

## **RELIEF FROM THE COLLATERAL CONSEQUENCES OF CONVICTION**

### **I. State Laws Limiting Consideration of Conviction in Employment and Licensure**

*Editor's Note: This is the first in a series of four articles describing the results of the author's recent study of how U.S. jurisdictions deal with the question of relief from the collateral consequences of conviction. In coming months, articles address executive pardon, judicial expungement, and deferred adjudication.*

I recently completed a study of state law mechanisms for avoiding or mitigating the collateral consequences of conviction. The happiest surprise was that well over half the states have laws that prohibit the arbitrary denial of public employment and/or occupational licensure based solely on a criminal conviction. When I began the study last year, I expected to find that very few states have general provisions for judicial expungement, and that pardon has become unavailable for all practical purposes in all but a handful of jurisdictions. But I did not expect to find that most states agree, at least in principle, that a criminal conviction should not be disqualifying unless it indicates that an individual is unfit to engage in the particular occupation or profession at issue.

Thirty-three states have laws on the books that prohibit denial of a job or license “solely” on grounds of a criminal conviction. Rather, a conviction must be “reasonably related” (or “directly” or “substantially” related) to the particular occupation or profession before termination or refusal to hire is permitted. Some states define “reasonable relationship” in terms of the circumstances of the offense, the amount of time since conviction, and the individual’s demonstrated rehabilitation. A few states presume rehabilitation after a specified number of years. Even states that do not have a generally applicable “nondiscrimination” law recognize that a “reasonable relationship” test is appropriate for at least some occupations.

The intended effect of these laws is to cut back on categorical disqualifications because of conviction, and substitute a system of case-by-case discretionary decision-making based upon individual circumstances. Many of them date from the 1970’s, though a few have been enacted more recently in response to concerns about offender reentry.

It is not clear how helpful these nondiscrimination laws have been as a practical matter in allowing people with convictions to get their foot in the door in the workplace. While the laws look good on paper, only a few states have any mechanism for their enforcement, and they have been narrowly interpreted by the courts. In a few states they have been enacted as a part of the state’s fair employment practices scheme, and a few laws make reference to the state administrative procedure act. But in most states the laws are free-standing with no mechanism for administrative enforcement. Moreover, every state separately regulates numerous employments and occupations, and in this connection may

permit (or require) consideration of conviction without regard to their general nondiscrimination laws. In addition to such obvious areas as law enforcement and banking institutions, jobs in education and health care are often closed to people with convictions without regard to what they actually did and how long ago they did it. Any ambiguity in coverage is usually resolved against the convicted person.

Yet in spite of exceptions and lax enforcement, general nondiscrimination laws are an important expression of a state's public policy that can be built upon by law reformers. A chart describing each state's nondiscrimination law can be found on the Sentencing Project's website, along with profiles of each state's law and practice. See <http://www.sentencingproject.org/rights-restoration.cfm>. It shows that four states (Hawaii, New York, Pennsylvania and Wisconsin) regulate consideration of a conviction in public and private employment and occupational licensure.

Twelve states (Arizona, California, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, Missouri, New Jersey, New Mexico, and Washington) prohibit disqualification from public employment and occupational licensure solely on grounds of conviction, but do not regulate private employment. One state (Kansas) prohibits disqualification from public and private employment but does not regulate occupational licensing decisions. Eleven states (Arkansas, Delaware, Indiana, Maine, Michigan, Montana, North Dakota, Oregon, South Carolina, Texas, and Virginia) limit consideration of conviction in connection with occupational licensing but not employment. Six states (Illinois, New Hampshire, Ohio, Oklahoma, Massachusetts, and West Virginia) limit consideration of a felony conviction in licensing and/or employment only when rights have otherwise been restored by a pardon or the conviction vacated or expunged by a court. Of the 17 states that do not have a general nondiscrimination law, many nevertheless apply the "direct" or "rational" relation test in the context of at least one regulatory or licensing scheme, often in the context of disciplinary actions.

As a general matter, federal law prohibits discrimination in employment on the basis of conviction only insofar as it involves discrimination on some basis that is otherwise forbidden under federal civil rights laws. In addition, federal law requires criminal history checks and limits the employment of people with criminal records in a number of occupational areas, including banking, education, healthcare, and transportation. In some cases, however, notably in the transportation industry, federal law requires disqualification only for certain offenses, and only for a limited period of time. Transportation regulations give effect to state pardons and expungements, and also permit administrative waivers.

