

**AMERICAN BAR ASSOCIATION
COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS
CRIMINAL JUSTICE SECTION
NATIONAL LEGAL AID AND DEFENDER ASSOCIATION**

**REPORT TO THE HOUSE OF DELEGATES
[ON EMPLOYMENT AND LICENSURE OF PERSONS WITH A CRIMINAL RECORD]**

Recommendation

RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to develop policy on the employment of persons with a criminal record by government agencies, and the contractors and vendors who do business with those agencies. Professional and occupational licensing authorities should develop similar policy for the issuance of licenses. Except in cases where there is an absolute statutory prohibition on employment or licensure of persons because of a criminal conviction, as permitted by Standard 19-2.2 of the ABA Standards for Criminal Justice on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, and that prohibition has not been waived or modified, the conduct underlying the conviction should be considered disqualifying only if it substantially relates to the particular employment or license, or presents a present threat to public safety, consistent with Criminal Justice Standard 19-3.1. Jurisdictions should develop criteria for determining when such a substantial relationship exists.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local legislatures to compile an inventory of all collateral sanctions relating to employment and licensure in the law codes for which they are responsible; where an absolute statutory disqualification cannot be justified, the legislature should either eliminate it, or modify it to authorize the employer or licensing authority to waive the disqualification on a case-by-case basis. Jurisdictions should also inventory all statutes and regulations specifically authorizing consideration of conviction as a basis for discretionary disqualification from employment or licensure.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to require that each government agency, and professional and occupational licensing authority, take the following steps:

- 1) Conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency's jurisdiction;
- 2) Eliminate or modify, to the extent authorized, any such restrictions or disqualifications that are either (i) not substantially related to the particular employment or (ii) not designed to protect the public safety;
- 3) Provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction; and

- 4) Provide for judicial or administrative review of a decision to deny employment or licensure based upon a person's criminal record.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to authorize a court or administrative agency to enter an order waiving, modifying, or granting relief from a particular collateral sanction, in order to facilitate an offender's reentry into the community, in accordance with Standard 19-2.5(a). Such an order should be available upon request at the time of sentencing or release from imprisonment, or at any time thereafter, upon a finding that such relief would be consistent with the rehabilitation of the offender and the safety of the public, and in the public interest. Where a sentence has not been fully discharged, relief may be temporary or conditional, and it may be enlarged or modified by the court or administrative agency at any time upon a showing of good cause. Such an order will not preclude employers or licensing boards from considering the conduct underlying the conviction as a factor in discretionary employment and licensing decisions, if that conduct is substantially related to the particular employment or license sought.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to establish a process whereby a convicted person may, upon completion of sentence or at some reasonable time thereafter, obtain a judicial or administrative order relieving the person of all collateral sanctions imposed by the law of that jurisdiction, as provided by Standard 19-2.5(c). Such an order should be predicated upon a finding that the person has conducted himself in a law-abiding and productive manner since the conviction, and should create a "presumption of fitness" that should be taken into account in all discretionary decision-making by public employers and licensing boards, even if the conduct underlying the conviction is substantially related to the particular employment or license sought. Such an order may be conditional upon good conduct where an offender is still under supervision, and may leave in place a specific collateral sanction if appropriate.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to work with private employer groups to develop job opportunities for people with a criminal record, and incentives for private employers to hire people with criminal records.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to work with employers and others who have a legitimate need for access to criminal record information to permit its more efficient use, so as to encourage the employment of persons with criminal records where appropriate. In particular, they should:

- 1) to the extent constitutionally permissible, require all agencies and employers seeking access to a person's criminal record to rely upon an officially approved system of records;
- 2) except in cases where there is a statutory requirement that an agency or employer conduct a criminal background check, require non-law enforcement agencies and employers seeking access to an individual's criminal record to demonstrate that the public interest in receiving such information clearly outweighs the individual's interest in security and privacy.

FURTHER RESOLVED, That the American Bar Association urges federal, state, territorial and local governments to make evidence of an individual's conviction inadmissible in any action alleging an employer's negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction.

REPORT

The ability to get and maintain employment has been identified as a reliable predictor of a criminal offender's ability to successfully reenter society after a term in prison, and remain law-abiding.¹ One recent study of reentry in a large metropolitan area showed that those who are unable to get a job are three times more likely to return to prison than those who find steady employment.² Unfortunately, that same study showed that 60 percent of former prisoners were still unemployed one year after their release from prison.

Most people would agree that people who have committed a crime should be entitled to a second chance after paying their debt to society. Very few jurisdictions have figured out how to accomplish this successfully, however. The statute books in every state are filled with laws that disqualify people from jobs and licenses based on a criminal record. Even where it does not mandate exclusion, the law generally allows rejection of applicants for employment (and termination of existing employees) based solely on the fact of a criminal record. Some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted. The increased reliance since 9/11 on criminal records checks as a screening mechanism makes it much more difficult for the millions of Americans who have a criminal record to find employment and become productive citizens in our society.³

The inability of persons with criminal records to secure employment stems from a number of factors, including lack of training and skills, and risk-averse attitudes of employers. Moreover, many of these offenders are returning to communities that are already plagued with high unemployment rates, which puts them at an even greater disadvantage. But the legal system itself contributes heavily to the inability of criminal offenders to get and keep jobs, restricting employment and licensure in numerous professions based solely on a criminal record. While some restrictions are narrowly tailored to protect against an identified public safety risk, more often they are categorical and arbitrary, bearing little or no apparent relationship to particular offense conduct, and without consideration of a particular individual's post-conviction rehabilitation.

