
# *THE CENTER FOR COMMUNITY ALTERNATIVES COMMENTS TO THE NACDL TASK FORCE ON RESTORATION OF RIGHTS AND STATUS AFTER CONVICTION*

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On behalf of the Center for Community Alternatives, I appreciate the opportunity to engage in this discussion with National Association of Criminal Defense Attorney's (NACDL's) Task Force on the Restoration of Rights and Status after Conviction. I offer these written comments to supplement my oral comments.

For over thirty years, the Center for Community Alternatives (CCA) has promoted reintegrative justice and a reduced reliance on incarceration through direct services, advocacy, and policy development. Much of CCA's expertise in issues pertaining to the life-long consequences of a criminal conviction results from the direct services we provide program participants and clients in furthering our mission. CCA's Client Specific Program (CSP) is a "front-end" defense-based sentencing advocacy program that utilizes life-history investigation to advocate for sentences designed to promote our clients' successful reintegration into the community. CCA's Alternative-to-Incarceration (ATI) and Reentry Programs enhance community safety by helping people to realize their full potential to live law-abiding lives and make positive contributions to the community. CCA's Reentry Clinic leverages existing state and federal law to assist people with past convictions in overcoming the barriers to employment. In addition to overseeing CSP and the Reentry Clinic, CCA's Justice Strategies division advocates for the implementation of sound policies that promote fairness and genuine second-chances for people who have a past conviction. Most recently, Justice Strategies has explored the extent to which past criminal justice involvement creates barriers to college admission, and in 2011 we authored the report, *The Use of Criminal History Records in College Admissions Reconsidered*, the first report to detail the emerging practice of colleges and universities to screen applicants for past criminal justice involvement. This report, and our experiences with individuals facing barriers to college because of past convictions, prompted Justice Strategies to author *Criminal History Screening in College Admissions: A Guide for Attorneys Representing College Applicants and Students During and After Criminal Proceedings.*

The comments and recommendations I offer to this Task Force are informed both by CCA's day-to-day experiences working with people who are or have been caught up in the criminal justice system, the research we have conducted, and trainings we have delivered. Thus, the recommendations below flow from a perspective that is research-based and practical.

I begin by acknowledging that since the early 1970s, New York State has led the nation in enacting and implementing legislation and polices that discourage employers from discriminating against people with past criminal justice involvement.[1] New York relies primarily on the following policies to restore the rights and status of people after contacts with the criminal justice system: 1) sealing arrests that did not lead to criminal convictions and limited conditional sealing for certain drug related convictions; 2) anti-discrimination policies in the area of employment; and 3) issuance of Certificates of Rehabilitation. These New York policies are set forth in the following laws:

- Correction Law Article 23 (Correction Law § 700, et seq.), which provides for the issuance of Certificates of Relief from Disabilities and Certificates of Good Conduct for people with convictions. Such certificates create a legal presumption of rehabilitation. Employers must consider such Certificates when determining whether or not to hire or promote a person with a past criminal conviction.

- Correction Law Article 23-A (Correction Law § 750, et seq.) which establishes the New York State policy of encouraging the licensure and employment of people with criminal convictions and provides that employers and licensing agencies cannot refuse to hire or license a person based on the person's past conviction unless there is a direct relationship between the conviction and the specific job duties or doing so would involve an unreasonable risk to property or the safety of others. To make this direct relationship/unreasonable risk determination, Correction Law § 753 requires employers to consider eight factors pertaining to the individual applicant, the specific job duties, and the specific conviction.

- Human Rights (Executive) Law § 296(15), which makes it an unlawful discriminatory practice for an employer or occupational licensing agency to fail to comply with Correction Law Article 23-A. Human Rights Law § 296(15) also sets forth a limited "safe harbor" for employers who face a negligent hiring claim but can document that they have complied with Correction Law Article 23-A in hiring the employee.

- Human Rights Law § 296(16) provides that employers cannot ask about, consider, or require job applicants to disclose arrests that have been sealed (such as arrests that have resulted in a dismissal or a conviction for a non-criminal offense), arrests that have resulted in a Youthful offender adjudication, or convictions that have been conditionally sealed.

