BUILDING AN EMPLOYMENT BRIDGE

Making Ex-Offenders Marketable, Getting Employers to the Table, and Increasing the Likelihood of an Employment Connection

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Abstract

If an ex-offender lies about their criminal record on a job application, there is a risk of being fired if their criminal record is later discovered. If an ex-offender is honest and discloses their criminal record, there is a risk of not getting the job in the first place. Various strategies--financial incentives, erasing of criminal records after demonstrated rehabilitation, certificates of rehabilitation issued by the state, and third-party intermediaries--can make ex-offenders more marketable and employers more willing to hire ex-offenders.

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PROLOGUE

Somewhere in California, a middle-aged Ex-Offender is released from prison. The Ex-Offender was in prison for five years due to a felony conviction. Back in his twenties, the Ex-Offender was also convicted of two misdemeanors and served short prison terms. During his recent prison stint, the Ex-Offender was a model prisoner. He never got into any trouble and worked hard to rehabilitate himself. He completed several in-prison programs and even earned his GED. His criminal past is behind him and he is ready to become a productive member of society. With the help of his relatives, he is able to find an apartment and pay the first month's rent. But in order to make ends meet, he needs to find a job. He is nervous about his criminal past; in this tight job market, he is worried it will scare off employers.

Somewhere else in California, an Employer is hiring. She has one job opening and expects to fill it quickly. She is not expecting tons of applicants, but hopes to have enough to allow her to be somewhat picky when filling the position. The job requires frequent interaction with people and access to a cash register. Because of this, she is looking for someone who has good people skills and is trustworthy. She has created an application for prospective employees to complete before they come in for an interview. On the application there is a question that asks the applicants about their criminal history.[1] The Employer feels that a criminal past is highly relevant and has reservations about hiring someone with a checkered past. She feels uncomfortable with criminals talking to her customers and she is not sure she could trust a criminal with handling the cash register.

[1] The application resembles the attached job application used by Jamba Juice—a fresh-fruit smoothie chain with over 200 locations in California. The attached application was obtained directly from a Jamba Juice location in December of 2005.

The Ex-Offender sees a "Now Hiring" sign in the Employer's window. He goes into the store and asks for an application. The Employer tells him to fill out the application and then they will take it from there. Later that night, while reading over the application, the Ex-Offender comes across the question about criminal history. The Ex-Offender feels uncomfortable and is unsure about what to do. He knows his criminal past is behind him, and he wants to answer every question completely and honestly. But the application asks about *any* conviction he has ever received—*even* the convictions from way back in his twenties. Also, it asks about felonies *and* misdemeanors. "Why should I have to disclose *everything* about my past?" he wonders to himself. "My criminal past is behind me. And even if my recent conviction is relevant, certainly I shouldn't have to disclose my misdemeanor convictions from all those years back," he reasons. He feels that revealing his criminal past will unfairly handicap his chances of landing the job. He thinks about not disclosing everything. But he has heard that employers use investigators to compile background checks on applicants. "What if they discover I lied on my application?" he worries. Plus, his criminal past is not exactly a secret. "What if somebody tells them about my convictions?" Even if he passes the application stage, he now worries that he will be found out later. "Surely they'll fire me if they found out I lied on the application," he frets. "But if I tell them about my criminal past, they'll never hire me. It might be worth it to not fully disclose. That might be the only way I can ever get the job. What should I do?"

PART I: The Issue and California Policy

A. Issue: The Employment Rift Caused by Voluntary Disclosure of Criminal Records on Employment Applications

For an ex-offender, a job search can become a frustrating Catch-22. Nearly every employment application will ask in some fashion if a person has a criminal record. If a person lies, then they are always at risk of being terminated upon such a criminal record being discovered. If a person is honest and admits the past conduct, there is a risk of not getting the job.[2]

> [E]mployers are, in general, quite averse to hiring ex-offenders, indeed, they are more reluctant to hire them than workers from virtually any other disadvantaged or stigmatized group. The severe skill deficiencies and other personal limitations of ex-offenders, such as substance abuse problems, would certainly limit their employability even without having offender status. But this status then makes them even less employable, as employers fear the legal liabilities that could potentially be created by hiring offenders, and as they view their offender status as a signal of lack of reliability and trustworthiness.[3]

Most experts believe that finding employment is critical to successful reintegration—it helps ex-offenders be productive, take care of their families, and strengthen their social

[2] Lester Rosen, Criminal Records and Getting Back into the Workforce: Six Critical Steps for Ex-offenders Trying to Get Back into the Workforce, Privacy Rights Clearinghouse (2003), http://www.privacyrights.org/ar/rosencrim.html (accessed on Oct. 1, 2005).
[3] Harry Holzer, Steven Raphael, and Michael Stoll, "Can Employers Play a More Positive Role in Prisoner Reentry?" Working Discussion Paper for the Urban Institute's Reentry Toundtable, 10 (2002).

connectedness.[4] It is hard for an ex-offender to become a functional, contributing, law abiding citizen without a job. Yet ex-offenders face significant formal obstacles on the road to finding employment. Ex-offenders often do not have the requisite skills for many jobs. Parolees are often legally barred from working in certain professions such as the law, medicine, and education.[5] Many state licensing schemes make it impossible for ex-offenders to get licensed.[6] And unions will sometimes prohibit ex-offenders from joining.[7]

But even if the formal obstacles to employment are overcome, an informal obstacle will often remain. Employers will usually ask about an applicant's criminal record—be it verbally or on an application. Once the criminal record is revealed, the chances of being hired are drastically reduced.[8] "Avoidance of those with criminal records is a method frequently used by employers to screen out those with stigmatizing characteristics that could signal poor skills or reliability."[9] In fact, employers are more reluctant to hire ex-offenders than any other group of disadvantaged workers (e.g., welfare recipients, applicants with GEDs, and applicants with spotty work histories).[10] In a 2002 survey, fewer than 40 percent of surveyed employers indicated that they would "definitely" or "probably" hire ex-offenders into their most recently filled non-college job.[11] Employers who will not hire ex-offenders are most concerned about their general

[4] Joan Petersilia, When Prisoners Come Home: Parole and Prisoner Reentry 112 (2003). In the interests of full disclosure, it should be noted that there is some research indicating that "the effect of incarceration on employment is negligible, at an estimated 0%-4%." Devah Pager, *The Mark of a Criminal Record*, AJS Volume 108 Number 5, 940 (2003). These findings "standing in stark contrast to the majority of literature asserting a strong link between incarceration and employment." *Id.*
[5] Petersilia at 113.
[6] *Id.* at 114.
[7] *Id.*
[8] *Id.* at 116.
[9] Holzer at 2.
[10] *Id.* at 4.
[11] *Id.*

"trustworthiness" and "reliability" rather than anything specifically related to the crime.[12] And even if ex-offenders are hired, they are less likely to receive promotions.

So what exactly is an ex-offender supposed to do when asked to disclose a criminal record on a job application? An employer is justifiably concerned that an ex-offender might have the propensity to commit more crimes. But the rest of society also has a vested interest in helping ex-offenders obtain and maintain employment.[13]

B. Existing California Policy Concerning Employment Applications

If employers want to ask applicants about their criminal histories, California law is not much of an impediment—there is no general prohibition on asking, only a few restrictions on what you can ask about. In California, employers *may not* ask applicants to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in a conviction, or participation in pretrial or posttrial diversion programs.[14] Employers also *may not* seek from any source, or utilize as a factor in determining employment conditions (hiring, promotion, termination, etc.) any record of arrest or detention that did not result in a conviction, or any record regarding participation in pretrial or posttrial diversion programs.[15] There are no restrictions on how far back an employer may go when asking about convictions (although, third-party background screening firms *are* restricted).[16]

[12] Petersilia at 116-17.
[13] Rosen 2003.
[14] Cal. Lab. Code § 432.7(a) (2005).
[15] *Id.*
[16] Lester Rosen, *Criminal Records, Employment and Employment Applications*, Employment Screening Resources (2005), http://www.esrcheck.com/articles/crime_and_employment_application.php (accessed on Oct. 1, 2005)

When it comes to misdemeanors, employers *may not* ask applicants to disclose a misdemeanor conviction if probation was completed and the case was dismissed.[17] Further, employers *may not* ask applicants to disclose misdemeanor convictions relating to certain minor marijuana offenses that are older than two years.[18]

