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Citations:

Bluebook 21st ed.
Cara Suvall, Certifying Second Chances, 42 CARDOZO L. REV. 1175 (2021).

ALWD 6th ed.
Suvall, C. ., Certifying second chances, 42(4) Cardozo L. Rev. 1175 (2021).

APA 7th ed.
Suvall, C. (2021). Certifying second chances. Cardozo Law Review, 42(4), 1175-1236.

Chicago 17th ed.
Cara Suvall, "Certifying Second Chances," Cardozo Law Review 42, no. 4 (July 2021): 1175-1236

McGill Guide 9th ed.
Cara Suvall, "Certifying Second Chances" (2021) 42:4 Cardozo L Rev 1175.

AGLC 4th ed.
Cara Suvall, 'Certifying Second Chances' (2021) 42(4) Cardozo Law Review 1175.

MLA 8th ed.
Suvall, Cara. "Certifying Second Chances." Cardozo Law Review, vol. 42, no. 4, July 2021, p. 1175-1236. HeinOnline.

OSCOLA 4th ed.
Cara Suvall, 'Certifying Second Chances' (2021) 42 Cardozo L Rev 1175

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CERTIFYING SECOND CHANCES

Cara Suvall†

Policymakers around the country are grappling with how to provide a second chance to people with criminal records. These records create collateral consequences—invisible punishments that inhibit opportunity in all facets of a person’s life. Over the past seven years, states have repeatedly tried to legislate new paths for people trying to move on with their lives. State legislators passed more than 150 laws targeting collateral consequences in 2019 alone.

But what happens when these paths to second chances are littered with learning, compliance, and psychological costs? The people who most need these new opportunities may find that they are out of reach. A major problem, I argue, is the administrative burdens involved in accessing these remedies. Because of these hurdles, people with fewer resources—the population that would most benefit from the help—are the ones most likely to find these second chances out of reach. The Article closely examines one increasingly popular type of second-chance program: certificate laws that remove employment barriers.

Building on recent research identifying the low usage rates of petition-based second-chance programs, this Article catalogs and analyzes the costs and burdens placed on people attempting to access employment certificates. Of particular concern is not only these low usage rates themselves, but also the identity of those least likely to access these interventions. Second-chance programs like employment certificates that provide a way forward for people with greater resources while leaving behind those without may be more harmful than helpful when placed in the larger context of mass criminalization and social change, even if they help the small number of individuals who do access them. In contrast, a well-designed second-chance initiative that appropriately considers administrative burdens and the way that interventions like employment certificates fit into the broader picture of social

† Associate Clinical Professor of Law, Vanderbilt Law School. Director, Youth Opportunity Clinic. For invaluable feedback, let me take this first chance to thank Rebecca Haw Allensworth, Terry Maroney, Joy Radice, Jocelyn Simonson, Chris Slobogin, and Kevin Stack. I would also like to thank the participants in the N.Y.U. *Clinical Law Review* Writers’ Workshop: Jeff Selbin, Jenny Roberts, Nicole Smith Futrell, and Eve Rips.

change could provide short-term benefits to people with criminal records while also bolstering larger-scale reforms to the criminal legal system.

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INTRODUCTION

For the tens of millions of people in the United States marked by a criminal record, a second chance can sound like an empty promise. The collateral consequences of a criminal record have been referred to as an “invisible punishment,”¹ or even an “invisible life sentence,”² holding people back from opportunities in life well beyond the end of their sentence. Throughout the country, policymakers have been hard at work developing solutions to these invisible punishments in an effort to fulfill the promise of a second chance.

The language of a “second chance” is, of course, loaded—in fact, many people do not receive a fair “first” chance, and all people need to be able to support themselves and their families regardless of the number of contacts they may have had with the criminal legal system. This language also does not acknowledge the vast differences in opportunities that people have, regardless of criminal conviction, based on factors including race, class, and social capital. Nonetheless, the phrase “second chances” is often used as shorthand in connection to reducing barriers to accessing employment, housing, and more after a criminal conviction, and will be used to refer to those same issues here. In 2019 alone, 43 states and the District of Columbia collectively passed 153 distinct laws designed to reduce barriers that people face in voting,

¹ See INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

² See, e.g., Laura Dimon, *The Collateral Catastrophe: Serving the Invisible Life Sentence*, MIC (Apr. 11, 2014), <https://www.mic.com/articles/87463/the-collateral-catastrophe-serving-the-invisible-life-sentence> [<https://perma.cc/U28U-RC4C>].

employment, housing, and licensing.³ This breakneck pace of legislative innovation is a continuation and expansion of a trend that has been developing since 2013⁴ of states working to stem the flow of lost opportunities due to formal and informal collateral consequences. While the rapid rate of change and experimentation is exciting, it is occurring against a very bleak backdrop—the crisis of mass criminalization and the enduring barriers and stigma of a criminal record.

Given the relatively recent surge in second-chance—related legislation, we are just now beginning to see initial data about the impact of some of these interventions—how many people they reach and what effect they have.⁵ Recent studies focusing on record-clearing remedies like expungement demonstrate significant benefits for people with criminal records.⁶ But they also show that very few people have taken advantage of them.⁷ The number of people who are eligible for a form of relief yet have not taken advantage of it is referred to as the “second-chance gap”⁸ or the “uptake gap.”⁹ These large gaps demonstrate that second-chance interventions are typically not reaching enough people and are, therefore, barely making a dent in the crisis of mass criminalization.

Building on these studies, this Article diagnoses the uptake gap. A major part of the problem, I argue, is the series of administrative hurdles involved in accessing these remedies. Because of those hurdles, people with fewer resources—the population that would most benefit from the help—are the ones most likely to fall into the gap. The Article closely examines one increasingly popular type of second-chance program that focuses primarily on employment barriers. These initiatives have varied names around the country, including Certificate of Employability, Certificate of Rehabilitation, and Certificate of Relief from Disabilities.

³ MARGARET LOVE & DAVID SCHLUSSEL, *PATHWAYS TO REINTEGRATION: CRIMINAL RECORD REFORMS IN 2019*, at 1 (2020), http://ccresourcecenter.org/wp-content/uploads/2020/02/Pathways-to-Reintegration_Criminal-Record-Reforms-in-2019.pdf [<https://perma.cc/D7CF-E7P9>].

⁴ *Id.*

⁵ See, e.g., Colleen Chien, *America's Paper Prisons: The Second Chance Gap*, 119 MICH. L. REV. 519 (2020); J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 HARV. L. REV. 2460 (2020).

⁶ See Jeffrey Selbin, Justin McCrary, & Joshua Epstein, *Unmarked? Criminal Record Clearing and Employment Outcomes*, 108 J. CRIM. L. & CRIMINOLOGY 1, 56–57 (2018) (discussing increased employment rates and average earnings for people who have successfully cleared their records); Prescott & Starr, *supra* note 5.

⁷ See Prescott & Starr, *supra* note 5, at 2466–67.

⁸ Chien, *supra* note 5.

⁹ Prescott & Starr, *supra* note 5.

These programs, which I refer to collectively here as “Certificate laws,” are designed to help people access employment despite having a criminal record. They typically give a person with a criminal record a positive credential that helps overcome statutory bars to occupational licensing and insulates employers from liability for negligently hiring a person with a criminal record.

Rooting the analysis of Certificate laws in the reality of mass criminalization, this Article evaluates these programs in practice and argues that we must center distributional concerns in assessing these initiatives. The Article draws on an administrative burden¹⁰ framework to catalog and analyze the many costs and obstacles an applicant might encounter in accessing a Certificate. Of particular concern is not only the uptake gap itself but also the identity of those most likely to fall into it. Certificate programs that provide a way forward for those with greater resources while leaving out those without are likely to be more harmful than helpful when placed in the larger context of mass criminalization and social change. This is so even if they are helpful to the small number of individuals who access them. In contrast, well-designed Certificate initiatives that appropriately consider administrative burdens and the way that Certificates fit into the broader picture of social change could provide short-term benefits to people with criminal records while still supporting larger-scale reforms to the criminal legal system.

This Article proceeds in three Parts. Part I lays out the problems of mass criminalization and employment barriers and identifies existing partial solutions and their limitations. Part II presents an introduction to Certificates, how they fit in with other reforms, and generally how they operate. This Part also introduces the concept of administrative burden in Certificate programs, and then presents three contrasting case studies of Certificate programs that highlight the ways in which each imposes or avoids burdens on an individual seeking a Certificate. Part III critically assesses Certificate programs, analyzing administrative burdens in many existing Certificate programs. This Part draws lessons from theory and from existing Certificate programs to recommend features of Certificate program design that would decrease administrative burdens. These features could make the Certificate programs more equitable and would make it more likely that they would continue to help individuals with criminal records trying to get ahead in the workforce while still being consistent with—and even

¹⁰ PAMELA HERD & DONALD P. MOYNIHAN, ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 15–16 (2019) (the administrative burden framework, which is further detailed in Part III, highlights the learning, psychological, and compliance costs that often burden an individual’s interactions with the government).

supportive of—larger efforts to promote positive change in the criminal legal system.

I. MASS CRIMINALIZATION, EMPLOYMENT BARRIERS, AND PARTIAL SOLUTIONS

A. *The Era of Mass Criminalization*

We live in an era of mass incarceration¹¹ and, more broadly, mass criminalization.¹² The term “mass criminalization” can be used to refer to a range of problems—here, it is used to highlight the large numbers of people who are marked by criminal records and forced to face the barriers and obstacles that a criminal record often creates.¹³ Much of the public discourse around mass criminalization focuses on the number of people who are imprisoned today, but that reveals only a small part of the criminalization picture. In addition to the 2.3 million people in prisons and jails in the United States,¹⁴ an additional 4.5 million people are under correctional control through probation or parole.¹⁵ Even the total number of people under correctional control, 6.7 million,¹⁶ does not tell nearly the full story.¹⁷

¹¹ 2.3 million people are in prisons and jails, 840,000 on parole, and 3.6 million on probation. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2020*, PRISON POL’Y INITIATIVE (Mar. 24, 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/N5QW-6PKY>].

¹² See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 MICH. L. REV. 259 (2018) (discussing different frames including an “over” frame, critiquing the rate of criminalization, and a “mass” frame, focusing instead on the role the criminal legal system plays in society); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

¹³ Mass Criminalization is also used, in other contexts, to refer to the proliferation of criminal laws as well as the way that criminalization and penal control is used to govern, for example in the context of school discipline. For an overview of the rise of mass criminalization in connection with the proliferation of easily-accessible criminal records, see Selbin et al., *supra* note 6, at 9–14.

¹⁴ Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL’Y INITIATIVE (Dec. 2018), <https://www.prisonpolicy.org/reports/correctionalcontrol2018.html> [<https://perma.cc/D6TX-3THX>].

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1803–04 (2012) (suggesting the label “mass conviction” instead of “mass incarceration” given the tremendous harm and “civil death” that arises from conviction alone, even without incarceration); see also Jenny Roberts, *Expunging America’s Rap Sheet in the Information Age*, 2015 WIS. L. REV. 321, 325 (“Although mass incarceration is perhaps the most serious and pressing problem with the criminal justice system in the United

While prison sentences¹⁸ and correctional supervision typically come to an end, a criminal record can follow a person for a lifetime. Systems of criminalization extend far beyond prison walls or the front desk of a probation office. A criminal record, which can include felony and misdemeanor convictions, charged offenses, and often even arrest information not leading to a charge, can limit a person's opportunities in nearly all areas of their lives.

Shockingly, we do not have a clear picture of how many people in the United States have criminal records. Estimates range from seventy million to over one hundred million.¹⁹ A Bureau of Justice Statistics (BJS) report using 2018 data identified 112,450,300 individual subjects in state criminal history files.²⁰ That number, however, does not give us a full picture of the number of Americans with criminal records, since not all criminal records are reported and some people have criminal records in multiple states. Using conservative estimates,²¹ the number of people in the United States with criminal records is nearly seventy-eight million people—close to one in three adults in the United States.²²

States, most criminal cases are misdemeanors and often do not result in jail or prison time. The problem is thus better characterized as one of mass criminalization.” (footnotes omitted)).

¹⁸ At least 95% of people in state prisons will be released back to their communities. *NRRC Facts & Trends*, NAT'L REENTRY RES. CTR., https://csgjusticecenter.org/nrrc/facts-and-trends/#_ftn4 [<https://perma.cc/5CBL-KGH2>].

¹⁹ U.S. COMM'N ON C.R., *COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES* 9 (2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/8FCH-PDZC>].

²⁰ BECKI R. GOGGINS & DENNIS A. DEBACCO, U.S. DEP'T OF JUST., *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2018: A CRIMINAL JUSTICE INFORMATION POLICY REPORT* 2 (2020), <https://www.ncjrs.gov/pdffiles1/bjs/grants/255651.pdf> [<https://perma.cc/79RM-7K24>].

²¹ The numbers in the BJS report include duplicate entries where a single person has records in multiple states, and also fails to include records that were not reported to federal authorities, which are more likely to be misdemeanor offenses. Following the methodology of the authors in *65 Million "Need Not Apply"*, the conservative estimate here is reducing the total number of records by 30%. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT'L EMP. L. PROJECT, *65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT* 3, 27 n.2 (2011), https://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<https://perma.cc/XZQ4-6PE9>] (discussing use of the BJS numbers to create a conservative estimate by discounting the number of records by 30% to account for duplicates). The actual number based on this estimate is 78,715,210.

²² Adding up the population over eighteen years in 2018 based on data by the U.S. Census Bureau, totaling 253,815,197. *Population by Age, 2018*, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/table?q=2018%20population&tid=ACSSE2018.K200104&hidePreview=false> [<https://perma.cc/W8P6-HBNJ>]. The conclusion that the ratios result in nearly one in three adults in the United States having a criminal record is consistent with the findings of the National Employment Law Project report from 2011 and a 2006 Department of Justice report. See RODRIGUEZ & Emsellem, *supra* note 21.

These numbers, of course, do not affect all people equally. Racial disparities exist at all points in the criminal legal system, from policing to arrest and from sentencing to parole.²³ As a result, Latino men are two and a half times more likely than white men to be imprisoned and Black men are six times more likely.²⁴ For people born in 2001, white men have a one in seventeen likelihood of imprisonment in their lifetime, whereas Black men have a one in three likelihood.²⁵ While imprisonment and having a criminal record are not identical phenomena, there are similarly problematic racial disparities in criminal records. These disparities extend to the collateral consequences that arise from these contacts with the criminal legal system. As discussed below, these disparities are compounded by racial discrimination in other areas such as employment.

B. *Employment Barriers*

People with criminal records face a range of barriers and obstacles to employment. These range from legal or regulatory restrictions that bar them from some occupations to employers' use of criminal records as a screening mechanism, to the generalized stigma that often accompanies a criminal record. As detailed below, while the term "collateral consequences" is sometimes used solely to refer to formalized barriers created by the state, this Article uses it to refer to the full range of barriers and obstacles that limit life opportunities for people who have had contact with the criminal legal system.²⁶ Just as mass criminalization has grown out of slavery and race discrimination,²⁷ so too the system of collateral consequences has its roots in racially discriminatory foundations.²⁸

²³ SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities> [<https://perma.cc/LSC4-3JM6>].

²⁴ SENT'G PROJECT, TRENDS IN U.S. CORRECTIONS 5 (2021), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections> [<https://perma.cc/DW8H-8XVY>].

²⁵ *Id.*

²⁶ See Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1104 (2013) (These collateral consequences "are informal in origin, arising independently of specific legal authority, and concern the gamut of negative social, economic, medical, and psychological consequences of conviction.").

²⁷ See ALEXANDER, *supra* note 12.

²⁸ See Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 514-17 (2010) (discussing the origins of many collateral consequences as rooted in racial oppression).

Some of the collateral consequences that people face are formalized barriers, including the “legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities.”²⁹ The Council of State Governments’ National Inventory of Collateral Consequences of Conviction, a database of these laws and regulations around the country, currently catalogs 44,778 collateral consequences on the books around the country.³⁰ These include restrictions on political and civic participation, recreational licenses, and public housing. Notably, 65% of these consequences concern employment or licensure.³¹ One might think that licensing restrictions are a fringe issue, but they are not. In fact, nearly one-third of jobs require occupational licenses,³² often extending to such varied occupations as barbers, auctioneers, and pest control applicators.³³

Other barriers that people with criminal records face in employment are not formal legal exclusions or bars, though they often feel just as impermeable. The stigma of a criminal record often keeps a person from employment, even if no law is directly on point. While there are many formal restrictions limiting employment options for a person with a criminal record, there are significantly more that work through these informal barriers or obstacles, whether that is a licensing board rejecting an applicant for lack of amorphous “good moral character”³⁴ or an employer preferring an applicant without a criminal

²⁹ *What Are Collateral Consequences?*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.csgjusticecenter.org> [<https://perma.cc/H7CH-PETX>].

³⁰ *Collateral Consequences Inventory*, NAT’L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/consequences> [<https://perma.cc/ML5A-G5SZ>] (click search to view the total number of consequences).

³¹ 29,242 of the restrictions, making up 65% of the total restrictions. *Id.* (sort by consequence type: Business licensure & participation, Employment & volunteering, Occupational & professional license & certification, Occupational & professional licensure & certification).

³² *Regulation & Red Tape*, BEACON CTR. TENN., <https://www.beacontn.org/issues/occupational-licensing> [<https://perma.cc/V52T-BZ39>].

