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Employment of Former Criminals

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EMPLOYMENT OF FORMER CRIMINALS

[P]eona mori potest, culpa perennis erit (punishment can terminate, guilt endures forever).—Lord Coke[1]

More than fifty million people in the United States have some form of criminal record.[2] No doubt, most had only minor conflicts with the law and are today socially adjusted and employed. For them the shadow of prejudice may lurk in their minds only. But for those with more serious records, especially those who have served prison sentences, prejudice and legal barriers regularly deny employment opportunities. Economic need[3] then combines with discrimination[4] to become the chief causative factor sending one in three of this group back to crime.[5] Existing statutory attempts to deal with the problem have not proven effective, but federal legislation prohibiting most discrimination because of a criminal record may be a solution.

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1 Brown v. Crashaw, 2 Bulst. 154, 80 Eng. Rep. 1028 (K.B. 1614). *See also* 78 HARV. L. REV. 1676 (1965).

2 As early as 1956, some concluded that almost this many people had criminal conviction records. *E.g.*, A. NUSSBAUM, FIRST OFFENDERS—A SECOND CHANCE 8-10 (1956). Since then, these figures have probably increased. *See* PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 18-27 (1967) [hereinafter cited as NATIONAL REPORT]. In 1965, there were 3,695.2 arrests per 100,000 population in the United States, excluding arrests for traffic offenses. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, CRIME IN THE UNITED STATES, UNIFORM CRIME REPORTS—1965, at 108-09. Even assuming a high 63% recidivism rate to compensate for multiple offenders within one year, these figures suggest that over 1.6 million people are arrested for the first time each year.

3 Upon release from prison, the average ex-criminal has about $55 and a two-change wardrobe. He needs a job and needs it quickly. *See* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 311-20, 329, 359 (1964); Baker, *Preparing Prisoners for Their Return to the Community*, 30 FED. PROBATION, June 1966, at 49.

4 Of course the record of a conviction for a serious crime is often a lifelong handicap. There are a dozen ways in which even a person who has reformed, never offended again, and constantly endeavored to lead an upright life may be prejudiced thereby. The stain on his reputation may at any time threaten his social standing or affect his job opportunities . . . .

United States v. Morgan, 346 U.S. 502, 519 (1954) (Minton, J., dissenting). *Accord*, Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (dissenting opinion).

5 Estimates of recidivism vary from one-third to two-thirds of all former offenders. GLASER, *supra* note 3, at 13-35. The most recent studies indicate that roughly one-third of all offenders released from state and federal prisons are reimprisoned within five years. NATIONAL REPORT 45.

I

PROBLEMS OF EMPLOYMENT

A. *Private Prejudice and Employment Discrimination*

Several studies have demonstrated the extent of discrimination against former criminals[6] in private employment. Of 475 potential employers interviewed in New York City, .312 stated unequivocally that they would never hire a released offender; 311 of the 312 said they would fire such a man if they inadvertently hired him and later learned of his past.[7] In a recent study of employment agencies, seventy-five percent of those sampled said they refuse to refer any applicant with a record of arrest, whether or not followed by conviction.[8] Despite prison training programs, former offenders may be forced to accept employment at skill levels lower than they had before entering prison,[9] and there is considerable evidence that they are regularly underpaid.[10] A 1968 survey showed that seventy-two percent of the public are uneasy about working alongside ex-offenders.[11] Plainly, in the eyes of a majority of citizens and employers, the former offender, especially one who served time in prison, is an ex-convict rather than an ex-criminal.[12]

The former offender's employment problems have been noted by courts, criminologists, and penologists.[13] A description in a text de-

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6 Although a legal distinction is sometimes drawn between them, the terms "criminal" and "offender" are used interchangeably throughout this note.

7 Wyle, *The Employment of Released Offenders*, 25 PROBATION, Oct. 1946, at 10. Of those remaining, 62 said they were uncertain what they would do if confronted with this employment decision. The remaining 101 said they would hire a former criminal if he were otherwise qualified (*id.*), but only 46 had ever knowingly done so (*id.* at 11). For a more recent Canadian study with similar results, see Melichercik, *Employment Problems of Former Offenders*, 1 NAT'L PROBATION AND PAROLE ASS'N J., Jan. 1956, at 43.

8 NATIONAL REPORT 75. The standard federal government employment application (Form 57) was just recently modified to ask only about arrests followed by conviction. *Id.*

9 GLASER, *supra* note 3, at 330-32. A national survey taken in 1968 showed that when put in the position of hiring an ex-offender, the best the majority would offer is the possibility of a "janitorial or maybe production job, certainly not a white collar or supervisory position." Harris, *Changing Public Attitudes Toward Crime and Corrections*, 32 FED. PROBATION, Dec. 1968, at 12.