Employers *may* ask applicants about arrests for which the applicant is currently out on bail or on his/her own recognizance pending trial.[19]

Health facilities *may* ask applicants who will have regular access to patients to disclose information regarding arrests for sex offenses.[20] Health facilities *may* also ask applicants who will have access to drugs to disclose information regarding arrests for controlled substance offenses.[21]

Should an ex-prisoner fail to disclose a criminal record, the denial of the job can be based upon that very lack of honesty, even if the underlying offense was trivial.[22]

Ex-prisoners do not have to disclose convictions that have been expunged. Expunging is the cleansing of one's criminal record, or the sealing and destruction of arrest and conviction information.[23] The California Penal Code says that in any case in which a defendant fulfills the conditions of probation for the entire probation period, or in any other case in which a court (in its discretion and the interests of justice) determines that a defendant should be granted expungement, the court shall dismiss the accusations against the defendant and the defendant

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[17] Lester Rosen, *Employers Sometimes Pardon a Conviction*, California Job Journal (2002), http://www.jobjournal.com/article_full_text.asp?artid=440 (accessed Oct. 1, 2005).
[18] Cal. Lab. Code § 432.8.
[19] *Id.* § 432.7(a).
[20] *Id.* § 432.7(f).
[21] *Id.*
[22] Rosen 2002.
[23] Darren Kavinoky, *Expungement*, NoCuffs.com (2005), http://www.nocuffs.com/expungement/expungement101.html (accessed on Oct. 1, 2005). For a more developed discussion of expungement, *see infra* Part II. E. 1.

shall be released from all penalties and disabilities resulting from the conviction.[24] Once expungement has been granted, the ex-prisoner can lawfully state on a private job application that they have not been convicted of that crime.[25]

C. Importance to California Crime Control

It is unlikely that any party is making the argument that the disclosure of criminal records on job applications will directly control crime itself in any appreciable way. But there is a legitimate reason behind employers inquiring about applicants' criminal records. Employers are under a legal duty to make reasonable inquiries into their prospective employees and to provide a safe workplace.[26] Employers fear that they will face legal liability if they hire the ex-offender and the ex-offender commits a new crime.[27] The doctrine of negligent hiring attaches liability to employers that knew, or should have known, that an employee had a history of criminal behavior.[28] Employers have been hit with large jury verdicts,[29] for both compensatory damages (loss, pain, and suffering) and punitive damages.[30]

Ex-offenders are also less likely to be hired for jobs that require working directly with customers or handling the property of others.[31] This is likely due to employers' concerns about ex-offenders' stigma and lack of trustworthiness and reliability. This concern ties in closely with safety concerns. Employers might feel that simply having an ex-prisoner around makes their

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[24] Cal. Penal Code § 1203.4.
[25] Kavinoky
[26] Rosen 2005.
[27] Petersilia at 117.
[28] *Id*. Ordinarily, an employer's reasonable efforts to check and consider a prospective employee's background will generally satisfy the legal requirements and eliminate the risk of liability on the employer's part. National H.I.R.E. Network, *Negligent Hiring Concerns*, http://www.hirenetwork.org/negligent_hiring.html (accessed on Jan. 21, 2005).
[29] Rosen 2003.
[30] Petersilia at 117.
[31] *Id.* at 118.

environment, their customers' environment, and their community unsafe.[32] Again, employers have a legitimate reason for wanting to know about their employees' criminal background. But the problem is that "[m]any employers seem to use the information as a screening mechanism, without attempting to probe deeper into the possible context or complexities of the situation."[33] Indeed, a 2003 study verified this belief by finding that employers were unwilling to *consider* (as opposed to *hire*) equally qualified applicants on the basis of their criminal record.[34]

[32] *Id.* at 137.
[33] Pager at 956.
[34] *See id.*

PART II: Options for Confronting Issue

California has already acknowledged that the stigma attaching to a conviction (or simply an arrest, for that matter) has debilitating effects on an applicant's chances of landing a job. To this end, California is one of only eleven states that prohibit employers from asking about arrests that *did not* lead to convictions.[35] California goes further and even limits employers' ability to ask about certain minor offenses that *did* result in convictions. Federal law adds another layer of protection for offenders—employers cannot deny employment based solely on the presence of a conviction.[36] Before denying employment based on a conviction, employers must examine whether there is a sound business reason not to hire by examining whether the offense is job-related, when it occurred, and what the applicant has done since then.[37] To the extent that California employers follow the law, ex-offenders should, in theory, be free from invidious, illogical discrimination when applying for jobs. So assuming the employer asks for disclosure of a criminal record on a job application, there is *some* level of protection for applicants who fully and honestly disclose their record.

However, in reality, getting employers to overlook, or more properly, to accord less weight to, criminal convictions will require more than telling employers "you may not engage in illegal discriminatory behavior." Employers not wishing to hire ex-offenders will simply select a non-offender applicant who has the same or better credentials. If employers are to consider ex-offenders on equal terms with non-offenders, some sort of carrot is going to have to be hung out in front of them.

[35] Other states include Connecticut, Hawaii, Massachusetts. Michigan, Montana, New York, Ohio, Rhode Island, Utah, and Wisconsin.
[36] Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.
[37] *Id*.

A. Application Scenario

Imagine for a moment that an Employer looking to fill one position is faced with two seemingly equally qualified job applicants. The two are alike in every single way: educational achievement, job skills, race/gender/appearance, etc. After filling out the job application, one difference between the applicants comes to the surface: criminal history. The only difference between the two is that Applicant 1 disclosed on his application that he had been convicted of a crime 10 years ago, while Applicant 2 indicated no criminal history.[38] Imagine now that the conviction is not related to the job, but still, the Employer is reluctant to hire ex-offenders out of fear that *something* might go wrong down the line. In this case, it is easy for the Employer to avoid the risk and hire A2 (the applicant with no criminal history). For example, let us say something does go wrong in the future and A1 is at the center of it. Even if A1 is not legally at fault, the fact that an ex-offender is at the center of the incident is likely to cause the Employer (and other interested parties such as customers and the general public) considerable grief. With that bad-case scenario in mind, the Employer is almost always going to play it safe and hire A2 instead of A1. Even in cases where the qualifications of the two applicants are marginally different (assume that A1 is marginally better than A2), the Employer is still likely to hire the A2; after all, "it's better to be safe than sorry."

And the Employer's position is completely understandable—why should the Employer risk headaches, bad press, and lost profits to hire an ex-offender when there are other options available? Whether the Employer *should* or *should not*, business concerns dictate that the Employer probably *will not*.

[38] For the purposes of this scenario, assume that Applicant 2 is honest about his record and is indeed conviction free.

B. Tax Breaks

Many employers (private employers, for the most part) are, among other things, motivated by the desire to turn a profit. The layman's perception is that ex-offenders make bad applicants. Ex-offenders have cheated, lied, and robbed before—what's to stop them from doing it again, this time to the detriment of the firm? Customers and clients are likely to feel less comfortable around ex-offenders. In short, the argument goes, ex-offenders are "bad" for business. So how then to make offenders "good" for business? Imagine now the A1/A2 scenario described above. But this time, imagine that the Employer's calls about the risk of lost profits have gone heeded. A mysterious Benefactor steps into the picture and tells the Employer that he is willing to compensate the Employer for the risk of loss that the Employer must bear. The Employer and the Benefactor sit down with their accountants and discuss terms. The Employer imagines a bad-case scenario and figures that he stands to lose $X if A1's recidivism proves to be a liability. The Employer asks the Benefactor to give him $X (or $X+) before he will hire A1. The Benefactor counters by saying that this deal is unfair. While it is true that the Employer stands to lose $X if A1 recidivates, there is a good chance that A1 will not recidivate. The Benefactor and the Employer agree that the chance that A1 will recidivate is Y%. If the Employer were to get $X for every offender hired, the Employer would reap a windfall every time the offender does not recidivate. Instead, the Benefactor discounts $X by Y% to arrive at $Z. $Z reflects the expected value of the Employer hiring A1. In order for the Employer to "profit" (or at the very least, break even) from hiring A1, the Employer needs to receive $Z. The two agree that the Benefactor will pay the Employer $Z.

While this scenario is oversimplified, the thrust of the idea might work. The Benefactor is the government and employers receive value in the form of tax breaks. A handful of states, including California, are already trying this.[39] This idea can be implemented at both the state and federal level.