- General Business Law Article 25 (General Business Law § 380 et seq.) incorporates and supplements the federal Fair Credit Reporting Act and offers some protections for

[1] *See e.g.* Legal Action Center's 2009 "Report Card," ranking New York as one of the top two states in implementing policies designed to help people seeking reentry. This report card is available at: http://www.lac.org/roadblocks-to-reentry/upload/lacreport/Roadblocks-to-Reentry--2009.pdf.

individuals when an employer utilizes a private company to conduct a criminal background check.

Despite these laws and policies, CCA's research and experiences with our clients tells us that there is much work to be done to achieve fairness and to ensure that people with a past conviction have genuine opportunities to live law-abiding and fulfilling lives in the community. Below is a discussion of the limitations of New York's reliance on limited sealing, employment anti-discrimination laws, and Certificates, followed by concrete recommendations for steps to fully restore peoples' rights and status after involvement in the criminal justice system. In identifying limitations, my goal is not to diminish the value of the law and policies that currently exist in New York. Rather, if New York is a national leader in promoting successful reintegration after involvement in the criminal justice system – which I believe it is – the reality that so many New Yorkers continue to face needless discrimination and stigma underscores the fact that more needs to be done, not just in New York but in every jurisdiction.

## I. The Limitations of New York's Current Law and Policies.

Through CCA's direct services, research, and training programs, we have come to see the following as significant limitations to New York's current laws and policies:

### *1. Many Employers Fail to Comply with New York Law.*

Whether it is because they are ignorant of the law, or simply do not care about it, CCA's experience is that most employers fail to comply with the law in the following significant ways.

(a) Most employers include questions on the job application that require applicants to disclose arrests or convictions that have been sealed, as illustrated by the following actual questions from job applications:

> *"Have you ever been convicted of a crime?" (There is no caveat that informs applicants they should not disclose conditionally sealed convictions.)*
>
> *"Have you ever been convicted of a violation?"*
>
> *"Have you ever been convicted of an offense other than a traffic infraction?"*

(b) Many employers refuse to consider applicants who check the criminal history "box" on the application, despite the fact that they do not have enough information to make the

individualized consideration about the applicant, the crime of conviction, and the specific job duties as required under Correction Law § 753. Moreover, since checking the criminal history box typically results in applicants being denied the opportunity for an interview, such applicants are never able to tell the employer about their rehabilitation and evidence of good conduct, a requisite consideration for employers under Correction Law § 753. Even credentialed applicants with significant work history are typically passed over because of mistakes they made long ago.

> *Dorie was convicted of a drug crime in 2002, and released after serving two years in prison. After her release, she secured employment, working for five years as a Quality Coach and then Quality Analyst for Sutherland Gobal, during which time she also earned an associate's degree. A medical emergency resulted in her having to leave Sutherland, but when she returned to the workforce, she found that her past conviction haunted her every time she applied for a job. Dorie told CCA staff, "As soon as they see my conviction, my work history, skills, and experience goes out the window."*

(c) Many employers have blanket and clearly illegal bars against hiring people with certain convictions. In our experience, this is just as true for the larger employers with legal staff and human resource departments as it is for smaller employers.

> *John applied for a job with a reputable, large engineering firm in Central New York. He was offered the job conditioned upon the completion of a criminal background check. When the background check revealed a robbery conviction from several years ago, the company rescinded the job offer, despite the fact that John offered compelling evidence of rehabilitation and good conduct. On John's behalf, I contacted the company's human resource (HR) manager to determine why John was denied the job. The HR manager bluntly told me that they "really liked John" but the job offer was rescinded because the company's policy prohibits the hiring people with violent convictions. In response to my suggestion that such a blanket policy is illegal, the HR manager responded that this has "been the company's policy for years, so it must be legal."*

(d) For applicants who have a Certificate of Rehabilitation, many employers fail to consider the Certificate or afford the applicant the legal presumption of rehabilitation that is required by the Certificate. Many employers seem not to understand what a Certificate is, and thus treat it as nothing more than a piece of paper. In the same vein, few employers have a process for eliciting or considering an applicant's evidence of rehabilitation and good conduct. The growing practice of employers outsourcing the human resources function to third party vendors has made it increasingly difficult for applicants to present evidence of rehabilitation or to be afforded the legal presumption of rehabilitation to which they are entitled if they have a Certificate.