10 Hannum, *Problems of Getting Jobs for Parolees*, 6 NAT'L PROBATION AND PAROLE ASS'N J., Jan. 1960, at 185, 187-88.

11 Harris, *supra* note 9, at 12.

12 NUSSBAUM, *supra* note 2, at 3-4.

13 All threats of punishment or kindly efforts at "reform" are likely to be set at naught when an ex-prisoner returns to a poverty-stricken home and, after weeks

signed for use in prison pre-release programs is particularly illustrative:

> [A]s a general guide, the prison inmate must be prepared to meet both prejudice and competition. He must be ready to accept work in fields where the smallest number of people are looking for work, if necessary. Often his aptitudes and interests are such that he will wish to seek employment in a highly competitive field, in which case he should study the occupation to find which jobs are least competitive. Unwilling as he may be to accept employment requiring less than his full capabilities, he must understand that the job seeker must often begin where the opening occurs, relying on transfers and promotions to eventually bring him to his main or original goal.[14]

B. *Legal Barriers to Employment*

Where private prejudice does not make the ex-offender unemployable, the state may. Approximately sixty occupations in California require state licenses. Thirty-nine of the licensing laws permit denial, revocation, or suspension for conviction of a felony or of an offense involving moral turpitude.[15] All states[16] and a number of municipalities[17] have similar laws.[18] Licensed activity necessary to employment, such as driving, is frequently forbidden after conviction.[19]

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of sincere effort, finds society not too eager to assist him in obtaining honest employment.

S. & E. GLUECK, AFTER-CONDUCT OF DISCHARGED OFFENDERS 11 (1945). *See* sources cited in NUSSBAUM, *supra* note 2, at 1-14 nn.1-36.

14 A. LYKKE, PAROLEES AND PAYROLLS 73 (1957).

15 Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127, 136-37 (1967). Most of the remaining statutes provide for license denial if the offense is in any way connected with the licensed occupation. *Id. See also* Note, *The Effect of a Pardon on License Revocation and Reinstatement*, 15 HASTINGS L.J. 355 (1964); Note, *Entrance and Disciplinary Requirements for Occupational Licenses in California*, 14 STAN. L. REV. 533 (1962).

Of course, valid distinctions exist both between license denial and revocation and between denial or revocation for conduct related to the licensed occupation and for unrelated conduct. But these distinctions are irrelevant to the employment problems of former offenders. Unless otherwise indicated, all cases cited herein involve license revocation or denial for conduct unrelated to the licensed occupation.

16 S. RUBIN, THE LAW OF CRIMINAL CORRECTION 625 (1963); Note, *Restoration of Deprived Rights*, 10 WM. & MARY L. REV. 924, 929 (1969).

17 *See, e.g.*, Hirsh v. City and County of San Francisco, 143 Cal. App. 2d 313, 300 P.2d 177 (1956) (denial of municipal license to sell certain goods because of prior conviction upheld).

18 For the range of occupations covered, see Affeldt & Seney, *Group Sanctions and Personal Rights—Professions, Occupations and Labor Law*, 11 ST. LOUIS U.L.J. 382 (1968). *See also* Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

19 RUBIN, *supra* note 16, at 625.

The scope of some licensing laws can hardly be over-estimated. New York's Alcoholic Beverage Control Law, for example, not only denies a license to a former offender,[20] but also forbids a licensee to knowingly employ "in any capacity whatsoever" anyone convicted of a felony or of certain enumerated misdemeanors, including possession of burglar tools, receiving stolen goods, unlawful entry, prostitution, or vagrancy.[21] The only exceptions are offenders approved in writing by the State Liquor Authority or having executive pardons.[22]

License denials and revocations have been upheld under these laws[23] whether the statute specifically requires such action or merely outlines a test such as "good moral character," "inspire confidence," or "good repute." Similarly, unless the statute specifically provides otherwise, courts seem unconcerned whether the crime on which the denial is based is in any way related to the licensed occupation.[24] In *Page v. Watson*,[25] revocation of a medical license because of a perjury conviction was upheld. In *Branch v. State*,[26] the right to practice law was lost because of an assault conviction. In *Kaufman v. Taxicab Bureau*,[27] a young man arrested in connection with the distribution of socialist

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20 N.Y. ALCO. BEV. CONTROL LAW § 126(1) (McKinney Supp. 1969).

21 *Id.* § 102(2).

22 *Id.* That such approval is not easily obtained is illustrated by the story of a former long-term prisoner who wanted to wash dishes in one of New York's terminal restaurants:

> The employer knew about the applicant's crime and punishment but said, "Why shouldn't we give him a decent chance to get started?" We hurried the process, obtained the parole officer's approval, and filled out the required fingerprint forms and the lengthy petition. The would-be employer affixed his signature in all of the required places and we went hopefully to the ABC Board's headquarters for the sacred permission to work. But alas, the State Liquor Authority representative surveyed the completed documents, muttered something about "sex offense" in front of the petitioner, and forthwith rejected the application.

