March 13, 2006

Drafting Committee on a Uniform Collateral Sanctions
and Disqualifications Act
National Conference of Commissioners on Uniform State Laws
211 E. Ontario Street, Suite 1300
Chicago, IL 60611
nccusl@nccusl.org

To the Committee:

We write to urge the Drafting Committee on a Uniform Collateral Sanctions and Disqualifications Act to include criminal disenfranchisement in its consideration of the collateral consequences of conviction. We understand the current draft of the Uniform Collateral Sanctions and Disqualifications Act focuses primarily on procedural issues applicable to all collateral consequences, including disenfranchisement; nevertheless, the Act also contains substantive limits on certain sanctions related to employment, education, and licensing. It does not, however, recommend any substantive limitation with respect to criminal disenfranchisement. The Brennan Center for Justice urges the Committee to address disenfranchisement along with other collateral consequences of conviction, and to recommend that the denial of voting rights, if any, extend no longer than the term of a person's incarceration upon conviction of a felony offense. This rule would follow from previous recommendations by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to limit criminal disenfranchisement. The approach we suggest would also reflect contemporary state legislative trends towards less restrictive felony disenfranchisement schemes.

Although most of the draft Act focuses on procedural issues relating to collateral sanctions and disqualifications, Section 5 of the draft for the March 17-19, 2006, Drafting Committee Meeting creates a substantive limitation on collateral sanctions and disqualifications related to employment, education, and licensing, for the purpose of preventing recidivism and promoting public safety. While felony disenfranchisement is mentioned in the Comments to the other sections, suggesting that the procedural sections apply to disenfranchisement laws as well as other sanctions, no similar substantive limitation on disenfranchisement

is contained in the Act. We would recommend including such a limitation, drawing on the "direct relationship" test set out in the current act, and reflecting both current statutory trends and NCCUSL's earlier progressive recommendations on disenfranchisement.

The Drafting Committee may wish to consider whether the proposed draft's silence on felony disenfranchisement marks a turnaround from the NCCUSL's previous positions, which had positively asserted progressive stances on the voting rights of people with criminal convictions. For example, in 1964, the NCCUSL's Uniform Act on the Status of Convicted Persons contained a provision that would have allowed persons convicted of a felony to vote post-incarceration.[1] In 1978, the NCCUSL's Model Sentencing and Corrections Act contained a complete prohibition of felony disenfranchisement.[2] Giving teeth to this provision, the 1978 Act provided that confined persons should be allowed to vote via absentee ballot[3] and receive assistance in voting.[4] The Brennan Center supports the positions the NCCUSL took in these earlier Uniform Acts.

As to the current proposal, if the Drafting Committee were to apply the same "direct relationship" test set out in § 5(D)[5] to most criminal disenfranchisement schemes, it should generally prohibit disenfranchisement other than in cases of felony conviction for election law violations. For example, there is no obvious connection between drug possession and a categorical unfitness to take part in the democratic process. In fact, far from seeking to achieve any legitimate criminal justice objective, many states expanded their criminal disenfranchisement provisions as part of broader efforts to suppress the political power of newly freed slaves in the aftermath of the Civil War.[6]

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[1] UNIFORM ACT ON STATUS OF CONVICTED PERSONS § 2(a) (1964) (stating that a "person sentenced for a felony, from the time of his sentence until his final discharge may not: (1) vote in an election, but if execution of sentence is suspended with or without the defendant being placed on probation or he is paroled after commitment to imprisonment, he may vote during the period of the suspension or parole").

[2] MODEL SENTENCING AND CORRECTIONS ACT § 4-1001(b)(2) (1978) (stating, "[e]xcept as provided by [the Constitution of this State or] this Act, a person convicted of an offense does not sustain loss of civil rights or forfeiture of estate or property by reason of a conviction or confinement; he retains all rights, political, personal, civil, and otherwise, including the right to…vote in elections").

[3] *Id.* at § 4-1003 (stating that "a confined person otherwise eligible may vote by absentee ballot. For voting purposes, the residence of a confined person is the last legal residence before confinement.").

[4] *Id.* at § 4-1112 (requiring "the confined offender to be notified of his right to vote by absentee ballot and to be given assistance in exercising that right").

