LOUISIANA-

BARRIERS TO THE EMPLOYMENT OF FORMER OFFENDERS

LEGAL CONSIDERATIONS

GOVERNOR'S PARDON, PAROLE AND
REHABILITATION COMMISSION

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I. OVERVIEW OF THE BARRIERS TO THE EMPLOYMENT OF FORMER OFFENDERS

For the recently released offender, freedom, as in the popular folk tune, may be just another word for nothing left to lose. If his incarceration has been lengthy, he may have lost contact with his family and friends. His ability to make responsible decisions could depend on how well he resisted institutionalization. Prison gave him a bed, food and a place to belong, however unpleasant and unnatural. Shut out of prison, he may have no particular place to go and no knowledge of how to get there. The euphoria of being free could well fade with the few state-issued dollars in his pocket.

For most offenders, the first search is for a source of income. Apart from its necessity for sheer survival, a job is a source of identity for people, offenders included. The level of skill and the income it produces molds a worker's self-image and his life style. With an ex-offender, a special danger lurks that, if he is disillusioned in the job market, he will drift back towards criminality. While a return to crime should not be excused, neither should additional barriers be erected to prevent an ex-offender from finding satisfying work.

> If the offender is to be rehabilitated, two things must be done: he must be made a part of groups emphasizing values conducive to reform and law-abiding conduct, and he must concurrently be alienated from groups whose values are conducive to criminality./1/

Various studies have found links between unemployment and criminality. Adult property crimes rise sharply with unemployment and drop as sharply with full employment.[2] The largest proportion of criminal behavior is in the working class and the bulk of those offenses are

property-related.[3] These correlations do not necessarily mean unemployment causes crime. An interaction of other factors, known and unknown, may well cause both unemployment and crime, and surely once a person has a criminal record, his chances of finding suitable employment are impaired. Nevertheless, the correlations are so predictable that one analyst has concluded that unemployment is a principal cause of recidivism.[4] In fact, the employment pattern of an offender prior to incarceration is one of the best predictors of his success once released--those with a good working record previously are less likely to recidivate once discharged.[5] Employment is conducive to an "integrated 'style of life'" which includes "non-recidivism, successful marriage, and satisfaction in other social relationships."[6] The conclusion is both common sensical and scholarly--an ex-offender without a job is more likely to return to crime than one who has a job.

Yet, the unemployment rate of ex-offenders is high. One study found that one-third of federal releasees were unemployed a month after release, and only one-fourth were working at least 80% of the time.[7] After three months, 20% were still without work and another 40% were part-timers, or underemployed.

Another survey of federal ex-offenders found that 63% had full-time jobs, 20% part-time and 17% were unemployed.[8] Among the non-offender work force at the same time, 81% were fully employed, 9% part-time and only 5% unemployed. The highest rate of unemployment for offenders is in their first six months after release, which is also the peak period for recidivism.

The employment prospects for ex-offenders are bleak for a number of reasons. Offenders disproportionately come from racial or ethnic minorities, are without a high-school education and are lacking in job skills or work habits. They come from neighborhoods where crime, drug usage, inadequate housing and unemployment fester.[9] The prison experience is apt to embitter the offender further and fortify his junglelike techniques for survival.

Even if the offender does genuinely seek a new life, he is likely to be stigmatized by his criminal record. In one public opinion poll, nearly 75% of those queried said they would feel uncomfortable working alongside an ex-offender and that they would pause before hiring such a person for a position involving trust or responsibility.[10] One intriguing study polled teachers, farmers and maintenance men as to what rights and privileges they felt ex-offenders were entitled to regain.[11] While the questions covered a wide range of topics, the following results were obtained with respect to employment opportunities:

Right	Percentage Favoring Resumption of Right[12]		
	Teachers	Farmers	Maintenance Men
Resume his profession	76.5	56	68.4
Get a job	99.1	92	100
Conduct business	92	80	78.9
Hold public office or positions of public trust	45.6	18	43.2

While a large percentage of each group favored ex-offenders being allowed to at least get a job, a significantly smaller percentage of each group was inclined to let him resume his particular profession.

A still smaller percentage of each group would permit his entry into public employment. The teachers were the most amenable to opening employment opportunities to ex-offenders, while the farmers were the most punitive or distrustful. Worth noting is that 8% of the farmers did not even feel an ex-offender should be allowed a job at all!

Attitudes of employers have also been probed. One study found that approximately 65% of the private employers polled would flatly refuse to hire an ex-offender and would fire a worker who turned out to be an ex-offender.[13] Another poll found 16% of private employers who had policies which absolutely banned hiring ex-offenders.[14] In a more detailed study, only 11% of the employers queried would hire a person with an assault conviction, and only 33% would accept a person who had been charged with assault and acquitted.[15] A survey of employment agencies found 75% unwilling to refer anyone with even an arrest record.[16]

Even if an offender is fortunate enough to find a trusting employer, he is likely to be relegated to more menial tasks. In one survey of employers, 84% were willing to consider an offender for an unskilled job, but only 64% would consider him for a skilled job, 40% for a clerical position, 8% for salesman and none for a position of cashier, accountant or executive.[17] Even those employers willing to hire ex-offenders give a preference to non-offenders if choice is possible. As one employer explained,

> The company's primary role in society is to be a profit-making venture and not a nursing home for the world's ailing. Management must be convinced that ex-offenders can be hired without risk to the company's normal business goals./18/

While the stigma is apparent and real, its basis is somewhat ficticious. The image of the violent criminal is probably what conjures up the fear, yet that category of criminals accounts for a small percentage of the total crime. Robbery and property offenses account for the vast majority of reported crime.[19] Worth noting is that among employers actually willing to hire offenders, violent criminals have been the better employment risks while such bland-sounding offenders like check forgers and embezzlers are the worst.[20] Worth noting also is that in one survey of employers, those who flatly refused to even consider an ex-offender had had no experience, good or bad, with employing offenders.[21] Employers who do hire offenders report a generally favorable result.[22]

In addition to deficient background and the stigma of a criminal record, ex-offenders are blocked from certain types of jobs because of bonding requirements.[23] In large retail and service businesses, it is not unusual for the company to be bonded against employee theft. These low-cost blanket bonds frequently provide that the coverage is void if the employer knowingly hires a person with a criminal record. Individual bonding to cover individual employees is prohibitively expensive.

On top of all the other obstacles, the law itself has erected several barriers to the employability of ex-offenders, particularly in the areas of government work and licensed occupations.

Laws which disqualify persons from public employment are largely an adjunct to the "civil death" that historically occurred when a person was convicted.[24] Under this concept, offenders not only suffered

the particular penalty imposed but were stripped of their rights and privileges as citizens as well. The more modern rationale for the disqualification is to protect the public from corrupting influences in their government.[25]

Federal, state and local governments employ millions of people. Public employment includes the prestigious posts of elected and appointed office as well as the multitude of jobs not appreciably different from those in the private sector.

Many states have constitutional or statutory provisions that effectively disqualify former offenders from elected or appointed office.[26] Ironically, the federal government does not disqualify ex-offenders as candidates for President, Vice President, U.S. Senator or U.S. Representative.[27] The federal government and most of the state governments do provide for forfeiture of public office if convicted of a crime.[28]

As for the more routine positions of public employment, federal law prohibits certain classes of offenders from obtaining jobs in the federal government.[29] Federal law also limits the labor union activity possible for ex-offenders and sometimes requires private contractors, working on federal projects, not to hire former offenders.[30] Ex-felons are generally ineligible to enlist in the U.S. military forces.[31] Even in the absence of direct prohibitions, federal agencies have broad discretion in hiring. Fortunately for the ex-offender, the U.S. Civil Service has joined the trend towards reintegration of offenders and now more sympathetically considers their applications for employment.[32]

As for state public employment, one survey found that 10% of the

state governments specifically disqualify convicted persons; one-fifth can disqualify those guilty of notoriously disgraceful conduct and one-third can disqualify someone on the basis that he is unfit.[33] The exclusions arise sometimes from constitutional or statutory provisions but more often from administrative rule, such as civil service regulations and agency discretion.[34] Very few former offenders have actually been hired and those able to find work have been relegated to lowly, unskilled jobs.[35]

Louisiana's former offenders are fortunate in that they live in one of the few jurisdictions that apparently do not disqualify them from public employment. Under Article 1, Section 20 of the 1974 Louisiana Constitution, "(f)ull rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." Prior Louisiana Constitutions specifically prohibited unpardoned offenders from holding public office or other positions of trust in the state.[36] This was interpreted to cover even a job as a public school driver.[37]

During the debate on Article 1, Section 20, the delegates were clear in their intention that the provision would allow former offenders to serve in elected and appointed offices.[38] The debate is less express as to public employment generally, but the delegates did indicate that those barriers would be lifted as well.[39] The state civil service has so interpreted the provision and accepts applications from former offenders.

Unpardoned ex-felons are still ineligible for those positions of public employment that entail carrying a firearm. Federal law requires

that an ex-felon must be pardoned and must also receive a certificate of relief from the federal government before he may legally possess a firearm.[40]

In allowing former offenders the right to hold public office, Louisiana is endorsing the fundamental principle that in a democracy the voters should decide whom they wish to elect, including ex-offenders. As for public employment generally, by lifting those impediments, the state is serving as an example to private industry and the public generally to be more accepting of former offenders and to assist in their transition back into society.

A different legal stumbling block for offenders seeking work in Louisiana and elsewhere is the multitude of laws that restrict their entry into professional or licensed occupations.[41] An occupational license is a privilege bestowed by a government entity, such as a city or state, which allows the person to legally practice that particular trade. The standard rationale for licensing laws is the desire to protect the public from incompetent or dishonest persons in particularly sensitive positions.[42] Law and medicine are perhaps the most demanding in the professional standards required. In the past century, however, licensing laws have proliferated, seeming to wander far afield of their original justification.[43] In Louisiana, for example, a license is now required to be a watchmaker, a pawnbroker, a shorthand reporter and an embalmer, among some 30 other occupations.[44] Across the country, such varied occupations as tree surgery, junk yard operating, fumigating, tatoo artistry and lightning rod selling are subject to licensing.[45]

A recent survey found over 4,000 statutes nationwide that require

occupational licensing, nearly half of which use an applicant's criminal past, either directly or indirectly, in assessing his eligibility.[46] The licensing stipulation that effectively disqualifies the former offender is that which specifically refers to a person's criminal record or that which renders eligibility contingent on the applicant's having good moral character.[47] The licensing agency generally has the discretion in determining the vague standard of character, and such agencies have generally found a criminal record as conclusive evidence of inadequate character.[48]

The scope of occupations potentially unavailable to former offenders can hardly be exaggerated. Some states, for example, not only deny a liquor license to a former offender but also require that such a person not be hired to work in establishments that serve liquor, thus eliminating job possibilities as waiter, busboy, sweeper, cook or dishwasher.[49] An inmate may learn barbering while in prison, but in most states, Louisiana included, his criminal record can disqualify him from working as a barber once released.[50]

In summary, an offender released from prison is likely to be deficient in job skills and good work habits and will also have to contend with prejudice on the part of employers, bonding restrictions and legal impediments to his access to employment. Attempts to improve an offender's marketability through job training and similar programs are the subject of another Commission report. With respect to prejudice, bonding and legal restrictions, relief is possible through judicial, executive and legislative action. These remedies are explored in the remainder of this report.

FOOTNOTES

[1]"The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status," 1966 Washington University Law Quarterly 147, at 161

[2]"Crime, Age and Unemployment," American Sociological Review XXIV (1959) at 679-686

[3]Sutherland & Cressey, Principles of Criminology (New York: 1966) at 235-238

[4]Glaser, The Effectiveness of a Prison and Parole System (New York: 1964) at 329

[5]Program Research in Correctional Effectiveness, Report #1 (Wisconsin: 1967)

[6]Glaser, supra note 4 at 7

[7]Ibid at 329

[8]"Employment Problems of Released Prisoners," Report to Manpower Administration, U.S. Department of Labor (1969) at 8-9

[9]"Barriers to the Rehabilitation of Ex-Offenders," Crime & Delinquency July, 1976 at 323-324

[10]Ibid at 324

[11]"Society Perpetuates the Stigma of a Conviction," XXXVI Federal Probation June, 1972 at 27

[12]Ibid at 29

[13]"Employment of Former Criminals," 55 Cornell Law Review 306 (1970) at 307

[14]Rubin, Law of Criminal Correction (Minnesota: 1973) at 728

[15]"Two Studies of Legal Stigma," 10 Social Problems 133 (1962) at 136

[16]55 Cornell Law Review supra note 13 at 307

[17]Rubin, supra note 14 at 728

[18]"Needed: A Special Employment Clearinghouse for Ex-Offenders," XXXIV Federal Probation Sept., 1970 at 54

[19]Crime & Delinquency supra note 9 at 324

[20]XXXIV Federal Probation supra note 18 at 54

[21]Rubin supra note 14 at 729

[22]Crime & Delinquency supra note 9 at 325

[23]Ibid at 325-327

[24]Ibid at 327-328

[25]"The Collateral Consequences of Criminal Conviction," 23 Vanderbilt Law Review 929 (1970) at 997-1000

[26]Ibid at 991-994

[27]U.S. Constitution Article II, Section 1: Article I, Section 2

[28]23 Vanderbilt Law Review supra note 25 at 995-997

[29]Ibid at 1015-1016

[30]55 Cornell Law Review supra note 13 at 310

[31]23 Vanderbilt Law Review supra note 25 at 1015-1016

[32]Ibid at 1016-1017; Rubin supra note 14 at 717

[33]"The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners," 26 Hastings Law Review 1403 (1975) at 1424

[34]Rubin supra note 14 at 713

[35]26 Hastings Law Review supra note 33 at 1024; Rubin supra note 14 at 716; 23 Vanderbilt supra note 25 at 1014

[36]See for example 1921 Louisiana Constitution, Article VIII, Section 6

[37]Thomas v. Evangeline Parish School Board, 138 So.3d 658 (3rd Circuit, 1962)

[38]State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts XIV (44th Day) at 57,60

[39]Id

[40]18 U.S.C. App.Sec. 1201-1203, 18 U.S.C. Sec. 921-928

[41]See generally "Removing Offender Employment Restrictions," ABA Clearinghouse on Offender Employment Restrictions (1976)

[42] Crime and Delinquency supra note 9 at 329-330

[43] "Limitations on Denying Licensure to Ex-Offenders," 2 Capital University Law Review 1 (1972-73) at 1-2; also Crime & Delinquency supra note 9 at 330

[44] See appendix following section.

