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Marlaina Freisthler

Mark A. Godsey

University of Cincinnati College of Law, markgodsey@gmail.com

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GOING HOME TO STAY: A REVIEW OF COLLATERAL CONSEQUENCES OF CONVICTION, POST-INCARCERATION EMPLOYMENT, AND RECIDIVISM IN OHIO

Marlaina Freisthler and Mark A. Godsey***

The overarching goal of reentry ... is to have returned to our midst an individual who has discharged his legal obligation to society by serving his sentence *and* has demonstrated an ability to live by society's rules.¹

OHIO has the seventh largest prisoner population and is ranked 22nd in the nation in per capita incarceration rate.² Incarceration rates have increased in recent years,³ while sentencing reform efforts have led to an even higher number of prisoners being released from prison.⁴ In fact, most prisoners in Ohio are serving short terms⁵ and will be reentering the community.⁶ Expectations are high when prisoners are released back into the community.⁷ Some 1600 prisoners return home every day in this country;⁸ on average, seventy return home each day in Ohio.⁹ Released offenders need to establish a residence, find employment, and provide for themselves and whatever family may be awaiting their return.¹⁰ At first, this may not seem to be a huge undertaking. The released offender has completed his prison sentence and has thereby "paid his debt to society." The released offender, then,

* J.D. 2004, University of Cincinnati College of Law.

** Associate Professor of Law and Faculty Director, Rosenthal Institute, University of Cincinnati College of Law.

1. JEREMY TRAVIS, U.S. DEP'T OF JUSTICE, PUB. NO. NCJ 181413, BUT THEY ALL COME BACK: RETHINKING PRISONER REENTRY 2 (May 2000) [hereinafter TRAVIS, U.S. DEP'T OF JUSTICE], available at <http://www.ncjrs.org/pdffiles1/nij/181413.pdf>.

2. NANCY G. LA VIGNE ET AL., URBAN INSTITUTE, A PORTRAIT OF PRISONER REENTRY IN OHIO 14 (2003), available at http://www.urban.org/UploadedPDF/410891_ohio_reentry.pdf. Ohio's prisoner incarceration rate is 398 prisoners per 100,000 residents. *Id.*

3. *Id.* at 16-19.

4. *Id.* at 21. In 2002, there were 25,624 prisoners released from Ohio prisons. *Id.* at 26.

5. In 2001, 54% of all released prisoners had served less than one year. *Id.* at 40.

6. See JEREMY TRAVIS ET AL., URBAN INSTITUTE JUSTICE POLICY CENTER, FROM PRISON TO HOME: THE DIMENSIONS AND CONSEQUENCES OF PRISONER REENTRY 9 (2001), available at http://www.urban.org/UploadedPDF/from_prison_to_home.pdf ("More than 95 percent of the nation's state prisoners will eventually return to the community.").

7. *Id.* at 18-19.

8. *Id.* at 1.

9. See LA VIGNE ET AL., *supra* note 2, at 7 (basing the daily average on 25,624 inmates returning home in 2002).

10. TRAVIS ET AL., *supra* note 6, at 14-15. Some prisoners are released with no post-incarceration control. For these prisoners, the need to accomplish these tasks is functional in nature: it is the need to provide the basic necessities for living. Other prisoners are released under some kind of supervision such as parole, a condition of which is a permanent address and stable employment, in addition to other things. *Id.*

should be on equal footing with everyone else in search of a place to live and a job to support his family.

However, years after conviction or release from prison, a convicted felon will be plagued by the effects of his or her offense.¹¹ While a prisoner released back into his community in Ohio may be able to contribute to society by voting,¹² sitting on a jury,¹³ and being able to own and possess a firearm,¹⁴ one very important obstacle he is likely to face is obtaining suitable employment.¹⁵

Most of the problems that the released offender will face are a result of the "collateral consequences" of his conviction. Collateral consequences of conviction are "sanctions ... [that] are not imposed explicitly as part of the sentencing process, but by legislative creation of penalties applicable by operation of law to persons convicted of particular crimes."¹⁶ These collateral consequences serve several purported goals: retribution, rehabilitation, deterrence, and prevention.¹⁷

Currently, Ohio's legislative and administrative schemes dealing with employment are unduly punitive toward convicted felons.¹⁸ This article suggests an alternative approach to achieve the same legitimate purposes that the current scheme purports to serve. The first part of the article is a general discussion of collateral consequences. The second part discusses the manner in which collateral consequences can be imposed to achieve inappropriate results and describes the ABA's recent Criminal Justice Standards on collateral consequences as a method to avoid inappropriate results. The third part evaluates Ohio's efforts to return prisoners to communities following conviction and the effect that current collateral employment consequences have on that effort. This part also discusses Ohio's current reform efforts with respect to collateral employment consequences. This article concludes that Ohio's current collateral employment consequences are

11. Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 154 (1999).

12. OHIO REV. CODE ANN. § 2961.01 (West 2004).

13. OHIO REV. CODE ANN. § 2313.42(A) (West 2000); OHIO REV. CODE ANN. § 2967.16 (West 2004); OHIO ADMIN. CODE § 5120:1-1-14 (2004).

14. Under Ohio law, a person who has been convicted of an offense of violence is not permitted to knowingly acquire or have a firearm or dangerous ordnance. OHIO REV. CODE ANN. § 2923.13(A)(2) (West 2004). Likewise, a person convicted of certain drug offenses may not possess a firearm. OHIO REV. CODE ANN. § 2923.13(A)(3) (West 2004). Ohio law, however, permits a person to have these rights reinstated. Persons subject to the firearm disability may have their rights reinstated upon showing proof to the court that the person has been fully discharged from his term of commitment, has led a law-abiding life, and is not subject to other firearms disabilities. OHIO REV. CODE ANN. § 2923.14(D) (West 2004). This reinstatement "does not apply ... to 'dangerous ordnance.'" OHIO REV. CODE ANN. § 2923.14(F)(3) (West 2004).

15. See *infra* part III.

16. Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253, 253 (2002). Those persons convicted of felonies who are not sentenced to a prison term are equally likely to experience the debilitating effects of collateral consequences of conviction. This paper focuses narrowly on only those convicted felons who are also sentenced to a prison term because of the stark contrast between the rehabilitative and educative efforts of the Ohio Department of Rehabilitation and Correction (ODRC) and the community-based barriers to reentry that the previously incarcerated person experiences when he returns to that community. See *infra* part III.

17. See Demleitner, *supra* note 11, at 160-61.

18. See *infra* part III.

unduly punitive in nature, that its reform efforts are insufficient to reduce recidivism, and that it should alter its legislative and regulatory approach to mirror the standards provided by the ABA.

I. COLLATERAL CONSEQUENCES OF CONVICTION GENERALLY

In order to provide a definition for, and establish legitimate uses of, collateral consequences of conviction, it is helpful to remind oneself of the purpose of the traditional criminal justice system in the United States: “to punish a person for committing a morally culpable act that injures society.”¹⁹ Collateral consequences of conviction, however, cannot be considered “punishment.”²⁰ Thus, they must be different from criminal consequences by definition and in purpose.