*Bill, who has a master's degree and was honorably discharged after a career in the military, has had one arrest that resulted in a low-level felony conviction for a sex offense in 2007. His Veterans Administration counselor urged him to apply for a job in the lawn care department at Walmart, which was promoting a special hiring program for veterans. Bill applied, and went through three interviews, disclosing his past conviction each time. He also tried to provide the staff interviewing him a copy of his Certificate of Relief from Disabilities (CRD, which staff would not accept. When he stated he would like to talk about his rehabilitation and good conduct, he was told that this was "not necessary." He was offered the position, conditioned upon the background check. Shortly after, he received a letter from, GIS, a third party vendor that had conducted the background check stating he was "non-competitive" because of his conviction. GIS stated that he could challenge the accuracy of the background check. Bill sent GIS a copy of his CRD, stating this should be noted in his background check. He also sent Walmart a copy of his CRD and a statement outlining his evidence of rehabilitation and good conduct. What followed was a confusing series of letters in which Walmart stated that all information had to be sent to GIS, and GIS stated that Walmart was making the final employment decision. Ultimately, Bill received "final" denial letters from both GIS and Walmart. At no point did either GIS or Walmart acknowledge the fact that Bill had a CRD. Nor was there any acknowledgement of Bill's evidence of rehabilitation and good conduct, or any explanation of how Bill's conviction was directly related to a position in lawn and gardens.*

(d) Though the law requires that employers who make an adverse employment decision give a copy of the background check to the job applicant *prior* to making such a decision, we know of few employers in New York who do so. Indeed, most will not provide a copy of the background until after the adverse employment decision, and then only if the applicant specifically requests it. Given the plethora of mistakes on commercial background checks, there is no question that the failure to comply with the law results in applicants losing job opportunities because of mistakes on their background checks that remain unidentified and uncorrected.

*2. New York's Human Rights Protections are Limited to the Domain of Employment and Do Not Protect Individuals in other Domains, Such as Housing, Higher Education, and Volunteer Work.*

Human Rights Law § 296(16) applies only to the domain of employment and credit. As a result, outside the areas of employment and credit, decision-makers in New York feel free to ask people to disclose any arrest, even arrests that have resulted in a dismissal, a Youthful Offender adjudication, a conviction for a non-criminal offense, or a conditional sealing. These questions clearly undermine New York's sealing and Youthful Offender statutes, and are confusing to applicants, who have been told by the court and their defense attorneys that they need not ever disclose such arrests.

Similarly, Correction Law Article 23-A (incorporated into Human Rights Law § 296(15)) applies only to employment and occupational licensing decisions. As a result, those who check the arrest or conviction box on housing, higher education, or volunteer applications often face outright bars or barriers that consist of unguided, arbitrary decision-making.

In the context of housing, many private landlords and housing authorities maintain policies against renting to people with certain convictions, regardless of how remote in time the conviction is or the person's evidence of rehabilitation and good conduct.

> *Charles has a felony sex offense conviction from 7 years ago for which he had been sentenced to probation. He is required to register on New York's sex offense registry for 20 years, and has been deemed "low risk." He has completed sex offense treatment, was discharged early from probation because of his good behavior, and has been awarded a Certificate of Relief from Disabilities.*

*Because of his advanced age and poor health, he is confined to a wheelchair, but lives in a second floor apartment that is not wheelchair accessible – which means he is literally trapped in his apartment. He has repeatedly applied to assisted living facilities that are more appropriate to his medical condition and needs, but has been repeatedly denied because he is a "sex offender."*

In the context of higher education, CCA's 2011 report, *The Use of Criminal History Records in College Admissions Reconsidered* reveals that during the application process, approximately 66% of colleges and universities collect information about applicants' past criminal justice involvement, despite the fact that there is no evidence that doing so enhances campus safety. Some colleges maintain outright bars to admission for certain convictions; others establish additional steps that applicants who check the box must take, such as requiring the applicant to submit a letter of recommendation from his or her parole or probation officer or the "warden" of the prison in which the applicant was incarcerated. The schools that have additional steps for those who check the box often have high rates of incomplete application rates – schools have reported incomplete rates of almost 50%. Less than half the schools that collect and use criminal history have written policies in place about how such information will be used, and only 40% train staff on how to interpret such information. As a result, many applicants who have had past criminal justice involvement face arbitrary bars to admission:

*While on Probation for a felony offense, Chad completed three semesters at a community college in Western New York, achieving a 4.0 grade point average. Chad moved to Central New York to be closer to his family, and applied to a local community college there. Despite his stellar performance at the Western New York community college, he was denied admission to the Central New York community college because of his conviction, and was told that he could "re-apply" after a year.*

*Dan was convicted of joy-riding when he was 18 years old, which in South Carolina (where the offense occurred) was a felony. (In New York, the same crime is a misdemeanor). Dan, who was*

*determined to earn an advanced degree, did not let this conviction deter him, and graduated with honors from Claflin University, a historically black college. When he applied to master's degree programs, he was denied admission to Syracuse University because of his past conviction. Cornell University, however, focused on Dan's undergraduate track record rather than his conviction, and admitted him. A year ago this May, Dan graduated from Cornell with a Master's Degree and a 3.6 grade point average.*

Even for colleges that do not have outright bars, the criminal history screening process has a profound chilling effect. Many people elect to not apply to colleges that include the criminal history "box" on the application.

In the context of volunteer work, a growing number of organizations are adopting strict criminal history screening requirements for volunteers. For example, just last year, the United States Track and Field Association (USATF) adopted a background screening process for youth coaches and volunteers that mandates a lifetime bar of anyone with a past violent or sex offense conviction, and a five year bar for anyone convicted of any other felony or any drug crime (whether a misdemeanor of felony). The policy does not allow for consideration of the person's evidence of rehabilitation or good conduct. A growing number of grammar schools are also conducting background checks on parent-volunteers, screening out parents who simply wish to be more involved in the lives of their children.

*Ray called me to ask if there was any mechanism available to seal or expunge his New York drug conviction from 15 years ago. Ray, who was in his early twenties when the conviction happened, had been sentenced to probation, which he had successfully completed. He had since completed his college education, moved to another state because of a good job opportunity, married, and started a family. His young daughter was participating in her grammar school play, and the school needed parent volunteers. Ray wanted to volunteer, but had been told that the school did not want him to be "around children" because of his past conviction. When he asked if obtaining a Certificate of Relief from Disabilities would overcome the bar to his volunteering, he was told no – only expungement or sealing would do so.*

The importance of having opportunities to volunteer cannot be overstated. Volunteer activity allows a person to feel as though he or she has something of worth to offer the community, and thus is intimately associated with a sense of full civic and community engagement. Moreover, most parents participate in volunteer work as a means of positively engaging and participating in the lives of their children. In the discussions about the restoration of rights and status, this is one aspect of full community participation that is often overlooked, yet it is becoming increasing difficult for people with past convictions to feel like full community members through volunteer work.

*3. Decision-Makers Access and Consider Convictions that Are Remote in Time and Thus Not Predictive of a Person's Likelihood to Commit a Crime*.

This Task Force is doubtless well-versed in the research of Alfred Blumstein, Kiminori Nakamura, Megan Kurlychek, Shawn Bushway and others about the limited value of past convictions in predicting future offending.[2] Yet, despite the fact that the research compellingly reveals that after 4 to 8 years (depending on the type of crime and the age of the person at the time of the crime), a past conviction does not meaningfully predict a person's likelihood of engaging in criminal conduct, people in New York face barriers to employment, housing, higher education, and volunteer work for convictions that are quite remote in time.

> *Andrea has a single criminal conviction from 6 years ago – a misdemeanor for criminal mischief that stemmed from a drunken argument with her then-husband. Since, Andrea has successfully completed substance abuse treatment and mental health counseling, she has regained custody of her children, and to support herself and her children, she has applied for a job as a home health aide, which is work that she had been doing successfully for years before her conviction. Her former employer offered her a job, but the New York State Department of Health (DOH) denied her clearance. Andrea appealed this denial, but it took her a year to convince the DOH to grant her appeal, in part because the judge who sentenced Andrea refused to grant her a Certificate of Relief from Disabilities (see below).*

[2] *See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327, 331 (2009) ; Megan C. Kurlychek, Robert Brame, and Shawn D. Bushway, *Scarlet Letters and Recidivism Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUBLIC POLICY 1101, 1108 (2006).