[5] UNIFORM COLLATERAL SANCTIONS & DISQUALIFICATIONS ACT § 5(D) (Draft, Mar. 17-19, 2006 Drafting Committee Meeting).

[6] *See generally*, Angela Behrens, Jeff Manza & Christopher Uggen, *Ballot Manipulation and the Menace of Negro Domination: Racial Threat and Felon Disenfranchisement in the United States, 1850-2002*, 109 AM. J. OF SOCIOLOGY 559 (Nov. 2003).

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Furthermore, the current state legislative trend is away from felony disenfranchisement, arguing against the NCCUSL's silence. From 1997 to the present, twelve states have eased the restoration process or expanded the voting rights of people with criminal convictions, while only three states have disqualified additional voters.[7] Most recently, in 2005, the Nebraska legislature amended that state's voter eligibility laws, moving from permanent felony disenfranchisement to automatic restoration two years following the completion of sentence.[8] The Brennan Center for Justice urges the Drafting Committee to recognize this trend and to propose a nationwide standard. Such a standard would not only advance the right to vote and the reintegration of people with criminal convictions into the community, but would also help to rationalize the election process. A lack of uniformity regarding voter eligibility and other election laws may have contributed to the questions that surrounded the 2000 presidential election and created a national crisis.[9]

Based on the foregoing discussion, the Drafting Committee should amend its proposed Uniform Act to explicitly limit felony disenfranchisement. For example, the Drafting Committee could modify the title of Section 5 to read, "Limitation of Collateral Sanctions and Disqualification Related to Employment, Education, Licensing, *and Voting*" (additions are italicized). The Committee could then add a new subsection 5(h), reading

> [Except as otherwise required by the state constitution,] individuals who have been convicted of a felony offense and sentenced to a term of incarceration, but who have completed, or been paroled or otherwise released from, such term of incarceration shall be eligible to register and vote, [unless incarcerated upon a felony conviction for an election-related offense]. No individual who has not been incarcerated on conviction for a felony offense shall lose the right to vote by reason of conviction of an offense.

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[7] Sentencing Project, *Felony Disenfranchisement Laws in the United States* (Nov. 2005), http://sentencingproject.org/pdfs/1046.pdf.

[8] *See* Act of Mar. 10, 2005, 2005 Neb. Laws 53 (codified at NEB. REV. ST. § 29-112 (2005)).

[9] *See* ACLU et al., *Purged: How a Patchwork of Flawed and Inconsistent Voting Systems Could Deprive Millions of Americans of the Right to Vote* (Oct. 2004), *available at* http://www.aclu.org/FilesPDFs/purged%20-voting_report.pdf; Elkan Abramowitz, *Felon Disenfranchisement v. Uniform Standards in Federal Elections*, N.Y. LAW JOURNAL, Jan. 2, 2001, at 3 ("Lurking among the issues raised by the recent election debacle in Florida were two questions related to the administration of criminal justice: whether Vice President Al Gore had received a number of votes illegally cast by felons, and whether eligible voters were barred from the polls having been erroneously identified as former felons and improperly 'purged' from the voter registration lists.").

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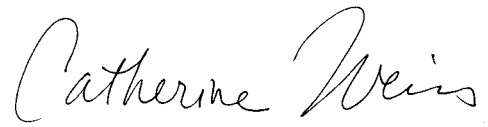
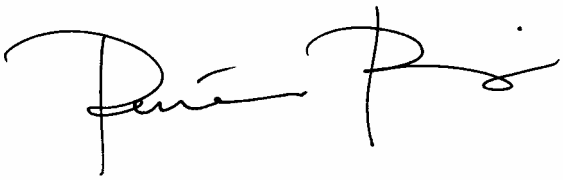
We appreciate your consideration of these suggestions. We attach a copy of Section 5 of the draft Uniform Act with the changes we propose. Please feel free to contact us if you have any questions or concerns about the issue we raise.

