

# EXTENDING THE HOME COURT ADVANTAGE: A CALL TO UPDATE THE ARIZONA CIVIL RIGHTS RESTORATION SCHEME

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## INTRODUCTION

On a recent Thursday evening over two hundred people crowded into a meeting room at Pima Community College to discuss civil rights restoration.<sup>1</sup> Some were individuals convicted of a felony who had received an absolute discharge of their sentences many years before this meeting. One man, with a single felony conviction, neither realized that his rights were taken from him when he was sent to prison, nor that they were restored automatically after he received an absolute discharge of his sentence.<sup>2</sup>

Upon the first felony conviction, an individual convicted in an Arizona court loses the right to vote,<sup>3</sup> hold public office,<sup>4</sup> possess a firearm,<sup>5</sup> and serve on a jury.<sup>6</sup> At the completion of probation or an absolute discharge from prison, and after the individual has paid any court-ordered restitution and fines, an individual

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1. A.J. Flick, *Ex-felons Can Get Rights Back*, TUCSON CITIZEN, Nov. 4, 2005, at 7A. See generally Laurie Laine, *Restoring Civil Rights After Felons Serve Sentences is Topic of Forum*, ARIZ. DAILY STAR, Nov. 1, 2005, at B2.

2. Flick, *supra* note 1, at 7A.

3. ARIZ. REV. STAT. ANN. § 13-904 (2005), ARIZ. CONST. art. VII, § 2(C) (restricting an individual who has been convicted of a felony from voting unless her civil rights have been restored).

4. ARIZ. REV. STAT. ANN. § 16-101 (2005) (listing the qualifications of an elector for public office).

5. *Id.* § 13-904(A)(5).

6. *Id.* § 21-201(3) (disqualifying a potential juror with a felony conviction whose civil rights have not been restored).

convicted of a single felony will have most civil rights automatically restored.<sup>7</sup> In order to legally possess a firearm after a felony conviction, one must petition the judge who originally imposed the felony sentence.<sup>8</sup>

Disenfranchisement, a significant component of the civil rights restrictions placed on a convicted individual,<sup>9</sup> is widespread throughout the United States. An estimated 4.7 million people in the United States have lost the ability to vote as the result of a felony conviction.<sup>10</sup> Currently, forty-eight states place some form of voting restriction on a convicted person at various times in the criminal adjudication process.<sup>11</sup> Thirty-six states prevent a convicted person from voting while on parole; thirty-one levy similar restrictions on probation.<sup>12</sup> Arizona statistics are similarly striking: Approximately 74,600 individuals face civil disabilities in Arizona.<sup>13</sup>

The importance of having one's civil rights restored can be demonstrated by the Arizona business licensing scheme. Arizona currently has 266 licensing boards and commissions.<sup>14</sup> Many of the boards impose licensing requirements upon jobs ranging from medicine to funeral services to pest control.<sup>15</sup> One whose rights have not been restored may have significant difficulty obtaining or keeping a license. Under Arizona law, "a person *whose civil rights have been restored* [shall not] be disqualified to engage in any occupation for which a license, permit or certificate is required to be issued by this state solely because of a prior conviction for a felony or misdemeanor within or without this state."<sup>16</sup> However, in order to gain restoration, the convicted individual must first pay all fines and restitution.<sup>17</sup>

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7. *Id.* § 13-912. The right to possess a firearm is not restored automatically for the individual with a single felony conviction.

8. *Id.* § 13-912(B).

9. "Convicted individual" as it is used throughout this Note refers to an individual with a felony conviction, unless otherwise noted.

10. Kevin Krajick, *Why Can't Ex-felons Vote?*, WASH. POST, Aug. 18, 2004, at A19. *See also* Flick, *supra* note 1, at 7A.

11. THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES (2006), <http://www.sentencingproject.org/pdfs/1046.pdf>.

12. *Id.*

13. *See* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 50-STATE REPORT ON RE-ENFRANCHISEMENT—A GUIDE TO RESTORING YOUR RIGHT TO VOTE (2005), [www.lawyerscomm.org/2005website/ep04/electionprotectionpics/50stateguide.pdf](http://www.lawyerscomm.org/2005website/ep04/electionprotectionpics/50stateguide.pdf). In Arizona, the right to vote is not restricted apart from the other civil rights restrictions in Arizona, so the above number is a telling statistic for *all* civil rights disabilities imposed by the Arizona disqualification scheme. *See* ARIZ. REV. STAT. ANN. § 13-904 (2005) (detailing the civil rights restrictions placed on an individual convicted of a felony).

14. Office of Boards and Commissions, Office of the Governor of Arizona, Information About Becoming a Member of a State Board or Commission, <http://www.governor.state.az.us/bc/BCinfo.asp> (last visited Nov. 3, 2006).

15. Many of the statutes that govern the operation of the boards include provisions that take effect when a licensee is convicted of a felony. A sampling of these statutes include: cosmetology, ARIZ. REV. STAT. ANN. § 32-572(A) (2005), real estate, *id.* § 32-2157(C), pest control, *id.* § 32-2312(D), and funeral services, *id.* § 32-1301(28).

16. *Id.* § 13-904(E) (emphasis added).

17. *Id.* § 13-912(A)(2) (stating that all restitution and fines must be paid by before convicted individual may reap the benefit of the automatic restoration statute).

A convicted individual may be unable to make sufficient money to meet restitution responsibilities because of her inability to get or keep a license, which in turn prevents her from getting her rights restored, which then prevents her from avoiding the licensing problems associated with a felony conviction for which rights have not been restored.<sup>18</sup>

Civil rights restoration can serve as an incentive to pay off fines, earn an honest wage, and reintegrate into society. If this is a goal of the statutory scheme, it is troubling that the uneven application of civil disabilities to different offender groups can bar many individuals from moving on with their lives by limiting the ability to qualify for jobs or voice an opinion by voting.

On its face, the civil rights restoration process for an individual convicted in Arizona<sup>19</sup> is fairly straightforward. Upon the absolute discharge of a single felony, the individual's rights are automatically restored, requiring no action by the individual.<sup>20</sup> Issues related to the first-time Arizona offender arise most frequently when an individual has been subsequently charged with another crime and the civil rights status of the individual is in question for conviction or sentencing purposes.<sup>21</sup>

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Unpaid restitution may also be a barrier to restoration for the individual who is convicted of multiple offenses, as the judge considering the individual's petition for restoration may take into account unpaid restitution. *Id.* § 13-908 (discretion for Arizona convictions); *id.* § 13-911 (2005) (discretion for federal convictions).

18. This argument can be extended a step further: a convicted individual's inability to secure a license prevents her from obtaining work and can lead to recidivism. This step in the logical progression is met with opposition. For example, the National District Attorneys Association, while acknowledging that civil disabilities may make integration into society more difficult, notes that civil disabilities "should never be used as a justification by offenders for failing to re-enter society as productive citizens." NAT'L DISTRICT ATTORNEYS ASS'N, POLICY POSITIONS ON PRISONER REENTRY ISSUES 10–11 (July 17, 2005), available at <http://www.reentry.net/library.cfm?fa=detail&id=87247&appView=folder>.

19. This Note will discuss some of the curious results that occur when an individual is convicted of a felony in Arizona compared to a similar conviction in another state's court. For brevity, a conviction for a felony in an Arizona state court will be termed an "Arizona felony," and a conviction in a federal court will be termed a "federal felony." Convictions in other states and jurisdictions will be similarly descriptive. This convention is used similarly when referring to the "Arizona individual" or "out-of-state individual."

20. ARIZ. REV. STAT. ANN. § 13-912.

21. See, e.g., *United States v. Meza-Corrales*, 183 F.3d 1116, 1127–30 (9th Cir. 1999) (discussing whether a charge of being a felon in possession of a firearm could be sustained in light of the automatic restoration statute); *United States v. Cerverizzo*, 74 F.3d 629, 631–32 (5th Cir. 1996) (discussing the applicability of Arizona's automatic restoration statute when calculating an individual's criminal history category for sentencing purposes); *State v. Buonafede*, 814 P.2d 1381, 1384–85 (Ariz. 1991) (holding that automatic restoration applies regardless of whether or not the individual is believed to be "rehabilitated").