³³ *Id.*; BEACON CTR. TENN., THE DIRTY DOZEN: ELIMINATING RED TAPE FOR BLUE-COLLAR WORKERS 1 (2017), http://www.beacontn.org/wp-content/uploads/2017/12/BCN_DirtyDozenv5.pdf [<https://perma.cc/85TR-XWK6>].

³⁴ Alec C. Ewald, *Barbers, Caregivers, and the “Disciplinary Subject”*: Occupational Licensure for People with Criminal Justice Backgrounds in the United States, 46 FORDHAM URB. L.J. 719, 732–33 (2019) (study showing that occupational licensure increasingly operates through discretion, not outright bars, and that this process is very difficult for people with criminal records to navigate).

record because of a concern about how customers might react to knowing an employee has a criminal record.³⁵

Informal barriers are not erected by direct state action; rather, they stem most immediately from private, individual actors. However, they too exist within our statutory and regulatory frameworks, since stigma is created and reinforced through laws, policies, and enforcement or lack thereof surrounding criminal records, background checks,³⁶ and tort liability,³⁷ among other areas.³⁸ One might well see a form of state action as well where the state has failed to act, for example through failing to enforce race-based anti-discrimination laws, failing to create anti-discrimination laws that would protect people with criminal records, or choosing not to promulgate laws that further limit the ways that criminal records are used.

Whatever the source of the obstacle, it is undisputed that people with criminal records face a significant challenge in employment. Most of these obstacles are based on perception, not the reality of whether people with criminal records might be good employees.³⁹ In a recent survey, only around half of managers and human resources professionals stated that they are “willing” to work with people with criminal records.⁴⁰ Employers’ expressed concerns about hiring people

35 SOC’Y FOR HUM. RES. MGMT. & CHARLES KOCH INST., WORKERS WITH CRIMINAL RECORDS 5 (2018), <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Documents/SHRM-CKI%20Workers%20with%20Criminal%20Records%20Issue%20Brief%202018-05-17.pdf> [<https://perma.cc/FF38-NCKS>] [hereinafter CRIMINAL RECORDS] (listing concern about customer perception as a primary reason for not hiring people with criminal records).

36 Fair Credit Reporting Act, 15 U.S.C. § 1681.

37 Benjamin Levin, *Criminal Employment Law*, 39 CARDOZO L. REV. 2265, 2280 (2018).

38 See generally Joy Radice, *The Reintegrative State*, 66 EMORY L.J. 1315 (2017) (assessing the state role in creating reentry barriers and arguing that the state has a corresponding obligation and interest in promoting reintegration).

39 See Brent W. Roberts, Peter D. Harms, Avshalom Caspi, & Terri E. Moffitt, *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCH. 1427, 1434 (2007).

40 CRIMINAL RECORDS, *supra* note 35, at 3. 55% of managers, 51% of non-managers, and 47% of HR professionals stated affirmatively that they are willing to work with people with criminal records. *Id.* The rest indicated they were either unwilling or unsure. *Id.* Significantly, people’s perceptions of whether their co-workers would be willing to work with co-workers with criminal records is significantly lower, with only 36% of managers, 29% of non-managers, and 26% of HR professionals believing that their co-workers would be willing to work with people with criminal records. *Id.* Interestingly, a different survey suggests that three-quarters of people would feel comfortable patronizing or working for a business known to give people with criminal records a “second chance,” though respondents felt less comfortable with people with “violent” criminal records. *Workers with Criminal Records: Consumer and Employee Perspectives*, SOC’Y FOR HUM. RES. MGMT., <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/Pages/Workers-with-Criminal-Records-Consumer-and-Employee-Perspectives.aspx> [<https://perma.cc/W3W2-YMQV>].

with criminal records include general stigma-related concerns including how customers⁴¹ or co-workers⁴² might react to knowing that employees have criminal records, legal liability,⁴³ and regulatory constraints.⁴⁴ Perception is much harsher than reality when we look at job performance of people with criminal records. For those who have hired people with criminal records, however, the vast majority of managers (82%) state that the “quality of hire” for people with criminal records has been similar or better than comparable hires without criminal records.⁴⁵ Multiple studies have found that when people with criminal records are given job opportunities, they perform comparably to—and sometimes even better than—the general population.⁴⁶

The vast majority of employers conduct criminal background checks on applicants.⁴⁷ Experimental studies confirm that a criminal record makes it much more difficult for people to get a job.⁴⁸ This has become an increasingly significant issue as the number of people with criminal records has increased while, at the same time, accessing those records has become easier due to centralization and digitization.⁴⁹ Alarming, given the increased role of third-party criminal background search companies that sweep digital records, employers are

41 CRIMINAL RECORDS, *supra* note 35, at 5 (35% of managers, 41% of non-managers, 30% of HR Professionals).

42 *Id.* (19% of managers, 25% of non-managers, 21% of HR Professionals).

43 *Id.* (32% of managers, 42% of non-managers, 39% of HR Professionals).

44 *Id.* (29% of managers, 35% of non-managers, 22% of HR Professionals).

45 *Id.* at 2.

46 See Jennifer Hickes Lundquist, Devah Pager, & Eiko Strader, *Does a Criminal Past Predict Worker Performance? Evidence from One of America's Largest Employers*, 96 SOC. FORCES 1039 (2018) (analyzing performance of people with felony records in the U.S. military, finding no difference in attrition rates due to poor performance to those without criminal records); Dylan Minor, Nicola Persico, & Deborah M. Weiss, *Criminal Background and Job Performance*, IZA J. LAB. POL'Y, Sept. 12, 2018, at 1 (reporting data that employees with criminal records have longer tenures at their job on average and have lower rates of voluntary departure); CRIMINAL RECORDS, *supra* note 35, at 2 (reporting that of companies that have hired employees with criminal records, 82% of managers and 67% of HR professionals reported that the “quality of hire” for workers with criminal records is similar or higher than that of workers without records, while 74% of managers and HR reported that the cost of hiring people with criminal records is similar or lower than that of hiring people without criminal records).

47 CRIMINAL RECORDS, *supra* note 35, at 6 (84% of large employers report conducting criminal background checks, while 73% of all employers do).

48 Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOCIO. 937 (2003); Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland, & Hilary K. Whitham, *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 637 (2014).

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

increasingly likely to see information on criminal records that has been erased, sealed, or expunged.⁵⁰

The significant costs of unemployment and underemployment do not fall solely on the individual with a criminal record. Reduced employment opportunities for people with criminal records are estimated to cost the United States at least \$57–65 billion dollars a year in lost productivity.⁵¹ Employment—especially good jobs—are consistently featured as a protective factor against recidivism.⁵² Higher recidivism rates due to decreased opportunities harm communities because of public safety concerns as well as the costs of imprisonment to the individual, their community, and the public.

The barriers that people with criminal records must overcome in gaining employment are multiplied by race discrimination and other forms of discrimination that people of color, and particularly Black people, face. Experimental studies show that white people with criminal records receive job callbacks at rates higher than Black people without a criminal record.⁵³ And having a criminal record has been shown to have a 40% worse effect on the likelihood of getting a job callback for Black compared to white applicants.⁵⁴ These studies suggest that employers often use a criminal record as a pretext to engage in race discrimination—while this is illegal, it is very difficult to identify and almost impossible to enforce.⁵⁵ Since Black people are more likely to have a criminal record and are also more likely to face barriers related to employment discrimination, these overlapping systems contribute not only to low employment rates for people with criminal records but also to low resource levels in Black communities and for Black families. The tremendous racial wealth gap in the United States, with white households having on average nearly 6.5 times the wealth of Black

⁵⁰ Meg Leta Ambrose, Nicole Friess, & Jill Van Matre, *Seeking Digital Redemption: The Future of Forgiveness in the Internet Age*, 29 SANTA CLARA COMPUT. & HIGH TECH. L.J. 99, 142 (2012); see also Roberts, *supra* note 17.

⁵¹ See JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RSCH., EX-OFFENDERS AND THE LABOR MARKET 13–14 (2010) (estimating that the United States loses \$57 to \$65 billion each year in productivity due to reduced employment opportunities due to criminal records).

⁵² Devah Pager, *Evidence-Based Policy for Successful Prisoner Reentry*, 5 CRIMINOLOGY & PUB. POL'Y 505 (2006).

⁵³ Pager, *supra* note 48, at 958.

⁵⁴ *Id.* at 959 (showing, for example, that white applicants with identical qualifications and criminal records were called back at a rate three times that of black applicants).

⁵⁵ See U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2012-1, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [<https://perma.cc/L7RD-QKNT>]. *But see* Texas v. EEOC, 933 F.3d 433 (5th Cir. 2019) (holding that the EEOC overstepped its rulemaking power when it issued the arrest and conviction guidance).

households,⁵⁶ is made significantly worse by low income due to criminal records and imprisonment.⁵⁷ Employment barriers due to criminal records, therefore, disproportionately negatively affect not only Black people with a criminal record themselves, but also their families and communities.

C. Solutions and Their Limitations

Given the high costs of employment barriers, advocates, politicians, and state officials have been looking for solutions. As the Uniform Law Commission notes, “Most states have not yet developed a comprehensive and effective way of ‘neutralizing’ the effect of a conviction in cases where it is not necessary or appropriate for it to be decisive.”⁵⁸ States are in the process of experimenting to try to fill that gap.

1. Pardons and Expungement

The more traditional tools for giving someone a second chance, such as pardons or expungement, can have significant positive life-changing effects.⁵⁹ They are, in many ways, the cleanest and most effective tools for opening up opportunities for people with conviction records because they remove the prior conviction from consideration and often from third parties’ ability to view them. Because of this, they are not dependent on the ways that third parties might react to a criminal history, so the stereotypes, prejudices, and anxieties of people like employers and landlords do not play as big a role as in solutions

⁵⁶ Brentin Mock, *Why Can't We Close the Racial Wealth Gap?*, BLOOMBERG CITYLAB (Mar. 21, 2019, 4:53 PM), <https://www.citylab.com/equity/2019/03/racial-wealth-gap-income-inequality-black-white-households/585325> [<https://perma.cc/22LG-XTFY>].

⁵⁷ Incarceration has a strong negative effect on wealth accumulation and is more severe for Black people than white people. Khaing Zaw, Darrick Hamilton, & William Darity Jr., *Race, Wealth and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 RACE & SOC. PROBS. 103 (2016); see also Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, PRISON POL'Y INITIATIVE (Apr. 26, 2016), <https://www.prisonpolicy.org/blog/2016/04/26/wealth> [<https://perma.cc/6W6G-T574>]; Bryan L. Sykes & Michelle Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth, 1996 to 2011*, 2 RUSSELL SAGE FOUND. J. SOC. SCIS. 129 (2016).

⁵⁸ NAT'L CONF. COMM'RS ON UNIFORM STATE L., AMENDMENTS TO UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT 4 (2010).

⁵⁹ See, e.g., Prescott & Starr, *supra* note 5 (noting an average increased income of 25% within two years of expungement in one study of expungements in Michigan); see also Selbin et al., *supra* note 6.

that depend on how interventions are received by third parties. Despite their significant benefits, however, these are limited solutions because of political feasibility. In most states, pardons are rarely or infrequently granted,⁶⁰ with many governors waiting until the end of their terms out of concern for political backlash. While expungement laws have recently been expanded significantly,⁶¹ they typically include only non-convictions, like dismissals or diversion that still otherwise show up on a person's criminal record, or a narrow range of specified minor convictions. Felony expungement remains exceedingly rare. Given the positive effects of record clearing, including improved employment and earning outcomes⁶² as well as their general positive effects on equity of opportunity, there is reason to hope that state expungement initiatives will continue to expand. However, the more expansive proposed expungement laws become, the more political pushback they will receive. At least in the foreseeable future, many people with criminal records will be unable to overcome the significant employment-related collateral consequences of a criminal record through expungement because of limited eligibility. Pardons and conviction expungement also both often require long waiting periods. This makes these interventions particularly unhelpful to people shortly after their conviction or release from prison, which is the time period in which a person with a criminal record is most likely to be unemployed.⁶³

2. Ban-the-Box Legislation

One policy innovation that has entered the field in the recent past is ban-the-box legislation, statutes that prohibit employers from inquiring about criminal history on job applications.⁶⁴ These policies

⁶⁰ Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities> [<https://perma.cc/W7KT-CPXD>].

⁶¹ *Bumper Crop of New Expungement Laws Expected in 2019*, COLLATERAL CONSEQUENCES RES. CTR. (Apr. 9, 2019), <http://ccresourcecenter.org/2019/04/09/bumper-crop-of-new-expungement-laws-so-far-in-2019> [<https://perma.cc/XZ24-6VPP>].

⁶² See Selbin et al., *supra* note 6; Prescott & Starr, *supra* note 5.

⁶³ Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL'Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/4LQ4-HSM5>] (30% unemployment within two years of release).

⁶⁴ Beth Avery & Han Lu, *Ban the Box: US Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Sept. 30, 2020), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> [<https://perma.cc/L7YH-U26V>] (The states are: "Arizona (2017), California (2017, 2013, 2010), Colorado (2019, 2012), Connecticut (2016,

typically do permit employers to conduct background checks or inquire about criminal history at later points in the hiring process, though some also constrain the ways that employers may use this information. While ban-the-box legislation typically only delays the revelation of a criminal record, the goal of these policies is to help people with criminal records get their foot in the door and give them the opportunity to show that they are the best candidate for the job. Most of these statutes address only public hiring,⁶⁵ though fourteen states have extended their legislation to cover at least some private employers.⁶⁶

In the past few years, however, there has been some increased concern that ban-the-box policies may have unintended consequences. For example, some data suggests that employers may discriminate against Black applicants as a proxy for perceived criminality in the absence of individualized information early in the hiring process. For example, a study looking at employment rates by demographic found up to a 5.1% decrease in employment among young, low-skilled Black men after the adoption of ban-the-box legislation.⁶⁷ Experimental studies sending out fictitious resumes before and after the adoption of ban-the-box legislation in New York and New Jersey similarly showed decreased employment opportunities for Black applicants relative to identical white applicants.⁶⁸ The jury is still out on the efficacy and side effects of ban-the-box legislation, with some arguing that the response should be to enforce race discrimination laws, not abandon ban-the-box.⁶⁹ Between these concerns, however, and the more traditional

2010), Delaware (2014), Georgia (2015), Hawai'i (1998), Illinois (2014, 2013), Indiana (2017), Kansas (2018), Kentucky (2017), Louisiana (2016), Maine (2019), Maryland (2020, 2013), Massachusetts (2010), Michigan (2018), Minnesota (2013, 2009), Missouri (2016), Nebraska (2014), Nevada (2017), New Hampshire (2020), New Jersey (2014), New Mexico (2010, 2019), New York (2015), North Dakota (2019), Ohio (2015), Oklahoma (2016), Oregon (2015), Pennsylvania (2017), Rhode Island (2013), Tennessee (2016), Utah (2017), Vermont (2016, 2015), Virginia (2020, 2015), Washington (2018), and Wisconsin (2016).”)

⁶⁵ LOVE & SCHLUSSEL, *supra* note 3.

⁶⁶ Avery & Lu, *supra* note 64 (including California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington).

⁶⁷ Jennifer L. Doleac & Benjamin Hansen, *Does “Ban the Box” Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden* 5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22469, 2016), https://www.nber.org/system/files/working_papers/w22469/w22469.pdf [<https://perma.cc/V9KV-Y7X4>].

⁶⁸ Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q.J. ECON. 191 (2018). The study showed that before ban-the-box, white applicants received 7% more callbacks than similar Black applicants, and that after ban-the-box, this gap increased to 43%. *Id.*

⁶⁹ Phil Hernandez, *Ban-the-Box “Statistical Discrimination” Studies Draw the Wrong Conclusions*, NAT'L EMP. L. PROJECT (Aug. 29, 2017), <https://www.nelp.org/blog/ban-the-box->

opposition from employers who do not want limits on their access to information, some advocates and legislators are looking to other models. Even in states that have ban-the-box, there remains the issue of how applicants will be treated once their records are disclosed later in the hiring process.

3. Other Anti-Discrimination Legislation

Some states have taken additional legislative steps to protect job applicants with criminal records. Most of these efforts have focused on public employment, such as a law in Arizona requiring that there be a “reasonable relationship” between the conviction and job or license sought for the public employer to deny employment,⁷⁰ or Louisiana’s similar law requiring that any conviction used as a basis for denying employment “directly relate[]” to the employment sought.⁷¹ Others, however, have extended these protections to people applying for private employment. For example, Wisconsin prohibits employment discrimination on the basis of a criminal record in the same way that it protects members of other protected classes (though with many exceptions),⁷² and Kansas law requires a criminal record to “reasonably bear[]”⁷³ on an applicant’s trustworthiness or on public safety concerns for an employer to refuse to hire someone based on a criminal record.⁷⁴

Generally applicable anti-discrimination laws that protect people with criminal records come with the significant benefit that they are automatically applicable to all eligible people within a jurisdiction and do not require a specific application. Unfortunately, as with the 2012 Equal Employment Opportunity Commission’s guidance on when consideration of arrest or conviction information may violate Title VII,⁷⁵ anti-discrimination laws supporting people with criminal records often face enforcement challenges. Of course, most jurisdictions do not currently have strong anti-discrimination laws, and, even with strong

statistical-discrimination-studies-draw-the-wrong-conclusions [https://perma.cc/K9ZD-JNRR] (arguing that the negative effects on people of color without criminal records can be corrected through anti-discrimination laws and enforcement).

⁷⁰ ARIZ. REV. STAT. ANN. § 13-904(E) (2021).

⁷¹ LA. STAT. ANN. § 37:2950(A) (2020).

⁷² WIS. STAT. ANN. § 111.335 (West 2021).