¹ See, e.g., Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* at 196 (Oxford Univ. Press 2003) ("Research has also consistently shown that if parolees can find decent jobs as soon as possible after release, they are less likely to return to crime and to prison."). Programs devoted to finding work for parolees like the Texas RIO (Re-integration of Offenders) Project, the New York City Center for Employment Opportunities, and the Safer Foundation in Chicago, have been found to produce greatly reduced recidivism rates. *Id.* at 197.

² *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*. Final Report of the Mayoral Policy Caucus on Prisoner Reentry at 15 (2006).

³ The Bureau of Justice Statistics reports that as of December 31, 2003, over 71 million criminal history records were in the criminal history files of the State criminal history repositories. Some individuals had a record in more than one state. *Survey of State Criminal History Information Systems*, 2003 at 2, Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/sschis03.pdf>. A decade earlier, over six million arrest records were reported to state criminal history repositories. *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update*, Bureau of Justice Statistics, Table 6, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/umchri01.pdf>

Moreover, in most jurisdictions, there is no reliable and generally accessible way of avoiding or waiving legal disqualifications, or of reassuring an employer that an offender is rehabilitated and fit for the employment.⁴ And yet, a recent study has shown that people with a criminal record that is more than three years old are no more likely to commit a new crime than people who have no criminal record at all.⁵

The bottom line is that many people who are willing and able to work, and who pose little or no risk to the community, are being shut out of decent jobs because of their criminal record. This has obvious negative implications for the successful functioning of the criminal justice system, whose goal, after all, is to reduce crime and make communities safer. Admittedly, this phenomenon is not new;⁶ what is new is the scale of the problem. To the extent it is a function of flaws in the legal system, the legal profession has a responsibility to address it.⁷

Existing ABA Policy on Systemic Relief from Employment Barriers -

The ABA has developed a body of policy relating to the employment of people with criminal convictions. In the *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* (3d ed.), the ABA has urged the repeal of laws that automatically exclude people from particular jobs or licenses solely because of a conviction. Standard 19-2.2 takes the position that such automatic categorical disqualifications should be very narrowly drawn: “The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot

⁴ See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide*, (W.S. Hein, 2006), condensed at <http://www.sentencingproject.org/rights-restoration.cfm>. It bears emphasis that it is very much in the government’s interest to help people lead law-abiding and productive lives after they have served their court-imposed sentences. Unfortunately, this does not seem to have occurred to the legislators and administrators who continue to make and enforce blanket policies of exclusion that provide for no exceptions.

⁵ Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement* (forthcoming, draft dated March 2006 available from the Commission office); Kurlychek, Brame, Bushway, *Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?* (Fall 2005). Both papers are available from the Commission office.

⁶ See, e.g., Final Report of the ABA Commission on Correctional Facilities and Services, *When Society Pronounces Judgment – The Work of the Commission on Correctional Facilities and Services. Five Year Report, 1970-1975*, available from the ABA Criminal Justice Section offices.

⁷ The Justice Kennedy Commission framed the issue eloquently:

Although it came as no surprise to us that most people have a generally unsympathetic response to convicted felons, the Commission became acutely aware of an irony that is readily apparent in our treatment of men and women sentenced to prison: i.e., the public expects convicted felons to learn their lesson and become law-abiding citizens, while the legal system burdens them with continuing collateral disabilities that make it very difficult, if not practically impossible, for them to successfully reintegrate into the free community. To the extent that the legal system has itself been complicit in creating this class of ‘internal exiles,’ it is incumbent on the legal profession to try to remedy it.

Report of the Justice Kennedy Commission at 80 (2004), available at <http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf>

reasonably contemplate any circumstances in which imposing the sanction would not be justified.”⁸

The Standards also address situations in which a conviction is not automatically disqualifying but rather is considered (or, more properly, the conduct underlying the conviction is considered) as a basis for disqualification. The Standards on Collateral Sanctions require that disqualification in such circumstances should be permitted only if “engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.” Standard 19-3.1. The Standards also provide for waiver, modification or “timely and effective” relief from particular collateral sanctions, by a court or administrative agency, and for relief from all collateral sanctions, in recognition of an offender’s record of good conduct since conviction. Standard 19-2.5(a) and (c). Relief from particular collateral sanctions might be to facilitate reentry, while the more comprehensive form of relief might recognize a sustained period of good conduct since conviction. Finally, the Standards also call for a process by which an offender may obtain review of, and relief from, discretionary disqualifications. Standard 19-3.2.

Two years ago, the House adopted recommendations of the Justice Kennedy Commission urging jurisdictions to provide prisoners, from the beginning of their incarceration, with educational and job training opportunities, and give credit toward satisfaction of sentence for successful completion of such programs. The Justice Kennedy Commission also recommended that jurisdictions provide prisoners returning to the community with job placement assistance. Finally, it urged that jurisdictions limit situations in which a convicted person may be disqualified from otherwise available benefits and opportunities, including employment, to the greatest extent consistent with public safety.