An individual with multiple felony convictions must petition the court for restoration of her civil rights.<sup>22</sup> The court the individual must petition varies depending on the court in which she was originally convicted.<sup>23</sup> The individual can file a one-page form with the Clerk of the Court to request consideration for restoration of rights.<sup>24</sup> The judge has discretion to grant restoration of civil rights.<sup>25</sup>

Individuals with a single conviction and those with multiple convictions may face complications during the restoration process. The automatic restoration, for example, does not take effect until all fines and restitution are paid.<sup>26</sup> Also, many individuals with a single conviction do not realize that their rights are restored automatically upon the completion of their sentence or probation for a single felony conviction.<sup>27</sup>

Those that relocate to Arizona from another state face a host of problems in utilizing the Arizona process. An individual's civil rights may not fare well on the move to Arizona, and upon establishing residency in Arizona, an individual may find that her right to vote, serve on a jury, run for office, or hold certain licenses and certifications has been revoked.<sup>28</sup>

There are serious inconsistencies between the statutes governing civil rights restoration and how restoration occurs in practice. First, it is questionable whether an out-of-state individual is statutorily entitled to the remedies that Arizona allows in practice. The statutes that govern judicially granted civil rights restoration do not mention the out-of-state individual nor provide an explicit process by which she can seek to have her rights restored.<sup>29</sup> On the other hand, the

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22. The terms "multiple convictions" or "repeat convictions" are used for brevity in this Note to define more than one felony. The Author does not intend this term to equate with to what is commonly known as a "career criminal" or a "habitual offender."

23. Compare, e.g., ARIZ. REV. STAT. ANN. § 13-905(A) (allowing an individual with multiple felony convictions, upon completion of probation, to petition the judge who discharged her from probation for restoration of civil rights), with ARIZ. REV. STAT. ANN. § 13-906(A) (allowing an individual with multiple felony convictions, upon completion of a prison sentence, to petition the sentencing judge for civil rights restoration), and ARIZ. REV. STAT. ANN. §§ 13-909 to -910 (allowing an individual with a federal conviction, upon completing probation, in the case of section 13-909, or upon release from federal prison, in the case of section 13-910, to petition the presiding judge of the superior court in the county in which the individual resides).

24. Interview with Lily Shafer, Criminal Unit Supervisor, Clerk of the Super. Ct. of Pima County, in Tucson, Ariz. (Nov. 8, 2005) [hereinafter Shafer Interview]. There is no filing fee for this document. *Id.*

25. ARIZ. REV. STAT. ANN. § 13-908 (discretion for Arizona convictions); ARIZ. REV. STAT. ANN. § 13-911 (discretion for federal convictions).

26. ARIZ. REV. STAT. ANN. § 13-912(A)(2).

27. Flick, *supra* note 1, at 7A.

28. Other states, however, do not revoke certain civil rights because of a felony conviction. For instance, Maine allows incarcerated felons to vote by absentee ballot. ME. REV. STAT. ANN. tit. 21-A, § 112(14) (2006).

29. See ARIZ. REV. STAT. ANN. §§ 13-904 to -912 (codifying civil rights restoration upon felony conviction via judicial grant). The above code sections do not make any reference to how out-of-state individuals should be treated for rights restoration purposes. However, the statutes explicitly address both Arizona and federal convicts.

statute that allows automatic restoration of rights states that it should be applied to “[a]ny person.”<sup>30</sup> In practice, however, only those convicted in an Arizona state court reap the benefit of the automatic rights restoration statute. Simply put, the current practices in Arizona either construe the statutes too broadly by allowing *any* restoration for the out-of-state individual, or too narrowly by not allowing the out-of-state individual to use the restoration processes granted by the statutes to the Arizona and federally convicted individual. However, the imprecision in the statutes makes it impossible to tell which is the case. A recent comprehensive study of each state’s civil rights restoration process captured the uncertainty of the Arizona restoration scheme. The study noted that the restoration process was unclear as to “whether out-of-state felony convictions result in the loss of rights under Arizona law,”<sup>31</sup> and found “no provisions in Arizona law for restoration of any rights under Arizona law that may have been lost as a result of a felony conviction in another state.”<sup>32</sup>

The statutes provide minimal guidance to the officials who must implement them. Clerks’ Offices, Registrars of Voters, and judges have done an admirable job in developing processes that provide relief for many groups of individuals with felonies who are affected by civil rights disabilities. However, the legislation in the area has significantly lagged behind, and no longer captures the strides made by those who implement statutes. The current statutes also restrain the implementers from making sweeping changes that would allow for both efficient and uniform administration of the rights restoration process. The optimal solution is revision of the statutes and codification of the current practices, which would level the playing field for all individuals residing in Arizona seeking restoration of their rights.

It is convenient to argue that those affected by the restoration statutes should not receive further consideration by the Legislature because of their felony status. However, 95% of individuals convicted at the state level are eventually released from incarceration<sup>33</sup> and begin reintegration into society. These individuals are faced with conflicting messages upon reentry: They are expected to reintegrate into society while at the same time being burdened with civil disabilities that may serve as a bar from true integration. Being “tough on crime” is compatible with rights restoration. Rights restoration does not wipe clean an individual’s slate—rather, it provides a method by which she can reintegrate and it demonstrates a willingness by society to give an offender another chance.

This Note examines the Arizona Revised Statutes as they apply to the restoration of civil rights. This Note focuses primarily on out-of-state individuals because Arizona has failed to clearly determine statutorily what processes apply to this group. Instead, administrative processes have developed organically—

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30. *Id.* § 13-912.

31. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: ARIZONA (2005), <http://www.sentencingproject.org/pdfs/rights-restoration/Arizona.pdf>.

32. *Id.*

33. Bureau of Justice Statistics, Reentry Trends in the United States, <http://www.ojp.usdoj.gov/bjs/reentry/reentry.htm> (last visited Nov. 3, 2006).

processes, that even if designed with good intentions, may nevertheless place out-of-state individuals on uneven footing with an Arizonan who has been convicted of the very same crime.

Part I of this Note discusses Arizona's statutory civil rights restoration framework and the current restoration practices. Part II examines how Arizona treats out-of-state convictions and the method by which the out-of-state individual can seek restoration of civil rights. Part III discusses possible modifications to the statutes and procedures that would allow for a more uniform application of rights restoration.

## I. CIVIL RIGHTS RESTORATION AFTER AN ARIZONA CONVICTION

An individual with a felony conviction in Arizona, upon release from imprisonment or probation, has two paths to restoration depending on whether or not the conviction is her first. Either the individual will have her rights automatically restored by statute or the individual must petition the court to gain restoration.

### A. Statutory Process

The process by which the individual seeks restoration of her rights varies significantly based upon the jurisdiction in which an individual is convicted. With the exception of firearm possession,<sup>34</sup> the civil disabilities associated with a first-time Arizona felony conviction are remedied automatically upon completion of any incarceration and repayment of restitution or fines.<sup>35</sup>

An individual loses the benefit of automatic rights restoration after conviction of a second felony.<sup>36</sup> The restoration process varies for an individual with multiple felonies depending on the jurisdiction in which she was convicted

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34. ARIZ. REV. STAT. ANN. § 13-912(B). Section 13-912(B) states, in regard to the automatic restoration of rights, “[t]his section does not apply to a person’s right to possess weapons as defined in § 13-3101 unless the person applies to a court pursuant to section 13-905 or 13-906.” Until 1988, the automatic restoration statute also restored the right to possess a firearm. *See United States v. Meza-Corrales*, 183 F.3d 1116, 1126–30 (9th Cir. 1999). Sections 13-905 and -906 detail the processes by which an individual with more than one felony conviction petitions for the restoration of rights, either after completing probation or after being discharged from imprisonment, respectively.

35. ARIZ. REV. STAT. ANN. § 13-912. This statute applies only to a single felony. A single criminal adjudication in which the individual is sentenced for multiple felonies in one proceeding does not count as a single felony for the purposes of section 13-912. *Rocking K Holdings, Ltd. v. Pima County*, 822 P.2d 487, 489 (Ariz. App. 1991). This reading of section 13-912 is followed in practice. *See, e.g.*, PIMA COUNTY RECORDER’S OFFICE, RESTORATION OF RIGHT TO VOTE, *available at* [http://www.recorder.co.pima.az.us/images/felony\\_info.pdf](http://www.recorder.co.pima.az.us/images/felony_info.pdf) (last visited Nov. 4, 2006) (“If the person was convicted of two or more felony offenses, either in a single criminal case or in separate cases, the individual (or their attorney) must petition the court that sentenced them for restoration of their civil rights, including the right to vote.”).

36. Section 13-912 applies only to “[a]ny person who has not previously been convicted of any other felony.”

originally and the court that grants her discharge at the end of a term of imprisonment or probation.

If the repeat offender committed a felony in Arizona, was convicted in an Arizona state court, and served a period of probation, she must petition the judge who discharged her at the end of her term of probation.<sup>37</sup> This process can be started immediately upon the absolute discharge of probation.