Jurisprudentially, collateral consequences of conviction are different from criminal consequences of conviction. This is because the traditional safeguards provided during a criminal trial are not afforded before collateral consequences are imposed.²¹ Often, as is the case in Ohio, neither a judge nor a defense attorney has an obligation to inform a defendant of the many collateral consequences he may face as a result of his pleading guilty.²² In addition, many collateral consequences

19. Susan R. Klein, *Redrawing the Civil-Criminal Boundary*, 2 BUFF. CRIM. L. REV. 679, 685-86 (1999).

20. This is because they would be legislatively imposed punishments, which are unconstitutional under the Bill of Attainder Clause of the United States. See generally Daniel L. Feldman, *The “Scarlet Letter Laws” of the 1990s: A Response to Critics*, 60 ALB. L. REV. 1081 (1997) (arguing the constitutionality of sex offender notification laws).

21. These rights are tied up in both the Due Process Clause and the Sixth Amendment right to effective assistance of counsel. The most significant requirement is that, under the Due Process Clause, a defendant’s plea must be entered knowingly, intelligently, and voluntarily. See *Boykin v. Alabama*, 395 U.S. 238, 242 (1969). In practice, this requirement is met through Rule 11, which requires that the judge, before accepting a plea from a defendant, inquire as to whether the defendant is aware of the direct consequences of the conviction. FED. R. CRIM. P. 11(b); OHIO R. CRIM. P. 11(C)(2). With respect to effective assistance of counsel, this minimum requirement that defendant be aware of the direct effects of his or her plea has been extended to encompass the attorney’s obligations under the Sixth Amendment right to effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In *Hill v. Lockhart*, the Supreme Court applied a two-part test for determining when a defendant has been denied the effective assistance of counsel in entering a guilty plea. 474 U.S. 52, 57 (1985). The Court stated that, in order to claim ineffective assistance of counsel, the “defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

22. See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 706-708 (2002). For several different reasons, courts that have considered the application of traditional safeguards to collateral consequences have found that defense counsel is under no obligation to inform the defendant of the possible collateral consequences of conviction. *Id.*; Chin, *supra* note 35, at 253. In Ohio, the extension of these rules to encompass defense attorneys in addition to judges has occurred because of a failure of courts to distinguish between the duties of the court under the Due Process Clause and the duties of counsel under the Sixth Amendment. The courts that have considered it, with very minimal analysis, have seemingly conflated the issues. See, e.g., *Ohio v. Wombold*, No. 18428, 2001 Ohio App. LEXIS 236, at *21 (Ohio Ct. App. Jan 26, 2001) (“We also agree with the State and the trial court that the APA’s role in evaluating parole is in the nature of a collateral, not a direct consequence of a plea. As a result, neither the court nor Wombold’s defense attorney had a duty under Crim. R. 11 to inform Wombold of this type of consequence of his plea.”). Admittedly, there is an utter dearth of treatment of the

are imposed on a mandatory basis and without opportunity for review.²³ From this distinction, there arises a definitional difference between the criminal and the collateral consequences of criminal conviction. Those consequences considered criminal, and, therefore, retributive in nature, are often called “direct” consequences of conviction, as opposed to the collateral consequences.²⁴ The right to be informed of the consequences of conviction has been strictly circumscribed to include only *direct* consequences.²⁵

Because criminal law protections apply only to direct, and not collateral, consequences of conviction, the U.S. Supreme Court has established a dichotomy between the two.²⁶ This distinction has been developed by the lower courts.²⁷ The maximum sentence and amount of a fine are considered direct consequences of conviction.²⁸ Collateral consequences are varied and scattered, and they may include anything from parole issues to deportation requirements.²⁹

The definitional distinction between direct and collateral consequences establishes a dichotomy in the purposes that each type of consequence can legitimately serve. Direct consequences of conviction generally serve the traditional penological goals of retribution, prevention, deterrence, and rehabilitation.³⁰ In their current form, however, collateral consequences cannot be justified on any of these grounds.³¹ The definitional distinction between direct and collateral consequences eliminates retribution as a permissible goal of collateral

subject in Ohio caselaw. What is clear is that courts in Ohio are “especially loathe to allow an accused to withdraw his plea when the supposed unprofessional conduct was not concerning the severity of the sentence directly flowing from the judgment of conviction, but a collateral consequence thereof.” *Ohio v. Kazymyriw*, No. 96CA006474, 1997 Ohio App. LEXIS 2033, at *8 (Ohio Ct. App. May 14, 1997). The most significant existing argument against this conflation is that there is “good reason to doubt that the duties and conduct of courts and defense lawyers should be regarded as identical in this context.” *Chin & Holmes, supra*, at 730. This is because “given that the judge is an impartial arbiter and defense counsel is an advocate, ‘it is not apparent, to say the least, why a defense attorney’s responsibilities in advising his client on such matters should be deemed to be no more extensive than the judge’s.’” *Id.* at 731. Furthermore, a common reason given for the court’s limited role in providing this information to defendants is that “detailed exploration of collateral consequences is defense counsel’s job.” *Id.*

23. *See, e.g.*, OHIO REV. CODE ANN. § 4749.03(A)(1)(a) (West 2004) (person convicted of felony within the past twenty years not eligible to be licensed as security guard); OHIO REV. CODE ANN. § 4749.03(D) (West 2004) (license of security guard cannot be renewed if convicted of felony).

24. *See Wombold*, 2001 Ohio App. LEXIS 236, at *21. *See also* 5 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 21.4(d) (2d ed. 2004).

25. *See, e.g.*, *Hill*, 474 U.S. at 55; *Wombold*, 2001 Ohio App. LEXIS 236, at *21. *See also* *Chin & Holmes, supra* note 22, at 704-705; 5 LAFAYE, *supra* note 24, § 21.4(d).

26. *See Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (“[A] plea of guilty entered by one fully aware of the direct consequences ... must [stand.]”); *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971) (“We presume that the Supreme Court meant what it said when it used the word ‘direct’; by doing so, it excluded *collateral* consequences.”).

27. For a general discussion of standards applied by different courts, see *Chin & Holmes, supra* note 22, at 705-09.

28. *See id.* at 704-05.

29. *See id.* at 705-06.

30. *See Demleitner, supra* note 11, at 154.

31. *See id.* at 160-61.

consequences.³² It is widely accepted that collateral consequences do not serve a rehabilitative function, because they often make it more, not less, difficult for the offender to reenter society.³³ Additionally, collateral consequences are ineffective as a deterrent because their impact is often not widely known to offenders.³⁴

Collateral consequences of conviction are generally justified on preventive grounds.³⁵ In this capacity, they theoretically serve two alternative purposes. One is to generally protect society from the criminal's influence.³⁶ The other is very simply to prevent the criminal from re-offending.³⁷ The Supreme Court has endorsed the use of collateral consequences on these grounds.³⁸ However, as the following discussion will illustrate, the current legislative and regulatory implementation of collateral consequences indicates that these purposes are not the underlying motivation for many collateral consequences, particularly those related to employment. As a result, there is no justification for these collateral sanctions in their current form.