Allowing decision-makers to consider past criminal justice involvement that has minimal to no value in predicting an applicant's likelihood to engage in crime makes no sense and is counter-productive.

*4. Enforcement of New York Law is Problematic*.

Correction Law Article 23-A provides that, for private employment decisions, an aggrieved person has a cause of action and can sue the employer. However, lawsuits are both hard to file and hard to win, and as a result, this has not been an effective enforcement method. Alternatively, because New York's Human Rights Law incorporates Correction Law Article 23-A, a person can file a complaint with the Division of Human Rights. (In New York City, an aggrieved person can also file a complaint with the NYC Department of Human Rights, and in certain circumstances, a person can consider pursuing a complaint with the federal EEOC). But our experience reveals that the New York State Division of Human Rights will pursue sanctions against employers only where there is clear, concrete, and objective evidence of a violation, such as an employer admitting to or maintaining a written policy that bars the hiring of people with past convictions.

The problems with enforcement are related to the lack of awareness of the existing legal protections in New York. Most applicants do not know of their rights, and therefore assume that employers can legally discriminate against them. Similarly, many employers – even large employers with legal and human resource departments – engage in practices that suggest that they are ignorant of or simply do not care about the law. In 2009, in an attempt to remedy this, New York's General Business Law was amended to require employers to post copies of Correction Law Article 23-A and to provide applicants a copy at least one time during the application process if the employer conducts a criminal background check. Yet, most employers are unaware of these requirements. In fact, I cannot think of one of our Reentry Clinic participants who has been given a copy of Correction Law Article 23-A when applying for a job. Last year, when the Director of CCA's Reentry Clinic and I conducted a series of trainings for Central New York employers on issues pertaining to hiring people with past convictions, every employer we trained (approximately 60) shook their head in dismay when we informed them of this obligation, admitting that they had no idea that they were required to post and handout copies of Correction Law Article 23-A.

*5. The Process of Applying for Certificates of Rehabilitation Can Be Confusing and Decision-Making About Certificates Is Subject to Arbitrariness.*

Despite the potential that Certificates of Rehabilitation have in promoting a person's successful reintegration into the community, the process of applying for Certificates can be confusing and daunting. People who have more than one felony conviction are often confused about the waiting periods for a Certificate of Good Conduct because the length is dictated by the most serious conviction, while the running of the waiting period is triggered by the most recent conviction, even if it is a misdemeanor. People who have just one felony conviction are confused by whether they must submit the application to the sentencing court or the Department of Corrections and Community Supervision (DOCCS). The process of applying to DOCCS is needlessly cumbersome, involving a 4 page detailed application that requires the applicant, among other things, to provide tax returns and W-2s for the past three years and list the address of every residence over the past five years (a daunting endeavor for those applicants who experienced periods of homelessness during this time frame). The process is also exceedingly time-consuming: currently it takes DOCCS twelve to eighteen months from receipt of the application to process it.

The process of applying to a court for a Certificate of Relief from Disabilities can also be confusing, as every county in New York utilizes a different process. In New York City, for example, the process typically requires an in-person interview with Probation, which is problematic for those applicants who now live in other parts of New York. Many courts do not even have a clear process for Certificate applications.