The thirty-three general non-discrimination laws range all the way from simple one-sentence declarations, to complex regulatory schemes covering many pages in the statute book. Arkansas, Michigan, and Washington all state the public policy sought to be served by the law as intended to "encourage and contribute to the rehabilitation of offenders" and "to assist them in the assumption of the responsibilities of citizenship." New York and New Jersey focus on employment and training as an aid to rehabilitation. Connecticut and New Mexico both link nondiscrimination with public safety ("the public is best

protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens”). Colorado’s statute appears to be aimed at rewarding offenders who have already achieved rehabilitation (“to expand employment opportunities for persons who, notwithstanding that fact of conviction of an offense, have been rehabilitated and are ready to accept the responsibilities of a law-abiding and productive member of society”).

States take very different approaches to establishing an offender’s rehabilitation. Minnesota requires consideration of rehabilitation as part of the test for determining the relationship of the conviction to employment; Virginia and New Jersey incorporate the extent of rehabilitation into the relationship test; Michigan makes rehabilitation the basis for rebuttal of an administrative determination that an applicant lacks good moral character. Arkansas, Minnesota, and New Mexico presume that an offender is rehabilitated if the sentence has been served and a specified number of years have passed without further adverse encounters with the law. A number of states require an employer or licensing agency to give specific reasons, in writing, for denial or termination of employment or licensure on grounds related to conviction. Some states prohibit employer inquiries about pardoned or expunged offenses, or arrests not leading to conviction. In New Jersey, a person may overcome an adverse decision by a licensing board by obtaining a “certificate of rehabilitation” from the Parole Board. Colorado, Delaware, New Mexico and North Dakota incorporate their general nondiscrimination test verbatim into dozens of individual licensing statutes, while other states exempt many of the same professions. Kansas appears to be the only state that addresses employer concerns about liability for negligent hiring, and Hawaii uniquely permits an employer to inquire about an applicant’s criminal record only after an offer of employment has been made.

The wide variety of these nondiscrimination laws has surely earned the states their spurs as “laboratories of democracy.” But variety is not unique to this particular method of neutralizing the effect of a conviction. As will be seen in later issues of this newsletter, it is just as much in evidence when it comes to judicial remedies like expungement and sealing, and executive pardoning arrangements.

## **II. Judicial Expungement, Sealing and Set-Aside**

More than half the states authorize their courts to expunge or seal at least some adult felony records. The ostensible purpose of this relief is to remove the legal disabilities associated with a felony conviction after a sentence has been fully served, and to help overcome the prejudice displayed toward people with a criminal record. It remains to be seen whether expungement actually works to accomplish the goal of allowing convicted persons to put their convictions behind them.

First of all, it is important to understand what it means to have your record expunged. Here terminology can be something of a trap. Some states (like Arkansas) use the terms “expunge” and “seal” interchangeably, while others draw a sharp distinction between the two. In Illinois, for example, sealing is a more modest remedy than expungement, limiting access to records but not modifying their legal effect. New

Hampshire uses the term “annulment” to describe its judicial expungement orders, while Arizona and Washington authorize their court to “vacate” a conviction. Still other states provide for the conviction to be “set aside.” Some of these terms are functionally interchangeable.

Differences in terminology aside, not all judicial relief mechanisms have the same effect. In most (though not all) states, a conviction that has been expunged (or sealed, or annulled) remains accessible to law enforcement, and may be used to enhance a penalty in subsequent criminal proceedings. People whose convictions have been expunged are usually (though not always) allowed to deny having been convicted in the first place, and criminal penalties may be imposed for dissemination of expunged records. For example, in Utah and Washington, a person whose conviction has been expunged or vacated may respond to any inquiry “as though the conviction did not occur.” Arkansas law goes even further, in defining “sealing” to mean that the *underlying conduct* “shall be deemed as a matter of law never to have occurred, and the individual may state that no such conduct ever occurred and that no such records exist.”

