A Model Proposal to Avoid Ex-Offender Employment Discrimination

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I. INTRODUCTION

Although in recent years there has been legislative movement both to remove the great bulk of civil disabilities of ex-offenders[1] and to prohibit employment discrimination based solely on the existence of a prior criminal record,[2] the present system still presents a myriad of legal and practical impediments to ex-offenders in search of employment. This article examines the plight of the released ex-offender who has employment skills to sell but who faces employers neither willing nor needing to buy. It evaluates several attempts to correct this situation and focuses on the solution proposed in the Model Sentencing and Corrections Act that offers the most promise of enhanced employment opportunities for ex-offenders.

II. REALISTIC EMPLOYMENT FOR CONFINED OFFENDERS: A NEW GOAL

In 1978 the National Conference of Commissioners on Uniform State Laws adopted the Model Sentencing and Corrections Act.[3] The Act governs the treatment of offenders[4] from initial sentencing to sentence discharge. A significant underpinning of the Act is the rejection of rehabilitation as a goal in determining either the nature or duration of the sentence[5] or in compelling participation by offenders in programs of self-

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1. *See, e.g.*, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS [NCCUSL], MODEL SENTENCING AND CORRECTIONS ACT § 4-1001 (1978) [hereinafter cited as MSCA] and text at notes 25-30 and 35 *infra*.

2. *See* text accompanying notes 150-63 *infra* (describing direct relationship test of ex-offender employment discrimination legislation).

3. The Model Act was the culmination of a three-year drafting project covering 17 meetings of the Special Committee to Draft the Sentencing and Corrections Act and producing two precursor annual drafts of the Act. The First and Second Tentative Drafts were presented for interim review and comments to the National Conference at the 1976 and 1977 annual meetings. At the times of both presentations the Act was referred to as the Uniform Corrections Act. The title was expanded to Sentencing and Corrections Act in order to reflect more accurately its scope. After consideration of Conference criteria governing uniform and model acts, the National Conference voted formally in August of 1978 to approve the Sentencing and Corrections Act as a model rather than a uniform Act. Discussion of that decision is found at 2 NCCUSL, PROCEEDINGS IN COMMITTEE OF THE WHOLE TO DISCUSS THE UNIFORM SENTENCING AND CORRECTIONS ACT 473-74 (July 30-31, 1978). For a general summary of provisions of the Model Act and a description of the drafting process, see Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1979).

4. In the Model Sentencing and Corrections Act, "offender" refers to all sentenced persons whether incarcerated or not. MSCA, *supra* note 1, § 1-101(8). The class of incarcerated persons, denominated "confined persons" under the Act, includes offenders as well as pretrial detainees and material witnesses. *Id.* § 1-101(2). A confined offender, therefore, is a convicted person sentenced to a term of incarceration.

5. MSCA, *supra* note 1, § 3-102. The one exception is that the length of a term of community supervision (probation) may relate to the time necessary to complete a rehabilitation program in which participation by the offender was made a condition of the sentence. *Id.* § 3-102(5). The sentencing provisions of the Model Act are contained in Article 3 (Sentencing). The Act describes a presumptive sentencing scheme through use of a statutorily created Sentencing Commission (§ 3-110) charged with establishing guideline sentences (§§ 3-112 to 3-114) consistent with the principles and purposes of sentencing (§ 3-115) as defined by the Act (§§ 3-101, 3-102). The basic purposes of the sentencing scheme established by the Act are punishment, the elimination of unjustified disparity, and promotion

betterment.[6] The Act is, however, structured to encourage voluntary[7] participation by confined offenders in the wide variety of rehabilitative programs and opportunities to be made available under the Act.[8] It is anticipated that the rehabilitative potential of those programs will be increased by "giving offenders a greater voice in, and accordingly a greater incentive for, their own self-improvement."[9] Central among these programs and opportunities are those provisions dealing with the employment and training of offenders.[10]

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of respect for law by providing specific and general deterrence as well as correctional programs so created as to produce the voluntary participation of offenders (§ 3-101).

This "just desserts" model of sentencing responds to many proposals arguing for such an approach and rejecting indeterminant sentencing as inappropriate or ineffective or both. *See, e.g.*, M. FRANKEL, CRIMINAL SENTENCES (1973); D. LIPTON, B. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975); N. MORRIS, THE FUTURE OF IMPRISONMENT (1974); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976). The present state legislative response, in its movement away from indeterminant sentencing, also reflects disenchantment with the present system. *See, e.g.*, CAL. PENAL CODE §§ 1170-1170.6 (West Supp. 1979); IND. CODE ANN. §§ 35-50-2-4 to 35-50-2-9 (Burns Supp. 1979); ME. REV. STAT. ANN. tit. 17-A §§ 1253-1254 (Supp. 1979).

6. MSCA, *supra* note 1, Art. 4, Treatment of Convicted and Confined Persons. Article 4 delineates the protected interests and treatment of confined persons. It provides a code of treatment of confined persons (pt. 1), provides methods of resolving internal correctional disputes by creating a correctional mediator (pt. 2) and grievance procedures (pt. 3), adopts procedures for confined-person assignment, classification, and transfer (pt. 4), prescribes a code of presumptive punishments for disciplinary infractions (pt. 5), describes procedures for programs putting confined persons at risk (pt. 6), establishes a voucher program permitting confined persons to choose those rehabilitation programs in which to participate (pt. 7), mandates provision of employment and training opportunities (pt. 8), establishes a workers compensation program (pt. 9), and deals with the collateral consequences of conviction and confinement (pt. 10).

7. The abandonment of coerced participation in rehabilitation programs reflects doubt as to their effectiveness. *See, e.g.*, D. LIPTON, R. MARTINSON & J. WILKS, THE EFFECTIVENESS OF CORRECTIONAL TREATMENT (1975). It also relates to a policy choice embodied in the Act—to create a correctional environment as near as possible to what life is like outside the prison. Expecting confined persons to make, and accept responsibility for, their own decisions while incarcerated is, after all, preparation for their release when "they will daily be required to make choices and exercise self-restraint. If institutions of confinement do not replace self-restraint for compelled restraint, and encourage choice rather than note obedience, released prisoners will continue to be unable to deal with the 'real' world." COMMITTEE ON THE LEGAL STATUS OF PRISONERS, STANDARDS RELATING TO THE LEGAL STATUS OF PRISONERS 418-19 (tent. draft 1977), *reprinted in* 14 AM. CRIM. L. REV. 377 (1977) [hereinafter cited as ABA JOINT COMM.].

8. *See, e.g.*, MSCA, *supra* note 1, §§ 2-105 (programs and services); 3-507 (pre-release and post-release programs); 4-111(b) (availability of community and institutional programs on an equal basis); 4-302 (grievance committees); 4-701 to -706 (voucher program).

9. MSCA, *supra* note 1, Prefatory Note, at 5.

10. *Id.*, pt. 8, Employment and Training of Confined Persons. This part obligates the director to upgrade and expand employment and vocational training opportunities (§ 4-801) and both to administer prison industries and to encourage employment of confined persons by private enterprise (§4-802); authorizes the establishment of programs that permit confined persons to work outside the facility (§ 4-803) and permit private employers to establish enterprises on facility grounds (§ 4-804); permits cost adjustments to be made to reimburse private employers on facility grounds for additional costs unavoidably incurred because of the nature of the confined-person work force (§ 4-805); clarifies that a private employer hiring confined persons is not a state agency (§ 4-806); requires the adoption of rules governing eligibility for employment and training assignments (§ 4-807); specifies that confined persons may be required to perform general facility maintenance work and other essential services (§ 4-808); requires improved management techniques for prison industries and permits the expending of additional funds to support activities related to confined-person employment and training (§ 4-809); permits handcrafts sales (§ 4-810); requires that, except where specified in the Act, free-world wages be paid to employed confined persons (§ 4-811); assesses room and board and other costs against the

The Special Committee to Draft the Model Sentencing and Corrections Act[11] sought to create a correctional system in which everything possible is done to encourage offender participation in programs offering the potential of decreased recidivism among program participants. Since the correlation between recidivism and the inability to obtain and retain employment upon release is clear,[12] a major priority of the Model Act is to develop "adequate employment skills and habits for all confined persons and [to assist] them [in finding] employment upon release. . . ."[13] Once fully implemented, the Model Act employment and training provisions will provide, in contrast to the great majority of presently operating correctional employment and training programs,[14] full employment of confined persons at real world wages.[15] The employment provisions include the familiar work-release program[16] as well as programs permitting private employers to operate enterprises on the grounds of a correctional facility.[17]

There are, then, in the Model Act and elsewhere,[18] efforts being made to provide realistic employment opportunities to confined persons. The goal is that those released from facilities be persons with employable skills who are ready, willing, and able to work.

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wages of a confined person (§ 4-812); requires that department-held confined-person funds earn interest payable to the confined person (§ 4-813); entitles a released confined person not placed in comparable employment to a weekly wage for up to four weeks (§ 4-814); requires the adoption of rules to prevent exploitation of confined-person labor (§ 4-815); and takes a first step towards avoiding the interstate commerce restrictions on prison-made goods (§ 4-816). The Act also provides for workers' compensation for work-related injuries to confined persons (§§ 4-901 to 4-905).

11. This was the committee of Uniform Law Commissioners that had primary responsibility to oversee the drafting of the Model Act.

12. *E.g.*, D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 311-61 (1964); 6 ECON, INC., ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE, STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY (Sept. 24, 1976); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS & GOALS, CORRECTIONS, Standard 16.13, Commentary, at 583-84 (1973) [hereinafter cited as NAC]; MSCA, *supra* note 1, § 4-801, Comment, at 384. *See* ABA JOINT COMM., *supra* note 7, Standard 4.1, Commentary, at 460-65, 7 LEAA NEWSLETTER No. 4, at 4 (May 1978) (reporting institution of a new research project to study correlation between employment and crime).

13. MCSA, *supra* note 1, § 4-801, Comment, at 384.

14. Prison industry systems are generally poorly managed and do not provide a realistic work experience. *See, e.g.*, 6 ECON, INC. ANALYSIS OF PRISON INDUSTRIES AND RECOMMENDATIONS FOR CHANGE, STUDY OF THE ECONOMIC AND REHABILITATIVE ASPECTS OF PRISON INDUSTRY (Sept. 24, 1976); Jensen, Mazze, & Miller, *Legal Reform of Prison Industries: New Opportunities for Marketing Managers*, 12 AM. BUS. L.J. 173 (1974); PRESIDENT'S TASK FORCE ON PRISONER REHABILITATION, THE CRIMINAL OFFENDER—WHAT SHOULD BE DONE? 10 (1970). Further, the opportunities to work in a prison industry or work release program are limited. G. LEVY, R. ABRAMS, & D. LADOW, FINAL REPORT ON VOCATIONAL PREPARATION IN U.S. CORRECTIONAL INSTITUTIONS TO THE U.S. DEPT. OF LABOR iii-iv (1975) (of the total 1974 population in federal and state prisons, only 4% of prisoners were on work release and only 11% were employed in prison industries).

15. *See, e.g.*, MSCA, *supra* note 1, § 4-811. For information with respect to wages recently being paid to employed confined persons, see HOUSE SELECT COMM. ON CRIME, REFORM OF OUR CORRECTIONAL SYSTEMS, H.R. REP. No. 93-329, 93d Cong., 1st Sess. 31 (1973).

16. *E.g.*, MSCA, *supra* note 1, § 4-803.

17. *Id.* § 4-804.

18. *See, e.g.*, MINN. STAT. ANN. § 243.88 (West Supp. 1979); HAWAII REV. STAT. § 354-2 (1974). *See generally* authorities cited in note 14 *supra*.

III. AFTER RELEASE

A fully implemented and effective correctional employment and training program that achieves the release of offenders sufficiently skilled and motivated to succeed at paying jobs will have accomplished little if these released offenders are unable to obtain jobs upon release. A successful societal effort to decrease recidivism must couple correctional programs that employ and train confined persons with a system that makes available a wide variety of employment opportunities to ex-offenders upon release.