[45] Ibid at 331; 2 Capital University Law Review supra note 43 at 2-3

[46] ABA Clearinghouse supra note 41 at 8-9

[47] Ibid at 9

[48] Ibid at 10; 23 Vanderbilt Law Review supra note 25 at 1009-1010

[49] Crime & Delinquency supra note 9 at 330

[50] Id; La.R.S. 37:356; La.R.S. 37:374

SURVEY OF LICENSED OCCUPATIONS IN LOUISIANA

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
certified public accountant	37:79(3)	good moral character
architects	37:146(1)(2)	good moral character conviction of a felony for which the debt to society hasn't been paid
attorney	37:Chap. 4 App. Art. 14, Sec. 7	good moral character
barber	37:356 37:374	good moral character *conviction of a felony
cosmetology (manicurist)	37:502 (37:507) 37:513	good moral character (good moral character) *conviction of a felony
podiatry	37:613 37:624	good moral character *conviction of a felony
engineer(civil)	37:692(B) (37:700)	good moral character (grounds for suspension/revocation of a license--conviction of a felony)
dental hygienist	37:764	good moral character
dentist	37:776	*conviction of felony or crime involving moral turpitude
embalmers/funeral directors	37:842 37:846(9)	good moral character *conviction of felony or offense involving moral turpitude
registered nurse	37:921(B)	*guilty of a felony
practical nurse	37:970 37:969(b)	good moral character *guilty of a crime

*indicates the same grounds may be used to suspend or revoke a license already issued

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
medication attendants	37:1025(5)	conviction of a felony
optometry	37:1049(1) 37:1061(1)	good moral character *conviction of crime involving moral turpitude
osteopaths	37:1111-1123	no apparent exclusion for ex-offenders
pharmacist	37:1179	good moral character
midwifery/ physician	37:1272 37:1285	good moral character *conviction of a crime
acupuncture	37:1356-1360	no apparent exclusion for ex-offenders
real estate brokers/ salesman	37:1438 (37:1454)	good reputation for honesty and fair dealing (grounds for suspension/revocation of license - conviction of a felony or other violation involving moral turpitude)
veterinarian	37:1520 (37:1526)	good moral character (grounds for suspension/revocation - conviction of felony or other public offense involving moral turpitude)
watchmakers	37:1592	good reputation and good moral character
pawnbroker	37:1751-1762	no apparent exclusion for ex-offenders (unless convicted three times for violations of pawnbrokers' statutes)
second hand dealer	37:1862	good moral character
transient merchant	37:1901-1909	no apparent exclusion for ex-offenders

*indicates the same grounds may be used to suspend or revoke a license already issued

Occupation	Statute	Requirement or Restriction Affecting Entry by Ex-Offender
sanitarians	37:2114	*conviction of a crime
contractors	37:2156.1	no apparent exclusion for ex-offenders
radio & TV technicians	37:2308	no apparent exclusion for ex-offenders
psychologist	37:2357 37:2360	good moral character *conviction of a felony or crime involving moral turpitude
physical therapist	37:2403(3) 37:2413	good moral character *conviction of a crime
hearing aid dealers	37:2445 (37:2453)	good moral character (grounds for suspension/revocation of a license - conviction of an offense involving moral turpitude)
nursing home administrators	37:2506 (37:2510)	good character (grounds for suspension/revocation of license - conviction of a felony)
shorthand reporters	37:2554 (37:2557)	no apparent exclusion for ex-offenders (grounds for suspension/revocation of license - conviction of a felony or a misdemeanor involving moral turpitude)
financial planning and management service	37:2585	conviction of any crime involving moral turpitude
speech pathologist	37:2659 (37:2662)	good moral character (grounds for suspension/revocation of license - conviction of a felony)
social workers	37:2706 37:2713	good moral character *conviction of a felony
chiropractor	37:2805(B)(3) (37:2816)	good moral character (grounds for suspension/revocation of a license - conviction of a crime)

*indicates the same grounds may be used to suspend or revoke a license already issued

II. JUDICIAL REMEDIES

Traditionally, the courts have upheld employment standards which disqualify applicants with a criminal record. The rationale has generally been that such criteria are reasonable in order to protect the health and safety of the public. In recent years, with the trend towards rehabilitation and reintegration of offenders, the courts have been more inclined to balance the protection of society against the need of an offender to find lawful employment. Implicit in this trend is the realistic recognition that both the offender and society are endangered when the offender is unable to find work and subsequently slips back to crime.

The more successful judicial attacks on barriers to the employment of former offenders have been through Title VII of the 1964 Civil Rights Act and the equal protection and due process clauses of the 14th Amendment of the U.S. Constitution. In addition, the 1974 Louisiana Constitution provides some relief.

1. Title VII of the 1964 Civil Rights Act

Title VII of the 1964 Civil Rights Act states that it is illegal for a private, state or municipal employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin./1/

In the significant case of Griggs v. Duke Power Company,[2] the United States Supreme Court interpreted Title VII to not only ban "overt discrimination" but also procedures that are "fair in form, but discriminatory in operation."[3]

In that case, the company required applicants for particular jobs to have either a high school education or a satisfactory score on a standardized intelligence test. Black workers claimed these requirements violated their civil rights under Title VII.

The Court established a two-step analysis. The first question was whether the practice was racially discriminatory. They found that while the requirement appeared racially neutral, it did have a disproportionately negative impact on blacks, who are generally less well educated than whites.

Finding de facto discrimination, the Court then took the second step, which was to see if the requirement bore "a demonstrable

relationship to successful performance of the jobs. . . ."[4] Citing "business necessity" as a touchstone, the Court said that if the employment practice is not shown to be job-related, it is prohibited.[5]

In this case, they found that neither the high school education or the IQ test were indicative of job capability, hence their use in screening out applicants was unlawful and prohibited.

The use of arrest or conviction records to disqualify applicants for employment has been challenged several times in federal court.

In Gregory v. Litton Systems, Inc.[6] a 9th circuit decision, a black applicant for a job was disqualified after the employer learned he had been arrested 14 times, although never convicted. The company had a policy of not hiring persons with substantive arrest records. The applicant sued, alleging racial discrimination on the basis of Title VII.

The court found that the company policy disqualifying persons with a number of arrests was facially neutral but did have a disproportionate impact on blacks, who are arrested significantly more often than whites. The court further found no evidence to indicate that persons who have been arrested, but never convicted, perform work any less honestly than persons not arrested at all. Therefore, the court found that the discriminatory policy was not justified by any business necessity, hence was illegal. Business necessity was defined as that which is "essential" for the safe and efficient operation of the business,[7] as opposed to what is convenient or preferable.

The court enjoined the company from asking applicants about arrests not followed by conviction and from seeking that information from other

sources, unless it is a matter of public record. They were also enjoined from discriminating against black applicants on the basis of arrests not followed by conviction, but specifically did not rule on "how, and to what extent" employers could consider actual criminal convictions in appraising job applicants.[8]

Other complaintants have been less successful. In Jimerson v. Kisco Company, Inc.,[9] a black employee sued after he was fired for falsifying his criminal record by stating he hadn't been arrested or convicted since 1963 when in fact he had an arrest in 1971.

The court found that the employee was fired, not for having an arrest record, but for falsifying the information. Consequently, in order to prove the threshold racial discrimination, the employee had to show that black employees are fired more often for falsifying their arrest forms than white employees. This the plaintiff failed to prove. The court also took note that the company had been actively involved in a manpower program for several years, hiring numerous hard-core unemployables, including persons with criminal records. The court also noted that a decision rendered by the Equal Employment Opportunity Commission had ruled that when blacks are discharged for falsifying arrest records, there exists "reasonable cause" to believe a violation of Title VII exists.[10] Nevertheless, the court found no discriminatory racial impact in fact and denied the plaintiff relief.

Several courts have confronted the question of if and how conviction records may be used in assessing prospective employees. Two cases, coincidentally, dealt with suits filed against municipal fire departments for prohibiting persons with conviction records from being firemen.

In Dozier v. Chupka,[11] the city fire department apparently had a blanket provision that persons with conviction records were ineligible to become firemen. The court found that this had a discriminatory impact upon black applicants, who have proportionally more convictions than whites. While the court recognized that the city was arguably attempting to screen out persons with a propensity to steal, the city was using "tools too crude for their purpose."[12] They noted that a person could have been convicted of a nonlarcenous crime.

In Carter v. Gallagher,[13] a class action was brought against the Minneapolis fire department, alleging numerous discriminatory hiring practices, including the use of conviction records. The court noted that all parties agreed that a criminal conviction "should not per se constitute an absolute bar to employment."[14] At the same time, they felt that "any rule giving fair consideration to the bearing of the conviction upon applicant's fitness" for the job was not "inappropriate."[15] Specifically, they noted that persons convicted of aggravated offenses or multiple offenses might correctly be considered unsuitable for a job as a fireman.

In Green v. Missouri Pacific Railroad Company,[16] a black job applicant challenged the company's absolute ban on hiring persons convicted of any offense other than a traffic violation. The applicant was denied a job on the basis of a conviction for refusing military induction.

The court found, predictably, that the policy of excluding persons with conviction records had a disporportinate impact on black applicants. They then scrutinized whether the blanket policy was a

business necessity and concluded, rather bluntly, that:

> We cannot conceive of any business necessity which would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden./17/

In Richardson v. Hotel Corporation of America,[18] a case arising out of New Orleans, a black bellboy sued when he was fired on the basis of a pre-employment conviction of theft. The hotel policy was to exclude persons convicted of serious crimes from working in "security sensitive" positions, such as those allowing access to the hotel rooms and guests' luggage. The court noted that the crucial issue was whether the policy was required by business necessity and concluded that it was "reasonable" for the hotel to require that employees who have access to the property of others should have "a record reasonably free from convictions for serious property crimes."[19]

Generally speaking, the rulings of the Equal Employment Opportunity Commission parallel this balancing approach with regard to convictions. They consistently hold that automatic disqualifications are improper, but that a case-by-case examination of the conviction, the job, and other related circumstances is appropriate.[20]

Title VII actions are significant in that they attack not only overt, deliberate discrimination, but also covert discrimination that results from years of economic and educational deprivations. At the same time, it does not protect against discrimination on the basis of

a criminal record, per se, but rather on the basis of race, sex, religion or national origin. Consequently, an aggrieved ex-offender has to link his cause to that of a protected group. Courts may also vary on what is considered a business necessity. In Richardson, for example, the court upheld the ban on ex-offenders serving as bellboys on the basis of the requirement being "reasonable" while other courts, such as in Green, defined the standard as being that which is "essential" for the business for which there is "no acceptable alternative."

2. Equal Protection

The equal protection clause of the 14th Amendment prohibits the state from enacting legislation that unreasonably discriminates against one class of persons over another. Generally speaking, the state need only show that the purpose of the legislation is legitimate and that the classification is rationally related to it. The presumption is that the state legislature acts constitutionally and the class discriminated against has the burden of showing the classification irrational.[21]

The Warren Court, in the 1960's, carved out several types of particularly sensitive classifications that were entitled to special protection from the court to avoid unfair state discrimination.[22] These special areas included classifications based on certain "suspect" criteria, such as race[23] or national origin,[24] and classifications that touched on certain "fundamental interests" such as the right to vote[25] or the right to travel.[26] When the state cries to make legislative distinctions in these areas, the court requires them to show a "compelling" state interest to be served and also to show that the means chosen, the classification, is strictly tailored to serve the legitimate state purpose.[27]

The Supreme Court has defined a "suspect" class as one that has been:

> . . .saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process./28/

Arguably, convicted criminals come within a "suspect" class under this

definition. In many jurisdictions, a conviction costs a person his right to vote,[29] which relegates the offender to the nadir in political powerlessness. Additionally, most offenders are poor, members of minority groups and uneducated, subject to years of social neglect and outright discrimination.

Arguably also, the right to work should be considered a fundamental interest. Some state constitutions have held that employment is of such compelling importance to be akin to a civil right.[30] The Supreme Court has yet to hold the right to work a fundamental interest, although it has held it to be "the very essence of the personal freedom and opportunity" the 14th Amendment is supposed to preserve.[31]

In Upshaw v. McNamara,[32] a 1970 federal court of appeals case, an ex-felon who had been pardoned applied to work for the Boston Police Department. He was denied because of the prior conviction. Among other arguments, he claimed that disqualifying even pardoned ex-offenders was a denial of equal protection. The court noted that a classification based on a criminal record is not "suspect." They felt that an ex-offender "may be thought to lack the qualities of self-control or honesty that this sensitive job requires"[33] and that this was a valid rationale for the disqualification, regardless of the pardon.

A few years later, an ex-offender working as a journalist sued when he was denied a press pass on the basis of his criminal record.[34] The pass would entitle him to various privileges, including access to certain police files. He argued that there was no compelling

state interest or rational basis in the press association's excluding ex-offenders from having press passes. The court pointed out that it was not a suspect criteria, nor was a fundamental right involved, and that the prohibition was not, in fact, automatic, but resulted from case-by-case consideration.[35] This particular journalist, apart from having a past conviction, was, at the time of the suit, charged with a new felony. The court held the disqualification not a denial of equal protection.

In Butts v. Nichols,[36] an ex-felon challenged a provision under the Iowa civil service laws that disqualified convicted felons. The court found, as prior courts had, that a classification based on a criminal record is not "suspect" nor is the right to employment a "fundamental interest." Consequently, the state only needed to have a reasonable, rational justification for the disparate treatment of ex-felons. The court then stated that not just any legislative reason will do and that the means chosen must substantially further the end desired.[37] The state interest in this case is protecting the public from dishonest or criminal employees. The implication of the automatic prohibition against ex-felons in civil service positions is that such persons are presumed unworthy of trust or reliability. The court did not question the end sought, but ruled that the "an across-the-board prohibition" was overly-broad and a denial of equal protection.[38] They noted that the state could ban certain types of offenders from certain types of jobs, based on the connexity. The court further noted a growing judicial sensitivity to "felon bans" as they interfere with genuine efforts at rehabilitation. They also noted that while

civil service in Iowa banned all ex-felons, nonclassified jobs, such as the positions of city solicitor, treasurer and city manager, were openly available, creating "a totally irrational and inconsistent scheme" which was unconstitutional.[39]

In Smith v. Fussenich,[40] an ex-offender challenged Connecticut's law which precluded felony offenders from being employed in private detective and security guard agencies. The court found the legislative goal of keeping unsavory persons from these sensitive positions was valid but that the means chosen were overly broad, hence violated equal protection.[41] They criticized the automatic disqualification for failing to tailor the offenses to the particular job (i.e., a conviction for bigamy has no relevance to ability to be a security guard) and for failing to allow consideration of mitigating circumstances, such as age, time, or rehabilitation. The court noted also that another state statute prohibits state agencies from disqualifying persons solely because of a criminal record, thus creating the peculiar situation where an ex-felon may be able to become a lawyer or doctor, but not a security guard.

