thirds of released prisoners will

1. KRISTEN A. HUGHES, U.S. DEP'T OF JUSTICE, JUSTICE EXPENDITURE AND EMPLOYMENT IN THE UNITED STATES, 2003 3 (2006) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jeeus03.pdf>.

2. *Id.*

3. *Id.*

4. H.R. REP. NO. 110-140, at 2 (2007), reprinted in 2008 U.S.C.C.A.N. 24, 25 (where the House Report asserts that the “web of obstacles . . . have substantially contributed to the historically high rate of recidivism . . .”).

5. *Id.*

6. MILES D. HARER, FED. BUREAU OF PRISONS OFFICE OF RES. & EVALUATION, RECIDIVISM AMONG FEDERAL PRISONERS RELEASED IN 1987 2 (1994), available at http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf (reporting that the recidivism rate of the most recent study conducted by Bureau of Prisons releasees in 1997 was 40.8%). See also U.S. SENTENCING COMM'N, MEASURING RECIDIVISM: THE CRIMINAL HISTORY COMPUTATION OF THE

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 157

commit a new crime within the first three years.⁷ This is a price tag that the United States government cannot afford to pay.⁸

Understanding that the collateral consequences of incarceration are costing Americans billions of dollars annually, federal policymakers are shifting their focus from imprisonment toward breaking the cycle of recidivism.⁹ Over the past five years, legislative reforms have been drafted, introduced to Congress, or signed into law. For example, George W. Bush signed the Second Chance Act into law in April 2008.¹⁰ The legislation's principal purpose is to put an end to criminal recidivism by providing federal assistance to various reentry and alternatives to incarceration programs.¹¹ In fiscal year 2010, \$100 million was appropriated to fund Second Chance Act programs.¹² In 2009, Congressman Charles D. Rangel reintroduced the "Second Chance for Ex-Offenders Act of 2009" to the 111th Congress, which would allow individuals charged with a particular classification of federal crimes to be eligible for a newly created federal expungement.¹³ In the summer of 2009, the National Conference of Commissioners on Uniform State Laws drafted the Uniform Collateral Consequences of Conviction Act with the purpose of addressing the post-conviction consequences and legal barriers to reentry faced by thousands of ex-offenders each year.¹⁴ While these efforts are an admirable step in the right direction, they fail to address the core problem: the record and stigma associated with conviction.

Many states have attempted to ameliorate the effects of post-

FEDERAL SENTENCING GUIDELINES (2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf [hereinafter MEASURING RECIDIVISM]; U.S. SENTENCING COMM'N, RECIDIVISM AND THE "FIRST OFFENDER" (2004), available at http://www.ussc.gov/publicat/Recidivism_FirstOffender.pdf.

7. H.R. REP. NO. 110-140, at 2 (2007), reprinted in 2008 U.S.C.C.A.N. 24, 25.

8. Todd R. Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 308 (2009).

9. H.R. REP. NO. 110-140 ("prison after imprisonment—a web of obstacles . . . limit their housing options, employment prospects, access to healthcare, and potential for family reunification. These obstacles have substantially contributed to the historically high rate of recidivism . . ."); Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008) (Section 3(a)(1) explicitly states that one of the purposes of the Act is "to break the cycle of criminal recidivism.").

10. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 657 (2008).

11. See *id.* § 3(a)(1); see also H.R. REP. NO. 110-140, at 1 (where the House Report provides that "H.R. 1593, the 'Second Chance Act of 2007' is intended to reduce recidivism, increase public safety, and help State and local governments better address the growing population of ex-offenders"). The programs are primarily focused on treating substance abuse.

12. Reentry Policy Council, Second Chance Act Appropriations Update, http://reentrypolicy.org/government_affairs/second_chance_act (last visited March 21, 2010).

13. The Second Chance For Ex-Offenders Act of 2009, H.R. 1529, 111th Cong.

14. NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, THE UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT (2009), available at http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009am_approved.pdf.

conviction penalties on their releasees, but the federal government's efforts have been delayed to say the least. Many states have enacted some type of executive, legislative, or judicial mechanism that permits the use of post-conviction remedies to soften the severity of collateral consequences that result from a felony conviction. Fourteen states utilize the governor's pardoning power to expunge any record of conviction.¹⁵ Seventeen states have first-offender statutes permitting expungement or authorizing the sealing of first and minor offenses.¹⁶ And thirty-two states and the District of Columbia allow judicial set-asides or deferred adjudication for convictions after successful completion of a sentence, including probationary sentences or a specific waiting period.¹⁷ In contrast, federal law offers expungement for first time offenders on one criminal offense: simple possession of narcotics.¹⁸

Part II of this Article presents a broad overview of recidivism and the effect of collateral consequences on ex-offenders. While the focus of the Article is on the federal offender and the federal system, it is important to discuss state implications of a felony offender as well.¹⁹ Part II demonstrates that America is forced to pay a variety of economic and political costs in exchange for the enactment and enforcement of collateral consequences. Part III reviews the remedies currently available to federal offenders, including presidential pardons and judicial petitions for expungement. The two existing federal post-conviction remedies are not designed to, and cannot as a practical matter, provide systematic relief from post-conviction disabilities. Part IV examines the expungement programs in Massachusetts, California, and Connecticut. This Part examines the different state methods used to

15. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE tbl.5 (2009) (These states include Arkansas, Connecticut, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Ohio, Oklahoma, Pennsylvania, South Dakota, Texas, Washington, and West Virginia.).

16. *Id.* (These states include Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Michigan, Mississippi, Montana, Nevada, North Carolina, New Jersey, Ohio, Oklahoma, Rhode Island, South Dakota, and Utah.).

17. *Id.* (These states include Arizona, Alaska, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Washington, and Wyoming.).

18. The Federal First Offender Act, 18 U.S.C. § 3607(c) (2006) (providing for the expungement of disposition records for individuals found guilty of simple narcotic possession (21 U.S.C. § 844) with no prior convictions).

19. The state in which the federal offender returns is likely to have in place its own state statutes and regulations imposing collateral consequences on ex-offenders. Moreover, state remedies are typically not available to the federal offender due to federalism concerns. These features compound reentry efforts of the federal offender making him unique.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 159

reintegrate state offenders back into mainstream society. Part V discusses an approach in which a comprehensive federal legislative plan for expungement can be crafted and executed—a mechanism for obtaining a clean slate. This Article advocates for the creation of a Second Chance Advisory Group to the United States Sentencing Commission. This group would be charged with investigating criminal recidivism, collateral consequences, and the costs associated with both. After adequately examining these issues, this group would be charged with recommending legislative initiatives to resolve these concerns including the creation of a comprehensive federal expungement program for non-violent federal offenders.

II. POST-CONVICTION PENALTIES AND RECIDIVISM

Post-conviction penalties involve a web of political, social, and economic obstacles faced by ex-offenders.²⁰ They are numerous and potent. These consequences take the form of mandatory exclusions and restrictions that operate outside of the public view and beyond the normal sentencing framework.²¹ Reentry scholar Jeremy Travis called this phenomenon the “invisible punishment.”²² This punishment begins the day the ex-offender is released and often results in a return to prison shortly thereafter.²³

A. Definitions

As a starting point, it is important to be clear on how terms are defined in this Article. For purposes of this Article, recidivism is defined in accordance with the U.S.S.C.’s understanding.²⁴ Recidivism consists of one of the following: (1) re-conviction of a new offense or (2) revocation of probation/parole.²⁵ For purposes of this Article, an expungement is defined as the removal of the record of criminal conviction and related documents from public purview and general public accessibility. Expungement would not, however, destroy law enforcement accessibility. Maintaining such records for an extended period of time is in the interest of public safety. The understanding of

20. H.R. REP. NO. 110-140, at 2 (2007), *reprinted in* 2008 U.S.C.C.A.N. 24, 25.

21. Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* 15, 15–19 (Marc Mauer & Meda Chesney-Lind eds., 2002).

22. *Id.*

23. H.R. REP. NO. 110-140.

24. *MEASURING RECIDIVISM*, *supra* note 6, at 4.

25. *Id.* The U.S.S.C. also considers re-arrest a component of the definition of “recidivism.”

the legal effect of an expungement is taken from the Federal First Offender Act and is adopted for purposes of this Article:

The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings. A person concerning whom such an order has been entered shall not be held thereafter under any provision of law to be guilty of perjury, false swearing, or making a false statement by reason of his failure to recite or acknowledge such arrests or institution of criminal proceedings, or the results thereof, in response to an inquiry made of him for any purpose.²⁶

It is important to understand that this Article only focuses on the non-violent federal offender. The additional restrictions and special conditions on violent offenders and immigrant populations are beyond the scope of this Article.²⁷ The definition of non-violent is the inverse definition of “violent” taken from the Armed Career Criminal Act (the Act).²⁸ The Act was chosen due to the guidance it offers regarding Congress’s potential stance on legal elements that define non-violent offenders. Thus, a non-violent offender is defined as an individual, who has been convicted of a crime that does not have an element requiring “the use, attempted use, or threatened use of physical force against the person . . . of another.”²⁹ For purposes of this Article, those convicted of drug trafficking/possession and property crimes are included in this class of offenders. At last count federal prisoners convicted of drug offenses comprised 53.5% of the prison population.³⁰ Finally, the term collateral consequence is defined as a statutory and/or regulatory disqualification occurring in both the public and private sectors resulting from a criminal conviction.

26. The Federal First Offender Act, 18 U.S.C. § 3607(c) (2006).

27. It is important to note that I also advocate for this system for the violent offender however, the concerns and restrictions regarding that sub-group are beyond the scope of this paper. I also recognize that there are numerous immigration implications on this topic but they too are beyond the scope of this paper.

28. Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B) (2006). The ACCA defines “violent felony” as a “crime punishable by imprisonment for a term exceeding one year” and either “(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” See also *Chambers v. United States*, 129 S.Ct. 687 (2009); *Begay v. United States*, 553 U.S. 137 (2008).

29. § 924(e)(2)(B).

30. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, STATE OF THE BUREAU 2007 52, available at <http://www.bop.gov/news/PDFs/sob07.pdf>.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 161*B. Recidivism*

Recidivism is problematic and expensive. Republican Representative Frank Wolf stated that members of Congress are “deeply concerned about the recidivism crisis that is straining our corrections system at all levels.”³¹ After decades of mandatory minimums, “truth” in sentencing and the abolition of parole, the federal government is taking steps toward reforming the way America punishes. There seems to be a growing sense that “the revolving door” in and out of prison results in the breakdown of families, collapse of local economies, and destruction of entire communities.

The last formal recidivism study tracking a cohort of federal prisoners was conducted by the Federal Bureau of Prisons (BOP) in 1987 and published in 1994.³² This will be referred to as the “Harer study,” and it is the most recent research focusing squarely on federal offender recidivism over a three year period.³³ Recent state recidivism studies conducted in the past few years are comparable with the results of the Harer study.³⁴

The Harer study was based on a representative sample of 1,205 BOP inmates.³⁵ It found that within the first three years of their release, 40.8% of the former inmates had recidivated.³⁶ The rates were highest

31. *Congressional Leaders Take on Recidivism and Corrections Spending*, NAT’L REENTRY RES. CTR., Jan. 28, 2010, available at <http://www.nationalreentryresourcecenter.org/announcements/congressional-leaders-take-on-recidivism-and-corrections-spending> (last visited March 21, 2010).

32. HARER, *supra* note 6.

33. This information was verified through a phone conversation with the BOP Office of Research on February 21, 2010. More recent federal recidivism studies conducted by the U.S.S.C. in 2003 have focused on first-time federal offenders and recidivism in relation to the accuracy of the Criminal History Category.

34. CRIMINAL JUSTICE POLICY & PLANNING DIV. UNIT, CONN. OFFICE OF POLICY MGMT., 2010 ANNUAL RECIDIVISM REPORT (2010) [hereinafter CONN. OPM 2010 STUDY]; CRIMINAL JUSTICE POLICY & PLANNING DIV. UNIT, CONN. OFFICE OF POLICY MGMT., 2009 CONNECTICUT RECIDIVISM STUDY (2009) [hereinafter CONN. OPM 2009 STUDY]; HOLLIE MATTHEWS & CHRISTOPHER CALIA, MASS. DEP’T OF CORR., RECIDIVISM OF 2002 RELEASED DEPARTMENT OF CORRECTION INMATES (MAY 2009) [hereinafter MASS. 2009 STUDY]; STEVEN J. SEMMANN, WIS. SENTENCING COMM’N, THREE CRITICAL SENTENCING ELEMENTS REDUCE RECIDIVISM: A COMPARISON BETWEEN ROBBERS AND OTHER OFFENDERS, (2006) [hereinafter Wis. 2006 STUDY]; ARIZ. DEP’T OF CORR., ARIZONA INMATE RECIDIVISM STUDY, (2005), available at http://www.adc.state.az.us/adc/reports/recidivism_2005.pdf; NANCY G. LA VIGNE & CYNTHIA A. MAMALIAN, URBAN INST. JUSTICE POLICY CTR., PRISONER REENTRY IN GEORGIA, (2004) [hereinafter GA. 2000 STUDY]; FLA. DEP’T OF CORR., FLORIDA DEPARTMENT OF CORRECTIONS RECIDIVISM REPORT: INMATES RELEASED FROM FLORIDA PRISONS JULY 1995 TO JUNE 2001 (2003).

35. HARER, *supra* note 6, at 1.

36. *Id.* Cf. Bureau of Justice Statistics, Recidivism, <http://bjs.ojp.usdoj.gov/index.cfm?ty=tp&tid=17> (last visited March 16, 2010) (reporting that the recidivism rate for 300,000 prisoners released in 1994 in fifteen states was 67.5%); CONN. OPM 2010 STUDY, *supra* note 34, at 4 (stating that recidivism rate for 2005 cohort that was returned to prison with new charges for either a

within the first year of release with a rate of 20.3%.³⁷ In the first six months of release 11.3% of the sample recidivated.³⁸ An additional 11.4% of new releasees recidivated in year two and 9.1% in year three.³⁹ The study documented the monthly recidivism rate over a thirty-six month period and found that the rate dropped from twenty-nine per one thousand individuals recidivating in the first month to two per one thousand individuals recidivating in the thirty-sixth month.⁴⁰ Thus, there is a downhill slope from month one to month thirty-six signifying a decrease in the risk of recidivism as time passes.⁴¹

Post-release employment appears to be a, if not the, determinative factor in post-release success. The majority of offenses, both primary incarcerating and recidivating, consist of economic crimes such as drug trafficking, theft, larceny, *etc.*, which suggests that many crimes are committed with an economic objective—getting paid.⁴² In the Harer study ex-offenders, who arranged for post-release employment, had a recidivism rate of 27.6% compared to 53.9% of those who did not.⁴³ In other words, post-release employment appears to cut the recidivism rate by almost half.