To urge the availability of increased employment opportunities for ex-offenders is not to suggest that they should be favored over nonoffenders in competing for jobs or in any way be treated as a "suspect" class for equal protection purposes.[19] On the other hand, however comforting it may be to some to discriminate against an ex-offender on some theory of continued deserved punishment,[20] an ex-offender should not be disadvantaged merely because he has committed an offense in the past.[21] This view is, in part and perhaps most importantly, based on the philosophical premise that the ex-offender has "paid his debt to society" and, by so paying, justly deserves equal treatment by that society. Moreover, this view is preeminently practical since to discriminate on the basis of the offense committed decreases ex-offender employment

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19. It is possible to describe ex-offenders as a class that received discriminatory treatment in the past and thus requires affirmative action to right past wrongs. But affirmative action programs are increasingly being challenged on legal and constitutional grounds. *E.g.*, Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United Steelworkers of America, AFL-CIO-CLC v. Weber, 99 S. Ct. 2710 (1979). And even if such programs are upheld for "suspect" classes, it is difficult to view ex-offenders as a suspect class for constitutional purposes. *See, e.g.*, Upshaw v. McNamara, 435 F.2d 1188, 1189 (1st Cir. 1970); Rubio v. Superior Court, 24 Cal. 3d 93, 99, 593 P.2d 595,600, 154 Cal. Rptr. 734,739 (1979). An ex-offender, even if compelled by economic necessity, committed a criminal offense, and it was that affirmative, volitional act that brought him within the class receiving discriminatory treatment. *See* Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 318 (1970) [hereinafter cited as *Former Criminals*].

Further, favored treatment in employment decisions would seem to exalt unduly the status of "ex-offender" in situations such as neighbor-on-neighbor or intra-family crime where the ex-offender and victim frequently share similar socio-economic backgrounds and problems. *See* MSCA, *supra* note 1, at 430. Favored treatment would seem particularly unfair in these instances since it would permit the commission of an offense, in and of itself, to set the ex-offender apart from his "peers" and give him the employment edge.

Even if philosophically sound, a "favored treatment" approach is not only unlikely to win political support for attempts to expand ex-offender employment opportunities but may lead to increased union opposition to the confined-person employment provisions of the Model Act on the theory that if satisfactory work skills and habits are not instilled in confined persons while imprisoned then ex-offenders will not pass the test of competence required of applicants before any favored treatment approach is used. It follows that if ex-offenders do not pass this test of competence, even favored treatment will not lead to offender displacement of non-offender job applicants. *But cf.* J. WEST & J. STRATTON, THE ROLE OF CORRECTIONAL INDUSTRIES 63 (1971) (indicating union opposition to confined-person employment competition may be on the decline) and discussion in note 80 *infra*.

20. This was, in part, the rationale in earlier times for mutilations and brandings. *See The Collateral Consequences of A Criminal Conviction*, 23 VAND. L. REV. 929, 944-45 (1970) [hereinafter cited as *Vanderbilt Special Project*]. A good example of this approach can be seen in N. HAWTHORNE, THE SCARLET LETTER (Ticknor, Reed & Fields ed. 1850).

21. This is not to say, however, that a criminal record ought never be considered by potential employers. *See* text accompanying notes 157-59 *infra*.

opportunities and, in turn, this lack of employment increases the chances that the ex-offender will recidivate.[22] It need hardly be said that the best interests of society are ill-served by a treatment of ex-offenders that makes their recidivism more likely.

Historically, societal treatment of ex-offenders went well beyond employment discrimination;[23] upon commission of a crime a person suffered corruption of blood and forfeiture of estate.[24] Today we have eliminated these penalties and are well on the way to elimination of all vestiges[25] of the concept of civil death[26] of offenders. In the Model Sentencing and Corrections Act, for example, the Special Committee chose to include a provision that expressly retains for an offender "all rights political, personal, civil, and otherwise"[27] unless specifically

22. *See* cases and authorities cited in note 12 *supra.*

23. *Vanderbilt Special Project, supra* note 20, at 944. *See also* cases and authorities cited in note 34 *infra.*

24. Forfeiture of estate meant that the convicted person lost all real and personal property owned by him. Comment, *Arizona's Living Dead: Civil Death and Disabilities in Arizona,* 1975 ARIZ. ST. L.J. 137, 144 [hereinafter cited as *Arizona Living Dead*]. In England, however, such property escheated to the King only upon the King's application for it. *Vanderbilt Special Project, supra* note 20, at 943. Until that time the offender could exercise ownership rights over the property. *Id.* In the United States forfeiture was an automatic consequence of conviction. S. RUBIN, THE LAW OF CRIMINAL CORRECTION 24 (1963). Corruption of blood meant, generally, that upon commission of a criminal offense a person could neither devise nor inherit property. Comment, *Civil Death in California: A Concept Overdue for its Grave,* 15 SANTA CLARA L. REV. 427, 429 (1975). *See, e.g.,* Avery v. Everett, 110 N.Y. 317, 324, 18 N.E. 148, 150 (1888). *See generally* Damaska, *Adverse Legal Consequences of Conviction and Removal: A Comparative Study,* 59 J. CRIM. L.C. & P.S. 347, 350-51 (1968); 4 BLACKSTONE, COMMENTARIES* 373-82. In the United States, forfeiture and corruption of blood are prohibited punishments except during the life of an offender who committed treason. U.S. CONST. art. III, § 3.

25. Some vestiges of civil death remain. *E.g.,* ALASKA STAT. § 11.05.080 (Supp. 1970); HAWAII REV. STAT. § 353-38 (1976); IDAHO CODE § 18-311 (1979); N.Y. CIV. RIGHTS LAW § 79(a)(1) (McKinney 1976); R.I. GEN. LAWS ANN. § 13-6-1 (1969).

26. Civil death meant just that. Upon commission of a crime and until release the offender was declared legally dead. *Arizona Living Dead, supra* note 24, at 138 n.3. *See In re* Estate of Donnelly, 125 Cal. 417, 419, 58 P. 61 (1899); Byers v. Sun Savings Bank, 41 Okla. 728, 731, 139 P. 948, 949 (1914). Civil or legal death, however, did not mean the extinguishment of all rights there is disagreement among courts as to which rights a prisoner loses when civilly dead. *Vanderbilt Special Project, supra* note 20, at 951.

27. MSCA, *supra* note 1, § 4-1001 (*Rights Retained*):

> (a) A person convicted of an offense does not suffer civil death or corruption of blood.
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> (b) Except 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:
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> (1) be a candidate for, be elected or appointed to, or hold public office or employment:
> (2) vote in elections;
> (3) hold, receive, and transfer property;
> (4) enter into contracts;
> (5) sue and be sued;
> (6) hold offices of private trust in accordance with law;
> (7) execute affidavits and other judicial documents;
> (8) marry, separate, obtain a dissolution or annulment of marriage, adopt children, or withhold consent to the adoption of children; and
> (9) testify in legal proceedings.
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> (c) This section does not affect laws governing the right of a person to benefit from the death of his victim.

For a general treatment of each of the aspects of § 4-1001, see *Vanderbilt Special Project, supra* note 20.

excluded by state constitution or other provisions of the Model Act.[28] Some jurisdictions, although providing no such automatic retention of rights, permit the restoration of rights by statute,[29] or by legislative or executive pardon.[30] However achieved, the fact that offenders and ex-offenders are declared able, among other things, to inherit, marry, contract, sue, and be sued is hardly sufficient. In many jurisdictions certain civil disabilities are specifically retained.[31] Even today, for example, a confined offender may not be able to vote[32] and even after release may be prohibited from holding public office[33] or serving as a juror.[34]

In the absence in a jurisdiction of an express civil death statute, a statutory retention of rights may well be redundant. *See, e.g.*, Owens v. Owens, 100 N.C. 240, 6 S.E. 794 (1888). The Model Act included the provision rather than a mere repealer of all contrary legislation (*cf.* MSCA, *supra* note 1, § 6-203), at least in part on the theory that it is better to say something twice than risk a court deciding it was never said at all.

Section 4-1001 of the Model Act was patterned after, and supersedes, the Uniform Act on the Status of Convicted Persons adopted by the National Conference in 1964. In most respects the provisions in the two statutes are alike. The Uniform Act on the Status of Convicted Persons has been adopted in New Hampshire and Hawaii. *See* NCCUSL, REFERENCE BOOK at Table 1 (1978).

28. There are very few exclusions from the operation of this section in the Model Act. They are (1) inheritance rights in cases in which the victim's death is caused by—and benefits—the offender or ex-offender (§ 4-1001(c)); (2) forfeiture of public office under the conditions prescribed in § 4-1004; and (3) juror eligibility of offenders while incarcerated and of persons convicted of felonies while serving their sentences and until sentence discharge (§ 4-1002). The scope and thrust of the exclusions received serious consideration by the Special Committee. The reason for the exclusion of inheritance rights is obvious. The provision dealing with forfeiture of public office is explained in note 61 *infra*. The ineligibility for jury duty of confined offenders is, in part, a recognition of the practical difficulties attendant on jury service by someone confined. It also reflects, as does the disqualification of felons, the Special Committee's sense of the impropriety of a person sitting as a juror while himself serving a sentence and, more importantly, of committee fear of the potential either of a bias against the system by the offender juror or of undue pressure brought to bear upon the offender juror by representatives of the system. Once the sentence is discharged juror eligibility automatically is restored. In many states this is not the case. *See* authorities cited in note 34 *infra*.

29. In some states restoration occurs automatically, either upon satisfactory completion of the sentence, *e.g.*, WIS. STAT. ANN. § 57.078 (Supp. 1979-80), and S.D. CODIFIED LAWS ANN. § 23A-27-35 (1979), or after the passage of a specified amount of time after release, *e.g.*, WASH. REV. CODE. ANN. § 9.96.050 (1977). Other states permit the restoration of rights upon ex-offender application, *e.g.*, ARIZ. REV. STAT. ANN. §§ 13-906 to 13-908 (1978). In still other states restoration of rights is accomplished after ex-offender application by the issuance by a board of a certificate of rehabilitation or as an incident to the parole decision, *e.g.*, N.Y. CORREC. LAW § 703 (McKinney Supp. 1979-80) (certificate of relief from disabilities). Any approach requiring ex-offender initiative is, however, of limited use since so few ex-offenders will ever apply. *See Former Criminals*, *supra* note 19, at 313; Note, *Reducing Civil Disabilities for Convicted Felons in North Dakota: A Step in the Right Direction*, 50 N.D.L. REV. 61, 61 (1973).

30. *Arizona Living Dead*, *supra* note 24, at 151. *See* S. RUBIN, THE LAW OF CRIMINAL CORRECTIONS 577-78 (1963).

31. In addition to civil death statutes, states have a myriad of statutes disabling an offender or ex-offender from pursuing specific activities such as voting (*see* statutes cited in note 32 *infra*), holding public office (*see* statutes cited note 33 *infra*), and obtaining licenses (*see* note 36 *infra*).

32. *See, e.g.*, ALA. CONST. art. VIII § 182; ALA. CODE tit. 17, § 15 (1958); ALASKA STAT. § 15.05.030 (1976). ARIZ. CONST. art. VII, § 2; ARIZ. REV. STAT. ANN. § 16-101 (West Supp. 1979); ARK. CONST. amend. 8, § 1; CONN. GEN. STAT. ANN. § 9-46 (West Supp. 1979); DEL. CODE ANN. tit. 15, § 1701 (1974); FLA. STAT. ANN. § 97.041 (3)(b) (West Supp. 1978) (unless rights restored); IDAHO CONST. arts. 6 & 3; MISS. CONST. art. XII, § 241; MISS. CODE ANN. § 99-19-35 (1972); N.D. CONST. art. V, §§ 122, 127; WYOMING CONST. art. 6, § 6; WYOMING STAT. § 6-4 (1977).