⁷³ KAN. STAT. ANN. § 22-4710(f) (West 2021).

⁷⁴ See generally Margaret Love, Josh Gaines, & Jenny Osborne, *Forgiving and Forgetting in American Justice: A 50-State Guide to Expungement and Restoration of Rights*, COLLATERAL CONSEQUENCES RES. CTR. 18–22 (2018), <http://ccresourcecenter.org/wp-content/uploads/2017/10/Forgiving-Forgetting-CCRC-Jan-2018.pdf> [https://perma.cc/NL8K-P76Z].

⁷⁵ EQUAL EMP. OPPORTUNITY COMM’N, *supra* note 55.

anti-discrimination laws, there will be people with criminal records who remain unprotected. These shortcomings leave room for additional needed interventions to help people with criminal records be competitive in job applications.

II. EMPLOYMENT CERTIFICATES AND CASE STUDIES

A. *Overview of Employment Certificate Programs*

Alongside the interventions discussed above, another policy intervention being experimented with around the country is an employment certificate program.⁷⁶ These programs have a wide range of names, including Certificate of Employability,⁷⁷ Certificate of Relief from Disabilities,⁷⁸ and Certificate of Qualification for Employment.⁷⁹ They are referred to in this Article collectively as “Certificates.” The idea behind Certificates is to give a person with a criminal record, which is a negative credential, an official certification that will counteract it as a positive credential. These Certificates often operate by removing legal barriers, such as mandatory licensure and occupational exclusions, that would otherwise attach to a person with a conviction. Many also feature liability protections for employers that hire a person with a Certificate. Some additionally serve as some degree of evidence of rehabilitation. New York is the only state that combines this evidence of rehabilitation with an enforcement mechanism, through New York’s anti-discrimination law.⁸⁰ While states vary in how early in a person’s reintegration process they may be eligible, Certificates that help people get jobs are also likely to promote further rehabilitation and cut against the risk of recidivism.⁸¹ Certificates fit in with the other second-chance initiatives discussed above because each of them is only a partial solution to the problem of collateral consequences. Even if record clearance, ban-the-box, and anti-discrimination protections were in place in a single jurisdiction, Certificates would play their role whenever a person has an eligible record of conviction that cannot be expunged, when an employer runs a background check at later points in the hiring

76 Jennifer L. Doleac, *Forget “Ban the Box” and Give Ex-prisoners Employability Certificates*, BROOKINGS INST. (Dec. 15, 2016), <https://www.brookings.edu/opinions/forget-ban-the-box-and-give-ex-prisoners-employability-certificates> [<https://perma.cc/BAT2-H69E>].

77 TENN. CODE ANN. § 40-29-107 (2021).

78 N.Y. CORRECT. LAW §§ 701-705 (McKinney 2021).

79 OHIO REV. CODE ANN. § 2953.25 (West 2021).

80 CORRECT. §§ 701-705.

81 Pager, *supra* note 52.

process despite a ban-the-box law, or when a conviction may be related to a position and, therefore, likely unprotected by general anti-discrimination laws.

These initiatives are part of a larger model of “rights restoration,” in which states take steps to mitigate the harmful consequences of a criminal record in order to restore people to their pre-conviction status in areas including employment, housing, and voting.⁸² This model is often thought of as one of “forgiving” rather than “forgetting” a person’s criminal history, since it does not hide or erase information from the public record.⁸³ Instead, it adds a piece of information for employers or licensing boards to consider. Just as many states have rights-restoration procedures for civil rights that have been lost (such as the rights of firearm ownership, serving on a jury, or ability to hold public office) states are increasingly trying to restore a person’s employability through judicial or administrative processes.

Aside from New York’s Certificate of Good Conduct and Certificate of Relief from Disabilities, which have been around for decades, these certificates are a relatively recent phenomenon. Illinois created its Certificate program in 2006, and Iowa created the first version of its program in 2008. The other current Certificate programs have been created within the past decade. Arizona, Arkansas, California, Colorado, Connecticut, Washington, D.C., Georgia, Illinois, Iowa, Maryland, Michigan, New Jersey, New York, North Carolina, Ohio, Rhode Island, Tennessee, Vermont, and Washington each have some version of a Certificate program.⁸⁴

The scholarly literature on Certificates has, so far, focused primarily on New York’s decades-old Certificate regime and lessons to be learned from its successes and shortcomings. Joy Radice, in her Article *Administering Justice: Removing Statutory Barriers to Reentry*,⁸⁵ conducted a deep dive into the history and evolution of the New York statute, identifying its strengths and weaknesses with an eye toward improving Certificate programs. Heather J. Garretson, in her Article *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy*

⁸² See generally Love et al., *supra* note 74, at 15.

⁸³ *Id.* at 2–4.

⁸⁴ See Wesley McCann, Melissa A. Kowalski, Craig Hemmens, & Mary K. Stohr, *An Analysis of Certificates of Rehabilitation in the United States*, 6 CORR.: POL’Y, PRAC. & RSCH. 18, for an analysis of the eligibility requirements for many Certificate laws around the country. For more detailed information about each state’s restoration of rights process, see Love et al., *supra* note 74, at 15–17, and RESTORATION OF RTS. PROJECT, <http://restoration.ccsresourcecenter.org> [<https://perma.cc/9CME-CP3E>].

⁸⁵ Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012).

to Address the Employment Consequences of a Conviction,⁸⁶ expands on Radice's work by supplementing the statutory and historical analysis of the New York Certificate with a series of qualitative interviews with judges, people with Certificates, people who are eligible for Certificates but do not have one, probation officials, and advocates. Both authors identify issues around access as essential to the success of Certificate programs generally. Alec C. Ewald, in his Article, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief,"*⁸⁷ similarly supplements our understanding of how the New York Certificate works on the ground through structured interviews with probation officers and judges throughout the state of New York. These interviews reveal differences in implementation in rural versus urban areas and add significant color to the on-the-ground practice of Certificate administration in New York. A more recent Article, *An Analysis of Certificates of Rehabilitation in the United States,*⁸⁸ takes a national perspective and conducts statutory analysis of different states' Certificates to assess the likelihood of states giving reciprocity to other states' Certificates. The outstanding and invaluable Restoration of Rights Project⁸⁹ tracks the rapidly changing statutes governing rights restoration around the country. This Article is the first to take a close look at the administrative burdens involved in Certificate programs around the country with a primary focus on the way that those burdens affect not just access generally, but the distribution of that access—who is likely able to get a Certificate, and who is likely to be left behind?

To date, there is very little field-based evidence of how having a Certificate increases recipients' employment prospects. A survey in Ohio, in which researchers attempted to contact all recipients of a Certificate, revealed that 42% of Ohio Certificate recipients reached believed that the Certificate made a difference in their employment search.⁹⁰ Unfortunately, they only reached a small percentage of recipients.⁹¹ In a survey of Washington, D.C. employers, 50% of the surveyed employers said that policies like legal liability protections and

⁸⁶ Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. Pub. Int. L.J. 1 (2016).

⁸⁷ Alec C. Ewald, *Rights Restoration and the Entanglement of US Criminal and Civil Law: A Study of New York's "Certificates of Relief"*, 41 LAW & SOC. INQUIRY 5 (2016).

⁸⁸ McCann et al., *supra* note 84.

⁸⁹ RESTORATION OF RTS. PROJECT, *supra* note 84.

⁹⁰ JOANN SAHL & MARK GALLAGHER, *CERTIFICATE OF QUALIFICATION (CQE) STATEWIDE TRAINING PROJECT REPORT: JANUARY 1, 2015 TO DECEMBER 31, 2015*, at 6 (2016), <https://drc.ohio.gov/Portals/0/CQE/CQE%20Statewide%20Project%20Final%20Report2016.pdf?ver=2016-09-14-164320-990> [<https://perma.cc/J6M3-NVBK>].

⁹¹ *Id.* at 7 (only 22% responded).

certificates of rehabilitation would “significantly increase or influence hiring,”⁹² which suggests that a Certificate program that limited liability could have a significant effect on job prospects there. The story out of New York is more mixed—qualitative interviews in New York, for example, reveal that some probation officers perceive Certificates as making a big difference, but that others are highly skeptical about their effects.⁹³ A recent study in the health care sector in New York studied outcomes of denial challenges after provisional offers were rescinded because of criminal records. The study showed that a large percentage (20%) of people who challenged denials did have a Certificate, but that a Certificate did not make a significant difference in who was ultimately hired.⁹⁴

There is some strong experimental evidence that Certificates can have a positive effect on a person’s employment prospects. An experimental study in Ohio, published in 2016, sent identical fictitious resumes to employers. The study found that when the “applicant” informed employers that they had a Certificate, they benefited from much higher call-back rates than when the criminal record was disclosed without a Certificate.⁹⁵ The positive response rate with no criminal record information was 28.97%, for a disclosed one-year-old felony it was 9.8%, and with a disclosed one-year-old felony with a Certificate of Qualification for Employment the rate was 25.45%—nearly identical to the call-back rate when no record was disclosed.⁹⁶ This study suggests that Certificates do hold promise for improving employment for people with criminal records. Of course, the best

⁹² COUNCIL FOR CT. EXCELLENCE, UNLOCKING EMPLOYMENT OPPORTUNITY FOR PREVIOUSLY INCARCERATED PERSONS IN THE DISTRICT OF COLUMBIA 13 (2011), http://www.courtexcellence.org/uploads/publications/CCE_Reentry.pdf [https://perma.cc/78TD-4FLF].

⁹³ Garretson, *supra* note 86, at 34–36; Ewald, *supra* note 87, at 24–27 (reporting that, of twenty-three probation officers interviewed, nine said they did not know enough about the effects, seven were tentatively positive, and seven others gave strongly positive responses about Certificates’ effects).

⁹⁴ Megan Denver, *Criminal Records, Positive Credentials and Recidivism: Incorporating Evidence of Rehabilitation into Criminal Background Check Employment Decisions*, 66 CRIME & DELINQ. 194, 206 (2020).

⁹⁵ Peter Leasure & Tia Stevens Andersen, *The Effectiveness of Certificates of Relief as Collateral Consequence Relief Mechanisms: An Experimental Study*, 35 YALE L. & POL’Y REV. INTER ALIA 11, 19–20 (2016). The fake resume submitted in connection with this experiment is of a person named “Matthew O’Brien,” who had a one-year-old felony drug conviction. *Id.* at 15. As the authors note, more research is needed on the effect of a Certificate on minority job seekers, since the combination of a criminal record and race discrimination makes employment even more difficult. *Id.* at 21. More research similarly would need to be done on Certificates’ effects for people with violent felony convictions and multiple convictions on their records as opposed to a single drug conviction.

⁹⁶ *Id.* at 19–20.

measure of Certificates' efficacy would be to see how they operate in practice. Unfortunately, no large-scale assessment of the effect of Certificates on real people's employment yet exists.

Certificates are politically popular interventions, as evidenced by their quick spread to politically diverse states. As criminal justice reforms in general, and reentry in particular, see more and more bipartisan support,⁹⁷ Certificates might be an easy win for advocates interested in supporting people with criminal records. The popularity of these laws stems, in part, from the fact that they typically provide protection not only to employees but also to employers through liability protections. They also do not involve concealing information either from the public, as expungements do, or from employers, as initiatives like ban-the-box do. These can often feel like a win-win intervention.

Under this framing, states with Certificate programs that have seen low levels of application, issuance, and use of Certificates might assume that even if the programs have limited upside, they have little to no downside. That may not be true, however. The ways that Certificate programs are designed and implemented raise important questions, including questions of equity about who ends up with a Certificate in hand, and of how Certificates may or may not fit in with larger social change. The way many Certificate programs are designed today, people with more resources and privilege are particularly likely to be able to access them, while those with fewer resources and less privilege are less likely. Certificate programs that require an individual to overcome obstacles to earn a Certificate can also reinforce the idea that the obstacles that Certificates are designed to alleviate are personal failings rather than social problems created and reinforced by state law. In most Certificate programs, an individual has to jump through costly administrative hoops and carry heavy, but amorphous, evidentiary burdens⁹⁸ to get one of these Certificates. This places the onus firmly on the individual affected by these employment barriers, rather than on the state.

The obstacles a person faces to getting a Certificate are administrative burdens. Administrative burdens can be thought of as

⁹⁷ See, e.g., *The State of Justice Reform 2018: A Bipartisan Emphasis on Reentry*, VERA INST. OF JUST., <https://www.vera.org/state-of-justice-reform/2018/the-state-of-reentry> [<https://perma.cc/UD9T-BF9M>]; *Criminal Justice Reform*, CHARLES KOCH INST., <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform> [<https://perma.cc/9NER-HSBK>] (“Our Goal [is] . . . ensuring that people leaving prison have opportunities to succeed on the outside.”).

⁹⁸ For example, an applicant in Tennessee must demonstrate that they have “sustained the character of a person of honesty, respectability, and veracity and is generally esteemed as such by the petitioner’s neighbors,” among other factors. TENN. CODE ANN. § 40-29-107(i)(1) (West 2021).

falling into three buckets. The first is learning costs, which include the time and effort it takes to learn about a program or service, to determine eligibility, to figure out if it is something that brings expected benefits, and to identify the steps one must take.⁹⁹ The second is compliance costs, which includes financial costs, provision of information and documentation, and other steps taken to respond to administrative demands.¹⁰⁰ The third is psychological costs, which includes stigma, loss of autonomy, and stress related to navigating a complex and unpredictable process.¹⁰¹ The way in which these Certificate programs are designed and implemented to minimize or maximize these costs will help determine if, ultimately, they are more helpful or harmful.

B. Case Studies

Below are three case studies that explore three different existing models of administering a Certificate program. These case studies draw on the underlying statutes as well as any administrative rules, regulations, or processes that states have developed. This description is supplemented, where available, with updated information about usage rates and people's actual experiences of trying to access a Certificate. Each case study briefly presents the background, eligibility and effect, and administration of the state's efforts at a Certificate program. As discussed below, each Certificate program varies significantly from the others in terms of eligibility and effect. They also vary significantly in the types of administrative burdens—the learning, compliance, and psychological costs—a person would face in securing one of them. Tennessee is presented as an example of a strongly individualistic system of Certificate administration where the burdens are entirely on the individual who must file a motion in state court, and Georgia provides an example of a system in which the administration of the Certificates is almost exclusively managed by a state agency. New York provides an example of a hybrid model, in which the state takes on varying roles throughout the process depending on timing, eligibility, and custodial status. None of these case studies is presented as an ideal model—rather, each provides lessons for ways in which administrative burdens can be lightened for people seeking Certificates. The following Section includes a critique and analysis of the features of these three case studies and of Certificates more generally, as well as lessons learned for a way forward.

⁹⁹ HERD & MOYNIHAN, *supra* note 10, at 23–24.

¹⁰⁰ *Id.* at 24.

¹⁰¹ *Id.* at 25–29.

C. Tennessee

1. Background and Origins

Tennessee's Certificate law demonstrates the popularity and political feasibility of Certificate laws generally. The Tennessee Certificate law was drafted and championed by Republican state legislators when it was first passed in 2014. It was then amended in 2017. Both times, the legislation received near-universal bipartisan support in a heavily Republican state legislature.¹⁰² The law was touted by its advocates as a solution to the obstacles people with felonies face when searching for jobs.¹⁰³ The Certificate law received nothing but positive press when it was passed, including being hailed by *The Commercial Appeal's* editorial board as “[o]ne of the more important pieces of legislation that came out of the Tennessee General Assembly’s recently ended session.”¹⁰⁴ *The Jackson Sun* declared it “a step in the right direction that could help felons overcome one of the greatest obstacles to becoming productive citizens, getting a good job. It also could help slow the costly revolving door of repeat offenders.”¹⁰⁵

2. Eligibility and Effect

The Tennessee law as amended has relatively broad eligibility. The law originally applied to a subgroup of people with felony convictions who had completed their sentences, since it was part of the general rights restoration process.¹⁰⁶ After the 2017 amendment, the Certificate of Restoration was severed from the broader rights restoration process,

¹⁰² The initial 2014 Certificate legislation passed 27-3 in the State Senate and 95-0 in the House. *SB 0276, Bill History*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0276&GA=108> [<https://perma.cc/44ME-PTXS>]. The 2017 amendment received unanimous support, passing 33-0 in the Senate and 96-0 in the House. *SB 0016, Bill History*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0016&GA=110> [<https://perma.cc/GQ9E-JM4Q>].

¹⁰³ SB 0276, Senate-Judiciary Committee (Tenn. Feb 26, 2014), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0276&GA=108> [<https://perma.cc/44ME-PTXS>] (click “video” tab; then scroll down to Senate-Judiciary Committee for Feb 26, 2014; then follow “video” hyperlink to the right) (video of State Senate committee hearing in which Sen. Kelsey discussed the background and motivation for the legislation).

¹⁰⁴ Editorial, *Job Help for Felons*, COM. APPEAL, Apr. 19, 2014, at 6.

¹⁰⁵ *Court Endorsed Employability Offers Felons a Real Advantage*, JACKSON SUN, Apr. 17, 2014, at A5.