For administrative ease, the government might give a uniform tax break to any business that hires ex-offenders, regardless of the number of ex-offenders it hires. Or it might choose to increase the break for businesses that hire more x-offenders—the more ex-offenders the business employs, the more of a tax break the business gets. A graduated increase might serve to get more ex-offenders hired because it provides an economic incentive to hire more than one ex-offender. If the tax break remained constant, businesses hiring just one ex-offender would be rewarded on par with businesses employing multiple offenders.

One major selling point of this potential solution is that it makes use of the language of business owners—money. Businesses can see exactly how much more they are making, or in this case, how much they are saving through tax breaks. And the financial savings are easy to calculate no matter how the government bestows the tax break. With a constant tax break, be it in the form of a credit or a deduction, a business can say with relative certainty how much it will save—"because we hired an ex-offender, we only have to pay taxes on $X of our profit," or "because we hired an ex-offender, our tax liability is $X less." And with a graduated tax break, the calculation is not that much more complicated.

There are several potential pitfalls to this solution. First, the government must ensure that the tax break is big enough so as to make it worthwhile for employers to hire offenders. For

[39] National H.I.R.E. Network, *State Tax Incentives to Benefit Employers Who Hire People with Criminal Records*, http://www.hirenetwork.org/state_tax_credits.htm (accessed on Nov. 1, 2005). Other states include Louisiana, Maryland, Texas, and Iowa. *Id.*

example, if the employer's expected loss[40] is $X and the government offers a tax break valued at $<X, an economically rational employer would not hire the ex-offender. Further, the government must ensure that any tax break of $>X is sweet enough to entice the employer to hire an ex-offender. If an employer's expected loss is $X, a tax break of $X+1 hardly seems like much of an offer. Risk averse employers will fear that the actual loss might exceed the forecasted loss and are unlikely to hire an ex-offender (and deal with the fallout should recidivism occur) for merely minimal savings.

A second pitfall is abuse of the system by employers. Employers, recognizing that they can increase their saving by hiring ex-offenders, might be tempted to stockpile ex-offenders on their payroll. At first glance, this does not seem like a bad situation—jobs for ex-offenders is the goal of this policy. And it might very well be a legitimate situation. But the potential for abuse cannot be overlooked. An employer might go overboard hoping to wipe out their entire tax liability. If this happens, the business would not contribute any (or very little) money to the state or federal tax fund. But whether or not that is a problem is debatable—perhaps the business is contributing non-pecuniary value by its employment of ex-offenders in the first place.

A third problem, closely related to the second, is that some businesses (due to their line of business) are prohibited from employing ex-offenders at all. *Supra* Part I.A. These businesses will be unable to avail themselves of the benefits of tax breaks that other businesses will enjoy and might cry foul.

C. Bonding

A second potential solution is bonding. Bonding is the insuring of employers in case of theft, forgery, larceny, or embezzlement of money or property by an employee who is covered by

[40] Expected loss = ($ lost as a result of recidivism) x (risk that offender will recidivate).

the bond.[41] Some employers demand that certain employees such as cashiers be bonded before they are hired. Both private bonding organizations and the government can provide the bonding. Many private bonding organizations will not bond offenders because they are categorized as "at-risk."

At this point in time, the state of California does not offer a bonding program of its own. But the federal government has stepped in and provides the Federal Bonding Program (FBP). The FBP bonds employees who have been offered a job conditioned upon being bonded, even when private companies have denied bonding.[42]

Bonding can help achieve the goal of employing more ex-offenders because it puts at ease employers who are concerned with the trustworthiness of ex-offenders (or non-offenders for that matter). An employer may opt to not hire an ex-offender for certain positions out of fear that the ex-offender will steal from the company. Bonding provides a safety net for the employer in case the ex-offender does recidivate.

But like tax breaks, bonding does not appear to be a panacea either. Most noticeably, bonding has its financial limits. At no charge to the employer or employee, the FBP will insure employees for up to $10,000 depending on the nature of the job for a maximum of six months.[43] After six months, the bond can be renewed through the FBP.[44] But there is a catch—after six months the employer or employee must pay for the bond.[45] Also, there are a limited number of bonds available each year through the FBP.[46]

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[41] National Hire Network, *Federal Bonding Program*, http://www.hirenetwork.org/fed_bonding.html (accessed on Nov. 1, 2005).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*
[46] *Id.*

Bonding also appears to have limits when it comes to the scope of activities covered. While bonding covers theft, forgery, embezzlement, and crimes of that ilk, it does not necessarily cover a wider range of other criminal or merely tortious behavior. Employers' fears that an ex-offender is more prone to tortious behavior are not always alleviated by bonding. An employer will be protected if an ex-offender decides to steal from the company coffers, but what if an offender is negligent and involved in an automobile accident? And what if bonding is simply not available? Many private bonding companies will not issue bonds for ex-offenders, a practice that courts have allowed.[47]

D. Insurance

Closely related to tax breaks and bonding is insurance. Insurance, like the first two solutions presented, appeals to an employer's desire to avoid financial loss. Where bonding might leave large pockets of activity unprotected, insurance can step in and fill in the gaps. It is likely that many companies already use insurance to secure against financial loss caused by an ex-offender. To the extent that insurance companies resist insuring ex-offenders, any move away from this position toward a more expansive reach would likely increase the number of employers willing to hire ex-offenders.

How likely is this to happen? It all depends on the willingness of insurances companies to underwrite a policy for an at-risk ex-offender. Ex-offenders convicted of less serious crimes and crimes that do not evince a character of moral turpitude probably pose a less serious risk for insurance companies. Insurance companies are more likely to underwrite a policy for these ex-offenders. To the extent that ex-offenders have been convicted of more serious crimes that

[47] Petersilia at 114.

evince an untrustworthy character, insurance premiums can reflect that risk. But this leads to another problem: who will pay the insurance premiums?

E. Erasing Criminal Records

Imagine now the hypothetical posed under Part II.A. where two applicants, A1 and A2, are both applying for the same job. The Employer asks the two applicants a question about their criminal record. Again, A1 has a criminal record and A2 does not. A1's conviction came 10 years earlier and he has been a model citizen since then. What if A1 could legally conceal his criminal record? A1 would now be on equal footing with A2, and A1's chances of obtaining employment would in no way hinge on his criminal past. Allowing ex-offenders to in essence "erase" their criminal past seems anathema to the belief that a criminal record is a strong predictor of future criminality. How are employers supposed to guard against risks posed by ex-offenders when the employers do not even know who the offenders are?

"To be sure, there are valid reasons for wanting to know the criminal backgrounds of persons with whom we come in contact [, but]. . . . [t]here must be a better way simultaneously to protect the public . . . while not imped[ing] offenders who wish to go straight."[48] In fact, California already allows ex-offenders to "erase" their criminal record—albeit with strict limitations.

1. Expungement

The first of these erasing procedures is expungement. "Expungement is a limited remedy that . . . results in a notation to the rap sheet indicating that the conviction has been 'dismissed [in] furtherance of justice.'"[49] California law allows for the expungement of most adult

[48] Petersilia at 216.
[49] Legal Action Center, *Employment Discrimination and What to Do About It: A Guide for California Counselors of Individuals with Criminal Records or in Recovery from Alcohol and*

misdemeanor and felony convictions.[50] While expungement does not seal criminal records, it does allow ex-offenders to answer "no" on job applications when asked about convictions.[51]

The expungement process differs in California depending on two factors: the level of the crime and the court in which the crime was charged. For a misdemeanor, if probation is successfully completed, an ex-offender may apply directly to the courts for expungement.[52] If probation has not been completed, an ex-offender may petition for expungement but is required to attend an in-court hearing.[53] If the ex-offender was never sentenced to probation in the first place, the ex-offender must wait one year from the complete of the sentence before applying for expungement.[54] For a felony, the ex-offender can file directly for expungement.[55] However, convictions of non-wobbler felony offenses without probation as part of the sentence are not eligible for expungement.[56] Further complicating the equation is the fact that each court may set up its own procedure for granting expungements.

Expungement in California certainly has its limits. First, certain convictions, such as failure to obey a police officer or certain sex offenses cannot be expunged.[57] Second, even if a conviction is expunged, offenders may be required to disclose them if asked about them by certain employers. Ex-offenders must disclose expunged convictions when applying for positions

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Drug Dependence, at 19, http://www.hirenetwork.org/pdfs/050542_ca_disc.pdf (accessed Nov. 1, 2005).