Confined persons are specifically afforded the right to vote under the Model Act. MSCA, *supra* note 1, § 4-1003. The Model Act describes domicile for voting purposes as "the last legal residence before confinement." *Id.* This was done to avoid the undue impact on local elections that could possibly result if confined persons in areas with small populations vote as a bloc. The Model Act also grants a confined person the right to vote by absentee ballot. *Id.* § 4-112.

33. *E.g.*, CAL. GOV'T CODE § 1021 (West Supp. 1966); COLO. CONST. art XII, § 4; NEV. REV. STAT.

These disabilities affect the ex-offender's status as a citizen and his ability to function completely as a reintegrated member of the free community. There is hope that these disabilities, too, will slowly be eliminated.[35] But the most serious disabilities affecting recidivism—employment discrimination and licensing restrictions—still remain.

And so today a governmental agency may choose to refuse—or, indeed, be forced by statute to refuse—to license even a pardoned ex-offender[36] for an occupation or profession,[37] and an employer may refuse to hire him solely because he once committed a crime.[38]

The present system of prohibitions against licensing of ex-offenders contains a myriad of restrictions, worded generally or specifically, that operate to preclude ex-offenders from employment without supportable reasons. As the President's Task Force described it:

> [I]t seems appropriate to suspend or revoke licenses for offenses involving dangerous driving, both to remove the unfit driver from the road and to deter such behavior. But to ban convicted persons from numerous activities without regard to the particular conviction's relevance to the particular activity can be expected seriously to impede efforts to rehabilitate offenders by encouraging their participation in society, without any compensating benefit to society.
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> Most of the law in this area is overly broad. Thus, good character is often made a prerequisite for activities where it is of no particular relevance. It is,

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§ 197.230 (1973); PA. CONST. art. II, § 7.

34. *E.g.*, ALASKA STAT. § 09.20.020 (1973) (until rights restored); CAL. CIV. PROC. CODE § 199 (West. Supp. 1979); COLO. REV. STAT. § 13-71-109(2) (d) (1973); LA. CODE CRIM. PRO. ANN. art 401(5) (West 1967) (unless pardoned); N.Y. JUD. LAW §§ 509(a), 510(4) (McKinney Supp. 1979-80); TEX. REV. CIV. STAT. ANN. art. 2133(5), (6) (Vernon Supp. 1978-79). *See* Rubio v. Superior Court, 24 Cal. 3d 93, 154 Cal. Rptr. 734, 593 P.2d 595 (1979).

35. *Compare, e.g.*, NCCUSL, UNIFORM ACT ON THE STATUS OF CONVICTED PERSONS (1964), *with* MSCA, *supra* note 1, §§ 4-1001 to 4-1005. Another example of this trend can be found in FED. R. EVID. 609(c) (prohibiting impeachment of credibility based on a pardon, annulment, or other procedure based on a finding of rehabilitation). *See* United States v. Thorne, 547 F.2d 56 (8th Cir. 1976).

36. This is true for licenses that may be issued only to applicants having no criminal record as well as for licenses that may be issued only to those of good moral character. S. RUBIN, THE LAW OF CRIMINAL CONVICTIONS 608 (1963). Courts are generally agreed that a pardon does not mean that an ex-offender is of good moral character. *Vanderbilt Special Project*, *supra* note 20, at 1145. Ex-offenders' restored rights through statute are treated similarly and, thus, are also not restored to license eligibility. *Id.* at 1148. *See generally* Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W.L. REV. 121 (1967). A distinction in treatment based on whether the person had been issued the license before the commission of the offense was recently rejected as a violation of equal protection. Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), *aff'd*, 434 U.S. 356 (1978).

37. *E.g.*, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE ON CORRECTIONS 90-91 (1967) [hereinafter cited as PRESIDENT'S COMM'N ON CORRECTIONS]; ABA JOINT COMM., *supra* note 7, at 614-16; MSCA, *supra* note 1, at 424-26. For a comprehensive study of ex-offender licensing restrictions and prohibitions, see ABA CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS, REMOVING OFFENDER EMPLOYMENT RESTRICTIONS (March 1976). *See also Vanderbilt Special Project*, *supra* note 20, at 1162; Note, *The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners*, 26 HASTINGS L.J. 1403 (1975).

38. *See, e.g.*, ABA JOINT COMM., *supra* note 7, at 615-16; MSCA, *supra* note 1, at 425; *Former Criminals*, *supra* note 19, at 313; PRESIDENT'S COMM'N ON CORRECTIONS, *supra* note 37, at 31-33; *Vanderbilt Special Project*, *supra* note 20, at 1001; S. RUBIN, THE LAW OF CRIMINAL CORRECTION 639 (1963).

> for example, a common requirement for obtaining a barber's license. Yet it is doubtful whether good character is of any more importance to exercise of one's duties as a barber than to most other occupations. And regulatory legislation generally makes no effort to define the kind of character, and thus the kind of convictions, relevant to fitness. . . . In the area of individual licenses, professional and occupational groups are often given the power to determine who is initially qualified to receive a license, and to regulate the standards of those licensed by defining rules of conduct and revoking or suspending licenses for breach of those rules. Such groups tend to be primarily concerned with the interests of their own members. Thus, when faced with the problem of whether to license persons with criminal records, they may be unduly concerned with the effect on the status of their professions. Further, to the extent they try to consider the public interest, they are likely to have an unrealistic view of the importance of their own profession or occupation. . . .[39]

The statutes precluding license eligibility are stated in terms of a prohibition of license issuance to offenders who committed infamous crimes. The application of such provisions is broader than one might have guessed: all felonies are infamous for civil disability purposes.[40] Other statutes require a disqualification of applicants demonstrating moral turpitude. This generally means an offender may not obtain a license if the offense committed, whether felony or misdemeanor, is contrary to justice or good morals.[41] Furthermore, absent a statute prohibiting it, a private employer can refuse to hire an ex-offender solely because he was once convicted of a crime.

We are left, then, with an ex-offender whose rights may be restored or, as in the Model Act, were retained while imprisoned, but who is nevertheless unable to pursue fully employment opportunities for which he is qualified and that are available generally in the free community. What more, if anything, can and should be done?

A. *Record Expungement and Sealing*

There are several approaches that attempt to decrease or eliminate these and other collateral consequences of conviction and confinement,[42] and the most efficient system may well require a combination of approaches.[43] The retention or restoration of rights described above is a

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39. PRESIDENT'S COMM'N ON CORRECTIONS, *supra* note 37, at 91. *See also* Bromberger, *Rehabilitation and Occupational Licensing: A Conflict of Interests*, 13 WM. & MARY L. REV. 794 (1972); Stacy, *Limitations on Denying Licensure to Ex-Offenders*, 2 CAP. U.L. REV. 1 (1973); NAC, *supra* note 12, Standard 2.10 and Commentary.

40. *Vanderbilt Special Project*, *supra* note 20, at 958-59.

41. *Id.* at 960.

42. As used throughout this article, the "collateral consequences of conviction and confinement" are the civil consequences of a criminal conviction that result through adherence to statute, caselaw, or practice. *See generally Vanderbilt Special Project*, *supra* note 20. Since statutory civil disabilities attach only upon conviction, courts have faced definitional problems with respect to when that occurs. *Id.* at 953-55.

43. *See* ABA JOINT COMM., *supra* note 7, at 610; NAC, *supra* note 12, at 47.

necessary beginning. Expungement[44] and the sealing of records[45] together represent another approach. This approach attempts to eliminate collateral consequences basically by acting as if the ex-offender's criminal record never existed.[46] Expungement and sealing are predicated on the undeniable truth that a criminal record can produce no adverse effect if its existence is unknown and undiscoverable.

One problem with this approach, however, is doubt whether expungement or sealing can, in fact, accomplish this result. It is unclear whether an ex-offender whose record is expunged, or even merely sealed, may respond "no" to a question on an employment questionnaire that asks the applicant if he has ever been convicted of a crime.[47] Specific authority for this may be necessary and several states have given it through a statutory provision that "no" is an appropriate response.[48] Another difficulty is whether, with today's computer technology, a record can ever successfully be expunged.[49] Moreover, the keeping of duplicate records by state and federal law enforcement agencies makes it difficult to reach even all relevant records kept by those bodies.[50]

Perhaps a more basic problem with an approach that seeks to

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44. *E.g.*, N.J. REV. STAT. § 2C:51-4 (1979). Expungement generally means that the affected records, including fingerprints, photographs, and court files, are destroyed. Note, *The Rights of the Innocent Arrestee: Sealing of Records under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1469 (1977). Expungement statutes generally require that the ex-offender spend a period of "clean time" after release before eligibility for expungement. *See Former Criminals, supra* note 19, at 314; ABA JOINT COMM., *supra* note 7, at 624-25.

45. Sealing records preserves the records themselves but eliminates, or limits to specified agencies, access to those records. *Former Criminals, supra* note 19, at 314. Employers have been able to avoid this limitation, however, by requiring applicants to sign waivers permitting employers to review otherwise confidential information. *Id.* at 316.

46. Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. L. Q. 147, 151.

47. *See, e.g.*, Schaefer, *The Federal Youth Corrections Act: The Purposes and Uses of Vacating the Conviction*, 39 FED. PROB. 31 (September 1975). It might be possible for a state to restrict employers to questions relating only to unexpunged or unsealed arrests and convictions. *E.g.*, COLO. REV. STAT., § 24-72-308(6) (Supp. 1978).

48. *E.g.*, CAL. PENAL CODE §§ 1203.4-.4a, 1203.45 (West Supp. 1979); COLO. REV. STAT., § 24-72-308(6) (Supp. 1978).

49. *See Former Criminals, supra* note 19, at 316. The Federal Youth Corrections Act, for example, was intended to provide for expungement of youth records. *See, e.g.*, Harnsberger, *Does the Federal Youth Corrections Act Remove the "Leper's Bell" from Rehabilitated Offenders?*, 7 FLA. ST. L. REV. 395 (1979). Nonetheless, expunged juvenile records have been used routinely by the United States Parole Commission in making parole decisions. Coffee, *Repressed Issues of Sentencing: Accountability, Predictability, and Equality in the Era of the Sentencing Commission*, 66 GEO. L.J. 975, 1018 n.124 (1978). *See* Fite v. Retail Credit Co., 386 F. Supp. 1045 (D. Mont. 1975), *aff'd*, 537 F.2d 384 (9th Cir. 1976); Note, *The Rights of the Innocent Arrestee: Sealing of Records under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1464 (1977).

50. A state order to seal or expunge does not reach duplicate copies in federal files. Note, *The Rights of the Innocent Arrestee: Sealing of Records under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1468 n.28 (1977). *See generally Former Criminals, supra* note 19, at 316; Note, *Criminal Law—F.B.I. Retention of Criminal Identification Records—Tarlton v. Saxbe*, 29 RUTGERS L. REV. 151 (1975). The FBI has now developed procedures to expunge nonfederal arrest records in its files (as well as to notify all agencies to which the FBI supplied the information). These procedures require that expungement orders be processed through the local arresting agency before transmittal to the F.B.I. 6 CRIM. JUSTICE (No. 4, Winter 1979). Unfortunately, these procedures are frequently not followed; this results in confusion and difficulty in achieving complete expungement since the court

eliminate the record itself is that we nowhere put it fully into practice. Legislatures are understandably reluctant to destroy all traces of the criminal record of a person without the impossible guarantee that he will not recidivate. This reluctance translates into expungement statutes that generally relate either to minor crimes or to those crimes for which the offender was sentenced to probation;[51] it translates into sealing statutes that permit various specified agencies access to the sealed records.[52] If these statutes were drafted more broadly, however, their potential reach could also create problems since a criminal record may well be relevant to an employment decision. Surely a bank, for example, should have access to information that a prospective employee is a convicted embezzler. And surely that bank should be able to refuse to hire him even in a system seeking to protect and expand ex-offender employment opportunities.[53]

A final problem with an expungement approach relates to its appropriateness. Even if practical and successful, expungement and sealing raise a basic policy question since

> [t]hey deprive employers and others of the right to know the truth about the man with whom they are dealing. At the same time, concealment puts the former offender in the position of being discreditable, a position hardly more enviable than being discredited. In short, the laws attempt to build on a lie personal relationships that can only develop through mutual trust and respect.[54]

Expungement and sealing, after all, run counter to modern public sentiment that government and its records should be open and accessible.[55]

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orders generally lack sufficient identifying information to permit the F.B.I. to comply with the request. *Id.*

Some states also make an attempt to reach duplicate copies by routinely notifying of record erasure all agencies that received a copy of the record now erased. *E.g.*, CONN. GEN. STAT. ANN. § 54-142a(e) (Supp. 1978).