In summary, equal protection challenges to state restrictions on the employment of ex-offenders, be it in public employment or through licensing authorities, have been successful in voiding automatic disqualifications on the basis of a criminal record. At the same time, courts have generally upheld challenges when the state can show that the disqualification is not automatic or that it is specifically tailored to a particularly sensitive area of employment.

3. Due Process

Apart from the assurances of the equal protection clause, the 14th Amendment also states that persons may not be deprived of life, liberty or property by the state without due process of law. The basic elements of due process are that a person must be given notice and an opportunity to be heard before any of these interests can be deprived.[42] Apart from obvious due process rights, such as the right to a trial when charged with an offense, due process has been extended to protect parolees and probationers from arbitrary revocation and to welfare recipients threatened with a cut off of their funds.[43] If the right to work is protected under the due process clause, it would be so as a property interest. The Supreme Court has ruled that in order for a property interest to be entitled to such protection, the person (a) must have legitimately be entitled to it; (b) have more than just an abstract desire or need for it; and (c) have more than a one-way expectation of acquiring it.[44] Consequently, if a person already has a job or has been actually promised a job, he can evoke due process if the job is arbitrarily rescinded. Otherwise, the burden of proving a denial of due process is difficult.

An appendage of due process protection is in the exploration of "irrebutable presumptions."[45] If a state statute presumes some fact about a class of persons and does not allow members of that class an opportunity to rebut the presumption, it may be held to violate due process. For example, a Connecticut state statute had determined for university tuition purposes that anyone who was a nonresident

at the time of college application, was considered a nonresident throughout their academic tenure. The Supreme Court struck down this "irrebutable presumption" of nonresidency as the "presumption is not necessarily or universally true in fact."[46] Obviously, a person could become a resident after the initial application, but the Connecticut statute ignored that fact.

In Hawker v. New York,[47] an 1898 case, a physician convicted of a felony challenged the revocation of his right to practice medicine. The statute prohibited anyone convicted of a felony from practicing medicine. The court upheld the presumption of unworthiness, saying that when

> . . .the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule--one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience. . . .So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is. . .invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care./48/

In more recent years, the Supreme Court has been less tolerant of sweeping disqualifications from employment based on a criminal record. In Schware v. Board of Bar Examiners of the State of New Mexico,[49] the Supreme Court struck down a ruling by the New Mexico bar examiners which had disqualified a prospective applicant on the basis of his arrest record and prior involvement with the Communist Party. Schware was given notice and a hearing. The Supreme Court nonetheless overturned the decision, citing the circumstances surrounding the earlier

misadventures as well as Schware's remarkable achievements since that time. As far as the state's power to set criteria for admission to the bar, the Court said a

> ....State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the appellant's fitness or capacity to practice law./50/

Several years later, the Supreme Court upheld a New York law which automatically banned unpardoned ex-felons from serving in certain fiduciary positions in the waterfront labor unions.[51] The complainant was a union member who had been disqualified on the basis of a conviction 40 years before. While the Court cited Hawker as rationale, they also emphasized that the waterfront unions had been afflicted with long-standing scandals and corruption. "The presence on the waterfront of convicted felons in many influential positions was an important causative factor in this appalling situation."[52] The statute disqualifying ex-offenders from particular union positions was in response to that corruption.

Upshaw v. McNamara[53] was a case involving a pardoned felon who desired to become a Boston city policeman. The plaintiff challenged his disqualification on due process grounds as well as equal protection. He complained that he had been denied the appointment without having a hearing. The court felt that since he was only an applicant for the job, and since the Commissioner of the police department was under an obligation to appoint only honest and reliable persons, considering the sensitivity of the position, all the ex-felon was entitled to was notice as to why he had not been hired. In this case, the offender

had been notified of the reasons why and had also been afforded the right to challenge the decision in writing. As for the apparent presumption against ex-felons, even those pardoned, from serving as police officers, the court noted the decision on the part of the Commissioner is discretionary--he may hire an ex-felon if he feels the ex-felon is qualified and trustworthy.

Similarly, in Watson v. Cronin,[54] the case dealing with the ex-offender journalist denied a press pass, the court noted that the disqualification was not automatic but rather came about as a result of an individual investigation into the applicant's worthiness. The plaintiff had been given notice, but not a hearing. The court felt that a hearing might have been advisable but was not constitutionally mandated, since the lack of a press pass did not seriously interfere with the plaintiff's functioning as a journalist, and particularly since the journalist had a pending felony charge against him at the time.

In Hyland v. Fukuda,[55] an ex-offender challenged his failure to be hired as a correctional officer on a number of grounds, including a denial of due process. The plaintiff claimed he had a right to the job, akin to a property right. The court noted that while the state statute expressly provided that ex-offenders could not solely be disqualified by reason of a prior crime, this did not entitle an ex-offender to the job but rather merely entitled him to be eligible for the job.

Butts v. Nichols,[56] which voided the Iowa statute that automatically disqualified ex-felons from obtaining civil service jobs on equal

protection grounds, also implied that the statute would have been voided under due process as well. The court noted that the disqualification presented an "irrebutable presumption" that ex-felons were unworthy of those jobs, and allowed no opportunity for an offender to challenge that assumption on an individual basis.[57]

Smith v. Fussenich,[58] which overturned the Connecticut statute automatically banning ex-offenders from private detective agency jobs or security guard positions as violative of equal protection, also implied that the statute created an "irrebutable presumption" that would constitute a denial of due process as well.[59]

In summary, the courts peruse due process claims for the same elements as they due equal protection arguments. If the state statute blanketly forbids ex-offenders from an area of employment, it generally will create an impermissible "irrebutable presumption" unless the area of employment is particularly sensitive to abuse. If the statute allows a case-by-case evaluation of the ex-offender's fitness, the statute will generally be upheld even though the particular plaintiff may in fact be disqualified from employment on the basis of the criminal record. Finally, the courts hold that an applicant for a job, be he an ex-offender or not, is not entitled to a hearing if rejected, but merely to notice which gives the reasons for the denial.

4. Louisiana Constitution

The 1921 Louisiana Constitution prohibited unpardoned ex-felons from occupying any "office or appointment of honor, trust or profit in this state. . . ."[60] This provision, absolute as it was, led to some arbitrary results. In one instance, a school bus driver lost his job when the school board learned he had been convicted of an offense some 20 years earlier.[61]

Fortunately for the ex-offender, this provision was not brought forth in the 1974 Constitution. In Fox v. Municipal Democratic Executive Committee of the City of Monroe,[62] a 1976 case, an attempt was made to disqualify a candidate for mayor on the ground that he was convicted of a felony and had not been pardoned. The 2nd circuit ruled the candidate eligible as the new Constitution no longer prohibited unpardoned felons from running for office. Philosophically, the decision parallels the notion that in a democratic society, the people should determine whom they wish to elect, including former offenders.

Article 1, Section 20 of the 1974 Constitution states, in part, "Full rights of citizenship shall be restored upon termination of state and federal supervision following conviction for any offense." The proposal was originally presented to the full convention without the proviso "of citizenship" so that it read simply that "full rights shall be restored. . . ."[63] The intention of the amendment was to limit the sweep of the rights restored. With respect to employment, the delegates did seem to agree that Section 20 affirmed that former offenders could occupy positions of honor, trust or profit in the state government.[64] The state civil service does still inquire as to criminal convictions

in its application forms, but this is in order to comply in part with federal law which prohibits certain offenders from possessing firearms which in effect disqualifies them from jobs that include such possession.[65] Civil service does also weigh in the nature of the particular offense as against the job so that, for example, a child molester would not be allocated any job in an institution for children.[66]

While Section 20 of the new Constitution was intended to ease the barriers to public employment, the delegates apparently intended it to not affect employment licensing.[67] This perceived intention was crystallized somewhat in 1975 when an ex-offender sued on the basis of Section 20 after being denied a liquor license.[68] The 3rd circuit court of appeals ruled against the plaintiff on the grounds that the new constitution was not retroactive and her conviction came before its passage. In dicta, however, the court favorably quoted from a legal commentary that interpreted Section 20 to only restore "basic rights of citizenship" such as voting, running for office and working for the state.[69] The state Attorney-General came up with the same conclusion, in comparing Section 20 to an executive pardon, stating that a pardon restores the "privileges" such as holding a liquor license, but Section 20 only restores fundamental rights of citizenship.[70]

Article I, Section 3 of the 1974 Louisiana Constitution reads in part:

> No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall

> arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations.

Ben Miller, former Chairman of the Bar Association's Section on Criminal Justice, suggests that this provision, combined with Section 20 and Article I, Section 10's restoration of the right to vote to ex-offenders, effectively precludes "the Legislature from imposing any restrictions whatever on criminals after they have served time, regardless of the type of offense."[71] However, Section 3 does not include the status of ex-offender among the categories protected from even arbitrary discrimination nor apparently has any judicial attempt been made to challenge employment discrimination against ex-offenders under this article.

Section 2 of Article 1 declares that no person "shall be deprived of life, liberty or property except by due process of law." This parallels a provision of the 1921 Constitution[72] as well as the U.S. Constitution's due process guarantees. The state supreme court has considered several complaints by lawyers convicted of offenses who claimed they were subsequently suspended or disbarred without due process.[73] In Louisiana State Bar Association v. Ehmig,[74] the Bar Association had recommended the suspension of a lawyer because he had been convicted of "a serious crime." At that time, the Bar Association rules provided that when a lawyer was convicted of an offense, the Committee on Professional Responsibility would peruse the conviction and determine if it was a "serious crime"--defined as a felony or any other offense which directly reflected on the attorney's moral fitness to practice

law. If the supreme court agreed with the committee that it was a "serious crime," the court would then suspend the attorney pending the final outcome of appeals. Under the rules, the attorney was not entitled to a hearing, even though suspended, until after the conviction was finalized. In Ehmig, the supreme court held this procedure to be an unconstitutional denial of due process, both under state and federal law. They noted that there "has been a uniform trend throughout the country in both federal and state courts to require that a hearing be held prior to the revocation, suspension, or modification of an existing license to engage in a business or profession."[75] They concluded that the right to practice law is constitutionally protected and an attorney cannot be deprived of that right except by "strict adherence"[76] to due process principles. They concluded that Ehmig could not be suspended without affording him a hearing in which he could present evidence and argue as to whether or not his crime was serious enough to warrant suspension.

In summary, the 1974 Louisiana Constitution opens up public employment to former offenders but licensed employment is apparently unaffected. As in federal law, Louisiana due process considerations guarantee an offender a hearing before an existing occupational license can be suspended or revoked.

FOOTNOTES

[1]42 U.S.C. Sec. 2000e(b); 42 U.S.C. Sec. 2000e-2(a)

[2]401 U.S. 424 (1974)

[3]Ibid at 431

[4]Id

[5]Id

[6]316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th cir. 1972)

[7]Ibid at 403

[8]Ibid at 404

[9]404 F. Supp. 338 (1975)

[10]CCH EEOC Decisions (1973) Sec. 6359, Sec. 6390

[11]395 F. Supp. 836 (1975)

[12]Ibid at 850, ftnte 10

[13]452 F.2d. 315 (1971)

[14]Ibid at 326

[15]Id

[16]523 F.2d. 1290 (1975)

[17]Ibid at 1298

[18]332 F. Supp. 519 (E.D.La. 1971), aff'd mem., 468 F.2d. 951 (5th Cir. 1972)

[19]Ibid at 953

[20]"The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners" 26 Hastings Law Journal 1403 (1975) at 1413

[21]"Barriers to the Rehabilitation of Ex-Offenders." Crime and Delinquency, July, 1976, 322 at 334.

"The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners." 26 Hastings Law Journal 1403 (1975) at 1417-1418.

[22]Ibid

[23]Loving v. Virginia, 388 U.S. 1 (1967)

[24]Graham v. Richardson, 403 U.S. 365 (1971)

[25]Bullock v. Carter, 405 U.S. 134 (1972)

[26]Shapiro v. Thompson, 394 U.S. 618 (1969)

[27]26 Hastings Law Journal, supra note 21 at 1418; Crime and Delinquency supra note 21 at 334

[28]San Antonio School District v. Rodriguez, 411 U.S. 1 (1973) at 28

[29]"The Collateral Consequences of a Criminal Conviction," 23 Vanderbilt Law Review 929 (1970) at 974-987.

[30]26 Hastings Law Journal supra note 21 at 1422

[31]Truax v. Raich, 239 U.S. 33 (1915) at 41

[32]435 F.2d 1188 (1970)

[33]Ibid at 1190

[34]Watson v. Cronin, 384 F. Supp. 652 (1974)

[35]Ibid at 659

[36]Butts v. Nichols, 381 F. Supp. 573 (1974)

[37]Ibid at 579

[38]Ibid at 580

[39]Ibid at 581-582

[40]Smith v. Fussenich, 440 F. Supp. 1077 (1977)

[41]Ibid at 1088

[42]26 Hastings Law Journal 1403 (1975) at 1423

[43]Id

[44]Board of Regents v. Roth, 408 U.S. 564 (1972) at 577

[45]26 Hastings Law Journal supra note 42 at 1424

[46]Vlandis v. Kline, 412 U.S. 441 (1973) at 452

[47]170 U.S. 189 (1898)

[48]Ibid at 196

[49]353 U.S. 232 (1957)

[50]Ibid at 239

[51]DeVeau v. Braisted, 363 U.S. 144 (1960)

[52]Ibid at 147

[53]435 F.2d 1188 (1970)

[54]384 F. Supp. 652 (1974)

[55]402 F. Supp. 84 (1975)

[56]381 F. Supp. 573 (1974)

[57]Ibid at 582

[58]440 F. Supp. 1077 (1977)

[59]Ibid at 1081

[60]Article 8, Section 6, 1921 Louisiana Constitution

[61]Thomas v. Evangeline Parish School Board, 138 So.2d 658 (1962)

[62]328 So.2d 171 (La.App.2nd Circuit 1976)

[63]State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts XIV (44th Day) 57-62

[64]Ibid, 44; 57-58; 60-61

[65]18 U.S.C. App. Sec. 1201-1203; 18 U.S.C. Sec. 921-928

[66]Interview with Civil Service Department, September, 1978

[67]Transcripts, supra note 63 at 57-58; 60-61; 46-47 but see also 49,60. See also 21 Loyola Law Review 9 (1975) at 39

[68]317 So.2d 247 (1975)

[69]Ibid, 249

[70]No. 75-339, 1974-75 Louisiana Opinions of the Attorney-General, 166, 167

[71]21 Loyola Law Review 43 (1975), 48-49

[72]Article 1, Section 2, 1921 Louisiana Constitution

[73] Louisiana State Bar Ass'n v. Loridans, 338 So.2d 1338 (1976); Louisiana State Bar Ass'n v. Ponder, 340 So.2d 134 (1976)

[74] 277 So.2d 137 (1975)

[75] Ibid at 139

[76] Id

III. EXECUTIVE CLEMENCY[1]

Executive clemency is a governmental act of grace which releases an offender from some or all of the penalties and disabilities that result from his crime. It evolved presumably from the absolute power of ancient monarchs to levy punishment as well as forgiveness upon those subjects who had offended the sovereignty. In more modern times, the executive power to exempt an offender from the penalties of law is a logical adjunct to the fundamental executive responsibility which is to implement the law. As an act of grace, clemency is a privilege to be bestowed by the executive power rather than a right to be demanded by the offender.