Moreover, the Harer study concluded that those offenders released to a halfway house prior to being released back to the community were more successful than those directly released to the community because the halfway house increases the likelihood of obtaining post-release employment.⁴⁴ Of the 614 people in the sample who went to halfway

supervision violation or to begin a new prison sentence was 56.5%); CONN. OPM 2009 STUDY, *supra* note 34, at 10 (stating that recidivism rate for 2004 cohort that was returned to prison at least once in the three year study was 56%); WIS. 2006 STUDY, *supra* note 34, at 1 (stating that recidivism rates vary from 39% to 58% depending on the number of prior offenses); MASS. 2009 STUDY, *supra* note 34, at v (reporting recidivism rate for 2002 cohort at 40%); GA. 2000 STUDY, *supra* note 34, at 18 (reporting recidivism rate for 2000 cohort at 36%).

37. HARER, *supra* note 6, at 2. Cf. CONN OPM 2010 study, *supra* note 34, app. at 3 (stating the recidivism rate for 2005 cohort that was returned to prison within twelve months was 34.2%); MASS. 2009 STUDY, *supra* note 34, at v (reporting recidivism rate within the first eighteen months for 2002 cohort at 28%).

38. HARER, *supra* note 6, at 2.

39. *Id.* at 9.

40. *Id.*

41. *Id.* State studies also show a downhill slope from month one to month thirty-six. See RHIANA KOHL ET AL., URBAN INST. JUSTICE POLICY CTR., MASSACHUSETTS RECIDIVISM STUDY: A CLOSER LOOK AT RELEASES AND RETURNS TO PRISON 22 (2008) (showing a decrease in recidivism from month one at 18% compared with month thirty-six at 9%); CONN. OPM 2010 STUDY, *supra* note 34, app. at 3 (demonstrating a downhill slope of recidivism (returning to prison) in month one with five hundred nine returnees compared with month thirty-six with eighty returnees).

42. HARER, *supra* note 6, at 52.

43. *Id.* at 4–5. See MEASURING RECIDIVISM, *supra* note 6, at 12.

44. HARER, *supra* note 6, at 63–66; CHRISTY VISHER ET AL., URBAN INST. JUSTICE POLICY CTR., EMPLOYMENT AFTER PRISON: A LONGITUDINAL STUDY OF RELEASEES IN THREE STATES 1 (2008),

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 163

houses, 68.1% obtained employment compared to 22% of those released directly to the community.⁴⁵ This disparity is largely due to halfway house selection where individuals are selected due to their employability.⁴⁶ Thus, halfway house release has an indirect positive effect on reentry through the opportunity of employment. Therefore, it comes as no surprise that post-release employment has a positive effect on reducing recidivism.

Education also seems to play an important role in success. The Harer study demonstrated that recidivism is inversely related to education level. Those offenders entering prison with an education of eighth grade or less who participated in Adult Basic Education and GED courses had a lower recidivism rate than those who opted out.⁴⁷ The same is true of those entering prison with some high school education and participating in Adult Continuing Education, Post-Secondary Education, and Adult Basic Education.⁴⁸ Family and spousal support appears just as determinative with those releasees living with a spouse post-release recidivating at a rate of 20.0% while those with other living arrangements recidivating at a rate of 47.9%.⁴⁹

There is no classic textbook profile for a typical recidivist. One must piece together a picture from the sparse statistical evidence available on BOP recidivism. The highest recidivism rate, at 64%, was among those in prison for robbery or other crimes against a person, excluding sex offenses, manslaughter, and homicide.⁵⁰ Drug trafficking and fraud had the lowest recidivism rates at 34.2% and 20.8% respectively.⁵¹ The largest number of recidivating events were arrests for drug trafficking or possession followed by larceny and parole violations.⁵² Males and females recidivated at almost the same rate with 40.9% of men

available at <http://www.urban.org/publications/411778.html>.

45. HARER, *supra* note 6, at 63.

46. *Id.* at 64.

47. *Id.* at 23–25.

48. *Id.* at 4–5. See MEASURING RECIDIVISM, *supra* note 6, at 12 (showing that while education correlates with lower levels of recidivism, there is an exception for recidivism rates for offenders with college educations. This group tends to have a higher rate of recidivism than other educated groups.).

49. HARER, *supra* note 6, at 5. Cf. CHRISTY VISHER ET AL., URBAN INST. JUSTICE POLICY CTR., THE IMPACT OF MARITAL AND RELATIONSHIP STATUS ON SOCIAL OUTCOMES FOR RETURNING PRISONERS 6 (2009), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf.

50. See HARER, *supra* note 6, at 3; WIS. 2006 STUDY, *supra* note 34, at 1 (stating that convicted robbers recidivate at a higher rate, 65%, compared with most other offenders at a rate of 35%).

51. See HARER, *supra* note 6, at 3.

52. See *id.* at 6 (The recidivating events broke down as follows: 25.3% for drug trafficking or possession; 13.1% for larceny theft, 13.1% for parole violations, and 6.9% for assault.).

recidivating compared with 39.7% of women.⁵³ Recidivism rates were highest among African-Americans with 58.8% of releasees recidivating followed by Hispanics at 45.2% and Whites at 33.5%.⁵⁴ Those with a history of drug or alcohol abuse were more likely to recidivate than those without such history.⁵⁵ Older ex-offenders were less likely to return to prison with a rate of recidivism of 15.3% for individuals fifty-five years of age or older compared to a 56.6% rate for persons twenty-five years and younger.⁵⁶ People with more schooling were less likely to return to prison as well those employed full time prior to the federal offense.⁵⁷

From the available data, it can be determined that employment is critical to the success of a new releasee. Education and family support are also key factors in a smooth transition from prison to the community. The collateral consequences outlined in the next section serve as major roadblocks to economic opportunity, access to education, and family reunification. These collateral consequences undermine the very factors that have been shown to decrease recidivism and increase public safety. An expungement program could reduce the consequences discussed in detail in the next section.

C. Collateral Consequences and the Loss of Opportunity

Something as simple as checking a box indicating a conviction bars a person from employment, housing, educational assistance, and government benefits. Collateral consequences take the form of employment disqualifications in the public and private sectors, prohibitions on federal educational subsidies, housing exclusions, public benefit ineligibility, and political punishment.⁵⁸ They are commonly justified on preventative grounds.⁵⁹ The consequences are thought to deter ex-offenders from committing new crimes while also protecting

53. *Id.*

54. *See id.* at 2.

55. *See id.* at 4 (Heroin abusers had the highest rate of recidivism with a rate of 69.5%, while powder cocaine users had the lowest rate of recidivism at 51.3%).

56. *See id.* at 3; MEASURING RECIDIVISM, *supra* note 6, at 12.

57. HARER, *supra* note 6, at 3.

58. Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 594–99 (2006); Christopher Mele & Teresa A. Miller, *Collateral Civil Penalties as Techniques of Social Policy*, in CIVIL PENALTIES, SOCIAL CONSEQUENCES, 19–20 (Christopher Mele & Teresa A. Miller eds., 2005); Travis, *supra* note 21, at 22–23.

59. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 160 (1999).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 165

the public from the criminal's influence.⁶⁰ On another level they are considered to provide a denunciatory purpose and retributive function.⁶¹ These theoretical justifications do less to serve the stated objectives and more to provide a strong argument for the designation of collateral consequences as part of the sentencing court's punishment for the original offense.⁶² This web of obstacles significantly contributes to the current recidivism rate.⁶³ Moreover, the ex-offender faces a double penalty: he pays his debt through incarceration and also pays through loss of opportunity. This opportunity cost is socioeconomic, political, and seemingly never ending.

1. Employment as a "Rehabilitative Necessity"

*So strong is the inverse correlation between employment and recidivism that employment is considered a "rehabilitative necessity."*⁶⁴

Employment is intrinsic to the American identity. Maintaining employment is not only a prerequisite to membership in society but is also a staple to the survival of the American family. Without employment, one is stripped of the ability to provide for himself or his family. An individual who does not participate in the labor market is not only economically disadvantaged but is also socially marred.⁶⁵ Joblessness is a primary factor in recidivism and also one of the most severe post-conviction penalties.⁶⁶ Many ex-offenders released from prison face this obstacle head-on and are repeatedly rejected, denied, and virtually excluded from the qualified applicant pool based solely on their previous conviction.

Stepping out of prison, ex-offenders have fewer employment opportunities and a decreased lifetime earning potential.⁶⁷ It is

60. *Id.* at 161; Marlaina Freisthler & Mark A. 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, 529 (2005).

61. Demleitner, *supra* note 59, at 160.

62. *Id.*

63. H.R. REP. NO. 110-140, at 2 (2007), *reprinted in* 2008 U.S.C.C.A.N. 24, 25.

64. Freisthler & Godsey, *supra* note 60, at 532; Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286 (2002).

65. See Freisthler & Godsey, *supra* note 60, at 532.

66. *Id.*; 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, 1719 (2003).

67. Jeremy Travis et al., URBAN INST. JUSTICE POLICY CTR., FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 32 (2001), *available at* http://www.urban.org/UploadedPDF/from_prison_to_home.pdf.

estimated that the “wage penalty” of imprisonment is between 10% and 20%.⁶⁸ This result is not only attributable to the lack of skills and work experience that characterize the typical profile of many ex-offenders, it is also due to the stigmatization and legal employment restrictions that ex-offenders face.⁶⁹

As evidence of its commitment to the “tough on crime” stance in the 1980s, the federal government and several states, implemented a number of occupational restrictions affecting ex-offenders.⁷⁰ These restrictions have assumed the form of blanket prohibitions based on an individual’s status as a convicted felon.⁷¹ Unless an exception is made, individuals convicted of a felony are deemed ineligible to serve in any of the United States armed forces.⁷² Federal law enforcement officers convicted of felonies will be removed from service.⁷³ And while the United States Constitution does not prohibit felons from holding public office,⁷⁴ various federal statutes provide for the removal of the individual from office upon conviction.⁷⁵

68. *Id.*

69. *Id.*

70. Pinard & Thompson, *supra* note 58, at 596. See also Deborah N. Archer & Kele S. Williams, *Making America “The Land of Second Chances”: Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 532–38 (2006) (discussing state employment restrictions).

71. See Pinard & Thompson, *supra* note 58, at 596.

72. 10 U.S.C. § 504 (2006). See also 50 U.S.C. App. § 456(m) (2006).

73. 5 U.S.C. §§ 7371, 8331(20) (2006). “‘Law enforcement officer’ means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, including an employee engaged in this activity who is transferred to a supervisory or administrative position.” § 8331(20). “Law enforcement officer” also means:

(A) an employee, the duties of whose position—

(i) are primarily—

(I) the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States, or
(II) the protection of officials of the United States against threats to personal safety; and

(ii) are sufficiently rigorous that employment opportunities should be limited to young and physically vigorous individuals, as determined by the Director considering the recommendations of the employing agency.

5 U.S.C. § 8401(17) (2006).

74. U.S. CONST. art. I, §§ 2, 3; *Id.* art. II, § 1; *Id.* art. VI, cl. 3. The Constitution provides that the “President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” *Id.* art. II, § 4.

75. 18 U.S.C. § 2381 (2006) (providing that a conviction of treason bars an individual from “holding any office under the United States”); 18 U.S.C. § 201(b) (2006) (providing that bribing a public official or accepting a bribe disqualifies an individual may be disqualified from holding federal

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 167

In addition, federal law bars certain classes of felons from working in institutions that are Federal Deposit Insurance Corporation (FDIC) insured⁷⁶ and from working in the insurance industry without permission from an insurance regulatory official.⁷⁷ Certain classes of felons are federally barred for a minimum of thirteen years after conviction from holding positions in a labor union or other organization that manages employee benefit plans.⁷⁸ A federal statute disqualifies certain ex-offenders from providing healthcare services where they will receive monies from Medicare.⁷⁹

Federal and state laws further decrease ex-offenders' employment opportunities through occupational licensing laws. Licensing restrictions result in the loss of new employment and act as a bar on reemployment in the occupation in which the offender was employed prior to conviction.⁸⁰ Federal law provides for the suspension and revocation of numerous licenses including commercial motor vehicle operator licenses,⁸¹ pilot's licenses (called airmen certificates),⁸² hazardous materials equipment licenses (from local trash collectors to interstate trucking companies carrying nuclear waste),⁸³ broadcasting licenses,⁸⁴ and port workers transportation worker identification credential.⁸⁵ This list is by no means exhaustive.

Other federal and state license restrictions have been put forth as necessary "to foster high professional standards," while limitations on employment opportunities are said to guarantee that those hired have "good moral character."⁸⁶ Suspensions and revocations placed on the licenses of commodity dealers,⁸⁷ customs brokers,⁸⁸ and SEC registrants

office); 5 U.S.C. § 7313 (2006) (removes from federal or District of Columbia office and also disqualifies from employment in the United States or the District of Columbia for five years upon conviction of inciting, organizing, encouraging, or participating in, a riot or civil disorder or any offense committed in furtherance of, or while participating in, a riot or civil disorder).

76. 12 U.S.C. § 1829 (2006).

77. 18 U.S.C. § 1033(e)(1)(A), (2) (2006).

78. 29 U.S.C. §§ 504, 1111 (2006).

79. 42 U.S.C. § 1320a-7 (2006).

80. Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 225, 282 (2004).

81. 49 U.S.C. § 31310 (2006) (provides for a one time reinstatement for some offenses after ten years).