Hannum, *Employment Impediments for Offenders and Public Safety Regulations*, 27 FED. PROBATION, March 1963, at 32-33.

23 The statutes cover a wide range of occupations, but most of the cases involve professionals, particularly lawyers and doctors; the reason may be that their licenses are particularly valuable or that these men are more often able to afford the litigation expense. Cases involving these professions may distort licensing law in other areas of employment. Judges are notoriously keen to cleanse the legal profession of potential blight (*see* 43 CORNELL L.Q. 489 (1958)), and the importance of health demands that the highest possible standards be imposed on those who would administer to it (*id.* at 495). If the standards of these professions are established as precedent, the law is arguably prejudiced against the ex-criminal seeking licensed employment less affected with the public interest.

24 *See* text at notes 25-28 *infra*.

25 140 Fla. 536, 192 So. 205 (1939).

26 120 Fla. 666, 163 So. 48 (1935).

27 236 Md. 476, 204 A.2d 521 (1964), *cert. denied*, 382 U.S. 849 (1965).

literature in front of a college was denied a taxi license. Selective Service Act violations frequently lead to license denials or revocations.[28]

Public employment is even more strictly regulated than licensed occupations. In over half the states, public employment is closed to a person with a record of criminal conviction.[29] The United States military services generally refuse or strictly condition the enlistment of persons with criminal records.[30] Certain labor union activity by ex-criminals is prohibited by the Labor-Management Reporting and Disclosure Act of 1959,[31] and private employers working on Defense Department contracts are sometimes required, as a security precaution, not to hire former offenders.[32] Where the statutes do not prevent public employment entirely, the decision on hiring is regularly left to an administrative agency.[33] Here, practical politics dictates that few ex-criminals actually be employed.[34]

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28 *See, e.g.*, Application of Brooks, 57 Wash. 2d 66, 355 P.2d 840 (1960), *cert. denied*, 365 U.S. 813 (1961); Hannum, *supra* note 22, at 31.

29 RUBIN, *supra* note 16, at 613-14, 625-62. *E.g.*, PA. CONST. art. 2, § 7(1874), FLA. STAT. ANN. § 112.01 (1960). The more liberal laws prohibit public employment of ex-offenders for only a specified time after conviction—but this is the time when the ex-offender's need for a job is the greatest. *E.g.*, MASS. ANN. LAWS ch. 31, § 17 (1966). A number of other statutes permit but do not require denial of public employment because of a criminal record. *E.g.*, CAL. GOV'T CODE § 18935 (West 1963). Almost all states bar convicted offenders from certain types of public employment, such as police or correctional positions or those that require the regular handling of money. *E.g.*, ILL. ANN. STAT. ch. 24, § 3-6-5 (Smith-Hurd Supp. 1969). *See* RUBIN, *supra* note 16, at 625-26; Wise, *Public Employment of Persons with a Criminal Record*, 6 NAT'L PROBATION AND PAROLE ASS'N J., Jan. 1960, at 197. Statutes creating quasi-governmental authorities may also prohibit employing ex-offenders. *E.g.*, N.Y. UNCONSOL. LAWS §§ 9801-9937 (McKinney Supp. 1969) (New York-New Jersey Waterfront Commission Act). Municipal ordinances and regulations may be equally oppressive. For example, job specifications for New York City's vast hospital system include: "No arrest record. Fingerprints will be taken." Hannum, *supra* note 22, at 29.

30 10 U.S.C. § 3253a (1964). The policy is varied in time of war. RUBIN, *supra* note 16, at 626.

31 29 U.S.C. § 504a (1964).

32 LYKKE, *supra* note 14, at 73.

33 *See* RUBIN, *supra* note 16, at 628; Wise, *supra* note 29, at 197.

34 In the 1969 New York City mayoralty campaigu, Democratic candidate Mario Procaccino accused Mayor John Lindsay of demoralizing the city police by hiring "hardened criminals and troublemakers . . . for $100-a-week jobs." N.Y. Times, Oct. 20, 1969, at 1, col. 8 (city ed.). The city jobs were summer positions at a youth center, and the "hardened criminals" were ten parolee youths. *Id.*

In addition to the prohibitions discussed in the text, various state and federal criminal laws attach employment disabilities to the commission of specific crimes. *E.g.*, 18 U.S.C. § 2387 (1964). A prior conviction is not a statutory barrier to many federal jobs, but United States Civil Service Commission policy requires two years to elapse after discharge from a felony sentence, and one year after discharge from a misdemeanor sentence, before an applicant is considered for most positions. GLASER, *supra* note 3, at 414.

Case law on public employment of former offenders is sparse, but it suggests that neither courts nor state administrators hesitate to apply the laws stringently. In *Commonwealth v. Rudman*,[35] a Pennsylvania court defined the term "infamous crime," used in the employment disqualification section of the state constitution,[36] to include all felonies.[37] Similarly, in *Thomas v. Evangeline Parish School Board*,[38] a Louisiana court found that a twenty-five year old conviction required a school bus driver be fired from his job of ten years because the state constitution[39] forbids public employment of convicted offenders.