Sincerely,



Catherine Weiss
Deputy Director, Democracy Program
catherine.weiss@nyu.edu
(212) 992-8161

Kirsten Levingston
Director, Criminal Justice Program
kirsten.levingston@nyu.edu
(212 998-6186



Renée Paradis
Associate Counsel,* Democracy Program
renee.paradis@nyu.edu
(212) 992-8162

Brennan Center for Justice at NYU School of Law

* not yet licensed to practice law; awaiting admission in California

Appendix A – Amended Language of Section 5
(insertions in underline; deletions in ~~strikethrough~~)

SECTION 5. LIMITATION OF COLLATERAL SANCTIONS AND DISQUALIFICATION RELATED TO EMPLOYMENT, EDUCATION, ~~AND~~ LICENSING, AND VOTING TO PREVENT RECIDIVISM AND PROMOTE PUBLIC SAFETY.

(a) This section applies only to acts by the state, its instrumentalities including municipalities, subdivisions, boards, agencies, commissions and their employees, and government contractors made subject to this provision by contract, statute or ordinance, which are directed at individuals who have been convicted of an offense and have completed, or been paroled or otherwise released from, any term of incarceration imposed as part of the sentence.

(b) Notwithstanding any other provision of law, no existing or hereinafter enacted regulation, ordinance, or policy may impose a collateral sanction unless specifically authorized by statute. Neither a general grant of authority to make regulations or ordinances, nor a grant of authority to establish good moral character, admission, or hiring standards shall constitute specific authorization, but they may constitute authority to take the facts underlying convictions into account on a case by case basis in accordance with subsection (f). Any regulation, ordinance, or policy imposing collateral sanctions without specific authorization must be construed to impose a discretionary disqualification to be evaluated pursuant to subsection (f).

(c) Notwithstanding any other provision of law, the state, including a state educational institution, solely because of a conviction, may not:

(1) refuse to hire, or otherwise to discriminate against a person with respect to the compensation, terms, conditions, or privileges of his employment;

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(2) refuse to admit, or otherwise discriminate against a person with regard to an educational program; or

(3) suspend, revoke or refuse to issue or renew a license, permit, or certificate necessary to practice or engage in an occupation, profession, trade or business.

(d) For purposes of any law of this state imposing a collateral sanction, a conviction shall not include a conviction:

(1) that has been the subject of a pardon;

(2) that has been finally reversed, vacated, expunged, sealed, or otherwise set aside on appeal or in post-conviction proceedings;

(3) if the defendant has been determined by a court or other tribunal of competent jurisdiction established by law to have been innocent of the offense upon which the conviction was based; or

(4) that has been the subject of a certificate of rehabilitation.

(e) Subsections (c) and (d)(4) are not applicable to [police departments, sheriff's departments, the state police, the department of corrections, and other law enforcement agencies].

(f) The state may disqualify a person from employment, education, or licensing if the decisionmaker determines, based on the relevant facts and circumstances, including any relevant facts and circumstances of the offense, that the person is presently unfit. In determining whether the prior conviction renders the person presently unfit for the opportunity at issue, the following factors must be considered:

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(1) the policy of this state that former offenders should work, in order to promote public safety, reduce recidivism, and encourage civic and personal responsibility, including the obligation to support themselves and their families;

(2) the facts and circumstances underlying the crime and their relation, if any, to the duties or functions of the occupation, profession, or educational endeavor;

(3) any increased risk to the safety or welfare of individuals or the public if the opportunity is granted, including whether it will provides an opportunity for the commission of similar offenses;

(4) the person's rehabilitation and conduct since the offense, including whether the person has committed other serious offenses since conviction;

(5) the age of the person when the offense was committed;

(6) the time elapsed since commission of the offense and release; and

(7) whether persons other than the applicant who have engaged in the prohibited conduct underlying the conviction, whether or not convicted, have been or would be disqualified.

(g) If conviction of a crime is used as a basis for rejection of an applicant for employment or an educational program or a license, permit, or certificate, the rejection must be in writing and set forth the evidence relied on and the reason for the rejection. A copy of the rejection must be provided to the applicant.

(h) [Except as otherwise required by the state constitution,] individuals who have been convicted of a felony offense and sentenced to a term of incarceration, but

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who have completed, or been paroled or otherwise released from, such term of incarceration shall be eligible to register and vote, [unless incarcerated upon a felony conviction for an election-related offense]. No individual who has not been incarcerated on conviction for a felony offense shall lose the right to vote by reason of conviction of an offense.