II. LEGITIMATE USES OF COLLATERAL CONSEQUENCES OF CONVICTION

Although collateral consequences can undoubtedly serve legitimate purposes, "it is not always clear that the primary legislative motivation for a collateral sanction is civil rather than punitive, nor is it always a simple matter to discern the primary motivation."³⁹ One important consideration identified in making this determination is whether the collateral consequence is based on the person being convicted or on the conduct underlying the conviction.⁴⁰ If the purpose of the rule is to deny a certain opportunity to all persons who have undertaken such conduct, then it is likely that the prohibition can be justified on civil preventative grounds.⁴¹ However, if the only method that can be used to disqualify a person from the opportunity is to show evidence of conviction, this indicates "that the legislature did not regard the underlying conduct as sufficient in itself to warrant disqualification."⁴² This supports a finding that the rule is punitive in purpose and, therefore, unjustified as a collateral consequence of criminal conviction.⁴³

The American Bar Association Criminal Justice Standards serve to "guide[] policymakers and practitioners working in the criminal justice arena."⁴⁴ In August

32. If the defendant is not entitled to constitutional protections, then the sanction should not be punishment. *See supra* notes 19-20 and accompanying text.

33. Demleitner, *supra* note 11, at 161.

34. *Id.*

35. *Id.*; Gabriel J. Chin, *Are Collateral Consequences Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1685-86 (2003).

36. Demleitner, *supra* note 11, at 161.

37. *Id.*

38. *See, e.g.,* Kennedy v. Martinez-Mendoza, 372 U.S. 144, 163-65 (1963); Hawker v. New York, 170 U.S. 189, 200 (1898).

39. Chin, *supra* note 35, at 1686.

40. *Id.*

41. *Id.* at 1686-87.

42. *Id.* at 1687.

43. *Id.*

44. American Bar Association, *Criminal Justice Standards*, available at

2003, the American Bar Association adopted the black letter *ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*.⁴⁵ The new standards, which supplant the 1981 Standards on the Legal Status of Prisoners,⁴⁶ establish a workable scheme for the use of collateral consequences for protective and preventative purposes.⁴⁷ They do so by implementing the conviction/conduct distinction.⁴⁸

The standards define two different types of collateral consequences.⁴⁹ The first are called "collateral sanctions," and include any "penalty, disability or disadvantage, however denominated, that is imposed on a person automatically upon that person's conviction for a felony, misdemeanor or other offense, even if it is not included in the sentence."⁵⁰ The second are "discretionary disqualifications," which include any "penalty, disability or disadvantage, however denominated, that a civil court, administrative agency, or official is authorized but not required to impose on a person convicted of an offense on grounds related to conviction."⁵¹ The significant difference between collateral sanctions and discretionary disqualifications is the opportunity for review before implementation. This distinction is so significant that it provides the framework from which the standards are formed.

The standards recommend severe restrictions on the use of collateral sanctions because they are applied in an immediate and mandatory manner.⁵² The standards recommend elimination of collateral sanctions based on criminal conviction unless "the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified."⁵³ In addition, the standards recommend that defendants be informed of collateral sanctions before entering a plea, that courts consider collateral sanctions during the sentencing phase of a trial, and that a process for obtaining relief from collateral sanctions be implemented.⁵⁴

Similarly, the standards recommend reform of the use of discretionary disqualifications. The major recommendation is that implementation of discretionary disqualifications should be prohibited on the basis of conviction unless engaging in the underlying conduct would likewise be sufficient to establish a basis for disqualification.⁵⁵ They also recommend a process for review of discretionary disqualifications.⁵⁶ Finally, the standards encourage jurisdictions to

<http://www.abanet.org/crimjust/standards/> (last visited Mar. 14, 2005) [hereinafter ABA Standards].

45. AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS COMM'N, REPORT TO THE ABA HOUSE OF DELEGATES ON PROPOSED STANDARDS ON COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATIONS OF CONVICTED PERSONS 1 (2003) [hereinafter ABA REPORT], available at <http://www.abanet.org/leadership/2003/journal/101a.pdf>.

46. *Id.* at R-17.

47. *Id.* at R-7 to R-9.

48. *Id.*

49. *Id.* at BL-1.

50. *Id.* (Standard 19-1.1(a)).

51. *Id.* (Standard 19-1.1(b)).

52. *Id.* at R-7 to R-9.

53. *Id.* at BL-2 to BL-3 (Standard 19-2.2).

54. *Id.* at BL-3 to BL-4 (Standards 19-2.3, 19-2.4, & 19-2.5).

55. *Id.* at BL-5 (Standard 19-3.1).

56. *Id.* (Standard 19-3.2).

adopt legislation to prevent discrimination on the basis of conviction unless the underlying conduct would be a sufficient basis for the decision.⁵⁷

The report section describes several reasons for the development of these new standards. The report recognizes that “[t]he indiscriminate imposition of collateral penalties has serious implications, not only in terms of fairness to the individuals involved, but also in terms of the resulting burdens on the community.”⁵⁸ In addition, the report acknowledges that “a regime of collateral consequences may frustrate the reentry and rehabilitation of [released offenders], and encourage recidivism.”⁵⁹ These implications of the collateral consequences regime drive the movement for reform.

III. COLLATERAL EMPLOYMENT CONSEQUENCES IN OHIO

A review of Ohio’s current legislative and regulatory scheme imposing collateral consequences indicates that collateral employment consequences are applied in a manner that is inconsistent with the ABA Criminal Justice Standards. Further analysis indicates that these collateral consequences frustrate the efforts of the Ohio Department of Rehabilitation and Correction (ODRC) by creating a significant barrier to offender reentry that is inappropriately punitive in nature.

A. Offender Reentry

Reentry is “the process of leaving the adult state prison system and returning to society.”⁶⁰ When reentry occurs, prisoners have certain needs that must be met in the immediate post-release period.⁶¹ One of the most immediate needs is employment.⁶²

1. Employment and Recidivism

Prisoners who are able to contribute to the community after their release are less likely to recidivate.⁶³ In this country, employment is a significant factor in community integration. A person who does not participate in the labor market may

57. *Id.* at BL-5 to BL-6 (Standard 19-3.3).

58. *Id.* at R-1.

59. *Id.* at R-4.

60. LA VIGNE ET AL., *supra* note 2, at 7.

61. TRAVIS ET AL., *supra* note 6, at 18-19.

62. Most prisoners are released for reentry with little or no money. *Id.* at 19. Money will become an immediate need, hence, the need for employment. In addition, those prisoners released on post-release supervision may be required to maintain employment as a condition of parole. *Id.* at 21.

63. John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1, 20 (2001) (“Job stability and marital attachment in adulthood were significantly related to changes in adult crime—the stronger the adult ties to work and family, the less crime and deviance.”).

be in a socially, as well as economically, disadvantaged position.⁶⁴ Because of the compound effects of joblessness, employment is a significant factor in recidivism.⁶⁵

Employment is likely to be a significant obstacle for the prisoner attempting to reenter the community. Though half of state prisoners nationwide are employed before being incarcerated, only about 20% are able to find employment following imprisonment.⁶⁶ Released prisoners have fewer job prospects and a decreased lifetime earning capacity.⁶⁷ The “wage penalty” of incarceration is estimated to be between 10% and 20%.⁶⁸ One factor contributing to employment difficulties is a “lack of skill and work experience.”⁶⁹ This problem is compounded by the fact that the prisoner has not participated in the labor market for some time.⁷⁰ Additionally, ex-offenders may have to deal with stigmatization and regulatory barriers.⁷¹

Studies indicate that prison employment programs contribute to decreased recidivism and positive post-release outcomes,⁷² including “an increased likelihood of employment.”⁷³ In fact, “involvement in job training and placement programs can lead to employment and lower recidivism. On average, participants in vocational programs were more likely to be employed following release and to have a recidivism rate 20 percent lower than nonparticipants.”⁷⁴ So strong is the inverse correlation between employment and recidivism that employment is considered a “rehabilitative necessity.”⁷⁵

2. ODRC's Approach

True to its rehabilitative function, the Ohio Department of Rehabilitation and Correction (ODRC) strives to attain low levels of recidivism by instilling in offenders “the capacity to become law-abiding members of society.”⁷⁶ Reentry is a primary focus, as “the ODRC is working to establish a system in which the concept of reentry underlies the assessments, programming and services that a

64. Demleitner, *supra* note 11, at 155 (“Since the liberal state assumes that ‘the labor market is the main instrument of incorporation,’ the position of individuals in such a society depends to a large extent on their participation in the labor force.”).