Conflicting federal and state policies, moreover, may also cause difficulties. For example, it is a federal offense for an ex-offender, convicted in either a state or federal court of a crime punishable by imprisonment for a term exceeding one year, to be in possession of a firearm or ammunition that has been shipped or transported in interstate or foreign commerce. 18 U.S.C. § 922(h) (1976). It has been held that an offender whose state offense subjects him to the federal statute will commit a federal offense by carrying a gun even if his state conviction was expunged by a state court order. United States v. Herrell, 588 F.2d 711 (1978); United States v. Potts, 528 F.2d 883 (1975).

51. *See Former Criminals*, *supra* note 19, at 314; ABA JOINT COMM., *supra* note 7, at 624-25.

52. *See* authority cited in note 45 *supra*.

53. *See* text accompanying notes 150-58 *infra*, discussing a direct relationship standard for permissible ex-offender employment discrimination.

54. *Former Criminals*, *supra* note 19, at 316-17.

55. *E.g.*, MD. ELEC. CODE ANN. §§ 29-1 to 29-11 (1976); NEB. REV. STAT. §§ 49-1401 to 49-14,138 (1978); OR. REV. STAT. §§ 244.010 to 244.390 (1977). Moreover, at least in theory, expungement and sealing of records are inconsistent with sentencing schemes that impose greater punishment on the repeat or persistent offender. *E.g.*, MSCA, *supra* note 1, § 3-104. In practice, however, expungement and sealing statutes provide some mechanism for use of prior records by law enforcement agencies and courts when the ex-offender commits a later crime. *See, e.g.*, NEB. REV. STAT. § 29-2264 (1975); *Former Criminals*, *supra* note 19, at 315.

It should be noted here that the societal interest in open and public records is matched by a societal interest in individual privacy. *See, e.g.*, the Privacy Act of 1974, 5 U.S.C. § 522a (1976). *See generally* STAFF OF THE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, FEDERAL DATA BANKS AND CONSTITUTIONAL RIGHTS: A STUDY OF DATA SYSTEMS ON INDIVIDUALS

For these reasons, and after much debate, the Special Committee to Draft the Model Sentencing and Corrections Act omitted provisions for expungement or sealing of records. It seems reasonably clear that any jurisdiction including this option will neither cover all offenders and all crimes nor will the operation of the statutes be uniformly successful. We are left, then, with an ex-offender who may not always—or even almost always—be able to hide his status from prospective employers and who is protected from licensing disabilities and employment discrimination by neither pardon nor retention or restoration of rights.

B. *Prohibiting Employment Discrimination*

The approach that provides the most hope for success in achieving ex-offender employment[56] is that on which the Special Committee to Draft the Model Sentencing and Corrections Act placed greatest reliance:[57] a statute requiring a determination that there exists a direct relationship between the employment activity in which the ex-offender seeks to engage and the offense that he committed. In the absence of such a relationship the Model Act prohibits both licensing restrictions[58] and discrimination against ex-offenders, whether by employers in employment decisions,[59] by trade or professional schools in admission decisions,[60] or by unions or professional organizations in which membership is a condition of employment.[61]

Courts without such legislative guidance have generally been very

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MAINTAINED BY AGENCIES OF THE U.S. GOVERNMENT, 93d Cong., 2d Sess. (1974). Striking an appropriate balance between these two interests—or even agreeing on what that appropriate balance should be—is not easy. *Cf.* Newspapers, Inc. v. Breier, 89 Wis.2d 417, 279 N.W.2d 179 (1979).

56. *Former Criminals, supra* note 19, at 317-20. *See, e.g., Vanderbilt Special Project, supra* note 20, at 1160-61; ABA JOINT COMM., upra note 7, Standard 10.4 and Commentary, at 614-16.

57. MCSA, *supra* note 1, § 4-1005 and Comment. This approach may be particularly useful when coupled with a new federal program permitting private employers a tax write-off of up to $4500 for employment of, among others, economically disadvantaged ex-offenders less than five years from conviction or release date. For a brief description of this Targeted Jobs Tax Credit Program, see 8 LEAA NEWSLETTER 3 (May 1979).

58. MSCA, *supra* note 1, § 4-1005(b)(4). This section includes the practice of law within its mandate. For a discussion of the particular difficulties raised by inclusion of licensing lawyers, see notes 116-21 and accompanying text *infra*. The American Bar Association has also taken a position opposed to licensing restrictions of ex-offenders based solely on the fact of the commission of the prior offense. 61 A.B.A.J. 1088 (1975).

59. Employment decisions include hiring and firing as well as decisions governing wages or the terms and conditions of employment. *Id.* § 4-1005(b)(1).

60. *Id.* § 4-1005(b)(2).

61. *Id.* § 4-1005(b)(3). The Model Act, in addition to its requirement of a direct relationship in ex-offender employment discrimination, provides a specific section governing public office. MSCA, *supra* note 1, § 4-1004. The section requires a state legislature to specify particularly those offenses requiring the forfeiture of public office. Some aspects of forfeiture are controlled by constitutional provisions. *E.g.*, U.S. CONST. art. 2, § 4. These will exist regardless of legislative statement.

It is hoped that under § 4-1004 the offenses specified by the legislature will be those offenses directly relating to the office-holder's ability to perform fairly the responsibilities of the office. MSCA, *supra* note 1, § 4-1004 and Comment. The offenses that are seemingly most relevant here would be those, such as bribery or felonious theft, relating to the honesty of the individual. For an example of a specification of offenses requiring forfeiture, see NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS PROPOSED NEW FEDERAL CRIMINAL CODE § 3501(a), (b) (1971). By contrast, the

reluctant to overturn license denials based on an applicant's past criminal record.[62] Their decisions have, for example, upheld denials of a license to practice medicine because of a conviction for refusing to cooperate with the House Un-American Activities Committee,[63] of a license to drive a taxicab because of a conviction for distributing socialist literature,[64] of a license to practice law because of a selective service violation,[65] and of a license to sell beer because of a bad check conviction.[66] In the past few years, judicial concern has been spurred, at least in part, by several United States Supreme Court cases in which the opportunity to pursue a particular occupation or profession was described as a significant interest[67] that carries with it due process protection.[68] Although none of these Supreme Court cases dealt with exclusions based on status as an ex-offender, the standard described therein, a rational connection between the employment sought and the reasons underlying the decision to disqualify from employment,[69] nonetheless appears to be applicable to ex-offenders.[70] Even *De Veau v. Braisted*,[71] in which the Supreme Court upheld a blanket statutory exclusion of convicted felons from jobs as officers or agents of unions representing workers on the New York Waterfront, made it clear that the exclusion was permissible because it was designed to correct "a notoriously serious situation [needing] drastic

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Model Penal Code requires forfeiture of office upon the commission of any felony as well as any offense involving malfeasance in office or dishonesty. MODEL PENAL CODE § 306.2 (1973). Other authorities would predicate forfeiture upon imprisonment. *E.g.*, NAC, *supra* note 12, Standard 16.17. This provision presumably relates, at least in part, to a determination that an imprisoned official cannot adequately fulfill the requirements of his office.

62. *See, e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954); Hawker v. United States, 170 U.S. 189 (1898); and cases and authorities cited in notes 63-66 *infra*. *See generally* ABA JOINT COMM., *supra* note 7, at 614.

63. Barsky v. Board of Regents, 347 U.S. 442 (1954). *See* Page v. Watson, 140 Fla. 536, 192 So. 205 (1939) (revocation of medical license because of conviction for perjury).

64. Kaufman v. Taxicab Bureau, 236 Md. 476, 204 A.2d 521 (1964), *cert. denied*, 382 U.S. 849 (1965). This decision was also based on Kaufman's lack of cooperation with the police to abate the disorders it was felt he helped create.

65. Application of Brooks, 57 Wash.2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961).

66. Copeland v. Department of Alcoholic Beverage Control, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (1966).

67. The characterization question regarding whether something is a "right" is less important than the determination of the due process requirements that attach before its deprivation. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971).

68. *See, e.g.*, Willner v. Committee on Character, 373 U.S. 96 (1963) (person denied license to practice law must be given opportunity to confront adverse witnesses); Greene v. McElroy, 360 U.S. 474, 500 (1959) (government employee denied security clearance must be given opportunity to confront adverse witnesses); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (overturning denial of license to practice law on the basis of prior arrest and membership in Communist Party).

69. Schware v. Board of Bar Examiners, 353 U.S. 232 (1957). The cases also require notice and an opportunity both to be heard and to confront the evidence presented. Willner v. Committee on Character, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474 (1959).

70. *See* Smith v. Fussenich, 440 F. Supp. 1077, 1081 (D. Conn. 1977); ABA JOINT COMM., *supra* note 7, at 614.

71. 363 U.S. 144 (1960).

reform."[72] In recent cases requiring a rational connection, courts have required reinstatement of a federal civil service employee convicted of possession of a controlled substance,[73] invalidated a statute that barred all felony offenders from civil service employment,[74] and found an equal protection violation through overbreadth in a statute that barred all felony offenders from employment as licensed private detectives and security guards.[75]

Notwithstanding the foregoing account, help from the courts, even if the case law is progressing in the right direction, is both slow and too limited. This is a difficulty endemic to a court-fashioned solution. A court, acting on a case-by-case basis, is naturally hesitant to set broad policy for fear of not seeing, or not completely understanding the ramifications of, the big picture. Further, and perhaps more explanatory of the reason for slow progress here, a court challenged to act on a violation of a constitutional right will establish a minimum standard below which no decisionmaker may go without violating the right; in so acting the court makes no claim that it is setting the best and wisest policy.[76] It is also true that great deference is paid to the expertise reflected in the agency determination, because, under the rational relationship standard applied in these cases, a small quantity of evidence is sufficient to uphold an agency determination.[77] Finally, a court decision may not always provide as clear a basis for appellate review of agency action as would a specific statutory standard.

The role of the legislature, on the other hand, *is* to provide wise policy choices in enacted legislation. Properly drafted legislation can provide a clear and specific standard both for implementation of the statutory mandate and for appellate review of the action undertaken in light of the statute. Such legislative leadership can prod reluctant agencies and employers into providing employment opportunities to ex-offenders. It was with this goal in mind that the Special Committee to Draft the Model Sentencing and Corrections Act included a statutory direct relationship test for ex-offender licensing and employment.

This determination to provide a legislative solution is one that is shared by several jurisdictions that have enacted legislation similar to the Model Sentencing and Corrections Act, legislation requiring a direct

72. *Id.* at 147. The Court cited evidence produced at trial that the employment of ex-offenders greatly contributed to the unacceptable level of crime and violence on the waterfront.

73. Young v. Hampton, 568 F.2d 1253, 1258 (7th Cir. 1977) (based on statutory standard permitting disciplinary action when necessary to "promote the efficiency of the service").

74. Butts v. Nichols, 381 F. Supp. 573 (D. Iowa 1974).

75. Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977). *But see* Hetherington v. California State Personnel Board, 82 Cal. App. 3d 58, 147 Cal. Rptr. 300 (1978), *and* text accompanying notes 113, 114 *infra*.