82. 49 U.S.C. § 44710 (2006); 14 C.F.R. § 61.15 (2010).

83. 49 U.S.C. § 5103a (2006).

84. 47 C.F.R. § 73.4280 (2010).

85. 46 U.S.C. § 70105 (2006), 49 C.F.R. §§ 1515.7, 1572.103 (2010).

86. Demleitner, *supra* note 59, at 156.

87. 7 U.S.C. § 12a(2) (2006).

88. 19 U.S.C. § 1641 (2006).

(brokers and dealers)⁸⁹ are examples where “good moral character” comes into play. In all of the above mentioned statutes and regulations, criminal background checks are conducted and a conviction becomes a statutory basis for denial. Thus, if a new releasee convicted of drug possession wanted to return to work as the local trash collector, he would be prevented from doing so as his license was revoked upon conviction.

One of the most common problems associated with access to work is the employer’s unwillingness to hire an individual with a criminal conviction. Various studies conducted over the past fifteen years consistently show that on average 60% of employers indicate that they would “probably not” or “definitely not” consider hiring an individual with a criminal history.⁹⁰ A study conducted by Devah Pager in Milwaukee, Wisconsin suggests that a criminal record reduces the likelihood of a callback by 50% depending on the race of the applicant.⁹¹ Overall reasons given for the automatic exclusion of ex-offenders from the applicant pool include fears of theft, issues of physical safety, desire to avoid dealing with probation officers, and the risk of the employee reoffending.⁹² Employers note a distinction between non-violent and violent offenders and assert that such a difference is an important element in their decision.⁹³ Inducements,

89. 15 U.S.C. 78o (2006).

90. DEVAH PAGER & BRUCE WESTERN, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 20 (2009) (The study was conducted in New York City. The study was an employment audit conducted with four male testers: two African-Americans and two whites. The testers were paired by race; the two African-American testers formed one team and the two white testers formed the second team. Within each team, one auditor was randomly assigned a “criminal record” for the first week; the pair rotated which member presented himself as the ex-offender for each successive week of employment searches, such that the tester served in the criminal record condition for an equal number of cases. The criminal record consisted of a felony drug conviction (possession with intent to distribute cocaine) and eighteen months of served prison time. The testers were to apply for real job openings in entry level positions to see whether employers respond differently to applications on the basis of selected characteristics. The audit was subsequently followed by a telephone survey to employers for the investigative purposes.); Devah Pager & Lincoln Quillian, *Walking the Talk? What Employers Say Versus What They Do*, 70 AM. SOC. REV. 355, 363 (2005). See also Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 363 (2005); Harry J. Holzer et al., *Will Employers Hire Ex-Offenders? Employer Preferences, Background Checks and Their Determinants*, in IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 205 (Mary Patillo et al. eds., 2001) (The study was an employer survey conducted in 1993–1994 in four cities: Boston, Atlanta, Detroit, and Los Angeles finding exclusion rates of 60%).

91. Devah Pager, *The Mark of a Criminal Record*, 108 WIS. L. REV. 617 (2005) (The callback rate was 34% for whites with no criminal record, 17% for whites with a criminal record, 14% for African-Americans without a criminal record, and 5% for African-Americans with a criminal record.).

92. PAGER & WESTERN, *supra* note 90, at 23.

93. *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 169

such as tax incentives and federal bonding, play a positive role in the hiring of releasees.⁹⁴ Surprisingly, negligent hiring liability is not the primary concern for employers when deciding whether to hire an ex-offender.⁹⁵ A study published in 2009 found that the majority of employers are more concerned about behavioral problems than anything else.⁹⁶

This “employment penalty” has developed into a major socioeconomic problem for entire communities. Social organizations and advocacy groups across the country have been working with their municipal and state legislatures to “Ban the Box” on employment applications for work in public sector positions.⁹⁷ Major cities, such as Boston and Chicago, have enacted rules requiring city employers to review an applicant’s qualifications prior to conducting a background check.⁹⁸ Entire states are following suit with similar legislation in Illinois and Kansas.⁹⁹

2. Disqualification from Federal Educational Assistance

Under the Higher Education Amendments of 1998, individuals with minor drug convictions while receiving federal aid will be deemed ineligible for continued federal educational assistance.¹⁰⁰ The amendments state that individuals convicted of drug-related offenses, state or federal, are disqualified from receiving federal student loans, grants or work study for varying time periods depending on the nature and number of convictions.¹⁰¹ For example, an individual convicted of first time possession of a controlled substance is ineligible to receive federal student assistance for one year from the date of conviction.¹⁰² A person convicted of a second offense for possession faces ineligibility

94. *Id.* at 29.

95. *Id.* at 28.

96. *Id.* at 23.

97. Legal Services for Prisoners with Children, Ban the Box, <http://www.allofusomone.org/campaigns/ban-the-box> (last visited February 21, 2010) (Ban the Box is a national initiative aimed at prohibiting city and/or state employers from requesting information pertaining to criminal convictions on initial employment applications.).

98. SAFER FOUNDATIONS, RECENT LEGISLATION ESTABLISHING STANDARDS FOR HIRING PEOPLE WITH CRIMINAL RECORDS, available at [http://www.saferfoundation.org/docs/Hiring_Standards_Matrix_Final_\(2\).pdf](http://www.saferfoundation.org/docs/Hiring_Standards_Matrix_Final_(2).pdf) (last visited February 21, 2010).

99. *Id.* See H.R. Res. 107, 94th Leg. (Ill. 2006); KAN. STAT. ANN. § 22-4710 (2009).

100. Pub. L. No. 105-244, 112 Stat. 1581 (codified as amended in scattered sections of 20 U.S.C. (2000)).

101. 20 U.S.C. § 1091(r)(1) (2006).

102. *Id.*

for two years, and for a third time—“indefinite” ineligibility.¹⁰³ A first offense of the sale of a controlled substance results in the ineligibility for two years with a subsequent offense resulting in indefinite ineligibility.¹⁰⁴ The text of the statute does not link eligibility for receipt of federal assistance on any other offense, only drug related crimes.¹⁰⁵

State financial aid is typically linked to the federal requirements adding more exclusions and a layer of complexity. This prevents thousands of potential students from financing their education. In the 2000–2001 academic year, over 65,000 applicants filing for federal student assistance indicated they had been convicted of either selling or possessing a controlled substance while an additional 11,417 applicants left the question blank.¹⁰⁶

3. Issues in Housing

Criminal convictions, tarnished credit, and sparse employment are all common issues faced by ex-offenders. They are also justifications for landlords and property managers to reject otherwise qualified applicants. A 2007 study examined landlords’ perspectives toward housing released offenders.¹⁰⁷ The study showed that out of 611 landlord and property managers who participated in the survey, 66% would not accept an applicant with a criminal history.¹⁰⁸

Securing public housing is another difficult challenge. Changes in federal housing policy, particularly in the past fifteen years, have dramatically affected the ability of ex-offenders to obtain affordable housing. In the same year Congress overhauled welfare legislation, it also tightened the rules governing government-backed housing subsidies. Congress promulgated rules giving housing authorities great discretionary power to prohibit ex-offenders from securing § 8 vouchers and apartments in public housing projects.¹⁰⁹ Under the Housing

103. *Id.*

104. *Id.*

105. *Id.*

106. Dan Curry, *U.S. May Relax Ban on Aid for Those with Drug Convictions*, CHRONICLE OF HIGHER EDU., Sept. 7, 2001, <http://chronicle.com/article/US-May-Relax-Ban-on-Aid-for/20048>.

107. Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offender*, 71 FED. PROBATION 20 (2007).

108. *Id.* at 22.

109. Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (codified as amended in scattered sections of 12 and 42 U.S.C. (2006)); Veteran Affairs and Hud Appropriations Act, Pub. L. No. 105-276, 112 Stat. 2461 (1998); 42 U.S.C. § 13663(a) (2006); 24 C.F.R. § 960.204(a)(3), (4) (2010).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 171

Opportunity Program Extension Act of 1996¹¹⁰ and the Quality Housing and Work Responsibility Act of 1998,¹¹¹ an ex-offender faces a lifetime ban on receiving § 8 and other federally subsidized housing, if any member of the household is required to register with the state as a sex offender or has been convicted of production of methamphetamine on public housing grounds.¹¹² Moreover, local housing authorities may refuse housing to individuals who have “engaged in any drug-related or violent criminal activity or other activity which would adversely affect the health, safety, or right to peaceful enjoyment of the premises by other residents, the owner, or public housing agency employees” for a “reasonable time.”¹¹³ Furthermore,

any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant’s household, or any guest or other person under the tenant’s control, shall be cause for termination of tenancy.¹¹⁴

This language in effect permits housing authorities to evict residents on the basis of a drug arrest on or off the premises of any individual in the household.¹¹⁵ This strict liability punishment for third party actions has been upheld by the Supreme Court in *HUD v. Rucker*.¹¹⁶ These new regulations typically cause landlords to decline ex-offenders’ applications.¹¹⁷

These federal policies are severe, resulting in the punishment of entire family units for the past criminal behaviors of a single member of the household. Families of formerly imprisoned individuals “find it nearly impossible” to reunify with their fathers, mothers, and children without

110. Pub. L. No. 104-120, 110 Stat. 834 (1996) (codified as amended in scatter sections of 12 and 42 U.S.C. (2000)).

111. Pub. L. No. 105-276, 112 Stat. 2518 (1998).

112. 42 U.S.C. § 13663(a) (2006) (registered sex offenders); 24 C.F.R. § 960.204(a)(3), (4) (2010) (registered sex offenders and those convicted of manufacturing methamphetamine on the premises of federally-assisted housing).

113. 42 U.S.C. § 13661(c) (2006); 24 C.F.R. § 906.203(c) (2010) (providing that in screening applicants, public housing authorities may consider “all relevant information”).

114. 42 U.S.C. § 1437d(l)(6) (2006).

115. *Id.*

116. *Dep’t of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 127–28 (2002); Christopher Mele, *The Civil Threat of Eviction*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, *supra* note 21.

117. *See* Christopher Mele, *The Civil Threat of Eviction*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, *supra* note 21, at 25. Data is not currently available on the denial of applicants to Department of Housing and Urban Development (HUD) administered programs.

potentially endangering their subsidies.¹¹⁸ The regulations' effects are the fracturing of family units and the penalization of household members without convictions.

4. Lifetime Ban on TANF and Food Stamps

In 1996, Congress systematically dismantled welfare in the United States, in effect poking large holes in the socioeconomic safety net for ex-offenders and the families who rely on them.¹¹⁹ Through a series of legislative initiatives, Congress enacted laws that imposed restrictions based on felony convictions on receipt of cash benefits and food stamps. These restrictions have a direct and often negative impact on the ex-offender and his family.¹²⁰

Under the Clinton Administration, the Welfare Reform Act of 1996, entitled the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), terminated individual entitlements and replaced Aid to Families with Dependent Children (AFDC) with block grants known as Temporary Assistance to Needy Families (TANF).¹²¹ TANF provides cash assistance to needy families to meet life's basic requirements while the food stamp program provides low income families with a way to obtain foodstuffs.¹²² The 1996 change provided that an individual convicted of a federal or state felony offense involving the use or sale of drugs is subject to a lifetime ban on food stamps and cash assistance.¹²³ Thus, a newly released ex-offender is barred from receiving food and minimal cash assistance at the very moment he would most need it.

5. Disenfranchisement

Christopher Uggen and Jeff Manza estimate that approximately 4.7 million adults were legally disenfranchised by virtue of conviction in

118. Gwen Rubinstein & Debbie Mukamal, *Welfare and Housing—Denial of Benefits to Drug Offenders*, in *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT*, *supra* note 21, at 37, 48.

119. PATRICIA ALLARD, *THE SENTENCING PROJECT, LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES 10–14* (2002), *available at* http://www.soros.org/initiatives/baltimore/articles_publications/publications/lifesentences/03-18-03patriciaAllardReport.pdf; Archer & Williams, *supra* note 70, at 541.

120. Demleitner, *supra* note 59, at 158.

121. Travis, *supra* note 21, at 23.

122. Archer & Williams, *supra* note 70, at 542.

123. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 7, 8, 21, 25, and 42 U.S.C., § 115(a) (2006); codified at 21 U.S.C. § 862a(a) (2006)).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 173

2000.¹²⁴ Three-fourths of this population were either under community supervision or had completed their sentence but were still disenfranchised by state statute.¹²⁵ Individuals charged with misdemeanor crimes currently incarcerated and awaiting trial are also “practically disenfranchised” in that they retain the legal right to vote but are denied access to the polls on Election Day.¹²⁶ This phenomenon impacts racial minorities more severely. One study estimated that 13% of African-American males are disenfranchised due to a felony conviction and that in 2000 over 10% of the African-American voting population was disenfranchised in fifteen states.¹²⁷ Disenfranchised felons comprise more than 2% of the voting age population and four of the last eleven presidential elections were won by a 1.1% margin of victory.¹²⁸ Felon disenfranchisement may be more salient, and perhaps a decisive, factor in future presidential races.¹²⁹

Constitutional challenges to felon disenfranchisement have been unsuccessful following the Supreme Court’s decision in *Richardson v. Ramirez*.¹³⁰ In *Richardson*, the Court ruled that felon disenfranchisement is not a violation of the Equal Protection Clause of the Fourteenth Amendment.¹³¹ It reasoned that § 2 of the Fourteenth Amendment appears to explicitly allow limitations on voting due to a criminal conviction.¹³² The constitutional text calls for disenfranchisement for participation “in rebellion or other crimes.”¹³³ However, a recent circuit challenge, decided in 2008, seems to have reignited the debate by focusing on the statutory requirements of the Voting Rights Act.¹³⁴ In *Farrakhan v. Gregoire*, the Ninth Circuit ruled

124. Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 21, at 67 (They predicted that the Democrats would have gained parity in the U.S. Senate in 1984 and would have maintained control of the Senate from 1986 to the present. Furthermore, they predicted that had the rate of felon disenfranchisement been the same as it is today during 1960, John F. Kennedy’s election would have been jeopardized.). See also Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 *AM. SOC. REV.* 777 (2002); Brian Pinaire et al., *Barred From the Vote: Public Attitudes Toward the Disenfranchisement of Felons*, 30 *FORDHAM URB. L. J.* 1519 (2003).