65. TRAVIS ET AL., *supra* note 6, at 31; Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1719 (2003).

66. John Hagan & Ronit Dinovitzer, *Collateral Consequences of Conviction for Children, Communities, and Prisoners*, 26 CRIME & JUST. 121, 137 (1999).

67. TRAVIS ET AL., *supra* note 6, at 31; Hagan & Dinovitzer, *supra* note 66, at 134.

68. TRAVIS ET AL., *supra* note 6, at 32.

69. Laub & Sampson, *supra* note 63, at 18.

70. TRAVIS ET AL., *supra* note 6, at 31.

71. *Id.*

72. LA VIGNE ET AL., *supra* note 24, at 44.

73. Laurie Robinson & Jeremy Travis, *Managing Prisoner Reentry for Public Safety*, 12 FED. SENTENCING REP. 258, 258-59 (2000).

74. TRAVIS ET AL., *supra* note 6, at 32.

75. Jennifer Leavitt, Note, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281, 1286 (2002).

76. 2003 OHIO DEP'T OF REHAB. & CORR. ANN. REP. 3 (2003), available at <http://www.drc.state.oh.us/web/Reports/Annual/Annual%20Report%202003.pdf> [hereinafter ODRC REPORT].

prisoner receives during incarceration as well as after release from prison.”⁷⁷ ODRC has adopted a slogan that embodies this commitment: “[R]eentry means ‘Going Home to Stay.’”⁷⁸

ODRC has been relatively successful in this goal: Ohio’s three-year recidivism rate has been estimated to be around 35%,⁷⁹ which is considerably lower than the national rate.⁸⁰ This may be due, at least in part, to Ohio’s programming efforts. Most recently, ODRC has developed a comprehensive reentry program to prepare prisoners to return to the community.⁸¹ The program addresses several areas of importance, including family, housing, social services, and employment.⁸²

Ohio prisoners are in need of these services, particularly in the area of vocation and education. The average prisoner in Ohio has less than an eighth grade education,⁸³ and far less than half of all prisoners incarcerated in 2003 had jobs before going to prison.⁸⁴ In summary, “most [Ohio] prisoners lack the education achievement level and job skills necessary to maintain meaningful employment.”⁸⁵ As employment is such a significant factor in recidivism,⁸⁶ obstacles to employment must be dealt with in order for reentry efforts to be successful.

Vocation and education programming are an important part of the employment preparation process. ODRC’s vocation and education programming, in preparation for post-incarceration employment, is relatively extensive. While many other states have eliminated vocation and education programs for inmates because of budget cuts,⁸⁷ Ohio has developed programs for inmates of all education and skill levels.⁸⁸ In 2002,

on any given day ... nearly one-quarter of the ODRC prison population was enrolled in an education program, and over the course of the year, over half of the population participated in a school program. In addition to educational programs ranging from literacy to college-level coursework, the ODRC offers vocational programs and apprenticeships.⁸⁹

77. LA VIGNE ET AL., *supra* note 2, at 45.

78. ODRC REPORT, *supra* note 76, at 7.

79. LA VIGNE ET AL., *supra* note 2, at 33. This rate was for prisoners released in 1994. *Id.* The rate for prisoners released in 1998 was 37%. *Id.*

80. *Id.* (“The study found that within three years of their release, 52 percent of these prisoner were back in prison for new charges or technical violations of the conditions of their release.”).

81. *Id.* at 8. The program is called the “Release Preparation Program” and is provided to all inmates starting six months prior to release. *Id.*

82. *Id.* at 45.

83. ODRC REPORT, *supra* note 76, at 29.

84. *Id.* However, in other states, the pre-conviction employment rate may be higher. See TRAVIS ET AL., *supra* note 6, at 31. It has been estimated to be as high as 75%, with as many as half of convicted persons having full-time employment at the time of incarceration. *Id.*

85. ODRC REPORT, *supra* note 76, at 29.

86. See *supra* part III.a.i. See also TRAVIS ET AL., *supra* note 6, at 31.

87. TRAVIS ET AL., *supra* note 6, at 34.

88. LA VIGNE ET AL., *supra* note 2, at 49-51.

89. *Id.* at 9.

ODRC's vocational and educational programming includes 27 different vocational occupations, with continual efforts to expand the offerings.⁹⁰ ODRC also offers 67 different apprenticeship programs in conjunction with the U.S. Department of Labor's Bureau of Apprenticeship Training.⁹¹ In 2003, more than 2600 Ohio prisoners participated in vocation programs, 2900 participated in advanced job training, and 1300 participated in apprenticeship programs. Further, over 800 career-technical (vocational) certificates were awarded, as well as more than 790 advanced job training certificates and 210 apprenticeship certificates.⁹² This programming has shown to be effective: in Ohio, "all three measures of recidivism—re-arrest, re-conviction, and re-incarceration—showed statistically significant lower rates for participants [in correctional education programs] vs. non-participants."⁹³

ODRC considers itself "one of the top corrections agencies in the nation"⁹⁴ and hopes to "serve as a national benchmark for other state correctional systems" in terms of reentry programs.⁹⁵ Through its careful attention to the needs of prisoners in attaining successful reentry, ODRC might very well be able to achieve this goal. However, ODRC cannot single-handedly achieve all that it sets out to do. While it is responsible for providing prisoners with the skills and resources necessary to provide for themselves after incarceration, ODRC cannot remove reentry barriers firmly established by the community. ODRC's authority is limited to what occurs prior to release.⁹⁶

3. *Community Barriers to Reentry*

There are many complex, community-based barriers to reentry. Some arise in the urban community to which the prisoner returns. When ex-offenders are released from prison, they usually return to specific neighborhoods of metropolitan communities.⁹⁷ Communities with high return rates often experience significant social stresses.⁹⁸ These communities are usually socioeconomically disadvantaged, so the reentering prisoner is in need of strained social resources, such as substance abuse treatment and shelter.⁹⁹

90. Ohio Dep't of Rehab. & Corr., *Vocational Programs*, available at <http://www.drc.state.oh.us/web/vocational.html> (last updated Jan. 25, 2000) [hereinafter *ODRC Vocations*].

91. Ohio Dep't of Rehab. & Corr., *Apprenticeship Programs*, available at <http://www.drc.state.oh.us/web/apprentice.htm> (last visited Jan. 16, 2005) [hereinafter *ODRC Apprenticeship*].