The vague wording of many licensing and public employment laws and the construction and application given them by the courts invite objections on due process grounds. Unfortunately, the common law distinction between right and privilege puts in doubt the very applicability of due process, let alone its violation.[40] If public employment or an occupational license is a right, it cannot be withheld or denied without due process; but if it is a privilege, due process is not required. The trend today, typified by *Schware v. Board of Bar Examiners*,[41] is probably to treat entry to an occupation as a right.

If the ex-criminal seeking employment is entitled to due process, his position is not much improved. The relation between a criminal past, vagueness, and reasonableness was discussed by the Supreme Court in the 1898 case of *Hawker v. New York*:[42]

> [The State] may require both qualifications of learning and of good character, and, if it deems that one who has violated the criminal laws of the State is not possessed of sufficient good character, it can deny to such a one the right to practice . . . , and, further, it may make the record of a conviction conclusive ev-

35 56 Pa. D. & C. 393 (County Ct. 1946).

36 PA. CONST. art. 2, § 7 (1874).

37 "Infamous crime" was defined as one that renders a person "incompetent to be a witness thereafter" or "disables a man to be a witness or juror." Commonwealth v. Rudman, 56 Pa. D. & C. 393, 400-01 (County Ct. 1946). "Persons who have been convicted of felonies are ineligible for jury service." PA. STAT. tit. 17, § 1333 (1962). *But see* Otsuka v. Hite, 64 Cal. 2d 596, 51 Cal. Rptr. 284, 414 P.2d 412 (1966) (conscientious objector who pleaded guilty to Selective Service Act violation had not committed an "infamous crime" within California constitutional provision barring those who had from exercising franchise); *In re* Buehrer, 50 N.J. 501, 236 A.2d 592 (1967) (summary contempt proceeding not a conviction for disability purposes); States v. Jones, 105 N.J. Super. 493, 253 A.2d 193 (County Ct. 1969) (summary conviction for contempt not within employment disqualification statute).

38 138 So. 2d 658 (La. App. 1962).

39 LA. CONST. art. 8, § 6 (1946).

40 *See* sources cited note 18 *supra*.

41 353 U.S. 232 (1957). *See also* Note, *supra* note 16, at 930.

42 170 U.S. 189 (1898).

> idence of the fact of the violation of the criminal law and of the absence of the requisite good character.[43]

The Court cited *Hawker* in 1960 in *DeVeau v. Braisted*,[44] in which New York's power to prohibit the employment of all ex-criminals in certain waterfront jobs was sustained. *Schware* also suggests that the *Hawker* rationale is still viable; although it indicates the Court's willingness to examine arbitrary administrative decisions that deny entry to a profession, the opinion points out that Schware had never been convicted of a crime.[45] Nor does absence of a connection between the occupation and the violation offend due process;[46] in *Barsky v. Board of Regents*[47] the Court upheld a denial of a physician's license based on a conviction for refusing to provide information to the House Un-American Activities Committee. In effect, the courts have held that it is reasonable for statutes and administrative authorities to classify all former offenders as unfit for any type of employment because of "character."

II

Existing Remedies

Suspended sentence, probation, parole, pardon, and expungement are present-day penal concepts aimed at rehabilitation. By keeping a convicted criminal out of prison, a suspended sentence or probation allows him to keep any job he may still have after the trial. So modifying a sentence, however, generally has little effect on the legal consequences of conviction on licensing and public employment.[48] A paroled

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43 *Id.* at 191.

44 363 U.S. 144 (1960).

45 353 U.S. at 337.

46 On at least this question, *Hawker* is dicta. In *Hawker* a physician's right to practice was revoked for conviction for performing an abortion, a crime clearly related to the licensed occupation. *See* note 15 *supra*.

47 347 U.S. 442 (1954). On the necessity of a relationship between the offense and the occupation the Court stated:

> The issue is not before us but it has not been questioned that the state could make it a condition of admission to practice [medicine] that applicants shall not have been convicted of a crime in a court of competent jurisdiction either within or without the State of New York.

Id. at 451.