125. Christopher Uggen & Jeff Manza, *Disenfranchisement and the Civic Reintegration of Convicted Felons*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 21, at 71.

126. *Id.*

127. *Id.* at 72.

128. *Id.*

129. *Id.*

130. *Richardson v. Ramirez*, 418 U.S. 24 (1976).

131. *Id.* at 56.

132. *Id.*

133. *Id.*; U.S. CONST. amend. XIV, § 2.

134. *Farrakhan v. Gregoire*, 590 F.3d 989 (9th Cir. 2010).

that the state of Washington's felon disenfranchisement law violated § 2 of the Voting Rights Act.¹³⁵ It has been considered a small victory for ex-offenders and advocates on the voting disenfranchisement front.

While it is clear that further research is needed to connect civic reintegration with a reduction in recidivism, a great deal has already been done to make a case for abandoning statutes barring ex-offenders from participating in the political process. In 2001, the National Commission on Federal Election Reform, headed by Jimmy Carter and Gerald Ford, advocated for the restoration of voting rights to ex-offenders who had fully completed their sentences.¹³⁶

D. Summary

Today, in America, a felony conviction costs. It costs taxpayers in the form of expenditures supporting various penal departments. It costs the ex-offender socioeconomic and political opportunity. It also costs American society in the form of human capital and progression, individual talent, and community strength. The picture created from the recidivism research conducted by the BOP shows that employment is vital to the success of the releasee. Yet, most employers are unlikely to hire an individual with a criminal record. The research also shows that education and family support play key roles in keeping an ex-offender out of prison. However, the federal government will not provide educational assistance to individuals convicted of drug offenses and ex-offenders' inability to obtain housing keeps families apart. The cycle perpetuates itself causing desperation, reoffending, and ultimately a return to prison.

Federal offenders are in a particularly precarious position as they have no realistic remedy available to them to combat these obstacles. Presidential pardons are merely symbolic and judicial petitions for expungement are almost non-existent. Congress is the only branch of government that has the authority to create a system with the wherewithal to break the cycle that it in essence created.

III. POST-CONVICTION REMEDIES IN THE FEDERAL SYSTEM

This Part describes the two existing post-conviction remedies in the

135. *Id.* at 1016 (The court further found that Plaintiffs met their summary judgment burden of proving that the discriminatory impact of the disenfranchisement law was attributable to racial discrimination in the Washington criminal justice system.).

136. NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS (2001).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 175

federal system—the presidential pardoning power and federal judicial expungements—and shows why both are inadequate to address the numerous collateral consequences faced by today’s federal ex-offender. It is unclear whether the pardoning power could constitutionally expunge a criminal conviction. It is also uncertain whether federal courts have the requisite jurisdiction to hear petitions for expungements. The federal circuits remain divided on the issue. Congress is the only branch of government with the authority to implement a viable federal program aimed at combating collateral consequences.

A. Presidential Pardon

*The President shall . . . have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.*¹³⁷

The power to pardon is one of the greatest and most unbridled powers enumerated in the text of the United States Constitution. There are no constitutional textual restrictions and neither of the two other branches may check the President in the use of this power.¹³⁸ The power itself is also regarded as one of the most benevolent powers of our chief executive, bestowing mercy and forgiveness on those to whom it is granted.¹³⁹ Actual utilization of the power speaks to the American tradition of separation of powers as well as checks and balances. While pardons were not designed to achieve any sort of systematic criminal justice reform, they do serve as a check on the other two branches of government by flagging harsh and inflexible criminal statutes and by challenging outcomes of criminal cases.¹⁴⁰ Despite the enormous authority conferred upon the President, the pardoning power has become increasingly underutilized, particularly in recent years.

137. U.S. CONST. art. II, § 2, cl. 1.

138. *Id.* See, e.g., *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833) (asserting that the power to pardon is the private and official act of the President); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (asserting that the presidential pardoning power is not subject to legislative controls).

139. *Wilson*, 32 U.S. at 159–60 (“A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual on whom it is bestowed, from the punishment the law inflicts for a crime he has committed”); *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855) (stating that a pardon is “forgiveness, release, remission”). See also William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569 (1991).

140. Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President’s Duty To Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1506–08 (2000).

1. Origins

The earliest account of pardons is found in the ancient Greek city-state of Athens.¹⁴¹ Although not highly developed, pardons existed. However, in Athens the power rested with the people.¹⁴² The process was quite difficult and typically depended on popularity rather than concerns of justice or mercy.¹⁴³

The power to pardon eventually manifested itself in England; first in the English Crown and ultimately in the hands of Parliament.¹⁴⁴ In England, pardons were the exclusive legal remedy of justice for those individuals whose punishment was questionable due to infancy, incapacity, *etc.*¹⁴⁵ Pardons were also used as a tool of conscription, by which the King would pardon outlaws in exchange for service in the royal military.¹⁴⁶ In 1535, King Henry VIII consolidated the power to pardon in the Crown.¹⁴⁷ This power was absolute and remained so for 165 years until a constitutional crisis forced the English to rethink the authority given to the King.¹⁴⁸

England began its colonization of North America in 1585. American Colonists of the new world took with them English ideas, laws, and systems of governance. This included the clemency power, which the King delegated to his direct representatives in the New World.¹⁴⁹ The royal charters for each of the colonies expressly committed the power to pardon to the executive of each colony.¹⁵⁰ However, the American Revolution brought with it distrust of executive authority as well as an end to executive clemency.¹⁵¹ With this, most states placed the authority in the hands of the legislature.¹⁵²

141. Kobil, *supra* note 139, at 583.

142. *Id.*

143. *Id.* at 584 (An individual petitioning for a pardon was required to obtain the support of 6,000 citizens in a secret poll. Those individuals who were not athletes or celebrities had incredible difficulty obtaining such support).

144. *Id.* at 586; Duker, *supra* note 139, at 475–87.

145. Duker, *supra* note 139, at 479 (describing the case of four-year-old Katherine Pesscavant who was imprisoned in the abbot of St. Alban's gaol because she unintentionally killed a younger child by opening a door and accidentally pushing him into a cauldron of hot water).

146. *Id.* at 478.

147. Kobil, *supra* note 139, at 586; Duker, *supra* note 139, at 493.

148. Duker, *supra* note 139, at 487.

149. Kobil, *supra* note 139, at 589.

150. *Id.* (The charters of Virginia, Massachusetts Bay, Maine, Maryland, Georgia, Pennsylvania, the Carolinas and New Jersey gave the power directly to the governors. Rhode Island, Connecticut, and Providence gave the power to the legislature, but this power could only be exercised in the presence of the governor and six assistant governors.).

151. *Id.* at 590.

152. *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 177

During the revolutionary years, Alexander Hamilton, advocated for the consolidation of the power in one Chief Executive, similar to the English model.¹⁵³ Both he and James Iredell argued that the power was necessary to ensure fairness, and it should be held by only one man.¹⁵⁴ In *Federalist No. 74*, Alexander Hamilton argued that:

The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel. As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance.¹⁵⁵

In Hamilton's opinion, the pardoning power was necessary to protect against a potentially harsh criminal code.¹⁵⁶ For him, one man would be less likely to give in to political pressure and more likely to understand the necessity of mitigation in the case of severe laws. His argument won and the Constitution was ratified by the thirteen states in 1787 with the power being consolidated solely in the President.¹⁵⁷

2. American Trends

Throughout this country's history, the pardoning power has been used for a variety of purposes, including calming and unifying the country during times of rebellion and political strife, commuting prison sentences from death to life in prison, and rewarding ex-offenders for rehabilitation and a commitment to a law-abiding life.¹⁵⁸ Between 1928 and 1980, before the advent and expansion of collateral consequences, there were at least one hundred post-conviction presidential pardons granted almost every year.¹⁵⁹ In most years, the President granted more than one hundred petitions.¹⁶⁰ In other years, over 300 separate pardon warrants were granted.¹⁶¹ The percentage of pardons granted remained

153. *Id.*

154. *Id.*

155. THE FEDERALIST NO. 74 (Alexander Hamilton).

156. *Id.*

157. *Id.*

158. Love, *supra* note 140, at 1487.

159. Office of the Pardon Attorney, Presidential Clemency by Administration: 1900 to 1945 and 1945 to present, <http://www.justice.gov/pardon/statistics.htm> (last visited February 21, 2010).

160. *Id.*; Love, *supra* note 140, at 1491–92.

161. In 1950, President Truman granted 400 petitions. Office of the Pardon Attorney, *supra* note 159. President Franklin Roosevelt signed well over 2,500 separate pardon warrants and commuted well

178 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

high through these years in every presidential administration beginning with F.D.R. and ending with Jimmy Carter.¹⁶² The number of pardons granted signified that the utilization of the power was considered a customary presidential duty.¹⁶³

Something peculiar happened during the Reagan Administration. During his presidency, the number of pardons dropped significantly. Reagan pardoned a total of 393 individuals in his two terms, which is less than half of the number of individuals pardoned by Jimmy Carter in his four years as President.¹⁶⁴ George H.W. Bush's grant rate was lowest for any twentieth century president—seventy-four pardons granted during his tenure in office.¹⁶⁵ Some may argue that the dwindling number of pardons is actually a prudent use of the power.

over 400 sentences during his tenure as President. Love, *supra* note 140, at 1491 n.32.

162. Office of the Pardon Attorney, *supra* note 159. This source further provides the following data on pardons:

President	No. of Pardons
McKinley (1897–1901)	291
Roosevelt (1901–1909)	668
Taft (1909–1913)	383
Wilson (1913–1921)	1087
Harding (1921–1923)	300
Coolidge (1923–1929)	773
Hoover (1929–1933)	672
FDR (1933–1945)	2799
Truman (1945–1953)	1913
Eisenhower (1953–1961)	1110
JFK (1961–1964)	472
LBJ (1964–1969)	960
Nixon (1969–1975)	863
Ford (1975–1977)	382
Carter (1977–1981)	534

163. Love, *supra* note 140, at 1493.

164. *Id.* at 1494.

165. Office of the Pardon Attorney, *supra* note 159. This source provides the following data on pardons:

President	No. of Pardons
Reagan (1981–1989)	393
George H.W. Bush (1989–1993)	74
Clinton (1993–2001)	396
George W. Bush (2001–2009)	189
Obama (2009–2010)	0

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 179

This argument fails to appreciate the severity and harshness of collateral consequences in today's world on non-violent federal offenders. It also assumes that all offenders are equally dangerous and undesirable.

Since the 1980s, both parties have competed in the "race to incarcerate" that proliferated with the War on Drugs. The "race to incarcerate" exponentially increased the national prison population. It also saw Congress and state legislatures enact an expansive web of penalties disqualifying individuals based solely on conviction. During this time, the practice of pardoning became devalued when the Attorney General delegated his authority to approve clemency applications to subordinate officials in the Department of Justice, known today as Pardon Attorneys.¹⁶⁶ These attorneys reflected the perspectives of prosecutors and may not have had a clear understanding of the clemency power.¹⁶⁷ Over time, the standards used for granting clemency became higher resulting in the number of petitions granted becoming lower.¹⁶⁸ The number of cases recommended and sent to the White House for favorable consideration has correspondingly dropped as well.¹⁶⁹

3. Meaning and Effect

What does it mean to be pardoned? What is its legal effect? The text of the Constitution fails to give any definition or meaning to the term. Early on, the United States Supreme Court delineated the legal scope of a pardon in a handful of opinions, but this failed to develop into a clear characterization leaving lower courts to determine the legal effect of a pardon.

a. Supreme Court Precedent

One of the original cases discussing the presidential pardoning power was a decision by the Marshall Court in 1833.¹⁷⁰ In the case of *United States v. Wilson*, the Court defined a pardon as:

an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated

166. Love, *supra* note 140, at 1496.

167. *Id.*

168. *Id.*

169. *Id.* at 1497.

170. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833).

officially to the court.¹⁷¹

In 1866, Justice Field articulated for the majority the effect of a pardon in *Ex Parte Garland*.¹⁷² In that case, the Court struck down an 1865 Act of Congress requiring attorneys of the federal bar to take an oath affirming they never voluntarily bore arms against the United States or engaged, assisted, or taken office in a “pretended authority in hostility to the United States.”¹⁷³ The Act was a clear attempt to require allegiance to the United States from the Confederate bar. Those who refused the oath were barred from practicing.¹⁷⁴

The petitioner, Attorney A.H. Garland was an Arkansas lawyer and politician who served as Senator in both the United States and Confederate Congress and was granted a full pardon after the war of secession.¹⁷⁵ Garland petitioned the court to continue to practice as an attorney without taking the oath.¹⁷⁶ He argued the act of Congress was unconstitutional and that even if it were deemed constitutional, he was released from the requirement by the pardon of the President.¹⁷⁷ The Court ruled in favor of Garland finding that a pardon theoretically erases a conviction. The Court laid out the legal effect of a pardon, writing:

A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.¹⁷⁸

The *Garland* dissent conceded that a pardon relieves the petitioner from “all the punishment which the law inflicted for his offence.”¹⁷⁹ This suggests a uniform understanding among the Justices of the legal

171. *Id.* at 160.

172. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866).

173. *Id.* at 334–36.

174. *Id.*

175. *Id.* at 336–37.

176. *Id.*

177. *Id.*

178. *Id.* at 381–82.

179. *Id.* at 396 (Miller, J., dissenting).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 181

effect of a pardon granted post-conviction. Ultimately, the Court determined that the 1865 Act was unconstitutional and that it was beyond the constitutional authority of Congress to impose punishment outside the reach of executive clemency.¹⁸⁰ Garland was now permitted to practice and was reborn as a “new man” with “new credit and capacity” going on to become the Attorney General of the United States in the first Cleveland administration.¹⁸¹ The effect given to pardons by the Court in *Garland* was further doctrinally entrenched with the case of *Knote v. United States*, where the Court held that while a pardon gives an individual a “new credit and capacity” and “rehabilitates him to the extent in his former position,” it did not restore confiscated property that was sold to a third party, where those third party rights have vested.¹⁸² These cases remain good law.