92. ODRC REPORT, *supra* note 76, at 31.

93. LA VIGNE ET AL., *supra* note 2, at 50 (alteration in original) (quoting STEPHEN J. STEURER & LINDA G. SMITH, EDUCATION REDUCES CRIME: THREE STATE RECIDIVISM STUDY—EXECUTIVE SUMMARY 13 (Feb. 2003)).

94. ODRC REPORT, *supra* note 76, at 4.

95. *Id.*

96. TRAVIS, U.S. DEP'T OF JUSTICE, *supra* note 1, at 2.

97. TRAVIS ET AL., *supra* note 6, at 41.

98. *Id.* at 41-42.

99. Jeremy Travis, Prisoner Reentry Seen Through a Community Lens, Luncheon Address at the Neighborhood Reinvestment Corporation Training Institute 2 (Aug. 23, 2001), available at

Returning to this environment creates a substantial difficulty for the reentering prisoner in terms of employment. Because of constrained financial resources and loss of the labor market to suburban communities, these primarily urban communities may have a severely limited job market.¹⁰⁰ With limited availability of jobs, the situation is compounded for the prisoner, who might not be able to effectively compete with other applicants because of his conviction status.¹⁰¹ In Ohio, employers are generally permitted to discriminate against employees based on a prior conviction.¹⁰²

In addition to the immediate community, however, the prisoner is also received into the statewide community upon reentry. This statewide community is also responsible for establishing significant obstacles that the reentering prisoner must overcome to be successful. One particular obstacle that impedes the efforts of reentering prisoners, as well as ODRC, is the collateral employment consequences that the ex-offender will experience.

Assume a hypothetical average prisoner at the end of his prison term in Ohio. He is 33 years old and has just spent two years of his life in prison for a drug violation. Assume that our prisoner used his prison term wisely and undertook a vocational program in heating, ventilation, and air conditioning (HVAC) during his incarceration.¹⁰³ Prior to his release, this prisoner received information on employment readiness, so he feels confident he will be able to find employment with his new skills. However, when the prisoner is released, he learns that he will never be licensed as an HVAC contractor under Ohio law because of his conviction status.¹⁰⁴ Likewise, if the prisoner had undertaken the barbering program, he could be precluded from ever working as a barber because of his conviction status.¹⁰⁵

The ex-offender may be returning to a community that has few, if any, available jobs, and may already be disadvantaged as a competitor for any available jobs based solely on his conviction status. In addition to these obstacles, the prisoner is faced with requirements within the legislative and regulatory scheme that prevent him

<http://www.urban.org/pdfs/prisoner-reentry-speech.pdf> ("So the aggressive cycle of arrest, removal, incarceration, and reentry is highly concentrated in communities that are already facing the enormous challenges of poverty, crime, disinvestment and inadequate social services. Yet these are the communities we are asking to take on the difficult task of reintegrating record numbers of returning prisoners.").

100. TRAVIS ET AL., *supra* note 6, at 41.

101. *See, e.g.*, OHIO REV. CODE ANN. § 4740.06 (West 2004).

102. This is not the case in several states. *See* Leavitt, *supra* note 76, at 1288-98. At least one state has made convicted persons a protected class, and has completely prohibited the use of criminal records in employment decisions. *Id.* at 1288. Other states simply forbid asking about conviction status. *Id.* at 1289-90. Others only extend protections to those persons seeking public sector employment. *Id.* at 1292-93.

103. Some prisons offer vocational training to their prisoners. *See, e.g.*, ODRC REPORT, *supra* note 76, at 12-13.

104. *See* OHIO REV. CODE ANN. § 4740.06 (West 2004). The same would be true if he had undertaken the plumbing or electrical vocational or apprenticeship programs. *Id.* This does not necessarily mean that he would not be able to be employed in HVAC. He is only prohibited from taking the contractor exam. Presumably, he would still be able to be a technician. However, lifetime prohibitions from professional fields compounds problems the prisoner may already in terms of a decreased lifetime wage potential.

105. *See* OHIO REV. CODE ANN. § 4709.13(A) (West 2004).

from attaining certain employment positions, or at least make it significantly more difficult for him to find such employment, based on the fact that he is a convicted felon. This is particularly disconcerting when the occupations the ex-offender is barred from participating are the same ones that ODRC offers as vocational and apprenticeship programs.¹⁰⁶

B. Punitive Structure of Employment Regulation

The conflict between ODRC's reentry preparation efforts and the statutorily implemented collateral employment consequences indicates that Ohio's collateral employment consequences may not have been carefully drafted in a manner to serve only preventative and protective functions. A review of the many different types of collateral employment consequences implemented under Ohio law further illustrates the lack of connection between the purpose of collateral employment consequences and their functional effect.

There are several collateral employment consequences in Ohio based on felony convictions. The collateral consequences can be categorized as licensing decisions,¹⁰⁷ examination prerequisites,¹⁰⁸ or hiring decisions.¹⁰⁹ For instance, some professionals are subject to having their licenses revoked or suspended, or having their applications for a license or license renewal rejected: accountants,¹¹⁰

106. There are several overlapping programs. The one that stands out most distinctly is the barbering program because the overlap is complete. *See id.*; ODRC *Vocations*, *supra* note 90. The HVAC program is also interesting. The construction licensing statute applies to construction, HVAC, plumbing, electrical, hydronics, and refrigeration contractors. *See* OHIO REV. CODE ANN. § 4740.06(B) (West 2004). While the statute does not completely prohibit convicted felons from working in these fields, it does prevent them advancing in the field because they can never be qualified to sit for the examinations necessary to become contractors. *Id.* ODRC offers vocation and apprenticeship programs in HVAC, electrical, and plumbing. *See* ODRC *Vocations*, *supra* note 90; ODRC *Apprenticeship*, *supra* note 91. Other potential overlaps include accounting, OHIO REV. CODE ANN. § 4701.16 (West 2004); dentists and dental hygienists, OHIO REV. CODE ANN. § 4715.30(A)(4) (West 2004); nursing, OHIO REV. CODE ANN. § 4723.28(B) (West 2004); opticians, OHIO REV. CODE ANN. § 4725.53(B)(1) (West 2004); and surveyor, OHIO REV. CODE ANN. § 4733.20(A)(4) (West 2004). In each situation, the convicted felon's right to work in the field may not be able to be completely abrogated under the statute, but future advancements within the field may be prohibited.

107. *See infra* notes 110-151 and accompanying text.

108. An applicant to take an examination offered by the Construction Board must not have a record of felony conviction. OHIO REV. CODE ANN. § 4740.06 (West 2004). A person with a felony conviction does not qualify to sit for one of these examinations. *Id.* The examinations are necessary in order to become an HVAC, electrical, plumbing, or construction contractor. *Id.* The disqualification is mandatory. *Id.*

109. Hiring decisions are made based on felony conviction status for most law enforcement and financial occupations. *See, e.g.*, OHIO REV. CODE ANN. § 737.052 (West 2004) (not eligible to become city police officers); OHIO REV. CODE ANN. § 1105.02(B)(1) (West 2004) (not eligible to become bank directors).

