

Relief from the Collateral Consequences of Conviction: Notes from the “Laboratories of Democracy”

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Editor’s note: This is the fourth and final installment in a series of articles describing how people with a criminal record can seek to “neutralize” its effect for employment and other purposes. The first article, published in the November 2005 newsletter, dealt with laws limiting consideration of conviction in hiring and licensure. The second, in the December 2005 newsletter, deal with judicial expungement, sealing and set-aside. The third described executive pardoning practices in the 50 states. This final article summarizes national trends, and takes a closer look at a promising approach from the federal government.

"It is one of the happy incidents of the federal system," Justice Louis D. Brandeis wrote in his 1932 dissent in *New State Ice Co. v. Liebmann*, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." The pots of social experimentation are bubbling in a few state laboratories, where governments have begun to appreciate the downstream problems created by the mass incarceration policies of the 1990s. But well-intentioned social programs to facilitate offender reentry are often frustrated by laws that work at cross-purposes to the goal of reintegrating people with convictions. These legal barriers reinforce popular prejudices against employing or renting to anyone who has any sort of criminal record. The now-routine use of criminal background checks by employers and landlords makes it all the harder for people who want to become productive members of society. A criminal record is hard to shake, a “mark of Cain” that legitimates discrimination and exclusion.¹

The ABA Commission on Effective Criminal Sanctions (the successor to the Justice Kennedy Commission) recently held hearings in Washington and Chicago to hear from criminal justice professionals from eight states about alternative sentencing strategies that offer minor offenders a chance to avoid prison and a conviction record. The Commission also wanted to know about what states are doing to neutralize the effect of a conviction for employment and other purposes. It is clear that most states have not yet developed a comprehensive approach to this problem, though many are coming to appreciate its importance in dealing with the problem of recidivism.

Recent research indicates that after six or seven years there is little to no distinguishable difference in risk of future offending between those with an old criminal record and those

¹ Webb Hubbell, once a close advisor to President Bill Clinton and prominent citizen of Little Rock, wrote movingly of the many barriers to a normal life that faced him upon his return from federal prison in the January/February 2001 issue of the *Federal Sentencing Reporter*.

without any criminal record at all.² If true, this surely suggests the importance of having a slate-clearing mechanism to deal with state law barriers to employment and other opportunities, as well as the life-long stigma of conviction.

All eight of the states whose officials testified before the Commission make some provision for “clearing” a conviction record. Arkansas and Connecticut both offer minor offenders the possibility that charges will be dismissed and the record sealed upon successful completion of probation, and both of these states also have an active pardoning program for more serious offenders. Kansas offers judicial expungement to all but the most serious offenders, but Oregon limits expungement to minor offenders. Neither of these states have a functioning pardon program. New York offers certificates of relief from disabilities to all first offenders, including those with federal and out-of-state convictions, and certificates of good conduct to all others, but it is not clear what if any effect these certificates have in overcoming employment disabilities. Illinois also offers certificates of rehabilitation, though its program is relatively new and is available only to non-violent first offenders. There is no pardon program in New York, and the one in Illinois has recently been stalled. Michigan offers first offenders a “set-aside,” but people with a more extensive record are remitted to a pardon process that under Michigan’s present governor has produced no grants at all. Maryland’s Governor Robert Ehrlich has taken a commendable interest in his pardoning power, but only a relatively few people can benefit from it. More details about relief mechanisms in these eight states can be found on the Sentencing Project’s website. See

<http://www.sentencingproject.org/rights-restoration.cfm>.

All eight of the states whose officials testified evidently recognize the difficulty that a conviction record can pose for an offender trying to rent an apartment or find a job. But it is not so clear that they appreciate the importance of giving every offender a way to neutralize the effect of that record. Most fair-minded people would agree that, except perhaps for the most hardened criminal, everyone who breaks the law should be given an opportunity to discharge their debt to society and get on with their lives. But very few jurisdictions seem to have figured out a way to accomplish this. Indeed, there is not a single jurisdiction in the country whose criminal law incorporates a formal mechanism for recognizing rehabilitation that is routinely available to all offenders who can qualify. Judicial expungement and sealing orders are generally limited to certain crimes, they can be expensive to obtain if a court proceeding is involved, and the whole effort may backfire in the end if an employer’s records check turns up the conviction notwithstanding the judicial sealing order, branding the person as a liar. Pardon is a realistic remedy in only a few states, and the pardon process can be time-consuming and expensive if the jurisdiction requires a hearing. Even New York’s vaunted certificates have a limited value in persuading employers not to hold a person’s conviction record against them. Nondiscrimination statutes purporting to limit consideration of a conviction record are rarely enforceable.

² See Megan C. Kurlychek, Robert Brame, Shawn Bushway, “Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement;” Kurlychek, et al., “Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?”