A pardon is the most expansive form of executive clemency. It releases an offender from his sentence, but more commonly it is granted to those who have already completed their sentences and are seeking a restoration of civil rights and privileges.[2] The effect of a pardon on the offender's civil disabilities varies from state to state and is gleaned primarily from court decisions. In Ex Parte Garland,[3] the U.S. Supreme Court stated that

> A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. . . it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. . .it removes the penalties and disabilities and restores to him all his civil rights./4/

Later, however, the Court noted that a "confession of guilt" is "implied in the acceptance of a pardon."[5] Most lower courts have ruled that a pardon does not blot out the conviction and so many disabilities presumably still attach.[6]

Louisiana has adopted the minority view that a pardon, in essence, voids the original guilt. In State v. Lee,[7] a pardoned offender was charged with a new crime and treated as a second offender. The court held that

> . . .the pardon restores the original status of the pardoned individual, i.e. a status of innocence of crime, and therefore a person occupying such a status, who is convicted of a crime subsequent to the granting of a full pardon for the first offense. . .must be dealt with and punished as a first offender./8/

Later court decisions in Louisiana have upheld this sweeping impact of an executive pardon.[9]

Louisiana has had a pardon process since its first constitution in 1812.[10] While the procedures have varied over the years, the power to pardon has always veen vested in the executive branch, unfettered by legislative or judicial restraints.[11] The 1974 Louisiana Constitution re-enacted the executive power to pardon and added a new provision that grants an automatic pardon to all first offenders upon completion of their sentences.[12]

As was discussed in the previous section of this report,[13] Article I, Section 20 of the 1974 Constitution states that "(f)ull rights of citizenship shall be restored" to all convicted persons at the termination of their supervision. With respect to employment, this apparently was intended to allow ex-offenders access to government employment, be it elected or appointed office or simply civil service position. Section 20 was apparently not intended to void employment licensing standards that use a conviction as grounds for disqualification.

Since a pardon in Louisiana restores the person to a status of innocence, it should also restore his eligibility for licensed employment. The legislature cannot limit the effects of an executive pardon, and so any attempt to disqualify an offender from an occupational license on the basis of a pardoned conviction would be arguably unconstitutional.

The delegates at the constitutional convention in 1973 did not give guidance as to what they intended the effect of a pardon to be. One commentator cited the prior jurisprudence, concluding that a pardoned individual would be eligible for a liquor license.[14] The Attorney General has stated that a pardon restores the "privileges" of citizenship as well as the basic rights.[15] In an early case, a lawyer was disbarred because of a criminal conviction and then was pardoned.[16] He petitioned to have his disbarment rescinded. The supreme court held that the pardon "removed the disqualification."[17] While they declined to actually void the disbarment, they did suggest the lawyer should simply re-apply for admission as would a beginning attorney.

The impact of the automatic first offender pardon is less apparent. The delegates at the constitutional convention did not distinguish between the two and in fact tacked on the automatic pardon provision at the end of the general section on gubernatorial pardons. One commentator has surmised that the apparent intention of the delegates was for the automatic pardon to have the same broad effect as the regular pardon.[18] The juxtaposition of the two provisions does create a philosophical peculiarity. On the one hand, Louisiana considers

a pardon to have a sweeping effect, in essence washing away the original guilt. This calls for a careful screening as to who should be rewarded with such a presumption of trustworthiness. At the same time, all first offenders are now pardoned automatically, without any individual perusal whatsoever. To give that type of pardon the same broad effect is arguably bestowing forgiveness on some who don't warrant it. On the other hand, first offenders are presumably novices at crime and should be given the benefit of the doubt and the societal boost that a pardon would bring.

The state supreme court, in State v. Adams,[19] has concluded that the first offender automatic pardon does have a different effect than a gubernatorial pardon, at least as far as the habitual offender law is concerned. The court noted that the prior jurisdiction, going back to State v. Lee and Ex Parte Garland, was interpreting the effect of gubernatorial pardons, pardons which were presumably issued only after careful consideration of the facts of the case. These pardons admittedly restored the person to a status of innocence. The court then opined that the convention delegates did not intend for the automatic first offender pardon to create that same status of innocence; therefore a conviction which had been automatically pardoned could still be used to adjudicate a person as a habitual offender. The court did concede that the delegates at the convention gave little actual guidance as to their intent in passing the automatic pardon provision.[20]

Whether the court will render a similar distinction should an automatically pardoned offender be seeking an employment license is

unknown. On the one hand, the same rationale should apply. A person automatically pardoned is not rewarded on the basis of any individual merit, so the pardon arguably would not void his conviction as a license disqualification. At the same time, seeking a job is a positive rehabilitative step and should be encouraged. In State v. Adams, the automatically pardoned offender had been convicted of a new crime and was trying to avoid an enhancement of penalty on the basis of his first conviction. Arguably a distinction should be made between a person who abuses the forgiveness inherent in his first pardon by committing a new crime and an offender who seeks an occupational license in order to secure a lawful means of making a living.

FOOTNOTES

[1]For a detailed analysis of executive clemency, see "Staff Analysis of Executive Clemency in Louisiana." Governor's Pardon, Parole and Rehabilitation Commission, February 2, 1978.

[2]Ronald Goldfarb and Linda R. Singer, After Conviction (New York, 1973), at 331

[3]71 U.S. (4 Wall) 333 (1866)

[4]Ibid, at 380

[5]Burdick v. United States, 236 U.S. 79 (1914) at 91

[6]"The Collateral Consequences of Criminal Conviction," 23 Vanderbilt Law Review 929 (1970) at 1145

[7]132 So. 219 (1931)

[8]Ibid, at 219

[9]State v. Childers, 2 So.2d 189 (1941); State v. Selmon, 343 So.2d 720 (1977)

[10]1812 Louisiana Constitution, Article 3, Section II

[11]State v. Collins, 328 So.2d 674 (1976); State v. Ramsey, 292 So.2d 708 (1974); State v. Spotville, 308 So.2d 763 (1975); State v. Varice, 292 So.2d 703 (1974)

[12]Article VI, Section 5(E), 1974 Louisiana Constitution

[13]See page 29-30

[14]"Work of Appellate Courts 1975-1976" 37 Louisiana Law Review 480 (1977) at 492

[15]No. 75-339, 1974-75 Louisiana Opinions of the Attorney-General

[16]State v. Gowland, 140 So. 500 (1932)

[17]Ibid, at 501

[18]37 Louisiana Law Review at 491-492

[19]355 So.2d 917 (1978)

[20]Ibid, 922 ftnte 4

IV. LEGISLATIVE REMEDIES

The most logical source of relief from legal barriers to the employment of former offenders is the legislature as that is the source of many of the barriers themselves. The legislature can also provide broader relief than that of a court or a governor who are restricted to the confines of individual cases. As the most attuned to the citizenry, legislative action has a greater aura of democratic consensus than does the more isolated actions of a court or a governor.

At the same time, the legislature is also the most vulnerable to the ebb and flow of public opinion and the wrath of a citizenry frustrated with rising crime rates. As pointed out in the overview, the public is at best wary of ex-offenders and at worst, hostile.

State legislatures have nevertheless shown a trend over the past years, similar to that of the judiciary, towards balancing the need to protect society and the need to reintegrate offenders back into that society. Some states have attempted to do this by hiding the fact of conviction altogether from the public, particularly prospective employers.[1] Some 20 states have enacted these so-called expungement laws, which are unique in that their purpose is to circumvent the punishment levied by public opinion rather than the law itself, to save the offender from "future harrassment and embarrassment by virtue of a criminal record."[2] Other states have attempted to lessen the barriers to licensed employment by requiring a direct connection between the offense and the occupation before an applicant can be rejected on that ground.[3] One state has extended this concept to private employment by making it an illegally discriminatory practice

for any employer to disqualify an applicant on the basis of a criminal record unless it relates to a bona fide requirement of the job.[4] Last but not least, the federal government has supervised an apparently successful bonding program whereby offenders are bonded, thus removing the disability caused by restrictions on the bonding of offenders by private surety companies.[5]

Louisiana has an extremely limited quasi-expungement procedure. With respect to licensing, it recently enacted a statute intended to lower the barriers to licensed employment for former offenders. It has yet to consider extending that policy to private employers. The federal bonding program is available to Louisiana offenders. These areas are explored more fully in the following sections.

1. Expungement

Expungement Generally

To expunge literally means to strike out, obliterate or erase. A true expungement law would not only remove the penalties and legal disabilities attached to a conviction but would attack the very existence of the conviction itself.[6]

The concept of expungement is frought with both philosophical and practical problems. It "sanctions deceit--it institutionalizes a lie."[7] In the employment situation, it allows for certain facts about an applicant to be concealed from his prospective employer. "In encouraging him /the offender/ to lie," said one critic, "the society communicates to him that his former offender status is too degrading to acknowledge. . . ."[8] In addition, the offender may compound the falsehood as he tries to explain away gaps in his past; the times of incarceration. Even if he manages to be hired without disclosing the convictions, they may surface later to discredit him in the eyes of his employer, not only as an ex-offender but as a liar.

At the same time, an expungement law that fails to allow this "lie" fails in its purpose of countering the stigma of conviction. Even persons who have only been arrested, and never convicted, are haunted throughout their lives by the taint of the arrest.[9] One expungement proponent feels the complaint that expungement legalizes lying "can be classed as little more than trivia in view of the objective sought to be accomplished. . . ."[10]

Practically speaking, a true expungement law is very difficult to implement. The fact of conviction is of public record, widely disseminated throughout law enforcement circles and available to

the public. One writer commented that "It seems that when the Moving Finger writes these days, a dozen Xerox copies likely are made."[11] A statewide expungement law would apply to state agencies but arguably could not force private employment agencies or employers to render void what information they have gathered.[12] Nor would a state statute have impact beyond its own borders or upon the records kept by federal authorities.[13] An expungement law that only partially expunges then leads to half-truths, speculation and confusion as to what the person's past activities were.[14]

Expungement Statutes

Approximately 20 states have enacted expungementlike statutes, and they reflect the philosophical and practical conflicts embedded in the concept. "It is not exaggeration to declare that confusion is monumental," said one critic.[15] As a threshold problem, the various statutes use a variety of terms to express their intent.[16] Some statutes purport to "set aside" or "annul" a conviction, leaving unclear whether the conviction is to be hidden from public view. Other statutes provide that the records will be "sealed" or "destroyed," strongly implying that the conviction is presumed to no longer exist. The terminology is important for if the conviction is in truth expunged, the offender can arguably reply "no" when asked if he has ever been convicted of that offense.

Apart from the confusion over semantics, the statutes vary in terms of eligibility. Most of them restrict their relief to either youthful offenders,[17] first offenders,[18] or persons convicted of

minor crimes.[19] Some require a waiting period of good behavior after release before becoming eligible,[20] while others offer immediate relief as an incentive to reform.[21] Some render certain classes of offenders automatically ineligible,[22] and virtually all provide that the conviction can be resurrected later for sentencing purposes if the person is convicted of a new crime.[23]

> The common thread uniting the various expungement statutes is the limited relief available under their provisions. These limitations reflect the states' temerity to accept fully expungement's premise: the complete restoration of a criminal offender's social status offers him incentive to accept societal norms which in turn protects society from future criminal activity./24/

California's law is reportedly the oldest,[25] dating back to the early part of the century. A person who successfully completes his term of probation may petition the court to have the guilty verdict set aside, releasing him from "all penalties and disabilities" flowing from the offense.[26] Persons convicted of misdemeanors may also petition the court for the same relief, after sustaining a year of "honest and upright life" after judgment.[27] In both cases the relief must be granted if at the time of request the offender is not charged with or serving time for another offense. For any other type of offenders, the relief is solely within the discretion of the court.[28]

An early court decision construed the impact of the release broadly, in essence voiding the conviction itself. Later court decisions and legislative enactments severely narrowed the intent of the statutes, concluding that only "legal" disabilities were

removed.[29] In the area of employment, the conviction could still be used to deny a professional license or discharge a civil service employee.[30] The courts concluded that the conviction is not actually expunged, or even sealed, only a notation added that the charges were dismissed.[31] Consequently, an offender must probably admit the conviction if queried. One commentator has concluded that the California statutes are now "so riddled with legislative and case-law exceptions that they are almost wholly ineffectual."[32]

Kansas' statute is an example of more recent legislation. If the offender was under 21 at the time of his offense, and has served his sentence or term of probation, he may petition the court to set aside his guilty verdict, and the court "shall" dismiss the criminal charge, releasing the offender from "all penalties and disabilities."[33] The offender shall then "in all respects be treated as not having been convicted" except that the offense can be reactivated for sentencing purposes after a later conviction.[34]

The statute specially provides that in applying for employment or a license, a "person whose conviction of crime has been annulled under this statute may state that he or she has never been convicted of such crime."[35] The custodian of the records is instructed not to disclose the existence of the records unless requested by the offender or sentencing judge.[36]

If the offender is over 21 at the time of his offense, he may petition the court for similar relief after five years from the end of his sentence. He must have "exhibited good moral character" as well as not having been convicted of a felony.[37] This gives the

petitioned court some discretion in granting relief, although once granted, the relief has the same effect as with youthful offenders.

The Kansas supreme court has held that compliance with the statutory requirements constitutes prima facie entitlement to expungement and the relief should be granted "unless the court finds some strong affirmative cause to deny it."[38] Significantly, the statute allows the offender to answer "no" when asked if he has ever been convicted of that offense. At the same time, it provides no particular sanction for improper disclosure of the record.[39]

Ohio's statute, also of recent years, applies only to first offenders.[40] A first offender felon may apply for expungement of his record after three years from final discharge, a misdemeanant first offender after one.