110. OHIO REV. CODE ANN. § 4701.16 (West 2004).

architects,¹¹¹ athletic trainers,¹¹² audiologists,¹¹³ barbers,¹¹⁴ motor vehicle dealers,¹¹⁵ chiropractors,¹¹⁶ counselors,¹¹⁷ credit service organizations,¹¹⁸ dentists and dental hygienists,¹¹⁹ dietitians,¹²⁰ emergency medical service workers,¹²¹ engineers and surveyors,¹²² fireworks exhibitors,¹²³ hearing aid dealers,¹²⁴ horse race workers,¹²⁵ insurance administrators,¹²⁶ insurance agents,¹²⁷ livestock brokers/dealers,¹²⁸ liquor license,¹²⁹ lottery sales agents,¹³⁰ therapists,¹³¹ salvage dealers,¹³² nurses,¹³³ occupational therapists,¹³⁴ opticians,¹³⁵ optometrists,¹³⁶ pharmacists,¹³⁷ physical therapists,¹³⁸ physicians,¹³⁹ physician assistants,¹⁴⁰ precious metal dealers,¹⁴¹ private investigators,¹⁴² real estate appraisers,¹⁴³ real estate brokers,¹⁴⁴ respiratory care professionals,¹⁴⁵ school employees,¹⁴⁶ security guards,¹⁴⁷ social workers,¹⁴⁸ speech pathologists,¹⁴⁹ telephone solicitors,¹⁵⁰ and veterinarians.¹⁵¹

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111. OHIO REV. CODE ANN. § 4703.15(B) (West 2004).
 112. OHIO REV. CODE ANN. § 4755.64(A)(1) (West 2004).
 113. OHIO REV. CODE ANN. § 4753.10(N) (West 2004).
 114. OHIO REV. CODE ANN. § 4709.13(A)(1) (West 2004).
 115. OHIO ADMIN. CODE § 4501:1-3-09 (2004).
 116. OHIO REV. CODE ANN. § 4734.31(C)(1) (West 2004).
 117. OHIO REV. CODE ANN. § 4757.361(C) (West 2004).
 118. OHIO REV. CODE ANN. § 4712.08(D) (West 2004).
 119. OHIO REV. CODE ANN. § 4715.30(A)(4) (West 2004).
 120. OHIO REV. CODE ANN. § 4759.07(A)(3) (West 2004).
 121. OHIO REV. CODE ANN. § 4765.18(C) (West 2004).
 122. OHIO REV. CODE ANN. § 4733.20(A)(4) (West 2004).
 123. OHIO REV. CODE ANN. § 3743.70 (West 2004).
 124. OHIO REV. CODE ANN. § 4747.12(A) (West 2004).
 125. OHIO ADMIN. CODE § 3769-2-26(A) (2004).
 126. OHIO REV. CODE ANN. § 3959.12(A)(9)-(10) (West 2004).
 127. OHIO REV. CODE ANN. § 3905.49 (West 2004).
 128. OHIO REV. CODE ANN. § 943.05(A)(1) (West 2004).
 129. OHIO REV. CODE ANN. § 4301.25(A)(1) (West 2004).
 130. OHIO REV. CODE ANN. § 3770.05(C)(1) (West 2004).
 131. OHIO REV. CODE ANN. § 4757.36(A)(5) (West 2004).
 132. OHIO REV. CODE ANN. § 4738.07(D) (West 2004).
 133. OHIO REV. CODE ANN. § 4723.28(B) (West 2004).
 134. OHIO REV. CODE ANN. § 4755.10(A)(1) (West 2004).
 135. OHIO REV. CODE ANN. § 4725.53(A)(1) (West 2004).
 136. OHIO REV. CODE ANN. § 4725.19(B)(4) (West 2004).
 137. OHIO REV. CODE ANN. § 4729.16(A) (West 2004).
 138. OHIO REV. CODE ANN. § 4755.47(A)(2) (West 2004).
 139. OHIO REV. CODE ANN. § 4731.22(B) (West 2004).
 140. OHIO REV. CODE ANN. § 4730.25(B) (West 2004).
 141. OHIO REV. CODE ANN. § 4728.13(A)(1)(a) (West 2004).
 142. OHIO REV. CODE ANN. §§ 4749.03(A), 4749.04(A) (West 2004).
 143. OHIO REV. CODE ANN. § 4763.11(F) (West 2004).
 144. OHIO REV. CODE ANN. §§ 4735.07(B), 4735.09(F) (West 2004).
 145. OHIO REV. CODE ANN. § 4761.09(A)(1) (West 2004).
 146. OHIO REV. CODE ANN. § 3319.31(B)(2)(a) (West 2004).
 147. OHIO REV. CODE ANN. §§ 4749.03(A)(1)(a), 4749.04(B) (West 2004).
 148. OHIO REV. CODE ANN. § 4757.36(A)(5) (West 2004).
 149. OHIO REV. CODE ANN. § 4753.10(N) (West 2004).
 150. OHIO REV. CODE ANN. § 4719.03(B)(4) (West 2004).
 151. OHIO REV. CODE ANN. § 4741.22(J), (L) (West 2004).

These collateral consequences may be applied in either a mandatory or discretionary manner.¹⁵² Mandatory collateral consequences are considered collateral sanctions under the ABA Criminal Justice Standards, and their use would therefore be strictly circumscribed.¹⁵³ It is unlikely that a mandatory adverse licensing action, as required under Ohio law, would be appropriate and necessary in nearly every possible situation, so the use of required adverse licensing actions is probably inappropriate.¹⁵⁴ However, most collateral employment consequences in Ohio are imposed on a discretionary basis.¹⁵⁵ This makes them discretionary disqualifications under the ABA Criminal Justice Standards.¹⁵⁶ The Criminal Justice Standards indicate that they should be discretionary with regard to the underlying conduct that led to the conviction, rather than with regard to the conviction itself.¹⁵⁷ As a result, none of these discretionary disqualifications regarding employment found in Ohio law would be appropriate, because every one is based on the fact of conviction rather than the underlying conduct.¹⁵⁸

The vast majority of the occupations subject to collateral employment consequences fall into one of three categories: healthcare,¹⁵⁹ law enforcement,¹⁶⁰ or financial occupations.¹⁶¹ It is important to note that the argument is not being advanced that collateral employment consequences should never be applied to ex-offenders. In fact, it is arguable that most, if not all, of the collateral employment consequences directly serve preventative goals, particularly in light of the type of occupations covered by the statutes.¹⁶² More appropriately, the argument is that these collateral employment consequences are overbroad in that, while they may prevent some potentially dangerous candidates from receiving a license to practice a certain profession, they might just as likely prevent a well-qualified and perfectly harmless ex-offender from being licensed in that profession. This is because the licensing decision is made based on the fact of conviction, rather than on the circumstances underlying the conviction.

As an illustration, it might be appropriate to prohibit a physician who has been incarcerated for selling prescription drugs to addicts from being licensed to practice

152. Adverse licensure actions are mandatory with respect to auctioneers, OHIO REV. CODE ANN. § 4707.02 (West 2004); physician assistants, OHIO REV. CODE ANN. § 4730.25(B)(11) (West 2004); physicians and limited practitioners, OHIO REV. CODE ANN. § 4731.22(B)(9) (West 2004); motor vehicle salvage dealers, OHIO REV. CODE ANN. § 4738.07(D) (West 2004); private investigators and security guards, OHIO REV. CODE ANN. § 4749.03(A)(1)(a) (West 2004); nursing home administrators, OHIO REV. CODE ANN. § 4751.10(D) (West 2004); anesthesiologist assistants, OHIO REV. CODE ANN. § 4760.13(B)(10) (West 2004); and acupuncturists, OHIO REV. CODE ANN. § 4762.13(B)(11) (West 2004).