It is time to take the Collateral Sanctions Standards and the Justice Kennedy Commission’s recommendations a further step, to address in operational fashion the systemic legal and attitudinal barriers that keep qualified people from getting and keeping a job simply because of a conviction record. At a meeting in Chicago in March of 2006 with offenders working with the Safer Foundation, members of the Commission heard moving testimony from people with marketable skills who had served a term in prison and then struggled, upon their

⁸ The courts have frequently invalidated laws that categorically exclude people with a criminal record based on a rational basis analysis. See Miriam Aukerman, *The Somewhat Suspect Class: Toward a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 Wayne St. J. Law & Soc. 1 (2006) for an extensive analysis of the legal protections available to people rejected for employment based on their criminal record. Aukerman finds that “in a surprising number of cases related to occupational restrictions, the courts have used rational basis review to invalidate laws that limit the employment opportunities of people with criminal records. The pattern that emerges from the cases is that courts are willing to strike down laws which categorically bar large groups of former offenders from particular occupations, but will generally uphold laws where the relationship between the offense and the restricted occupation is more carefully tailored.” *Id.* at 3.

return to their communities, to find work.⁹ Other witnesses spoke of the importance of making job placement a central part of a reentry program. In October, the Commission held a full day's hearing in Brooklyn, and heard testimony suggesting that New York's venerable certificate program may not work as well as it might, largely because offenders are not made aware of it, either by their defense counsel, by the courts, or by probation and parole officers who supervise them in the community. The New York program is also hampered by a certain degree of confusion about the legal effect of certificates even among those officials responsible for administering the program. The Commission heard testimony about similar relief programs in operation in Illinois, Connecticut, and Arizona. Many of the witnesses, particularly those from the advocacy community, spoke of the substantial obstacles facing people seeking employment after a stint in prison, obstacles that may take the form of legal barriers and prejudice against people with a criminal record, but more frequently take the form of lack of job skills and work experience on the part of the offenders seeking employment. Witnesses spoke of the importance of having some assistance in overcoming these legal barriers as well as job training programs as early as sentencing or release from prison.

The Commission came away from the October hearing convinced that government needs to make a concerted effort to address the problem of employment barriers, both legal and attitudinal, and that it needs to bring the private sector into the discussion. This effort must begin with the legislature, the statute books are filled with collateral sanctions that absolutely prohibit people with criminal convictions from being considered for certain jobs, no matter how dated the offense and no matter how heroic their rehabilitation, and without regard to whether the offense conduct is related in any way to the job or license sought. Three years ago the ABA called upon legislatures to collect all collateral sanctions in their statute books in a single chapter or section of the jurisdiction's criminal code, and to identify with particularity the type, severity and duration of collateral sanctions applicable to each offense. See Standard 19-2.1. We know of no legislature that has even begun work on this important task since the Standards were adopted by the House.¹⁰

Public Employment Policies Toward People with Criminal Convictions

⁹ Joe Cassily, the elected prosecutor from Harford County, Maryland, who testified at our Washington, D.C. hearing, told of a young man whose dated and minor drug conviction from another jurisdiction was proving an insuperable obstacle to getting a decent job, and proposed a number of reforms in the legal system to address the need to see that offenders have a decent chance to prove themselves in the workplace.

¹⁰ Law students in Maryland and Ohio have compiled partial inventories of the collateral consequences applicable in those states. See Kimberly R. Mossoney and Cara A. Roecker, *Ohio Collateral Sanctions Project*, 36 *U. Toledo L. Rev.* 611 (2005); see also University of Maryland School of Law Reentry of Ex-Offenders Clinic, *A Report on Collateral Consequences of Criminal Convictions in Maryland* (October, 2004). At the time of this writing, a report from the University of Arizona's James E. Rogers College of Law was in draft form (*Collateral Consequences: A Comprehensive Study of the Ongoing Effects of Criminal Convictions in Arizona, Preliminary Draft by the Law, Criminal Justice and Security Program*, November 2005). In addition, since adoption of the Collateral Sanctions Standards in 2003, the National Conference of Commissioners on Uniform State Laws has begun a uniform law drafting project on collateral Sanctions and disqualification of people with convictions that covers much of the same area as the ABA Standards. (Indeed, the NCCUSL project was avowedly inspired by the ABA Standards.) In particular, the current draft contains a provision limiting consideration of conviction in employment, licensing, housing and education, and allowing disqualification only if the person is judged "unfit." See § 6 of draft dated November 27, 2006, discussed at note 28, *infra*.

The executive branches of two major urban centers and one large state have in the past year announced sweeping changes in public employment policies relating to people with criminal convictions. These changes, described below, inspired the Commission's own more general recommendations. We do not hesitate to admit that we borrowed heavily from these commendable efforts, particularly the extraordinary Executive Order issued by Florida's Governor Jeb Bush in April of 2006, directing all state agencies and licensing boards to review and revise their policies relating to the employment and licensure of people with criminal convictions, imposed similar obligations on any employers subject to state regulation (including contractors, vendors and regulated entities) and encouraged private employers to do likewise. Also in 2006, Boston and Chicago adopted sweeping new hiring policies applicable to all municipal agencies in an effort to encourage employment of people with conviction records.

The Chicago order came in response to recommendations of the Mayoral Policy Caucus on Prisoner Reentry. Chicago Mayor Richard Daley announced that the City would begin to "balance the nature and severity of the crime with other factors, such as the passage of time and evidence of rehabilitation" in their hiring decisions. The City Department of Human Resources issued guidelines imposing standards on all city agencies regulating hiring decisions related to people with criminal records, requiring that agencies consider the age of an individual's criminal record, the seriousness of the offense, evidence of rehabilitation, and other mitigating factors before making their hiring decisions. Mayor Daley observed wisely that "we cannot ask private employers to consider hiring former prisoners unless the City practices what it preaches."