Comment

The principle that at least some licenses and employment opportunities should not be arbitrarily denied to people with criminal convictions is well established in state codes. As Margaret Love's research shows,[1] more than 30 states have statutory restrictions on collateral sanctions and disqualifications imposed by state actors. Many of these statutes seem to be based on the Model Sentencing and Corrections Act. These restrictions fall into four categories:

Hawaii,[2] New York,[3] Pennsylvania[4] and Wisconsin[5] regulate consideration of a conviction in public and private employment and occupational licensure.

Arizona,[6] California,[7] Colorado,[8] Connecticut,[9] Florida,[10] Kentucky,[11] Louisiana,[12] Minnesota,[13] Missouri,[14] New Jersey,[15] New Mexico,[16] and Washington[17] prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. Kansas[18] prohibits disqualification from public and private employment but does not regulate occupational licensing.

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[1] *See* MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY STATE RESOURCE GUIDE, Ch. 4 (William S. Hein & Co., forthcoming 2006).
[2] HAW. REV. STAT. § 831-3.1.
[3] N.Y. CORRECTIONS L. §§ 750-56.
[4] 18 PA. C.S. ANN. § 9124-25.
[5] WISC. STAT. ANN. § 111.321 & § 111.335.
[6] AZ. REV. STAT. § 13-904(E).
[7] CAL. BUS. & PROF. CODE §§ 490, 493. *See also* CAL. CODE REGS. Tit. 2, § 7287.4(d)(1)(B).
[8] COLO. REV. STAT. § 24-5-101.
[9] CT. GEN. STAT. ANN. § 46a-80.
[10] FLA. STAT. ANN. § 112.011.
[11] KY. REV. STAT. § 335B.020.
[12] LA. STAT. ANN.-R.S. 37:2950.
[13] MINN. STAT. ANN. § 364.01- .10.
[14] ANN. MISSOURI STAT. §§ 314.200 & 561.016.
[15] N.J. STAT. ANN. §§ 2A:168A-1 & 2C:51-1.
[16] NEW MEX. STAT. ANN. §§ 28-2-1 to 28-2-6.
[17] WASH. REV. CODE ANN. § 9.96A.020.
[18] KAN. STAT. ANN. § 22-4710.

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Arkansas,[19] Delaware,[20] Indiana,[21] Maine,[22] Michigan,[23] Montana,[24] North Dakota,[25] Oregon,[26] South Carolina[27] Texas[28] and Virginia[29] regulate occupational licensing but not employment.

Illinois[30] Massachusetts,[31] Ohio,[32] Oklahoma, and West Virginia[33] bar consideration of a conviction only when rights have otherwise been restored or a conviction vacated or expunged.

Although they vary in specifics, most statutes provide that a conviction shall not be an absolute bar. However, almost all also permit the conviction or the facts underlying it to be weighed by the decisionmaker on a case by case basis, depending on whether it is "directly" or "substantially" related to the employment or license at stake.

The "substantial" or "direct" relation test is deep in the law. Of the minority of states without general laws, many nevertheless apply the test in the context of at least one licensing or regulatory regime. At least 10 states use the test alone,[34] at least 7 others