But in other jurisdictions the effect of expungement is more limited. For example, in New Jersey an expunged conviction must be reported when a person is applying for a job in the judicial branch or in law enforcement, and in Kansas an expunged conviction must be reported to all licensing boards. In Ohio, employers and licensing boards may question a person about a sealed conviction, as long as the question “bears a direct and substantial relationship to the position for which the person is being considered.” In Arizona, the fact that a conviction record has been “vacated” does not relieve the person at all from an obligation to report it, if asked.

In most jurisdictions, expungement orders (however denominated) are available only to first offenders, to minor offenders sentenced to probation, or to misdemeanants. In the few states that offer expungement more broadly, serious and violent offenses are still ineligible, as are sex offenses. States impose eligibility waiting periods of from one to 10 years, and sometimes longer, depending upon the gravity of the offense.

A chart available on The Sentencing Project’s website shows what each U.S. jurisdiction provides by way of judicial relief from collateral penalties and disabilities. See Chart #5 at <http://www.sentencingproject.org/rights-restoration.cfm>. There are eight jurisdictions that have general judicial sealing or expungement schemes that apply to most adult felony convictions (Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Puerto Rico, Utah, Washington). Puerto Rico has by far the broadest expungement statute, authorizing “elimination” of all offenses from the criminal records after a waiting period ranging from one to 20 years in the case of violent felonies, upon a showing of “a good moral reputation in the community.” Kansas and Utah also have broad statutory expungement schemes, presuming expungement for most felonies after a waiting period. Minnesota appears to be the only state whose courts have generally applicable common law expungement authority, but it is exercised quite conservatively. Indiana has a general sealing statute that is administered by the state police. Oregon’s expungement remedy applies only to minor (Class C) felonies. Nevada provides for

automatic sealing of the record of a probationary sentence three years after discharge, and also after successful completion of reentry program and for minor drug possession cases. Missouri also provides for sealing where a prison sentence is suspended.

Four states (Michigan, New Jersey, Ohio, and Rhode Island) make some form of expungement or sealing available to some or all first offenders upon completion of their sentence, including those sentenced to prison. Rhode Island's expungement provisions are widely used, with 4,201 misdemeanors and 490 felonies expunged in 2004 alone. Ohio's sealing statute is also widely used, but it applies only to non-violent offenses that are not subject to a mandatory prison term. Georgia provides for first offender "exoneration" following completion of sentence (including a prison sentence), which restores all rights but does not expunge or seal the record. Arkansas's first offender law applies only to persons placed on probation.

Sometimes expungement and sealing of the record are authorized in the context of a deferred adjudication or diversion scheme. Typically, after an eligible individual pleads guilty the adjudication of guilt (or sentencing) is withheld, subject to the satisfactory completion of a period of probation with conditions. If the conditions are satisfied, the charges are dismissed and the record of conviction is "set aside," "nullified," or "vacated," so that the defendant can truthfully say that he or she has no record of conviction. These preemptive front-end schemes are aimed at keeping certain types of offenders from incurring a criminal record in the first place, and hold great promise for ameliorating the situation created by the growing number of people whose criminal records are effectively relegating them to the margins of society. Access to deferred adjudication is generally controlled by prosecutors, which suggests the need to reach out to that community to persuade prosecutors of the benefits of expanding use of these programs.

Fourteen states have statutory deferred adjudication schemes that lead to eventual expungement or sealing of the court record after successful completion of a period of probation: Arkansas, Connecticut, Hawaii, Iowa, Louisiana, Maryland, Mississippi, Missouri, Montana, Oklahoma, Pennsylvania, South Dakota, Vermont, Washington. In many of these states, only non-violent first offenders are eligible for deferred adjudication. Other states permit certain types of minor convictions to be "set aside" upon successful completion of a period of probation, but make no provision for expungement or sealing of the record (*e.g.*, Alaska, Florida, Georgia, Idaho, Kentucky, Nebraska, and New Mexico). California, Minnesota and North Dakota authorize courts to "knock down" a felony conviction to a misdemeanor upon successful completion of probation, thus avoiding imposition of legal disabilities, but do not authorize expungement or sealing of the record. North Carolina and South Carolina permit deferred adjudication only for minor drug offenses, and authorize expungement of records only for youthful offenders. The District of Columbia Code authorizes deferred adjudication and expungement only for persons charged with drug use or possession.