In Boston, the City Council passed an ordinance, which was effective July 1, 2006, prohibiting municipal agencies and their vendors and contractors from conducting a criminal background check as part of their hiring process until the job applicant is found to be "otherwise qualified" for the position.¹¹ The ordinance also requires that the final employment decision considers the age and seriousness of the crime and the "occurrences in the life of the applicant since the crime(s)." Finally, the ordinance creates appeal rights for those denied employment based on a criminal record and the right to present information related to "accuracy and relevancy" of the criminal record. This measure ensures that everyone is given an opportunity to be considered in the early stages of the employment process without regard to their criminal

¹¹ A copy of the Boston Ordinance is available at <http://www.nelp.org/docUploads/BostonCORIOrdinance%2Epdf>. The press release announcing the Chicago Mayor's policy is at <http://www.chicagometropolis2020.org/documents/prisonerreentrypressrelease.pdf>. See also National Employment Law Project summary of the two ordinances, as well as San Francisco's "Ban the Box" initiative, available at http://www.nelp.org/nwp/second_chance_labor_project/citypolicies.cfm?bSuppressLayout=1&printpage=1. Under Massachusetts law, both public and private employers are limited in what they may ask of job applicants: Massachusetts' general fair employment practices law makes it unlawful for any covered employer to request any information from an employee or applicant for employment about: (1) an arrest without conviction; (2) a first conviction for misdemeanors such as simple assault or minor traffic violations; and (3) any conviction of a misdemeanor that occurred five or more years before the application date. Mass. Gen. Laws ch. 151B, § 4(9) ("any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information").

record, and encourages employers to consider rehabilitation and other factors that may neutralize or overcome the negative effect of the criminal record.¹²

In Florida, responding to the findings and recommendations of his Ex-Offender Task Force, Governor Jeb Bush put in place a system of state employment practices “to facilitate the re-entry of ex-offenders into our communities and reduce the incidence of recidivism.”¹³ Executive Order 06-89, issued on April 26, 2006, requires each state agency to 1) conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency’s jurisdiction; 2) determine the impact of such restrictions and disqualifications and eliminate or modify any such restrictions or disqualifications that are not tailored to protect the public safety; and 3) describe the exemption, waiver or review mechanisms available to seek relief from the disqualification or restriction. The order extends not simply to employment within the agencies, but also to employment in facilities licensed, regulated, supervised or funded by the state, employment pursuant to contracts with the state, and employment in which the state licenses or provides certifications to practice. The order encourages other public entities and private employers, “to the extent they are able, to take similar actions to review their own employment policies and provide employment opportunities to individuals with criminal records.”

Before leaving the area of systemic approaches to the employment of people with convictions, it is worth describing the promising scheme developed by the federal government for employment in the transportation industries. A series of laws and policies developed after 9/11 to screen workers in the air, sea and ground transportation industries have produced a generally flexible regulatory scheme that balances government security interests on the one hand, with employee rights and reentry considerations on the other. The central features of this scheme are mandatory (or presumptive) disqualification is applicable only to specified serious felonies; most mandatory disqualifications lapse after a certain period of time, generally seven to ten years; within the mandatory disqualification period, state pardons and expungements are given effect; and waivers may be granted by the employing agency within the period of mandatory disqualification if no other exception applies. Though serious crimes may still be the basis of exclusion or termination, the requirements applicable in each of the three industries recognize the importance of a case-by-case approach to consideration of conviction in employment.¹⁴

¹² Just prior to publication of this report, in December 2006, the Mayor of St. Paul, Minnesota, signed an Executive Order removing the standard question regarding a criminal background from the City’s job application form. Background checks will still be conducted for many jobs but only after the applicant has been determined to be “otherwise qualified”. Job applicants with a criminal record will then be given an opportunity to explain what they have done to deserve a second chance before the City makes a final decision. See <http://www.twincities.com/mld/pioneerpress/16181165.htm>. Similar reform efforts are under way in Minneapolis, and nearby Ramsey and Hennepin Counties.

¹³ See Exec. Order No. 06-89, April 25, 2006, available at http://sun6.dms.state.fl.us/eog_new/eog/orders/2006/April/06-89-exoff.pdf

¹⁴ The TSA scheme is described in greater detail in National Employment Law Project, *A Summary of the New Federal Security Standards Regulating Transportation Workers*, March 8, 2005, <http://www.nelp.org/docUploads/TransportationLaws%2Epdf>; See also Margaret Colgate Love, Relief from the Collateral Consequences of Conviction: Notes from the ‘Laboratories of Democracy’, The National HIRE Newsletter (Spring 2006.) Modeled generally on the approach taken in the federally regulated banking and securities industries, the TSA scheme distinguishes between serious offenses whose nature would raise a reasonable question

The Commission commends these pioneering efforts. It recommends that other municipal jurisdictions take steps to emulate Chicago and Boston, and that other state governors consider following the example of Governor Bush. Specifically, the Commission recommends that jurisdictions develop policy on the employment of persons with a criminal record by government agencies, and the contractors and vendors who do business with those agencies. Professional and occupational licensing authorities should develop similar policy for the issuance of licenses.