[50] Cal. Penal Code §§ 1203.3-.4.

[51] Legal Action Center at 19.

[52] *Id.* at 20.

[53] *Id.*

[54] *Id.*

[55] *Id.* Felonies in California are divided between non-wobblers and wobblers; for a wobbler felony conviction, an offender can file a petition to both reduce the offense to a misdemeanor and have the conviction expunged. *Id.*.

[56] *Id.* at 19.

[57] *Id.* Also ineligible for expungement are convictions with outstanding fees or restitution and current or expected charges for any criminal or serious traffic offense. *Id.*

with law enforcement, health care facilities, financial institutions, public employment, and occupational licenses.[58] Further, expungement *does not* erase the conviction from the rap sheet, so anybody who has access to rap sheets will see expunged cases.[59] This might cause some ex-offenders to disclose convictions, (even, when legally, they do not have to) out of fear that their employers will learn about their convictions by accessing their rap sheets.

An ideal expungement system would have a uniform, state-wide system put in place. As it stands now, each court in California can establish its own system. With a uniform system, the rules everywhere will be the same. Agencies and attorneys that work with ex-offenders to have their convictions expunged will be more efficient and the whole process will become more streamlined.

2. Sealing

But expungement only goes so far—the criminal history is still on the rap sheet that employers can access. What if A1 could go further and get the criminal history information altogether removed from the rap sheet? In California, this is actually possible—albeit with incredibly strict limitations—in the form of sealing. Having a case sealed means that criminal history information is erased from the version of the rap sheet that employers can see.[60] If the criminal history does manage to get sealed, the physical record is usually destroyed, but a confidential file will remain on state Department of Justice computers indefinitely.[61] In California, sealing is possible only for *arrests* that did not lead to convictions and juvenile ward of the court orders.[62] And even juvenile convictions will not be sealed if they involved certain

[58] Cal. Lab. Code § 432.7
[59] Legal Action Center at 19.
[60] *Id.* at 20.
[61] *Id.*
[62] *Id.*

violent or sex offenses, felonies or misdemeanors of moral turpitude, or if the case was transferred from juvenile court.[63]

This, in essence, means that no adult *convictions* (as opposed to arrests) can be sealed. In other words, there is no way for an adult ex-offender to ensure that an employer will never see his convictions. Sure, if the case only led to an arrest, and not a conviction, sealing is possible. But what of *actual* convictions? Sealing in California does not appear to be a viable option for those ex-offenders wishing to erase their convictions.

And as for those cases that are eligible, ex-offenders are deterred from pursuing sealing because the process is so burdensome. Much of the process hinges on whether an indictment[64] is filed.[65] Generally, an ex-offender must petition for sealing within two years of the arrest.[66] If an indictment *has not* been filed, the ex-offender must contact the law enforcement agency that made the arrest and a hearing is generally not required.[67] The records will be sealed for three years from the date of arrest and then be destroyed if the individual is found "factually innocent."[68] A denied petition may be appealed.[69]

If an indictment *has* been filed, the offender must contact the court that dismissed the indictment and a hearing is required.[70] A judge decides whether to approve the sealing petition.[71] If the ex-offender is found "factually innocent," the court will order the state Department of

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[63] *Id.*
[64] An indictment is a "formal written accusation of a crime . . . presented to a court for prosecution against the accused person. Black's Law Dictionary 344 (2nd pocket ed. 2001).
[65] Legal Action Center at 21.
[66] Cal. Penal Code § 851.8.
[67] Legal Action Center at 21.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*

Justice to remove the criminal record from the rap sheet and the record will be destroyed three years later.[72] Again, a denied petition may be appealed.[73]

3. Purging

What if A1 could go even further and insure that his convictions could never be released under any circumstances? This time, there would be no confidential file on the DOJ's website. All records are destroyed and no records are retained.[74] In California, ex-offenders can get certain minor marijuana arrests and convictions purged from their records.[75] Purging is automatic for some offenses[76] and not automatic[77] (offenders must apply to the state Department of Justice to have their records purged) for others.

Purging has an obvious benefit—it allows for the complete erasure of a criminal record. An ex-offender can forever be free of the taint of a criminal record if it is purged. The ex-offender need not worry that someday the record will be revealed. Quite simply, the record no longer exists. And for this very reason, purging has an obvious downside. Some will argue that a criminal record, no matter how trivial, should never be permanently erased. Expunged? Yes. Sealed? Yes. But purged??? Never.

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[72] *Id.*
[73] *Id.*
[74] *Id.* at 22.
[75] *Id.*
[76] Records *will be* automatically purged two years after an arrest or conviction, after January 1, 1976, for (1) possession of less than 28.5 grams of marijuana; or (2) unauthorized transportation, sale, or giving away of less than 28.5 grams of marijuana. Cal. Health & Safety Code §§ 11357, 11360-11361.5.
[77] Records *will not be* automatically purged after an arrest or conviction, before January 1, 1976, for (1) possession of less than 28.5 grams of marijuana; (2) unlawful possession of marijuana paraphernalia; (3) unlawful presence in a place where marijuana is being used; or (4) unlawfully being under the influence of marijuana. Cal. Health & Safety Code §§ 11360-11361.5, 11364, 11365, 11550.

But at this point, in California, purging appears to be somewhat of a non-issue because of its extremely narrow reach. If purging, the only true "erasing" of a criminal record, is to become more of a viable option, it needs to be expanded to encompass more offenses. As it stands now, unless a marijuana offense is at issue, purging is not even an option.

4. English Style Laws

How have other countries dealt with "erasing" criminal records? In many other countries, *all* criminal offenses become "spent" after specified rehabilitation time periods.[78] England's rehabilitation laws, which are actually more stringent than the rehabilitation laws of most other countries, are still generous when compared to the rehabilitation laws of California.[79] Under England's Rehabilitation of Offenders Act, "[a]n ex-offender who becomes a 'rehabilitated person' is treated for all purposes in law as 'a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for' the offense."[80] The Act enables many criminal convictions to become spent or ignored after a period of rehabilitation time has elapsed from the date of the conviction, provided that no felony convictions occur during this time period.[81] Should another felony conviction occur, neither conviction becomes spent until the rehabilitation periods for both offenses have elapsed.[82] The rehabilitation period is determined by

[78] Petersilia at 217-18. England, Ireland, and Germany are exceptions to this general rule. *Id.* at 218.
[79] *See id.* at 217-19.
[80] *Id.* at 217.
[81] *Id.*
[82] *Id.* at 218. Subsequent misdemeanor offenses do not affect the rehabilitation period of the first offense. *Id.*

the sentence imposed by the courts, not the type of offense committed.[83] A prison sentence of 2.5 years or more precludes the conviction from becoming spent.[84]

After the rehabilitation time period has elapsed, the criminal record is "put entirely in the past and the slate wiped clean."[85] Ex-offenders are no longer required to mention neither their convictions nor their arrests when asked directly about their criminal records.[86] Should an employer somehow find out about the spent criminal record of an employee, the Act forbids the employer from using that information as a grounds for firing or not hiring an employee.[87]

The benefits of English law are obvious. Like the "erasing" methods that California already has in place, English law allows an ex-offender to move beyond their criminal record after a certain period of demonstrated good behavior. English law goes even further by providing a relatively simple and lucid scheme.[88] Provided the sentence is under 2.5 years, the rehabilitation period begins automatically and the ex-offender knows exactly how long he will have to avoid criminal activity in order to get his record spent. This is in stark contract to existing California law which generally allows each court or jurisdiction to establish its own, often complex, process.[89] When an ex-offender has clear notice of exactly when his rehabilitation period starts, exactly how long it will last, and exactly what behavior to avoid, the ex-offender is likely to rely on the law and structure behavior accordingly. It is likely that ex-offenders in California will experience a sense of hopelessness when confronted with the

[83] *Id.* Prison sentence of 6 months to 2.5 years: 10 year rehabilitation period. Prison sentence of 6 months or less: 7 years. Fines, probation, community service, drug treatment/testing: 5 years. *Id.* at 219.
[84] *Id.* at 218.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *See id.* at 217-19.
[89] *See supra* Part II, E., sec. 1-3.

complicated requirements and procedures of "erasing" their record in California. If putting one's criminal past behind them is not seen as a workable option, fewer ex-offenders are likely to try and move beyond their status as criminals.