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[19] ARK. CODE ANN. § 17-1-103(a).
[20] 75 DEL. LAWS c. 262.
[21] IND. CODE § 25-1-1.1-1.
[22] 5 MAINE REV. STAT. ANN. § 5301.
[23] MICH. COMP. LAWS ANN. § 338.42.
[24] MONT. CODE ANN. § 37-1-201.
[25] N.D. CENT. CODE, 12.1-33-02.1.
[26] OR. REV. STAT. § 670.280.
[27] S. C. CODE § 40-1-140.
[28] TEX. OCCUPATIONS CODE ANN. § 53.021(a).
[29] VA. CODE ANN. § 54.1-204.
[30] 775 ILL. COMP. STAT. 5/2-103; *see also* 730 ILL. COMP. STAT. 5/5-5-5 (describing certificate of relief from disabilities).
[31] MASS. GEN LAWS ANN. 127 § 152; *see also* Mass. Gen. Laws Ann. ch. 151B § 4(9).
[32] OHIO REV. CODE § 2953.33(B).
[33] W. VA. CODE, § 5-1-16a.
[34] *See, e.g.*, ALA. CODE § 34-1A-5 (d)(2)a. ("An applicant [for an alarm system installer license] shall not be refused a license solely because of a prior criminal conviction, unless the criminal conviction directly relates to the occupation or profession for which the license is sought."); IOWA CODE ANN. § 147.3 (health related professions licensing; "A board may consider the past felony record of an applicant only if the felony conviction relates directly to the practice of the profession"); MASS. GEN. LAWS ANN. 112 § 52D ("The board . . . may [discipline] any dentist convicted . . . of a felony related to the practice of dentistry"); MD. R. 4-340(e) (procedures required after sentencing in drug crime cases) ("If the defendant holds a license, but has no such prior conviction, the court shall determine whether, prima facie, there is a relationship between the current conviction and the license, including" [then listing factors]); MISS. CODE § 73-67-27(1)(e) (license may be denied or revoked if person has conviction or charges "that directly relates to the practice of massage therapy or to the ability to practice massage therapy."); NEB. REV. STAT. § 87-404 (franchise termination protections inapplicable when "the alleged grounds are (a) the conviction . . . an indictable offense directly related to the business"); NEV. REV. STAT. § 625.410(4) (discipline permissible based on "Conviction of . . . any crime an essential element of which is dishonesty or which is directly related to the practice of engineering or land surveying"); N.C. GEN. STAT. ANN. § 88A-21(a)(1) (grounds for discipline include "Conviction of [a crime] if any element of the crime directly relates to the practice of electrolysis."); 59 OK. STAT. ANN. § 1503A(B) (requiring rejection of "an applicant who has a felony

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provide that a felon *or* a crime substantially related to the license or occupation is disqualifying.[35] Accordingly, the states are virtually unanimous in holding that in some instances, criminal convictions should be considered not as a broad category, but based on their specific facts and circumstances, as they relate to the license, privilege or employment at issue. Collateral sanctions are meant to protect public welfare and safety, not inflict arbitrary and needless harms. Accordingly, as reflected by the laws already on the books, most states agree that it is important whether a conviction "directly relates" to a fitness to engage in a particular occupation or to obtain a particular license. Other informed observers agree; for example, the National District Attorneys Association, while supporting collateral sanctions necessary to protect the public, states that "[r]elief from some collateral sanctions may be appropriate if they do not relate to the conduct involved in the offense of conviction."[36]

However, it must be acknowledged that even in states with broad protective legislation, the principle is honored, to some extent, in the breach. Many statues and regulations can be identified, even in these states, which conflict with the non-discrimination provisions by imposing absolute bars even in the absence of a general or fact-specific determination that the offense is "directly related" to the sanction.

Section 5 is based on the Model Sentencing and Corrections Act, § 4-1005. However, the provision in this draft does not identify a list of prohibited collateral sanctions, as do the Model Sentencing and Corrections Act and the ABA Standards. The Model Sentencing and Corrections Act, § 4-1001(b) provides that a convicted person "retains all rights, political, personal, civil and otherwise", including, among others it

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conviction which directly relates to the duties and responsibilities of the occupation of pawnbroker."); VERNON'S TEXAS STAT. & CODES ANN., GOVERNMENT CODE § 52.029(a)(6) (discipline permitted for "a final conviction of a felony or misdemeanor that directly relates to the duties and responsibilities of a certified court reporter").