The individual incarcerated for multiple Arizona state felonies may petition the superior court judge who originally sentenced her.<sup>38</sup> Unlike the process for one who served only a period of probation, the incarcerated Arizonan must wait two years from the date of absolute discharge before beginning the restoration process.<sup>39</sup>

An individual with multiple felonies who receives probation as the result of a federal conviction may petition the presiding judge of the superior court in the county in which she now resides.<sup>40</sup> An individual with multiple felony convictions, who is serving a federal prison term as the result of a federal felony conviction, must petition the superior court in the county in which she resides after waiting two years beyond the absolute discharge from prison.<sup>41</sup>

In each of the four above situations, the individual will *not* have her right to possess a firearm restored along with her right to hold office, serve on a jury, or vote, and may be completely barred from having her firearm rights restored. If she has committed a “dangerous” felony,<sup>42</sup> she cannot have her firearm rights restored.<sup>43</sup> If the individual was convicted of a “serious” felony,<sup>44</sup> she must wait ten years from the date of discharge of imprisonment or probation.<sup>45</sup> For any other felony offense, the individual must wait for two years beyond her absolute discharge from imprisonment or probation before seeking the restoration of firearm rights.<sup>46</sup>

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37. ARIZ. REV. STAT. ANN. § 13-905. Rule 29.1 of the Arizona Rules of Criminal Procedure requires that upon release from probation, the individual shall receive from either the court or her probation officer written notice about how she can have her civil rights restored.

38. ARIZ. REV. STAT. ANN. § 13-906.

39. *Id.* § 13-906(B).

40. *Id.* § 13-909.

41. *Id.* § 13-910.

42. *See id.* § 13-604(P) (defining a dangerous felony as “a felony involving the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury upon another”).

43. *Id.* §§ 13-905(C), 13-906(C), 13-909(C), 13-910(C).

44. *Id.* § 13-604(W)(4) (listing certain crimes as serious offenses, including murder, manslaughter, aggravated assault resulting in a serious injury or accomplished via the use of a firearm or dangerous instrument, sexual assault, crimes against children, and armed robbery).

45. *Id.* §§ 13-905(C), 13-906(C), 13-909(C), 13-910(C).

46. *Id.*

## *B. The Process in Practice*

### *1. Automatic and Administrative Restoration*

The automatic restoration process for the individual with a single conviction occurs automatically if the individual both “[c]ompletes a term of probation or receives an absolute discharge from imprisonment” and “[p]ays any fine or restitution imposed” and does not require any action on the part of the individual.<sup>47</sup>

Besides the judicial restoration mechanisms, one may also request a pardon from the Arizona Board of Executive Clemency.<sup>48</sup> Unlike the automatic restoration process, a petition to the Board does not first require her to pay all restitution and fines, unless another statutory requirement requires payment.<sup>49</sup> While the Board considers any remaining fines and restitution as a factor, the debts are not an automatic disqualification. This is partly because other ways to collect restitution payment exist besides withholding a pardon or rights restoration, including civil suits and other court process.<sup>50</sup>

### *2. Discretionary Restoration*

The automatic rights restoration process is not an option for an individual with multiple Arizona felony convictions or an individual convicted of a federal felony who resides in Arizona.<sup>51</sup> Instead, she must petition the superior court to have her rights restored.<sup>52</sup> If this individual is incarcerated for a period of time, either in state or federal prison, she must wait two years after receiving an absolute

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47. *Id.* § 13-912(A)(1)–(2); Shafer Interview, *supra* note 24. While ARIZ. REV. STAT. ANN. § 13-912 appears to allow the individual convicted of a federal offense to benefit from the automatic restoration process, in practice she must apply for discretionary restoration regardless of whether she has been convicted of one or multiple felonies. Telephone Interview with Madonna Anderson, Clerk of the Maricopa County Super. Ct., in Phoenix, Ariz. (Jan. 18, 2006) [hereinafter Anderson Interview]; MARICOPA CLERK OF THE COURT, VACATING JUDGMENT OF GUILT DISMISSING CHARGES AND RESTORATION OF CIVIL RIGHTS 2 (2005).

48. ARIZ. REV. STAT. ANN. § 31-442 (2005).

49. Telephone Interview with Duane Belcher, Sr., Chairman and Executive Director, Arizona Board of Executive Clemency, Tucson, Ariz. (Jan. 17, 2006).

50. *Id.*

51. *See* ARIZ. REV. STAT. ANN. § 13-912(A) (“Any person who has *not previously been convicted* of any other felony shall automatically be restored any civil rights that were lost or suspended by the conviction.”) (emphasis added). While it would appear that sections 13-909 and -910 only apply to the individual convicted of *multiple* federal felonies now living in Arizona, in practice, the individual convicted of a *single* federal felony must petition the court for restoration as well. The automatic restoration process is also not available for individuals convicted of a single felony in non-Arizona state courts. Anderson Interview, *supra* note 47; E-mail from Lily Shafer, Criminal Unit Supervisor, Clerk of the Super. Court of Pima County, to Flynn Carey, Author (Jan. 19, 2006) (on file with author) [hereinafter Shafer E-mail].

52. ARIZ. REV. STAT. ANN. §§ 13-905(A), 13-906(A), 13-909(A), 13-910(A).

discharge before she can apply for restoration.<sup>53</sup> The convicted person that receives probation can petition for consideration upon discharge from probation.<sup>54</sup>

The convicted person files a single page form with the Clerk of the Court which includes the details of the conviction.<sup>55</sup> The clerk forwards the completed form to a superior court judge and sends a copy to the prosecuting agency, often the County Attorney or the Attorney General's office.<sup>56</sup> The prosecuting agency may oppose the restoration, at which time the court will hold a hearing to determine whether to grant the restoration.<sup>57</sup> Often, the prosecuting agency will not respond. Lily Shafer, supervisor of the Criminal Unit at the Pima County Clerk of the Court stated, "many times, an individual will receive a letter from the judge, expecting it to tell him when he needs to arrive for his hearing, and in fact, it's a document granting the petition for restoration."<sup>58</sup> Even if the prosecuting agency does not object, the sentencing judge still has discretion regarding whether to grant the restoration.<sup>59</sup>

According to Ms. Shafer, many of the individuals that could take advantage of the restoration process do not because they already distrust the system on account of their last experience with the legal system, which led to a felony conviction.<sup>60</sup> Caroline Isaacs of the American Friends Service Committee believes that some people are lost in the shuffle because of the sheer number of responsibilities they face upon reentry.<sup>61</sup>

According to Ms. Isaacs, individuals are so inundated with information about securing employment and obtaining much-needed services and aid towards the end of their incarceration or probation, that they forget about their right to vote and other civil rights.<sup>62</sup> Ms. Isaacs is often contacted when a convicted individual faces an issue that impacts a loved one and is barred from voting or getting involved because of a civil disqualification.<sup>63</sup>

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53. See *id.* § 13-906 (state imprisonment); *Id.* § 13-910 (federal imprisonment).

54. See *id.* § 13-905 (state probation); *id.* § 13-909 (federal probation).

55. Shafer Interview, *supra* note 24.

56. *Id.*

57. *Id.*

58. *Id.*

59. ARIZ. REV. STAT. ANN. § 13-908 (discretion for Arizona convictions); *Id.* § 13-911 (discretion for federal convictions).

60. Shafer Interview, *supra* note 24.

61. Interview with Caroline Isaacs, Program Dir., Am. Friends Serv. Comm., Ariz. Area, in Tucson, Ariz. (Nov. 8, 2005). Ms. Isaacs works extensively with those who are reintegrating into society after incarceration.

62. *Id.*

63. *Id.* Ms. Isaacs discussed one situation in which a grandmother wanted to vote in a school board election because the outcome of the vote would affect her granddaughter. The grandmother's old conviction in another state barred her from voting in the local election. *Id.*

## II. CIVIL RIGHTS DISQUALIFICATION AND RESTORATION FOR THE OUT-OF-STATE OFFENDER

### A. Disqualification for Out-of-State Offenders

Even though an individual committed a crime outside Arizona, Arizona's disqualification statutes will impact her if she resides in Arizona. Arizona courts have not yet published an opinion interpreting how section 13-904, which imposes civil disqualifications, impacts those who move to Arizona from out-of-state.<sup>64</sup>

Section 13-904 states in part,

A conviction for a felony suspends the following civil rights of the person sentenced:

1. The right to vote.
2. The right to hold public office of trust or profit.
3. The right to serve as a juror.
4. During any period of imprisonment any other civil rights the suspension of which is reasonably necessary for the security of the institution in which the person sentenced is confined or for the reasonable protection of the public.
5. The right to possess a gun or firearm.<sup>65</sup>

A shortcoming of the statute is that it does not have a jurisdictional element that explains whether it triggers civil disabilities (1) only for felonies that are committed and adjudicated in Arizona or (2) for felonies committed in any state regardless of whether the violation would have been charged as a felony or misdemeanor in Arizona.<sup>66</sup> While the current practice in Arizona is the latter, the Arizona judiciary has not decided the issue.