¹⁰⁶ TENN. CODE ANN. § 40-29-101 (2021).

thereby expanding eligibility to all people with felony convictions, though the requirement of sentence completion likely still remains.¹⁰⁷

A Certificate may be granted if a court finds by a preponderance of evidence that various factors, such as that a person “has sustained the character of a person of honesty, respectability, and veracity and is generally esteemed as such by the petitioner’s neighbors,”¹⁰⁸ the person has a significant need for a certificate, and there would be no unreasonable risk to public safety, are met.¹⁰⁹ A court, however, may deny a Certificate in its discretion even if the above factors are all met.¹¹⁰ Denials are appealable only for abuse of discretion.¹¹¹

The recipient of a Certificate receives two primary benefits. The first is that no licensing or certifying board or agency can deny a person an occupational license or certificate based on the criminal conviction alone.¹¹² Instead, the agency or board must conduct an individualized, case-by-case analysis of whether to grant or deny a license or certification.¹¹³ The law provides a significant loophole, however, which permits licensing entities to adopt new rules denying the issuance of a license to a person based on either the time that has elapsed since the criminal offense or the “direct bearing” of the offense on the “fitness or ability of the person to perform” a duty “necessarily related to the license.”¹¹⁴ The second benefit is that if an employer knows of a Certificate at the time of hiring, an employer has complete immunity from a civil claim of negligent hiring of a person with a prior conviction.¹¹⁵ The Certificate statute specifies conditions under which an employer could be held liable for negligent retention, including demonstrated danger or subsequent conviction of a felony.¹¹⁶ A Certificate is also evidence of an employer’s due care in hiring or

¹⁰⁷ The 2017 amendment seemingly expanded eligibility for all felonies, whereas before the amendment a person would have had to be in the process of restoring their rights generally, a process that excluded first degree murder, aggravated rape, treason, and voter fraud. *Id.* § 40-29-105(b)(2). It remains unclear whether, according to the amended statute, a person must have completed his maximum sentence to apply, as is necessary for restoration of rights more generally under § 40-29-101, or whether the amendment divorcing the Certificate from the rights restoration process made that requirement obsolete as well. Regardless, advocates expect judges to continue to require sentence completion.

¹⁰⁸ § 40-29-107(i)(1).

¹⁰⁹ *Id.* (i)(1-4).

¹¹⁰ *Id.* (i).

¹¹¹ *Id.* (k)(2).

¹¹² *Id.* (m).

¹¹³ *Id.*

¹¹⁴ *Id.* (m)(4).

¹¹⁵ *Id.* (n)(2).

¹¹⁶ *Id.* (n)(3).

retaining an employee.¹¹⁷ The use of a Certificate as evidence defending against negligence or other liability extends beyond the employment realm to landlords, schools or other programs, and organizations doing business with a person who holds a Certificate.¹¹⁸ A less formal but equally significant benefit is that the Certificate may informally act as a positive credential that helps an applicant overcome the generalized stigma of a criminal record.

3. Administration

No state agency has any role in making people aware that Certificates of Employability exist or in assisting people to apply for Certificates. In the context of restoring voting rights, state law “urge[s]” judges, probation, and parole to have someone inform a person about the restoration of citizenship rights procedure.¹¹⁹ No law or policy, however, requires anyone to inform a person with a felony conviction of the voting rights restoration process, and no law even urges—let alone requires—judges, corrections personnel, or any other actor to inform people about the Certificate of Employability or provide any other assistance.

In order to secure a Certificate of Employability in Tennessee, a person must file a petition in the Circuit Court of the county of conviction or where the person resides.¹²⁰ The person filing the petition bears the costs of the filing fees, which vary by county but can easily be a couple hundred dollars.¹²¹ Since a person cannot file the petition as part of their criminal case, they are without appointed legal counsel. Legislators discussing the Certificate legislation acknowledged the ways in which this petition would be difficult and costly, including the cost of retaining counsel to advise about the Certificate and advocate on behalf of a petitioner.¹²² The statute does provide that the

¹¹⁷ *Id.* (n)(1).

¹¹⁸ *Id.*

¹¹⁹ § 40-29-106(a).

¹²⁰ § 40-29-107(b).

¹²¹ § 40-29-107(c). Filing fees vary by county. In Davidson County (which includes Nashville), the filing fee is \$159.50. See *Circuit Court Filing Fees*, NASHVILLE CIR. CT. CLERK, <https://circuitclerk.nashville.gov/circuit/circuitfees.asp> [<https://perma.cc/BBA8-5PMV>]. In Rutherford County, just a few miles away, the filing fee is \$264.50. See *Filing Fees*, RUTHERFORD CNTY. CHANCERY CT. CLERK & MASTER, https://www.rcchancery.com/filing_fees.htm [<https://perma.cc/8S3B-DJDR>].

¹²² SB 0016, Senate-Judiciary Committee (Tenn. Jan. 31, 2017), <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB0016&GA=110> [<https://perma.cc/65WF-DT5T>] (click “video” tab; then scroll down to Senate-Judiciary Committee for January 31, 2017; then follow “video” hyperlink to the right) (video of State Senate committee hearing).

Administrative Office of the Courts should create a *pro se* form,¹²³ which has been done, but it seems exceedingly rare that a person in Tennessee pursues a Certificate *pro se*. The *pro se* form essentially parrots the language of the statute, including questions that are difficult for individuals to answer, for example, “[i]nclude each offense that is a disqualification from employment or licensing in an occupation or profession, including the years of each conviction or plea of guilty.”¹²⁴

4. Usage and Impact

Despite the significant benefits that a Certificate would grant someone, the Tennessee Certificate statute is very rarely used. While the Tennessee Administrative Office of the Courts does not keep data on how frequently Certificate petitions are requested and granted or denied, and this information was not accessible from courts themselves without docket information, it is clear that these are not common even in the largest counties. Inquiries made of Circuit Court clerks’ offices by county paint a depressing picture.¹²⁵ Of the ninety-five counties in Tennessee, fifty-one of the clerks’ offices contacted indicated that they were not aware of the Certificate at all or incorrectly claimed that they did not have them in their county.¹²⁶ Another twenty-two indicated that they were aware of them but had never seen one.¹²⁷ Six indicated that a small number of Certificates have been filed in their court since the law was passed.¹²⁸ Conversations with reentry advocates in Tennessee reinforce the fact that these are very rarely accessed in Tennessee.¹²⁹

D. Georgia

1. Background and Origins

Georgia provides another example of the political viability of Certificate legislation. In 2014, Georgia passed legislation creating its

¹²³ See § 40-29-107(d); TENN. STATE CT., PETITION FOR CERTIFICATE OF EMPLOYABILITY (2014), http://www.tsc.state.tn.us/sites/default/files/docs/petition_for_certificate_of_employability.pdf [<https://perma.cc/K2DJ-DRTS>].

¹²⁴ TENN. STATE CT., *supra* note 123.

¹²⁵ Data on file with the author.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Discussions by author with reentry advocates in Tennessee.

first Certificate program.¹³⁰ The Program and Treatment Completion Certificate (“Certificate”)¹³¹ was initially only designed to be issued by the Georgia Department of Corrections for people in prison and on parole. In 2017, the Certificate program was extended so that people on probation can receive the Certificate through the Department of Community Supervision as well.¹³² These laws were parts of Governor Deal’s criminal justice reform packages, which passed with significant bipartisan support.¹³³

2. Eligibility and Effect

According to statute, the Certificate “symbolize[s] an offender’s achievements toward successful reentry into society.”¹³⁴ The statute excludes people who have been convicted of certain enumerated violent felonies.¹³⁵ Rather than the statute’s dictating the parameters of the Certificate, the law directed the Board of Corrections to promulgate rules and regulations relating to the Certificate, simply stating that these “shall take into account an offender’s disciplinary record and any other factor the board deems relevant to an individual’s qualification for such certificate.”¹³⁶ The 2017 statute has identical language about the effect of the Certificate, but directs the Board of Community Supervision to create “rules and regulations relating to the issuance of such certificate [that] shall take into account a probationer’s violations of the terms of his or her probation and any other factor the board deems relevant to an individual’s qualification for such certificate.”¹³⁷

Georgia’s Certificate, like a pardon, creates a “presumption of due care in hiring, retaining, licensing, leasing to, admitting to a school or

¹³⁰ The Program and Treatment Completion Certificate first “went live” in February 2015. See GA. DEP’T CORR., FACT SHEET: SENTENCING LEGISLATION (2019), <http://www.dcor.state.ga.us/sites/default/files/Sentencing%20Legislation.pdf> [<https://perma.cc/246W-T5JY>].

¹³¹ GA. CODE ANN. § 42-2-5.2 (2020).

¹³² § 42-3-2.

¹³³ See, e.g., Bill Rankin, *Nathan Deal’s Criminal Justice Reforms Leave Lasting Legacy*, ATLANTA J.-CONST. (Jan. 2, 2019), <https://www.ajc.com/news/local/deal-criminal-justice-reforms-leaves-lasting-legacy/ZMwb2vG7C4LurWoFESw46O> [<https://perma.cc/2GWP-97RN>]; Naomi Shavin, *A Republican Governor Is Leading the Country’s Most Successful Prison Reform*, NEW REPUBLIC (Mar. 31, 2015) <https://newrepublic.com/article/121425/gop-governor-nathan-deal-leading-us-prison-reform> [<https://perma.cc/DX7X-S9K5>].

¹³⁴ § 42-2-5.2.

¹³⁵ GA. CODE ANN. § 17-10-6.1 (2020) (enumerating murder, felony murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery).

¹³⁶ § 42-2-5.2(c).

¹³⁷ § 42-3-2(h)(2).

program, or otherwise engaging in activity with the individual to whom the Program and Treatment Completion Certificate was issued or the pardon was granted.¹³⁸ A Certificate, therefore, provides assurance to potential employers, landlords, schools, and programs that they would be unlikely to be liable for hiring, renting to, or admitting a person with a criminal record who has a Certificate unless there were other red flags. The Georgia Certificate does not have any effect on mandatory bars related to occupational licensing, though one may not be necessary given Georgia's licensing law requiring individualized assessment of people with criminal records.¹³⁹

The Department of Corrections (DOC) has issued Standard Operating Procedures outlining eligibility and the process for receiving a Certificate. The eligibility criteria are clear and largely objective. Under the DOC-promulgated eligibility criteria, a person is eligible for a Certificate if they have not been convicted of one of a small group of enumerated serious violent felonies,¹⁴⁰ they do not have an active ICE detainer, they are not receiving a Level IV mental health treatment or higher,¹⁴¹ they have not had any convictions for additional crimes during the current period of imprisonment, have not been found guilty of a high-level disciplinary action within the last twelve months before release, and have not had any refusal or disciplinary withdrawal from programs or treatment within the last twelve months before release.¹⁴²

In 2017, based on the first two years of data on Georgia's Certificate program, the Georgia Council on Criminal Justice Reform suggested

¹³⁸ GA. CODE ANN. § 51-1-54(b) (2020).

¹³⁹ GA. CODE ANN. § 43-1-19(q) (2020). The law prohibits all licensing boards from revoking or refusing to grant a license to an applicant "due solely or in part to such applicant's . . . [c]onviction of any felony" or due to any "[a]rrest, charge, and sentence for the commission" of any felony unless such felony "directly relates to the occupation for which the license is sought or held." *Id.* The law goes on to require any licensing board to consider enumerated factors, including the nature and seriousness of the offense, the person's age at the time, the length of time elapsed, circumstances surrounding the offense, and evidence of rehabilitation and present fitness to perform the occupation at issue. *Id.*

¹⁴⁰ This eligibility criterion is specified in the statute, referring to § 17-10-6.1, which lists the excluded felonies as murder, felony murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy, and aggravated sexual battery.

¹⁴¹ Under DOC policies, Level IV Mental Health Level of Care is for people whose "ability to function in general population is severely impaired due to mental illness" reflecting "active symptoms of a Severe and Persistent Mental Illness (SPMI) with impaired reality testing," with Level V and VI receiving higher levels of care. GA. DEP'T OF CORR., STANDARD OPERATING PROCEDURES: MENTAL HEALTH LEVELS OF CARE 13-17 (2018), <https://www.powerdms.com/public/GADOC/documents/106278> [<https://perma.cc/P5E5-3M92>].

¹⁴² GA. DEP'T OF CORR., STANDARD OPERATING PROCEDURES: PROGRAM AND TREATMENT COMPLETION CERTIFICATE 2 (2018), <https://www.powerdms.com/public/GADOC/documents/183947> [<https://perma.cc/Z22H-Z7S6>].

expanding the program to people on probation.¹⁴³ As of February 2019, however, the Department of Community Supervision has not issued eligibility criteria.

3. Administration

The DOC regulations provide clear procedures that place the onus on DOC employees, rather than the person in prison, to secure a Certificate for people who are eligible. The DOC regulations state that “[i]t is the responsibility of the Warden, Superintendent or their designee, and the Deputy Warden of Care and Treatment or Assistant Superintendent to ensure that Certificates are issued to eligible and approved offenders.”¹⁴⁴ The Certificate contains information about programs and trainings completed and work history during the period of imprisonment, and is automatically populated.¹⁴⁵ It is the staff’s responsibility to confirm the accuracy of the information.¹⁴⁶ The regulations also obligate DOC staff to make sure people know about the Certificate, eligibility requirements, and its benefits. People in prison are told about the Certificate during orientation and upon arrival at a new facility.¹⁴⁷ Staff educate people in prison about eligibility and benefits of a Certificate.¹⁴⁸ Once a person’s release date is determined, a counselor meets with a person who is eligible for a Certificate to let them know that that the Certificate will be included in their “release package,” and to “discuss the Certificate’s use and benefits.”¹⁴⁹ The Certificate is then automatically provided to a person leaving prison upon their release.¹⁵⁰

4. Usage and Impact

The issuance rate of these Certificates to people leaving prison in Georgia is very high compared to Certificate issuance in other states. In

¹⁴³ GA. DEP’T OF CMTY. SUPERVISION, REPORT OF THE GEORGIA COUNCIL ON CRIMINAL JUSTICE REFORM (2017), https://dcs.georgia.gov/sites/dcs.georgia.gov/files/related_files/site_page/Report%20of%20the%20Georgia%20Council%20on%20Criminal%20Justice%20Reform%202017.pdf [https://perma.cc/A7WS-JSCA].

¹⁴⁴ GA. DEP’T OF CORR., *supra* note 142, at 2.

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 4.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 6.

the first two years that the Certificate program was implemented and administered through the DOC, approximately 5,000 Certificates were issued.¹⁵¹ Since the Certificates were first issued in 2015, the number has increased each year.¹⁵² In fiscal year 2018, “7,662 Program Treatment Completion Certificates were issued.”¹⁵³ More than half of the population of people released from prison were eligible for Certificates in 2018.¹⁵⁴ Interestingly, Georgia’s DOC states that while 9,669 people were eligible, only 7,662 were granted¹⁵⁵—this strongly suggests that, despite the automated process that the Georgia regulations have created, some people are still falling through the cracks. In total, as of the end of fiscal year 2018, 18,882 Certificates had been issued by the Georgia DOC.¹⁵⁶ The expansion of Certificates to the Department of Community Supervision for people on probation and parole has not yet occurred but has the potential to reach many more people.

E. New York

1. Background and Origins

New York, which has the country’s oldest Certificate legislation by far, is often looked to as the original model for a Certificate. New York’s Certificates, which were first created in 1945¹⁵⁷ but then amended and adapted through the 1970s,¹⁵⁸ hearken back to an era well before our current era of mass criminalization and mass incarceration to a period in which the rehabilitative ideal was the driving force in criminal justice reform.¹⁵⁹ Through the early decades of the Certificate’s creation and development, legislators, with the support of Governor Nelson Rockefeller and wide popular support, took steps to expand access to

¹⁵¹ GA. DEP’T OF CMTY. SUPERVISION, *supra* note 143, at 43.

¹⁵² GA. DEP’T OF CORR. INMATE SERVS., FY18 IMPACT REPORT 18 (2018), <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20Impact%20Report%202018.pdf> [<https://perma.cc/A4QW-VE83>] (244 Certificates were issued in fiscal year (FY) 2015; 4,854 in FY 2016; 6,122 in FY 2017; and 7,662 in FY 2018.).

¹⁵³ *Id.* at 2.

¹⁵⁴ GA. DEP’T OF CORR., 2018 ANNUAL REPORT 27 (2018), <http://www.dcor.state.ga.us/sites/default/files/sites/all/gdc/files/pdf/Research/Monthly/GDC%20FY2018%20Annual%20Report.pdf> [<https://perma.cc/C2Q8-YT78>] (reporting that, of 18,242 people being released, 9,669 were eligible for a Certificate, which is a 37% increase over FY 2017).

¹⁵⁵ *Compare id.*, with GA. DEP’T OF CORR. INMATE SERVS., *supra* note 152.

¹⁵⁶ GA. DEP’T OF CORR. INMATE SERVS., *supra* note 152.

¹⁵⁷ Radice, *supra* note 85, at 734 n.109 (citing 1945 N.Y. Laws 123).

¹⁵⁸ *Id.* at 733.

¹⁵⁹ *Id.*

and eligibility for Certificates, with an eye toward promoting rehabilitation and reentry.¹⁶⁰ The evolution and amendments over this period made clear that the Certificates were intended to promote rehabilitation (and be “consistent with” rehabilitation),¹⁶¹ not solely as a reward for past rehabilitation.¹⁶²

2. Eligibility and Effect

New York has two certificates—a Certificate of Relief from Disabilities (CRD) and a Certificate of Good Conduct (CGC)—which have similar effect but varying eligibility requirements.¹⁶³ A Certificate of Relief can be issued as early as sentencing when a person has no more than one felony conviction and any number of misdemeanors.¹⁶⁴ A person must apply for a Certificate of Relief for every conviction on their record.¹⁶⁵ A Certificate of Good Conduct has a waiting period and is available for people with more than one felony conviction.¹⁶⁶ The standard for both Certificates is whether the person is eligible, whether the relief to be granted is consistent with the rehabilitation of the person, and whether the relief to be granted is consistent with the public interest.¹⁶⁷ Both Certificates remove mandatory¹⁶⁸ bars in employment and licensing and require an employer or licensing board to consider their conviction in accord with state anti-discrimination law.¹⁶⁹

3. Administration

There are many possible ways that a person in New York might get a Certificate. If a person is not committed to a state prison under the jurisdiction of the state Department of Corrections and Community

¹⁶⁰ See *id.* at 733–39.