The Commission urges federal, state and local governments to set an example by amending their hiring policies to require that a conviction should be considered disqualifying only if the conduct underlying it “substantially relates” to the particular employment or licensure, or presents a present threat to public safety, consistent with Criminal Justice Standard 19-3.1. The only exception is for the small category of cases where an absolute statutory prohibition on employment or licensure of persons with a conviction can be justified under Standard 19-2.2 (see discussion above), and that prohibition has not been waived or modified. In extending the requirements of Standard 19-3.1 to private contractors and vendors, this recommendation would expand existing ABA policy. Jurisdictions should develop criteria for determining when particular offense conduct “substantially relates” to the employment or license sought.¹⁵

The Commission also urges that state legislatures examine each absolute statutory disqualification in state law and regulation, to determine whether it can be justified under Standard 19-2.2 (“the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified”).¹⁶ The commentary to Standard 19-2.2

about the individual’s fitness for employment in the particular job, and less serious offenses that should not result in automatic or presumptive disqualification, but can be considered as part of a general inquiry into an applicant’s character and fitness. It imposes a temporal limit on the presumptive disqualification, and adds a presumption of rehabilitation after a certain period of law-abiding behavior, similar to the English Rehabilitation of Offenders Act, under which a conviction is “spent” after a certain period of time, and may no longer be considered as grounds for disqualification. It gives effect, within the period of presumptive disqualification, to a state’s determination in a particular case that a conviction record should not be a black mark on an individual’s record, whether because the charges were dismissed or set aside at the front end, as a result of deferred adjudication or other diversion program, or the conviction pardoned or expunged at the back end. Finally, it allows the employing authority to consider exceptional circumstances even where there has not been a pardon or other external certification of an offender’s rehabilitation, and to take a chance on an individual where the facts seem to justify.

¹⁵ New York is one of the few states that has enacted a statutory definition of the “direct” or “substantial” relationship test. See N.Y. Correct. Law § 752 (“the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.”) A number of other states have codified multi-factor tests for determining when there is a “substantial” or “direct” relationship” between a conviction and a job or license offer). See, e.g., Conn. Gen. Stat. 46a-80; KY. Rev. Stat. Ann. § 335B.020(2); Minn. Stat. § 364.01; N.D. Cen. Code § 12.1-33-02.1; N.J. Stat. Ann. § 2A:168A-2; N.Y. Correct. Law § 753; Va. Stat. Ann. § 54.1-10H(B)

¹⁶ The commentary to Standard 19-2.2 provides that there is a “heavy burden of justification” on the legislature where absolute collateral penalties are concerned:

“There are certain situations in which a collateral sanction will be so clearly appropriate given the nature of the offense that case-by-case evaluation at the time of sentencing would be pointless and inefficient. . . . It might well be appropriate to provide for automatic suspension of a driver’s license where the offense conduct is related to driving or motor vehicles, or to exclude from educational institutions those who sell

provides that “absolute barriers to employment or licensure are problematic, particularly where no time limitation is specified and no waiver or relief mechanism is provided.” If an absolute disqualification cannot be justified, the legislature should either eliminate it, or modify it to authorize the agency to waive the disqualification on a case-by-case basis. Even where the legislature can identify a “close connection between the offense and the collateral sanction,” relief from the sanction should still be available, if warranted. *See* Standard 19-2.5.¹⁷

In addition to a legislative review of absolute statutory barriers that are not waivable at the administrative level, the Commission also recommends that each government agency, and each professional and occupational licensing authority, undertake the sort of systemic review of discretionary employment barriers contemplated in Governor Bush’s executive order. Specifically, state agencies should 1) conduct an inventory of employment and licensing restrictions and disqualifications based upon a criminal record for each occupation under the agency’s jurisdiction; 2) eliminate or modify, to the extent authorized, any such restrictions or disqualifications that are either (i) not substantially related to the particular employment or (ii) not designed to protect the public safety; 3) provide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction; and 4) provide for judicial or administrative review of a discretionary decision to deny employment or licensure based upon a person’s criminal record.¹⁸

These recommendations amplify the requirements of the Collateral Sanctions Standards relating to discretionary disqualification.¹⁹ Indeed, the commentary to Standard 3.3 foreshadows

drugs there. And, it may be appropriate to revoke a driver’s license or exclude from aid on a case-by-case basis, subject to Standard 19-3.1. But it is unreasonable and counterproductive to deny all drug offenders access to the means of rehabilitating themselves and supporting their families, thereby imposing a cost upon the community with no evident corresponding benefit.

Collateral Sanctions Standard 19-2.2, commentary at 24-25 (footnotes omitted).

¹⁷ Standard 19-2.5(a) provides that “The legislature should provide a should authorize a court, a specified administrative body, or both, to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction.” Standard 19-2.5(c) provides that “The legislature should establish a process by which a convicted person may obtain an order relieving the person of all collateral sanctions imposed by the law of that jurisdiction.”

¹⁸ Standard 19-3.2 provides that “The legislature should establish a process for obtaining review of, and relief from, any discretionary disqualification.” The commentary states that

On review, an individual might seek to argue that engaging in the conduct underlying the conviction is not a substantial basis for imposing the penalty; or that individuals who engage in the conduct but are not convicted are not subject to the same penalty. The procedures for review and the standard of review should be the same as those applied to review of other decisions by the decisionmaker.