48 For example, the term "conviction," as used in § 17, chapter 31, of Massachusetts Annotated Laws, which forbids civil service employment for "one year after . . . conviction of any crime against the laws of the commonwealth," applies to a case where a fine is imposed after a plea of nolo contendere and to a case where there is a finding of guilt and the subsequent fine or sentence is suspended. *See* 1933 Mass. Op. Att'y Gen. 56.

convict's criminal record similarly frustrates his attempts to find employment;[49] this is generally regarded as the primary reason that a majority of parolees fail successfully to complete parole.[50] Moreover, because a convict usually must have a job before he can be paroled, many men remain in prison long after they might have been released.[51]

A. *Pardon*

Some form of executive or legislative pardon is available in thirty-seven states.[52] Some states provide for the automatic restoration of certain rights upon satisfactory completion of the court-imposed sentence or at some specified time thereafter;[53] a few provide an administrative mechanism for obtaining a certificate of rehabilitation or good behavior.[54]

Except for those providing automatic restoration, however, little use is made of these laws.[55] The generally complex mechanics of applying for pardon or restoration of rights[56] may in part account for this, but the main reason restoration is not sought more often by former criminals is probably its limited practical value. The right to hold public employment is among those rights generally mentioned as restorable.[57] In ten states, however, pardon restores only the franchise.[58] In at least five other states, the only rights returned are those

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49 Parole regulations, particularly those that restrict travel across county lines, further reduce the employment potential of an ex-criminal. *See* LYKKE, *supra* note 14, at 68.

50 *See* Russell, in E. STUDT, THE RE-ENTRY OF THE OFFENDER INTO THE COMMUNITY iii (1967). *See also* STUDT, *id.* at 12-13 (employment problems); *id.* at 16 ("strategic importance" of job in parole success).

51 GLASER, *supra* note 3, at 321.

52 C. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE AND PARDON 43-44 (3d ed. 1968).

53 *E.g.*, S.D. CODE § 23-48-35 (1969); WIS. STAT. ANN. § 57.078 (Supp. 1969). *See also* NEWMAN, *supra* note 52, at 45-46.

54 *E.g.*, CAL. PENAL CODE § 4852.01 (West 1956); N.Y. EXEC. LAW § 242 (McKinney Supp. 1969).

55 In New York, for example, where several thousand people are convicted each year, only 176 applications for certificates of good conduct were processed in 1954. Of these, only 67 were granted. For these and similar statistics from other states, see RUBIN, *supra* note 16, at 636-37.

56 Applications may have to be filed by a certain date. In over half the states, the applicant must inform the public by newspaper publication or must notify the judge and/or prosecutor at his conviction. Recommendations from the judge or prosecutor or from the general public may be required. Sometimes neighborhood and employment inquiries are made by the uniformed authorities, and there may be a filing fee. *Id.* at 599-605.

57 The other rights generally considered to be restorable are the rights to vote, to serve on a jury, and to be a witness. *Id.* at 606. *See also* Note, *supra* note 16, at 926-28.

58 NEWMAN, *supra* note 52, at 44.

specifically mentioned in the pardon.[59] Furthermore, a pardon in no way erases a record of conviction or hides it from public view; private employers still have access to the record.[60]

Where the statutes are silent, the courts have restricted the effect of a pardon and other forms of restoration. In *Ex parte Garland*[61] the Supreme Court said, with respect to confederate sympathizers, "[a pardon] blots out the existence of guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the offense,"[62] but courts regularly by-pass this logic in dealing with more common offenders.[63] The case law is clear that a pardon does not restore a license or position of public employment revoked or lost because of conviction. A policeman discharged upon conviction is not reinstated by pardon;[64] an attorney is not automatically readmitted to the bar.[65] A pardon does not even prevent subsequent license denial or revocation because of the conviction. In *Baldi v. Gilchrist*[66] a taxi driver was denied a license renewal in 1922 because of a 1914 felony conviction, even though he had been pardoned in 1920.[67]

B. *Expungement*

In an attempt to lessen the penalties that public opinion imposes on former offenders, a few states have adopted "expungement" statutes. Under most statutes expungement is available only to minor offenders and only after a lengthy waiting period.[68] Remedies offered

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59 *Id.*

60 Cozort, *The Benefits of Executive Clemency*, 32 FED. PROBATION, June 1968, at 34.

61 71 U.S. (4 Wall.) 333 (1867).

62 *Id.* at 380.

63 *See* NEWMAN, *supra* note 52, at 47; RUBIN, *supra* note 16, at 605-10.

64 *See* Morris v. Hartsfield, 186 Ga. 171, 197 S.E. 251 (1938).

65 *In re* Stephenson, 243 Ala. 342, 10 So. 2d 1 (1942). *See also* State v. Hazzard, 139 Wash. 487, 247 P. 957 (1926) (physician's license not restored by pardon). Where the pardon was granted because of innocence it may have more weight. *See In re* Kaufmann, 245 N.Y. 423, 157 N.E. 730 (1927).

66 204 App. Div. 425, 198 N.Y.S. 493 (1st Dep't 1923).

67 Perhaps the most the pardoned ex-offender can hope for is that the pardon will be evidence that the licensing authority must consider. *See* Feinstein v. State Bar of California, 39 Cal. 2d 541, 248 P.2d 3 (1952) (readmission to the bar); Slater v. Olson, 230 Iowa 1005, 299 N.W. 879 (1941) (application for civil service position).