The granting is discretionary in that the court must find that the person is indeed a first offender, has no pending criminal charges, that his "rehabilitation has been attained to the satisfaction of the court" and the expungement is "consistent with the public interest."[41]

If the expungement is granted, the court orders all the records of the case sealed and the index references deleted. The criminal proceedings "shall be deemed not to have occurred" unless the offender is later convicted of a new charge.[42] In applying for employment or licensing, the offender may be questioned only about unexpunged convictions unless the questions bear a "direct and substantial relationship" to the position sought.[43] Finally, any custodian of the records, who knows the conviction has been expunged, who nonetheless releases

the information "for any purpose involving employment, bonding, or licensing" shall be guilty of a misdemeanor.[45]

While the statute is limited to first offenders, it is thorough in that it implies an offender may answer "no" when asked if he was convicted of that offense, since the proceedings are "deemed not to have occurred." At the same time, such an offense may be considered if it has a "direct and substantial relationship" to the position sought. An obvious logistics problem arises as to who will make that determination--the offender is unlikely to volunteer the information and if the conviction is expunged, the employer presumably does not have access to it.[46]

The Ohio statute also provides a penalty for unlawful dissemination of the information. With this in mind, a survey was made several years ago, asking the various clerks of courts how they sealed the information.[47] The general procedure was to obliterate the offender's name on the index and put all the records of the case in a sealed file.[48] When asked by other than authorized persons about the offender, the clerks respond that they have no record.[49] The various law enforcement agencies follow a similar strategy with a coded number system so that the files can be refound if the person is later convicted of new charges.[50]

Louisiana

Code of Criminal Procedure Article 893 states that when a convicted felon is given a suspended sentence and satisfactorily completes his probation, the court <u>may</u> set the conviction aside and

dismiss the prosecution. Article 894 gives the same relief to persons convicted of misdemeanors and placed on probation. The dismissal shall have the "same effect as an acquittal" except that it may later be considered in multiple offender prosecution. The effect of the dismissal is unclear, however, as to whether the offender can respond to questions as if he had never been convicted.

The relief under these articles is limited to persons placed on probation and even then the relief is discretionary. Article 893 also restricts probation eligibility for felons in most cases to first offenders only. In addition, a number of offenses, such as armed robbery,[51] expressly exclude the possibility of probation.

La. R.S. 44:9 provides that persons who have been arrested for violations of a municipal ordinance or for violations of state statutes which are classified as misdemeanors can petition for an expungement of their records if they were not actually prosecuted or the case resulted in a dismissal or acquittal. Under an order of expungement, the court orders all agencies and law enforcement offices to destroy all the records pertaining to the arrest and deleting any notation in their central repositories that would infer that such records were ever on file.

Misdemeanants who have had their convictions set aside through the provisions of Article 894, dismissal having the effect of an acquittal, could then petition under R.S. 44:9 to have the records actually destroyed. This lends credence to the notion that the effect of the dismissal was to void the conviction, freeing the offender to claim he had never actually been convicted. The combination of articles is apparently not available to felons whose convictions have been set aside, since R.S. 44:9 is expressly reserved to those arrested for misdemeanors.

R.S. 44:9 was presumably drafted to remove the stigma that occurs when a person is arrested but not actually convicted, hence presumed innocent. The availability of expungement to persons actually convicted of misdemeanors is somewhat flukish, contingent on the fact that the dismissal under Article 894 shall have the effect of an "acquittal" which is the key provision that entitles the offender to the relief offered by R.S. 44:9.

One Louisiana case has dealt with the perplexity of combining these two articles. In State v. Sims[52] the offender had been arrested for a felony but pled guilty to a reduced misdemeanor charge. He was placed on probation, then after the term had expired, filed a motion to expunge his record through Article 894 and R.S. 44:9. The motion was granted but the state police balked, at which point the trial court rescinded the motion.

The majority opinion noted that the "primary purpose of the acts in question is rehabilitative. They were designed to prevent individuals aided by their terms from future harrassment and embarrassment by virtue of a criminal record."[53] The state police objected that the mandate of R.S. 44:9 to destroy all records conflicted with Article 894's stipulation that the dismissed conviction could still be used in later multiple offender prosecution.[54] The court found no such conflict, noting that R.S. 44:9 provides that a copy of the expungement order itself be kept and that Article 894 implied that a confidential record of the fact of conviction could be kept for the later possibility of sentencing as a multiple offender.[55] The court held that the expungement order be reinstated with the limited modification that

the state police be permitted to maintain a confidential record of the conviction.[56]

In upholding the expungement order, the court also dealt with the problem of the offender having been arrested initially for a felony. R.S. 44:9 speaks in terms of persons arrested for misdemeanors. The court resolved this apparent disqualification by ruling that the actual offense committed was a misdemeanor since that was what the district attorney actually charged the defendant and to that the defendant actually pled guilty.

The Louisiana legislature, perhaps alarmed by the implications of Sims, amended Articles 893, 894 and R.S. 44:9 to provide that no court shall order the destruction of any record of arrest and prosecution of a person convicted of a felony or a misdemeanor.[57] The purpose of the amendments was to negate the possibility that any person actually convicted of an offense could subsequently take advantage of the relief offered by R.S. 44:9. A more limited, technical interpretation would argue that the amendments only guarantee that the records will not actually be ordered destroyed. R.S. 44:9 arbuably offers two types of relief--the actual destruction of the records and the assurance that no notation in the central repository of the agencies remains that would infer that a record was on file. The 1978 amendments effectively preclude the actual destruction of the records but perhaps an offender could still petition for notations to be removed so that persons other than law enforcement personnel would not learn of the dismissed conviction. This would be a form of sealing, as opposed to actual expungement. Even Sims conceded that some records could be kept of the conviction for the limited purposes allowed by law.

A survey of Louisiana clerks of court found that few offenders take advantage of even the threshold dismissal opportunity offered by Articles 893/894.[58] Of the 29 judicial districts responding, 16 had had no applications at all. The other 13 districts had rendered approximately 75 dismissals in the past year. Apparently in a number of districts this is interpreted as expunging or is followed by a motion to actually expunge the record. Some districts actually destroy the records, while others simply delete the index reference, remove the file and store it elsewhere.

The courts do not make a significant effort to disseminate the dismissal/expungement order to other agencies. Only four of the 13 districts, for example, notified the sheriff's department or the state police. Four districts don't circulate the order to anyone. Other agencies occasionally notified are the F.B.I., the Department of Corrections, the local police department, as well as the defendant, his attorney and the bondsman. One clerk stated that the order is given to the defendant's attorney to circulate.

Most of the districts reported no problems with the procedure. What complaints there were centered on the practical problems of concealing records but at the same time preserving the court's access to them and excising the records of co-defendants whose charges are not included in the dismissal/expungement order.

Model Act

Proponents of expungement have criticized the various state statutes for their limited effect.[59] In 1962, the National Council on Crime and Delinquency drafted a model statute, "The Annulment of a Conviction of Crime," designed to meet these objections. The act provides that:

> The court in which a conviction of crime has been had may, at the time of discharge of a convicted person from its control, or upon his discharge from imprisonment or parole, or at any time thereafter, enter an order annulling, canceling, and rescinding the record of conviction and disposition, when in the opinion of the court the order would assist in rehabilitation and be consistent with the public welfare. Upon the entry of such order the person against whom the conviction had been entered shall be restored to all civil rights lost or suspended by virtue of the arrest, conviction, or sentence, unless otherwise provided in the order, and shall be treated in all respects as not having been convicted, except that upon conviction of any subsequent crime the prior conviction may be considered by the court in determining the sentence to be imposed.
>
> In any application for employment, license, or other civil right or privilege, or any appearance as a witness, a person may be questioned about previous criminal record only in language such as the following: "Have you ever been arrested for or convicted of a crime which has not been annulled by a court?"
>
> Upon entry of the order of annulment of conviction, the court shall issue to the person in whose favor the order has been entered a certificate stating that his behavior after conviction has warranted the issuance of the order, and that its effect is to annul, cancel, and rescind the record of conviction and disposition.
>
> Nothing in this act shall affect any right of the offender to appeal from his conviction or to rely on it in bar of any subsequent proceedings for the same offense./60/

The reach of the statute is available to all offenders, regardless of age, crime or number of prior offenses. The power to annul the conviction is discretionary with the sentencing court, which may also

limit its effect, after considering the public welfare and the needs of the offender. The statute skirts the problem of an offender "lying" by stipulating that he can only be queried about unannulled convictions. If the employer fails to qualify the question, the offender can still say he had not been convicted, as a fully annulled conviction "shall be treated in all respects" as no longer a conviction. The statute does have the usual proviso that the prior conviction can be rejuvenated for the sentencing purposes if the offender is later convicted again.

The statute does not provide for the actual destruction of the records, or even their sealing; rather a certificate is issued to the offender stating that the conviction is cancelled. The statute does not provide for any dissemination procedure of the annulment order, nor does it provide for a penalty for disclosure of the conviction record. Consequently, the offender would apparently be in the awkward position of being able to deny the conviction but at the same time not being able apparently to conceal the conviction itself.

Summary

Expungement is the catch-all term used to describe a variety of attempts to set aside a conviction and negate its impact once the offender has served his sentence.

Proponents of expungement argue that once an offender has completed his term, his "debt is paid." Nevertheless, the stigma of the conviction continues to haunt him as he attempts to find work and general acceptance by society. This is particularly crucial in the first few months after release from custody when the offender needs an immediate

source of income and is also struggling with the dramatic adjustment from incarceration to free society. An offender with the best of intentions may find his attempts to reform thwarted by the public prejudice and be impelled back towards criminal behavior.

Pure expungement actually erases the fact of conviction, allowing an offender to answer "no" when queried as to whether the expunged conviction occurred. He is thus no longer shackled by the impact of his past misdeed.

Critics of expungement argue that it is fundamentally dishonest, building relationships on the basis of a lie. They also argue that in reality the principle is unworkable due to the vast dissemination of criminal records and the likelihood of at least partial disclosure of even an expunged conviction.

The ambivalence felt towards expungement is reflected in the limited relief that existing statutes offer. Even statutes that purport to give broad relief have been interpreted narrowly. Expungement tends to be limited to persons convicted of relatively minor crimes and given light sentences.

If the concept of expungement is adopted, the fundamental decision is whether it should be mandatory or discretionary. Since the penal law stipulates specifically what the punishment is for a crime, an offender who has served his sentence arguably should be entitled to a mandatory expungement of that record so it will not harass him in the future.[61] The complaint that multiple offenders and dangerous criminals would then be operating under a false guise of past innocence is arguably more the burden of the criminal statutes,

the sentencing court, or the pardon process, whichever allows them to eventually discharge. Those offenders, like others, serve their designated period of punishment and once released, the presumption is that they have paid their debt and owe no more.[62]

A more modified approach is to provide for fairly automatic expungement for youthful offenders, first offenders and/or persons convicted of minor crimes. The presumption would be to expunge unless some strong affirmative reason exists for denial.[63] For multiple offenders or serious felony offenders the expungement could be more discretionary, taking into consideration the offender's likelihood of successful readjustment and the need to protect society. While this is probably a more realistic approach, it does run afoul of the presumption that an offender's debt is paid and it does provide an additional burden on offenders who are arguably less likely to successfully readjust as it is.

Relatedly, a decision must be made as to whether the expungement relief should be available immediately after discharge[64] or only following a certain period of time after release.[65] Immediate relief parallels the notion that the debt is paid and also provides an incentive for the offender to succeed, particularly in his first difficult months. Delayed relief is intended to protect the public in that it requires a good-faith effort on the part of the offender to behave, after which he will be rewarded by having his conviction erased. It does, however, also mean that his criminal record is there to impede him in his initial attempts to find work and acceptance.

Arguably, the ideal expungement statute should also contain the following provisions:

1. A statement as to the actual effect of the order,[66] including a specification that the records are to be truly withdrawn from public access, either by sealing or actual destruction.

2. Mandatory dissemination of the expungement order to all agencies maintaining criminal records.[67] An attempt should also be made to establish some sort of reciprocity with federal authorities and other states in order to extend the impact of the order.[68]

3. A penal sanction for unauthorized disclosure of the expunged conviction.[69]

4. A limitation on inquiry by prospective employers, credit bureaus, etc., to only unexpunged convictions.[70] The statute should also specify that if an offender is asked whether he has had prior convictions, he may answer "no" with respect to any expunged conviction.[71]

5. A procedure whereby the conviction can be resurrected in the instance of a later conviction.[72] Arguably certain high-risk professions, such as those involving national security or law enforcement, should have the right of limited inquiry into even expunged convictions.[73]

6. Extension of the expungement relief to persons who are arrested but never actually convicted. The prejudicial impact of those records is even more fundamentally unfair than it is for those of convicted persons.[74]

2. Occupational Licensing

Every state subjects certain occupations to licensing, and for many of these occupations a criminal conviction can disqualify an applicant. Connecticut alone, for example, has enacted 80 statutory provisions that affect the licensing of persons with criminal records. The average number per state is 39.[75]

Louisiana requires licenses for approximately 40 occupations and most of them provide that an applicant may be disqualified because of a criminal past. Until recently, most of these statutes, in Louisiana and elsewhere, required no particular connection between the crime committed and the job applied for--virtually any offense could disqualify an applicant for the licensed position. [76]

In 1971, Florida enacted a general law that decreed that a criminal offense would not be a bar to an occupational license unless it directly relates to the position desired.[77] In 1972, California adopted a similar concept with regard to the requirement of "good moral character" for certain licensed professions. Any act by the applicant, including a crime, will not disqualify him in California on character grounds unless it has a "substantial relationship" to the occupation.[78]

Since 1972, approximately 20 other states have sought to legislatively lower the barriers to licensed employment mostly by requiring a connection between the offense and the job before an applicant may be rendered ineligible.[79]

In spring, 1978, the Governor's Pardon, Parole and Rehabilitation Commission endorsed a proposal that would require that before an applicant be denied an occupational license on the basis of a criminal

conviction, a direct relationship must exist between the crime committed and the position sought. The proposal was based in part on the statutes of other states, as well as on a Model Statute recommended by the Georgetown University Law Center's Institute of Criminal Law and Procedure.[80]

While the proposal was adopted by the Governor's Commission, it was not included as part of the governor's administration package of legislation. Several interested legislators, including a Commission member, nonetheless introduced the bill independently, H.B. 790.[81] H.B. 790 was amended and passed the legislature and was signed into law by the governor.