153. ABA REPORT, *supra* note 45, at BL-2 to BL-3 (Standard 19-2.2).

154. *See id.*

155. *See supra* notes 102-151 and accompanying text.

156. ABA REPORT, *supra* note 45, at BL-5 (Standard 19-3.1).

157. *Id.*

158. *See supra* note 102-151 and accompanying text.

159. *See, e.g.*, OHIO REV. CODE ANN. § 4730.25(B)(11)-(17) (West 2004) (physician assistant); *id.* § 4723.28(B)(3)-(7) (nurse).

160. *See, e.g.*, OHIO REV. CODE ANN. § 505.49(D)(1) (West 2004) (police officer).

161. *See, e.g.*, OHIO REV. CODE ANN. § 3905.14(B) (West 2004) (insurance agent).

162. *See supra* notes 159-161 and accompanying text.

medicine.¹⁶³ To prohibit, on a mandatory basis, a physician from being licensed to practice medicine because he was convicted of vehicular manslaughter, however, is probably not effective as a preventative measure.¹⁶⁴ And the imposition of this consequence becomes punitive in nature when another physician, guilty but not convicted of murdering three people by administering lethal doses of a prescription drug, is not prevented from being licensed to practice medicine under the same statute.¹⁶⁵ It is punitive in nature because the consequence is being applied only on the basis of the conviction, rather than on the basis of a credible threat to society, or even on the commission of a crime.¹⁶⁶

Furthermore, these collateral consequences create a public policy that is particularly hard to justify in light of the dueling policies established by ODRC practices. ODRC has created extensive vocational and apprenticeship programs, the appropriateness of which is frequently evaluated,¹⁶⁷ in order to assist prisoners in developing employable skills.¹⁶⁸ We live in a society where “low-skilled jobs continue to disappear and governmental regulatory mechanisms and professional organizations oversee an ever larger number of professions[.]”¹⁶⁹ Regulation of these professions has traditionally been “justified as necessary ‘to foster high professional standards,’ and have been couched in general terms, such as ‘good moral character.’”¹⁷⁰ As low-skill jobs continue to be outsourced and jobs requiring technical and professional skills continue to be regulated, reentering ex-offenders will find themselves in an even more precarious situation: “The exclusion of ex-offenders from vast segments of the labor market as a result of governmental regulation of many professions parallels the effect of restrictions on the ex-offender’s right to contract in the nineteenth and early twentieth centuries.”¹⁷¹ Even in the case where a prison vocation or apprenticeship program appears to prepare a person to eventually become a licensed professional, Ohio law basically forbids such advancement based on conviction status.¹⁷² To subject rehabilitated ex-offenders¹⁷³ to this continued discrimination is not justifiable on any level. Fortunately, several legislators in Ohio seem to agree.¹⁷⁴

163. See OHIO REV. CODE ANN. § 4731.22(B) (West 2004).

164. See *id.*

165. See *id.*

166. See *id.*

167. See generally ODRC REPORT, *supra* note 76 (annual report discussing Ohio’s prisoner reentry program).

168. LA VIGNE ET AL., *supra* note 2, at 50-51.

169. Demleitner, *supra* note 11, at 156.

170. *Id.*

171. *Id.*

172. See *supra* note 106 and accompanying text.

173. Presumably, the ex-offender under discussion is rehabilitated because the person is not only seeking employment, but also advancement in the given employment field. It is not clear how relevant this argument may be, as it is not entirely clear how successful prison vocation programs are at helping the prisoner gain employment in the given profession, let alone providing the option to pursue career advancement.

174. See *infra* notes 175-194 and accompanying text.

C. Reform Efforts

Currently, there are two bills pending before the Ohio House of Representatives to reform Ohio's collateral employment consequences for convicted felons. These are House Bill 349¹⁷⁵ and House Bill 429.¹⁷⁶ Both operate to remove some of the punitive aspects of current laws.¹⁷⁷

1. H.B. No. 349

The purpose of House Bill 349 is to eliminate felony conviction status as a reason for taking an adverse licensing action against a barber or a cosmetologist.¹⁷⁸ The current law specifically permits the Ohio Barber Board to refuse to issue or renew, or to suspend or revoke a barber's license based on a felony conviction.¹⁷⁹ Although no law currently exists with respect to cosmetologists,¹⁸⁰ the bill proposes that language be added to the cosmetologist licensing statute to prevent any adverse action from being taken against a cosmetologist on the basis of conviction status.¹⁸¹ This bill is important because of the existence of barber and cosmetology vocational and apprenticeship programs in Ohio prisons. There is considerable inconsistency in providing a vocational program for a prisoner to improve his chances of successful reentry and eliminating any opportunity for the ex-offender to use those new skills once returned to the community. House Bill 349 would effectively eliminate this inconsistency.

The bill would also bring Ohio code provisions in line with the ABA Criminal Justice Standards, because it would require that any adverse licensing decision made against an ex-offender be made, if at all, based only on the underlying conduct that resulted in the conviction.¹⁸² In addition, it would harmonize the ODRC's efforts with Ohio's licensing requirements by allowing those ex-offenders who do not jeopardize the preventative goals of the licensing requirements to find gainful employment using their new skills.¹⁸³

2. H.B. 429

House Bill 429, likewise, removes conviction status as a reason for making adverse licensing decisions against ex-offenders.¹⁸⁴ H.B. 429 applies only when permissive licensing decisions must be made. It does not affect mandatory licensing

175. H.B. 349, 125th Gen. Assem., Reg. Sess. (Ohio 2003), LEXIS 2003 OH HB 349.

176. H.B. 429, 125th Gen. Assem., Reg. Sess. (Ohio 2003), LEXIS 2003 OH HB 429.

177. See Ohio H.B. 349, LEXIS 2003 OH HB 349; Ohio H.B. 429, LEXIS 2003 OH HB 429.

178. Ohio H.B. 349, LEXIS 2003 OH HB 349.

179. OHIO REV. CODE ANN. § 4709.13(A)(1) (West 2004).

180. See OHIO REV. CODE ANN. § 4713.60 (West 2004) (governing renewal); *id.* § 4713.64 (governing denial, suspension & revocation).

181. Ohio H.B. 349, LEXIS 2003 OH HB 349.

182. See *id.*

183. It should be noted that H.B. 349 protects both barbers and cosmetologists who were licensed at the time they were convicted and barbers and cosmetologists who received their instruction through a prison vocation program. See *id.*

184. H.B. 429, 125th Gen. Assem., Reg. Sess. (Ohio 2003), LEXIS 2003 OH HB 429.

decisions.¹⁸⁵ However, H.B. 429 is considerably more circumscribed in its efforts than H.B. 349. While H.B. 349 eliminates felony conviction status as a factor in making any licensing decision against a current or prospective cosmetologist or barber, H.B. 429 only protects “qualifying applicants” from such decisions. In order to be a “qualifying applicant,” the applicant must have received a vocational certificate from ODRC either while in prison or within one year of release.¹⁸⁶ Qualifying applicants cannot be denied a license unless “[t]here is a direct relationship between one or more of the qualifying applicant’s previous offenses and the specific certificate, license or permit sought,”¹⁸⁷ or issuing the license would create an “unreasonable risk.”¹⁸⁸

Because the application of the statute is limited to qualifying applicants, the extent of the protection afforded under H.B. 429 is strictly limited.¹⁸⁹ Any person who already had a license to practice the particular profession prior to the time of incarceration could still have an adverse licensing action brought against them based solely on their conviction status.¹⁹⁰ This creates a dichotomy of protection that is unjustified.