Still, there is a downside to England's Rehabilitation of Offenders Act. And this downside applies as well to California's "erasing" options. There are those who will validly argue that "erasing" a criminal record is not prudent—that it somehow erases the truth. After all, the ex-offender committed the crime, and they should have to live with the agreed upon consequences. Employers may feel that they have a right to know the criminal history of their employers—that it should be up to them whether to hire an ex-offender or not. After all, they are the ones who will have to deal with any fallout should an ex-offender recidivate.

F. Certificates of Rehabilitation

Let us go back to the imaginary scenario posed under Part II.A., where two applicants, A1 and A2, are both applying for the same job. The Employer asks the two applicants a question about their criminal record. Again, A1 has a criminal record and A2 does not. A1's conviction came 10 years earlier and he has been a model citizen since then. And for whatever reason, A1 was not able to get his criminal record "erased" under any of the options discussed in Part II.E. What is A1 going to do now? A1 wants to be truthful when answering questions. But at the same time, A1 does not want the 10-year-old conviction to unfairly prejudice his chances. Is there another option other than lying? A1 wishes there was some way to reveal the truth while at the same time lessening the sting of the criminal conviction. A1 thinks it would be helpful to present some kind of certificate from the state that tells the Employer that the state vouches for A1 and lets the Employer know that A1 is a rehabilitated person—that A1 has demonstrated exemplary behavior since the conviction.

These certificates, while not perfect, can go a long towards making an ex-offender more attractive to an employer and an employer more likely to hire an ex-offender. An actual paper certificate can issue to the ex-offender so that the ex-offender can have the certificate on their person at any time, especially during job interviews. Further, to prevent fraud, there should be some sort of process by which employers can contact the state directly to verify the validity of an ex-offender's certificate.

There is not any magic combination of words on the certificate that will work to alleviate the concerns of all parties involved. The certificate can range from a barebones one-pager to a detailed multi-paged tome. A most basic certificate would contain the name of the ex-offender, a state seal, and some indication that the ex-offender is rehabilitated for purposes of a certain conviction. A more detailed certificate might, in addition, include *all* the convictions for which an ex-offender is considered rehabilitated. A more detailed certificate might also include some sort of activity list or mini-biography of an offender in order to provide more positive information to the prospective employer. Ex-offenders could list positive accomplishments from their life before, during, or after prison as long as they can convince the state that the accomplishments actually occurred.[90] Regardless of the wording chosen, certificates should all work towards the same goal—letting employers know that, despite the presence of a conviction, the ex-offender has demonstrated to the state (the very party that issued the conviction) that rehabilitation has occurred.

[90] This "activity list" idea was endorsed by Jeanne Woodford, the California Undersecretary for the Department of Corrections & Rehabilitation, during her visit to Stanford Law School on November 9, 2005. Undersecretary Woodford spoke of a hypothetical she posed to employers. She asked employers whether or not they would hire an ex-offender. Most replied "no." She then asked if they would hire ex-offenders who have since fought fires. Many of the employers now answered "yes." She continued to modify her question to employers by informing them of more good deeds. The further she went the more employers responded "yes."

A uniform system can be set up by the state by which ex-offenders can easily apply for a certificate. There can be a central office where all applications can be sent. A uniform set of requirements can be promulgated by the state. For example, ex-offenders should have to demonstrate a certain number of years of arrest-free behavior. The number of years might go up depending on the severity of the offense. The granting of the certificate should be automatic if the ex-offender has stayed arrest-free for the requisite amount of time. Perhaps some crimes, particularly sex crimes and violent crimes, should never allow for a certificate.

These certificates already exist in several states. In New York, they are called Certificates of Good Conduct, and are issued by some parole boards at their discretion.[91] Ex-offenders in New York who committed felonies are eligible for Certificates of Good Conduct after a minimum of three years.[92]

In California, ex-offenders may obtain a Certificate of Rehabilitation—a court order declaring an ex-offender "rehabilitated."[93] The process for obtaining a certificate in California is somewhat burdensome. Generally, Certificates of Rehabilitation will issue only for felony convictions.[94] To be eligible, first, an ex-offender must have been convicted in California.[95] Second, the conviction must have been expunged.[96] Lastly, the ex-offender must have resided at least five years in California.[97] If an ex-offender has been incarcerated for any reason since being

[91] Petersilia at 217.
[92] *Id.*
[93] Legal Action Center at 23.
[94] *Id.* Ex-offenders convicted of certain sex and violent offenses are precluded from obtaining Certificates of Rehabilitation. Petersilia at 217. Persons convicted of a misdemeanor sex offense requiring registration as a sex offender may also apply for a Certificate of Rehabilitation. Legal Action Center at 23. Generally, the number of misdemeanor convictions on an ex-offender's record does not affect eligibility. *Id.* at 23-24
[95] *Id.* at 23.
[96] *Id.*
[97] *Id.*

released from prison, the ex-offender will be ineligible.[98] Separate Certificates of Rehabilitation are needed for each felony conviction.[99] The amount of time an ex-offender must wait before applying varies by the offense.[100]

After the waiting period, the ex-offender must file a petition with the Superior Court where the ex-offender currently resides.[101] Once an application is filed the district attorney might investigate the ex-offender before submitting a report to the court.[102] A hearing is then required for the court to determine whether the ex-offender is leading "an upright and honest life" and behaving "with sobriety and industry."[103] It is believed by some that the hearing is often nothing more than a formality.[104] Barring any complications, the process usually takes several months.[105] If a certificate issues, a copy is forwarded to the Governor's office and serves as an application for a pardon.[106]

There are several benefits to issuing these kinds of certificates. First, while not perfect, they can go a long way towards appeasing employers' concerns about the trustworthiness of an employee. Employers no longer have to take just the word of the ex-offender that the ex-offender is rehabilitated. Employers can now rely on the opinion of the state that the ex-offender is rehabilitated. Second, ex-offenders themselves might feel better about their chances of obtaining employment with one of these certificates in their hands. This will make them more likely to hit

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[98] *Id.* at 23-24.
[99] Cal. Penal Code §§ 4852 *et seq.*
[100] *Id.*
[101] *Id.* In some counties, the public defender handles the application process and forms are available at the public defender's office. *Id.*
[102] *Id.* The report might include information about the ex-offender's conduct, additional crimes, and the amount of time spent residing in California. *Id.*
[103] *Id.*
[104] Legal Action Center at 24.
[105] *Id.*
[106] *Id.* For a discussion of pardons, *see infra* Part II. G.

the pavement and pursue more opportunities, therefore increasing their chances of eventually obtaining employment.

There are also a few problems with issuing certificates. First, an ex-offender with a certificate still has to deal with the fact that the employer knows about the convictions. Second, perhaps some employers, for whatever reasons, will not give the opinion of the state much credence. Lastly, there appears to be some sort of procedural or notice hurdle, in California in particular, which has made Certificates of Rehabilitation less effective. A long-time California parole officer can think of only two ex-offenders who have received Certificates of Rehabilitation in the past ten years.[107]

G. Pardons

Let us imagine again the employment scenario under Part II.A. The Employer asks the two applicants a question about their criminal record. Again, A1 has a criminal record and A2 does not. A1's conviction came 10 years earlier and he has been a model citizen since then. And for whatever reason, A1 was not able to get his criminal record "erased" under any of the options discussed in Part II.E. Like in Part II.F., A1 is able to walk into the job interview with a certificate that shows that the state vouches for A1's character. Except this time, the certificate is a little bit different. It does not just originate from the state and assert that the ex-offender is rehabilitated, like a certificate of rehabilitation does. No, this time it does more than that. This time, the certificate officially nullifies the punishment and any other legal consequences of the conviction. And to top it off, the decision to grant the certificate was made by the chief executive of the state government. If A1 is going to have to disclose a criminal record, A1 is particularly

[107] These comments were made by a California parole officer in a visit to Stanford Law School on October 12, 2005. The officer commented that he was aware of only two ex-offenders who have been able to obtain Certificates of Rehabilitation in the past ten years. These two ex-offenders were a Marine and a real estate loan officer respectively.

appreciative of this option. A1 thinks, "Hey, if I have to tell my employer about my conviction, I think I might be able to take some of the sting out of it by showing them that the Governor himself has pardoned me!"