Under the first approach, a convicted person only loses her civil rights for felonies committed in Arizona. Therefore, one who commits a serious felony in California will retain her civil rights upon moving to Arizona. States that have addressed statutes similar to Arizona's civil disabilities statute often reject this analysis.<sup>67</sup> If Arizona followed this interpretation, an individual could commit significant crimes out of state and not face civil disabilities in Arizona.

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64. No published opinion as of Feb. 22, 2006.

65. ARIZ. REV. STAT. ANN. § 13-904(A) (2005).

66. Compare ARIZ. REV. STAT. ANN. § 13-904 (lacking a clear jurisdictional element for "felony"), with MICH. COMP. LAWS ANN. § 600.1307a(4) (West 2005) ("For purposes of this section, 'felony' means a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.").

67. See *State ex rel. Olson v. Langer*, 256 N.W. 377, 387 (N.D. 1934) (stating, in response to the argument that loss of franchise only applied when a state felony was committed in North Dakota, "[i]t seems to us unthinkable . . . that an elector who has committed the most serious of offenses—for example, treason, or murder, or robbery—and

The second approach, which Arizona follows in practice, determines the civil disabilities affecting an individual based upon how the felony is classified in the state of commission.<sup>68</sup> For instance, if an individual is convicted of a felony in Maryland and subsequently moves to Arizona, the individual's Arizona civil rights are revoked because of the Maryland felony conviction. Under this approach, the disability attaches at the time of the commission of the crime, and the gravity of the crime is measured by the standards of the state in which the crime was committed. As a result, the "felony" label follows the individual to Arizona.

This approach, however, can produce anomalous results. A curious situation arises when an individual is convicted of a felony in another state that is only a misdemeanor under Arizona law. For instance, the crime of "Unlawfully Using Slugs in the First Degree" is a Class E *felony* in New York.<sup>69</sup> A comparable Arizona statute is "Unlawful Use of Slugs,"<sup>70</sup> a class 2 *misdemeanor*.<sup>71</sup> When an individual convicted of the New York offense moves to Arizona, her New York conviction is considered a felony conviction for the purposes of civil disability and rights restoration, even though an Arizonan who commits a similar crime will only face a misdemeanor and no loss of civil rights.<sup>72</sup>

Some courts utilize this approach because it preserves the punishment that the state wronged by the felon's actions has decided is appropriate.<sup>73</sup> The fact that one state exacts a higher penalty does not allow the convicted person to then seek shelter in a more forgiving jurisdiction with all of her rights intact.

Case law examining out-of-jurisdiction felonies is rare. *Bailey v. Baronian*<sup>74</sup> and *Bailey v. Burns*<sup>75</sup> provide detailed discussions of the applicability of out-of-state felonies to the state in which the individual now resides, and address both of the above interpretations. Both cases involved William Bailey, who ran for and subsequently won a seat in the Rhode Island House of Representatives.<sup>76</sup> Prior to his appointment, allegations arose that Bailey's election violated the Rhode Island Constitution, which barred individuals convicted of

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who has been convicted therefor [sic] in the federal court, should not be disqualified to exercise the elective franchise in North Dakota where the offense was committed").

68. Shafer Interview, *supra* note 24. No case law or statute requires that Arizona follows this approach.

69. N.Y. PENAL LAW § 170.60 (McKinney 2005). A "slug" is defined as "an object or article which, by virtue of its size, shape or any other quality, is capable of being inserted or deposited in a coin machine as an improper substitute for a genuine coin, bill or token." N.Y. PENAL LAW § 170.50.

70. ARIZ. REV. STAT. ANN. § 13-2007 (2005).

71. *Id.* § 13-2007(B). As this offense is a misdemeanor, a conviction does not trigger the civil disabilities of section 13-904 of the Arizona Revised Statutes. The maximum punishment for a class 2 misdemeanor, the second-lowest level of misdemeanors in Arizona, is four months imprisonment. *Id.* § 13-707(A)(2).

72. Shafer Interview, *supra* note 24.

73. *See State ex rel. Olson v. Langer*, 256 N.W. 377, 387 (N.D. 1934).

74. 394 A.2d 1338 (R.I. 1978).

75. 375 A.2d 203 (R.I. 1977).

76. *Id.* at 205.

certain crimes from voting or holding office.<sup>77</sup> Soon after Bailey was elected, a special committee convened to investigate the controversy of Bailey's past crimes.<sup>78</sup> The committee advised the Secretary of State that Bailey should not be seated as a representative.<sup>79</sup> Bailey sued for a writ of mandamus and requested that the court compel the Secretary of State to seat him in the House; a request that was ultimately denied by the court.<sup>80</sup>

Bailey later brought suit against the Providence Board of Canvassers and Registration when he was struck from the voter rolls.<sup>81</sup> Bailey argued that he was not within the class of people contemplated in the civil rights disqualification statutes because his convictions occurred in Michigan, not Rhode Island.<sup>82</sup> Bailey asserted that the correct reading of the Rhode Island Constitution limited civil rights disqualifications to violations of Rhode Island law because "the qualifications (or disqualifications) for voting in Rhode Island . . . remain subject to Rhode Island law."<sup>83</sup> The Board countered that a felony conviction in any jurisdiction disenfranchised Bailey, and found support in a majority of states that had addressed the issue.<sup>84</sup> Both parties adopted a fallback position, referred to as the "middle ground" position by the court, in which a crime committed out of state would be considered a felony in Rhode Island only if the same crime, committed in Rhode Island, would constitute a felony.<sup>85</sup>

The court quickly dispatched the "middle ground" reading as "the easiest to reject" and "practically unworkable."<sup>86</sup> The court noted that, while "appealing," it would be impossible to determine which Rhode Island statute would be analogous to the Michigan statute given the information it had regarding Bailey's Michigan conviction—a fact sheet from the Michigan Department of Corrections.<sup>87</sup> From a practical standpoint, if the court had difficulty determining the severity of Bailey's conviction in the context of Rhode Island's criminal code,

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77. *Id.* at 204.

78. *Id.* at 205.

79. *Id.* at 203.

80. *Id.* at 208.

81. *Bailey v. Baronian*, 394 A.2d 1338 (R.I. 1978).

82. *Id.* at 1339. The applicable portion of the Rhode Island Constitution held at the time: "Nor shall any person otherwise qualified to vote as provided in this article be permitted to vote while serving a prison sentence on final conviction of a felony nor subsequent to such imprisonment until the franchise shall have been restored by an act of the general assembly." *Id.* at 1339 n.3 (citing R.I. CONST. amend. XXXVIII, § 1).

83. *Id.* at 1342. The court provides a substantial list of cases that support each of the three possible outcomes of the case. *Id.* at 1341 nn.13–15.

84. *Id.* at 1341. To demonstrate the Board's "felony anywhere" position, the court used the example of a common law marriage. *Id.* at 1343–44. Entering into a common law marriage was a felony in Louisiana but legal in Rhode Island. *Id.* If a person committed the crime of common law marriage in Louisiana and then moved to Rhode Island, he would be penalized. *Id.* A Rhode Island citizen, committing the same act in Rhode Island, would not be similarly penalized. *Id.*

85. *Id.* at 1339.

86. *Id.* at 1341.

87. *Id.* at 1341–42.

it would be difficult for governmental and quasi-governmental agencies to do so in similar cases.<sup>88</sup>

Next, the court explored the interpretation that a voter would only be disqualified for a felony committed and adjudicated in Rhode Island.<sup>89</sup> Bailey argued that this reading would place the ability to disqualify a voter squarely in the control of Rhode Island, instead of allowing another state's processes to disable a Rhode Island voter.<sup>90</sup> The court rejected this position because of the potential mischief that could result when "one guilty of a Rhode Island felony [is] disqualified, but . . . one guilty of an equally or more reprehensible act under the laws of another jurisdiction should remain qualified."<sup>91</sup>

Finally, the court examined the Board's position, in which a felony conviction anywhere would disqualify the individual from voting in Rhode Island.<sup>92</sup> Acknowledging that no solution was a perfect fit, the court stated that this approach was in line with the "general purposes and policies which underlie [the disqualification] provision."<sup>93</sup>

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88. *Id.* at 1342 ("While some courts may wish to engage in these speculative mental gymnastics, this court does not."). Other courts are willing to engage in this method of analysis. *Baronian* provided a series of cases that follow the "middle ground" approach. *Id.* at 1341 n.15 (citing *Melton v. Oleson*, 530 P.2d 466 (Mont. 1974) (holding that a federal felony that would not be a felony under state law did not prevent an individual from acting as a college trustee or from voting); *Elder v. County Election Bd.*, 326 P.2d 776 (Okla.1958) (holding that an individual could run for the seat of county commissioner because his federal felony conviction would only be a misdemeanor at the state level); *State ex rel. Arpagaus v. Todd*, 29 N.W.2d 810 (Minn. 1947) (allowing an individual to hold office because his felony conviction would only be considered a misdemeanor at the state level).