68 New Jersey and California offer the remedies closest to complete expungement. Note, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CALIF. WESTERN L. REV. 121, 125 (1967). Under the New Jersey statute, a conviction for other than specified crimes, including arson, robbery, burglary, carrying a concealed weapon, and assisting or concealing persons accused of serious misdemeanors, may be expunged after ten years if the sentence was suspended or imposed only a fine of $1,000 or less. N.J. REV. STAT. § 2A:164-28 (1937).

by these laws vary[69] from nothing more than a judicial pardon to the entry of a *nunc pro tunc* dismissal of charges, but even the most advanced law, California's,[70] is of limited practical effect.

Like most state expungement laws, the California law allows anyone sentenced to probation or convicted of a misdemeanor to have the court set aside the verdict of guilt and enter a dismissal of charges against him after the completion of his sentence. By itself, this is an ineffective procedure; it directs the court to make an entry in the record that the conviction has been expunged but does not limit public access to the record as a whole. Furthermore, the statutory provision that the offender is thereafter "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted"[71] has been riddled with exceptions by California's courts and legislature.[72] In *In re Phillips*[73] and *Meyer v. Board of Medical Examiners*,[74] the court held that expungement prevented neither disbarment of an attorney nor revocation of a medical license because of the criminal conviction. The California legislature codified these holdings[75] and extended them to five other occupations.[76] One California court recently held that a beer license may be denied for lack of good character as evidenced by an expunged bad check conviction, although there is no statutory provision limiting the effect of expungement in this area.[77]

The California law is unique among expungement laws in providing that the complete record of the arrest, trial, and conviction may be sealed from public access if the offense occurred before the offender

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69 For a list of expungement statutes classified by effect, see Note, *supra* note 68, at 125 n.28.

70 CAL. PENAL CODE §§ 1203.4-.4a, 1203.45 (West Supp. 1968).

71 *Id.* §§ 1203.4, 1203.4a.

72 Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127, 136-39 (1967). The same has happened in other states.

73 17 Cal. 2d 55, 109 P.2d 344 (1941).

74 34 Cal. 2d 62, 206 P.2d 1085 (1949).

75 CAL. BUS. & PROF. CODE § 6102 (West 1964) (lawyers); *id.* § 2383 (doctors).

76 *Id.* § 1679 (dentists); *id.* § 2963 (West Supp. 1968) (psychologists); *id.* § 10177 (West 1964) (real estate brokers); *id.* § 10562 (mineral-oil-gas brokers); CAL. EDUC. CODE § 12911 (West 1969) (teachers). *See* Note, *supra* note 72, at 137-38.

77 Copeland v. Department of Alcoholic Beverage Control, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (1966). The court appeared to believe that the legislature had supported and would continue to support judicial narrowing of expungement. Note, *supra* note 72, at 138.

Federal courts have similarly ignored state expungement; in Taylor v. Macy, 252 F. Supp. 1021 (S.D. Cal. 1966), the court held that an expunged state conviction for lewd vagrancy was an adequate basis for federal civil service dismissal.

reached the age of twenty-one.[78] If the record is sealed, "the conviction, arrest and other proceedings shall be deemed not to have occurred, and the petitioner may answer accordingly any question relating to their occurrence."[79]

Sealing in California has little practical effect; although the records are closed to the general public, they are not destroyed. They are still used by law enforcement agencies, and this may keep them open to the public indirectly.[80] The effect of state expungement on FBI use of criminal records appears to be unlitigated,[81] but a security check done for employers engaged in defense work apparently reveals any expunged record.[82] Private employers are often able to avoid the statutes by requiring the applicant "to state whether he was ever arrested or taken into custody, or [by asking him] . . . to sign waivers permitting the court to release otherwise confidential information."[83]

A number of reformers have long advocated expungement sealing as the only effective means to enable former criminals to adjust and find employment.[84] These hopes have not been fulfilled in California, in part because the sealing is imperfect. But even if criminal records could be effectively sealed, expungement laws are inherently problematical. The statutes are designed to facilitate concealment. They deprive employers and others of the right to know the truth about the man with whom they are dealing.[85] At the same time, concealment puts the former offender in the position of being discreditable, a position hardly more enviable than being discredited.[86] In short, the laws at-

78 CAL. PENAL CODE § 1203.45 (West Supp. 1968). Many states provide for the sealing of only juvenile records. *E.g.*, N.Y. CODE CRIM. PROC. § 913-f (McKinney 1958).

79 CAL. PENAL CODE § 1203.45(a) (West Supp. 1968).

80 Booth, *The Expungement Myth*, 38 LOS ANGELES BAR BULL. 161, 163 (1963). *See also* Note, *Guilt by Record*, 1 CALIF. WESTERN L. REV. 126, 135 (1965).

81 The federal courts, however, have indicated a willingness to ignore state expungement. In Adams v. United States, 299 F.2d 327 (9th Cir. 1962), the court held that even if Adams had obtained the full benefit of California's expungement law, he would still be gnilty of leaving the United States without registering as a former narcotics offender under 18 U.S.C. § 1407 (1964). *See also* Taylor v. Macy, 252 F. Supp. 1021 (S.D. Cal. 1966).