The practical effect of this kind of certificate, or pardon, is much the same as the effect of a certificate of rehabilitation—it shows that the state vouches for the ex-offender and lets the employer know that ex-offender is a rehabilitated person and has demonstrated exemplary behavior since the conviction. But a pardon goes further in two essential ways. First, it indicates more than just rehabilitation of the ex-offender—it serves to "remedy a miscarriage of justice."[108] That is to say, pardons are usually given when an ex-offender has been found to be wrongfully convicted.[109] And second, pardons carry extra weight because they are usually granted by state governors. Pardons carry a certain aura that options such as expungement and certificates of rehabilitation lack. While the latter two options are familiar only to those well versed in the criminal justice system, laymen know what a pardon is. Most people, be it by reading the newspaper or watching the news, have at one time or another heard discussions of pardons and governors' roles in granting them. An employer is more likely to be "impressed" by a pardon than by a certificate of rehabilitation.

Pardons already exist all over the United States.[110] In many ways, a pardon might be akin to some sort of "golden ticket," but there is one big problem: getting one. Also known as executive clemencies in California, they are rarely granted and are issued only after an extensive investigation. [111] In California, ex-offenders can apply ten years after their release from prison

[108] Petersilia at 216.
[109] *Id.*
[110] *See id.*
[111] Legal Action Center at 25.

(or probation or parole) provided they have remained crime free during that time.[112] Although some do, ex-offenders *are not* required to have a Certificate of Rehabilitation in order to apply.[113] Eligible ex-offenders must apply by writing to the Governor's office in Sacramento.[114] The application must demonstrate that since release, the ex-offender has lived "an honest and upright life . . . [and behaved] with sobriety and industry."[115] The ex-offender must also "exhibit a good moral character . . . [and] conform to and obey the laws of the land."[116] It is felt that the ex-offenders application is aided by evidence of participation in community organizations, volunteer work, child care, elder parent care, and membership in religious organizations.[117]

The Governor's staff then reviews the application and determines whether the application will go forward.[118] If the application makes the cut, the Board of Prison Terms conducts an investigation before the Executive Board decides whether the application should reach the Governor.[119]

The long, complicated, and arduous process described above is the primary shortcoming of pardons—it is hard for pardons to be effective because practically nobody can get one. "Obtaining a pardon is a long and seldom successful process. [Ex-offenders] should be encouraged to focus first on obtaining [other relief], rather than pursuing an almost certainly fruitless attempt to obtain executive clemency alone."[120] "For all practical purposes, pardons are

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[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] Cal. Penal Code § 4852.05.
[116] *Id.*
[117] Legal Action Center at 25.
[118] *Id.*
[119] *Id.*
[120] *Id.* at 26.

irrelevant for most inmates coming out of prison today."[121] In 1999, the federal and state governments issued only 210 pardons nationwide.[122]

H. Third-Party Intermediary

Consider again the application scenario of Part II.A. A1 and A2 are both applying for the same job. A1 has a criminal record and A2 does not. A1 plans to be honest about his past. In fact, A1 plans to have a Friend *tell* the Employer about A1's past before A1 even fills out the application. The Friend has for several years run a non-profit organization that helps ex-offenders find jobs upon getting out of prison. The Friend has many contacts with employers who are willing to hire ex-offenders. Over the years, the Friend has found jobs for several ex-offenders. The Friend is even able to provide A1 training in basic skills such as interviewing, resume building, dealing with customers, and typing. The Friend worked with A1 to evaluate A1's skills and job prospects, and then helped A1 find a match with the Employer who hires ex-offenders. Assuming a job connection is made, the Friend will work with both A1 and the Employer to provide support and get involved if any problems arise.

In this scenario, the Friend is a third-party intermediary who serves as a quasi-employment agency for ex-offenders. These agencies help businesses "hire with confidence by acting as intermediaries between the employer and the job applicant."[123] "While these programs . . . vary in the package of services they offer, they typically provide job orientation, job assessment and development, pre-employment education and/or training, and post-placement services."[124]

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[121] *Id.* at 217.
[122] *Id.*
[123] The Welfare to Work Partnership. *Individuals With Criminal Histories: A Potential Untapped Resource* at 2, http://www.lac.org/pubs/gratis/smart_solutions.pdf (accessed on Nov. 1, 2005).
[124] *Id.*

Like most of the other solutions discussed, third-party intermediaries already exist all over the country.[125] New York City's Center for Employment Opportunities (CEO) helps ex-offenders "prepare for, find, and keep jobs."[126] The CEO uses a two-step process. First, its participants are placed in the Neighborhood Watch Program (NWP) where they are offered immediate short-term employment as day laborers.[127] The NWP provides general building maintenance and ground keeping services, while at the same time emphasizing basic work skills like getting to work on time.[128] And second, CEO participants are involved in the Vocational Development Program (VDP) where they attend a week-long life skills and pre-employment workshop.[129] VDP participants learn how to create a resume, basic interview skills, and how to openly discuss their criminal records with employers.[130] CEO participants work four days a week and meet once a week with a counselor who helps them develop an employment plan.[131] CEO has been able to place its participants in more than 300 companies and boasts a placement rate upwards of 65%.[132]

Pioneer Human Services in Seattle, Washington has enjoyed similar success—the recidivism rate of its participants is less than 5%.[133] Pioneer provides jobs and social support.[134]

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[125] Examples of third-party intermediaries at work can be found in New York Washington, Illinois, and Texas. Petersilia at 196-98.
[126] The Welfare to Work Partnership at 5.
[127] *Id.*
[128] *See id.*
[129] *Id.*
[130] *Id.*
[131] *See id.*
[132] *Id. See also* Petersilia at 197 (noting that CEO placed 70% of its participants in jobs from 1992-1996 and that most of its participants are young offenders who are required to enroll as a condition of parole).
[133] Petersilia at 198.
[134] *Id.*

Pioneer differentiates itself by operating sheltered workshops for the "hard-to-place offender" and by funding itself with the profits from the businesses it runs (as opposed to grants).[135]

The greatest benefit to this potential solution is that it provides an ally to both the ex-offender and the employer. Ex-offenders no longer have to go it alone—they now have someone to stand beside them in their quest to find and maintain employment. And employers no longer have to worry as much about the ex-offender failing—they can have confidence that the ex-offender is supported by a network that is working hard to maintain an employment connection. Surveys show that employers are more willing to hire ex-offenders if a third-party intermediary such as a counseling program is available to mentor and assist the offender with any problems.[136] For example, Embassy Suites (a national hotel chain) "has hired several ex-offenders from different programs, and was encouraged to hire individuals with criminal records because of the support systems in place. The company felt secure because they were not just 'out there' hiring, Embassy Suites had the extra help and support they needed."[137]

But it is hard to ignore the problems of this potential solution. Obviously, creating, staffing, and maintaining these programs costs money. Finding employees, office space, training materials, and a source of funding is not easy. It might be hard to convince state and local authorities to set aside money for "hug-a-thug" programs when so many other vital interests are under funded. Perhaps a solution to the funding problem can be found by looking at Pioneer Human Services. Third-party intermediaries can go beyond just placing ex-offenders with employers—these services can become the employers themselves. For example, New York's CEO might be able to use its day laborers on projects that CEO contracts for. Any revenue CEO

[135] *Id.*
[136] *Id.* at 196.
[137] The Welfare to Work Partnership at 5.

brings in after paying the wages of the ex-offenders could be directed back to the program itself to pay for office space, staff, materials, etc.

Another potential problem is that there are employers who are not going to employ ex-offenders no matter who is vouching for them. The third-party intermediary might be able to provide all the support in the world, but still, there might be employers who are so averse to hiring ex-offenders that it will not make a difference. Still, this resistance to hiring ex-offenders should not stop third-party intermediaries from trying their best to package and sell their services to both ex-offenders and employers.

I. Employment Discrimination Protection

And now, for the last time, imagine again the application scenario discussed in Part II.A. A1 and A2, are both applying for the same job. The Employer asks the two applicants a question about their criminal record. Again, A1 has a criminal record and A2 does not. A1's conviction came 10 years earlier and he has been a model citizen since then. A1 discloses his criminal record to the Employer. But this time, let us change the scenario a little. While A1 is much more qualified for the job, A2 ends up getting the job. The Employer swears that A1's criminal past played no role in the decision, but A1 thinks otherwise.