> *CCA assisted Charlene with obtaining a Certificate of Relief from Disabilities for her sole criminal conviction, a 3 year old misdemeanor conviction for promoting prison contraband which occurred after she was caught attempting to deliver cigarettes to her husband during a prison visit. The conviction occurred in a local town court, and CCA staff contacted the town court justice to ask about the court's process for accepting and considering applications for a Certificate of Relief from Disabilities. In response to this question, the town justice asked: "What's a Certificate of Relief from Disabilities?"*

*Tom came to one of CCA's community education programs, after which he decided to apply to a local town court for a Certificate of Relief from Disabilities (CRD) for his sole conviction, a misdemeanor. Tom completed the one-page CRD application, and personally went to the town court clerk's office to submit it. The town court clerk told Tom that he could not submit the application on his own, and instead would have to retain a lawyer to submit it for him.*

The difficulty in discerning the application process is not the only problem – there is a great deal of variation in decision-making about Certificates. Under the statute, the Certificate is to be granted to eligible individuals if the court is satisfied that granting the application is "consistent with the rehabilitation" of the applicant and "consistent with the public interest." Yet some judges apply completely different standards, as revealed by one judge in the Central New York area who denies a significant number of Certificate applications on the grounds that a "certificate of relief is not issued as a matter of right and is only granted under extraordinary circumstances."

*Andrea, who is discussed above, applied three times for a Certificate of Relief from Disabilities to the court that sentenced her for her sole misdemeanor conviction. Andrea was diligent about applying because the Department of Health informed her that she needed to obtain a Certificate to be cleared to return to work as a home health aide. Each time she provided the court with additional information about her rehabilitation and good conduct since the conviction. Each time the court denied the application, stating that Andrea was not deserving of this "extraordinary relief."*

## II. Recommendations for Moving Towards Full Restoration of Rights and Status after Criminal Justice Involvement.

As the foregoing illustrates, while New York has been a leader in sealing arrests that do not lead to a criminal conviction, utilizing Certificates and implementing laws that prohibit

discrimination in employment, this has not been enough and too many people are still relegated to "second-class" citizenship because of their past criminal justice involvement. New York's experience shows that there must be a variety of tools to achieve the goal of restoring the rights and status of people with past convictions. Based on our research and service experience, CCA believes that the following are all critical components of any scheme that seeks to make restoration of rights and status a reality.

It bears emphasizing that because of the well-documented disparate impact that our criminal justice system has on communities of color, the recommendations below are not merely necessary for full restoration of rights and status – these suggestions are civil rights imperatives.

1. *Ban the Criminal History "Box" from Applications.*

If decision-makers continue to require applicants to disclose their past convictions on the initial application, applicants with past criminal justice involvement will continue to be screened out before they ever have an opportunity to demonstrate their qualifications and their rehabilitation and good conduct. Requiring decision-makers to remove the criminal history box from the application and defer the inquiry until later in the application process is an effective means of ensuring that people with past convictions are not needlessly screened out before they have the opportunity to present their credentials.

In the context of employment, the "ban the box" movement has gained momentum, and a growing number of states and municipalities have banned the question about past convictions from employment applications.[3] But banning the box in other domains makes just as much sense in ensuring that people are not denied opportunities. For example, Newark, New Jersey's "ban the box" ordinance applies to employment *and* housing decisions.[4] As set forth in CCA's report, *The Use of Criminal History Records in College Admission Reconsidered*, banning the box altogether during the college admissions process makes the most sense given the lack of evidence that screening for past convictions enhances campus safety; at the very least, institutions of higher education should defer the criminal history inquiry until after a conditional offer of admission has been made.[5]

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[3] For an overview of the "ban the box" movement across the nation, visit the website of the National Employment Law Project's website at: ww.w.nelp.org.

[4] See http://nelp.3cdn.net/495bf1d813cadb030d_qxm6b9zbt.pdf. at 21.

2. *Allow for the Sealing or Expungement of Convictions that are Not Predictive of a Person's Likelihood to Engage in Crime.*

The work of researchers like Blumstein, Nakamura, Kurlychek, and Bushway demonstrates that requiring people to disclose their past convictions for the rest of their lives does not promote good decision-making and does nothing to enhance public safety. Yet, in most jurisdictions, people face life-long stigma and barriers because of their past convictions. This perpetual punishment is not merely unnecessary – it is affirmatively damaging, relegating people to second class citizenship. Sealing and expungement is a necessary and critical component of any state or federal scheme that genuinely seeks to fully restore a person's rights and status after conviction.