However, in the 1915 case of *Burdick v. United States*, the Court handed down an opinion that has since complicated the understood effect of a pardon.¹⁸³ Justice McKenna, writing for the majority, asserted that an “imputation of guilt” is inherent in a pardon.¹⁸⁴ This phrase has been interpreted by lower federal courts to stand for the proposition that a pardon does not have the far reaching effect of blotting out the existence of guilt.

In *Burdick*, a judgment of contempt was levied against the defendant a *New York Tribune* editor, for his refusal to turnover his source to prosecutors concerning articles published in the newspaper.¹⁸⁵ Claiming that his answers might incriminate him, Burdick refused to comply.¹⁸⁶ He was ordered to return later that day where he was handed a full and unconditional pardon, signed by President Woodrow Wilson.¹⁸⁷ He was officially absolved of any consequence of any criminal act.¹⁸⁸ Burdick

180. *Id.* at 381.

181. *See supra* note 178 and accompanying text.

182. *Knote v. United States*, 95 U.S. 149, 153–54 (1877). The Court was asked to consider whether the general pardon and amnesty granted by President Johnson following the civil war entitled an individual to compensation for loss of property previously confiscated and sold and after such proceeds were paid into the United States treasury pursuant to the confiscation act of 1862. Justice Fields, writing for the majority, asserted that a pardon, “[i]n contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.” *Id.* at 153. However, property confiscated and vested in a third party is not recoverable because the individual was granted a pardon unless the proceeds or property did not vest in a third party. *Id.* at 154.

183. *Burdick v. United States*, 236 U.S. 79 (1915).

184. *Id.* at 94.

185. *Id.* at 85.

186. *Id.* at 85.

187. *Id.* The pardon was for all offenses he “has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of” the articles in the newspaper. *Id.* at 86.

188. *Id.* at 85.

refused to accept the pardon and remained in contempt.¹⁸⁹

The Court was asked to review the judgment and in doing so answered two constitutional questions: (1) whether the President has the power to pardon before conviction of an offense and (2) whether it is necessary for the grantee to “accept” the pardon in order for it to have full legal effect.¹⁹⁰ The Court answered both questions in the affirmative.¹⁹¹ In answering the second question, the Court asserted that the grantee’s acceptance of a pardon admits guilt.¹⁹² The grantee “confess[es] his guilt in order to avoid conviction of it.”¹⁹³

The Court did not go farther than discussing the offer and acceptance theory underlying *pre-conviction* pardons. However, some lower courts have used the language in *Burdick* to diminish the unequivocal language in *Ex Parte Garland*. This has had major implications in determining the legal effect a pardon has on post-conviction penalties.

b. Lower Courts

While *Ex Parte Garland* remains good law, lower federal courts have used the language in *Burdick* to interpret the legal effect of a pardon today. The two cases, taken together, leave some questions open. For example, does a pardon expunge a criminal history? Will a former felon still be required to admit his conviction to the general public once pardoned by the President?

While the Supreme Court has yet to rule on these issues, some lower courts have determined that a pardon does not expunge the record of conviction and ex-offenders are required to admit convictions when asked despite being granted a pardon.¹⁹⁴ The 1990 Third Circuit case of *United States v. Noonan* called into question the effect a pardon has on an individual’s criminal record.¹⁹⁵ Noonan was convicted of draft violations and pardoned by President Carter.¹⁹⁶ He requested a court order stating that his pardon had the effect of expunging his criminal

189. *Id.* at 87.

190. *Id.*

191. *Id.*

192. *Id.* at 94.

193. *Id.*

194. *United States v. Noonan*, 906 F.2d 952 (3d Cir. 1990) (Aldisert, J., reasoning that a grant of a pardon does not wipe out the conviction); *Hirschberg v. Commodity Futures Trading Comm’n*, 414 F.3d 679 (7th Cir. 2005) (Kanne, J., asserting that the modern case law and the historical language in *Ex Parte Garland* are inconsistent with current law); *United States v. Bays*, 539 F.3d 1035, 1036 (9th Cir. 2009) (Tallman, J., holding that a “pardon does not constitute an expungement”).

195. *Noonan*, 906 F.2d at 952.

196. *Id.* at 953–54.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 183

convictions.¹⁹⁷ Framing the issue as a question of separation of powers, the court asked whether the executive power to pardon permits the President to directly or indirectly expunge a judicial branch record.¹⁹⁸ The Third Circuit determined that it does not.¹⁹⁹ Relying heavily on *Burdick*, Samuel Williston's *Harvard Law Review* exposé on pardons,²⁰⁰ and the historical evolution of the power in England, the *Noonan* court asserted a pardon does not "blot out guilt" nor does it restore an individual to a state of innocence before the eyes of the law.²⁰¹ There is an "imputation of guilt" in the acceptance of a pardon.²⁰² A pardon therefore leaves the record of conviction untouched.²⁰³ For the Third Circuit, a pardon is nothing more than "an executive prerogative of mercy."²⁰⁴

The *Noonan* holding has been adopted by many sister circuits and appears to be the dominant trend throughout the country.²⁰⁵ The Third Circuit's reasoning dismisses the doctrinal and historical significance of the strong language in both *Wilson* and *Ex Parte Garland*. It instead opts for the language in *Burdick*, a case regarding the pre-conviction pardoning authority of the President and having nothing to do with the legal effect of post-conviction pardons. The *Noonan* court also ignores the distinctiveness of American traditions focusing instead on English customs. Rather than investigating the intent of the American Framers, *Noonan* quotes Blackstone and British case law.²⁰⁶ Moreover, the Third Circuit completely ignores the many severe collateral consequences of conviction. The *Noonan* court offers a holding based on the laws of Britain, in essence stripping the pardoning power of its intended

197. *Id.* at 954.

198. *Id.* at 955.

199. *Id.*

200. Samuel Williston, *Does A Pardon Blot Out Guilt?*, 28 HARV. L. REV. 648, 653 (1915) (recognizing that while a pardon does remove civil disabilities associated with conviction, it does not change the character of a pardoned convict, and where character is a qualification for office an offence (whether pardoned or unpardoned) demonstrates the lack of that qualification).

201. *Noonan*, 906 F.2d at 958.

202. *Id.*

203. *Id.*

204. *Id.* at 955.

205. *See* *United States v. Bays*, 589 F.3d 1035 (9th Cir. 2009) (determining that the Idaho constitutional statute authorizing pardons did not specifically state that the underlying conviction is erased from the defendant's criminal record despite the Idaho Supreme Court's pronouncement that a pardon "does away with both the punishment and the effects of guilt"); *Hirschberg v. Commodity Futures Trading Comm'n*, 414 F.3d 679 (7th Cir. 2005) (reasoning that the pardon clause was not violated when the Commodity Futures Trading Commission (CFMC) took into consideration the underlying conduct in an insurance fraud scheme that resulted in a felony fraud conviction and subsequently denied his application to reinstatement as a floor broker).

206. *Noonan*, 906 F.2d at 959–60.

American exceptionalism.

c. Office of Legal Counsel

In August 2006, the Department of Justice's Office of Legal Counsel provided the United States Pardon Attorney with a Memorandum Opinion regarding whether a presidential pardon expunges judicial and executive branch records of crime.²⁰⁷ The office concluded that expungement is not automatic.²⁰⁸ It reasoned that *Ex Parte Garland* has not been literally applied and that the United States Supreme Court has appeared to back away from the language in that case.²⁰⁹ The opinion relied heavily on *Noonan*, quoting numerous passages as support.²¹⁰ However, the opinion came full circle and concluded that:

If a President chose simultaneously to issue a pardon and order the Executive Branch to expunge any such records, we believe that order would have the effect intended, subject to any statutory constraints on executive record keeping. . . . [T]he pardon would not automatically expunge the records; it would be the President's separate expungement order that would require administrative agencies to take action.²¹¹

4. Relevance

If a pardon does not in effect expunge the conviction, then what is its function and how does it help? The current state of the law shows that the courts and the executive are ever more confused about the legal effects of a pardon. The courts have contradicted years of doctrinal support for the notion that a presidential pardon offers a clean slate and determined that a pardon does not expunge the record of conviction. However, the Office of Legal Counsel determined that although not automatic, a pardon has the ability to require expungement if ordered by the President.

While there is a legitimate argument that presidential pardons are subject to abuses including political influences, abuse of discretion, and abuse of power, there are equally valid historical and textual arguments. It could be argued that the Framers contemplated potential abuses of the power and determined that the power was safer in the hands of one man

207. Whether Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, Op. Off. Legal Counsel (2006), available at <http://www.justice.gov/olc/2006/pardonopfinal.pdf>.

208. *Id.* at 6.

209. *Id.* at 3–5.

210. *Id.*

211. *Id.* at 6.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 185

instead of in the hands of the popular sentiment.²¹² The text of the Constitution reflects this intent, explicitly allowing for unlimited exercise (except in cases of impeachment) of the power, unchecked, and completely at the discretion of the President.

Thus far, despite a federal pardon, a felony conviction still stands. Practically speaking a presidential pardon has no legal significance on collateral consequences. Today a man granted a pardon is not a “new man” with “new credit and capacity.” The existence of his guilt is recorded in a criminal history resulting in continual punishment for the underlying offense. Today’s pardoned ex-offenders, although not convicted of treason, are not afforded the same treatment as Garland. Instead, the stain of conviction remains. One way to correct for the doctrinal narrowing of the pardon power is to create a class of legislatively sanctioned expungements.

B. Judicial Petitions for Expungement

While there is nominal, federal statutory authority permitting *legislative* expungements, some federal courts have determined that they have constitutional authority to grant *judicial* petitions for expungement. In fact, federal courts have granted petitions for expungement in “appropriate” cases such as where a defendant was arrested without the requisite probable cause²¹³ and where arrests were made for the deliberate purpose of interfering with the right to vote.²¹⁴ A federal ex-offender’s ability to obtain a judicial expungement depends largely on the federal circuit in which the conviction stands.

1. Jurisdiction

To expunge a federal conviction, an ex-offender must move to be heard in the federal district court where the conviction stands.²¹⁵ The district judge will then decide whether the matter will go forward. As with all cases, the judge must make a preliminary determination regarding whether the requisite jurisdiction to proceed to the merits exists. It is on this point that the federal circuits are split: Do the federal courts have jurisdiction to hear petitions for judicial expungement? It depends.

212. THE FEDERALIST NO. 74 (Alexander Hamilton).

213. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

214. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967).

215. This information was obtained by a criminal court clerk in the Northern District of Illinois on February 22, 2010. There is no formal procedure to be heard on an expungement matter.

The circuit courts differ in their approach. There is currently no federal statute granting district courts the general authority to expunge federal records of conviction solely on equitable grounds. There has been some controversy surrounding the interpretation of 18 U.S.C. § 3231 stating, that “district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.”²¹⁶ However, it is generally accepted that § 3231 does not permit equitable jurisdiction over petitions for criminal expungement.²¹⁷

Typical congressional grants of equitable jurisdiction are narrow and very specific. Federal statutes authorizing federal courts to grant expungements in equity include the Civil Rights Act,²¹⁸ habeas corpus statutes,²¹⁹ and, under the All Writs Act, a writ of error *coram nobis*²²⁰ to name a few. Under these statutes, district courts have been specifically granted jurisdiction to hear expungement petitions. However, if a case does not fall within a statutory grant of jurisdiction, some courts have found a lack of subject matter jurisdiction.²²¹

The circuits that have established the jurisdictional requirement to entertain expungement petitions do so through use of their “inherent” equitable power. The circuit courts are almost evenly split on the issue of jurisdiction with the Second, D.C., Fifth, Seventh, and Tenth Circuits finding jurisdiction while the First, Third, Eighth, and Ninth do not.²²²

216. *United States v. Sumner*, 226 F.3d 1005, 1014 (9th Cir. 2000).

217. *Id.*

218. *See* 42 U.S.C. §§ 1971, 1983, 1985 (2006).

219. 28 U.S.C. §§ 2254, 2255 (2006).

220. 28 U.S.C. § 1651 (2006).

221. *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001) (“Thus, we hold that in absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when ending in an acquittal.”).

222. Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1, 29–30 (2008). *See* *United States v. Schnitzer*, 567 F.2d 536, 539 (2d Cir. 1977) (finding equitable jurisdiction to hear petitions for expungement); *Menard v. Saxbe*, 498 F.2d 1017, 1023 (D.C. Cir. 1974) (“The judicial remedy of expungement is inherent and is not dependent on express statutory provision”); *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 (5th Cir. 1997) (stating that the court has supervisory powers over judicial records); *United States v. Janik*, 10 F.3d 470, 472 (7th Cir. 1993) (asserting that the court has authority to expunge judicial records); *United States v. Pinto*, 1 F.3d 1069, 1070 (10th Cir. 1993) (acknowledging that authority to expunge is found in the court’s equitable power); *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) (holding that the district court did not have jurisdiction to consider defendant’s request for expungement on equitable grounds); *United States v. Rowlands*, 451 F.3d 173, 178 (3d Cir. 2006) (“[O]ur precedent clearly establishes that we have jurisdiction over petitions for expungement only when the validity of the underlying criminal proceeding is challenged.”); *United States v. Meyer*, 439 F.3d 855, 859 (8th Cir. 2006) (holding lack of subject matter jurisdiction regarding expungement of criminal convictions solely on equitable grounds); *United States v. Sumner*, 226 F.3d 1005, 1014 (9th

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 187

The Fourth, Sixth, and Eleventh circuits have yet to affirmatively decide the issue.²²³

a. Inherent Equitable Jurisdiction

The circuit courts that have found jurisdiction put forth the doctrine of “inherent powers” as the basis for their authority.²²⁴ Within these inherent powers lies ancillary jurisdiction stemming from the court’s general power to oversee criminal prosecutions.²²⁵ Such authority is “incidental to the exercise of its primary jurisdiction over a cause under review.”²²⁶ The equitable power, an explicit constitutional grant, is used at the court’s discretion to apply justice.²²⁷

The circuits that employ the inherent equitable power doctrine go to the merits of an expungement petition. Typically the courts use a balancing test that weighs the petitioner’s interest in avoiding the harm that results from a conviction against the public’s interest in maintaining criminal records and promoting effective law enforcement.²²⁸ The Tenth Circuit has couched the petitioner’s interest in terms of “privacy.”²²⁹ These courts use the expungement power quite narrowly and have repeatedly asserted that an expungement will only be granted in an “exceptional circumstance.”²³⁰ The petitioner needs evidence demonstrating exceptional hardship due to the conviction or a showing that the circumstances surrounding the case call for the application of

Cir. 2000) (recognizing ancillary jurisdiction to expunge but not for equitable purposes).