¹⁶¹ N.Y. CORRECT. LAW § 702 (McKinney 2021).

¹⁶² Radice, *supra* note 85, at 738–39.

¹⁶³ See CORRECT. §§ 700–705.

¹⁶⁴ CORRECT. §§ 700, 702(1).

¹⁶⁵ CORRECT. § 701(1) (each Certificate applies only to the particular conviction detailed in the application).

¹⁶⁶ CORRECT. § 703-b.

¹⁶⁷ CORRECT. §§ 702(2), 703-b(1).

¹⁶⁸ But not discretionary. See, e.g., *Plantone v. Dep’t of State, Div. of Licensing Servs.*, 674 N.Y.S.2d 560, 561 (N.Y. App. Div. 1998) (“It is well settled that a certificate of relief from disabilities does not preclude a licensing body from exercising its discretion to revoke a license over which the licensing body has authority.” (citations omitted)).

¹⁶⁹ CORRECT. § 701. But only a Certificate of Good Conduct permits a person to hold public office. *Id.*

Supervision (DOCCS), the sentencing court is the authority that may issue the Certificate of Relief from Disabilities.¹⁷⁰ This could be issued at the time of conviction,¹⁷¹ or at any time after. However, if a person is sentenced to state prison time, or if a person is attempting to get a Certificate for a federal or out-of-state conviction, then DOCCS issues the certificate.¹⁷² DOCCS is the only institution with the power to issue a Certificate of Good Conduct.¹⁷³

Judicial grants, particularly at sentencing or early on in the reentry or reintegration process when they would likely be most helpful, are unpredictable and all-too-rare.¹⁷⁴ Despite the low standard for granting a Certificate that is written into the statute—that a person be eligible and that granting it be consistent with the rehabilitation of the person and with the public interest¹⁷⁵—judges typically create higher standards when a request is before them. While some judges grant certificates routinely,¹⁷⁶ that is not the norm. Despite clear statutory language that a person is eligible for a Certificate at the time of sentencing, judges instead often prefer to have a person convicted of a crime “earn[]” the Certificate over time.¹⁷⁷ Former Probation Commissioner Vincent Schiraldi commented that getting a judicially-granted Certificate is “completely roulette.”¹⁷⁸ Since sentencing grants are so rare, most Certificate applicants return to court months or years later,¹⁷⁹ when they no longer have their appointed defense attorney by their side. People, therefore, would need to navigate the Certificate application process themselves—collecting criminal history information, specifying the

¹⁷⁰ CORRECT. § 702.

¹⁷¹ New York has made efforts to encourage issuing a CRD at the time of sentencing by requiring relevant information be included in all pre-sentence reports. N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9 (2021). Courts are now required to consider a person’s fitness for a Certificate pursuant to a statutory change in 2011. CORRECT. § 702(1).

¹⁷² CORRECT. § 703.

¹⁷³ CORRECT. § 703-b.

¹⁷⁴ Ewald, *supra* note 87, at 18 (“[W]ith a few exceptions, most jurisdictions appear to award extremely few certificates at sentencing, and many judges and probation officers object outright to such grants.”).

¹⁷⁵ CORRECT. §§ 702(2), 703(3).

¹⁷⁶ Garretson, *supra* note 86, at 31 (“One judge noted an inability to ‘think of a case where I wouldn’t give it.’”).

¹⁷⁷ *Id.*

¹⁷⁸ NACDL Task Force on Restoration of Rights and Status After Conviction: Hearing Before Task Force Chairman Rick Jones 20 (N.Y. 2013), <https://www.nacdl.org/getattachment/4b5a5189-5d06-4daf-a693-f5722f5a7844/restoration-of-rights-task-force-hearing-transcript-new-york-city-day-3-edited.pdf> [<https://perma.cc/H3JD-HNVB>] (statement of Mr. Vincent Schiraldi, former Comm’r, N.Y. Department of Probations).

¹⁷⁹ Ewald, *supra* note 87, at 20.

relief requested, and collecting and attaching evidence of rehabilitation—or they would need to hire another lawyer.¹⁸⁰

Submitting the application involves hassle and uncertainty. As the New York Courts website notes, “Different Courts follow different procedures for CRD applications.”¹⁸¹ Applicants are encouraged to look up and then call the court that sentenced them for each offense, and ask the following questions:

[1] How do I submit my application, can I mail it, if so, where? [2] Do I have to get a probation report, and if so, how? [3] Do I have to submit my fingerprints, and if so, how? [4] Will I have a court date and hearing? if so, when? [5] How do I find out the Judge’s decision on the CRD? Do I have to submit a self-addressed stamped envelope?¹⁸²

There is also a lack of clarity about what will happen after an application is submitted. Courts typically, but not always, refer the application to probation, which investigates and issues a report. Probation officers’ approaches to Certificate recommendations vary widely. Notably, probation officers’ approaches to Certificates often mirror those of the judges in their district, as probation officers often consider the judge’s view of Certificates in making their recommendations and reports.¹⁸³ Judges’ approaches to Certificate requests appear to be “diverse,” with some taking the approach of, “If they’re eligible, I’ll give it to them,” and others wondering, “Is there something *compelling*, such that I should lift the onus of a criminal conviction from this person?”¹⁸⁴ Judicial assessments of whether to grant Certificates, particularly outside of New York City, frequently use more stringent standards than those in the statute.¹⁸⁵

Despite lacking a legislative mandate to do so, the New York City Probation Department has been a leader in educating the public, people on probation, judges, and attorneys about Certificates. For example, New York City Probation has held Certificate of Relief Days where

¹⁸⁰ Confusingly, the application itself does not specify that a person should include evidence of rehabilitation, N.Y. STATE UNIFIED CT. SYS., STATE OF NEW YORK APPLICATION BY AN ELIGIBLE OFFENDER FOR A CERTIFICATE OF RELIEF FROM DISABILITIES, <https://www.nycourts.gov/forms/criminal/pdfs/DPCA-52.pdf> [<https://perma.cc/AR7Z-RDHE>], but the N.Y. Courts website indicates that it is important that a person submit evidence of rehabilitation along with their application. See *Applying to Court for a Certificate of Relief from Civil Disabilities*, NYCOURTS.GOV, <https://www.nycourts.gov/courthelp/Criminal/CRDApplication.shtml> [<https://perma.cc/8BRZ-HVUK>].

¹⁸¹ See *Applying to Court for a Certificate of Relief from Civil Disabilities*, *supra* note 180.

¹⁸² *Id.*

¹⁸³ Ewald, *supra* note 87, at 17.

¹⁸⁴ *Id.* at 22.

¹⁸⁵ *Id.* at 17–23.

eligible people are invited to the courthouse, told about the Certificate, and probation officers help them fill out the paperwork and send it into the courts.¹⁸⁶ New York City Probation also hosts detailed and helpful Certificate information on its website.¹⁸⁷ Non-profits and public defender offices, particularly those in New York City like The Bronx Defenders and the Neighborhood Defender Service, have also taken a lead in identifying collateral consequences that clients face and pushing for the grant of Certificates at sentencing or soon after.¹⁸⁸

For people in DOCCS custody, the process looks much different. DOCCS, in contrast to the individual judges throughout New York State, has the capacity to create and pursue policies that would more systematically get Certificates into the hands of people who could benefit from them. In 2005, the Department of Parole (which was later merged into DOCCS) created a policy that they would issue Certificates to eligible people in prison when they are paroled.¹⁸⁹ Today, this policy requires DOCCS staff to identify people in prison who are eligible and to fill out the application for a Certificate of Relief on their behalf when they are approved for release.¹⁹⁰ The application is then submitted to the Superintendent, who determines whether to grant the Certificate or defer it for twenty-four months.¹⁹¹ The directive directs the Superintendent to grant the Certificate if it is “consistent with the rehabilitation” of the person and “consistent with the public interest.”¹⁹² It also includes a requirement that the Superintendent defer the grant of the Certificate if the person was subject to significant discipline or lost “good time” within the past year, or if the underlying offense of conviction was sexually motivated or one of a small number of specified offenses.¹⁹³ If a Certificate is denied for other reasons, the Superintendent must issue a Notice of Deferral.¹⁹⁴

¹⁸⁶ Vincent Schiraldi, *A Powerful Tool for Rehabilitation*, N.Y. L.J. (Nov. 30, 2012, 12:00 AM), <https://www.law.com/newyorklawjournal/almID/1202579748991/a-powerful-tool-for-rehabilitation> [<https://perma.cc/6UDU-A5B9>].

¹⁸⁷ *Certificate of Relief from Civil Disabilities*, NYC PROB., <https://www1.nyc.gov/site/probation/services/certificate-of-relief-from-disability.page> [<https://perma.cc/Q39T-ZBTA>].

¹⁸⁸ See, e.g., *Know Your Rights: Employment & Criminal Convictions*, BRONX DEFS. (Oct. 2, 2010), <https://www.bronxdefenders.org/employment-criminal-convictions> [<https://perma.cc/466K-8DDC>]; *Civil Defense: Employment*, NEIGHBORHOOD DEF. SERV., <https://www.neighborhooddefender.org/services/civil-defense> [<https://perma.cc/9JT9-XYC8>].

¹⁸⁹ Radice, *supra* note 85, at 775.

¹⁹⁰ N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DIRECTIVE NO. 8400, CERTIFICATES OF RELIEF FROM DISABILITIES PRE-RELEASE (2019), <http://www.doccs.ny.gov/Directives/8400.pdf> [<https://perma.cc/5R76-NJ6Q>].

¹⁹¹ *Id.* at 2.

¹⁹² *Id.* at 1.

¹⁹³ *Id.* at 2.

¹⁹⁴ *Id.*

People who do not receive a Certificate when paroled have a much more arduous process. DOCCS does not have a similarly streamlined policy for non-paroled applicants. Instead, it has an application that requires a person to include tax documentation, employment documentation, and criminal record information including dates of commitment. The form also includes warnings about falsification and requires notarization.¹⁹⁵

4. Usage and Impact

There is no centralized data available concerning judicial grants of Certificates in New York.¹⁹⁶ Information from interviews with probation officers makes it clear that only a very small proportion of eligible people seek Certificates.¹⁹⁷ Judicial grants at sentencing remain infrequent, though they vary by county and judge,¹⁹⁸ with judges more likely to grant Certificates once a candidate has shown success in supervision.¹⁹⁹ One rare data point is that, in 2012, the New York City Probation Department Certificate days resulted in over 2,000 Certificates being issued.²⁰⁰

Since the DOCCS policy change in 2005 concerning people receiving parole, the number of Certificates granted by DOCCS has increased significantly.²⁰¹ This trend continued under 2012 policy directives.²⁰² In 2015, 2,033 Certificates of Relief were issued at the time of release, 1,724 in 2016, 2,064 in 2017, and 2,197 in 2018.²⁰³ Of course, policies are only as good as their implementation, and there is evidence that implementation of DOCCS's policy to provide Certificates to eligible people on their way out of prison is "sporadic at best," with

¹⁹⁵ N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION CERTIFICATE OF RELIEF FROM DISABILITIES –CERTIFICATE OF GOOD CONDUCT APPLICATION AND INSTRUCTIONS, https://doocs.ny.gov/system/files/documents/2019/08/DOCCS-CRD-Application_Instructions.pdf [<https://perma.cc/SCT9-WWY5>].

¹⁹⁶ Ewald, *supra* note 87, at 12–13 (noting that the Division of Criminal Justice Services records issuance of Certificates on individuals' rap sheets but does not compile centralized records of all Certificates, and local courts typically place the Certificate in the individual file but do not keep a centralized record).

¹⁹⁷ *Id.* at 15.

¹⁹⁸ *Id.* at 18–19.

¹⁹⁹ *Id.* at 20–22.

²⁰⁰ Garretson, *supra* note 86, at 30.

²⁰¹ Radice, *supra* note 85, at 776 tbl.1.

²⁰² Ewald, *supra* note 87, at 12 n.16.

²⁰³ Freedom of Information Law Request, N.Y. Dep't Corr. & Cmty. Supervision FOIL Log No. 19-08-201 (Oct. 8, 2019) (on file with author) (In 2019, through October 8th, the date the FOIL request was responded to, 1,143 CRDs had been issued to people upon their release).

formerly imprisoned people reporting in interviews that they were not given a Certificate at the time of their parole.²⁰⁴

In contrast, DOCCS grants for people who were not paroled remain low. In 2015, DOCCS issued only 337 CRDs and 335 CGCs; in 2016, 315 CRDs and 302 CGCs; in 2017, 206 CRDs and 247 CGCs; in 2018, 259 CRDs and 202 CGCs.²⁰⁵ These numbers for people who were not assessed for a Certificate during the process of being released on parole are much smaller, despite the fact that there is a much larger pool of potentially eligible people. The extensive information required, and the lack of institutional agency support, no doubt turns away a significant number of people who are otherwise eligible.²⁰⁶

III. CERTIFICATE CRITIQUES AND A PATH FORWARD

Certificate legislation has proven to be a politically popular step to take to support reentry and reintegration. While even proponents of these policies do not think that they will be a silver bullet addressing collateral employment consequences, they are typically thought of as having upside promise and little downside cost. As evidenced by the three case studies of Certificate regimes in Part II, there is tremendous variation in these programs, particularly concerning eligibility requirements and the statutory effect of a Certificate. There is room for improvement on both axes for every state that has adopted a Certificate program. These areas, while important, are not the focus of this Article.

Even the most expansive eligibility standards and strongest effects will not improve people's lives unless great care and attention are paid to how the Certificate programs are administered, with specific attention to who ultimately is able to access these Certificates. The greater the administrative burdens involved in a Certificate program, the more likely it is that Certificate programs will not reach as many people as they otherwise could and will continue to have limited impact. Even more worryingly, the greater the administrative burdens involved in securing a Certificate, the more this rights restoration process will be inaccessible for those with the fewest resources. This not only limits the upside benefits these programs might have, but it can also create

²⁰⁴ Garretson, *supra* note 86, at 28.

²⁰⁵ Freedom of Information Law Request, *supra* note 203 (In 2019, through October 8th, the date the FOIL request was responded to, 316 CRDs had been issued and 191 CGCs had been issued).

²⁰⁶ Garretson found, in conversations with parolees, that while some parole officers provided support in the Certificate application process, others incorrectly informed parolees of eligibility or actively opposed the process by refusing to accept applications from parolees and advocates. See Garretson, *supra* note 86, at 29.

unintended negative effects by increasing the already-significant inequity and disparities within the criminal legal system on the bases of race and wealth.

This does not, however, mean that Certificates necessarily are a failed experiment. Now that many states have a few years of experience with their Certificate programs, the time is ripe to reevaluate how these programs are designed and administered. This Part provides a theoretical and practical framework for critiquing and moving forward with Certificate programs that centers concerns about administrative burdens and how they relate to access and equity. The first section of the Part presents theories of both the state interest in promoting reintegration of people with criminal records and of administrative burdens as tools of policy design. This Part then draws on the three case studies above, as well as additional examples from around the country, to highlight administrative burdens—the learning, compliance, and psychological costs—that are features of existing Certificate programs, as well as efforts and proposals to lower those burdens. This Part ends with a discussion of how Certificates may fit into—or be in tension with—movements for broader change in the criminal legal system.

By making explicit the possible theoretical framings behind Certificate programs and understanding the role that administrative burdens play in creating and shaping Certificate policies, we can think proactively about how best to design Certificate and other second-chance initiatives. When that design is undertaken with a goal of ensuring that Certificates are not yet another facet of the criminal legal system that disadvantages and discriminates against people based on poverty and race, and with an eye toward how Certificate programs intersect with other criminal legal system policies, Certificates have a greater likelihood of playing a positive role in promoting opportunity and equity.

A. *The State Interest in Successful Reintegration*

Why should states create second-chance interventions like Certificates? The way that states view the purpose of these interventions can shape what these programs look like. Certificates could be viewed primarily as a tool of individual advancement—something an individual might earn to increase their employment prospects and earning potential. Or, even more narrowly, Certificates could be a reward for someone who has successfully rehabilitated himself against the odds, with the Certificate operating to remove barriers that seem unfair only in his individual case. Under this view, it might make sense for Certificates to have high standards and be designed to reach only a

small number of seemingly-exceptional people, the worthy few. This type of intervention would be designed not to address in any way the system of mass criminalization, but to merely correct occasional discrete examples of individuals who no longer “deserve” to be marked by their criminal records because of their records of success.

This individualistic perspective, however, loses sight of who truly benefits from Certificates. Not only do people with criminal records benefit, but so do businesses that are interested in hiring people with criminal records and the state itself. As Joy Radice compellingly argues in *The Reintegrative State*, “there is a state interest, if not an obligation, to create an intentional and sequenced process to remove civil legal disabilities triggered by a conviction and to mitigate the permanency of public criminal records.”²⁰⁷ The state’s interest is in removing the continuing collateral consequences and sanctions of a criminal conviction that are created by the state²⁰⁸ when their costs outweigh their benefits.²⁰⁹ The state interests include public safety, ensuring criminal punishments are not excessive, economics, racial equity, and the moral values of redemption and forgiveness.²¹⁰ While an individualistic framing opens the possibility that administrative burdens may serve a positive function, for example as an “ordeal mechanism”²¹¹ to weed out the undeserving, framing that focuses on the benefits to the state and the broader community highlights the costs of such an approach.