89. *Baronian*, 394 A.2d at 1342.

90. *Id.* *Baronian* quotes a Minnesota case as support for this argument: "Is it not This State which prescribes the moral qualifications of Its voters, and not one of the forty-seven other States, or the Federal Government? Have we . . . turned over to those other jurisdictions the power to impose conditions of disenfranchisement upon our voters . . . ?" *Id.* (quoting *Arpagaus*, 29 N.W.2d at 813).

91. *Id.* at 1343. Some courts utilize this approach. *Baronian* again provided a series of cases that support this position. *Id.* at 1341 n.13 (citing *Crothers v. Jones*, 120 So. 2d 248 (La. 1960) (holding that a felony mail fraud conviction at the federal level did not disenfranchise an individual for the purposes of voting at the state level); *Isaacs v. Bd. of Ballot Comm'rs*, 12 S.E.2d 510, 512 (W. Va. 1940) (holding that the state civil rights disabilities "apply only to those residents of the state who have offended against its laws, and not to one who at some time had committed an offense in another jurisdiction").

92. *Id.* at 1343.

93. *Id.* Other jurisdictions have reached a similar conclusion, as noted by *Baronian*. *Id.* at 1341 n.14 (citing *State ex rel. Barrett v. Sartorius*, 175 S.W.2d 787, 790 (Mo. 1943) (holding that a felony conviction at a federal level can disenfranchise an individual at a state level because "he who sets himself above the law and does an act, regarded by the United States as of so serious a nature as to be prohibited and penalized as a felony, may well be held in this state to be unfit to participate in governmental affairs"); *Crampton v. O'Mara*, 139 N.E. 360, 363 (Ind. 1925), *error dismissed by* 267 U.S. 575 (1924) (holding that individual's conviction of a federal crime is sufficient to disqualify the individual from holding state office)).

The North Dakota Supreme Court examined a similar issue in *State ex rel. Olson v. Langer*,<sup>94</sup> in the context of a writ of *quo warranto*.<sup>95</sup> Under the North Dakota Constitution, the ability to hold office was tied to the ability to vote.<sup>96</sup> Langer had been convicted under federal law for defrauding the United States.<sup>97</sup> The crime was a felony in the federal system, but only a misdemeanor in North Dakota.<sup>98</sup> The court held,

Acts constituting felony may differ in different jurisdictions. Statutes simply embody the standard established by the public conscience in those jurisdictions where they are enacted. Public sentiment may vary and standards change accordingly. But *he who violates the statute must be held to know what he is doing when he does the prohibited act* and to know the consequence in the way of penalty. His personal standard cannot be the measure of the character of the act or its depravity.<sup>99</sup>

Other commentators examining situations similar to *Olson* have arrived at the same conclusion regarding the portability of a felony designation. The Pennsylvania Supreme Court “indulged in a somewhat strained effort” to find a state equivalent of the federal Hobbs Act.<sup>100</sup> A concurring opinion stated that the court did not have to undertake this speculative analysis, and instead suggested that the State had the ability to exercise sovereignty and deem out-of-state felonies to apply equally within the state.<sup>101</sup>

Although many jurisdictions appear to endorse the idea of “traveling felonies,” some have taken the opposite view: A felony conviction in one state (or at the federal level) does not necessarily “travel” with the convicted individual.<sup>102</sup> Courts have provided a variety of reasons for this view. West Virginia examined a federal felony which had a state analogue and held that there is a “presumption that a constitutional restriction [such as preventing an individual from holding office], is intended to apply only to those residents of the state who have offended against

94. 256 N.W. 377, 387 (N.D. 1934).

95. A writ of *quo warranto* is “designed to test whether a person exercising power is legally entitled to do so.” BLACK’S LAW DICTIONARY 1256 (6th ed. 1990). It is used to challenge an elected official’s right to hold office. *Id.*

96. N.D. CONST. OF 1889, art. III, § 73 (“No person shall be eligible to the office of Governor or Lieutenant Governor unless he be a citizen of the United States, and a qualified elector of the State . . .”).

97. *State ex rel. Olson v. Langer*, 256 N.W. 377, 379 (N.D. 1934).

98. *Id.* at 381.

99. *Id.* at 388 (emphasis added).

100. *In re* Petition of Hughes, 532 A.2d 298, 305 (Pa. 1987) (Papadakos, J., concurring).

101. *Id.* at 304 (Papadakos, J., concurring) (“If we choose to maintain the purity of our public life by giving full recognition to convictions in foreign jurisdictions, that is our affair as a simple exercise of our sovereignty.”).

102. *See, e.g.,* Arpagaus v. Todd, 29 N.W.2d 810, 813 (Minn. 1947).

its laws, and not to one who at some time had committed an offense in another jurisdiction, domestic or foreign.”<sup>103</sup>

New York’s highest court, when considering whether a defendant’s felony from Ohio could be introduced into evidence, stated that “there is nothing in the Constitution of the United States . . . [that prevents] or requires that the personal disabilities, such as incompetence to testify, or to vote, which may be imposed upon a person convicted of crime in one State, should follow him and be enforced in all the others.”<sup>104</sup> North Carolina’s Supreme Court, in an attorney disbarment case, held that the statute in dispute was limited to convictions that occurred in North Carolina.<sup>105</sup> The court found that any other reading would create a situation in which an individual under “the federal statutes or statutes of other states . . . would forfeit [his] right to vote under [North Carolina’s] Constitution.”<sup>106</sup>

In practice, an individual with an out-of-state felony conviction faces civil disabilities upon moving to Arizona, regardless of whether her crime would be considered a felony, misdemeanor, or non-crime under Arizona law.<sup>107</sup>

#### ***B. Restoration for Out-of-State Offenders—Statutory Process***

Although Arizona’s statutes provide different methods of rights restoration depending on the jurisdiction and type of conviction, an individual convicted of either multiple Arizona or federal felonies has a state-prescribed method of restoration available. The statutes that discuss civil rights restoration, however, do not refer to individuals with out-of-state felonies. Depending on the reading given to the restoration statutes, the statutes’ reach could be stretched to encompass out-of-state individuals or could be read narrowly to preclude a remedy for that group.

Under the narrow reading, the out-of-state individual has no remedy and may not use the Arizona rights restoration processes. Restoration of rights by the individual’s state of conviction will not act as a proxy for rights restoration in Arizona because an out-of-state court can only restore rights that are within its jurisdiction. Under this reading, the presence of statutes that provide a remedy to the Arizona convicted person and the federal convicted person must be read with an eye towards what is absent—any wording that could provide a remedy to the out-of-state individual. The second, more flexible reading allows the out-of-state convicted individual to return to her state of conviction and have her rights restored by a court in that state. The restoration in the state of conviction would then be honored by Arizona.

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103. Isaacs v. Bd. of Ballot Comm’rs, 12 S.E.2d 510, 512 (W. Va. 1940). The court termed the practice of presuming that one retained his civil rights “just and magnanimous.” *Id.*

104. Sims v. Sims, 75 N.Y. 466, 470 (1878). The court held that the defendant’s conviction did *not* disqualify him from testifying in New York. *Id.*

105. *In re Ebbs*, 63 S.E. 190, 194 (N.C. 1908).

106. *Id.*

107. Shafer Interview, *supra* note 24.

*I. “No Method of Restoration” Interpretation*

The first possible reading of the Arizona civil rights restoration statutes results in a statutory scheme that only allows individuals with either Arizona convictions or federal convictions to petition for restoration of rights. One convicted in another state is without a remedy.

Under this reading, the Arizona civil rights restoration statutes are construed narrowly, and the absence of a solution for out-of-state individuals is read as a conscious legislative choice. As a result, civil rights restoration processes are available only for the individuals specifically named in the statutes, i.e., persons convicted either in Arizona or any federal court.<sup>108</sup>

The statutory scheme in Arizona specifically addresses Arizona individuals who have either completed probation or incarceration and federal offenders who have completed probation or incarceration.<sup>109</sup> The statutes that pertain to non-federal probation and non-federal incarceration require the individual to petition the sentencing court or the court that released her from probation to have her rights restored.<sup>110</sup> Arizona has no power to compel another jurisdiction to restore an individual’s rights.<sup>111</sup> Similarly, the non-Arizona courts have no jurisdiction to restore the Arizona rights of the individual.<sup>112</sup>

Sections 13-909 and 13-910 refer to release from “a federal prison,” but do not limit restoration to those released from an *Arizona* federal prison. This would indicate that an individual released from any federal prison could make use of the Arizona restoration process provided she now resides in an Arizona county.<sup>113</sup>

Applying the surplusage canon of construction to the Arizona rights restoration scheme, the statutes addressing the individual convicted of a federal felony should be read to have some value of their own.<sup>114</sup> That is, the Arizona

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108. ARIZ. REV. STAT. ANN. §§ 13-905, 13-906, 13-909, 13-910 (2005).