223. *United States v. Allen*, 742 F.2d 153 (4th Cir. 1984) (holding that the district court did not abuse its discretion in denying a request for expungement by an acquittee but failing to address jurisdictional issue); *Thompson v. Rutherford County, Tenn.*, 318 F. App’x. 387, 388 (6th Cir. 2009) (majority asserting that “[t]he Sixth Circuit has not addressed the jurisdictional issue, and we need not decide it here”).

224. *Schnitzer*, 567 F.2d at 539; *Livingston v. Dep’t of Justice*, 759 F.2d 74 (D.C. Cir. 1985); *Janik*, 10 F.3d at 472. *See also* *United States v. Doe*, 556 F.2d 391, 393 (6th Cir. 1977); *Mouzon*, *supra* note 222, at 23. Inherent powers vest when the court is created and does not originate from any statute.

225. *Mouzon*, *supra* note 222, at 23. *See* *Soo Line R.R. v. Escanaba & Lake Superior R.R. Co.*, 840 F.2d 546, 551 (7th Cir. 1988) (asserting that the court has inherent power to make law when legislation does not address a particular topic); *Schnitzer*, 567 F.2d at 536.

226. BLACK’S LAW DICTIONARY 86 (6th ed. 1990).

227. U.S. CONST. art. III, § 2, cl. 1. Clause 1 states, “[t]he judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States.” *Id.*

228. *Diamond v. United States*, 649 F.2d 496, 499 (7th Cir. 1981) (“If the dangers of unwarranted adverse consequences to the individual outweigh the public interest in maintenance of records, then expunction is appropriate.”).

229. *United States v. Linn*, 513 F.2d 925, 928 (10th Cir. 1975) (“There was no showing . . . that the retained records have been, or will be, used improperly or intrusively Thus, there is no demonstrated invasion of privacy which overrides the Government’s justification in keeping the records.”).

230. *Schnitzer*, 567 F.2d at 538.

fairness and justice.²³¹

The “exceptional circumstances” test is not applied uniformly by the federal circuits. Courts have yet to spell out a clear definition of what constitutes an “exceptional circumstance.” The Sixth Circuit spoke when it affirmed a district court’s decision denying the petitioner an expungement where he was originally named in a federal civil suit and later dismissed as a defendant.²³² While the Sixth Circuit has yet to affirmatively decide the jurisdictional issue, the court asserted that this scenario failed to meet the “exceptional circumstances” threshold that is used by some courts.²³³ However, in a similar Wisconsin district court case, an expungement of indictment and arrest records were ordered.²³⁴ The defendant, an attorney, had a significant interest in maintaining a positive status. The court employed the balancing test and found that the defendant’s interest in maintaining his reputation outweighed the government’s interest in law enforcement.²³⁵ Noting that the records were eleven years old, there was no opposition from the government, and there was no indication the defendant engaged in criminal activity, the court ordered the records expunged.²³⁶ The court asserted that the existence of such records represented “an unwarranted slur on his reputation and character.”²³⁷

In a 2008 Utah district court case, an expungement was granted to a petitioner twenty years after the conviction. The defendant graduated from college “with high marks,” got married, had three children with whom he was very involved, maintained steady employment “while excelling at the workplace,” and maintained a law-abiding life.²³⁸ The petitioner also received the blessing of the United States attorney and provided the court with his company’s policy stating he would not

231. *United States v. Holmes*, No. MC19990106MDG2005, 2005 WL 1320149, at *2 (E.D.N.Y. June 2, 2005).

232. *Thompson v. Rutherford County, Tenn.*, 318 F. App’x. 387, 389 (6th Cir. 2009).

233. *Id.* (Keith, J., dissenting on the basis that the district court abused its discretion in failing to expunge the record as the case “presents an extraordinary circumstance, compelling us to address this jurisdictional issue and to find that we have ancillary jurisdiction to expunge a record in an appropriate case”).

234. *United States v. Bohr*, 406 F.Supp. 1218 (E.D. Wis. 1976).

235. *Id.* at 1219–20.

236. *Id.*

237. *Id.* at 1220.

238. *United States v. Williams*, 582 F. Supp. 2d 1345, 1346 (D. Utah 2008). In *Williams*, the petitioner/defendant was arrested and pled guilty to one count of distribution of a controlled substance (cocaine). *Id.* At the time of his arrest, he was a casual marijuana user and was attempting to obtain drugs at his friend’s request. Unbeknownst to him, his friend was actually an undercover federal agent. *Id.* The petitioner “was sentenced to three years of probation which he completed without incident.” *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 189

advance because of his past criminal conviction.²³⁹ The Tenth Circuit has emphasized the importance of evidentiary proof of actual harms suffered by the defendant when petitioning the court for expungement.²⁴⁰

b. Lack of Subject Matter Jurisdiction

Other circuit courts assert that they will use their inherent power to expunge a conviction that is constitutionally infirm or the result of a clerical error, but will not use their equitable power to expunge any other type of conviction.²⁴¹ For these circuits, in the absence of a federal statute or clear defect in the record, a petition for expungement will not be heard on the theory that equitable orders for expungement do not fit within the purposes of ancillary jurisdiction espoused by the Supreme Court in *Kokkonen v. Guardian Life Insurance Company of America*.²⁴² In *Kokkonen*, the Court asserted that ancillary jurisdiction exists under two separate principles: “(1) to permit disposition by a single court of claims that are, in varying respects and degrees, factually interdependent; and (2) to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.”²⁴³ Focusing on the second principle, several circuits determined that expungement based solely on equitable considerations does not fall within the scope of this purpose of ancillary jurisdiction.²⁴⁴

239. *Id.* at 1348. The court distinguished this petitioner by two main factors: (1) he provided documentary evidence proving the adverse consequences he faced as a result of his conviction; he provided the court with his and (2) the United States Attorney supported the petition. *Id.* The court quoted the United States Attorney commenting that this is the type of “rare and extreme circumstance” that warrants the grant of a petition for expungement. *Id.*

240. *United States v. Friesen*, 853 F.2d 816, 818 (10th Cir. 1988).

241. *United States v. McMains*, 540 F.2d 387, 389–90 (8th Cir. 1978) (“It is established that the federal courts have inherent power to expunge criminal records when necessary to preserve basic legal rights. The power is a narrow one, usually exercised in cases of illegal prosecution or acquittals and is not to be routinely used.”); *United States v. Dunegan*, 251 F.3d 477, 480 (3d Cir. 2001) (“Thus, we hold that in absence of any applicable statute enacted by Congress, or an allegation that the criminal proceedings were invalid or illegal, a District Court does not have the jurisdiction to expunge a criminal record, even when ending in an acquittal.”); *United States v. Sumner*, 226 F. 3d 1005, 1014 (9th Cir. 2000) (“In our view, a district court’s ancillary jurisdiction is limited to expunging the record of an unlawful arrest or conviction, or to correcting a clerical error.”).

242. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994). The Court of Appeals for the Ninth Circuit affirmed the decision of the Eastern District of California enforcing a settlement agreement between insurer and insurance agent regarding a breach of agency agreement. *Id.* at 377. The Court held that under the doctrine of ancillary jurisdiction, the district court did not have the inherent power to enforce the agreement. *Id.*

243. *Id.* at 379–80 (internal citations omitted).

244. *United States v. Coloian*, 480 F.3d 47, 52 (1st Cir. 2007) (“We agree with the Third, Eighth, and Ninth Circuits that *Kokkonen* answers the question raised *Kokkonen* forecloses any ancillary

Therefore, no such petitions will be heard in those circuits.

These circuits refuse to hear petition for expungement based in equity.²⁴⁵ The underlying premise is that federal courts, although possessing ancillary jurisdiction, may not preside over matters of expungement based solely on equitable principles because it constitutes a violation of separation of powers.²⁴⁶ Expanding the jurisdiction of federal courts can only be done by Congress.²⁴⁷

2. State of the Law

The federal circuit courts are divided over the authoritative power to grant judicial expungements based solely on equitable principles. The tension is solely jurisdictional. Despite the fact that the text of the Constitution clearly states that the jurisdiction of the judicial power extends to all cases in “Law and Equity,”²⁴⁸ some circuit courts are reluctant to assert their equitable power. The fact that the federal circuits are split on the question of jurisdiction signals that the issue is ripe for Supreme Court review. Thus, the Court may be inclined to grant certiorari to resolve the matter. However, if Congress is proactive, federal policymakers could eliminate the need for Supreme Court review by crafting a statute explicitly granting federal courts jurisdiction to hear judicial petitions for expungement.

C. Summary

The Executive and Judicial branches of the federal government could theoretically grant expungements to non-violent ex-offenders. The President, after granting a pardon, could provide an order expunging the record of conviction. The federal courts could find the requisite jurisdiction to hear petitions for expungement through its inherent power. However, both of these branches refrain from using the full

jurisdiction to order expungement based on . . . equitable reasons.”); *Dunegan*, 251 F.3d at 479 (finding that ancillary jurisdiction as enunciated in *Kokkonen* does not include petitions for expungement of criminal records); *Sumner*, 226 F.3d at 1010 (citing *Kokkonen*, 511 U.S. at 375, as the basis for restricting judicial power on the issue of criminal expungements).

245. *Coloian*, 480 F.3d at 52 (“We therefore find that the district court did not have jurisdiction to consider Coloian’s request for expungement of his criminal record on equitable grounds.”).

246. *Sumner*, 226 F.3d at 1014 (“[T]he expungement of the record of a valid arrest and conviction usurps the powers that the framers of the Constitution allocated to Congress, the Executive, and the states.”).

247. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

248. U.S. CONST. art. III, § 2, cl. 1.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 191

power granted to them by the United States Constitution. With this, Congress remains the only branch of government with the constitutional authority to implement comprehensive federal expungement legislation.

IV. STATES' EXPERIMENTS WITH OFFENDER REENTRY

States have their own unique process and customs that are typically codified as a permanent expression of the popular will. With regard to ameliorating the effects of conviction on its constituent offenders, many states have a legislatively sanctioned mechanism in place allowing the offender a chance to clear his criminal history. This Part looks at the expungement programs offered by three states: Massachusetts, California, and Connecticut. These three states have implemented different approaches to successfully integrate the ex-offender into the community by offering a carrot for those who are productive and remain crime free. The federal government can look to these state mechanisms when crafting a solution.

A. *Massachusetts*

Despite the state's longstanding tradition of permitting public inspection of court records,²⁴⁹ Massachusetts has a statutory mechanism permitting ex-offenders to petition the Commissioner of Probation to seal criminal history information.²⁵⁰ There is also a statutory method where District Court judges are permitted to seal records of first-offense possession of marijuana.²⁵¹ For purposes of this Article, only the first approach will be examined.

A sealing in Massachusetts means that the documents are only accessible by the court, unless the court authorizes limited disclosure.²⁵² Sealed records allow a defendant to answer "no record" for inquiries by employers regarding arrests, criminal court appearances, and convictions.²⁵³ Any application for employment in Massachusetts where the employer seeks criminal history information must contain language permitting an applicant with a sealed record to answer "no record" on the application.²⁵⁴ Non-compliance could result in a suit in

249. MASS. GEN. LAWS ch. 66, § 10 (2009) (guaranteeing public access to public records).

250. MASS. GEN. LAWS ch. 276, § 100A (adult criminal dispositions), 100B (juvenile delinquency dispositions), 100C (not guilty dispositions/no probable cause) (2009).

251. MASS. GEN. LAWS ch. 1102, § 1 (2009).

252. *Pixley v. Commonwealth*, 906 N.E.2d 320, 328 n.12 (Mass. 2009).

253. MASS. GEN. LAWS ch. 276, § 100A (2009).

254. *Id.*

equity taken by the Attorney General in superior court.²⁵⁵ In addition, a sealed record does not disqualify a person from public service, and the record cannot be admitted into evidence except when imposing a sentence for a subsequent conviction.²⁵⁶

The process has become fairly standardized requiring the defendant to apply for a sealing through the Commissioner of Probation.²⁵⁷ A specific form must be used, but it is easily accessible and uncomplicated.²⁵⁸ The statute requires the Commissioner to comply with the request so long as there have been no new criminal convictions or imprisonment, in Massachusetts or elsewhere, the defendant is not required to register as a sex-offender, there are no statutory exclusions applicable to the defendant, no firearm convictions, perjury, escape, or State Ethics Violations, and the statutorily proscribed time period has elapsed since the last conviction, which is ten years for misdemeanor crimes and fifteen years for felonies.²⁵⁹ The clock begins to toll once all sentence requirements terminate.²⁶⁰ If all conditions are met, the Commissioner will seal the record and notify the court clerk and chief probation officer of the courts in which the convictions stand so that all records of the proceedings are subsequently sealed.²⁶¹

The mechanics of sealing a criminal case are not overly difficult. In Massachusetts, docket entries are sealed by covering the pertinent information with opaque tape so that none of the information can be read.²⁶² The original docket sheet remains in the docket with “Sealed Record” recorded on the front.²⁶³ All case papers and related files are placed in a sealed envelope and are identifiable by the name of the

255. *Id.*

256. *Id.*

257. *Id.*

258. Comm’r of Prob., Petition To Seal, *available at* <http://www.masslegalhelp.org/cori/forms-and-letters/petition-to-seal-conviction-aged-out-cases.pdf> (last visited Sept. 1, 2010). Additionally, the form can be requested by calling the office of the Commissioner of Probation.