76. On the difference between constitutional minima and wise policy, see Jones v. North Carolina Prisoner's Labor Union, Inc., 433 U.S. 119, 136 (1977) (Burger, C.J., concurring); and Ferguson v. Skrupa, 372 U.S. 726, 729-30 (1963).

77. *See, e.g.*, Young v. Hampton, 568 F.2d 1253, 1258-59 (7th Cir. 1977).

relationship between the employment sought and the offense committed.[78] Minnesota,[79] for example, a state in the forefront of state correctional reform (particularly in the area of prisoner employment),[80] has probably the most comprehensive and detailed of any of the state statutes governing the subject of ex-offender employment discrimination. The Minnesota statute sets forth at the outset the rationale for enacting the legislation and indicates that the statute should be expansively interpreted in making and evaluating ex-offender employment and licensing decisions.[81] As described in the Minnesota legislation, the state's policy is "to encourage and contribute to the rehabilitation of criminal offenders and to assist them in the resumption of the responsibilities of citizenship."[82] Meaningful employment opportunities are described as "essential"[83] to the achievement of those goals. Thus the legislative tone is set.

C. *Public Employment and Licensing*

1. *Administrative Process to Handle Employment Discrimination Grievances*

Ex-offender claims of employment discrimination in the denial of public employment or a license are handled in Minnesota, and in all other

78. *E.g.* CONN. GEN. STAT. ANN. § 4-61q (West Supp. 1979); FLA. STAT. ANN. § 112.011 (Supp. 1974-78); MINN. STAT. ANN. §§ 364.01 -.10 (West Supp. 1979); N.M. STAT. ANN. §§ 28-2-1 to -2-6 (1978); N.Y. CIVIL PRAC. LAW § 7803 (McKinney Supp. 1979-80); N.Y. CORREC. LAW § 755 (McKinney Supp. 1979-80); WASH. REV. CODE §§ 9.96A.010 -.050 (Supp. 1976). *See also* HAWAII REV. STAT. ch. 378 (1976); N.J. STAT. ANN. § 11:10-6.1 (West 1976) (civil service employment).

79. MINN. STAT. ANN. §§ 364.01 -.10 (West Supp. 1979).

80. The strong Minnesota support for the upgrading and expansion of prisoner employment opportunities is due, at least in part, to active interest and encouragement by the Minnesota Department of Corrections and its commissioner, Kenneth Schoen. For a demonstration of that interest, see Letter from Kenneth Schoen to J.R. Potuto (Dec. 15, 1976) (on file in Model Sentencing and Corrections Act Project Office, University of Nebraska Law College, Lincoln, Neb.). The Department even has a Director of Private Industry. *See* Letter from Howard G. Fortier, Secretary-Treasurer, Minnesota Teamsters Joint Council No. 32, to S. Wood (April 21, 1976) (copy on file in Model Sentencing and Corrections Act Project Office, University of Nebraska Law College, Lincoln, Neb.). In consequence, (1) formal union cooperation with the Minnesota private industries program has been obtained, *see id.*; (2) progressive legislation has been enacted, *see, e.g.*, MINN. STAT. ANN. § 243.88 (West Supp. 1979); and there has been movement to eliminate federal legislation that impedes prisoner employment programs such as that of Minnesota. *E.g.*, H.R. REP. No. 4871, 94th Cong., 1st Sess. (1976) (sponsored by among others, Rep. Al Quie, R-Minn.). On June 9, 1976, Mr. Schoen testified in support of the bill before the House sub-committee on labor standards.

81. Other states have enacted similar policy provisions. *See* CONN. GEN. STAT. ANN. § 4-61n (West Supp. 1979); N.M. STAT. ANN. § 28-2-2 (1978); WASH. REV. CODE § 9.96A.010 (Supp. 1976). The Model Sentencing and Corrections Act contains no such policy statement introductory to its provisions on ex-offender employment discrimination. The comments to these provisions, however, do reflect that an expansive interpretation is anticipated. MSCA, *supra* note 1, §§ 4-1001 to 4-1005 and Comments. The comments to the Model Act, however, as with any other model or uniform act, are not enacted by a state that enacts the statutory provisions. In addition, although the Special Committee had the opportunity to review the comments, which the author believes are consistent with the intent of the Special Committee, the comments are the work of the reporters, essentially unedited by the Special Committee. Being comments, they were not formally approved by either the Special Committee or the conference as a whole.

82. MINN. STAT. ANN. § 364.01 (West Supp. 1979).

83. *Id.* In addition to policy statements in statutes specifically dealing with ex-offender employment discrimination, at least one state includes ex-offenders in its general fair employment

states with ex-offender employment discrimination legislation, through resort by the grievant to the procedures of a state administrative procedure act or its equivalent.[84] Use of the administrative process permits employer decisions to be reviewed and, when found erroneous, corrected internally. The administrative process thereby leaves review in the first instance with the expertise and professional judgment of the employer or licensing agency. This affords great weight to agency judgments[85] while relieving the court process from hearing those cases in which the ultimate agency determination proves satisfactory to the grievant. Judicial control of agency excesses is preserved by court review of those cases not resolved internally. The standard of review is that standard generally applied to appeals from agency decisions.[86]

The Minnesota legislation also includes detailed procedures governing notice to the ex-offender applicant denied employment or a license.[87] This is probably done routinely by public employers and licensing agencies and, in any case, may well reflect a concern for the grievant's due process interest.[88] Even if a denial of a license or public employment based on ex-offender status gives rise to neither substantive nor procedural due process claims this situation certainly changes once a statute exists creating a right of nondiscrimination; presumably, then, an adverse determination triggers a right to notice and a hearing.[89] Further, the very requirement of articulation of the reason for an adverse decision may help assure that the statutory test is followed by decisionmakers.

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policy statements. WIS. STAT. ANN. § 111.31 (West 1974 and Supp. 1979-80). In yet another state, there is a general policy of ex-offender employment, although the statute does not include provisions prohibiting ex-offender employment discrimination. ARIZ. REV. STAT. ANN. § 41-1955 (1974). *See also* N.D. CENT. CODE §§ 23, 12-55-24 (1957).

84. MINN. STAT. ANN. § 364.06 (West Supp. 1979).

85. *See* text accompanying notes 161-63 *infra*. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

86. *E.g.*, Administrative Procedure Act, 5 U.S.C. § 706 (1976); MODEL STATE ADMINISTRATIVE PROCEDURE ACT § 15(g) (rev. 1961).

87. MINN. STAT. ANN. § 364.05 (West Supp. 1979). Connecticut has a similar provision. CONN. GEN. STAT. ANN. § 4-61o(b) (West Supp. 1979). New Mexico also requires a written statement. N.M. STAT. ANN. § 28-2-4 (1978). New York requires a written statement of reasons when requested by the ex-offender. N.Y. CORREC. LAW § 754 (McKinney Supp. 1979-80).

88. *E.g.*, Willner v. Committee on Character, 373 U.S. 96 (1963); Greene v. McElroy, 360 U.S. 474, 500 (1959); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Hornsby v. Allen, 326 F.2d 605 (5th Cir. 1964); Fascination v. Hoover, 39 Cal.2d 260, 246 P.2d 656 (1952); Milligan v. Board of Registration, 348 Mass. 491, 204 N.E.2d 504 (1965). *See* Byse, *Opportunity to be Heard in License Issuance*, 101 U. PA. L. REV. 57 (1952); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

89. *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> Certain attributes of "property" interests protected by due process emerge [from an examination of prior cases]. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. . . . It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
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> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .

2. *Minor Offenses Excluded*

A potentially useful feature of the Minnesota statute is its exclusion from the statutory direct relationship test of those offenses that are characterized as misdemeanors for which a jail sentence may not be imposed.[90] Thus, at least in theory, a misdemeanant whose offense was one for which jail time could not have been imposed may not be refused employment even in the presence of a direct relationship between the offense committed and the employment sought. Limiting the use of even a direct relationship test is not novel to Minnesota. Florida, for example, limits legal discrimination of ex-offenders to felons and first-degree misdemeanants,[91] while New Mexico excludes use of misdemeanor convictions not involving moral turpitude,[92] and Washington appears to limit such legal discrimination to felons.[93]

The exclusion of minor offenses reflects a policy decision that the past criminal activity is too insubstantial to affect an employment or licensing decision. It may also reflect a judgment that the excluded offenses are too minor ever to affect employment competence; in other words, these offenses may be seen as per se incapable of providing the type of direct relationship contemplated by the statutory test. Thus, a statutory exclusion removes a class of cases from administrative discretion and describes a clear rule prohibiting consideration of the criminal record in making the decision.[94] Depending, of course, on the number of such ex-misdemeanant applications received, the removal of these cases could lessen the administrative burden. Moreover, such a per se rule not only assures administrative compliance,[95] but may well be wise policy if it is true that administrative discretion, and the time consumed in making case-by-case decisions, would always result in a finding of no direct relationship.

On the other hand, it can be argued that minor as well as major offenses should be subject to the direct relationship test since this test

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90. MINN. STAT. ANN. § 364.02 (West Supp. 1979).

91. FLA. STAT. ANN. § 120.011(1)(a) (Supp. 1974-78).

92. N.M. STAT. ANN. § 28-2-3 (1978).

93. WASH. REV. CODE § 9.96A.020 (Supp. 1976). Washington, unfortunately, in limiting its direct relationship test to ex-felons, left the statute silent with respect to the treatment of misdemeanants. The section provides that neither public employment nor a license may be denied solely because of prior conviction of a *felony* by the applicant. The section also provides that the fact of *any prior conviction* may be considered. *Id.* Next, the direct relationship test for felonies is set forth. Certainly the better reading of the statute would interpret the provision as meaning that misdemeanor convictions may not be the basis on which public employers or state licensing agencies discriminate against a person, even if a direct relationship under the statutory test would otherwise exist. It is possible, however, to read the statute as describing a direct relationship test for ex-felons, yet permitting discrimination against misdemeanants to occur without any relationship necessary to be shown.

94. This statutory prohibition is made easier to accomplish in Minnesota through the operation of a parallel provision prohibiting dissemination of, *inter alia*, records of misdemeanor convictions for which no jail time could have been imposed. MINN. STAT. ANN. § 364.04 (West Supp. 1979).

95. Assurance may also, and perhaps better, be achieved by faithful administrative compliance with the statutory mandate. A per se rule, then, may reflect legislative distrust of administrative decisionmaking.

retains the prerogative, even if the need arises only once in a million applications, to reject for license or employment an ex-offender whose misdemeanor does, in fact, directly relate to the employment or license sought. Further, if most of the offenses excluded by these statutes present situations in which it is clear that no direct relationship can be found, then there should be no great time or personnel burden in dealing with them. To the extent that such a burden is actual or perceived, however, the employer or licensing agency could itself fashion a per se rule by individually listing or describing by class those misdemeanors (or felonies) that per se form no direct relationship to the employment or license sought.

A rule fashioned by a particular employer or agency has the virtue of being specifically tailored to the particular employment or license requirements and responsibilities and should be less likely than legislation to be either over or underinclusive. If an employer or licensing agency is still disinclined to fashion any policy that removes obstacles from ex-offender hiring or licensing, preferring the administrative burden to a per se rule that yields the same result, it may still be wise to allow that employer or licensing agency to handle these matters on a case-by-case basis, for it is the employer or agency that suffers the burdens of that choice.[96]

Most of the ex-offender employment discrimination statutes contain no exclusions for minor offenses, possibly because of a desire to maintain administrative flexibility.[97] For example, the choice generally to vest a good deal of discretion in administrators to fashion rules, while structuring that discretion so that administrative practice conforms to overall legislative standards, was a major underpinning of the Model Sentencing and Corrections Act.[98] This approach allows agencies, based on expertise and particular circumstances, to fashion appropriate solutions consistent with the legislative mandate.[99]

Whatever the theoretical merits of a statutory exclusion of minor offenses, the practical success is dependent on the skill exercised in drafting the statutory exclusions.[100] It is also clear that the exclusions granted by

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96. Of course each ex-offender applicant also suffers the burden of the wait. If, in fact, the employer or agency is acting in bad faith a court in review should be able to correct the problem. It may also be that, faced with a pattern or practice of avoidance, the legislature may act to establish a per se rule. But there is no great need to anticipate such agency abuse.