*3. Establish Anti-Discrimination Legislation and Policies in Employment, Housing, Higher Education, and Volunteer Work.*

When followed, New York's anti-discrimination statute (Correction Law Article 23-A), effectively prevents employers from maintaining blanket bars against hiring people with certain past convictions and guides employers on how to determine if a person's past conviction impacts his other qualifications for a specific job. Decision-makers in other domains should similarly be required to reject blanket bars and render a thoughtful, individualized decision about applicants with past convictions.

In this sense, it bears noting that such decisions should be guided by specific standards, criteria or, as in New York, factors. However, the standards should be tailored to the particular type of decision at issue. In New York, for example, the goal of establishing effective anti-discrimination legislation in the domains of housing and higher education cannot be achieved merely by importing the eight factors set forth in Correction Law § 753 into these domains. Rather, there needs to be careful, thoughtful consideration about which standards, criteria, or factors are relevant to the decision at hand.[6] At the very least, every anti-discrimination policy should ensure that decision-makers are required to consider the applicant's evidence of rehabilitation and good conduct.

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[5] For more details about, and rational for, CCA's recommendations, see *The Use of Criminal History Records in College Admissions Reconsidered*, at 31-40 (available at http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf.

[6] See CCA's report, *The Use of Criminal History Records in College Admissions Reconsidered*, at 33-40 for suggestions for anti-discrimination criteria in higher education decision-making.

4. *Strengthen and Simplify Enforcement of Existing Anti-Discrimination Schemes.*

CCA applauds the current efforts of federal and New York leaders to educate decision-makers about the value of giving opportunities to people with past convictions. In New York, Governor Andrew Cuomo has initiated a "Work for Success" employment initiative designed to improve employment opportunities and outcomes for people returning from prison to the community.[7] Community and employer education is a key component of this initiative. On the federal level, President Barack Obama has established the Federal Interagency Reentry Council, which among other things, has a "Reentry Myth Busters" series with fact sheets designed to clarify existing federal laws and policies that pertain to people with past convictions.[8]

These educational efforts must continue. But alone, they are not enough. There needs to be a concerted effort to step-up enforcement of existing legal protections for people with past convictions. This effort should include targeted litigation, like the litigation recently initiated and settled by New York State Attorney General Eric Schneiderman against Quest Diagnostics, which maintained a policy of automatically excluding applicants with certain criminal convictions.[9] But because of the time and expense involved in lawsuits, there should also be mechanisms available to penalize decision-makers who do not comply with the objective requirements of existing law, even if there is no proof that a person has been harmed. For example, as stated previously, in 2009 New York sought to expand compliance with Correction Law Article 23-A by requiring employers to post a copy in the workplace and provide a copy to applicants if a background check is done. Yet very few employers comply with these requirements, perhaps because there is no penalty for their failure to comply. If employers faced a penalty such as a fine for non-compliance, there is no question that more employers would comply, thus the goal of increasing awareness of the law would be better achieved.

5. *Implement "Safe Harbor" Protections to Encourage Decision-Makers to Give People with Past Convictions Fair Opportunities.*

Fear of litigation prompts many decision-makers to adopt policies that are needlessly risk-adverse when it comes to decision-making about people with past convictions. For example, though negligent hiring lawsuits involving employees with past convictions are rare in

[7] See http://www.governor.ny.gov/press/02172012Work-Success.

[8] See http://www.nationalreentryresourcecenter.org/documents/0000/1090/REENTRY_MYTHBUSTERS.pdf.

[9] See http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-fortune-500-company-end-illegal-hiring-practices.

New York, many employers state that they do not want to hire a person with a past conviction because they are concerned about being sued. The 2009 change to New York's Human Rights Law § 296(15) seeks to ameliorate employer concerns about hiring qualified applicants with past convictions by providing a limited "safe harbor" for those employers who face negligent hiring claims for hiring a person with a past conviction and can demonstrate that they have complied with Correction Law Article 23-A. There is no reason that similar, and less limited, "safe harbors" cannot be enacted to protect decision-makers in other domains, including housing, higher education, and volunteer activity.

**Conclusion**

The Center for Community Alternatives appreciates this opportunity to share these comments with the NACDL Task Force on the Restoration and Rights and Status after Conviction. It is hoped that the foregoing comments will be helpful as the Task Force moves forward.