82 Booth, *supra* note 80, at 163.

83 NATIONAL REPORT 75.

84 *E.g.*, NUSSBAUM, *supra* note 2, at 26-54.

85 The right of people to know the truth about those with whom they deal is an important right. In some cases, *e.g.*, the securities industry, violating this right with an expungement law may do more harm than good to society as a whole. *See, e.g.*, 1 CCH FED. SEC. L. REP. ¶ 8195, item 16.

86 *See In re* Holmes, 379 Pa. 599, 612-13, 109 A.2d 523, 529 (1954) (dissenting opinion); GLASER, *supra* note 3, at 351; E. GOFFMAN, STIGMA 41-42 (1963). The possibility of being discredited will exist at least as long as the records are not completely destroyed.

tempt to build on a lie personal relationships that can only develop through mutual trust and respect.

III

A New Approach

The weight of law and opinion is set against employment of ex-criminals. At least in the areas of public employment and licensing, this position is a sad commentary on the state's opinion of its ability to reform offenders. The position is also self-sustaining: each refusal to hire an ex-criminal contributes to a massive barrier to employment and thus encourages recidivism, which in turn justifies the next refusal to hire. But to criticize the present situation is not to devise a means for putting the scales into a more even balance. Guidance may be had by comparing laws that effectively restore rights to former offenders with those that are ineffective, and by examining how analogous discriminatory situations have been handled in the past.

Because society is unwilling to give up its right to know, indirect methods of blotting out past crimes with pardons or expungement laws are generally ineffective to restore rights to former offenders. On the other hand, laws that approach the problem directly, take the past for what it is, and give the ex-criminal the power to deal with it have been successful. State automobile insurance laws that provide for assigned-risk coverage, for example, generally enable former offenders to obtain insurance where they are allowed to drive.[87] Similar laws could be enacted to cover employment bonds, which many jobs require and which are regularly denied former offenders.[88]

There are today federal laws against discrimination in employment because of sex and age.[89] It is frequently both reasonable and economic for an employer to hire a man instead of a woman or a young man instead of an older one.[90] The law, however, establishes an over-

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87 Rates may be higher, but the offender at least obtains the insurance. Rubin, *supra* note 16, at 643.

88 *See* Lykke, *Attitude of Bonding Companies Toward Probationers and Parolees*, 21 Fed. Probation, Dec. 1957, at 36.

The results of two HEW-supported experimental programs in bonding former offenders indicate that such a law would not be an unbearable burden on the insurance industry. Despite the fact that several of the men were involved in difficulties with the law outside their employment, all 150 bonds went claim-free the first year. *Bonding Ex-Cons Proves a Success*, 71 Nat'l Underwriter, Aug. 11, 1967, at 1.

89 42 U.S.C. § 2000e-2 (1964) (sex); 29 U.S.C. §§ 621-34 (Supp. IV, 1965-68) (age).

90 A young woman is more likely to leave work after marriage than is a

riding national concern for the welfare of these groups, which requires that they be employed even when it is reasonable to discriminate against them. Similarly, in many instances it may seem reasonable to an employer not to hire an ex-criminal.[91] Again, however, the national interest in crime prevention and the welfare of former offenders may require that employment discrimination against them be outlawed.[92]

The law against employment discrimination based on age provides a particularly good model for such legislation, because of the discretion it allows the Secretary of Labor in enforcement.[93] Some discrimination relating to employment requirements is allowed. For example, it is legal to require an airline pilot to retire at age sixty in the interests of public safety,[94] but it is illegal to refuse to hire older workers merely because the average cost of employing them as a group is higher than that of employing younger workers.[95] Similarly, banks should not be required to hire thrice-convicted bank robbers as security guards, but an employer should not be able to refuse to hire ex-offenders simply because he feels they are all untrustworthy. As in the age discrimination law, employability must be the general rule, and the burden of establishing exceptions must be placed on employers.[96] All exceptions should be construed narrowly,[97] and perhaps none should be allowed a given length of time after conviction.

The myriad of statutes that encourage and often require discrimination against former offenders present a problem that the laws

man. Similarly, hiring younger rather than older men probably leads to less employee turnover and thus to long-run savings in the expense of finding and training employees.

91 Employers' fears are probably not justified. Twenty-four states and the federal government now have some form of work release program. Carpenter, *The Federal Work Release Program*, 45 NEB. L. REV. 690 (1966). Most of the employers who have participated have registered favorable reactions. *See id.* at 692-93; *The Employees Who Got a Second Chance*, 55 NATION'S BUS., April 1967, at 90. Successful attempts to cut recidivism by using community pre-release guidance centers or half-way houses have led the federal government to authorize their expansion. 18 U.S.C. § 4082 (Supp. IV, 1965-68). *See also Hearings on H.R. 6964 Before Subcomm. Number 3 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 2-5 (1965) (statement by N.D. Katzenbach); Long, *The Prisoner Rehabilitation Act of 1965*, 29 FED. PROBATION, Dec. 1965, at 3; note 88 *supra*.