97. It may also be, of course, that the subject was never considered. *See* note 98 *infra.*

98. *See* Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1978). The minutes of the meetings of the Special Committee to Draft the Model Act indicate that the Special Committee never discussed the specific question whether minor offenses, however defined, should be excluded from offenses for which discrimination would be legal when the statutory direct relationship test was met.

99. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969).

100. Statutory classifications of offenses do not always represent internally consistent categories nor, of course, were the classifications created with ex-offender employment in mind. Thus a reference in an ex-offender employment discrimination statute to a statutory classification, such as Florida's exclusion of second-degree misdemeanors, may not always exclude the proper offenses and only those. This may explain New Mexico's exclusion of only those misdemeanors not involving moral turpitude rather than all offenses classified as misdemeanors.

statute may not be as broad in some respects as it first appears. Minnesota's statute provides the best example of this phenomenon.

In Minnesota, as described above, the total exclusion from public employment or licensing discrimination is limited to "misdemeanors for which a jail sentence may not be imposed."[101] This language refers only to petty misdemeanors[102] and basically encompasses minor traffic offenses.[103] Thus, in Minnesota, very nearly all those offenses that are commonly considered criminal, however minor, subject their perpetrators to employment discrimination if the direct relationship test is satisfied.

By contrast, Florida's statutory exclusion is somewhat broader. Legal employment discrimination must be based on an offense at least as serious as a first-degree misdemeanor.[104] The Florida exclusion relates to second-degree misdemeanors[105] and all minor traffic violations.[106] Since second-degree misdemeanors carry with them the possibility, upon conviction, of a maximum sentence of sixty days incarceration,[107] a public employer or licensing agency in Florida is barred by statute from considering convictions for a greater number of minor offenses than a similarly situated Minnesota employer or licensing agency.

3. *Law Enforcement and Lawyers Exempted*

An exemption for law enforcement agencies is quite common in existing state legislation.[108] The exemption may reflect either an unwillingness to permit ex-offenders to carry weapons, a necessary part of the job of at least those employees directly engaged in law enforcement,[109] or, more significantly, a perception that these agencies have a special interest in the appearance, as well as the reality, of good citizenship and probity in the fulfillment of their responsibilities.

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101. MINN. STAT. ANN. § 364.02(5) (West Supp. 1979).

102. *Id.* § 609.0 (4)(a). A misdemeanor is any offense which, upon conviction, may result in up to 90 days incarceration and/or up to a $500 fine. *Id.* § 609.02(3).

103. *See, e.g., id.* § 169.09(14). There are a few petty misdemeanors in Minnesota that are not traffic related. *See, e.g., id.* § 152.15(2) (possession of a "small amount" of marijuana).

104. FLA. STAT. ANN. § 120.011(1)(a) (West Supp. 1974-78). A first-degree misdemeanor is any offense which, upon conviction, may result in imprisonment for up to one year. *Id.* § 775.082 (West 1976).

105. *Id.* § 775.082.

106. These are classified in Florida as non-criminal violations and do not carry possible jail time as a sentence. *Id.* § 784.011. For examples of such violations, *see id.* §§ 239.53 (West 1977) (university traffic regulations); 318.14 (1975).

107. *Id.* § 775.082.

108. *E.g.*, CONN. GEN. STAT. ANN. § 4-61p (West Supp. 1979); FLA. STAT. ANN. § 112.011 (2)(a) (West Supp. 1974-78); MINN. STAT. ANN. § 364.09 (West Supp. 1979); N.M. STAT. ANN. § 28-2-5 (1978); N.Y. CORREC. LAW § 750(5) (McKinney Supp. 1979-80). Florida has an additional provision exempting fire departments from hiring ex-offenders as firemen for four years after release unless the ex-offender earlier obtains a pardon or restoration of rights. FLA. STAT. ANN. § 112.011(2)(b) (West Supp. 1974-78).

109. *See* N.Y. CORREC. LAW § 750(4) (McKinney Supp. 1979-80). Certainly statutes prohibiting the licensing of ex-offenders for guns are common. *E.g.*, FLA. STAT. ANN. §§ 790.001, 790.051, 790.23 (West Supp. 1979).

A statutory exemption of ex-offenders from becoming law enforcement officers will doubtless withstand legal challenge on the ground that it relates rationally to the objectives and needs of law enforcement officials. One could at least argue that the sensitive nature of law enforcement work creates risks that warrant such an exemption and, further, that the general public has the right to expect that law enforcement officials will set the tone and standard of lawfulness for the community.[110] In fact, a statutory *disqualification* of ex-felons from law enforcement jobs was recently upheld on the ground that the purpose of the disqualification was "to assure, insofar as possible, the good character and integrity of peace officers and to avoid any appearance to members of the public that persons holding public positions having the status of peace officers may be untrustworthy."[111] A rational purpose was found to exist even though the statute operated to disqualify ex-felons from jobs such as furniture and bedding inspectors and health inspectors, for which the carrying of firearms was unnecessary.[112]

In contrast to a disqualification of ex-offenders for law enforcement jobs, the statutory exemption provided in the ex-offender employment statutes at least permits the law enforcement agency the discretion to employ an ex-offender if it so chooses. Moreover, the statutory exemption gives hope of a narrow construction by the courts. It has already been held in Florida, for example, that, consistent with the Florida ex-offender employment discrimination statute, an ex-offender employed as a correctional guard may carry a weapon even though prohibited by other Florida statutory provisions.[113] Thus, a law enforcement agency may voluntarily choose to employ an ex-offender whose offense does not relate directly to the responsibilities of the employment. Even if an agency has determined that an ex-offender can never be a law enforcement officer,[114] he might yet be hired, for example, as part of the clerical staff.[115]

Exemption of the practice of law raises similar—as well as different—questions. Minnesota is the only state with legislation requiring a direct relationship in ex-offender employment that exempts the licensing of

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110. *See* P. MAAS, SERPICO (1973).

111. Hetherington v. California State Personnel Bd., 82 Cal. App.3d 582, 590, 147 Cal. Rptr. 300, 305 (1978).

112. *Id.* at 597, 147 Cal. Rptr. at 309 (Reynoso, J., dissenting).

113. *See* FLA. OP. ATTY. GEN. 073-229 (June 22, 1973) (interpreting FLA. STAT. ANN. §§ 790.001, 790.005, 790.023 (Supp. 1979) in light of ex-offender employment provisions). Despite the position taken in Florida, the question whether ex-offenders may carry guns when employed as correctional employees or in other employment requiring guns is also dependent upon whether the offender committed an offense for which federal law bars him from carrying a gun. *See* discussion in note 50 *supra.*

114. For a discussion of just how likely it is that agency or employer discretion will lead to licensing and employment decisions not mandated by statute, see text accompanying notes 124-25 *infra.*

115. Ex-offenders may be refused employment even as clerks if the job gives access to confidential files and information about ongoing investigations.

lawyers from coverage.[116] Again, a case can be made that the special trust relationship between the legal profession and the general public produces a special need to control more particularly membership in its ranks.[117] An additional difficulty is the issue of separation of powers raised by inclusion of the practice of law within the statutory mandate.

Courts have inherent constitutional power to effect the orderly administration of justice. The power arises from their very existence and requires as its source no specific constitutional or legislative provision.[118] This inherent power has traditionally been considered to extend to regulation of the practice of law, including the qualifications and standards for admission to practice.[119] Legislative statements affecting admission standards and qualifications have long been accepted by courts so long as these statements describe minimum standards to which a court may attach additional requirements.[120] Thus, whatever the statutory language, a legislative determination embodied in a statute will not control a court that finds the statute to be an unconstitutional transgression into a matter that is within the purview of the judicial branch. Whether a direct relationship test would be found by courts to intrude unduly on what they see as reasonable requirements for lawyers will probably vary from state to state. Some courts may reject the legislative power to impose such a requirement while acceding to the policy reflected in the legislation.[121]

Notwithstanding the existence of state statutes exempting law enforcement officials or lawyers from the operation of a direct relationship test and the expression of policy underlying them, The Special Committee to Draft the Model Sentencing and Corrections Act opted to exclude neither group. The Committee's theory was that the direct relationship test is adequate to exclude those ex-offenders who should properly be barred from engaging in law enforcement or the practice of law. The Committee

116. MINN. STAT. ANN. § 364.08 (West Supp. 1979).

117. And, again, at least post-Watergate there is some evidence that, whatever the need, public faith in the practice of law is not always there. Legislative concern with the practice of law may also be seen. *E.g.*, ALASKA STAT. § 08.08.230 (1975); CAL. BUS. & PROF. CODE § 6101 (West 1974); COLO. REV. STAT. § 12-5-108 (1978); FLA. STAT. ANN. § 454.18 (West 1965). Generally, a criminal conviction does not necessarily mean automatic disqualification. *E.g.*, Hallinan v. Committee of Bar Examiners, 65 Cal.2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966). Nor does the fact a person was not convicted, or even acquitted, necessarily mean he will not be disqualified. *E.g.*, Spears v. State Bar of California, 211 Cal. 183, 294 P. 697 (1930); Application of Cassidy, 268 App. Div. 282, 51 N.Y.S.2d 202 (1944).

118. *See, e.g.*, Comment, *Inherent Power and Administrative Court Reform*, 58 MARQUETTE L. REV. 133, 135-36 (1974). *See also* Connors, *Inherent Power of the Courts—Management Tool or Rhetorical Weapon?*, 1 JUST. SYS. J. 63 (1974).

119. *E.g.*, *In re* Mackay, 416 P.2d 823, 836-37 (Alaska 1964), *cert. denied*, 385 U.S. 890 (1966); Brydonjack v. State Bar of California, 208 Cal. 439, 447, 281 P. 1018, 1021 (1929); State Bar Ass'n v. Connecticut Bank & Trust Co., 145 Conn. 222, 230, 140 A.2d 863, 868 (1958); *In re* Opinion of Justices, 279 Mass. 607, 610, 180 N.E. 725, 727 (1932); *In re* Fox, 296 So. 2d 701, 703-04 (Miss. 1974); *In re* Integration of Nebraska State Bar Ass'n, 133 Neb. 283, 286-87, 275 N.W. 265, 266-68 (1937); Jenkins v. Oregon State Bar, 241 Or. 283, 286, 405 P.2d 525, 526 (1965).

120. *E.g.*, *In re* Mackay, 416 P.2d 823, 828 (Alaska 1964); *In re* Lavine, 2 Cal.2d 324, 329, 41 P.2d 161, 163 (1935); *In re* Opinion of Justices, 279 Mass. 607, 180 N.E. 725 (1932).

121. *See, e.g.*, *In re* Sparks, 267 Ky. 93, 97, 101 S.W.2d 194, 196 (1936); *In re* Fox, 296 So. 2d 701, 704 (Miss. 1974).

felt that, in all instances in which the direct relationship test is not met, lawyers and law enforcement officials should be on the same footing as persons in other professions or occupations in providing opportunities for entry into their ranks.[122] Consistent with this general approach, the Model Act provides no special criteria for ex-offenders in its provisions describing employment requirements for correctional employees.[123]

It bears emphasizing that the existing law enforcement and lawyer exemptions do not, typically, prohibit hiring or licensing of ex-offenders should the agency choose to do so. The wording of the Florida provision is illustrative: "This section shall not be applicable to any law enforcement agency. However, nothing herein shall be construed to preclude a law enforcement agency, in its discretion, from adopting the policy set forth herein."[124] Unfortunately, the preservation of choice in the agency will more than likely mean that the agency will not hire ex-offenders, since it will probably fall into the common pattern of overrating its own need to stay "pure."[125]

4. *Record Dissemination*

A particularly efficacious feature of the Minnesota statute,[126] unfortunately absent from the Model Sentencing and Corrections Act as well as most of the other existing ex-offender employment discrimination statutes,[127] is a statutory attempt to prohibit official dissemination of those records that have been determined on balance to be more harmful to the ex-offender applicant[128] than beneficial to those making employment or

122. This is certainly not meant to suggest that the evenhanded application of a direct relationship test will result in the same hiring or licensing decisions no matter what the occupation or profession. The responsibilities and duties of the particular job will, and should, color the employment or licensing decision resulting from application of a direct relationship test. It is likely, in other words, that many more offenses will be found to relate directly to law enforcement jobs than, for example, to the practice of barbering.