¹⁹ *See* Standard 19-3.1 (prohibits disqualification “grounds related to the conviction, unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted”); Standard 19-3.2 (“The legislature should establish a process for obtaining review of and relief from, any discretionary disqualification”) and Standard 19-3.3 (“Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise.”)

many of the Commission’s recommendations directed to state officials.²⁰ Unless there is an absolute statutory disqualification from employment that satisfies the strict standard of Standard 19-2.2 (“the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified”), agencies must eliminate or modify any restrictions and disqualifications based solely upon conviction. If the restrictions or disqualifications are not eliminated, agencies must provide for a case-by-case exemption or waiver process, if authorized to do so.²¹

The Commission stopped short of extending these affirmative obligations to government contractors, vendors, and private employers that are regulated by the state, as provide in Governor Bush’s Executive Order. While the Commission does not discourage such extended efforts by states to regulate private employment, it seems an ambitious beginning just for state agencies to impose the new requirement on “occupations under their jurisdiction.”²²

Relief from Collateral Sanctions and Disqualification from Employment Opportunities

One of the glaring flaws in the legal system of most states is the absence of an effective mechanism whereby people who have committed a crime may avoid or mitigate statutory disqualifications based on conviction, and demonstrate their record of fitness for purposes of employment and licensing.²³ The Commission heard testimony from state officials in over a

²⁰ The commentary to Standard 19-3.3 recognizes that “private employment opportunities are critical to a successful program of offender reentry.” Thus Standard 19-3.3 calls upon the legislative and executive branches of government to create additional employment opportunities for convicted persons in the private sector through financial and other incentives: “if large numbers of private employers impose broad and absolute bars on hiring individuals with criminal records, offenders will have limited opportunities for employment. Indeed, it would seem a reasonable public safety measure for the government to take affirmative steps to help offenders obtain jobs, for there is a high correlation between steady employment and successful completion of a term of supervision.” The commentary concedes that “there is a tension between facilitating reentry of convicts and the appearance of rewarding criminality by giving offenders special benefits that are not available to the law-abiding majority.

²¹ As noted, if the restriction or disqualification is absolute and mandated by law, and cannot be justified under Standard 19-2.2, the legislature should create a waiver or exemption process.) As suggested by the commentary to Standard 19-3.2, “[o]n review, an individual might seek to argue that engaging in the conduct underlying the conviction is not a substantial basis for imposing the penalty; or that individuals who engage in the conduct but are not convicted are not subject to the same penalty.”

²² The Florida executive order by Governor Bush interprets this phrase to mean “including but not limited to employment within the agency; employment in facilities licensed, regulated, supervised, or funded by the agency; employment pursuant to contracts with the agency; and employment in occupations that the agency licenses or provides certifications to practice.” The Commission did not adopt this expansive definition, and leaves it to each jurisdiction to decide how far to extend the obligation to inventory, modify or eliminate disqualifications, and provide for review and a statement of reasons.

²³ The Justice Kennedy Commission urged that jurisdictions establish an accessible process by which offenders who have served their sentences may obtain relief from the collateral consequences of conviction, in the form of an absolute statutory bar to convicted persons, or a discretionary disqualification based on conviction. The Collateral Sanctions Standards also promote the idea that jurisdictions should have a way for offenders to avoid particular collateral sanctions, *see* Standard 19-2.5(a), and also to obtain the kind of “general forgiveness” contemplated by Section 306.6 of the Model Penal Code. *See* Standard 19-2.5(c), commentary at 35-36.

dozen states about the legal mechanisms they have in place to help people overcome the legal barriers to reentry and reintegration. Some of these states have anti-discrimination laws that prohibit denial of employment and/or licensing opportunities solely because of a criminal record.²⁴ For example, New York's fair employment practices law extends its protections to people with a criminal record, and prohibits public and private employers and occupational licensing agencies from discriminating against employees based upon convictions and arrests that did not result in a conviction, unless disqualification is mandated by law.²⁵ While many other states have some form of nondiscrimination law, they are generally more limited than New York's. Many apply only to professional licensing decisions, and few have any provision for enforcement, a regrettable omission in the Commission's view.

In addition to non-discrimination laws, states have developed a variety of other mechanisms to "neutralize" the effect of a criminal record for employment purposes after the prison portion of the sentence has been served, including executive pardon, judicial sealing and expungement. The Commission heard testimony about each one of these restoration mechanisms operating in different settings: executive pardon in Arkansas, Connecticut and Maryland; expungement and sealing laws in Kansas and Oregon; and certificates of relief from disabilities in New York and Illinois. In most jurisdictions, there seems to be considerable resistance to the idea of judicial expungement for any but minor offenses, and some general unease about the idea of relief built upon a fiction that the conviction did not take place, particularly in light of the ubiquity of information in the internet age.

Pardon also seems unsuitable as a general relief mechanism, at least in states where the power is exercised by the governor. Pardon in Maryland and Arkansas is a considerably more vital relief mechanism than it is in most states, but this is only because of the personal commitment of the governors who were in office at the time of the Commission's hearings, Robert Ehrlich of Maryland and Mike Huckabee of Arkansas. And despite this commitment, the pardon program in both states operates on a comparatively small scale, constrained by political considerations to distribute relief on what appears to be almost a symbolic basis. It appears that

²⁴ See Love, *supra* note 4, chart No. 6 (Consideration of Criminal Record in Licensing and Employment). See also Love, Relief from the Collateral Consequences of Conviction: State Laws Limiting Consideration of Conviction in Employment and Licensure, The National HIRE Network Newsletter, November 2005, available at <http://www.hirenetwork.org/pdfs/HIRE%20Newsletter%20Nov%2005.pdf>.