92 There is a fundamental distinction between sex or age, the determination of which are beyond one's self-control, and a criminal record, by which society places blame on the offender. Justification for discrimination along the lines of such a distinction, however, looks toward retribution rather than rehabilitation. And it is rehabilitation that those who enforce our criminal laws tell us is the goal to be sought. *See Hearings, supra* note 91, at 2.

93 29 U.S.C. §§ 622, 625, 626 (Supp. IV, 1965-68).

94 29 C.F.R. § 860.102(d) (1969).

95 *Id.* § 860.103(h).

96 *Cf. id.* §§ 860.102(h), 860.103(e).

97 This is the rule under the age discrimination law. *Id.* § 860.103(e).

against sex and age employment discrimination did not have to face.[98] There seems to be no reason why a federal law aimed at employment discrimination based on criminal records could not sweep aside these state laws or unify those reasonable regulations they contain.[99] Moreover, even if Congress chose not to test its power to systematize the existing state laws, a federal law banning private discrimination against former offenders might be persuasive to a court attempting to establish the due process standard of reasonableness required of civil service commissions and licensing authorities.[100]

Such a law need not be politically inexpedient. Public opinion might not be inalterably opposed to such a law; the Harris survey showed that sixty percent of the public were aware of the employment problems of ex-offenders and were not adverse to change.[101] Further, the cost of keeping a man in jail and the burdens on police, courts, and prisons resulting from recidivism are staggering.[102] If recidivism rates can be lowered by removing many of the economic incentives to return to crime,[103] society records a positive dollar saving.[104]

Such a law approaches the problem of discrimination directly. It lets the employer know with whom he is dealing. He can take safety

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98 Both these laws specifically exempt state public employment from their coverage. 42 U.S.C. § 2000e(b) (Supp. IV, 1965-68) (sex); 29 U.S.C. § 630(b) (Supp. IV, 1965-68) (age).

99 The importance of licensed occupations to interstate commerce is probably enough to bring state licensing within the range of congressional control. In addition, probably many people are convicted in one state and denied a license in another.

Any possible tenth amendment barrier to federal regulation of state employment practices was recently overcome in Maryland v. Wirtz, 392 U.S. 183 (1968). On the basis of the commerce power the Supreme Court there upheld the congressional extension of the minimum wage and maximum hours provisions of the Fair Labor Standards Act to schools and hospitals operated by states and their political subdivisions. *See* 43 NOTRE DAME LAW. 414 (1968).

100 For an example of statutes used as persuasive authority on the question of reasonableness, see DeVeau v. Braisted, 363 U.S. 144, 157-60 (1959).

101 As with violence and its causes, so with ex-offenders. The public says, "Something should be done!" But, "let others do it." In effect, people are saying today "Yes, I want desperately to see something done and, by golly, I'll sit right by my television set and cheer it as I watch it done"—as a perfect spectator, you see, but not as a participant.

Harris, *supra* note 9, at 12.

102 Annual cost in 1968 to maintain a single man in prison was $2,500. Sultan, *Prisons and the Public Purse*, 4 CRIM. L. BULL. 90 (1968). *See also Criminals Should Be Cured Not Caged*, 6 AM. CRIM. L.Q. 133 (1968).

On the cost of crime generally to society, see NATIONAL REPORT 31-35.

103 *See* note 3 *supra*.

104 Such a dollar savings may be applied to underwrite by the public the cost of insuring the occasional employer who is damaged when a former offender violates the trust placed in him and reverts to criminal ways.

precautions if he chooses,[105] and he may even refuse to hire an applicant because of a relevant criminal past. At the same time it gives the former offender a realistic hope for employment.[106] This hope is based not upon undependable public sympathies or discreditable statements but upon rights secured in law.[107]

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105 It might be desirable for the state or federal government to automatically bond former offenders to encourage employers to hire them and to protect cooperating employers from recidivism. If the premise of this note—that suitable employment reduces recidivism—is correct, the expense of such insurance would be low. *See* note 88 *supra.*

106 In a recent study of prison inmates close to parole, their estimates of failure on parole varied from 50% to 90%. STUDT, *supra* note 50, at 21 n.5. Another study of prisoners close to release showed their principle post-release aim was to "settle down and stay out of trouble." Their anticipated major problem was finding adequate employment and "in many instances the attitude that an 'ex-con can't get a decent job anyway' doomed any attempted interpretation." Baker, *supra* note 3, at 46.

107 The need to restore dignity and self-respect is an essential element in the rehabilitative process. *See* NUSSBAUM, *supra* note 2, at 6-7.