123. MSCA, *supra* note 1, § 2-108.

124. FLA. STAT. ANN. § 112.011(2)(a) (West Supp. 1974-78). For other examples, see statutes cited note 108 *supra.*

125. PRESIDENT'S COMM'N ON CORRECTIONS, *supra* note 37, at 91.

126. MINN. STAT. ANN. § 364.04 (West Supp. 1979).

127. Connecticut and New Mexico are two other states having such a provision. Connecticut prevents use or dissemination of records of expunged convictions and arrest records not followed by convictions. CONN. GEN. STAT. ANN. § 4-61o(c) (West Supp. 1979). New Mexico prohibits use or dissemination of arrest records not followed by convictions and records of misdemeanor convictions not involving moral turpitude. N.M. STAT. ANN. § 28-2-3 (1978). *Cf.* CAL. PENAL CODE ANN. § 2947 (West Supp. 1979) (misdemeanor to communicate information with intent to deprive ex-offender of employment opportunity). Maryland by regulation permits private employer access to arrest records only when otherwise authorized by statute, ordinance, executive or court order, and to conviction records in those cases in which there is significant employment sensitivity or a public safety interest at stake. LEAA, PRIVACY AND SECURITY OF CRIMINAL HISTORY INFORMATION: AN ANALYSIS OF PRIVACY INTERESTS 58-59 (1978). *See generally* 28 C.F.R. §§ 20.20 and 20.33 (1978) (criminal history record information organization and dissemination). *See also* Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127, 140 (1967).

128. Those records are also harmful to the societal interest in encouraging him to obtain and retain gainful employment. *See Criminal Justice Information and Protection and Privacy Act of 1975: Hearings on S. 2008 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 235 (1975) (statement of A. Neier, Executive Director, American Civil Liberties Union).

licensing decisions. Minnesota prohibits distribution for employment or licensing purposes of those records of misdemeanor convictions for which no jail sentence can be imposed, of arrests not followed by convictions, and of expunged convictions.[129] The misdemeanor conviction records relate, of course, to the Minnesota exclusion of these offenses from employer or agency consideration for purposes of a direct relationship test. In a broader sense, expunged convictions represent a similar policy choice. Certainly a very efficient and successful method of assuring the effectuation of that policy choice is merely to prevent the dissemination of those records that are statutorily deemed not relevant to the employment or licensing decision. If, after all, the employer or licensing agency does not know that the applicant committed the offense, the employer or agency cannot consider the offense in making the employment or licensing decision.[130]

Arrest records not followed by convictions seem to present another clear case for a dissemination prohibition[131] because use of such records is inconsistent with a presumption of innocence.[132] The prohibition on dissemination of such records, however, does not clarify what Minnesota's policy is with respect to arrest records in pending cases.[133] It may be that the prohibition was intended to cover even these arrest records, but there is good reason to permit arrest record dissemination at least for a period of time after the arrest. First, if the offense charged would meet the direct relationship test, then the arrest record, particularly if followed by a prosecution, raises some legitimate concern on the part of the employer or licensing agency. Second, at least during the pendency of a trial, the employer or agency may well have substantial interest in avoiding both the impact of adverse publicity and the concern that the employee or licensee's time and attention will be directed toward the trial rather than the employment.[134]

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129. MINN. STAT. ANN. § 364.04 (West Supp. 1979).

130. This, of course, is the policy embodied in expungement statutes. *See* text accompanying notes 44-46 *supra.*

131. An argument can be made that arrest records not followed by conviction should nonetheless be disseminated. Minor misdemeanors, after all, are excluded because of a legislative determination and expunged records are the result of a court record predicated on a statutory standard. The exercise of prosecutorial discretion, by contrast, is not usually subject to review on the record nor predicated upon a specifically delineated public standard.

132. After a period of time arrest records should be neither disseminated nor used, except for law enforcement purposes, even in cases in which, in a practical sense, the presumption of innocence is clearly rebuttable. Consider a case in which no conviction followed the arrest presumably because of suppression of evidence based on an unconstitutional search and seizure. First, the exclusion policy should cover the arrest record because there is no certainty that a conviction would have resulted even if the evidence had not been suppressed. Second, there is no practical way to exclude those cases in which innocence is truly in doubt from all others, and a blanket approach should be in favor of no record dissemination or use.

133. This is likewise true of Connecticut, CONN. GEN. STAT. ANN. § 4-61o(c) (West Supp. 1979), and New Mexico. N.M. STAT. ANN. § 28-2-3 (1978).

134. This problem could admittedly also result in the case of a person already employed or licensed who is subsequently arrested and charged with an offense. When a direct relationship is present, the agency or employer should be able to suspend the license or employment for a period of time or until final disposition. *See* Skoler, *Accusation of Crime and Job Retention: A Cooling Off*

On the other hand, there must be a limit set on the period of time during which arrest records not followed by a conviction may be disseminated to members of the public. It is not enough to permit dissemination so long as the case is still pending since there is often no formal disposition of a case. For state agencies receiving federal funds to develop or maintain manual or automated data storage operations, the general rule is that the agency may not disseminate arrest information unless the case is in active process or less than one year has elapsed from the arrest.[135] Some such time limit is necessary to protect the arrestee from discrimination which could otherwise continue even though his case is no longer active.

5. *What About Private Employers?*

Unlike the Model Sentencing and Corrections Act, most of the existing ex-offender employment discrimination legislation suffers from a major defect: the legislation is restricted in impact to licensing and public employment[136] and leaves the private employer free to make whatever employment decisions he chooses. The Model Act, on the other hand, covers not only private employers[137] but unions and professional and vocational schools.[138] These latter groups are included within the mandate of the Act because their activities can affect substantially the employment opportunities available to ex-offenders. The statutes of at least three states, New York,[139] Wisconsin,[140] and Hawaii,[141] presently cover private

Period for Arrested Employees, 4 DAYTON L. REV. 283, 285-86 (1979). In the case of a person already employed or licensed, however, it may be difficult for the agency or employer to learn of the arrest since employees or licensees do not continually fill out employment questionnaires that might uncover a pending case against the employee or licensee.

135. 28 C.F.R. § 20.33 (1979). The regulations were adopted by the Law Enforcement Assistance Administration (LEAA) pursuant to the Federal Crime Control Act of 1973, 42 U.S.C. § 3701 (1976). The Act governs information systems receiving federal funds. 28 C.F.R. § 20.20 (1978). *See* COLO. REV. STAT. § 24-72-308(6) (Supp. 1978) (dissemination permitted for two years after arrest).

The federal regulations do not preclude resort to public records, such as police blotters, or public proceedings. 28 C.F.R. § 20.20 (1979). Under the proposed regulations, covered records would have had to be maintained chronologically. Proposed LEAA Admin. Regs., 40 FED. REG. 22114 (1975) (codified in 28 C.F.R. 20). Later direct access would thus have been more difficult because it would have required knowledge of a specific time period. *See* Nat'l L.J., June 18, 1979, at 31, col. 2. *See also* New Bedford Standard-Times Pub. Co. v. Clerk of the Third Dist., 387 N.E.2d 110 (Mass. Sup. Ct. 1979). The proposed regulation governing chronological recordkeeping was not adopted.

The LEAA adopted rules governing arrest records not followed by convictions. It could be argued that even arrest records followed by convictions should not be disseminated. The arrest record, after all, may describe an offense for which the offender, for a variety of reasons including a plea bargain, is not convicted.

136. *E.g.*, CONN. GEN. STAT. ANN. §§ 4-61n -4-61r (West Supp. 1979); FLA. STAT. ANN. §§ 112.011 (Supp. 1974-78); MINN. STAT. ANN. §§ 364.01 -364.10 (West Supp. 1979); WASH. REV. CODE §§ 9.96A.010 -9.96A.050 (Supp. 1976). *See* N.J. STAT. ANN. § 11:10-6.1 (West 1976).

137. MSCA, *supra* note 1, § 4-1005(b)(1). The section defines an employer by tracking the size and duration requirements of the Federal Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e.

138. MSCA *supra* note 1, § 4-1005(b)(2), (3).

139. N.Y. CORREC. LAW § 750 (McKinney Supp. 1979-80).

140. WIS. STAT. ANN. §§ 111.31, 111.32 (West 1974 and Supp. 1979-80).

141. HAWAII REV. STAT. § 378-2 (1976).

employers; Hawaii also covers both unions and employment agencies[142] while Wisconsin covers unions and education, health, and social welfare concerns as they relate to conditions of employment.[143]

Although it can be argued that a state should properly limit its prohibition of ex-offender employment discrimination to state employment and licensing, such a limitation places insufficient weight on the benefits of gainful employment that accrue both to the ex-offender and society.[144] Private employers are certainly prohibited from engaging in other types of employment discrimination.[145] There seems to be no particular harm in adding ex-offenders to that list of groups if employment can be refused when a direct relationship exists between the offense committed and the employment sought.

To avoid a possible caseload burden on the courts, claims of ex-offender employment discrimination by private employers can be handled by procedures already established to treat other claims of employment discrimination. The Model Sentencing and Corrections Act, as well as the Hawaii and New York statutes, do handle these claims in this manner.[146] The Model Act, for example, provides that the state's Equal Employment Opportunity Commission "has jurisdiction over ex-offender discrimination complaints in a like manner with its jurisdiction over other allegations of discrimination."[147] The Model Act was patterned after the statutory scheme described in the Hawaii act.[148] In New York these discrimination claims are referred for determination to the Division of Human Rights.[149]

D. *Direct Relationship Test: When Is It Met?*

Enactment of ex-offender employment discrimination provisions such as those of the Model Act and establishment of procedures to handle complaints arising under such a statute is a necessary first step in providing ex-offender employment. As described above, the Model Act and most of the state statutes allow discrimination only if a direct relationship[150] exists between the offense committed and the employment or license sought.[151]

142. *Id.* § 378-1.

143. WIS. STAT. ANN. § 111.32 (West 1974 and Supp. 1979-80).

144. *See* cases and authorities cited in note 12 *supra.*

145. *See, e.g.*, The Equal Employment Opportunity Act of 1972, § 2, 42 U.S.C. § 2000e.

146. In Wisconsin employment discrimination of ex-offenders is included within the general provisions of the Wisconsin Fair Employment statute. WIS. STAT. ANN. §§ 111.31, 111.32 (West 1974 and Supp. 1979-80).