Framing Certificate initiatives in terms of not only the individual, but the collective and state interests highlights the negative role that unnecessary barriers and burdens play in Certificate administration. Standards that are too high, and processes that are too burdensome, work against state interest, as well as the interests of individuals, and present often-insurmountable barriers.²¹² This framing would also be

²⁰⁷ Radice, *supra* note 38, at 1319.

²⁰⁸ State action is present and constructs the collateral consequences related to employment, for example, through its laws surrounding public access to criminal records. *See id.* at 1328–31. Other areas where state action is apparent include licensing and certification laws, laws related to background checks, and choosing not to act more forcefully in the area of employment discrimination.

²⁰⁹ *Id.* at 1323.

²¹⁰ *Id.* at 1338–50.

²¹¹ “Ordeal mechanism” theory is the economic concept that one’s willingness to overcome the hassle of securing a benefit reflects the utility a person expects to get from the benefit. *See* HERD & MOYNIHAN, *supra* note 10, at 16.

²¹² Radice, *supra* note 85, at 777 (“If the criteria for certificates are set too high, certificates will only be awarded to people who can show exemplary evidence of rehabilitation. This could create two tiers of people with convictions. . . . In this context, certificates could do more harm than good.”).

more likely to reinforce a narrative about the criminal legal system that centers individual actions, while the latter is more consistent with a narrative about mass criminalization and its systemic factors. The way that lawmakers understand the purpose and goals of Certificates—as an individual safety valve or as a tool for promoting the state’s interests in reintegration—can shape the way these programs ultimately look. If legislators properly consider the many benefits that the state and community reap from successful reintegration, they should be particularly attuned to the urgency of reducing administrative burdens in the Certificate administration process. And this urgency is further heightened if they consider not only the value of reintegration, but also the role that Certificates may play in promoting rehabilitation, to begin with.

B. *Administrative Burdens as Policy Levers*

Anyone who has ever waited in line at the DMV is intimately familiar with government bureaucracy and red tape. But we do not often think about these hassles as tools for shaping public policy. The concept of administrative burden helps us see how and why the existence of these burdens shapes what our policies look like and what effect they have. In *Administrative Burden: Policymaking by Other Means*, Pamela Herd and Donald Moynihan argue that administrative burdens are not just the unintended byproducts of policymaking. Instead, they explain that administrative burdens are constructed, and are the product of political and administrative choices.²¹³ Administrative burden decision points include both how heavy burdens should be and who, between the individual and the state, should shoulder the burdens. The shape that burdens take is affected by resource allocation decisions, decisions about whether we are more concerned about over- or under-inclusiveness in program access, and political calculations about who should benefit from, and who should be excluded from, particular policies. For example, administrative barriers and red tape can limit the number and type of people who can benefit from a welfare benefit even if the authorizing statute would suggest much broader reach and eligibility.²¹⁴

²¹³ HERD & MOYNIHAN, *supra* note 10, at 8.

²¹⁴ *Id.* at 242. See generally *id.* at ch. 5–8 (discussing the administrative burdens associated with Medicare, SNAP, Medicaid, and the Earned Income Tax Credit); *cf. id.* at ch. 9 (contrasting the aforementioned programs with the less burdened Social Security program).

Administrative burdens, then, are products of policy decisions and, in turn, also shape policies on the ground.²¹⁵ Rather than being flaws in the system, they are often features.²¹⁶ Sometimes administrative burdens are designed fully intentionally, other times they are intentionally created without understanding their full impact, and other times they are created based on unspoken assumptions.²¹⁷ Administrative burdens are policy-making tools that have real distributional effects. As Herd and Moynihan explain, “[a]dministrative burdens play a central role in determining when, how, and where goods, services, and rights are distributed and, in practice, who is likely to receive them.”²¹⁸ These distributive effects, in turn, are likely to harm groups with fewer resources more than others.²¹⁹ Not only are administrative burdens most likely to fall on people with fewer resources, but people with fewer resources are less likely to have the resources to overcome those burdens.

On their face, these costs and resource concerns sound primarily in the register of wealth-based disparities and discrimination. This alone, of course, is deeply problematic for all who believe that our criminal legal system should not treat people differently based on their wealth. However, given the fact that Black and other non-white people involved in the criminal legal system are particularly likely to have significantly less wealth,²²⁰ suffer a greater criminal record “penalty” in employment,²²¹ and generally have a harder time getting a decent job due to race discrimination,²²² wealth-based disparities

²¹⁵ *Id.* at 33.

²¹⁶ Rik Peeters, *The Political Economy of Administrative Burdens: A Theoretical Framework for Analyzing the Organizational Origins of Administrative Burdens*, 52 ADMIN. & SOC'Y 566, 568 (2019) (“They do not simply emerge by accident and are not mere[ly] a technical issue, but are often designed into bureaucratic procedures or are the unintended, but ultimately accepted, consequences of an organizational design or practice.”).

²¹⁷ HERD & MOYNIHAN, *supra* note 10, at 33 (“[P]oliticians will sometimes deliberately construct administrative burdens—as a complement or alternative to traditional forms of policymaking—to achieve their policy goals . . .”). Other times, burdens are an intended and necessary feature of a law. *Id.* at 21 (“[S]ome burdens legitimately reflect the nature of the policy itself.”); *see also* Peeters, *supra* note 216 (creating a theoretical framework for understanding the organizational origins of administrative burdens).

²¹⁸ HERD & MOYNIHAN, *supra* note 10, at 33.

²¹⁹ *Id.* at 3 (“[A]dministrative burdens are distributive. They affect some groups more than others, and in doing so, often reinforce inequalities in society.”); *see also* Peeters, *supra* note 216, at 570 (“[T]he study of both non-take-up and administrative burdens has shown that vulnerable social groups tend to suffer the most from bureaucratic barriers to access rights and services . . .”).

²²⁰ *See supra* notes 56–57 and accompanying text (concerning the racial wealth gap).

²²¹ Pager, *supra* note 48, at 959.

²²² *Id.* at 957–59.

disproportionately disadvantage people of color, particularly Black people involved in the criminal legal system.

Those who need to access a resource like a Certificate are likely to already be disadvantaged given the race- and class-based disparate impact of our criminal legal system and the resources needed to overcome those burdens are particularly likely to be out of reach.²²³ These burdens can be so heavy that they can lead to “administrative exclusion.”²²⁴ The administrative burdens connected to rights restoration generally, and Certificates specifically, therefore, can exacerbate inequality²²⁵ even while those pushing for these laws and policies may have hoped that they would play a positive role in reducing inequality.

By making the existence and impact of administrative burdens on Certificate policies explicit, advocates committed to opposing the race- and class-based hegemony of the system of mass criminalization can push for policies that truly pursue their goals and can work to avoid policies that appear to pursue their goals while actually undermining them. Strategic thinking about the goals of these programs and their attendant administrative burdens can promote the success of Certificate programs. If we fail to do so, however, we may be promoting the appearance of positive change while reifying and reinforcing race, class, and other resource-based disparities.²²⁶ Where, as in the Certificate space, unnecessarily heavy administrative burdens are likely to exacerbate class- and race-related disparities connected to the criminal legal system, the benefit of information about someone’s ability to overcome burdens is outweighed by the heavy attendant costs.

Policymakers, including politicians and administrators, “can deliberately alter burdens to generate a behavioral response that aligns with their preferred policy outcome.”²²⁷ Heavy burdens will keep people from getting Certificates, while lightening those burdens will make

223 HERD & MOYNIHAN, *supra* note 10, at 30 (“Human capital is not equally distributed. Those who may need services the most—those with lower income, less education, and fewer language skills—may therefore be most negatively affected by burdens. This group may also have lower access to forms of human capital resources that would help them overcome the burdens. Indeed, evidence indicates that burdens have differential impacts by class, race, and gender in social programs, education, voting registration rules, and immigration.”).

224 Peeters, *supra* note 216, at 569 (“Generally speaking, either burdens can be costly—in terms of time, effort, money, and stress—but ultimately surmountable or they can lead to ‘administrative exclusion’: formal eligibility which does not lead to an actual access to rights and services and affects citizens’ social capital and citizenship.” (citations omitted)).

225 HERD & MOYNIHAN, *supra* note 10, at 31 (“The net effect of variation in human capital is that administrative burdens can exacerbate inequality.”).

226 While the focus in this Article is on race and class, other resource disparities may arise from issues like physical health issues, limitations related mental health, social capital, and more.

227 HERD & MOYNIHAN, *supra* note 10, at 35.

these interventions more widely accessible. If we believe that broader accessibility comes with social benefits, that suggests that the process of learning about and applying for a Certificate should not be part of the “test”²²⁸ for determining whether someone is worthy of getting a Certificate. While someone’s willingness to overcome burdens may tell us something about how much they want the end product, this concept fails to take into account perspectives from behavioral economics about people’s seemingly irrational behavior as well as differences in resources and human capital that affect a person’s ability to overcome administrative burdens.²²⁹ The administrative burdens involved in Certificate programs, then, should be evaluated for necessity and, when necessary, be adapted to be as little an obstacle as possible. Where possible, given the state interest in not further exacerbating inequality and in successful employment outcomes for people with criminal records, burdens should be shifted from the individual to the state. While this might increase costs to the state in the short term, this approach would better reflect the state’s interests in reintegration as well as the fact that the state, in many instances, is the least cost provider of the information used in Certificate assessments. The discussion that follows identifies administrative burdens in Certificate programs around the country and possible alternatives to lower those burdens and increase access and equity.

C. *Administrative Burdens: Lessons from Practice*

1. Learning Costs

The way that people learn about Certificates varies significantly across states with these programs. Jurisdictions that make it more difficult for people to learn about Certificates, or that do not take affirmative steps to promote people’s ability to learn about Certificates, have higher learning costs. When people do not know Certificates exist, do not know how to begin learning about the process, and do not understand the role that collateral consequences play in constructing the obstacles they face to employment, they are not going to benefit from even the most generous eligibility requirements and the strongest possible effects.

²²⁸ *Id.*

²²⁹ *Id.*

a. Notification

The Certificate programs discussed above vary significantly in whether and how people might be notified about Certificates. In Tennessee, no individual or agency is mandated to inform people who may be eligible about the Certificate. While state law “urge[s]” various actors to inform people about rights restoration generally,²³⁰ no criminal legal system actor is required to do so. As a result, in practice, no one takes on the responsibility for informing people about this option, and almost no one in Tennessee is aware of the Certificate program.²³¹ Therefore, despite the legislation’s relatively broad eligibility, very few people have benefited from the legislation creating the program.

In contrast, in Georgia, DOC staff are obligated by policy to inform people about their version of a Certificate when they first enter a facility and at various points during the discharge planning process.²³² Of course, it is easier to lower learning costs for people who are in prison and who are eligible to earn a Certificate during their imprisonment than it is when trying to lower learning costs for people who have already been released or who may never have been imprisoned at all.

In New York, there is a statutory requirement that judges advise all defendants of their eligibility for a Certificate,²³³ though in practice many judges regularly fail to do so.²³⁴ Since people may be eligible for a Certificate as early as sentencing, a person may learn about a Certificate from their defense attorney. Based on DOCCS policy, people who are eligible for a Certificate who are being paroled should automatically be considered for a Certificate.²³⁵ Sometimes people who are on probation are encouraged to apply by their probation officers. People who are not being sentenced, being released on parole since the advent of this policy, or informed by their probation officers, however, would have to figure out what a Certificate is and why they might want one on their own.

One lesson out of New York is that just because a statute mandates that a judge or other actor inform a person about the possibility of a Certificate does not mean that the actor will actually do so. Despite such

²³⁰ TENN. CODE ANN. § 40-29-106(a) (2021); *see supra* text accompanying note 119.

²³¹ *See supra* Section II.C.4.

²³² GA. DEP’T OF CORR., *supra* note 142, at 4.

²³³ *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 200.9(b) (2021) (“[W]henever a defendant who is eligible to receive a certificate of relief from disabilities . . . is sentenced, the court, in pronouncing sentence, unless it grants such certificates at that time, shall advise the defendant of his or her eligibility to make application at a later time for such relief.”).

²³⁴ Ewald, *supra* note 87, at 32.

²³⁵ *See supra* text accompanying notes 189–94.

a requirement in law, many judges still do not.²³⁶ This means that mandatory notification must not only be written into statutes and policies, but it must also be monitored and enforced, for example, through an obligation that notification be noted on the case file or a docket sheet in a way that can be audited. Similarly, when agencies are in charge of informing individuals about Certificates, the agency can take steps to collect information to ensure compliance. Mandatory notification and accountability could lower learning costs for individuals, whether those requirements are applied to judges, an agency, or both.

Where jurisdictions do not take steps to inform people about the possible obstacles related to collateral consequences of a conviction and of the possibility of a Certificate to help with that process, fewer people are likely to identify a need for a Certificate or to know that the program exists or where to begin. The people most likely to get Certificates, then, are people with more resources. A portion of the people most likely to learn about Certificates, even in states that do nothing to reduce learning costs, include those with the most to lose in the short term. For example, people with licenses for relatively high-paying jobs that are revoked because of criminal convictions are more likely to have the resources and to be willing to invest them in figuring out a way forward. Similarly, people who can afford lawyers to help navigate employment situations and reentry needs are also more likely to learn about Certificates.

b. Complexity

Learning costs also include the administrative barriers related to learning about the steps one must take to apply for a Certificate. Having unnecessary complexities in the law itself heightens these costs. For example, New York's two types of Certificates, though they have similar effect, have been rightly critiqued as leading to unnecessary confusion²³⁷ that makes it harder for people to overcome the learning costs involved in applying for a Certificate. New York's multiple pathways to getting a Certificate may also increase learning costs, though some of these pathways may come with corresponding benefits as far as compliance costs (discussed below), as some, like through the parole process, are easier than others. Having multiple "on-ramps" for Certificate programs, therefore, comes with costs in one area and benefits in another. This, however, is not necessarily a wash—the state could take further steps to lower learning costs for the various paths while still

²³⁶ Ewald, *supra* note 87, at 32.

²³⁷ Radice, *supra* note 85, at 771–72.

offering them, for example, through creating accessible resources that help people learn the various processes and ensuring that state actors take an active role in informing people about their possible paths to a Certificate at different points in the criminal legal system process.

In Tennessee, the Certificate statute simply says that a person must file a motion in Circuit Court.²³⁸ A lay person without a lawyer would likely have no idea what it means to file a motion. Even though the state of Tennessee does provide a blank pro se motion form,²³⁹ which a person can find if they know that a Certificate exists and know the proper terms to search for,²⁴⁰ it does not include any information about how to fill it out, the process for filing, or what comes next. Instead, state websites suggest that a person speak with an attorney,²⁴¹ which, of course, requires resources. Since a person is not eligible for a Tennessee Certificate at sentencing or while they are in jail or prison, a person is unlikely to be connected with a lawyer or relevant state agency at the time of application.²⁴² This is in sharp contrast to Georgia, where there is no process for an individual to file for a Certificate other than through the state-controlled and state-managed process.

Lessons from the case studies above show the importance of the state's role in informing people of the existence of a Certificate, the ways in which they might benefit from a Certificate, and about the steps they need to take to secure a Certificate.

c. Timing

Both New York's and Georgia's Certificate laws demonstrate ways that learning costs can be reduced because of the timing eligibility. In New York, where a person may apply for a Certificate as early as sentencing,²⁴³ a person has the possibility of having a lawyer by their

²³⁸ TENN. CODE ANN. § 40-29-107 (2021).

²³⁹ See *supra* note 123.

²⁴⁰ See *supra* text accompanying notes 125–28 (showing that very few court clerks were familiar with the Certificate process and would not direct potentially-interested applicants as to where to find this).

²⁴¹ See, e.g., *Certificate of Employability*, KNOX CNTY. CRIM. CT., <https://knoxcounty.org/criminalcourt/services/employability.php> [<https://perma.cc/7LUK-2XQL>].

²⁴² TENN. CODE ANN. § 40-29-101 (2021). This statute states that a person is not eligible for rights restoration until the expiration of a sentence. Since the Certificate was separated from the general rights restoration process in 2017, it is not completely clear whether this timing requirement still applies in its entirety. However, since the Certificate process requires a person to show that they have “sustained the character of a person of honesty, respectability, and veracity and is generally esteemed as such by the petitioner’s neighbors,” it is very likely that a court would only consider a person in the community, rather than one who is in prison, even if the timing requirement were no longer to apply. § 40-29-107(i)(1).

²⁴³ N.Y. CORRECT. LAW § 702(1) (McKinney 2021).

side at the time they consider requesting one.²⁴⁴ Of course, in practice, judges' willingness to grant a Certificate at sentencing is not something that can be relied on,²⁴⁵ but even just the possibility of receiving a Certificate at sentencing increases the likelihood that a lawyer might tell a client about this possibility, thereby shifting the learning costs from the individual to a third party.

Public defender offices and civil legal aid offices have gotten increasingly involved in attempting to mitigate collateral consequences,²⁴⁶ and Certificates can play an important role in that. Having lawyers who are already representing a person advocate for a Certificate at sentencing fits in well with the state's interest in minimizing unproductive barriers, the third party's commitment to serving their clients and reducing collateral consequences, and, of course, for the individual seeking a Certificate. Not only does it serve each of these interests, but it does so in an efficient manner, since a lawyer would already be familiar with their client's background and context.