There is no reason to assume that a person who was licensed to practice a certain profession before their conviction poses a greater societal risk than a person who did not learn to practice that profession until the time of incarceration. The argument could be made that the completion of the vocation program is evidence of rehabilitation. However, this is tantamount to arguing that the educated prisoner should be punished for not being in need of the vocation program. This argument collapses further when one considers the other activities the previously educated prisoner may have undertaken while in prison. That prisoner may have completed a different vocational program,¹⁹¹ participated in Ohio Penal Industries (OPI),¹⁹² or been a literacy tutor to other inmates.¹⁹³ Each of these activities could equally indicate rehabilitation but would have no bearing on the licensing decision.¹⁹⁴

Additionally, House Bill 429 applies only to permissive decisions, and in practice, the decision to bring an adverse licensing action may never be based on conviction status alone. However, the need for the amendment itself arises from the existence of language in several statutes adopting felony conviction as a reason for adverse licensing actions.¹⁹⁵ If this argument were valid, it could just as easily be argued that there is no need for the amendment in the first place. While ODRC’s vocational and educational program is extensive, the actual number of certificate

185. *Id.* See also *supra* note 152 and accompanying text.

186. Ohio H.B. 429, LEXIS 2003 OH HB 429.

187. *Id.*

188. *Id.* (noting that the license may also be denied if so required by another section of the Revised Code).

189. *See id.*

190. *See* Ohio H.B. 429, LEXIS 2003 OH HB 429.

191. *See supra* notes 90-93 and accompanying text.

192. *See* Ohio Dep’t of Rehab. & Corr., *OPI Correctional Industries*, at <http://www.opi.state.oh.us/> (last visited Jan. 18, 2005) [hereinafter *ODRC Correctional*].

193. In 2003, some 740 inmates trained as tutors through prison programming. *See* ODRC REPORT, *supra* note 76, at 30.

194. *Id.*

195. *See supra* notes 110-151 and accompanying text.

recipients is relatively small.¹⁹⁶ In terms of raw numbers, it is more likely that a currently licensed professional convicted of a felony would experience an adverse licensing decision than a prison-educated ex-offender, particularly in light of the fact that the majority of applicable occupations are professional occupations.¹⁹⁷

IV. SUGGESTED ALTERNATIVE REFORM

While H.B. 349 and H.B. 429 eliminate some of the punitive aspects of current legislation regarding collateral employment consequences of felony conviction, they are insufficient to provide minimum standards of protection to ex-offenders. Reentering prisoners are people who have completed the punitive portion of the consequences of their crime. The only purposes left to be served are the legitimate preventative functions of collateral consequences. Because of this, only truly preventative collateral consequences, particularly with respect to a right and need as fundamental as employment, should be applied.

The first step in eliminating unnecessary and unjustified collateral employment consequences could be reform in state licensing board decisions, as provided in H.B. 349 and H.B. 429, particularly when the state has made considerable efforts to provide opportunities for its reentering ex-offenders.¹⁹⁸ However, it would be more appropriate if alterations of the current scheme provided more expansive protections by extending the protections to all convicted felons.¹⁹⁹ The Ohio legislature should prohibit adverse actions against persons based solely on a felony conviction “unless engaging in the conduct underlying the conviction would provide a substantial basis for disqualification even if the person had not been convicted.”²⁰⁰ This affirmative action would eliminate those collateral employment consequences referred to as “discretionary disqualifications” under the ABA Criminal Justice Standards, bringing Ohio’s licensing law in line with Standard 19-3.1.²⁰¹

In addition to expanding the scope of H.B. 349 and H.B. 429, the legislature should alter statutes dealing with mandatory adverse licensing actions.²⁰² It should eliminate the requirement of an adverse licensing action based on criminal conviction unless the action will be warranted in almost every fathomable situation.²⁰³ At the very least, these actions should be made permissive and not mandatory,²⁰⁴ and the decision concerning whether or not to take an adverse licensing action should be based on the underlying conduct leading to the

196. See *supra* notes 90-93 and accompanying text.

197. See *supra* notes 110-151 and accompanying text. Prison vocation and apprenticeship programs generally offer training in a skilled trade, but not professional training. ODRC *Vocations*, *supra* note 90 and accompanying text; ODRC *Apprenticeship*, *supra* note 91 and accompanying text.

198. See *supra* notes 76-91 and accompanying text.

199. See *supra* notes 88-89 and accompanying text.

200. ABA REPORT, *supra* note 45, at BL-5 (Standard 19-3.1).

201. *Id.*

202. See *supra* note 152 and accompanying text. This recommendation applies equally to requirements based on prerequisites to taking an examination necessary for licensure. See *supra* note 108 and accompanying text.

203. ABA REPORT, *supra* note 45, at BL-2 (Standard 19-2.1).

204. They would then be considered discretionary disqualifications, *id.* at BL-5 (Standard 19-3.1), rather than collateral sanctions, *id.* at BL-2 (Standard 19-2.1).

conviction rather than the conviction itself.²⁰⁵ Taking these actions reduces the punitive nature of the statutes and clearly establishes the preventative nature they should serve.²⁰⁶

Finally, as necessary, the legislature should revise those statutes that require hiring decisions to be made based on felony conviction status. Only hiring statutes that can be justified as collateral sanctions should require hiring decisions to be made based on felony conviction status.²⁰⁷ This might be particularly appropriate for law enforcement positions. Many states that have undertaken reform of collateral consequences of conviction have retained automatic disqualification of felons for law enforcement positions.²⁰⁸

V. CONCLUSION

While the proposed legislative action would provide some protections needed to comply with the ABA Criminal Justice Standards and to harmonize the efforts of the Ohio legislature and ODRC, it would not completely solve the unemployment-recidivism problem. Certainly, the vast majority of the obstacles that released prisoners face in terms of employment come from influences other than licensing boards. Released prisoners also face significant obstacles presented by limited job markets in financially constrained communities and prejudiced employers who would prefer to pay more for an employee without a criminal record than hire an ex-offender.

These changes in Ohio's reform efforts would bring new protections to the employment prospects of some of Ohio's ex-offenders. These reforms might not secure a single reentering prisoner an actual job, but they would clarify the extent of Ohio's commitment to the rehabilitation efforts of ODRC, to reducing unwarranted discrimination based on conviction status, and to "Going Home to Stay."

205. *Id.* at BL-5 (Standard 19-3.1).

206. *See supra* notes 18-23 and accompanying text.

207. The argument has been made that this is particularly applicable with respect to law enforcement personnel. *See Leavitt, supra* note 75, at 1289.

208. *Id.* at 1285-98.