H.B. 790, now Act 341, reads as follows:

> A. Notwithstanding any other proviisons law to the contrary, a person shall not be disqualified, or held ineligible to practice or engage in any trade, occupation, or profession for which a license, permit or certificate is required to be issued by the state of Louisiana or any of its agencies or political subdivisions, solely because of a prior criminal record, except in cases in which the applicant has been convicted of a felony, and such conviction directly relates to the position of employment sought, or to the specific occupation, trade or profession for which the license, permit or certificate is sought.
>
> B. Any decision which prohibits an applicant from engaging in the occupation, trade or profession for which the license, permit or certificate is sought, which is based in whole or in part on conviction of any crime, as described in Subsection A, shall explicitly state in writing the reasons for the decision.
>
> C. Any complaints concerning violations of this Section shall be adjudicated in accordance with procedures set forth for administrative and judicial review, contained in Title 49 of the Louisiana Revised Statutes of 1950.
>
> D. This Section shall not be applicable to any law enforcement agency, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Practical Nurse Examiners, State Racing Commission, State Athletic Commission or the Louisiana State Bar Association,

> however, nothing herein shall be construed to preclude these agencies, in their discretion, from adopting the policy set forth herein.
>
> This Section shall not be applicable to the Office of Alcoholic Beverage Control of the Department of Public Safety.

The new law begins with the general policy statement that an occupational license should not be denied solely because of a criminal record. It does provide, however, that a license may be denied if the applicant has been convicted of a felony that directly relates to the position of employment sought. By limiting the disqualification to felonies only, the law impliedly mandates that misdemeanor convictions and arrest records may not be used to bar an occupational license. The disallowance of misdemeanor offenses is more liberal than the Georgetown Model Statute and most of the other states which do permit an applicant to be disqualified from a licensed job for misdemeanor convictions that relate to the job desired.[82] The Model Statute and several of the states, however, also expressly stipulate that arrests not followed by conviction may not be used to disqualify an applicant.[83]

At least eight states and the Model Statute use the language "directly relates" as the connection needed before the crime can disqualify the offender.[84] Other states are more conservative, saying that a license may be denied if the offense is "reasonably and adversely" related to the occupation[85] or if the offense simply "relates" to the position sought.[86] Most of the other state statutes that use language similar to "directly relates" do not try to define the connection in any more detail. One state, however, has elaborated on the definition by saying that it means "that the nature of criminal conduct for which

the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought."[87] This parallels the notion that the denial of a license is not intended as further punishment but rather as a means of disqualifying unfit persons in the interest of protecting society.

Several states offer some factors to take into consideration in analyzing what impact the conviction should have. New Jersey, for example, lists the following:

a. The nature and duties of the occupation, trade, vocation, profession or business, a license or certificate for which the person is applying;

b. Nature and seriousness of the crime;

c. Circumstances under which the crime occurred;

d. Date of the crime:

e. Age of the person when the crime was committed;

f. Whether the crime was an isolated or repeated incident;

g. Social conditions which may have contributed to the crime;

h. Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have or have had the applicant under their supervision. /88/

Only five cases were found, nationwide, interpreting the nexus required between an offense and an occupation that would render an offender ineligible. This paucity of litigation could be a result of the legislation being fairly new throughout the country or, more

positively, that the nexus is sufficiently clear not to invoke litigation.

Three cases dealt with statutes that require a "direct" relationship between the offense and the occupation. In New York, the disbarment of a lawyer after being convicted of conspiracy to extort and attempted extortion was upheld as the court found that "the conviction of a felony visited upon a member of the Bar has historically been deemed conclusive of his unfitness to practice law."[89]

In Washington, a person with recent theft convictions was denied a cab driver's license. The court found that the board was reasonable in finding a direct relationship between theft and cab driving since passengers are in a "vulnerable position." Worth noting is that the applicant also had a series of motor vehicle violations on his record, including reckless driving.[90]

In Florida, a person was denied a clerk's position because a polygraph test indicated she had smoked marijuana in the past six months. She had not been convicted of any offense. The court noted that the statute required a direct rationship even before a conviction could render an applicant ineligible, and ordered the applicant reinstated to eligibility. It knew of no "respectable authority which suggests that a single use of marijuana within the last six months renders an applicant unfit to be a clerk."[91]

Two other cases interpreted statutes less similar to Act 341. New Mexico can disqualify a person from a job for any conviction if the licensing board finds that the person is not sufficiently rehabilitated.[92] A teacher was dismissed after it was learned she was on probation for

a conviction of distribution of marijuana. The court upheld the dismissal when evidence was introduced showing that the teacher was disrespectful of the drug laws and conveyed that attitude to her students.[93]

New Jersey licensing boards can disqualify a person if the offense "relates adversely" to the occupation sought.[94] An applicant was denied a school bus driver's license because of a recent conviction of assault and battery upon a juvenile. The court upheld the nexus as reasonable and thus upheld the denial.[95]

Act 341 provides that if a decision to deny a license is based wholly or in part on a prior conviction, the reasons must be explicitly stated in writing. This requirement is part of the Model Statutes and virtually all other state statutes similar to Act 341.[96] It is necessary to avoid arbitrary discrimination on the basis of a criminal record and to provide a basis for appeal.

The statute exempts a number of occupations from the impact of the law. Law enforcement agencies are traditionally excluded.[97] The other occupations exempted were amended into the bill during the legislative process. Nothing however prevents these licensing boards from adopting a policy similar to the statute if they so desire, with the exception of the Office of Alcoholic Beverage Control of the Department of Public Safety, which may not issue a liquor license to unpardoned ex-offenders.[98]

Act 341 also provides that appeals from the decisions of the licensing boards shall be processed in accordance with the Administrative Procedure Act.

The Administrative Procedure Act,[99] enacted in 1967, sets out

the procedures to be followed by state agencies in formulating rules and rendering decisions. With respect to persons already holding licenses, the Act provides that such a license cannot be suspended or revoked unless the licensee has been notified of the reason for the intended action and has had an opportunity to show that he has complied with all the lawful requirements for retaining the license.[100] Those who are applying for an initial license are not guaranteed this notice/hearing procedure unless it is required by some other law.[101] This parallels the developments in the judicial area that persons who have a vested interest in a job (i.e., already hold a license) are entitled to certain due process considerations, such as notice and a hearing, whereas persons with only an expectancy of possibly obtaining employment are not so entitled.[102]

The Administrative Procedure Act also provides that any person who is aggrieved by a final decision or order in an adjudication proceeding is entitled to judicial review.[103] The court may reverse or modify the decision of an agency if "the substantial rights of the appellant have been prejudiced" because the administrative decision was:

> (1) In violation of constitutional or statutory provisions;
>
> . . . .
>
> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (6) Manifestly erroneous in view of the reliable, probative, and substantial evidence on the whole record. . . ./104/

Under Act 341, licensing boards must now find a direct relationship between an applicant's past offense and the job he seeks before they

can deny him a license on that ground. An applicant so denied may petition for judicial review on the grounds that the ruling was in violation of the statutory provision, or that it was arbitrary, capricious, an abuse of discretion or manifestly erroneous.

Under Article 1, Section 20 of the 1974 Louisiana Constitution, former offenders are presumably restored to eligibility for public employment. An ex-felon may become a major, head of a state agency or superintendent of a school system, but still may be denied a license as a barber, a hearing aid dispenser or a watchmaker. The fact that public employment has been opened to offenders may well exert a subtle pressure on the court to scrutinize carefully any disqualification of a former offender from a licensed occupation. In this respect, Section 20, which was not apparently intended to affect licensing laws, may nonetheless provide a stricter standard for the courts in determining whether a licensing denial was arbitrary or manifestly erroneous.

3. Bonding

Fidelity bonding is a form of insurance used to idemnify employers for loss of money or property through the dishonest acts of their employees. These acts include theft, larceny, forgery, and embezzlement but do not include non-intentional omissions and/or errors.[105]

In recent years, fidelity bonding coverage has generally been purchased by employers in the form of blanket bonds, a single policy which covers all officers and employees of the establishment collectively. Other, less used, kinds of bonding include individual bonds (which, as is suggested by the name, cover only one individual for a specified amount of loss), name schedule bonds (which list individual employees and amounts of their coverage), and position schedule bonds (which cover all employees in a given position, e.g., cashier, for a stated amount without listing their names).

The blanket bonds have constituted the largest portion of the market because of their greater administrative simplicity. Under blanket bonds the individual employees are not identified and all new employees added to the payroll during the term of the bond are automatically covered without notice to the surety. To recover a loss the employer need not identify the person or persons responsible, he need only prove that a loss has resulted from employee dishonesty. Furthermore, there is no need to update the policy wherever personnel actions are taken or a new job category is created.

Unlike the blanket bond, under the individual or name schedule bond a perspective employee is insured only after a thorough credit check and investigation into his background is made. This coverage is terminated

once an employee is removed from his particular job slot, and is fairly expensive.

Fidelity bonding is generally considered good financial management practice and is now utilized by a significant proportion of employers.[106] Hence, almost any kind of job where the employee handles money or merchandise will require a bond. A person who cannot furnish a bond cannot work in a bank, a mercantile institution, or a warehouse. Nor can he be a truck driver, responsible for valuable shipments of goods, if the job specifications require the posting of a bond. Similarly, the collection agent, the bookkeeper, the door-to-door salesman, the ticket taker, the ice-cream vendor, and the holder of a milk route may need a bond before they will be allowed to enter upon their duties.

Until recently, most of the above occupations and others requiring bonds were beyond the reach of ex-offenders due to the fact that nearly all standard fidelity bonding policies contained the following clause excluding persons with criminal records:

> The coverage of this Bond shall not apply to any Employee from and after the time that the Insured or any partner officer thereof not in collusion with such Employee shall have the knowledge or information that such Employee has committed any fraudulent or dishonest act in the service of the Insured or otherwise, whether such act be committed before or after the date of employment by the Insured./107/ (Emphasis added.)

Fidelity bonding underwriters have included this clause because, according to standard fidelity bonding practice, bonds should not be issued at all whenever there is any reasonable likelihood that an individual might default. In other words, unlike life insurance underwriters, who peg premiums according to the degree of risk, fidelity bond underwriters generally seek to avoid risk altogether. In the eyes of these

underwriters, previous commission of a dishonest or fraudulent act is an indicator of a likelihood to do so again in the future.[108]

In what was probably the first private attempt anywhere in this country at bonding ex-offenders, the Aetna Life and Casualty Company, this country's largest fidelity bonding industry in terms of dollar volume of premiums and the present insurance carrier for the Federal Bonding Program, became involved in two experimental projects in Washington, D.C., and Denver, Colorado. The projects were designed to prove that high-risk individuals could be successfully bonded.

Both projects were viewed by Aetna officials as strictly limited activities undertaken to promote "good will" toward that insurance company.[109] In both cases, top officials of the Aetna Fidelity Bonding Department kept a close eye on all aspects of the project activities including, in many instances, making the final decision as to who would be bonded as there was never a commitment by Aetna to bond every applicant. This point was explicitly made in an internal Aetna communication:

> Both of these programs are group approaches and involve people who we believe are strongly motivated to rehabilitate themselves. Neither we nor any other company to the best of our knowledge proposes to provide any guarantee to individual, randomly selected, ex-convicts. /110/

Called Bonabond, Inc. (good bond) the programs were operated principally by ex-offenders. It developed some 300 job opportunities for its 215 members and recorded 190 confirmed job placements within its first twelve months.[111]

Under the agreement with Aetna, which became effective in June, 1966, Bonabond made available to each of its members bonds of up to $2,500 in

return for a $10.00 annual premium. Default claims were paid by Bonabond out of the premiums collected with Aetna agreeing to assume Bonabond's guarantee to employers if the latter's funds for paying losses in any one year became exhausted.

The Bonabond program proved to be a very successful one but due to the advent of the federal program, its services soon became duplicative and unnecessary.

The federal bonding program emerged from a series of experimental efforts by the Department of Labor (DOL) to determine whether ex-offenders and other potential employees excluded by the "fraudulent or dishonest" clause in commercial fidelity bonding contracts were truly such a risk as to be justifiably prohibited from working at certain jobs for the rest of their lives, simply because of a previous "record."

The specific impetus for the adoption of the bonding initiatives came from a series of reports received by the U.S. Employment Service concerning difficulties in placing job applicants who had police or criminal records;[112] and from reports that the manpower institutional training projects were having difficulty placing trainees in certain jobs because certain employers required fidelity bonding for those positions;[113] as well as from the results of a survey taken in Washington, D.C., that showed that of 5,100 disadvantaged job applicants in that area, 85% of the males and 10% of the females had police records.[114] But the fact that these reports resulted in a permanent federal bonding program was largely a matter of timing. The reports were considered during a period in which the Labor Department was devoting increased attention to the disadvantaged and the problems of offender rehabilitation.

In early 1965 a decision was made to conduct a short study to look into what could be done about bonding. The report recommended the initiation of an experimental fidelity bonding project to be funded by the federal government.

Although the Department of Labor already had broad enough authority to proceed with such a project, the Secretary of Labor insisted on direct congressional approval of the program. Hence an amendment was drafted adding a new section to the Manpower Development and Training Act which provided specific authorization for the experimental bonding activities.[115]

The specific authorization of the project, reasoned the Department of Labor, would serve to dramatize the commitment of the Department to such activities, would provide an opportunity for explicit congressional endorsement of the program, and would provide the project with an independent funding base.[116]

The amendment was submitted in February, 1965, and was enacted into law in April, 1965. The new section 105 of the Manpower Development and Training Act was entitled "Trainee Placement Assistance Demonstration Projects" and directed the Secretary of Labor to:

> . . . develop and carry out experimental and demonstration projects to assist in the placement of persons. . .who after appropriate counseling have been found by the Secretary to be qualified and suitable for the employment in question, but to whom employment is or may be denied for reasons other than ability to perform, including difficulty in securing bonds for indemnifying their employers against loss from the infidelity, dishonesty, or default of such persons. /117/

With the passage of the amendment, the Department of Labor entered into a contract with a private insurance company, the United Bonding Company of Indiana, obligating the company to provide uniform coverage

to all individuals who sought placement through the program. The strategy of the Department was to provide bonding coverage to presumed "high risk" job applicants and to use the record of the project to establish actuarial bases for determining the cost of providing special coverage for those applicants. In addition the Department of Labor hoped to demonstrate that these applicants were no less trustworthy than the average employee. If this hope were realized, it was further anticipated that insurance companies might be persuaded to modify or eliminate the restrictive bonding eligibility practices that precluded ex-offenders.[118]

By 1966, experimental bonding projects were implemented at public Employment Service offices in four cities[119] and at six additional sites.[120] Within a very short period after implementation, the Department of Labor officials responsible for the projects reached the conclusion that the availability of bonding was indeed helping significant numbers of employees to get jobs for which they were otherwise ineligible.