Recognizing the temptation that employers will face to easily dismiss an applicant based on a criminal past, California has already instituted laws that somewhat restrict what the Employers can ask of A1. These laws, discussed in Part I.B., prohibit the Employer from asking A1 about offenses that did not result in convictions. As of now, California penalizes employers if their inquires are too broad (i.e., if employers ask about arrests that did not lead to convictions)—there is a civil remedy of actual damages or $200, whichever is greater, plus costs

and reasonable attorney's fees.[138] Treble damages or $500, whichever is greater, plus costs and reasonable attorney's fees are available for intentional violations.[139] Further, it is a criminal misdemeanor for employers to violate relevant provisions.[140] These penalties seem to serve as little more than minor deterrents. Damages of $200 or $500 probably do little to dissuade employers from asking whatever questions they want. And if ex-offenders are able to prove damages greater than $200 or $500, it is unlikely that they will be able to prove a figure much higher than that. After all, damages incurred as a result of a denied opportunity are entirely speculative. Plus, it is difficult for ex-offenders to prove causation—that they would have gotten the job even if the employer did not know about the criminal history—as ex-offenders are likely to have other red flags or gaps in their resumes. And current California law puts A1 in a bind—he has a felony conviction and the Employer was allowed to ask about it. As it stands now, the law restricts employers from asking about certain offenses, but it does not restrict them from using what they legally learn about an ex-offender's criminal past as a basis for not hiring.

One potential solution to this predicament is for the California legislature to put into place a provision that restricts the ability of employers to base a hiring or firing decision on a legally discovered conviction. Perhaps California can take some guidance from federal law. Once a criminal record is disclosed, Title VII of the 1964 Civil Rights Act[141] prohibits the automatic denial of employment.[142] Discrimination based on a conviction record *might* in some

[138] Cal. Lab. Code § 432.7(c).
[139] *Id.*
[140] *Id.* § 433.
[141] Title VII generally prohibits private employers and state and local governments from employment discrimination based on race, color, gender, national origin, or religion. Legal Action Center at 54.
[142] Rosen 2002.

cases be tantamount to illegal race discrimination when the discrimination impacts a minority.[143] Discrimination based on a conviction must be justified by a "business necessity."[144] An employer can prove business necessity by showing that three factors were taken into consideration in the hiring/firing decision: 1) nature and gravity of the offense, 2) time elapsed since the conviction or completion of the sentence, and 3) nature of the job held or sought.[145] California law places no such restrictions on employers. Employers can consider convictions and may institute a policy of denying employment to *anyone* who has a criminal history.[146]

Still, even if new legislation were to, in theory, restrict what employers could do, it might offer little real-world protection. After all, who is going to enforce the legislation? Wronged parties under the law would be ex-offenders, a group with little ability to marshal much legal force. Attorneys, even though they can recoup their fees, are unlikely to take ex-offenders' cases because of a lack of a big payday. And it seems hard to imagine a prosecutor bringing a *criminal* case against an employer who asks improper application questions.

Nevertheless, legislative reform remains an option. If nothing else, stricter laws will put employers on notice that ex-offenders are a distinct minority group that the state believes merits special attention. These laws might force employers to be more careful and evenhanded in their dealings with ex-offenders.

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[143] Legal Action Center at 54. The Equal Employment Opportunity Commission has ruled that employment policies that exclude applicants based upon convictions *might* violate Title VII because such policies disproportionately impact minorities, who are arrested and convicted at a significantly higher rate than their percentage in the population. *Id.* at 54-55.
[144] *Id.* at 55.
[145] *Id.*
[146] National H.I.R.E. Network, *Recommendations to Support the Employability of People with Criminal Records in California*, http://www.hirenetwork.org/pdfs/California%20Policy%20Recommendations.pdf#search='california%20employment%20criminal%20conviction (accessed on Nov. 1, 2005)

PART III: Policy Recommendations

A. Problem Restated

> Those sent to prison are institutionally branded as a particular class of individuals—as are college graduates or welfare recipients—with implications for their perceived place in the stratification order. The "negative credential" associated with a criminal record represents a unique mechanism of stratification, in that it is the state that certifies particular individuals in ways that qualify them for discrimination or social exclusion. It is this official status of the negative credential that differentiates it from other sources of social stigma offering greater legitimacy to its use as the basis for differentiation.[147]

I searched for the panacea, but I was not able to find it. In my opinion, my research indicates that no single solution is the answer. Each solution presented above has definite benefits and legitimate flaws. Such is the nature of research—if one looks long and hard enough, one can find support for just about any position. But on the whole, I recommend California adopt *all* of the options explored above. This "salad-bowl" approach is not meant to protect me from having to make a clear-cut decision—I truly believe that each option can help California ensure that its employers and ex-offenders are building an employment bridge and meeting in the middle.

The first step in combating a problem is recognizing it exists. California has already acknowledged that it needs to do something about ex-offender employment issues. I find it particularly telling that California has already adopted all of the options to some extent. So, why then, does the problem persist? The answer to this question lies in the way that California's

[147] Pager at 942.

existing policies are implemented. California, for the most part, has its heart in the right place—the state appears to *want* to combat the problem—but it needs to tweak its approach.

First, California needs to acknowledge that each solution is not an unvarying set of rules, but rather, a constantly moving and fluid concept. Good ideas and good intentions do not ensure a program's success over a number of years. The programs need to be fully implemented, critiqued, and most importantly of all, changed.

Second, California needs to realize that each option does not exist in a vacuum. Option X might be a good idea. Option Y might be a good idea. But Option X + Option Y together might be an even better idea. Instead of using one tool to construct a flimsy raft, California needs to clean up its old tools, use two or three tools at a time, and build a whole new employment bridge.

In sum, instead of implementing all new, radical policies, California just needs to reform the policies already in place and consider how to use them in conjunction with each other to more effectively combat the employment problem that its ex-offenders face. While each solution described above has room for improvement, I want to especially focus on reforms that I recommend for a few of the most promising solutions.

B. Erasing

Giving an ex-offender the ability to "erase" their criminal record is a policy that California seems to think is promising. The state already offers several different ways to do this with expunging, sealing, and purging. But erasing, expunging in particular, could be a much more attractive option if a few changes were made. First, if expungement is going to be effective, it has to have some real teeth. As it stands now, ex-offenders are not required to disclose expunged convictions to employers. But this rule does not stop employers from finding out about the convictions from reports compiled by investigators. Expungement would be much more

effective if this backdoor was closed. The law of expungement needs to change so as to truly expunge the conviction from all public records. If ex-offenders are not required to disclose convictions, employers should not be able to find out about them through other means.

I should qualify this recommendation with one caveat—I am not advocating the total and literal erasure of the conviction. A complete rap sheet should remain under seal in a confidential file. But access to that file should be limited to only the most exigent circumstances. Perhaps law enforcement or national security concerns might justify access to the confidential file.[148] But run-of-the-mill employers *should not* have access to expunged records. Expungement restrictions can even be lifted for public employment and occupational licenses. California has deemed expungement a worthy option; the state has told ex-offenders that they do not have to disclose expunged convictions. The state is giving reformed ex-offenders the opportunity to move beyond the stigma of a criminal conviction. Why then, would the state want to undercut this effort by making it relatively simple for employers to find out about the expunged convictions anyways?

Expungement could also be more attractive if it were more widely available. Expungement should be allowed for certain non-violent *felony* convictions *even if* probation was not part of the sentence. Maybe even some violent offenses could be expunged if enough time has elapsed. It is hard to say exactly how far expungement should be expanded. To find the answer to this question, California needs to examine the underlying rationale behind allowing employers to ask about criminal convictions in the first place. Presumably, employers are allowed to ask ex-offenders about their convictions because this information is evidence that the

[148] Similarly, health care facilities and financial institutions are going to cry out that they too should be able to access expunged records. They certainly have a legitimate interest in hiring safe and trustworthy employees, but then, so does every employer. The more types of employers the state allows to access expunged records, the less effective expungement is overall. Employer concerns can be alleviated by demanding longer periods of crime-free behavior before serious offenses are expunged.

ex-offender actually committed the crime. Further, the fact that they committed the crime in the past tends to indicate that they might be less-than-ideal employees (or commit an altogether new crime) going forward. But if enough time has gone by—say, 10 years—it seems that past criminal activity is an unreliable indicator of future criminality. At a certain point, requiring ex-offenders to disclose convictions does nothing to ensure that employers hire non-risky employees, but rather, serves only to punish ex-offenders who committed crimes long ago.