109. *See id.* §§ 13-905, 13-906, 13-908 to 13-910.

110. *Id.* §§ 13-905(A), 13-906(A).

111. An individual convicted in another state of a felony, now living in Arizona, could not go to the non-Arizona court that released her and insist on having her rights restored by arguing that an Arizona law compels it.

112. The Texas restoration statute acknowledges the inherent limits on the restoration of civil rights. TEX. CRIM. PROC. CODE ANN. § 48.05(k) (Vernon 2005) (“A restoration of civil rights under this article is a form of pardon that restores all civil rights *under the laws of this state.*”) (emphasis added); *see also infra* notes 120–126 and accompanying text for a discussion of the Texas restoration scheme.

113. ARIZ. REV. STAT. ANN. §§ 13-909(A), 13-910(A). This reading is consistent with the practice in Arizona. Anderson Interview, *supra* note 47. Note that an individual with an out-of-state federal conviction is ineligible for the *automatic restoration* provided for in section 13-912. *Id.*

114. The theory of surplusage is an established tool of statutory interpretation in which all words of a statute and, to some extent, statutory schemes, add value or meaning and generally should not be read as redundant. *See, e.g.,* Walker v. City of Scottsdale, 786 P.2d 1057, 1061 (Ariz. Ct. App. 1989) (“[E]ach word, phrase, clause, and sentence must be given meaning so that no part of the statute will be void, inert, redundant, or trivial.”).

Legislature “does not enact superfluous or reiterative legislation,”<sup>115</sup> and the Legislature intended the federal felon restoration statutes to add to the statutory scheme. The Arizona Legislature enacted statutes to restore the rights of those convicted of Arizona felonies, whom the Legislature has control over. The Legislature then took an extra step by enacting statutes for individuals convicted of federal felonies—a class of individuals that do not have a “state of conviction” for the purposes of rights restoration.

Clearly, the individual convicted in an out-of-state court cannot be classified as a “federal felon,” since she was tried and convicted in a state court. Therefore, the statutes providing a method of rights restoration for a federal offender are inapplicable. Furthermore, the statutes providing a method of restoration for individuals convicted of a felony in Arizona are equally inoperative for one convicted in another state because those statutes require the individual to petition the court that sentenced or released the convicted person from probation—and, as mentioned above, a non-Arizona court has no power to restore the *Arizona* civil rights of the individual.

Another argument in support of this view is that the Legislature took the step of specifically providing a remedy for persons convicted of federal felonies but failed to do the same with those convicted of out-of-state felonies.<sup>116</sup> By including a restoration mechanism for every group except those with out-of-state felony convictions, it could be argued that the Legislature acted with purpose. If the Arizona Legislature wanted every convicted person to use the Arizona process, it could have written a single statute that allowed any repeat offender to petition the court in the county in which she now lives. Arguably, this demonstrates that the Legislature knows how to differentiate between offender populations and has the knowledge to calibrate the scope of statutes to selected groups.

Even though the narrow reading of the statutes provides no remedy for the individual convicted in another state, Arizona avoids this interpretation in practice by allowing such an individual to return to her state of conviction and make use of that state’s restoration process.<sup>117</sup> The issue, however, has not been settled definitively either by a statutory amendment or by a court opinion.

## 2. “Return to State of Conviction” Interpretation

The second possible interpretation of the statutes allows the out-of-state individual with multiple felonies to return to the judge that discharged her from probation or imprisonment in her state of conviction. To reach this conclusion, one must examine the wording of sections 13-905 and 13-906, which govern civil rights restoration of a repeat offender who is convicted of Arizona state felonies. This reading is still an imperfect solution, and the current Arizona practice goes beyond even the broadest reading of the statute.

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115. Phoenix Newspapers, Inc. v. Dep’t of Corrections, 934 P.2d 801, 808 (Ariz. Ct. App. 1997).

116. ARIZ. REV. STAT. ANN. §§ 13-909(A), 13-910(A).

117. Shafer Interview, *supra* note 24.

Sections 13-905 and 13-906 instruct the individual convicted in Arizona to petition “the judge who discharges [her] at the end of the term of probation”<sup>118</sup> or the “judge by whom the person was sentenced or his successors in office from the county in which [s]he was originally sentenced.”<sup>119</sup> This creates a solution for the typical Arizona repeat offender—she is convicted in Arizona, so she would be discharged from the penal system by an Arizona judicial authority and then could petition that authority for the restoration of her rights under 13-905 or -906. There is nothing in the text of the Arizona restoration statutes that explicitly limits use to Arizona courts. If the individual’s state of conviction utilizes a judicial restoration method similar to Arizona’s, Arizona’s mandate to return to the court that discharged her could be read to encompass such a restoration scheme.

However, the current Arizona practice, which allows an individual to return to her state of conviction and utilize whatever restoration mechanism exists in that state, is a much broader remedy than provided for in 13-905 and 13-906. It is hard to argue that a statute which enables one to return to the judge that sentenced or discharged her will encompass a governor’s pardon or a Board of Clemency’s discharge, methods used in other states to restore civil rights. However, in practice, Arizona requires felons to return to their states of conviction, even when the restoration method in that state is a governor’s pardon.

Although the statutory support may be lacking, other jurisdictions follow the approach of sending the convicted individual back to the state of her conviction. The Texas civil rights restoration statutes allow individuals with Texas convictions and those with federal convictions to make use of certain in-state rights restoration mechanisms but do not extend the same privilege to anyone convicted out-of-state.<sup>120</sup> Texas has a statutory civil rights restoration scheme comparable to Arizona’s. Texas’s restoration statute specifically creates a method by which individuals convicted of federal felonies can use the same procedures in place for those individuals convicted of Texas felonies.<sup>121</sup> In Texas, a Texas offender can petition the Board of Pardons and Paroles for consideration of her request for civil rights restoration, either by submitting her application to the board directly or to the sheriff in the county in which she was convicted (provided it was in Texas) or now resides. If the application is submitted to the sheriff, he or she then considers the application and forwards it to the Board with a recommendation.<sup>122</sup> The Board then forwards the request with its recommendation to the governor.<sup>123</sup> The Texas statute explicitly includes both Texas and federal

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118. ARIZ. REV. STAT. ANN. § 13-905(A).

119. *Id.* § 13-906(A).

120. *See* TEX. CRIM. PROC. CODE ANN. § 48.05 (Vernon 2005). The Board of Pardons and Paroles manages the restoration process in Texas. *Id.* § 48.05(d), (g); TEX. CONST. art. 4, § 11(b). *See also* Tex. Bd. of Pardons and Paroles, Tex. Dep’t of Criminal Justice, Executive Clemency in Texas (Feb. 28, 2006), [http://www.tdcj.state.tx.us/bpp/exec\\_clem/exec\\_clem.html](http://www.tdcj.state.tx.us/bpp/exec_clem/exec_clem.html).

121. TEX. CRIM. PROC. CODE ANN. § 48.05(a)(2)(A).

122. *Id.* § 48.05(e).

123. *Id.* § 48.05(e)(2), (g).

offenders in the group of individuals that may benefit from the restoration process.<sup>124</sup>

In practice, out-of-state offenders in Texas cannot use the state's rights restoration process and instead must return to their states of conviction to pursue rights restoration.<sup>125</sup> Once the individual with an out-of-state conviction has had her rights restored by the processes of her state of conviction and provides proof of this restoration to the Texas Board of Pardons and Paroles, Texas will recognize the restoration and restore the equivalent right for the individual in Texas.<sup>126</sup> Applying this interpretation to the Arizona statutory scheme, an individual with multiple non-Arizona felonies who now resides in Arizona would have to return to her state of conviction to petition for the restoration of her rights.