Accordingly, when requests from other cities for participation in the program were received, a decision was made to expand the program to cover all Employment Service offices in New York, Illinois, California, and Missouri. Numerous other expansions of the program occurred, and by the close of 1969, there were bonding projects in 51 cities, 29 states and the District of Columbia.

With the passage of time, a conviction grew within the Department of Labor that the bonding program was indeed demonstrating that some employers would hire persons with a police or criminal record when they found out

that the Department of Labor would provide the bonding coverage, and that this coverage could be provided without excessive cost or administrative burden. Furthermore, it was discovered that for every employer who required a bond, there were eight others who did away with the bonding requirement upon discovery of the fact that the Department of Labor was willing to bond the employee.[121] As a result of these and related considerations, the decision to "go national" with the program was made in the summer of 1970, making the program available through the more than 2,200 Employment Services offices throughout the country.[122]

In view of the fact that bonding was no longer an experimental project, the title Trainee Placement Assistance Demonstration Project was abandoned and the program became known as the Federal Bonding Program.

In 1971, the insurance underwriter for the program, the United Bonding Company, lost its certification to do business with the Federal Government, and its contractual obligations were assumed by the Indiana Bonding and Surety Company. No modification in program structure or operations resulted from this change.

In 1974, the Aetna Life and Casualty Company was the low bidder for the position of underwriting the program and is the present underwriter.

The first issue faced by the Department in providing a bonding program was the question of the basic program structure. After careful consideration of various options, the departmental planners opted for a master contract with a nationwide underwriter to cover all program participants.

Once the decision was made to contract with a national underwriter, the next consideration was terms of eligibility to participate in the program. Section 105 of the Manpower Development and Training Act

provided some guidance since it had authorized the Department to explore the means of overcoming the bonding barriers for "persons seeking employment through a public employment office who (had) successfully completed or participated in a federally assisted or financed training. . . or work experience program."[123] Ultimately, the Department decided to open the program to ex-offenders and other persons who were unable to obtain commercial bonding due to poor personal records.

This decision, however, led to the question of whether the insurance underwriter would be able to screen out certain individuals with criminal records according to a criteria approved in advance. After much debate, the following provision was agreed upon:

> Bond coverage hereunder shall be automatic and the contractor (underwriter) may not veto or otherwise fail to accept a bondee certified for bonding coverage hereunder, not withstanding the bondee's past record. /124/

An exception to the above provision was permitted, however. The underwriter was given the right to reject coverage of any individual who had at any previous time defaulted while in the bonding program.

Further eligibility requirements included the inability to obtain a commercial bond. This existed when an employer's bonding company refused to cover a perspective employee who had a questionable record or where a bond was required by an employer on a job which had not theretofore been covered by a bond and the bond was required simply because the individual had a questionable record. In the latter case, application to and rejection by at least one commercial bonding company was required.

Aside from being commercially unbondable, a participant also had to qualify for the job for which he was seeking the bond. This was a

determination to be made by local Employment Service counselors at the time of the application for the bond.

Finally, the job had to be one in which irresponsibility or dishonesty by the employee could materially damage the employer and it had to be a full-time permanent position.[125]

The choice of an agency within the Department of Labor to administer the program at the national level and of local organizations to serve as delivery agents (sponsors) was the next decision faced by the planners. Looking ahead to the possibility of a national program and due to the fact that they were the most likely organization to have unemployed applicants, the federal and state offices of the Employment Security Administration were selected as the regular administrative channels through which requests for bonds and other communications regarding bonding could flow.[126]

Presently, local Employment Services offices are responsible for identifying individuals needing bonding coverage, determining those persons' eligibility and for conducting periodic follow-ups (at least every six months) to determine if the bondee has changed jobs or is still employed.

The final issues of structure faced by the Department of Labor planners were relative to the amount for which an applicant would be bonded and the length of the bonding period. These issues were quickly resolved with the Department deciding to issue the bonds in units to be paid for totally by it with no charge to the applicant or the employer. (Although the legislative history of the bonding program amendment suggests that the employer was expected to pay whatever amount he would normally pay for obtaining

bonds for his workers with the Federal Government paying the added cost of increased premiums resulting from the greater risk factor, a Department of Labor staff paper concluded that the bonding business could not work that way and that there was only a small chance of success under such an arrangement.[127] This paper influenced the Department to structure the program so that the whole cost was absorbed by it.) A unit was defined as $500 worth of fidelity coverage for one bondee for one calendar month. Hence, to bond one person for $2,500 for a period of 12 months would require 5 bonding units per month and 60 units per year.

The maximum coverage under the program was originally $5,000 or 120 units per year, while the maximum period of coverage was for one year with no extensions allowed. These limitations resulted from concern by the Department of Labor that the total appropriation for the program might be used up too quickly to permit an accurate assessment of the program.[128] In addition, it was felt that the figure was sufficient to permit bondee placement in acceptable jobs while at the same time "rationing" the amount of units so that a maximum number of individuals might participate in the program.[129]

Shortly after the bonding program became operational, the demand from prospective employers made it painfully obvious that the $5,000 limit on the amount of coverage and the 1 year limitation of the length of coverage was inadequate. Hence, the Department agreed to relax both of these limitations. In 1967, the maximum monthly coverage was raised from 10 to 20 units per bondee per month. This had the effect of raising the maximum coverage from $5,000 to $10,000. However,

bonding counselors were urged to use the lowest amount acceptable to employers.[130] The restriction on the length of the bonding period was also removed so that participation in the program could continue as long as was necessary to enable employees to keep their jobs.

This extension was, however, later qualified by the official bonding program guidelines wherein the following regulation was published:

> Although the bonds are open-ended (without a specified termination date), the sponsors should obligate bonding units on the basis of one year with the option to continue only if absolutely necessary. At the end of a year's experience with the federal bonding program, the employer will be asked to assimilate the bondee into his regular bonding arrangement, drop the requirements for bonding, or make whatever arrangements he can, provided this does not jeopardize the bondee's job. However if the employer cannot make other arrangements or refuses to drop the requirements, the sponsor may continue federal bonding program coverage for the bondee past the year to a maximum of 18 months with continued regular checks, at least every six months to see when the requirement can or will be dropped. /131/

This regulation was probably the result of an agreement by the insurance underwriter for the federal bonding program to assist the Department of Labor in its bonding efforts by providing standard bonding coverage at comparable premium rates for all bondees who have been covered for a minimum of 18 consecutive months in the federal bonding program (FBP) without a paid default, where the employer is still unable to obtain commercial bonding.[132]

The only type of bonds available is the name schedule bond, which only protects the employer from loss through the specific acts of the named employee. (Unlike the blanket bond, under the name schedule bond the employer has to do more than simply show that he has incurred a loss; he must also locate the specific employee who caused the loss.)

Operational Characteristics:

A look at the results of the Department of Labor program reveals that during the period from June, 1966, through the end of July, 1974, 6,655 separate bonds were issued to a total of 6,401 individuals.[133] The discrepancy between the two figures is explained by the fact that 225 individuals were bonded more than once; 5 were bonded four times; and 1 was bonded six times. A 1977 survey reveals that over 11,000 individuals have been successfully bonded.

Department of Labor program results also show that the bonding activity has occurred disproportionately in a small number of states.[134] Roughly three of every ten bondings took place in California and, as of 1974, 15 states had 10 or fewer bondings.[135] Although Louisiana had reported more than ten bondings as of 1974, present statistics are not available. However, the Bonding Coordinator for this state has indicated that less than 20 persons have used the program since its inception in 1971 and a portion of these 20 were not ex-offenders.[136]

It also appears that half of all bondings have taken place in four states--namely, California, Illinois, New York, and Oregon.[137] This concentration of bonding activity can be explained, at least in part, by the fact that many of the states with the highest number of bondees have participated in the program for a longer period of time. Another possible explanation is that bonding has occurred more frequently in areas where local sponsors have taken an active role in promoting the program. This at least was the conclusion of one study done by the Department of Labor.[138]

A third result of the program is that roughly one-half of all

bondees have been covered at the maximum rate of $10,000; one-fifth have been covered for $5,000; and the remainder for less than $5,000.[139] In addition, about one-half of all bondees have been covered for six months or less; one-fourth for one or two months.[140]

Although there is no available data on why most bondees terminate so quickly, the logical alternatives are that either the job terminates, voluntarily or otherwise, or the employer drops the bonding requirement. At the other end of the spectrum, it appears that 15.5% of the bondees participated in the program for more than 18 months and that 3.7% were bonded for three years or longer. As of 1974 the median time for all bondings was 6.19 months.

Another result of the Department of Labor program is that fewer than 1 in every 50 bondees has been the subject of a valid claim since the program's inception yielding a 1.7 default rate.[141]

Since the insurance industry does not calculate a default rate from its statistics, it is impossible to use this rate to determine how it fares with that industry's performance. Nonetheless, a comparison may be made in terms of a "loss ratio," which is defined as the ratio of total amount paid in claims for a given time period to the amount of money earned in premiums.[142] The concept is frequently used by insurance underwriters as an indicator of profitability, with higher loss ratio indicating a lower profitability.

The analysis indicates that the loss ratio for the bonding program is lower than the comparable ratio for the insurance industry as a whole (the Department of Labor having a 14.24% loss ratio and the commercial insurance industry finishing with a 19.50% loss ratio.)[143] There are

however a number of unverifiable points made by leaders of the insurance industry which tend to reduce the importance of this finding from the insurers' point of view. Most insurers pointed to the existence of a higher premium structure in the federal program and to the comparatively small number of persons bonded by the program. In addition, there appears to be a widespread belief among insurers that most theft activity takes place after the person becomes a trusted employee, which is, in most cases, after he has been employed for more than three years.

Hence the essential conclusion drawn by most fidelity insurers from the Federal Bonding Program loss experience statistics is that bonding unbondables at standard rates for that type of bond (name schedule) is less profitable than commercial bonding at identical rates. It seems, therefore, that as long as their sole concern is maximizing profits, insurance companies cannot be expected to voluntarily adopt a program of bonding "unbondables."

Attitude of Insurance Industry:

> The great probability of repetition by offenders is a matter of common knowledge. Surety company management not only has a ficudiary obligation to the economic interests of its stockholders, but also a responsibility to the insuring public to keep rates within reasonable levels. /144/

> Probably less than 15 percent of all employers bond their employees and if surety companies began to write these sub-standard risks freely it would be a natural consequence within a short time that the industry would be carrying the entire risk, as the bonded employer would become the haven of refuge or the place of sanctuary for most, if not all, prior offenders./145/

The above two statements, for the most part, accurately summarize the attitude of the majority of the fidelity insurancy industry toward bonding ex-offenders and other high-risk individuals. Although other

segments of the insurance industry are willing to and do provide coverage for high-risk individuals by calculating the actuarial likelihood of loss and determining a premium structure which reflects this likelihood (the auto insurance industry, for example), the traditional practice of the fidelity bonding segment of the insurance industry is to reject totally those individuals who present any discernible possibility of loss. Previous fraudulent or dishonest behavior is considered in the industry to be an excellent indicator of future risk and thus serves to eliminate a potential bondee from coverage. Hence, it appears that the fidelity bonding premiums are based on previous loss experience within industrial classifications rather than on the potential risk involved with bonding a particular individual.

Some in the industry believe that much of the "so called" bonding problems are actually the result of employer attitudes. They believe that the industry has been used as a scapegoat by the employers who will find another reason not to hire the ex-offender if the bonding barrier were removed.[146]

One fallacy in this position, however, is that it is based upon the assumption that local insurance agents generally make exceptions to the exclusionary clauses in standard agreements which exclude ex-offenders when asked to do so by employers. This, however, has not been the case. Others in the industry have questioned the wisdom or the necessity of steering those with criminal records toward jobs which require fidelity bonding. This is because "there are other good jobs which are already open to such individuals."[147]

This type attitude explains, to some extent, why there has been

consistently only one company to bid for the Federal Bonding Program underwritership. Although hard evidence on this point has not been advanced, Department of Labor officials have felt that the commercial bonding industry was trying to torpedo their program.[148] This is understandable in view of the fact that the commercial industry loses a sale every time the Federal Bonding Program insures an ex-offender. (This flows from the fact that absent the Federal Bonding Program, the commercially unbondable ex-offender would not be hired and a bondable person would get the job.) Furthermore, with the Federal Bonding Program, when loss occurs, a determination of responsibility must be made. This is to be contrasted with the situation where the entire job is covered by one blanket bond, and losses are compensated no matter who specifically caused the loss. This complicating aspect of the Federal Bonding Program has resulted in many private companies threatening to cancel and refusing to renew an employer's coverage if the Federal Bonding Program is utilized.[149]

Needless to say, the presence of the Federal Bonding Program has not made any significant changes in the fidelity bonding industry's practices and attitudes, and there is little likelihood of any change in the near future.[150]

Recommendations:

The Federal Bonding Program does appear to have achieved significant results for at least some ex-offenders, at a relatively low cost. Perhaps more importantly, the program provides a service which does not appear to be duplicated anywhere else. Hence the Federal Government should, by all means, continue to fund the program.

Presuming the continued existence of the program, first and foremost

among the deficiencies is the failure of the Department of Labor to actively promote it. Both potential bondees and Employment Security staff are less than fully aware of the availability and full potential of the program.[151] This failure seems to have resulted, at least in part, from the belief during the initial stages of the program's development that it would be "self-implementing," which is to say that it would attract a sufficient number of participants without being advertised.[152]

This belief was held for several reasons. First, the notion that demand for bonding would be brisk led to concern that too much publicity might result in consumption of all available units before there was time to collect and analyze sufficient data concerning the program's effectiveness.[153] Second, it was feared that promotional activities would be counter-productive in that they might lead employers to require fidelity bonds even though they had not done so in the past.[154] For these reasons bonding sponsors were warned repeatedly against "overselling the Program."[155]

This strategy has apparently backfired and the effectiveness of the program has been severely retarded by the lack of promotion. Serious attempts should be made at informing the populace of the availability of fidelity bonds for those who might need them.

The second area requiring improvement on a national level involves the need for an increase in the number of personnel charged with the responsibility of administering the program. At present there is no full-scale staff to handle the creation and implementation of program policy. This absence results from the "satisfactory manner" in which the program has operated in the past and from a disinclination by the

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Department of Labor to upset the status quo. Such an attitude is neither consistent with good government nor good logic in that it is based in part on the fact that the first year's result of the program was achieved without the presence of a single full-time staff member at the national level. Furthermore, discussions with top administrative officials of the Federal Bonding Program have confirmed the observation that the absence of a full-time, independent staff is depriving the program of the ability to operate at optimum level.[156]

A third area in which national attention should be directed is that of attempting to discover a means whereby private underwriters might be persuaded to increase the frequency with which they cover ex-offenders on a case-by-case basis or a means whereby these fidelity underwriters would be willing to develop some version of an "assigned risk" category.