And California need not stop at reforming expungement. Sealing and purging can also be expanded. California can take a page from England in having a process in place that automatically erases (be this by expunging, sealing, or purging) certain convictions after a set number of years. The less serious the crime, the quicker the process begins for getting the conviction erased. The more time has gone by, the more permanently the conviction can be erased.

One expert has opined that, **"**[w]iping the slate clean or allowing a 'legal rebiographing' is critical to offenders who have made the decision to desist from crime."[149] "In this liberating model, an ex-offender is therefore legally enabled to rewrite his or her history to make it more in line with his or her present, reformed identity. After several years of good behavior, the State essentially says, 'You don't appear to be the sort of person who has a criminal record, therefore you needn't have one.'"[150] "Without this rebiographing, ex-offenders will always be ex-offenders, hence outsiders and doomed to deviance."[151] It should be noted that society allows rebiographing in other settings. Some juvenile records are destroyed or sealed upon adulthood.[152]

[149] Petersilia at 219 (quoting Maruna Shadd. 2001. *Making Good: How Ex-Convicts Reform and Rebuild Their Lives.* Washington, D.C.: American Psychological Association at 164).
[150] *Id.*
[151] *Id.* at 219.
[152] *Id.*

In the bankruptcy setting, credit histories can be redeemed after a set number of years.[153] Not allowing this for common criminals is a selective, possibly harmful, application of the "forgive and forget" doctrine.[154]

C. Certificates of Rehabilitation

It is a shame that Certificates of Rehabilitation are so underutilized. California should be alarmed that one of its parole officers can only remember two ex-offenders who were able to get certificates in the past ten years. Again, by putting the law on the books, California has deemed Certificates of Rehabilitation a worthy solution. Why then is it so difficult to get one?

Perhaps it is because California law currently allows only ex-offenders who were able to get their convictions expunged to apply. The pool of eligible applicants needs to be expanded. Expungement should no longer be a requirement. California should also remove the bar to misdemeanor ex-offenders applying for a certificate. Just like their felonious counterparts, these ex-offenders should be allowed to apply after they have served out their sentence and remained crime-free for a period of time. There is nothing inherent in a misdemeanor ex-offender that makes that ex-offender less worthy of a certificate. If anything, a misdemeanor ex-offender should be easier to rehabilitate.

There should be minimal requirements for applying for a certificate. Only two are essential: a completed sentence and a period of crime-free behavior. Once an ex-offender has served out his sentence, the clock should toll for the crime-free behavior period. At the end of that period, the ex-offender should be allowed to apply for a certificate. The court or the prosecutor can then, and should, conduct an investigation to ensure that the applicant has indeed remained crime free. If the ex-offender has remained crime-free, a certificate should issue.

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[153] *Id.* at 219-20.
[154] *Id.* at 220.

It should not matter if the ex-offender has not lived an upstanding life or experienced "problems" outside of the judicial system. After all, other job applicants are not held to this high standard. The certificate as it is now is only an indication that the ex-offender has served his sentence and lived a crime-free life since then. That is all it indicates, and employers should value it accordingly.

I also recommend expanding Certificates of Rehabilitation to include some sort of "good-deeds" list. If an ex-offender has fought fires since getting out of prison, the ex-offender should be allowed to tell employers about that. If an ex-offender has volunteered at a local AIDS clinic, that information should be transmitted to the employer. Obviously, an ex-offender can put good deeds like that on a resume. But the deeds will carry more weight if they are endorsed by the State of California. The ex-offender should provide proof of the good deeds in the application or during a hearing. If the ex-offender can satisfy a reasonable legal burden such as preponderance of the evidence, the good deed should be included in the certificate. To prevent fraud, there should be a process in place whereby employers can verify the good deeds with the state.

Employers may or may not hire on the basis of a certificate. Per Undersecretary Woodford's informal survey, there is evidence that they will.[155] But there seems to be very little downside to the state endorsing information that an ex-offender can put in front of the employer in the first place. There appears to be little risk to employers as well. A certificate and a good-deed list do not erase the conviction. Employers will still know both the good and the bad about the ex-offender. What employers choose to do with that information is out of the hands of the state. But at least it serves to decrease the disadvantage that ex-offenders face.

[155] *See supra* n.87.

D. Third-Party Intermediaries

The examples of third-party intermediaries discussed in Part II.H. prove that these kinds of programs can work. Do they all work? No, but the literature is replete with examples of programs that do. I recommend third-party intermediaries at both the state, local, and private level. But more importantly, I recommend a certain type of third-party intermediary: a self-sustaining agency. The biggest hurdle a third-party intermediary faces is a financial one. With schools, police forces, prisons, and other publicly funded programs desperately in need of funding, it seems that an ex-offender job-placement service might be at the bottom of California's list of priorities. A third-party intermediary can avoid the money problem by attempting to fund itself.

A self-sustaining agency would be the same as any other third-party intermediary, except that it would have its participants working for the agency itself. Instead of placing its participants with outside employers, the agency itself would be the employer. For example, instead of sending its participants to work on somebody else's road crew or at somebody else's construction site, the agency can have its own road crews and construction sites. With this type of agency, any dollar earned by the ex-offender out in the field will go back into the agency's coffers. The agency can pay the ex-offenders their salaries and then use the leftover money to fund its educational and vocational programs.

One major problem with this proposal is that it seems highly unlikely that an agency specializing in aiding ex-offenders with finding work will be able to, at the same time, serve as an adequate contractor. But this problem can be solved with a little creativity. The agency need not be a major construction contractor. In fact, there is no requirement as to what the agency has to be. The agency can do any type of work: construction, custodial, clerical, etc. The list is

endless. For example, instead of supplying its participants to other offices, the agency can serve as its own temp agency. It can then pocket all the profit that the ex-offender's work generates. And even if the agency is not able to be fully self-sustaining, it can be at least partially so. The point is that the agency needs to have a long-term plan to, at the very least, not depend entirely on the donations of others.

E. Notice and Education

While the situation facing ex-offenders looking for work is not ideal, there are many options already available. Most of the options discussed in Part II are available in some form or another. Still, it is highly unlikely that most ex-offenders looking for work have any idea of all the options that are available to them. Putting the relevant prison population on notice of what options will be available upon their release, and then educating them about these options, can go a long way towards helping ex-offenders do their part in building an employment bridge.

The process can begin as soon as an offender enters prison. If a prisoner knows that there are viable options on the outside, such as getting the conviction erased after several years of good behavior, the prisoner is more likely to behave well in prison because of the enticement of the opportunity to move beyond the conviction upon entering the outside world.

At the very least, prisons can put ex-offenders on notice of their options at the time of release. A simple pamphlet can be provided to ex-offenders upon their release that briefly details the options available. The pamphlet can provide basic how-to information as well as the contact information of agencies, lawyers, and employers who are willing to aide.

And notice and education should not be limited to ex-offenders. Employers should also be targeted. An informed employer is an employer that is more likely to understand all the options and actually take a chance on an ex-offender. If an applicant discloses a criminal record

and the employer is not aware that there are viable options, the employer is liable to panic and not hire the ex-offender. But if an employer knows beforehand that there are options available, the employer is more likely to make a better, more informed business choice, instead of automatically ruling out the ex-offender. Employers can be targeted at their place of business. The state or private organizations can distribute educational pamphlets or even hold seminars for employers.

Will notice and education solve all problems? Probably not. But putting ex-offenders and employers on notice of their options and even educating them a bit on those options will at least make them aware of what is out there. This can even make dormant existing policies, like certificates of rehabilitation, more potent.

F. Adding All the Solutions Together

Finally, use of the existing and proposed policies in combination with each other can be a solution in and of itself. Building an employment bridge is akin to a buffet line, not ordering one entrée off a menu. If an employer is concerned about lost profits due to hiring an ex-offender, there is no reason why that employer should have to depend on only one policy option. That employer can go the "buffet line" and put tax breaks on his plate in combination with insurance and bonding to put his financial fears at ease. Or an employer who hires ex-offenders through a third-party intermediary can also take advantage of tax breaks, bonding, and insurance.

For every ex-offender and employer out there seeking to build an employment bridge, there is a unique set of circumstances, concerns, and issues. No one single solution will work for everybody. But with a vast array of options at their disposal, ex-offenders can make themselves more marketable and employers should be more willing to sit down at the hiring table and make an employment connection.