Margaret Love, a former United States Pardon Attorney, explains the logic of sending this individual back to her state of conviction as a way to "wrap up the conviction process into a neat package."<sup>127</sup> Ms. Love regards the Texas method to be an attempt to place the decision whether to restore an individual's rights in the discretion of the court system that originally passed sentence.<sup>128</sup> She sees the sentencing court as the best authority because of the differences from jurisdiction to jurisdiction:

How would the [individual's new home] court know what exactly is going on [with her case]? Instead of putting the [court in the jurisdiction in which the individual now lives] to the duty of figuring out whether [a person with an out-of-state felony conviction] completed a sentence, you would logically send it to the court that convicted the [individual] in the first place.<sup>129</sup>

Ms. Love also emphasized the focus of the Arizona and Texas restoration laws compared to those of other states.<sup>130</sup> While the Texas and Arizona processes are not inquiries into the general good character of an applicant for rights restoration, some states *do* look at character to determine whether an individual deserves restoration. Ms. Love cited the New York system, which accepts rights restoration petitions from *any* resident with multiple felonies, regardless of the jurisdiction of conviction.<sup>131</sup>

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124. *Id.* § 48.05(a)(2) ("This article applies to . . . a federal offense.").

125. Telephone Interview with Maria Ramirez, Clemency Administrator, Texas Board of Pardons and Paroles, in Austin, Tex. (Oct. 10, 2005).

126. *Id.*

127. Telephone Interview with Margaret Love, Law Offices of Margaret Love, in Wash., D.C. (Oct. 9, 2005) [hereinafter Love Interview]. Ms. Love is the Director of the Commission on Effective Criminal Sanctions, formerly known as the ABA Justice Kennedy Commission. Ms. Love served as Pardon Attorney for the United States Department of Justice from 1990–97, and worked for the United States Deputy Attorney General. She has published and spoken extensively on clemency, collateral consequences, and civil rights restoration.

128. *Id.*

129. *Id.*

130. *Id.*

131. N.Y. CORRECT. LAW § 703-b(2) (McKinney 2005) ("The state board of parole . . . shall have the power to issue a certificate of good conduct to any person

In New York, the Board will issue a “certificate of good conduct,” which may grant the individual a reprieve from certain civil disabilities, such as restoring the right to serve on a jury<sup>132</sup> and the right to hold office.<sup>133</sup> In considering such a grant, the Board will examine whether granting the certificate would be “consistent with the rehabilitation of the applicant” and “consistent with the public interest.”<sup>134</sup> This approach can apply to an individual who was convicted in New York, the federal system, and out-of-state, because New York makes an assessment of how the individual is presently conducting herself in New York rather than looking to see if the individual has met certain procedural requirements in her state of conviction.<sup>135</sup> To compare, New York considers the current behavior and character of the applicant seeking restoration, while Arizona and Texas look for “procedural markers,” namely, the completion of court-ordered probation or imprisonment and a payment of restitution. It makes sense that the court most familiar with the individual’s “procedural markers” consider her request for restoration.<sup>136</sup>

Another problem with sending an individual back to her state of conviction to make use of its rights restoration process is the situation in which the state of conviction either does not provide a method of rights restoration or only provides an exacting, seldom-granted method. For instance, felony offenders in Louisiana can only restore their jury rights via an official pardon<sup>137</sup> which is granted in very limited circumstances.<sup>138</sup>

### *C. Restoration for Out-of-State Felons—the Process in Practice*

In practice, an individual with a felony conviction must return to the jurisdiction in which she was convicted to have her rights restored.<sup>139</sup> This injects a level of uncertainty and variation into the process as different states have different procedures for restoration. Regardless of the process of a particular state, once the

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previously convicted of a crime in any other jurisdiction . . .”). The individual with an out-of-state conviction, while granted the ability to make use of the New York restoration process to obtain a Certificate of Good Conduct, must also demonstrate “specific facts and circumstances, and specific sections of New York state law that have an adverse impact on the applicant and warrant the application for relief to be made in New York . . .” *Id.* § 703-b(2)(a).

132. 1991 N.Y. Op. Att’y Gen. 38 (“The disabilities, forfeitures and bars which can be relieved through a certificate of relief from disabilities or a certificate of good conduct include within their scope the disqualification of a felon to serve as a juror. The authorities responsible for granting these certificates must consider whether . . . to relieve a convicted felon of the statutory bar to serve as a juror.”).

133. New York State Division of Parole, Frequently Asked Questions, <http://parole.state.ny.us/FAQs.html> (last visited Nov. 4, 2006).

134. N.Y. CORRECT. LAW § 703-b(1)(b) to (c) (McKinney 2005).

135. Love Interview, *supra* note 127.

136. *Id.*

137. LA. CODE CRIM. PROC. ANN. art. 401(A)(5) (2005).

138. As of October, 2005, the current Louisiana governor had granted only one pardon. MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: LOUISIANA 4 (2005), available at <http://www.sentencingproject.org/pdfs/rights-restoration/Louisiana.pdf>.

139. Anderson Interview, *supra* note 47; Shafer Interview, *supra* note 24.

individual's state of conviction restores her rights, the restoration is honored in Arizona.<sup>140</sup>

For the individual with a single out-of-state felony conviction, the automatic restoration language of section 13-912 does not apply.<sup>141</sup> She will not have the right to vote, hold office, and serve on a jury when she moves to Arizona—she must return to her state of conviction to seek restoration of rights.<sup>142</sup> An individual with a federal conviction, whether the conviction is her first felony or not, must petition the court.<sup>143</sup> This practice is inconsistent with the statutory language, which appears to grant automatic restoration to “[a]ny person who has not previously been convicted of any other felony.”<sup>144</sup>

Once the individual has returned to her state of conviction and had her rights restored, she may serve on a jury and run for office in Arizona.<sup>145</sup> In order to be eligible to vote, the individual must re-register in Arizona.<sup>146</sup> The Arizona voter registration form requires that an applicant verify that either she has not been convicted of a felony, or that she has had her rights restored.<sup>147</sup> The voter registration form does not differentiate between restoration in Arizona or out-of-state, and simply requires that if the prospective voter has at one time had her right to vote revoked, she had to have had that right restored before signing the voter registration form.<sup>148</sup>

### III. PROVIDING A DEFINITIVE ANSWER

The current Arizona practices are a good start and provide avenues of restoration for some groups of convicted persons. However, the statutes must be updated to bring uniformity and address the areas beyond the current statutory scheme. Three major issues should be considered when revising the rights restoration process: (1) expanding the use of the automatic rights restoration process for single offense out-of-state offenders; (2) clearly determining how out-of-state felonies will be treated in Arizona and codifying that determination; and

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140. Shafer Interview, *supra* note 24.

141. Shafer E-mail, *supra* note 51; Anderson Interview, *supra* note 47.

142. Anderson Interview, *supra* note 47; Shafer Interview, *supra* note 24.

143. Anderson Interview, *supra* note 47; Shafer E-mail, *supra* note 51. Sections 13-909 and 13-910 of the Arizona Revised Statutes state that they are to be applied to the “person who has been convicted of two or more felonies.” ARIZ. REV. STAT. ANN. §§ 13-909, 13-910 (2005). In practice, however, the judicial restoration is used whether the individual with a federal felony has one conviction or many. Anderson Interview, *supra* note 47. This is, of course, inconsistent with the language of the statutes.

144. ARIZ. REV. STAT. ANN. § 13-912.

145. Shafer Interview, *supra* note 24.

146. Interview with Chris Roads, Pima County Deputy Recorder & Registrar of Voters, in Tucson, Ariz. (Dec. 7, 2005) [hereinafter Roads Interview].

147. Arizona Voter Registration Form (Mar. 2005).

148. Roads Interview, *supra* note 146. The Pima County Recorder's Office does not require proof of restoration. The form that is signed by the voter is an affidavit, with felony consequences if one submits a voter registration illegally. See Pima County Recorder's Office, Restoration of Right to Vote (2005), [http://www.recorder.co.pima.az.us/images/felony\\_info.pdf](http://www.recorder.co.pima.az.us/images/felony_info.pdf).

(3) examining the situation of an individual with two or more out-of-state convictions who has inadequate process in her state of conviction.

*A. Automatic Restoration for the Single-Offense Out-of-State Offender*

As discussed above, those with a single out-of-state felony conviction do not receive the benefit of the automatic rights restoration process<sup>149</sup> even though the statute appears to apply to *all* individuals convicted of a single felony. Allowing this group to use Arizona's automatic restoration process would both honor the plain reading of the statute and solve many of the problems with the current process. It is counter to the goal of reintegration to send an individual back to a state where she must contend with an inadequate restoration process with little chance of success.<sup>150</sup> Extending automatic restoration would avoid permanently disabling the out-of-state individual and give equal treatment to everyone that moves to Arizona. In order to accomplish this goal, two issues must be examined: first, the interpretation or modification of the automatic restoration statutory language; and second, the implementation of an automatic restoration process for an individual convicted in a non-Arizona court, taking into account the lack of a communication system between clerks' offices of different states.