147. MSCA, *supra* note 1, § 4-1005(d).

148. HAWAII REV. STAT. §§ 378-1 to 378-10 (1976).

149. N.Y. CORREC. LAW § 755 (2) (McKinney Supp. 1976).

150. MSCA, *supra* note 1, § 1005(c); FLA. STAT. ANN. § 120.011(1)(a) (West Supp. 1974-78); MINN. STAT. ANN. § 364.03 (West Supp. 1979); N.J. STAT. ANN. § 11:10-6.1 (West 1976); N.M. STAT. ANN. §§ 28-2-1 to 2-6 (1976); N.Y. CORREC. LAW § 752 (McKinney Supp. 1979-80) (direct relationship or "unreasonable risk to property or to the safety or welfare" of specific individuals or the general public); WASH. REV. CODE § 9.96A.020 (Supp. 1976). Connecticut's statutory standard is somewhat broader. CONN. GEN. STAT. ANN. § 41-61o (West Supp. 1979) (applicant "not suitable" based on time since conviction or release, rehabilitation shown, and nature of crime and its relationship to the

Thus, the determination whether a direct relationship exists is crucial. Yet several of the statutory definitions in existing legislation are either meager or nonexistent, providing no specific standard by which the initial employment or licensing decision can be made and, in turn, no specific standard by which a court can review an adverse decision to assure compliance with the legislative policy. Washington and Florida, for example, merely state that the direct relationship test is to be controlling[152] without any indication of what the test means or how to apply it. Hawaii's statutory test is "substantial relationship," but, again, there is nothing in the statute that defines just what a substantial relationship is or how it is to be found.[153]

Connecticut does provide some language with respect to when employment discrimination is permitted against ex-offenders, but the statutory language does not really provide guidelines for an employer or licensing agency with respect to how the determination is to be made; it merely directs consideration of the nature of the offense and its relationship to the employment or license sought, the degree of rehabilitation shown, and the time elapsed since conviction or release.[154] Listing these factors in the statute does eliminate other factors from consideration, but the factors are so broadly stated that they leave great room for maneuverability and probably obviate any need for additional factors. Minnesota provides no guidelines regarding what is meant by a direct relationship, but it does provide that even when a direct relationship exists, evidence of rehabilitation may outweigh the direct relationship.[155] New York provides the longest list of factors to be considered in applying a direct relationship test. These factors are: (1) New York's public policy in favor of hiring ex-offenders; (2) the requirements of the particular

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employment sought). Hawaii uses different language but its standard seems similar to "direct relationship." HAWAII REV. STAT. § 378(2) (1976) ("substantial relationship to the functions and responsibilities of the prospective or continued employment"). New Jersey, whose statute relates exclusively to civil service employment, uses an "adverse" relationship test.

New Mexico, although applying a direct relationship test, nonetheless permits discrimination in the absence of a direct relationship if a determination is made that the ex-offender is not sufficiently rehabilitated. N.M. STAT. ANN. § 28-2-4 (1978). In this case the ex-offender must receive the reasons in writing for the adverse decision. *Id.* The statute also provides that rehabilitation is presumed upon completion of probation or parole supervision or three years "clean time" after final discharge. *Id.*

151. For a list of the statutes that require use of a direct relationship test or some equivalent, see note 150 *supra*. There is no test of any kind mentioned in Wisconsin's fair employment statute. The statute was amended to include discrimination based solely on an arrest or conviction record. WIS. STAT. ANN. §§ 111.31, 111.32 (West Supp. 1979-80). The amendment is recent and there are no cases clarifying the scope of prohibited ex-offender discrimination in Wisconsin. Although no direct relationship test is included, practically speaking the Wisconsin statutory language, prohibiting discrimination "solely because" of an arrest or conviction record, should produce the same statutory interpretation and results as does the direct relationship test.

152. FLA. STAT. ANN. § 112.011(1) (West Supp. 1974-78); WASH. REV. CODE § 9.96A.020 (Supp. 1976).

153. HAWAII REV. STAT. § 378(2) (1976).

154. CONN. GEN. STAT. ANN. § 4-61o(a) (West Supp. 1979). New Jersey has a similar statutory scheme. N.J. STAT. ANN. § 11:10-6.1 (West 1976).

155. MINN. STAT. ANN. § 364.03 (West Supp. 1979).

employment sought; (3) the impact of the offense on job performance; (4) the time elapsed since commission of the offense; (5) the seriousness of the offense; (6) any evidence of rehabilitation; and (7) evidence going to employer interest and public safety and welfare.[156] Although the list of factors is long, it is, once again, not very specific in terms of the balancing that is required to determine whether a direct relationship exists.

The Model Sentencing and Corrections Act does provide detailed and directed guidelines for application of the direct relationship test. The Model Act requires evaluation of:

> (1) whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;
> (2) whether the circumstances leading to the offense will recur;
> (3) whether the person has committed other offenses since the conviction or his conduct since conviction makes it likely that he will commit other offenses;
> (4) whether the person seeks to establish or maintain a relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and
> (5) the time elapsed since release.[157]

The first two factors listed relate directly to consideration of the offense that was committed and the likelihood that the job or educational opportunity will provide circumstances or opportunities similar to those that led to the commission of that offense in the first place. These two factors are the heart of the direct relationship test and, whatever else the test could or should cover, it certainly covers these factors. Factors (1) and (2), then, assure that a bank need not hire a convicted bank embezzler nor need it hire an embezzler of any kind. There can be little argument that a legislative intent in establishing a direct relationship test was to permit these and similar decisions. The bank surely has an interest, if it chooses to assert it, in keeping an embezzler away. These first two factors will probably also permit decisions not to employ or license in situations in which the nexus between offense and employment is not quite so close. An offender who reacted to a pressure-filled job by a demonstration of assualtive behavior at work, for example, may properly be refused employment not only at that job but at other jobs creating similar pressures. Of use to that ex-offender would be evidence that his emotional state, changed by circumstances or psychiatric assistance, has improved sufficiently enough that he will not react to pressure as he did previously.

Factor (3), dealing with the subsequent commission of other offenses, relates less directly to a relationship between the primary offense in question and the employment, license, or educational opportunity sought. If not outweighed by the other factors, it operates to permit an employer to refuse to hire a repetitive offender even if none of the prior offenses are

156. N.Y. CORREC. LAW § 753 (McKinney Supp. 1979-80).
157. MSCA, *supra* note 1, § 4-1005(c).

related to the requirements of the job the ex-offender seeks. This result can be explained in part on the ground that job performance, or at least the employer's confidence in that performance, may be affected. The repeat offender's attention may be directed to the commission of other offenses, and, if he is charged with commission of another offense, his time on the job may be lessened by court appearances, lawyer conferences, and if convicted, subsequent incarceration. In part, a decision adverse to the repetitive ex-offender can also be explained as a recognition of legitimate employer interest both in his reputation in the community and in his faith in the reliability and stability of his work force. Although such results may at times be justified, the courts should be wary of too broad an interpretation of the scope of the authority to reject repetitive ex-offenders. Misuse of factor (3) could easily obviate much of the good to be achieved by an ex-offender employment discrimination statute.

Factor (4) reflects the employer's interest in refusing to rehire someone whose past offense has already produced an adverse effect on the employment relationship. Factor (4) thus protects the right of an employer to refuse to rehire the office troublemaker whose trouble was commission of a criminal offense for which he was prosecuted and convicted. In the case of theft of company property, the employer may have been the victim of the prior offense. In other cases the victim may have been another employee who was assaulted by the ex-offender. In either event, factor (4) makes express an employer's right to refuse to rehire the ex-offender.

Factor (4) is also intended to cover criminal conduct that occurred off company property, at least in those circumstances in which the original employment relationship is affected. For example, an employee who rapes another employee, after work hours and off the premises, is properly one that an employer could decide not to rehire. Factor (4), then, represents another reflection of an employer's legitimate interest in providing a pleasant and comfortable employment atmosphere and stable working relationships for himself and his employees. By recognizing such interests, factor (4) gives weight to the victim's interests[158] and balances against them both the personal employment interests of the ex-offender and the societal interest in providing employment to ex-offenders. If, as is entirely likely, the victim the ex-offender employee assaulted on the job and the victim he raped off the job would choose not to be employed where the ex-offender is employed, the Act permits the employer to continue the victim in his employ by refusing to hire the ex-offender. This solution is entirely reasonable.

The four factors described above provide criteria for determining that a direct relationship exists. Their presence leads to a decision not to

158. Factor (4), in its recognition of victims' interests, is consistent with a recognition of victims' interests reflected variously throughout the Model Act. *E.g.*, §§ 3-205 (presentence reports); 3-207 (sentencing hearing); 3-602 (restitution); and all of Article 5. There is today a growing awareness and attempt to deal with victims' interests. *See, e.g.*, MSCA, *supra* note 1, Art. 5, Prefatory Note.

employ or license, or to fire or revoke a license. These factors detail the considerations to be undertaken in making a decision adverse to the ex-offender. The thrust of factor (5), however, in its directive to consider time elapsed since release, points toward a decision favorable to the ex-offender. In other words, the longer the time elapsed, the less important become factors (1) through (4). Thus, a just-released three-time offender, even one who for the first time has employable skills to offer, might be refused employment because under factor (3) he is seen as likely to recidivate. If such a decision were upheld as an acceptable exercise of discretion on these facts,[159] most would agree that the decision would be much less acceptable two years later if the ex-offender is still "clean."

There is much to be said, in fact, for a provision in the ex-offender employment discrimination statutes that puts a time limit on the use of a conviction when no subsequent offenses are committed. Indeed, the existing Washington statute provides such a time limit.[160] It is quite reasonable to take the policy position, as Washington does, that a recent clean history is a more reliable predictor of recidivism than an old criminal record.[161] An earlier draft version of the Model Act set five clean years from release as the time after which a criminal conviction would no longer be considered. This is a sound legislative policy decision, at least as sound as that directing the expungement of records. But, whether the statute provides such an internal laches provision, it is still clear that the older the record the less likely that it can legitimately be the basis for a finding of a direct relationship leading to a refusal to license or hire.

Even an enumeration of the factors to be considered in applying a direct relationship test such as that found in the Model Act leaves a good deal of discretion to the decisionmaker. This is both good and necessary since legislation should not and cannot replace the decisionmaking function in a particular fact situation—legislatures need only set guidelines specific enough to structure appropriately the exercise of discretion, as was done in the Model Act. Those guidelines then serve a dual function. They dictate the parameters within the bounds of which the exercise of discretion occurs, and they provide a clear and specific standard against which a reviewing court may measure and judge the exercise of discretion.

Moreover, the Model Act leaves the employer (or licensing agency or labor union or school) with not only the specific fact determination, consistent with the factors delineated in the statute, but also with the power to make use of other, unlisted factors if they are consistent with the policy

159. This is not to suggest that such a decision would be the most reasonable. It could be argued that the three-time offender is as much in need of employment as anyone else and that gainful employment could prevent the recidivism (and might, in fact, have prevented the occurrence of his second or third offense).

160. WASH. REV. CODE § 9.96A.020 (Supp. 1976).

161. This is also true merely because the older a person is the less likely he is to commit an offense. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS STATISTICAL ABSTRACT OF THE UNITED STATES 187, Table 307 (99th ed. 1978) (56.3% of all arrestees under age 24).

embodied in the direct relationship test and with the five enumerated factors. The factors listed—those that must be considered—should, of course, assist in determining whether the additional factor used is reasonable and appropriate; thus, the listed factors will affect the number and scope of appropriate additional factors.

It should be reemphasized that the factors listed in the Model Act are intended not to be considered individually and to be individually decisive, but to be weighed one against the other in making a determination. Thus, the fact that the employment sought provides circumstances similar to those that produced the original offense (the pressure-filled job under which the assaultive behavior initially occurred) may well be outweighed by the ex-offender's exemplary conduct since his release one year ago,[162] or the fact that he is seeking a totally new employment situation with different co-workers.[163] The existence in a particular case of one or more of the first four factors, then, is not dispositive. Furthermore, as with the lawyer and law enforcement agency exemptions described earlier, nothing in the Model Act prevents an employer or licensing agency from deciding to provide the license or employment even in the face of what is fairly believed to be all four factors. Providing a chance to an employable ex-offender is, after all, what the ex-offender employment discrimination statutes are all about.

IV. CONCLUSION

Ex-offenders who find gainful employment after release are less likely to recidivate than those who do not. Correctional programs aimed at teaching employable skills and instilling good work habits can do their part—a substantial part—to assure that ex-offenders have employable skills, but these programs cannot assure the availability of employment opportunities upon release. The statutory retention of rights of offenders, or restoration of rights of ex-offenders, sets the framework. Ex-offender employment discrimination statutes can go a long way toward completing the picture.

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162. This is either incorporated under factor (3) or is an additional factor that reasonably should be considered.

163. MSCA, *supra* note 1, § 1005(c)(4).