In a number of states, recipients of an executive pardon are entitled to have the court record expunged or sealed. In Massachusetts, South Dakota, and Washington, this happens automatically upon the governor's action. In Arkansas, Connecticut, Indiana,

Pennsylvania, Texas, and Maryland, the recipient of a pardon must file a petition with the court to expunge, sometimes after a waiting period. In Oklahoma and West Virginia, only nonviolent pardon recipients may have their records expunged. In Minnesota a “pardon extraordinary” has the effect of “setting aside and nullifying” the conviction, but it does not authorize expungement of the court record.

There is no general federal expungement authority (the set-aside provision in the federal Youth Corrections Act was repealed in 1984). The only provision for expunging a federal criminal record is the very narrow authority in 18 U.S.C. § 3607 relating to minor marijuana possession offenses.

Based on a random sampling of state jurisdictions, expungement appears to be more easily attainable than pardon, and widely sought after in jurisdictions where it is available. Insofar as it offers the possibility of hiding from public view the fact of a prior conviction, expungement seems to offer the best possibility of true reintegration. At least until there is a sea change in public attitudes, denial seems unfortunately to be the most expedient way of dealing with a criminal record. Certainly the fear generated in employers and others by a criminal record makes it convenient to indulge the fiction that it does not exist. And, the courts as decision-makers offer the necessary respectability to make their relief at least as effective as an executive pardon.

On the negative side, it is likely to be more expensive for a criminal offender to hire a lawyer to go to court to seek expungement, than it is to file an application for administrative restoration or pardon, which can generally be done pro se. Moreover, the limited and/or uncertain legal effect of expungement in some jurisdictions, the general unreliability of criminal record systems and the additional uncertainties introduced by new information-sharing technologies, and the anxiety necessarily produced by a system built upon denial, all combine to raise questions about the usefulness of expungement as a restoration device. In short, in an age where it is difficult to control access to information of any kind, such an old-fashioned effort to un-ring the bell seems fraught with peril.

Expungement seems most useful where it is accompanied by a judicial set-aside or dismissal of charges, as in deferred adjudication schemes. When a guilty plea is set aside or vacated by a court before conviction becomes final, and if the police and court records are then sealed or expunged, a person can truthfully claim to have never been convicted and to have no criminal record. Even if a conviction becomes final before it is set aside, a person can still attest that he or she has no record of conviction. On balance, at least as long as pardon remains such an unreliable and inaccessible relief mechanism, judicial expungement and sealing seem to offer the best hope for convicted persons seeking to put their criminal record behind them and start over with a clean slate.

### **III. Executive Pardon**

Pardon is assigned a central role in the criminal justice system of almost every state, and in the federal system as well. While most states now allow convicted persons to

vote upon release from prison or completion of sentence, other legal barriers to reentry and reintegration are not so easily overcome. A felony conviction can permanently disqualify a person from many jobs and licenses, from housing and welfare benefits, from student loans, and from other generally available opportunities. For non-citizens it can result in deportation. A pardon offers the only possibility of relief from these collateral consequences of conviction for most adult felony offenders in the United States.

As noted in last month's newsletter, there are a few states that authorize their courts to expunge or seal an adult felony criminal record, and a few more states that offer the possibility of eventual expungement to first offenders, and to people sentenced to probation. When criminal records are sealed from public scrutiny, people are specifically authorized by statute to deny that they were ever convicted. New York has adopted an administrative relief system that involves the award of certificates of good conduct by courts and the parole board. However, in a majority of states, adult felony offenders have no alternative to seeking a pardon if they want to regain the legal status of an ordinary citizen.

The effect of a pardon is the same in most U.S. jurisdictions: it relieves the recipient of all collateral legal sanctions and disqualifications. It also generally evidences good character, so that an employer or landlord or lending institution can have some level of comfort in dealing with a pardoned individual. In some states, a pardon has the effect of "erasing" the conviction, and entitles the recipient to judicial expungement of the record. Connecticut, Massachusetts, Minnesota, Ohio, and Washington fall into the latter category. In most states, however, a pardoned offense remains on the books, and must be reported.