The language of the automatic rights restoration statute,<sup>151</sup> which arguably is not being honored in practice, would not require modification in order to expand its scope to a person with an out-of-Arizona conviction. Currently, the text of the statute states “[*any person* who has not previously been convicted of *any other* felony” will receive the automatic restoration.<sup>152</sup> In practice, the courts and clerks' offices only allow those convicted of an Arizona felony to make use of the restoration process. However, there is no jurisdictional element that explicitly limits the use of the statute to Arizona offenders. The statute's application could be extended to the restoration of any person with a single felony conviction under a plain reading of the statute and would not necessarily require revision of the statute by the Legislature.<sup>153</sup>

One hurdle to extending automatic restoration is the lack of interstate communication of an individual's felony status. Information systems are not set up between clerk's offices to allow for easy checks of an individual's felony record.<sup>154</sup> This may mean that the process may not be truly “automatic” for persons with non-Arizona convictions and will require those individuals to take *some* steps towards restoration. For instance, restoration could be granted once the individual

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149. ARIZ. REV. STAT. ANN. § 13-912.

150. See *infra* note 161 (discussing the lack of a judicial civil rights restoration process in Florida); see also *supra* note 138 (discussing the difficulty of obtaining restoration in Louisiana).

151. ARIZ. REV. STAT. ANN. § 13-912(A).

152. *Id.* (emphasis added).

153. However, it may be advantageous for the Legislature to change the statutory language, if only to combat the “this is the way we've always done it” mentality that often accompanies long-standing procedures. It would also provide the courts with fresh legislative history that unequivocally evinces the Legislature's intent to make the statute apply to any individual who has a single felony conviction.

154. Shafer Interview, *supra* note 24.

provided suitable proof that she had only one felony conviction in another state. If electronic record sharing between clerks' offices in different states becomes a reality, the automatic restoration could be seamless. In the interim, one solution may be to allow clerk's offices to perform a criminal records check, paid for by the requesting individual. Requiring payment for a records check places the individual with an out-of-state felony conviction on a somewhat uneven playing field because she must pay for restoration to which the individual convicted in an Arizona court is automatically entitled, but this is still fairer and less expensive than requiring her to return to her state of conviction to seek redress. If there are serious concerns about the cost, it may be advantageous to retain the option for an individual with an out-of-state felony conviction to return to her state of conviction to seek restoration, if she chooses. However, once seamless interstate communication occurs between the clerks' offices, the current practice of sending an individual with a single felony back to her state of conviction should be seriously reconsidered.

### ***B. The Effect of Multiple Out-of-State Felonies***

The Rhode Island case of *Bailey v. Baronian* provided three possible degrees of impact of an out-of-state conviction.<sup>155</sup> The Rhode Island court clearly took issue with the "mental gymnastics" needed to utilize the middle ground approach of comparing the out-of-state felony to the local felony.<sup>156</sup> While this solution would allow the examination of an individual's rights on a case-by-case basis, it would require a good deal of guesswork, analogizing between penal codes, and regular intervention by the judiciary.

The "Arizona felony" approach, in which only felonies committed in Arizona suspend one's rights, also has some allure because it gives an individual the benefit of the doubt when it comes to civil rights. As the *Baronian* court countered, though, it could result in situations in which a felon committed serious crimes in other jurisdictions without any civil rights consequences in Arizona.<sup>157</sup>

The most reasonable option is the "felony anywhere" approach. While this approach may disadvantage an individual convicted of a crime in her state of conviction that would only be a misdemeanor in Arizona, it does avoid the problems of the other two approaches. If this approach is adopted, and if automatic restoration is expanded to individuals with a single out-of-state conviction who then move to Arizona, that group will not face any disqualification, and the current penalties of a single felony "traveling" with the individual to Arizona will be effectively neutralized.

An effort to codify the "felony anywhere" approach and allow those with multiple out-of-state felonies to return to their state of conviction would have to address a few key issues. First, in order to codify the Legislature's intent to adopt the "felony anywhere" approach, the civil rights disability statute<sup>158</sup> should include a jurisdictional element. A possible phrase that could be added to this section

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155. 394 A.2d 1338 (R.I. 1978); *see supra* notes 75-93 and accompanying text.

156. *Baronian*, 394 A.2d at 1342.

157. *Id.* at 1343.

158. *See* ARIZ. REV. STAT. ANN. § 13-904 (2005).

would redefine a felony for rights restoration purposes as “a violation of a penal law of this state, another state, or the United States for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.”<sup>159</sup>

Second, the statutes could be amended to include language to recognize the restoration of civil rights granted by another jurisdiction. The out-of-state offender could make a proper showing of restoration by offering official documentation provided by the granting jurisdiction. As discussed above, individuals with a single out-of-state conviction should be provided for under the automatic restoration statute. Statutorily allowing the individual to return to her state of conviction to seek restoration after multiple felony convictions would provide a solution for those outside the reach of the automatic restoration statute. However, codification of the “felony anywhere” approach and the subsequent restoration processes would still not address the problem of inadequate restoration in certain states.

### *C. Individuals with Inadequate Recourse in Their States of Conviction*

An individual from a state in which the right to vote is never revoked (e.g., Maine or Vermont)<sup>160</sup> could potentially commit crimes and face no voting restriction in Arizona. In contrast, the individual convicted in Florida of a single crime will most likely be permanently barred from voting in Arizona unless she is able to navigate a complicated clemency process for which relief is infrequently granted.<sup>161</sup>

As discussed above, an expansion of the automatic restoration process for an individual with a single out-of-state felony is a promising method. However, the privilege of automatic restoration will likely not be expanded to the individuals with multiple felonies, regardless of where the crimes were committed. As a result, there are clear inequities between an individual that moves to Arizona from a state with a responsive rights restoration system and the individual who comes from a state, such as Florida, in which the promise of rights restoration is illusory.

Unlike the automatic restoration statute, there is no easy solution or creative way to reinterpret the repeat felon restoration statutes to provide the individual who has multiple out-of-state convictions with a remedy. Rather, it is

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159. This language appears in a Michigan statute, MICH. COMP. LAWS ANN. § 600.1307a(4) (West 2005).

160. See, e.g., ME. CONST. art. II, § 1, *declared unconstitutional on other grounds*, Doe v. Rowe, 156 F. Supp. 2d 36 (D. Me. 2001) (detailing Maine’s voting requirements); VT. STAT. ANN. tit. 28, § 807 (2005) (describing Vermont’s voting requirements).

161. See MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: FLORIDA 1, 3 (2005), *available at* <http://www.sentencingproject.org/pdfs/rights-restoration/Florida.pdf>. In Florida, the governor holds all power to grant restoration. *Id.* at 3. The Miami Herald investigated the efficacy of this process and found that over a recent five-year period, only around 20% of all requests for civil rights restoration were granted. *Id.* at 1 (citing Debbie Cenziper & Jason Grotto, *Clemency Proving Elusive for Florida’s Ex-Cons*, MIAMI HERALD, Oct. 31, 2004; Debbie Cenziper & Jason Grotto, *The Long Road to Clemency*, MIAMI HERALD, Nov. 7, 2004).

incumbent upon the Arizona Legislature to codify some process by which this individual can seek relief. A possible solution would be the adoption of the New York rights restoration method which issues a convicted individual a certificate of good conduct once she demonstrates that she has worked to become a productive member of the community.<sup>162</sup> Perhaps allowing the utilization of a process similar to the process that an Arizona repeat offender uses—petitioning an Arizona judge for restoration—is a workable solution. However, as discussed above, this places the power in an Arizona court that is unfamiliar with the underlying out-of-state conviction.<sup>163</sup> Whatever solution is chosen, it is important that the Legislature clearly codify its decision to avoid many of the interpretation issues to which the current restoration statutes are susceptible.

### CONCLUSION

The restoration of civil rights is an important step in the reintegration process. In Arizona, a clear disconnect exists between the statutory scheme and the actual processes of restoration.

Arizona statutes and the lack of case law on the matter fail to explain why individuals with out-of-state felonies are disqualified, even if this is the most reasonable approach. The path to restoration is equally confusing—ambiguous statutes may or may not give an individual a method of restoration, and it is unclear why the automatic restoration statute, which under a plain reading does not differentiate between offender groups, has only been applied to persons with an Arizona state conviction.

The Legislature should consider revamping the current statutory scheme by expanding automatic restoration to all individuals with felonies, codifying the current practice of sending those with multiple out-of-state felonies back to their states of conviction for restoration, and providing some recourse for individuals that have inadequate restoration processes in their states of conviction. Processes are in place, but there must an effort to reconcile statutes with the current practice. The current practices have provided *some* relief for the out-of-state individual but lack the refinement necessary to ensure that all groups are on the same footing in Arizona. Regardless of how the process develops over time, it is imperative that these questions be examined.

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162. See *supra* notes 131–138 and accompanying text.

163. See *supra* notes 118–129 and accompanying text.