[35] *See, e.g.*, ALASKA STAT. § 08.68.270 ("The board may [discipline] a person who . . . (2) has been convicted of a felony or other crime if the felony or other crime is substantially related to the qualifications, functions or duties of the licensee"); IDAHO CODE § 54-2103(23) ("In good standing" means that an applicant: (e) Has not been convicted of a felony . . .; and (f) Has no criminal conviction record or pending criminal charge relating to an offense the circumstances of which substantially relate to the practice of veterinary medicine."); 225 ILL. COMP. STAT. ANN. 2/110(a)(2) (discipline permitted against licensed acupuncturist for "Conviction of any crime under the laws of any U.S. jurisdiction that is (I) a felony, (ii) a misdemeanor, an essential element of which is dishonesty, or (iii) directly related to the practice of the profession."); R.I. STAT. ANN. § 23-16.3-12 (3) (discipline of clinical laboratory scientists authorized for "A conviction . . . which is a felony or which is a misdemeanor, an essential element of which is dishonesty, or of any crime which is directly related to the practice of the profession"); UTAH CODE ANN. § 13-12-3(6)(b) (restricting franchise termination except "Where the alleged grounds are caused by the conviction of the dealer or distributor . . . of a criminal offense directly related to the business"); 26 VT. STAT. ANN. § 2424(e) ("As used in this section, "in good standing" means that the applicant: . . . (5) has not been convicted of a felony; or (6) has no criminal conviction record nor pending criminal charge relating to an offense that relates substantially to the practice of veterinary medicine."); ANN. CODE W. VA. § 30-3-14(c)(2) (discipline authorized for: "Being found guilty of a crime in any jurisdiction, which offense is a felony, involves moral turpitude or directly relates to the practice of medicine.")

[36] *See, e.g.,* NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, POLICY POSITIONS ON PRISONER REENTRY ISSUES § 7, at 10 (Adopted July 17, 2005).

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lists, the right to vote. The ABA Standards has a list of sanctions which should never be imposed under any circumstances, such as "deprivation of the right to vote, except during actual confinement." (ABA CRIMINAL JUSTICE STANDARD 19-2.6(a)).

Section 5(a) differs from the original by limiting its coverage to state actors, excluding private employers. Regulation of public employment and licensing is less controversial than would be reaching into the decisions of private businesses. In addition, public employment and licensing are often done with the public interest in mind (for example, in the context of veteran's preferences, or reserved opportunities for the disabled). If any category of employer is going to take a chance by helping ex-offenders, it is going to be the public sector.

However, Section 5(a) contemplates that private corporations performing government functions or services might, by contract or statute, be made subject to these restrictions. It is far less intrusive to ask private companies who choose to do business with the state to comply with a policy like this; if a private company finds it objectionable, they may forego the business. Further, even if this is not a point upon which uniformity is likely, this section is not meant to discourage states from deciding on their own that private employers as a group should be covered; some now do and there is no reason they should not continue if it works for them.

A statute like this represents a policy direction, which a legislature might wish to make permanent. Yet, short of amending a state constitution or the U.S. Constitution, a given legislature cannot absolutely bind future legislatures. Thus, the approach of the ABA Criminal Justice Standards, essentially to ban collateral sanctions in most circumstances,[37] cannot be effectively accomplished through a mere statute—although at any given moment a legislature might accept it, a future legislature is free to go in a different direction.

Nevertheless, a state legislature can enact legislation constraining and channeling the creation and imposition of collateral sanctions. Section 5(b) represents one possible solution. This provision is designed to restrict creation of absolute, blanket collateral sanctions to the legislature. Individual agencies, municipalities and boards may not be equipped or inclined to consider large policy questions when drafting ordinances and regulations. Accordingly, in order to, say, simplify their own decisionmaking, or because they did not think deeply about the issue, a board might impose absolute bans on some or all persons with criminal convictions under circumstances when the legislature as a whole would find a categorical policy unwarranted. The idea of Section 5(b) is to require that such determinations be made by the legislature itself, which considers the welfare of the

[37] ABA CRIMINAL JUSTICE STANDARD 19-2.2 provides:

The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting the 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.

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state as a whole in addition to the concerns of the licensed occupation or profession, or of the particular locality.

Section 5(c) establishes the general principle that blanket collateral sanctions will not be created with respect to employment, admission to educational institutions and licensing. It applies both to formal and informal policies, and individual decisions. This provision is similar to the MSCA in that in effect it contemplates that there will be no categorical, absolute collateral sanctions in the employment and licensing context. Everything, it appears, will be dealt with on a case-by-case basis. However, when adopted by a state, inevitably there will be at least a handful of exceptions; persons with recent armed robbery convictions, for example, will not be permitted to have pistol permits; pedophiles will not receive licenses to operate day care centers. Nevertheless, it should serve as a reminder of the principle that blanket collateral sanctions should be sharply limited to the situations where they are genuinely necessary.