Finally, some consideration should be given to requiring that the employer bear at least a part of the cost of the bonds. This would not only produce an incentive for them to exercise more caution in internal operating procedures to prevent loss, but it would also discourage them from requiring bonds simply because they are free.

Less important areas of concern include looking into the fact that nearly one-half of the participants in the Federal Bonding Program have been covered for the maximum amount, thereby suggesting that the limit might be too low and that some bondees might be excluded from certain jobs because of it.[157] In addition, thought might be given to including part-time and temporary employees within the program.

State Recommendations:

At the state and local levels, notoriety once again raises its head

as the main area requiring attention, particularly in Louisiana because of its poor showing, thus far, in using the Federal Bonding Program. (Less than 20 persons have used the program since its inception in 1971.)[158] Although admittedly the absence of funding has historically been a problem, it need not always remain one. Some thought should be given to making a serious attempt at obtaining an increased legislative appropriation to be specifically used in conjunction with promoting the bonding project.

Any effective plan toward promoting this program should, by all means, include specific attempts to contact state, federal, and local penal institutions within the state to acquaint corrections personnel with the project. Parole officers and prospective parolees, as well as applicants for work release should particularly be made aware of the program. Such a plan should also entail both the dissemination of promotional flyers and other information to relevant community agencies and the enlightenment of state employees involved with administering the program. (It appears that numerous individuals charged with the responsibility of administering the program are lacking in the degree of awareness needed to effectively do their jobs.)[159]

A second area needing improvement on the state level involves data collection, presuming of course that increased publicity will result in increased usage of the program. Data collection at the local level could be used to determine exactly which persons were actually benefitting from the program and with complete information about the successful bondee, bonding slots could be more effectively utilized. Similarly, information on the characteristics of employers benefitting from the program would aid in efforts to develop job opportunities. Finally,

such data would provide additional guidance to Employment Service employees in their efforts to find satisfactory placement for ex-offenders, thereby minimizing inappropriate referrals and achieving the twin objective of improving service to the employer and the disadvantaged job seeker.

As for the possibility of a separate bonding program at the state level, such a program would arguably be duplicative and wasteful. Furthermore, it is extremely doubtful that such a program would be possible (absent self-insurance), given the existing attitudes of the fidelity insurance industry.[160] Even at a national level, there is a general reluctance by the insurance industry to underwrite this type project. (During the entire history of the Federal Bonding Program there has only been one single bidder for the underwritership of that program. The present underwriter, Aetna Life and Casualty, did not bid for its position. Rather the bid was made by the McLaughlin Insurance Company, which is the only broker for Aetna.) Hence, it follows that a company who would not write a national bonding contract would not write a statewide one. (All of the Louisiana based underwriters surveyed indicated that they did not write surety bonds, although they were authorized to do so.)[161]

In conclusion, apparently the bonding needs of most ex-offender and other high-risk individuals are met by the existence of the Federal Bonding Program. This program represents a major effort by the Department of Labor to provide placement services to ex-offenders; it possesses an inherent logic which suggests that the program can be justified almost by definition; and more than 12 years of corroborating experience indicate

that the program is working. Furthermore, the program appears to be providing its benefits without excessive costs or any major operating problems.

Practically speaking, the program can effectively remove bondability as an employer discriminatory screening device. Once the real impediment to hiring ex-offenders becomes clear and is not hidden behind a bonding requirement, constructive remedial steps can be taken. With the bonding requirement removed as a problem, other specific legal restrictions and licensing requirements may be identified and tackled directly.

Perhaps the most significant impact of the Federal Bonding Program thus far has been to bolster the confidence of both jobseekers with police records and the employment service interviewer. Applicants are now more willing to disclose complete background information, often revealing acquired skills and knowledge not otherwise apparent, as well as arrest/convictions, poor credit, etc., when previously they would rule out bonded jobs and would not discuss skills and training acquired while imprisoned. Employment services interviewers now attempt referrals of qualified, but apparently not commercially bondable, applicants to employers whom they would not otherwise approach. This increased frankness and confidence has sometimes been rewarded by having the applicant accepted without providing a bond or accepted under the employer's regular "blanket bond."

FOOTNOTES

[1]e.g. Kansas Stat. Ann. Sec. 21-4617(b); Nevada Rev. Stat. Sec. 179.285; Michigan Comp. Laws Ann. Sec. 780.622

[2]State v. Sims, 357 So.2d 1095 (1978) at 1098

[3]Florida Stat. Ann. Sec. 112.001; Washington Rev. Code Ann. Sec. 9.96 A.020; Connecticut Gen. Stat. Ann. Sec. 4-610

[4]Hawaii Revised Statutes, tit. 21, ch. 378

[5]"Barriers to the Rehabilitation of Ex-Offenders," Crime & Delinquency July, 1976 at 325-327

[6]"Sealing and Expungement of Criminal Records--The Big Lie," 61 Journal of Criminal Law, Corrections and Police Science 378 (1970), 379-830

[7]Ibid, 385

[8]Id

[9]"Guilt By Record." 1 California Western Law Review 126 (1965-67)

[10]"Criminal Records of Arrest and Conviction: Expungement from the General Public Access," 3 California Western Law Review 121 (1965-67), 133-134

[11]"Wiping Out a Criminal or Juvenile Record," 40 California S.B.J. 816 (1965), 824

[12]"Expungement in Ohio: Assimilation into Society for the Former Criminal," 8 Akron Law Review 480 (1975), 489 ftnte 67

[13]Ibid, 488-490

[14]61 J.C.L.C.P.S., supra note 6, at 385-386

[15]Ibid, 381

[16]"The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status," Washington University Law Quarterly 147 (1966), 149-150

[17]Michigan Revised Statutes 28.1274(101)

[18]La. Code of Criminal Procedure 893 and 894

[19]California Penal Code 1203.45

[20]New Jersey Revised Statute 2A:164-28

[21]Washington Rev. Code Ann. 9.95.240

[22]N.J. Rev. Stat. 2A:164-28

[23]Wash. Rev. Code Ann. 9.95.240

[24]"Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool," 13 Washburn Law Journal 93 (1974), 99

[25]8 Akron Law Review, supra note 12, at 481

[26]Cal. Pen. Code 1203.4

[27]Cal. Pen. Code 1203.4a

[28]Cal. Pen. Code 1203.4

[29]13 Washburn Law Journal, supra note 24, at 96-97

[30]"The Effect of Expungement on a Criminal Conviction," 40 Southern California Law Review 127 (1967), 136-141

[31]"Restoration of Rights to Felons in California," 2 Pacific Law Journal 718 (1971), 727

[32]3 California Western Law Review, supra note 10, 125

California also provides, under Penal Code 1203.45, that a person convicted before the age of 18 may petititon to not only have the charges dismissed but the records sealed and "(t)hereafter such conviction, arrest, or other proceeding shall be deemed not to have occurred, andthe petitioner may answer accordingly any question relating to their occurrence." An astute employer can circumvent this statute by asking the applicant if he has ever sought the relief of the statute. See Washington University Law Quarterly 147, supra note 16, at 164-165

[33]Kan. Stat. Ann. 21-4616(a)

[34]Id

[35]Ibid (b)

[36]Ibid (c)

[37]Kan. Stat. Ann. 21-4617

[38]State v. Miller, 520 P.2d 1248 (1974), 1254

[39]See generally 13 Washburn Law Journal, supra note 24

[40]Ohio Rev. Code Ann. 2953.32(A)

[41]Ohio Rev. Code Ann. 2953.32(C)

[42]Id

[43]Ohio Rev. Code Ann. 2953.33(B)

[44]Ohio Rev. Code Ann. 2953.35

[45]Ohio Rev. Code Ann. 2953.32(C)

[46]8 Akron Law Review, supra note 12, at 492, ftnte 87

[47]Ibid, 486-490

[48]Ibid, 486-487

[49]Ibid, 487

[50]Ibid, 487-488

[51]La. R.S. 14:64

[52]357 So.2d 1095 (1978)

[53]Ibid, 1098

[54]Id

[55]Id

[56]Ibid, 1099

[57]Act 570, Louisiana Legislature, 1978

[58]Survey by Governor's Pardon, Parole and Rehabilitation Commission, July, 1978

[59]Washington Law Quarterly 147, supra note 16, at 162; 3 California Western Law Review, supra note 10, at 125-128; 13 Washburn Law Journal, supra note 24, at 99

[60]8 Crime and Delinquency No. 2 (1962) 97, 100

[61]3 California Western Law Review, supra note 10, at 132-133

[62]Ibid, 131

[63]See, for example, Washington University Law Quarterly 147, supra note 16, at 187

[64]3 California Western Law Review, supra note 10, 132-133

[65]Washington University Law Quarterly 147, supra note 16, at 187

[66]Ibid, 188

[67]Ibid, 187

[68]3 California Western Law Review, supra note 10, 133

[69]Id

[70]Washington University Law Quarterly 147, supra note 16, at 188

[71]3 California Western Law Review, supra note 10, at 133-134

[72]Washington University Law Quarterly 147, supra note 16, at 189

[73]Ibid, 188

[74]Ibid, 187-188

[75]"Removing Offender Employment Restrictions," ABA Clearinghouse on Offender Employment Restrictions (1976) at 12

[76]"The Collateral Consequences of Criminal Conviction," 23 Vanderbilt Law Review 929 (1970) at 1003-1013

[77]Clearinghouse supra note 75 at 17

[78]Ibid

[79]See, for example, Rev.Code. Wash.Ann. 9.96A.010 and following (1973); New Mexico Statutes Annotated 41-24-1 and following (1974); New Jersey Stat. Ann. 2A-168A-1 and following (1974)

[80]Clearinghouse supra note 75 at 45-58

81 HB 790 was introduced by Commission member Rep. Johnny Jackson

[82]Clearinghouse supra note 75 at 46; see, for example, Fla.Stat. Ann. 112.011; Mich. Stat.Ann. 18.1208 (3); Minn. Stat.Ann. 364.04; but see also Ark. Stat.Ann. 71-2602

[83]Clearinghouse supra note 75 at 46; see, for example, Ark.Stat. Ann. 71-2602; Mich. Stat.Ann. 18.1208(3); Hawaii Rev. Stat. 831-3.1

[84]Clearinghouse supra note 75 at 46; Fla. Stat.Ann. 112.011; Hawaii Rev. Stat. 831-3.1; Maine Rev. Stat. Ann. 5301 (B.C.); Minn. Stat. Ann. 364.03; New Mexico Stat. Ann. 41-24-4(1); Cons. Laws of N.Y. Ann. Correction Law 752; N.D. Century Code 9.96A.020

[85]Mich. Stat. Ann. 18.1208(2)

[86]Rev. Codes of Montana 66.4003

[87]Cons. Laws of N.Y. Ann. Correction Law 750(3)

[88]New Jersey Stat.Ann. 2A.168A-2

[89]In the Matter of Glucksman, 394 N.Y.S. 2d 191 (1977) at 193

[90]Standow v. City of Spokane, 564 P.2d 1145 (1977)

[91]Osterman v. Paulk, 387 F.Supp. 669 (1974) at 671

[92]New Mexico Stat. Ann. 41-24-4(2)

[93]Bertrand v. New Mexico State Board of Education, 554 P.2d. 1176 (1976)

[94]New Jersey Stat. Ann. 2A.168A-2

[95]Sanders v. Division of Motor Vehicles, 328 A.2d 637 (1974)

[96]Clearinghouse supra note 75 at 47

[97]Ibid at 48

[98]La.Rev.Stat. 26:79

[99]La.Rev.Stat. 49:951 and following

[100]La.Rev.Stat. 49:961(C)

[101]La.Rev.Stat. 49:961(A)

[102]See pages 24-28 of this report.

[103]La.Rev.Stat. 49:964

[104]La.Rev.Stat. 49:964(G)

[105]Louisiana law classifies larceny and embezzlement under the general category of theft. The other 49 states recognize legal distinctions.

[106]About 15% of all occupations are bonded.
"Attitudes of Bonding Companies Toward Probationers and Parolees" Federal Probation (Dec., 1967) p. 37 (Hereinafter referred to as Attitudes.)

[107]Mitchell W. Dule, Barriers to the Rehabilitation of Ex-Offenders (Foundation, 1976) p. 326

[108]Contract Research Corp., An Analysis of the Federal Bonding Program, Vol. I, Program History, p. 2 (Hereinafter referred to as History.)

[109] National Underwriter, September, 1967, p. 1

[110] History, supra at Note 108, p. 51

[111] National Underwriter, Sept. 1967, p. 4

[112] History, p. 21

[113] Id

[114] Id

[115] Ibid at p. 22

[116] Id

[117] 42 U.S.C. 2571-2628

[118] History, p. 12

[119] Ibid at p. 65

[120] Id

[121] Ibid at p. 94

[122] Analysis, p. 13

[123] 42 U.S.C. 2571-2628

[124] History, p. 31

[125] Ibid at p. 36

[126] History, p. 41

[127] Staff Paper, Department of Labor, Sept. 3, 1965

[128] Analysis, p. 36

[129] Id

[130] Federal Bonding Program Guidelines, Oct. 18, 1977

[131] Ibid at p. 3

[132] Analysis, p. 38

[133] Ibid at p. 13

[134] Id

[135] Id

[136]Telephone interview with Mr. Bill Benson, Louisiana Bonding Coordinator, Louisiana Office of Employment Security

[137]Analysis, p. 34

[138]Ibid at p. 33

[139]Ibid at p. 14

[140]Id

[141]Stanford Law Review 28:333, Jan. 1976, p. 347

[142]Analysis, p. 48

[143]Id

[144]Attitudes, supra at Note 106, at p. 38

[145]Id

[146]History, p. 103

[147]Id

[148]Mitchell Dule, ibid at Note 107, at p. 327

[149]Id

[150]Analysis, p. 19

[151]Telephone interview with Mr. William Throckmorton, Department of Labor, Office of Research and Development

[152]History, p. 84

[153]Id

[154]Id

[155]Id

[156]Throckmorton interview, supra at note 151; Telephone interview with Dale Harger, Department of Labor

[157]Analysis, p. 14

[158]Benson interview, supra at note 136

[159]Personal telephone survey by author

[160]Analysis, p. 29

[161]Personal written survey by author

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