Surprisingly, it is the federal laboratory that has come up with one of the most promising methods of neutralizing the effect of a criminal record after a period of time. A series of laws and policies developed after 9/11 to screen workers in the air, sea and ground transportation industries have produced a generally flexible regulatory scheme that balances government security interests against employee rights. While the laws and regulations applicable to airport employees, commercial drivers, and maritime workers differ in some respects from one another, they share four basic features:

- mandatory (or presumptive) disqualification is applicable only to specified serious felonies;
- most mandatory disqualifications lapse after a certain period of time, generally seven to ten years;
- within the mandatory disqualification period, state pardons and expungements are given effect; and
- waivers may be granted by the employing agency within the period of mandatory disqualification if no other exception applies.

Though conviction may still be the basis of unreasonable exclusion or termination in some cases, the requirements applicable in each of the three industries go a long way to recognizing the importance of a case-by-case approach to consideration of conviction in employment. They are as generous to employees as they are largely because of pressure brought by labor unions concerned about the impact of new restrictive policies on their own members.

The approach taken by Congress and the TSA to factoring criminal records into employment decisions in the transportation industry, which was modeled generally on the approach taken ten years earlier in the federally regulated banking and securities industries, has a good deal to recommend it. Reduced to its basic schematic, it authorizes a short-term presumptive disqualification, followed by consideration of conviction only as part of a general inquiry into an individual's qualifications for the position. In its particulars, the federal approach has four main features:

- 1) it distinguishes between serious offenses whose nature would raise a reasonable question about the individual's fitness for employment in the particular job, and less serious offenses that should not result in presumptive disqualification but can be considered as part of a general inquiry into an applicants character and fitness;
- 2) it places a temporal limit on the presumptive disqualification, and adds a presumption of rehabilitation after a certain period of law-abiding behavior, similar to the English Rehabilitation of Offenders Act, under which a conviction is "spent" after a certain period of time, and may no longer be considered as grounds for disqualification;
- 3) it gives effect, within the period of presumptive disqualification, to a state's determination in a particular case that a conviction record should not be a black mark on an individual's record, whether because the charges were dismissed at the front end or the conviction pardoned or expunged at the back end; and

- 4) it allows the employing authority to consider exceptional circumstances even where there has not been a pardon or other external certification of an offender's rehabilitation, and to take a chance on an individual where the facts seem to justify it.

The concessions won by the unions in negotiations with the Transportation Security Administration (TSA) produced a slightly different approach in each of the three sectors. For example, the maritime unions negotiated the disqualification period down from ten to seven years, and insisted upon various procedural protections for workers threatened with dismissal because of a conviction record. Commercial drivers whose licenses require Hazardous Material Endorsements (ranging from municipal trash collectors carrying items like bleach and batteries, to interstate truckers carrying nuclear and biological waste) who are denied a clearance due to a disqualifying conviction may petition the TSA for a waiver. There is no provision for waiving disqualification for airport employees. In determining whether to grant a waiver for a Hazmat endorsement, the TSA is required to consider a number of factors, including the circumstances of the disqualifying offense, whether the applicant has made restitution to victims, and whether there are "other factors that indicate the applicant does not pose a security threat warranting denial of the HME." Airport employees are disqualified by virtue of a drug possession offense, while drivers and longshoremens are not. In all three industries, the TSA has taken the position that a "conviction" does not include offenses that have been discharged or set-aside under state law after successful completion of probation, or convictions that have been completely expunged or pardoned. (If expungement does not eliminate all legal disabilities under state law, the conviction may still be considered.) Each of the three different regulatory schemes is described in greater detail in the "Federal" profile at <http://www.sentencingproject.org/rights-restoration.cfm>.

The virtue of the TSA approach, writ large, is that it puts the fact and circumstances of an individual's criminal record directly on the table, and requires consideration of every applicant on his or her own merits. It factors in the possibility of rehabilitation, presumptively after a period of time, and sooner if an applicant can show it. Much like a licensing decision, the qualification decision is made by an independent government agency under the federal transportation laws, not by the immediate employer. This serves a valuable function of insulating employers from public criticism for hiring decisions, and encouraging them to take a chance on otherwise qualified applicants. Moreover, employers are not called upon to translate raw criminal history information that can be both confusing and misleading – and even inaccurate. It is true that this nuanced approach may not be adequate to deal with an offender's needs for employment at the point of reentry from prison or from community-based treatment. It may also not be as supportive of individual rehabilitative efforts as some of the state nondiscrimination laws discussed in the first article in this series. (See HIRE Newsletter, November 2005.) But it is certainly worth exploring as part of a long-range strategy for accommodating the needs of employers for a reliable workforce on the one hand, and the needs of the community to reintegrate offenders on the other.