259. MASS. GEN. LAWS ch. 276, § 100A (1) – (4) (2009). There is currently pending legislation to change the time period to five years for misdemeanors and ten years for felonies. *See* An Act reforming the administrative procedures relative to criminal offender record information and pre-and post-trial supervised release, S. 2220, 186th Cong. § 16 (as passed by Senate, Mass. November 30, 2009); *see also* Nancy Reardon, *Activists Want Law to Seal Criminal Records Sooner*, BROCKTON ENTERPRISE, July 28, 2009, <http://www.enterpriseneews.com/news/x836550449/Activists-want-law-to-seal-criminal-records-sooner> (last visited March 18, 2010).

260. MASS. GEN. LAWS ch. 276, § 100A (1), (2) (2009).

261. MASS. GEN. LAWS ch. 276, § 100A (2009).

262. DIST. COURT DEP’T OF THE TRIAL COURT, COMMONWEALTH OF MASS., A GUIDE TO PUBLIC ACCESS, SEALING & EXPUNGEMENT OF DISTRICT COURT RECORDS 39 n.121 (2009) *available at* <http://www.mass.gov/courts/courtsandjudges/courts/districtcourt/pubaccesscourtrecords.pdf> (last visited March 14, 2010).

263. *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 193

defendant and related docket numbers.²⁶⁴ The sealed envelope is kept in a secure place out of public reach.²⁶⁵ A sealed record index is kept by each department and is not available to the public.²⁶⁶ A sealed record is authorized to be used in a manner consistent with statute.²⁶⁷ In the event a record is unsealed, the date of the unsealing and the name of the person using the record are recorded on the front of the envelope.²⁶⁸ When finished with the information, the record is resealed.²⁶⁹

B. California

California has in place a dismissal program for misdemeanor and felony convictions. This system places the authority to dismiss convictions within the jurisdiction of the courts and does not seal, destroy, or remove case information from any of the three branches of government. However, individuals are generally not required to disclose a conviction if it was dismissed unless the question arises in the context of government employment or licensing.²⁷⁰

The process for obtaining a dismissal of prior convictions depends on the classification of the crime. Theoretically there is no waiting period for obtaining a dismissal. Defendants may begin the process while on probation or serving their sentence in county jail.²⁷¹ Misdemeanor convictions require the defendant to petition for dismissal of the convictions in the superior court where the conviction stands.²⁷² Felony convictions where the defendant received a sentence of probation and/or county jail time are a two-step process. First, a defendant files a petition to have the felony reduced to a misdemeanor.²⁷³ Once reduction is secured, the defendant files another petition to have the “misdemeanor” dismissed in accordance with the misdemeanor petition rules.²⁷⁴ Felony convictions where the defendant was sentenced to state prison, to the custody of the Department of Corrections and Rehabilitation requires a ten year waiting period, or to both.²⁷⁵ This process requires that the

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 39 n.122.

268. *Id.* at 39 n.121.

269. *Id.*

270. CAL. PENAL CODE § 1203.4 (West 2010); CAL. CODE REGS tit. 2, § 7287(d) (2009).

271. *See* § 1203.4 (not specifying any waiting period).

272. § 1203.4.

273. CAL. PENAL CODE § 17(b) (West 2010).

274. § 1203.4.

275. CAL. PENAL CODE § 4852.01 (West 2010).

defendant petition the court for a Certificate of Rehabilitation and subsequently apply for a pardon.²⁷⁶

C. Connecticut

In Connecticut, absolute pardons have the dual effect of forgiving and expunging the record of conviction. The governor of Connecticut has delegated the power to pardon to the Board of Pardons and Parole (Board).²⁷⁷ In turn, the Board uses its discretion to determine whether to grant an individual a provisional pardon, an absolute pardon, or to deny the petition outright.²⁷⁸

The applicant may apply three years after completing his sentence for a misdemeanor and five years after a felony.²⁷⁹ Typically an individual will have completed their sentence prior to applying for a pardon. However, in “extraordinary” circumstances, the Board will grant a pardon prior to the termination of a sentence.²⁸⁰

The applicant is required to fill out a ten page questionnaire that includes the reporting of child support orders, employment history, criminal history, and basic demographic information.²⁸¹ It also requires that the applicant obtain at least three references, all of whom must be aware of the applicant’s criminal history, provide the board with the criminal history printout from the state police and all police reports related to the applicant’s criminal convictions over the previous ten years.²⁸² Once the application is received, the Board notifies the State’s Attorney and the victim if there is one.²⁸³ Barring a request for a hearing by the State’s Attorney or victim and after review of the documentary information, the Board decides whether to grant the petition through either an absolute or provisional pardon, deny the petition, or grant the applicant a hearing.²⁸⁴ If a hearing is granted, the applicant appears before the Board to answer questions. After the hearing, the Board either grants or denies the application.

An absolute pardon is an expungement.²⁸⁵ If granted, the individual

276. *Id.*

277. CONN. GEN. STAT. § 54-130a(a) (2010).

278. § 54-130a(b).

279. § 54-130a(c).

280. *Id.*

281. Board of Pardons and Parole, Expungement/Provisional Pardon Petition, <http://www.ct.gov/doc/lib/doc/PDF/form/PardonFormerOffender.pdf> (last visited March 16, 2010).

282. *Id.*

283. CONN. GEN. STAT. §§ 54-142a(d), 54-124a(j)(2), (3) (2010).

284. § 54-124a(j)(2), (3).

285. § 54-142a(d).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 195

is not required by law to disclose convictions. A provisional pardon is used for employment purposes only and does not expunge the record of conviction.²⁸⁶ The individual is still required to disclose convictions when asked.²⁸⁷ However, he can use the provisional pardon as an advocacy tool. The intended effect of the provisional pardon is to demonstrate to employers that the Board considers the applicant trustworthy enough to hire.²⁸⁸ The applicant may also re-apply for an absolute pardon in one year. When the Board denies a petition or grants a provisional pardon, it provides the applicant with the reasoning underlying its decision, which allows the applicant to conform his conduct in a manner most conducive to securing a pardon.²⁸⁹

The Board of Pardons and Paroles uses the pardoning mechanism quite frequently. Prior to 2004, pardon grants were virtually non-existent.²⁹⁰ However, since that time the Board has granted over one hundred absolute pardons annually and has recently begun to use the provisional pardon with more consistency.²⁹¹

D. Summary

Examining state expungement mechanisms demonstrates that expungement is considered a viable reentry strategy by state legislators. Moreover, expungement programs can be crafted and carried out in a number of different ways with the deciding body being legislative, judicial, or executive. Little empirical research has been done regarding the effects of expungement, and research is needed to assess the success

286. CONN. GEN. STAT. § 54-130a(e) (2010).

287. *Id.*

288. An Act Concerning Criminal Justice Policy and Planning, H.R. 5781 (Conn. 2006). *See also* OFFICE OF LEGAL RESEARCH, H.R. 5781, AN ACT CONCERNING CERTIFICATES OF EMPLOYABILITY AND REHABILITATION (2006).

289. CONN. GEN. STAT. § 54-124a(j)(2)(A)(3) (2010).

290. Board of Pardons and Parole, Pardons Counts, <http://www.ct.gov/doc/lib/doc/PDF/PDFReport/PardonsCounts.pdf> (last visited March 21, 2010).

291. *Id.* This source provides the following data:

YEAR	APPLICATIONS RECEIVED	NO. OF PARDONS GRANTED
2004	303	145
2005	347	188
2006	393	220
2007	495	312 + 4 Provisional
2008	835	467 + 32 Provisional
2009	1290	413 + 66 Provisional

or failure of the state programs. However, Connecticut has increasingly granted pardons over the past six years, and Massachusetts is considering reducing the waiting period required to obtain a sealing. While expungement is by no means the absolute solution to reentry, it is a partial resolution to the growing number of non-violent federal ex-offenders who want to lead productive and law abiding lives. Massachusetts, Connecticut, and California appear to agree that expungement is a viable response.

V. A CASE FOR CONGRESSIONAL RESOLUTION

The proliferation of federal criminal statutes in the 1960s effectively created a federal criminal code. Under the auspices of the Commerce power, Congress created a new class of criminal—the federal offender. Unlike the states, which traditionally manage criminal offenders, the federal government was unprepared to deal with the aftermath of its legislation. To further compound the matter, Congress enacted numerous statutes and regulations that triggered collateral consequences including housing regulations, benefits rules, and federal educational assistance eligibility. The after-effects now require Congress to develop an effective, cost-efficient, and workable solution. It is the only branch of government with the constitutional authority to redirect these consequences.

As has been demonstrated in Part III, current federal law is confusing at best. The executive pardoning power does little to successfully integrate ex-offenders that the President has chosen to pardon. It does nothing to solve the practical and real life problems associated with conviction: the easy accessibility of criminal records and the stigma attached to conviction. It is also quite likely that pardons recently aroused public suspicion of corruptibility with the Clinton pardons in 2001.²⁹² A judicial petition for expungement is not a better alternative. The federal courts remain divided questioning if they even have the authority to expunge. Not only that, some ex-offenders are deprived of the opportunity to petition the courts by virtue of the circuit where the conviction stands. Neither of the two branches provide a reliable post-conviction remedy and relief from these branches is seldom granted.

While Congress has already enacted legislation providing assistance

292. Editorial, *An Indefensible Pardon*, N.Y. TIMES, Jan. 24, 2001, at A18 (opining that Clinton's pardon of Marc Rich, a commodities dealer who fled prosecution to Switzerland, was indefensible and arguing that there is a difference between pardoning someone who pays in full and someone who purposely avoids adjudication); Editorial, *The Pardons Look More Sordid*, N.Y. TIMES, Feb. 9, 2001, at A22 (reporting that President Clinton may have discussed a pardon with a Democratic fundraiser).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 197

for the reentering releasee, these initiatives did not and do not go far enough. Beginning in the late 1960s, Congress began to show lukewarm concern for the economic position of ex-offenders. Legislators worked to provide incentives to employers with the goal of influencing hiring practices. In 1966, the United States Department of Labor (USDOL) created the Federal Bonding program,²⁹³ and the Reagan Administration implemented the Work Opportunity Tax Credit.²⁹⁴ Both of these programs were aimed at assisting ex-offenders, among other disadvantaged groups, in securing employment from private sector employers. These programs provided limited assistance in one fundamental area in a time where collateral consequences existed and were not as potent.

Arguably, Congress could repeal or modify existing federal statutes and regulations that work as post-conviction penalties. While possible, this approach is open to two criticisms: (1) it leaves the problem of employer access wide open; and (2) there are an overwhelming number of statutes and regulations. Without expungement, private employers maintain the ability to inquire into the criminal history of an individual before even extending an offer of employment. Disqualification on the basis of a criminal conviction would likely continue.²⁹⁵ Title VII does not prohibit discrimination on the basis of a criminal record.²⁹⁶ Second, there are numerous statutes and regulations that impose collateral

293. Manpower Development and Training Act of 1962, 42 U.S.C. § 2571 (repealed 1969, but adopted by State and local operating agencies). The Federal Bonding Program guarantees the employer honesty from a high-risk job seeker. High-risk job seekers are those who have committed acts deemed fraudulent or dishonest in the past or who have demonstrated past behaviors that make their honesty or credibility questionable. This includes ex-offenders. Historically, employers have not hired from this category of job applicants on a variety of grounds. A major reason for the exclusion of ex-offenders is that commercial bond insurance companies do not cover this group as they are designated as "NOT BONDABLE." The Federal Bonding program, however, provides commercial insurance to the employer free of charge for six months as an incentive to hire high-risk job seekers. The insurance will reimburse the employer for any losses due to employee dishonesty with no deductible amount to the employees. Once the employee demonstrates job honesty for six months then he or she will be considered bondable for life under the commercially Fidelity Insurance bonds.

294. I.R.C. § 51 (2006). The Work Opportunity Tax Credit (WOTC) is a federal tax credit that is available to all private sector businesses. The original purpose was as an incentive to private sector employers to hire individuals from targeted groups, who traditionally experience high rates of unemployment. Individuals who have been convicted of a felony and were hired more than one year after the last date on which he was convicted or released from prison, qualifies the employer to receive the tax credit. Employers will receive a \$2400 tax credit for each ex-offender hired who has worked a minimum of 120 to 400 hours.

295. Although many states have statutes prohibiting such discrimination, individuals rarely use them because of the issues of proof. Employers rarely write the reason for not selecting a candidate and even when they do it is likely general standard denial.

296. It is likely that an amendment to Title VII including the prohibition of discrimination on the basis of a criminal conviction would suffer from the same shortfalls as the state statutes.

consequences. It would likely take significant resources and political will to sift through, sort, and modify decades of legislation.

It is also possible that Congress could statutorily prescribe jurisdiction to the federal courts to grant expungements. Doing so could potentially clog the dockets of federal courts and divert resources from customary court matters. Moreover, expungement would then be subject to discretionary judgment. Giving the courts jurisdiction would remove transparency from the process.

A. A New Approach

The purpose behind expungement is to wipe the proverbial slate clean, allowing formerly convicted citizens to live in America without a lifelong struggle with collateral consequences. In the context of crime and recidivism, expungement could be a tool to integrate ex-offenders into the community through an incentive structure. This structure would be transparent, practicable, and codified. Interestingly, Congress has already experimented with this type of system: it created a quasi-expungement system with the Bankruptcy Code. Bankruptcy itself is designed with the purpose of discharging one's debt.²⁹⁷ This discharge prevents creditors from any further collection.²⁹⁸ A central aspect of bankruptcy policy is the concept of the "fresh start;"²⁹⁹ debtors should have the ability to live a dignified life and not be forced into a permanently impoverished existence.³⁰⁰ In calculating a cost-benefit analysis, a debtor can do better for himself and his community when released from financial liabilities and restored to solid economic footing.³⁰¹

The same rationale may be applied to the non-violent federal offender. Once the offender discharges his debt to society, further collection on that debt, in the form of life-long collateral consequences, should be barred. Normatively speaking, an offender is likely to do better for himself and his community once he is released from collateral liabilities and allowed to maximize his opportunities. Thus, Congress can apply the theoretical justifications and safeguards that protect debtors in bankruptcy to the situation of federal offenders and

297. Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 370 (1991).