The constitutions of forty states place the pardon power in the governor; ten place it in a board. Four of these pardon boards count the governor as a member, and six pardon boards act entirely independent of the governor. The governor-alone model generally places no restrictions on the pardoning power, except occasionally to provide for legislative regulation of the "manner" of pardoning. In a few states, the constitution contains substantive limitations on the pardon power, and in a few others the pardoning authority itself restricts the effect of a grant. For example, in Virginia the courts restore firearms rights, and in Alabama and Arizona rights are restored only if the pardon document so specifies. State pardons are given effect in federal law in several important areas, including immigration, firearms privileges, and employment in federally regulated industries like transportation and banking. Under regulations issued by the Transportation Safety Administration, an individual who has been pardoned may qualify for a trucker's hazmat license, an airport security pass, or a job as a longshoreman.

But it is not easy to get a pardon even in the 42 jurisdictions that assign it a key operational role in offender reentry. Indeed, in only a handful of states are there more than a token number of pardons granted each year. Some governors have issued no pardons at all in recent years, even where they enjoy the relative safety of a legislatively designed support mechanism. For example, in Louisiana, Massachusetts, and Michigan, the legislature has authorized an administrative board to provide binding advice to the

governor pursuant to a regular administrative hearing process, but the incumbent governor has nonetheless chosen not to exercise the power. Pardons are “exceedingly rare” in Colorado, North Carolina, Tennessee, Vermont, West Virginia, and Wyoming -- even though there is no other relief mechanism in those states, even for the most minor offenders. In Mississippi, New Jersey and Washington, it has become customary for governors to issue pardons only at the end of their term, and very few are granted even then. The federal pardoning process has also withered in the past 20 years, producing only a trickle of grants where once there was a steady stream.

New York’s governor customarily commutes a handful of prison sentences at Christmas, but for many years has granted no post-sentence pardons. At least in New York there is an alternative way for offenders to regain their rights and demonstrate their rehabilitation. In most of the other jurisdictions mentioned above there is nothing.

The fact is that most chief executives no longer regard pardoning as an integral and routine function of their office. While the modern politician’s reluctance to pardon may be attributable to a pragmatic concern about making a politically costly mistake, it conveniently cloaks itself in a legal theory that regards pardon as an unwarranted interference with the proper functioning of the legal system. A pardon is conceived of as a lightning strike or a winning lottery ticket; not a remedy that can reasonably be sought by ordinary people who can meet an objective set of criteria. As far as I can tell, the only incumbent chief executives who approach their pardoning responsibilities with anything like the proper respect are Governors Robert Ehrlich of Maryland and Mike Huckabee of Arkansas, and the fictional President Josiah Bartlet of "The West Wing."

It may come as a surprise, then, that there are some states in which pardon continues to function as an integral part of the justice system, and is available to ordinary people with garden variety convictions who can meet the basic eligibility requirements and demonstrate their rehabilitation. With the new interest in facilitating offender reentry and “neutralizing” the effect of a criminal record in appropriate cases, the experience of the states with a regular pardoning practice should be of interest. As will be seen, the key to making the pardon power operational appears to lie in two things: protection from the political process, and regular exercise.

The ten states that presently treat the pardon power as an integral part of their criminal justice process each issue a substantial number of pardons each year, and grant a high percentage of the applications filed. It is no coincidence that in all of these states the pardon process is regulated by law and operates with a reasonable degree of transparency. In Alabama, Connecticut, Georgia, Idaho, and South Carolina, the pardon power reposes in an appointed board, and the governor has no role (except a peripheral one in capital cases). In Nebraska, the authority to grant pardons is vested in a board of pardons that is composed of the Governor, Secretary of State and Attorney General. In Delaware, Pennsylvania, and Oklahoma, an appointed board makes binding recommendations to the governor, without which the governor may not act. In Arkansas the legislature requires the governor to consult with the parole board and obtain its non-binding recommendation in each case, and to report regularly on the number of grants and the reasons for each. This regulation seems to give the pardoning authority in each of these states sufficient



protection from the political process to make them comfortable in exercising the power. (A chart available on The Sentencing Project's website shows the characteristics of the most active state pardoning authorities. See <http://www.sentencingproject.org/rights-restoration.cfm>. Idaho does not appear on this chart because of the comparatively low absolute number of grants, but it is included here because it acts favorably on 2/3 of the applications it receives.)