Even when Certificates are not available at sentencing, learning costs can be reduced by making people eligible for a Certificate while they are still under state supervision. In Georgia, while a person is not eligible for a Certificate at sentencing, their eligibility is tied to their supervision status.²⁴⁷ Although this limits eligibility, it also provides a clear path through which a person must be in close contact with a state agency to be eligible for a Certificate, which in turn makes it easier to shift learning and other costs to agencies rather than the individual. Georgia's clear regulations requiring that people entering the prison system be notified at specific points by particular actors of the Certificate,²⁴⁸ its eligibility, and its effects may be a useful model for other states as they experiment with how to assign responsibility for notification and information in a way that reduces learning costs. Other states considering creating or revising their Certificate programs could promote access by permitting eligibility while a person is under supervision, while still retaining alternative routes for people who are not.

²⁴⁴ This timing eligibility question also, of course, comes with the corresponding benefit that getting a Certificate into someone's hands earlier rather than later can also prevent a collateral consequence from happening at all (e.g., loss of a license), and could help staunch the period of depressed earning that typically follows a conviction. *Cf.* Selbin et al., *supra* note 6, at 52–53 (discussing a period of depressed earnings before expungement).

²⁴⁵ Ewald, *supra* note 87, at 18–20.

²⁴⁶ See Selbin et al., *supra* note 6, at 24–27.

²⁴⁷ GA. CODE ANN. § 42-2-5.2 (2020).

²⁴⁸ See GA. DEP'T OF CORR., *supra* note 142.

2. Compliance Costs

Once a person learns about what a Certificate is, how it might help them, and general information about how to apply, the next administrative burdens they face are the compliance costs, the costs of actually applying for a Certificate. One common feature of Certificate legislation that raises compliance costs is a mismatch between the standards used in issuing Certificates and the important but limited effects these have. High standards for receiving Certificates can be written into the laws themselves, such as when laws require proof of rehabilitation²⁴⁹ or good character,²⁵⁰ or they can be added by decision-makers like judges. Does a person need to be fully rehabilitated before they can have a decent job? Does a person need to have a character of respectability in his community to be able to earn a living? These standards are not in line with the benefits or effects of a Certificate, particularly given the social benefit we receive from people with criminal records accessing employment. In the realm of occupational licensing, the effect of a Certificate typically lets a licensing board conduct an individualized assessment—it does not mean someone will necessarily receive a license. A recent study demonstrates that while there remain significant licensing barriers for people with criminal records, the vast majority of these restrictions are discretionary (such as including assessments of “good moral character” that involve an individualized determination) rather than mandatory.²⁵¹ For the effects on employers’ potential liability, while employers do receive protection from negligent hiring and retention claims, this is typically only a presumption—employers still must act reasonably based on employee conduct. When the hoops to jump through are too difficult and the standards are too high, this adds unnecessary burdens on people who already have to work particularly hard to get ahead.

a. Filing Fees and Court Debt

Perhaps the most obvious of the compliance costs are direct financial obligations related to applying to receive a Certificate. Many states have filing fees when people apply for Certificates. For example, in Tennessee, filing fees vary by county but can be hundreds of dollars.²⁵² Similarly, in Ohio, fees vary by county, ranging from no fee

²⁴⁹ See, e.g., 730 ILL. COMP. STAT. ANN. 5/5-5.5-30 (West 2021); ch. 730, 5/5-5.5-15.

²⁵⁰ See, e.g., TENN. CODE ANN. § 40-29-107 (2021).

²⁵¹ Ewald, *supra* note 34.

²⁵² See *supra* note 121 and accompanying text.

to as high as \$300.²⁵³ Many states require that a person have fully completed their sentence before being eligible for a certificate. Where financial obligations such as restitution, fines, and court fees are part of the sentence, a person who is unable to pay will be ineligible for a certificate.²⁵⁴

Some states, like Tennessee, are reconsidering the high filing fees that historically have accompanied other reentry-related filings, like those around expungements. Whereas the state previously imposed hundreds of dollars to expunge a judicially diverted charge,²⁵⁵ for example, the state has now repealed those filing fees.²⁵⁶ The state also removed the \$180 state expungement fee for some convictions.²⁵⁷ These changes were made in acknowledgment of the positive social effects—increased employment and access to housing—that come from access to expungement.²⁵⁸ States should extend this logic to other efforts to reduce collateral consequences, like Certificates, and remove filing fees and other financial burdens to accessing Certificates.

b. Costs of Court Process

Compliance costs continue to proliferate if a person seeking a Certificate needs to secure a lawyer and go to court. Some Certificate processes are so complex that a person who wants to access a Certificate would likely need a lawyer to help navigate the process. For example, when legislators debated amending the Tennessee Certificate law discussed below to make it more easily accessible, they assumed that a person seeking a Certificate would still need a lawyer to help them with the process.²⁵⁹ They just believed the modified procedure would make that proposition less costly.²⁶⁰ While jurisdictions that have immediate eligibility, like New York, have an easier time connecting people with legal services since they are already represented by their criminal

²⁵³ OHIO JUST. & POL'Y CTR., CRIMINAL RECORDS MANUAL 17 (2014), <http://ohiojpc.org/wp-content/uploads/2015/07/OJPCs-Criminal-Record-Manual.pdf> [<https://perma.cc/JBC9-H8A4>].

²⁵⁴ See, e.g., TENN. ADVISORY COMM. TO THE U.S. COMM'N ON C.R., LEGAL FINANCIAL OBLIGATIONS IN THE TENNESSEE CRIMINAL JUSTICE SYSTEM (2019) (detailing and critiquing the complex and onerous system of legal financial obligations in the Tennessee criminal justice system, which often mires people in debt as a result of their criminal case).

²⁵⁵ TENN. CODE ANN. § 40-32-101 (2017) (amended 2019).

²⁵⁶ § 40-32-101 (2021). Counties are still permitted, however, to impose filing fees.

²⁵⁷ *Id.*

²⁵⁸ See, e.g., *Gov. Bill Lee Announces Strategies to Improve Criminal Justice System*, TENN. OFF. OF THE GOVERNOR (Feb. 28, 2019, 2:14 PM), <https://www.tn.gov/governor/news/2019/2/28/gov-bill-lee-announces-strategies-to-improve-criminal-justice-system.html> [<https://perma.cc/95RT-H2VN>].

²⁵⁹ SB 0016, *supra* note 122.

²⁶⁰ *Id.*

defense attorney at the time their criminal case is resolved, other jurisdictions that have delayed eligibility do not give their citizens that opportunity. Other compliance costs proliferate when the process requires people to appear in court or in front of a decision-making body—these include getting to and from courthouses, taking time off from work, and arranging childcare. Processes that permit application without going to court, or even that create the ability to apply online or by mail,²⁶¹ lower these costs significantly.

c. State Record Information

Another source of costs in terms of money, time, and know-how is getting and making sense of the information needed for a Certificate application. In many states, applicants must assess their own eligibility, collect criminal history documentation, and identify the ways in which their criminal conviction is holding them back. Even getting copies of these records often comes with financial obligations as well, whether through running a state background check²⁶² or paying for copies of criminal court records.²⁶³ For example, while in North Carolina the petition form is designed to be accessible through use of checkboxes, the application form still asks not only about prior convictions, but also demands completion of the file number, date of conviction, general statute and offense description, class, and date of sentence.²⁶⁴ Instructions “helpfully” say: “If you do not have this information on hand, you may want to review your case file in the Office of the Clerk of Superior Court.”²⁶⁵ Illinois has attempted to create a clear guide for applicants about how to read their criminal records, but, despite their

²⁶¹ In Ohio, for example, the state has created a website called “The Ohio Certificate of Qualification for Employment Online Petition Website.” OHIO DEP’T OF REHAB. & CORR., <https://www.drccqe.com/Login2.aspx?APPTHEME=OHCQE> [<https://perma.cc/JYB9-T2VP>]. This website allows an applicant to complete the petition online for it to receive an initial review. *Id.* After it is reviewed, however, the applicant must print the application and bring it to the clerk’s office. *Id.*

²⁶² See, e.g., *Background Checks*, TENN. BUREAU OF INVESTIGATION, <https://www.tn.gov/tbi/divisions/cjis-division/background-checks.html> [<https://perma.cc/B56Z-GAQ5>] (providing background checks for a fee of \$29).

²⁶³ For example, certified copies of records in Davidson County, Tennessee are \$5.00 plus \$.50/page. *Criminal Background Checks*, METRO. NASHVILLE & DAVIDSON CNTY. CRIM. CT. CLERK, <https://ccc.nashville.gov/about-our-services/criminal-background-checks> [<https://perma.cc/T5DP-K6TQ>].

²⁶⁴ N.C. CTS., CERTIFICATE OF RELIEF PETITION AND ORDER (2018), <https://www.nccourts.gov/assets/documents/forms/cr273.pdf?My2XGWsZpWfwoLkLUzZooDSEwj1ckKbh> [<https://perma.cc/5HMU-GQMH>].

²⁶⁵ N.C. CTS., INSTRUCTIONS FOR CERTIFICATE OF RELIEF PETITION AND ORDER (2018), https://www.nccourts.gov/assets/documents/forms/cr273-instr.pdf?_o28f7ApYwYvXKpb8i9mUSAXAvcNCZKC [<https://perma.cc/N7ZM-SHTQ>].

best efforts and multiple pages of charts, this remains an exceedingly difficult task for someone without a background in criminal justice.²⁶⁶ On top of the onerous process of collecting and making sense of criminal history, applicants often must collect and present evidence of rehabilitation, family and community ties, and other factors that a decision-maker may want to consider. This process could include requesting transcripts and certifications, requesting letters of support from one's social network, and collecting banking and pay stub information. Where jurisdictions use high but amorphous standards, like showing "rehabilitation"²⁶⁷ or good character,²⁶⁸ an applicant may be particularly likely to feel overwhelmed by the costs of collecting evidence.

This burden around criminal records in particular could easily be transferred back to the state, since much of the documentation required is already in the state's possession. When collecting and identifying relevant criminal record history, the state, as opposed to the individual, is in the position of the least cost provider—it is much less costly for the state to do this than for an applicant. In Georgia, given the exclusive role of the state agencies in identifying possible applicants and applying for a Certificate, the state takes on this role entirely and includes collecting information and records about people's programs and conduct while imprisoned.²⁶⁹ In New York, agencies like the Department of Probation or DOCCS at least sometimes play this role in assisting applicants with the materials needed for their consideration.²⁷⁰ In contrast, in states like Tennessee, Ohio, North Carolina, and Illinois, applicants must navigate obtaining and analyzing these complex records themselves. This is an area that is particularly appropriate for an increased state agency role in promoting Certificates and successful reentry and reintegration.

d. Employment History and Collateral Consequences Information

Beyond collecting and making sense of criminal record information, Certificate applications also typically weigh heavily information related to employment history and goals. Even collecting basic employment history can take significant time and can make or break an application. In Ohio, more than one-third of the application is

²⁶⁶ See ILL. CTS., HOW TO ASK FOR A CERTIFICATE OF GOOD CONDUCT (2018), https://courts.illinois.gov/forms/approved/good_conduct/Certif_Good_Conduct_How_To_Approved.pdf [<https://perma.cc/W37T-6YHK>].

²⁶⁷ See, e.g., 730 ILL. COMP. STAT. 5/5-5.5-30 (West 2021); ch. 730, 5/5-5.5-15.

²⁶⁸ See, e.g., TENN. CODE ANN. § 40-29-107 (2021).

²⁶⁹ GA. DEP'T OF CORR., *supra* note 142, at 2.

²⁷⁰ N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, *supra* note 190.

dedicated to employment history.²⁷¹ Some states make the process even more difficult by requiring proof of employment history beyond self-reporting. For example, in New York, one of the methods of receiving a Certificate requires applicants to submit two years of W-2s and tax records.²⁷² Some states not only require employment history information, but go further by requiring the applicant to identify the specific ways in which their criminal record is holding them back from opportunities. In New Jersey, by statute, an applicant must

establish[] that a specific licensing or employment disqualification, forfeiture, or bar, will apply to the applicant, and may endanger the applicant's ability to maintain existing public employment or employment for which the applicant has made application, or to engage in a business enterprise for which a license or certification is required[.]²⁷³

Even more specifically, the fifteen-page Ohio application for a Certificate requires applicants to “[d]efine the name or type of each collateral sanction for which you are requesting a certificate of qualification for employment.”²⁷⁴ While employment history and goals may well be relevant to a Certificate determination, it is also costly for an individual to figure out, collect, and present.

The means of asking for this information often do not align with the goals or effect of a Certificate. A Certificate in Ohio, for example, both removes specific collateral consequences outlined in law as well as provides general wrongful hiring immunity to employers,²⁷⁵ which would be helpful to any job applicant. In addition, all people with criminal records face collateral consequences in searching for employment, even if they are not formally barred from a particular occupation or license. Acknowledging that, the Ohio Certificate statute notes that a Certificate may be used for general employment purposes, referring to the employer immunity provision of the Certificate legislation that would help all job-seekers regardless of a particular bar or collateral consequence.²⁷⁶ The requirement that a person specify the specific collateral consequences they face, therefore, does not properly

271 OHIO DEP'T OF REHAB. & CORR., CERTIFICATE OF QUALIFICATION OF EMPLOYMENT PETITION (2016), https://drc.ohio.gov/Portals/0/CQE/CQE_sample_petition.pdf?ver=2016-09-14-164320-817 [<https://perma.cc/73YS-2LYV>].

272 See N.Y. STATE DEP'T OF CORR. & CMTY. SUPERVISION, *supra* note 195, at 2 (stating that income tax filings for the past two years and W-2 forms from the past two years must be included in the application).

273 N.J. STAT. ANN. § 2A:168A-8 (West 2021).

274 OHIO DEP'T OF REHAB. & CORR., *supra* note 271, at 5.

275 OHIO REV. CODE ANN. § 2953.25 (West 2021).

276 *Id.*

align with the effect of Ohio's Certificate and also imposes significant costs on an applicant. While an Ohio non-profit created a website as a resource to simplify the process for people with Ohio convictions who are trying to figure out what collateral consequences may apply to them,²⁷⁷ the website itself highlights the challenges people face in identifying which collateral consequences are specifically holding them back. For example, even misdemeanor theft comes with over three hundred identified collateral consequences.²⁷⁸ The website is one example of ways in which non-profit organizations or state agencies can take on roles in providing information to applicants to help them navigate the Certificate process. However, it also highlights the question of what information is actually needed to make an appropriate determination of who should get a Certificate. Even more effective than shifting some of the work to a third-party non-profit or agency would be eliminating questions that ask a lot of applicants but provide little helpful information to the Certificate decision-makers.

3. Psychological Costs

A third type of administrative burden is the psychological cost of applying for a Certificate. Certificate application processes that require applicants to go to court present significant psychological costs. For many people with criminal records, the courthouse is a site of pain, fear, and even trauma.²⁷⁹ Often, the periods during which people were involved with the criminal legal system are some of the lowest points in their lives, and people are loath to re-open old wounds. Many Certificate processes require either appearing in court, being interviewed by probation, or otherwise revisiting sites of past trauma and helplessness. That alone can be so significant a burden that a person is unwilling to go through with the Certificate application process.²⁸⁰ One way to lessen this barrier could be to structure a Certificate process in a way that does not force a person to go into court or to interface with probation or parole. Another way to address this is to structure timing-

²⁷⁷ CIV. IMPACTS OF CRIM. CONVICTIONS UNDER OHIO L., <https://civicc.opd.ohio.gov/Home.aspx/Agree> [<https://perma.cc/993A-QRRG>].

²⁷⁸ *Offense Detail: Petty Theft*, CIV. IMPACTS OF CRIM. CONVICTIONS UNDER OHIO L., <https://civicc.opd.ohio.gov/Home.aspx/OffenseDetail/35> [<https://perma.cc/NB32-D3QT>].

²⁷⁹ Deborah Smith, *Trauma and State Courts*, NAT'L CTR. FOR STATE CTS. (June 2018), <https://ncsc.contentdm.oclc.org/digital/collection/famct/id/1343> [<https://perma.cc/X9BX-W87W>].

²⁸⁰ In the Youth Opportunity Clinic, my students and I represent young adults on reentry issues. Many clients are resistant or even unwilling to voluntarily reenter the courthouse even with the support of a lawyer given their previous negative experience with the court system.

related eligibility so that a person is already in contact with the court or agency that can grant a Certificate. This includes, for example, Georgia's system of granting a Certificate as a person is on his way out of the prison system²⁸¹ or New York's policy of considering parolees for a Certificate as they go through the parole process.²⁸²

The subjective and amorphous standards at play in some Certificate programs, asking whether someone is rehabilitated or of good character, for instance, may create their own additional psychological costs because of how a denial could reflect on a person's sense of self and on the way a person is viewed by their social network.²⁸³ If a person presents information about their life and reaches out to her network to get letters of support and then is denied a Certificate, for example, she risks losing face in her community and losing a sense of motivation and pride in her path.²⁸⁴ This risk is likely heightened due to the unpredictable and highly subjective nature of many of these inquiries.²⁸⁵

The questions included in Certificate applications and the weight given to them in evaluating an applicant may also heighten psychological costs. For example, the heavy focus on employment history may turn away applicants with sparse or non-existent work histories, even if a person has other evidence that would warrant their getting a Certificate and even if that person would be more likely to get a job with a Certificate in hand. This is also likely to reflect patterns of criminalization and job discrimination, particularly of and against Black people. Extensive work history inquiries are another area in which questions may not be calibrated to the purpose or effect of the Certificates, and it illustrates how unreflectively high standards can raise psychological costs as well as compliance costs.