Section 5(d) regulates the application of collateral sanctions by defining conviction. It excludes pardoned convictions (1), convictions which have been reversed or otherwise set aside (2), convictions which, even if not reversed or set aside were found to have been the result of an miscarriage of justice by a court or government agency of competent jurisdiction (3). Section 5(d)(4) provides that a conviction covered by a Certificate of Rehabilitation issued pursuant to Section 6 shall not count as a conviction.

Section 5(e) differs from the Model Sentencing and Corrections Act by allowing law enforcement employers to bar persons based on conviction, rather than on a case by case analysis. Arizona, Colorado, Florida, Hawaii, Louisiana, New Mexico and New York specifically exclude law enforcement from the coverage of their statutes, and undoubtedly many others, not mentioning it specifically, do so in practice. Another collateral sanction which will undoubtedly be part of state law in the future is limitation of the ability of sex offenders to work in schools, hospitals and with the elderly.[38]

Section 5(f) describes the factors relevant to a case by case analysis of a conviction. Eleven states have as positive law the policy set forth in (f)(1), sometimes as a preamble to their statute, sometimes as a licensing factor, as here.[39]

[38] *See, e.g.*, 5 ME. REV. STAT. ANN. § 5301(2)(E); WASH. REV. CODE § 9.96A.020(3) & (4).

[39] ARK. CODE ANN. § 17-1-103(a) ("(1) It is the policy of the State of Arkansas to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the assumption of the responsibilities of citizenship. (2) The public is best protected when offenders are given the opportunity to secure employment or to engage in a meaningful trade, occupation, or profession."); COLO. REV. STAT. ANN. § 24-5-101(2); CT. GEN. STAT. ANN. § 46a-79; 730 ILL. COMP. STAT. 5/5-5-5(h) (recognizing "the public policy of this State, as expressed in Article 5.5 of this Chapter, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses"); MINN. STAT. ANN § 364.01; MONT. CODE ANN. § 37-1-201; N.J. STAT. ANN. 2A:168A-1; New Mexico Stat. Ann. § 28-2-2; N.Y. CORRECTIONS L. § 753 (factor in evaluating decision); REV. CODE WASH. ANN. § 9.96A.010; WISC. STAT. ANN. § 111.31.

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Section 5(d) uses the passage of time as a factor. Some jurisdictions have a term of years, after which, if the person has not been convicted of another crime, rehabilitation is presumed.[40]

Factor (d)(7) is designed to determine whether the disqualification is based on conduct or conviction. If the Plumber's Board grants licenses to those, say, who were fired from a job or suspended from school for marijuana possession, then it is probably not unreasonably dangerous or risky to public safety to allow an applicant who was convicted of precisely the same conduct to have a license to practice. On the other hand, if the agency would deny a position to a school bus driver applicant who had his child taken away in a civil action based on child abuse, that is strong evidence that a conviction for child abuse is directly related to fitness for the employment.[41]

Section 5(h) applies the "direct relationship" test to voting. Applying this test should prohibit disenfranchisement other than in cases of conviction for election law violations, as only those offenses bear a significant relationship to the franchise. Because voting is a fundamental right, where government employment, higher education, and licensing are discretionary benefits, a rule allowing the denial of rights only in a narrow set of cases is appropriate. Section 5(h) reflects this balance by making eligible to vote individuals who have completed their terms of incarceration, if any, unless their offenses were election-related. Election-related offenses will generally be those defined by the election code, or those otherwise related to the conduct of fair and orderly elections.

[40] *See, e.g.*, N.M. STAT. ANN. § 28.2.4(B) (three years after imprisonment or completion of parole and probation); N.D. CENT. CODE § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment).

[41] ABA CRIMINAL JUSTICE STANDARD 19-3.1 ("The legislature should prohibit discretionary disqualification of a convicted person from benefits or opportunities . . . on 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.")

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