²⁵ N.Y.S. Human Rights Law, N.Y. Exec. Law § 296(16). Employers may not discriminate against applicants with criminal records unless: (1) there is a "direct relationship" between one or more of the previous criminal offenses and the specific license or employment sought, or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The law sets out additional factors to determine whether the "direct relationship" is "sufficiently attenuated" to warrant the issuance of the license or employment: (1) "the public policy of this state . . . to encourage the licensure and employment of all persons previously convicted of one or more criminal offenses;" (2) specific duties necessarily related to the employment; (3) the relation of the conviction to the applicant's ability to perform his responsibilities; (4) amount of elapsed time since conviction; (5) the age of the person at the time of offense; (6) the seriousness of the offense; (7) any efforts toward rehabilitation; and (8) the interest of the employer of protecting property, and the safety and welfare of individuals or the general public. New York's law is incorporated into and enforced through its more general fair employment practices law.

only where the pardon power is administered by an appointed board, as it is in Connecticut, is it capable of functioning in a more regular and useful fashion.

At its hearing in Brooklyn in October 2006, the Commission heard additional testimony about the administrative and judicial relief schemes implemented by New York, Illinois, Arizona, and Connecticut. All four of these states recognize the need to give criminal offenders a way to avoid specific legal disabilities as early as sentencing, and at some later point to show that they have paid the full price for their crime and earned the right to return to responsible membership in society. And all four seek to accomplish an offender's reintegration into society not by trying to conceal the fact of conviction, but by advertising evidence of rehabilitation. The Commission was most impressed by Connecticut's recently enacted "provisional pardon," by which relief from specific "barriers or forfeitures" maybe obtained from the Pardon and Parole Board as early as sentencing. A person who has been awarded a provisional pardon may later seek a full pardon, which evidences rehabilitation and "erases" the conviction record.

The Commission was persuaded by testimony at its three hearings, and particularly by the witnesses at its Brooklyn hearing, that offenders need to have access to timely and effective relief from the collateral consequences of conviction, whether those consequences are automatic and statutory, or discretionary and attitudinal. There is also a clear need to make available immediate targeted relief in appropriate cases from specific disabilities as early as sentencing (e.g., to permit an offender placed on probation to keep a job). A full certification of "rehabilitation," however denominated, logically could be granted only after a waiting period following sentencing, when an offender has demonstrated a sustained record of good conduct

The Commission therefore determined that it should propose a more nuanced two-tiered process, as contemplated by the ABA Standards on Collateral Sanctions and the Model Penal Code.²⁶ First-tier relief from a particular collateral sanction should be available at an early point (even as early as sentencing for those sentenced to probation, or release from imprisonment) by order of the sentencing court or an administrative agency such as the paroling authority, as called for by Collateral Sanctions Standard 19-2.5(a). The relief would be "to facilitate reentry," and call for a finding that "such relief would be consistent with the rehabilitation of the offender and in the public interest." This finding would be something short of a full certification of "rehabilitation" or "good conduct", and its purpose would be to serve as some reassurance to a prospective employer, public or private. Once the absolute bar had been removed, the person could be considered for the job, and disqualified only if the conduct underlying the conviction was "substantially related" to the job or license. The purpose of this targeted relief would be to give people something to ward off automatic rejection even before they have completed their sentences and established a track record of law-abiding conduct.²⁷

²⁶ See Standards on Collateral Sanctions, commentary at 34-36, and note 42. See generally Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URBAN LAW JOURNAL* 101 (2003).

²⁷ For example, Judge Matthew D'Emic of the Brooklyn mental health court recounted that he had recently given a limited certificate of relief from disabilities to a defendant under his supervision who had been offered a job as a bus driver by the City of New York but was otherwise barred from accepting because of his criminal record.

It is important to note that the power to grant relief from a particular collateral sanctions under this provision (as under Standard 19-2.5(a)), would not be limited to employment and licensing. The Commission believes it is important for a court or administrative agency to be able to grant relief from disqualifications affecting housing or welfare benefits or drivers licenses as well as from employment. In addition, relief from collateral penalties imposed by state law should be available to federal offenders, as well as people with out of state convictions. See Standard 19-2.5(b).

More complete relief from all collateral sanctions would be accomplished at a later time, after a period of law-abiding conduct, and would in effect operate as a sort of judicial or administrative pardon, in accordance with Collateral Sanction Standard 19-2.5(c). This order would be predicated upon a finding that “the person has conducted himself in a law-abiding and productive manner since the conviction,” and it would create a “presumption of fitness” that would apply even where there is a substantial relationship between the conduct and the employment. The “presumption of fitness” would apply to all discretionary decision-making by public employers and licensing boards, and be given teeth through the enforcement provision of the fourth clause of the third Resolved clause. While it would not apply to private employment, such an order would be reassuring to private employers as a sign of “official forgiveness.”²⁸

One obstacle to employment for convicted persons is an employer’s concern about exposure to charges of negligent hiring. There is a need for employers to feel comfortable hiring people with convictions, without having to worry constantly that they will be sued in the event something goes wrong. Judicial or administrative relief orders may serve a useful function in limiting an employer’s exposure to negligent hiring suits based upon an employee’s conviction record. Therefore, the Commission recommends that jurisdictions make evidence of an individual’s conviction inadmissible in any action alleging an employer’s negligence or wrongful conduct based on hiring, as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction when hiring.²⁹ In order for such orders to be truly effective in encouraging employment of convicted persons, the private sector must be educated about them and view them as a reliable tool for measuring a prospective employee’s likely success on the job.