Third parties like non-profit organizations can play an important role in framing Certificates in a way that limits the psychological costs. Messaging about Certificates and their recipients can shape the way that these programs are perceived and understood by people who would stand to benefit from them. While positive messaging from government actors would likely lower the psychological costs involved, messaging from trusted service providers and community-based non-profits may be even more powerful in shaping how people who would benefit from

281 GA. DEP'T OF CORR., *supra* note 142, at 4.

282 Radice, *supra* note 85, at 775.

283 HERD & MOYNIHAN, *supra* note 10, at 25–29.

284 *Id.* at 25–26 (identifying damage to self-identity as a psychological cost).

285 *Id.* at 27 (noting that uncertainty about the outcomes of seeking benefits combined with the frustrations of the process may elevate stress in individuals).

Certificates see these programs and the costs and benefits involved in getting one.²⁸⁶

4. Administrative Burden Take-Aways

All of these costs—learning, compliance, and psychological—make it less likely that people who could benefit from Certificates would access them. They also raise significant equity concerns because these high costs make it much more likely that the people who would be able to access Certificates are those with more resources. The financial costs of filing fees and paying off court debt are more easily borne by those with financial resources while they are often insurmountable for people who are poor. People who can pay for an attorney's help in applying for a Certificate are more likely to navigate the costs of collecting and presenting evidence of criminal history and of rehabilitation than those who cannot.

While any person with a criminal record could benefit from a Certificate, given the high administrative burdens involved in learning about and securing a Certificate, the people most likely to be motivated to access Certificates are people who have the most to lose in the short term.²⁸⁷ In fact, there is evidence that people who are at risk of losing or not regaining occupational licenses or jobs they held prior to conviction are particularly likely to pursue a Certificate.²⁸⁸ This is unsurprising given the fact that people are likely to delay or forgo accessing a benefit that has costs in the short term and uncertain benefits in the future,²⁸⁹ and that people are more attuned to losses than benefits.²⁹⁰ Decision-makers, particularly judges, also seem particularly likely to grant a Certificate when there is an immediate need.²⁹¹ Since people who have the most to lose—an occupational license, a good-paying job—are the most likely to jump through the hoops and to withstand the obstacles needed to access a Certificate, the people most likely to end up with a Certificate in hand are likely to have had a history of well-paying, valued

²⁸⁶ See Selbin et al., *supra* note 6; HERD & MOYNIHAN, *supra* note 10, at 38.

²⁸⁷ Brigitte C. Madrian, *Applying Insights from Behavioral Economics to Policy Design*, 6 ANN. REV. ECON. 663, 664–65 (2014) (discussing present bias and the tendency of people to discount future benefits relative to immediate ones).

²⁸⁸ Ewald, *supra* note 87, at 19; *see supra* note 129.

²⁸⁹ Madrian, *supra* note 287.

²⁹⁰ Ewald, *supra* note 87, at 19.

²⁹¹ *Id.* (Probation officers who were typically opposed to sentencing grants noted that “early COR recommendations did occur, but only in response to those who *already* held licenses they stood to lose.”).

employment. People with fewer resources, at least historical resources, are less likely to access and, therefore, to benefit from these Certificates.

When designing a Certificate program, states need to center thinking not only about eligibility, standards, and effect, but also about administrative burdens and their distributional effects. This new focus would be most impactful if combined with a reframing of rights restoration as a state interest, and not only an individualized process where a person can earn back something they lost. An administrative burden focus would require states to identify what standards and processes are truly necessary given the goals and effects of Certificate programs, and would need to calibrate their Certificate programs accordingly.

One exciting new development in the area of collateral consequences and reentry is the recent rise of automated processes designed to help people move on after contact with the criminal legal system. In 2018, Pennsylvania passed the first law to retroactively seal misdemeanor records in the Clean Slate Act,²⁹² and Utah, California, and New Jersey have followed suit in 2019.²⁹³ This move to automatic sealing or expungement is a response to the very low response rate for people eligible for expungement. In one study of Michigan's set-aside law, researchers found that only 6.5% of those eligible for expungement successfully completed Michigan's application process within five years of when they became eligible.²⁹⁴ This is despite the fact that the study also found significant positive effects of expungement, with recipients seeing an average increased income of 25% within two years of expungement.²⁹⁵ Scholars studying the reach and benefits of post-conviction efforts to lessen negative consequences of convictions suggest that automatic processes are one way that these programs could reach a broader range of people and benefit individuals and society more broadly.²⁹⁶ Voting rights is another area of rights restoration in which some states have created automatic processes to restore rights to people with felony convictions, leading to much higher rates of enfranchisement in some states than others.²⁹⁷ Automating the

²⁹² LOVE & SCHLUSSEL, *supra* note 3, at 3.

²⁹³ *Id.* at 12–13.

²⁹⁴ Prescott & Starr, *supra* note 5.

²⁹⁵ *Id.*

²⁹⁶ See, e.g., Selbin et al., *supra* note 6, at 53–54.

²⁹⁷ See CHRISTOPHER UGGEN, RYAN LARSON, SARAH SHANNON, & ARLETH PULIDO-NAVA, SENT'G PROJECT, LOCKED OUT 2020: ESTIMATES OF PEOPLE DENIED VOTING RIGHTS DUE TO A FELONY CONVICTION 5 tbl.1, 8 fig.2 (2020), <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction>

Certificate process could be a powerful way to close the gap between people who are eligible for a Certificate and people who have a Certificate in hand.²⁹⁸

Georgia's Certificate model demonstrates one way to automate the Certificate grant process. It has clear and largely objective standards that state officials are able to assess, and then puts any burden on the agency officials to get the Certificate into people's hands and inform them of what it does.²⁹⁹ Expanding Georgia's model beyond corrections, as it is in the process of doing by expanding to probation,³⁰⁰ would be the next step in expanding automatic processes, but not the last. Given the large number of people who may benefit from a Certificate who are not currently under state supervision, it may take some creativity and effort to reach a broader audience.

Even if lawmakers and policymakers do not want to fully automate the Certificate grant process, parts of the process could be automated. For example, even if a state did not want to give people a Certificate while they are still under supervision or exiting prison, they could compile all of the needed information into a packet or online profile that a person could then later finish filling out by himself. The criminal record and collateral consequence information needed for many of these applications could be automated, if not all of the relevant information.

Another related proposal would be the clear use of rebuttable presumptions. For example, in Ohio, a person is presumptively entitled to a Certificate if the relevant waiting period is met.³⁰¹ While the presumption in Ohio does not come with any corresponding easing of the other learning or compliance burdens involved in applying for a Certificate (it may lessen the psychological burden, though), another state could use the concept of presumptions to shift information gathering and other burdens away from the individual. Having strong presumptions and communicating that to people to lessen learning

[<https://perma.cc/6UCJ-G35C>] (Table 1 indicates which states re-enfranchise at various points in a person's sentence or whether the disenfranchisement continues post sentence. This information is then reflected in Figure 2, showing the states with the highest rates of disenfranchisement.).

²⁹⁸ See HERD & MOYNIHAN, *supra* note 10, at 68, ch. 7 (presenting automatic voter registration and automatic enrollment in Medicaid as examples of automated procedures that can effectively overcome existing administrative burdens in those areas); *cf.* Chien, *supra* note 5 (suggesting automated processes in connection with record clearing).

²⁹⁹ See GA. DEP'T OF CORR., *supra* note 142.

³⁰⁰ GA. CODE ANN. § 42-3-2 (2020).

³⁰¹ OHIO REV. CODE ANN. § 2953.25(C)(5)-(6) (West 2021). The waiting period for felonies is three years since release from any supervision or imprisonment, and for misdemeanors it is one year since release from supervision or imprisonment. *Id.*

costs could lower the administrative burdens involved in getting a Certificate, since less information may be needed, unless there is an objection.

Leaving automatic processes aside, states can take other steps to remove administrative burdens from the Certificate application processes.³⁰² For example, they could remove filing fees; remove court debt as a factor in these applications; create and enforce notification requirements; promote and streamline agency roles in collecting and making sense of relevant information; provide for mail or electronic submissions of applications; create and refine clear, simple, and functional pro se forms; and clarify relevant standards. States can make efforts to connect affected people with the support they need to pursue rights restoration, for example, by expanding eligibility timing to include the time of sentencing when they are already represented or are otherwise connected with a state agency that is tasked with assisting, by providing resources to public defender offices and legal aid providers, or by providing training and resources for there to be designated court clerks or governmental officials who work to support individuals through this process. The state can also take steps itself, or provide resources to third parties, to publicize these initiatives and also to make employers, landlords, and other relevant parties aware of Certificates and their effects.³⁰³

D. *Certificates and Social Change*

As states reconsider the best path forward for Certificates, and rights restoration more generally, advocates should also consider how Certificates fit in with larger efforts to oppose mass criminalization and promote opportunity for people who have criminal records. Just as Certificates hold both promise and peril as far as promoting equity and

³⁰² Significantly, many of these suggested modifications—particularly those concerning executive government agencies—may be achieved through executive action and need not wait on legislative action.

³⁰³ Tennessee, whose Certificate program is presented above as an example of a highly-burdensome individual process, *see supra* Section II.C., may be in the process of learning some of these important lessons about administrative burdens. A 2019 Criminal Justice Investment Task Force Report suggests, among other reforms, requiring the state DOC to inform people about Certificates (lowering learning costs), to create a streamlined application process (to address compliance costs), to adjust eligibility so that people can apply while still under state supervision (addressing learning and compliance costs), and waiving or providing alternatives for filing fees (addressing compliance costs). *See* CRIM. JUST. INV. TASK FORCE, INTERIM REPORT 34–35 (2019), <https://www.tn.gov/content/dam/tn/governoroffice-documents/governorlee-documents/CJInvestmentTaskForceReport.pdf> [<https://perma.cc/M4TP-LDWV>]. As of September 2020, however, there has been no movement on making these changes a reality.

second chances, Certificates could also promote or impede larger social change in the area of criminal legal system and collateral consequence reform.

Certificates can easily fit into a limited and limiting narrative about our criminal legal system that says that the system would be fair if we provided relief to the exceptional individuals, the worthy few, who have managed to rehabilitate themselves against the odds. In this narrative, Certificates can act as a sort of safety valve—letting the small number of successful applicants out from under the burden of licensing restrictions and other employment obstacles. Approaches that let a small number of successful applicants have enhanced employment opportunities do not, by definition, take aim at addressing the problem of mass criminalization. If Certificates are never more than a safety valve, then they may promote inequality by providing a way out from under collateral consequences for those better able to navigate the administrative burdens while also decreasing the urgency for, and likelihood of, larger change that would affect everyone. For example, in Michigan, the business community used their support of Certificate legislation as a tool to decrease support from what they considered to be “more dangerous” legislation that would limit an employer’s ability to ask about criminal history on job applications.³⁰⁴ When the Tennessee law was first proposed, state legislators went out of their way to distinguish their support for the Certificate law from support for expungement.³⁰⁵ The existence of Certificates as a limited safety valve, in turn, may well relieve some of the pressure that arises from perceived unfairness, making further reform less likely.

One concern about Certificates within the broader landscape of reform is that their broad appeal may be precisely because, depending on how the programs are designed and implemented, Certificates can easily fit with and reinforce dominant understandings of the criminal

³⁰⁴ See *Incentivizing the Hiring of Non-Traditional Employees*, MICH. CHAMBER COMMERCE, [<https://web.archive.org/web/20170314150539/http://www.michamber.com/incentivizing-hiring-non-traditional-employees-o>] (“This bipartisan measure [Certificate legislation] was pursued as a tool to address Michigan’s parolee unemployment and recidivism rates and as an alternative to a more dangerous legislative initiative that would prohibit employers from asking prospective employees important questions about their criminal history on job applications, otherwise known as ‘ban the box.’”).

³⁰⁵ SB 0276, Senate-Judiciary Committee, *supra* note 103 (In the hearing, State Senator Bell asked, “Just to put it on the record. . . there would be nothing in this bill that would hide anything, remove anything from the record that a person in the past did, this is purely an employment certificate . . . ?” to which Senator Kelsey affirmed, “That is exactly correct, this is really an alternate route to helping these individuals from the expungement route . . .”).

legal system.³⁰⁶ This is particularly damaging for more radical efforts to rethink the foundations of our criminal legal system, but can also stand in the way of more moderate reforms. When Certificates are structured to reward only a few exceptional (or exceptionally well-resourced) individuals, rather than to reach a significant mass of people, then Certificates may operate further to shift responsibility for the criminal legal system's collateral consequences from the state to the individual. If Certificate programs take pressure off the state from having created these statutory, regulatory, and stigmatic barriers and places the failure to overcome them at the feet of people with criminal records themselves, Certificates could serve a counterproductive role by reinforcing messages about personal, rather than communal, responsibility for the systems of mass criminalization. When proposed solutions take on the trappings of the criminal legal system itself, this "'criminal justice' logic"³⁰⁷ can result in reforms that do not advance the interests of people affected by the criminal legal system.³⁰⁸

Certificates, therefore, have the potential to stand in the way of both discrete near-term reforms, like expanding expungement, as well as larger, potential changes that would require a rethinking of the foundations of our criminal legal system. To avoid Certificates deflating energy for larger reform, or simply reflecting and reinforcing the logic of the criminal legal system, advocates supporting Certificate programs must view Certificates as a means, not an end in themselves. Instead of being an end point, Certificates are well-positioned to function as a testing ground for pushing the idea that people with criminal records typically are not risky hires³⁰⁹ and should not be excluded from licensing and job opportunities. Unfortunately, there is currently very little data being tracked by states experimenting with Certificates. If data about Certificate programs were carefully collected,³¹⁰ however, successful

³⁰⁶ Kimberlé Crenshaw has explored the ways in which successful reform efforts often adopt the framing of the systems they are trying to change. These reforms often "reflect the logic of the institutions that they are challenging." Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1367 (1988). When this happens, adjustments are made "only to the extent necessary" to resolve a contradiction between the dominant ideology and reality. *Id.* at 1368.

³⁰⁷ See generally Michael J. Coyle, *Who Is Mired in Utopia? The Logics of Criminal Justice and Penal Abolition*, 45 SOC. JUST. 79, 79 (2018).

³⁰⁸ See Ewald, *supra* note 87, at 31 ("[T]he certificate was placed within the criminal justice system . . . and criminal justice actors employ the logics and tools of their routine practices in interpreting relevant texts and carrying out this duty.").

³⁰⁹ See *supra* notes 39–46 and accompanying text.

³¹⁰ For example, in both Tennessee and North Carolina, the central Administrative Office of the Courts does not have accurate numbers of Certificates granted because of inconsistent

Certificate programs could provide support for laws that limit negligent hiring liability³¹¹ more broadly, provide anti-discrimination protections for qualified people with criminal histories, present a time limit on how long employers can consider criminal history, or that otherwise work to roll back the many collateral consequences that hold people back from succeeding in employment. In the meantime, they could open up employment and career opportunities for those who need them.

CONCLUSION

In the era of mass criminalization and mass collateral consequences, we must figure out a way to give people with criminal records a true second chance. States are experimenting with different approaches, which often work in concert. Interventions like expungement, anti-discrimination laws, ban-the-box, and Certificates are quickly spreading across the country.

Any second-chance initiative that does not automatically apply to all eligible recipients will face the problem of an uptake gap. This Article has cataloged and analyzed the administrative burdens involved in applying for Certificates in order to shed light on one significant source of that gap. Lessons from existing Certificate programs demonstrate how the learning, compliance, and psychological costs involved can lower application rates and can lead to administrative exclusion. In addition to focusing on factors contributing to the gap itself, advocates and policymakers must consider the distributional effects of administrative burdens in second-chance initiatives. A system in which people's resources affect whether or not they can access a second-chance opportunity will only exacerbate the race- and class-based disparities in our criminal legal system.

By making explicit the role of administrative burdens in Certificate programs, policymakers can think critically about burdens in program design when it comes to second-chance policies. If policymakers are

record-keeping at the county level. *See, e.g.*, E-mail from Michelle Consiglio-Young, Assistant Gen. Couns., Tenn. Sup. Ct. Admin. Off. of the Cts., to Cara Suvall (July 9, 2019, 2:51 PM) (on file with author); E-mail from LaToya B. Powell, Assistant Legal Couns., N.C. Admin. Off. of the Cts., to Cara Suvall (Aug. 26, 2019, 2:38 PM) (on file with author).

³¹¹ The concern about negligent hiring liability is likely overblown or pretextual. *See, e.g.*, COUNCIL FOR CT. EXCELLENCE, *supra* note 92, at 13 ("The DC business community appears to be highly concerned about the risks of liability and claims of negligent hiring when considering hiring previously incarcerated persons. While CCE was able to find only five examples of negligent hiring lawsuits filed against DC employers over the past several decades, the lawsuits' impact on a private employers' risk management calculus is likely significant.").

seeking to address mass criminalization, rather than just alleviate collateral consequences for a few, these policies must be designed with an eye toward how second-chance initiatives fit in with social change in the criminal legal system. When interventions benefit a few but do not reach the many who are equally good candidates, or that provide a way out from under collateral consequences for those who are well-resourced while others fall in the gap, these initiatives may be more harmful than helpful. Just because these policies are politically popular does not mean that they are low-hanging fruit worth picking. In contrast, if second-chance policies are designed not only with access, but also equity in mind, they can be valuable tools to help people in the short term while supporting larger changes in the criminal legal system in the long term.

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