298. JEFF FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY 456 (2d ed. 2007).

299. Bernard R. Trujillo, *The Wisconsin Exemption Clause Debate of 1846: An Historical Perspective on the Regulation of Debt*, 1998 WIS. L. REV. 747 (1998).

300. Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978*, 96 MICH. L. REV. 47 (1997).

301. Trujillo, *supra* note 299, at 762.

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 199

expungement. This taken together with the objectives outlined in the Second Chance Act can provide a principled framework for federal expungement legislation. Both call for a second chance for the defendant.

1. Structure

As discussed in Part II, recidivism rates among non-violent offenders decline with the passage of time.³⁰² After three years post release, the likelihood of recidivism is two per one thousand individuals recidivating. Non-recidivists having kept themselves out of prison should be permitted to petition society for a clean slate some time after completion of their sentence. Having a publicly accessible criminal conviction will work as a lifelong cost the non-recidivist pays in future potential opportunity. Upon a showing of a law-abiding and productive life as defined by eligibility criteria, the non-recidivist should have an opportunity to petition for society's acceptance of full integration in the American social order.

The U.S.S.C. should create a Second Chance Advisory Group to determine how best to ameliorate the collateral consequences of federal convictions. As part of the judicial branch, the U.S.S.C. already has in place the resources, access and structural support needed to investigate, craft, and execute a post-conviction expungement initiative.³⁰³ The congressional mandate of the U.S.S.C., namely to provide Congress with recommendations regarding the sentencing guidelines, places the purpose of a Second Chance Advisory Group in line with the legislative purpose of the U.S.S.C.³⁰⁴ With a Second Chance Advisory group, the U.S.S.C. may be used as a vehicle for researching and recommending legislative policy initiatives that will effectively slash both incarceration and opportunity costs. It has been given nearly unlimited access to almost any federal, state, and local resources needed to efficiently fulfill its obligations.³⁰⁵

302. HARER, *supra* note 6, at 9.

303. 28 U.S.C. § 991 (2006).

304. 28 U.S.C. § 994(a)(2) (2006) (“Duties of the Commission (a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System— . . . (2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further purposes set forth in section 3553(a)(2) of title 18, United States Code . . .”). *See generally* 18 U.S.C. § 3553 (2006) (setting forth the application and implementation procedures of the sentencing guidelines).

305. *See generally* 28 U.S.C. § 995 (2006); *see also* 28 U.S.C. § 995(a)(5) (2006) (“The Commission, by vote of a majority of the members present and voting, shall have the power to . . . (5)

200 UNIVERSITY OF CINCINNATI LAW REVIEW [Vol. 79]

The creation of a Second Chance Advisory group would not be innovative, as the U.S.S.C. has previously created advisory groups for the purpose of facilitating “formal and informal input to the Commission.”³⁰⁶ Currently, there are three advisory groups to the U.S.S.C.³⁰⁷ These include the Probation Officers Advisory Group, the Practitioners Advisory Group, and the Victims Advisory Group.³⁰⁸ This seems to be the next logical step in fully addressing federal criminal recidivism.

2. Duties

A Second Chance Advisory Group could be the lead agency on federal offender reentry. This group could conduct fresh and current recidivism studies specifically aimed at BOP releasees giving the U.S.S.C. the updated data needed to craft sound legislative policy. A Second Chance Advisory group would have the ability to investigate and evaluate successful state sealing or expungement programs paying particular attention to collateral consequences, e.g., exceptions to statutory collateral consequences and administrative procedures for re-licensing, and restoration of civil rights statutes. This group could develop efficient and workable evidence-based programs proven to smooth the transition from prison to society. The primary objective would be to craft a recommendation or amendment to the U.S.S.C. aimed at combating the numerous collateral consequences arising out of conviction in the federal system. One such remedy could be the development and implementation of a federal expungement procedure.

The Second Chance Advisory Group could be charged with thinking through many issues, including whether expungement would be automatic after certain eligibility criteria were met; determining the required post-conviction waiting period; the agency to which applications would be addressed; whether this procedure would be administrative; whether this remedy would be subject to review; how federal expungement would interact with state law. The group could also consider other issues and remedies including the repeal of statutory

utilize, with their consent, the services, equipment, personnel, information, and facilities of other Federal, State, local, and private agencies and instrumentalities with or without reimbursement therefore . . .”).

306. U.S. SENTENCING COMM’N, RULES OF PRACTICE AND PROCEDURE 4 (2007), available at http://www.ussc.gov/general/RULES11_01.pdf.

307. *Id.*

308. *Id.* See also U.S. Probation Officers Advisory Group, Charter, <http://www.ussc.gov/POAG/charter.html> (last visited February 26, 2010); Practitioners Advisory Group, <http://www.ussc.gov/PAG/PAGindex.html> (last visited February 26, 2010).

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 201

and regulatory collateral consequences and expanded expungement authority.

3. Recommended Recidivism Risk Assessment

Expunging a criminal conviction is a matter of serious public concern. Before American society expunges criminal convictions, it wants to make sure that individuals will not reoffend. On one hand, no such guarantees can be made. The government can never guarantee that an individual will not recidivate because human behavior itself is uncertain. On the other hand, there are tools that assist in predicting the likelihood of recidivism and that make fewer errors than human judgment—statistical methods of prediction.³⁰⁹

Statistical devices for predicting recidivism have been used by the federal government in the past. For example, they have been used in the context of parole prior to its abolition.³¹⁰ In 1928, E.W. Burgess described his classic work in prediction methods.³¹¹ In an experiment conducted thirty years later by Gottfredson, the results were the same: the statistical prediction fared better.³¹² Indeed, statistical prediction analysis has consistently fared better than clinical judgments.³¹³ In 1957, Paul Meehl conducted a similar study and found the same results.³¹⁴ The decision makers' subjective biases and prejudices are excluded from the prediction table making the process more objective than if left to human judgment.

The decision to parole an individual was primarily based on the individual offender's risk of violating conditions and/or re-offending.³¹⁵ The statistical tool used by the United States Board of Parole to predict

309. PAUL MEEHL, *CLINICAL VERSUS STATISTICAL PREDICTION* 90–119 (1954) (comparing clinical and statistical methods of prediction in twenty studies including corrections and education with approximately half showing statistical superiority and the other half showing almost no difference); JOAN NUFFIELD, *PAROLE DECISION-MAKING IN CANADA: RESEARCH TOWARDS DECISION GUIDELINES* 12 (1983). See also Andrew Vachss, *Parole as Post-Conviction Relief: The Robert Lewis Decision*, 9 *NEW ENG. L. REV.* 1, 20–27 (1975).

310. LLOYD E. OHLIN, *SELECTION FOR PAROLE: A MANUAL OF PAROLE PREDICTION* 23 (1951).

311. E.W. Burgess, *Factors Making For Success or Failure On Parole*, in *THE WORKINGS OF THE INDETERMINATE-SENTENCE LAW AND THE PAROLE SYSTEM IN ILLINOIS* (Andrew A. Bruce et al. eds., 1928).

312. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME* (1967).

313. NUFFIELD, *supra* note 309, at 14.

314. *Id.*

315. Anne M. Heinz et al., *Sentencing By Parole Board: An Evaluation*, 67 *J. CRIM. L. & CRIMINOLOGY* 1, 2 (1976).

that risk was the Salient Factor Score (SFS).³¹⁶ The SFS was an instrument originally developed from Burgess's 1928 study of three Illinois correctional facilities.³¹⁷ Burgess crafted a twenty-one-factor test used to grade inmates with the purpose of determining the likelihood of parole success.³¹⁸ In the 1970s, Peter Hoffman, then director of research at the United States Board of Parole, crafted and implemented the SFS³¹⁹. The SFS included only nine out of the original twenty-one selection criteria and has recently been determined to be a better predictor of recidivism than the U.S.S.C.'s use of the Criminal History Category (CHC).³²⁰

The use of a statistical tool modeled after the actuarial tables of Burgess and the SFS could be employed in order to: (1) predict the likelihood of recidivism for individual petitioners; (2) create a uniform risk assessment tool based on codified eligibility criteria; (3) allow for transparency; and (4) collect data for future recidivism studies as well as investigate successful integration strategies. As with all statistical tools, this model has advantages and disadvantages.

The problems with the prediction tables are inherent in any statistical approach. A perfect statistical model would take the uncertainty out of the equation.³²¹ However, prediction tables are rarely 100% efficient.³²² Human behavior and environmental pressure may never be totally captured by predictive analysis.³²³

a. Eligibility Criteria

Eligibility criteria should be modeled after the best predictive factors of recidivism. The most useful information will be obtained through up-to-date studies tracking recidivism for specific cohorts. This data will serve to inventory characteristics of successful release. In addition, studies conducted by Burgess to Lloyd Ohlin and Peter Hoffman are rich in information regarding best predictive factors. Reassessing this information could potentially provide a spring board for a new statistical

316. Peter B. Hoffman, *History of the Federal Parole System: Part 2 (1973–1997)*, 61 FED. PROBATION 49, 49 (1997).

317. Burgess, *supra* note 311.

318. *Id.* at 221.

319. Hoffman, *supra* note 316, at 49–52.

320. MEASURING RECIDIVISM, *supra* note 6, at 1–2, 12 (explaining that the SFS was designed to measure only recidivism while the CHC was used to measure recidivism and reflect offender culpability).

321. NUFFIELD, *supra* note 309, at 14–15.

322. *Id.*

323. *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 203

model. The use and success of previous statistical tools, such as the SFS and CHC, should also be analyzed. Taken together, this should be enough information to construct an up-to-date statistical tool used for the dual purpose of predicting the likelihood of recidivism in the context of expungement and also serving as eligibility criteria for a potential petitioner.

4. Clinical Judgment

While statistical models of prediction fare better than clinical judgments, it would be an error to discount the value in human opinion. Human judgment could contribute in those borderline, “hard-to-tell” cases: those cases where an individual falls within a statistical range where the likelihood of recidivism could go either way. With this, a Second Act Commission could be created and called on to determine those cases on a case by case basis and through a codified hearing procedure. Such a Commission should consist of a diverse mix of persons and have an odd number of members. They could serve as hearing officers in those intermediate cases, allowing individuals to present themselves before making a determination on the petition. The Second Chance Advisory Group could research and experiment with different systems until it has discovered the best and most effective system to break the cycle of criminal recidivism, preferably by giving non-violent federal offenders the opportunity of a clean slate.

B. Concerns with Expungement

At this juncture, there are many questions and concerns with respect to a federal legislative expungement program. One question regards the right of the public to inspect public records. The Supreme Court provided guidance on this issue in *Nixon v. Warner Communications, Inc.*³²⁴ In that case the court firmly asserted, “that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.”³²⁵ While it is America’s practice to allow the copy and inspection of public documents, it is not an unlimited right. There are also individual privacy rights that should be respected and balanced. “It is the unwarranted invasion of individual privacy which is reprehended and to be, so far as

324. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589 (1970).

325. *Id.* at 1312.

possible, prevented.”³²⁶ These two rights should be balanced in order to maximize the benefit to American society.

Another argument asserts that expunging a criminal conviction would also prevent employers from obtaining a full and accurate history of prospective employees. Wanting to know the criminal background of individuals who will have expansive access to cash registers and retail merchandise is a legitimate concern. However, an expungement program would serve as a character screening tool for society in general. Moreover, there must be some point where the law recognizes the individual’s “right to be let alone.”³²⁷ After expungement, an individual should be allowed to pick up where he left off without intrusions into his past. He is to begin anew with a clean slate.

An expungement system may encounter problems on a different front. Many private companies have entered the criminal records business by “mining” criminal information from state systems.³²⁸ These companies then turn around and sell this information to anyone for a price.³²⁹ Expunging an individual’s criminal history may not prevent this information from being completely out of public reach. Private ownership of this information could cause major intellectual property, constitutional, and contractual issues. This is an issue that the Second Chance Advisory Group would be charged with resolving.

C. Summary

While Congress has implemented legislation aimed at providing employer incentives for hiring ex-offenders, it has fallen short of successfully integrating individuals back into mainstream society. It has especially failed to manage reentry for federal ex-offenders. The creation of a Second Chance Advisory Group could begin the process of resolving the pressing issues of over-incarceration, federal offender reentry, and collateral consequences. As noted above, the first step begins with empirical studies aimed at investigating current federal recidivism trends, successful state reentry programs, and general attitudes toward non-violent offenders and expungement. With the data collected from these studies, the Second Chance Advisory Group can provide Congress with guidance and a variety of recommended

326. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 214 (1890).

327. *Id.* at 193.

328. John Geffen & Stefanie Letze, *Chained To The Past: An Overview of Criminal Expungement Law In Minnesota – State v. Schultz*, 31 WM. MITCHELL L. REV. 1331, 1334 (2005).

329. *Id.*

2010] *EXPANDING EXPUNGEMENTS AND PARDONS* 205

legislative initiatives to address non-violent offender reentry.

VI. CONCLUSION

It is understood that in civilized nations criminal law and prison serve an important purpose—they punish criminal behavior. In America, the punishment does not end after imprisonment. Federal and state regulations continue punishment long after release. This works to bar ex-offenders from employment, education, housing, and participating in the political process, forcing the ex-offender to take part in the criminal underworld for money, social acceptance, and community engagement. This typically results in a return to prison and loss of opportunity. The cycle of criminality perpetuates itself while the costs of incarceration soar.

While not a perfect system the creation of a Second Chance Advisory Group, could begin to provide answers and offer remedies to a number of different concerns. This group would have the resources to conduct thorough empirical studies regarding the issues confronting federal ex-offenders while simultaneously combing the country for successful evidence-based programs to emulate and implement as part of the federal criminal justice system. As demonstrated in Part III, pardons are symbolic and judicial petitions are rare. Currently, there is no legal mechanism available to non-violent federal offenders to clear their names even after decades of productivity and law-abiding conduct.

America, hailed the “land of second chances,” appears to be a rhetorical myth to the millions of Americans that have served their time in the federal penitentiary only to be black-balled from American society. Incarceration and recidivism are no longer a sustainable option not only for ex-offenders but for the national economy as well. Something must be done to resolve this issue, and Congress is the branch that must lead the charge.