Jurisdictions should also work with employers and others who have a legitimate need for access to criminal record information to encourage its more efficient use, and thus to encourage employment of persons with criminal records where appropriate. We believe that jurisdictions should require (to the extent the law permits) all individuals and agencies seeking access to an individual’s criminal record to rely upon an officially approved system of records. Private

²⁸ As noted above, the National Conference of Commissioners of Uniform State Laws (NCCUSL) is drafting a uniform law on Collateral Consequences and Disqualification of Convicted Persons, and NCCUSL in fact was a co-sponsor of the Brooklyn hearing. Evidently the testimony at that hearing had essentially the same effect on the NCCUSL drafting committee, since its most recent draft dated November 27, 2006, also proposes a two-stage relief procedure. At the first stage, a “certificate of relief from disabilities” would be available as early as sentencing, while the second-stage “certificate of good conduct” would be available after a further waiting period. These certificates would relieve collateral sanctions as specified, but would not preclude a decisionmaker from considering the facts underlying the conviction.

²⁹ In the most recent NCCUSL draft, see note 28 supra, certificates would render the underlying convictions inadmissible in a negligent hiring lawsuit.

individuals seeking access to an individual's criminal record from such a records system should be required to demonstrate that the public interest in disseminating such information clearly outweighs the individual's interest in security and privacy. Certain individuals and entities, such as employers or agencies that have a statutory obligation to conduct background checks on applicants for employment or licenses, would be excepted from this obligation. This is the system employed in Massachusetts for thirty years, and at least in concept it appears to have worked well there.³⁰

As important as it is to remove legal barriers to employment and discourage discrimination, it is even more important to encourage the private sector to employ persons with criminal records.³¹ Joan Petersilia reports that "employers are more receptive to the idea of hiring an ex-felon if a third party intermediary – a counseling program or other service provider in their community – is available to mentor and to help avert any problems."³² This approach has been pioneered by Chicago's Safer Foundation, which has been working for over thirty-five years to assist people with criminal records find employment in the private sector.³³ Safer recruits and recommends candidates for particular jobs, and it takes the further step of continuing to sponsor and mentor the people it places with private employers, essentially acting as a subcontractor. While Safer has been successful in persuading small to medium companies to participate in their programs because these companies lack the resources to hire employment agencies to provide the mentoring and the training services that Safer provides, larger corporations have been harder

³⁰ Under the Massachusetts Criminal Offender Records Information (CORI) system there are four categories of access. Law enforcement has unrestricted access to conviction records, including those that have been sealed. A few non-law enforcement public entities have similar unrestricted access, notably the Department of Social Services and the Department of Early Education and Care. Certain employers (schools, nursing homes) have similar unrestricted access, except to sealed records. A third category of access is "discretionary," under which a wide variety of designated agencies (such as security companies, insurance agencies, ground transportation carriers, hotels and restaurants) may apply for "special certification" from the Criminal History Systems Board to receive an offender's record--usually only conviction data and pending cases, which will be granted if the Board determines by a two-thirds vote that "the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy." Mass. Gen. Laws ch. 6 § 172(c). Private individuals (including the press) may obtain information through a "public access record check" only if the offender is incarcerated, or has been recently released (one year for misdemeanants, two for felony offenders, three for persons ineligible for parole). A comprehensive review of the CORI system, published by the Boston Foundation in May of 2005, notes that the use of CORI for non-law enforcement purposes has increased in recent years, and that the number of persons and entities excepted from its requirements has been growing. See Boston Foundation, *CORI: Balancing Individual Rights and Public Access*, available at <http://www.tbf.org/uploadedFiles/CORI%20Report.pdf>. Additional recommendations relating to criminal records are contained in Report 103D.

³¹ Standard 19-3.3 provides that "Each jurisdiction should encourage the employment of convicted persons by legislative and executive mandate, through financial incentives and otherwise." See note 17, *supra*, for a discussion of the commentary to this standard.

³² Petersilia, *supra* note 1 at 196.

³³ Safer is now the largest community-based provider of support services for people with criminal records in the United States. The organization recognizes that individuals leaving prison face a stigma that make finding employment difficult, yet this population desperately needs jobs if they are going to turn their lives around and support their families. The Safer Foundation, *Letter from the President*, available at <http://www.saferfoundation.org/viewpage.asp?id=269>. The Commission met twice with officials from the Safer Foundation, on February 10 and March 30, 2006, and attended a meeting at which formerly incarcerated people described their positive experiences in Safer's employment programs.

to convince. There is a need for colleague-to-colleague dialogue to encourage larger corporate employers to employ offenders.³⁴ Certificates of relief from disabilities may be helpful in overcoming employer reluctance to hire people with convictions.

The Commission urges jurisdictions to work with private employer groups to create decent job opportunities for people with criminal records, and to develop incentives for private employers to hire people with criminal records. The structure and function of the Safer Foundation's program could be emulated in other jurisdictions, and will be all the more necessary as governments begin to dismantle the structure of exclusion and discrimination as the Commission recommends.

Respectfully submitted,

Stephen A. Saltzburg, Co-Chair
James R. Thompson, Co-Chair

February 2007

³⁴ The Commission is aware that some large private corporations have an official policy against hiring or retaining anyone with a criminal record. *See, e.g., Wright v. Home Depot*, 142 P. 3d 265 (HI, 2006)(under Hawaii fair employment practices law, employer may not terminate employee unless prior convictions bears a "rational relationship" to his employment). Such blanket exclusionary policies are regrettable. It is hoped that such policies will be reviewed with the same care that public employers review their exclusionary employment policies, in light of new concerns about offender reentry, to determine if they are necessary and appropriate.