In each of the ten states where the pardon power is actually operational, it is administered through a public application process. In all but two, the board responsible for administering the power is required by law to hold public hearings at regular intervals, and to notify the prosecutor and victim. (The Georgia Board of Pardons and Paroles generally considers cases on a paper record, as does the Arkansas Parole Board, though both have the authority to conduct public hearings.) Most of the pardoning authorities in these states are required to defend their grants by reporting them annually to the legislature, along with a statement of the reasons for each grant. In Arkansas, the governor may not issue a pardon unless he first issues a public notice that provides a statement of reasons for the grant.

Illinois and South Dakota also hold public pardon hearings at regular intervals, but are not counted among the ten "operational" boards either because of recent irregularities in the pardon process, or a sluggish pardoning rate by the current governor, or both. The current governors of Maryland and Hawaii have shown a commendable interest in pardoning, despite not having the benefit of a statutory administrative apparatus that would give them a regular stream of reliable recommendations and a measure of political protection.

Particularly since 9/11, there has been increased pressure on the pardoning mechanisms in the 42 states where it provides the only way most offenders can avoid the automatic rejection that generally follows discovery of their criminal record. A number of state pardon authorities reported a surge in pardon applications from people fired or refused employment because of their criminal record, often far in the past and involving quite relatively minor offenses. Employers increasingly rely on criminal background checks to winnow out undesirable employees, sometimes because they are required to by law, but more often simple because they are risk averse and criminal record information is readily available. Yet, relatively speaking, even in the jurisdictions that have reasonably functional pardon procedures, surprisingly few people make use of them. For example, Georgia grants more pardons than any other state, but the numbers involved are still relatively small: in 2004, the Georgia Board of Pardons and Parole granted 422 pardons (including 39 "immigration pardons"), acting favorably on between 35% and 50% of applications received. South Carolina and Connecticut each granted about 200 pardons in 2004, about 65% and 25% of all applications filed, respectively. It is unclear whether so few people apply because of the time and expense involved, the perceived uncertain prospects of success, the availability of alternative relief mechanisms, the belief that a pardon won't make much of a difference -- or some combination of these factors.

For example, the pardon process in Pennsylvania appears to be both fair and accessible. It is administered by capable professionals, is presided over by elected officials who seem committed to the enterprise, and is the only relief available under that state's law. Moreover, a high percentage of those who apply for pardon in Pennsylvania are ultimately successful. Yet the process involves a lengthy and burdensome application process even for misdemeanants and "summary" offenders, including a full background investigation and two public hearings in the state capital. It requires a substantial investment of time and energy each month from the five members of the Clemency Board, which include the lieutenant governor and state attorney general, and the numerous state employees responsible for its administration. A similar seriousness of purpose and formality of process is characteristic of all of the states where pardon remains operational. Perhaps there could be a less cumbersome and expensive alternative for individuals whose offenses are minor and dated, but who are still being denied jobs, loans, and other opportunities because of them.

It is unfortunate that in so many states pardoning has become an almost vestigial function, in light of its critical gate-keeping function for people struggling to overcome the lingering disabilities that come with having a criminal record. As a criminal record is becoming both more common and more disabling, it is essential to have a reliable and accessible way for individuals to overcome the legal barriers to reintegration, and to reassure employers and other members of the public of their rehabilitation. This surely has important benefits for the community as well as for the individuals involved. A well-administered pardon process can accomplish a great deal in closing the loop on an individual's experience in the criminal justice system, symbolizing a sort of "graduation" back to the legal status of an ordinary citizen. The ten states that have an active pardon docket offer models for jurisdictions interested in reviving the power.

On the other hand, pardon was never intended to be anything other than an "extraordinary" remedy, in theory unbidden by the strictures of the law and, as such, arguably unsuitable for everyday operational use. Pardon is supposed to remedy the occasional malfunctions of the legal system; it is not supposed to substitute for law reform. And, as a practical matter, any program that requires the personal action of the chief executive will never be quite as reliable or accessible as a program that is less politically vulnerable. This was the conclusion of the drafters of the Model Penal Code, when they provided for judicial relief from disabilities, and eventual "vacation" of the record of conviction for someone who had demonstrated his rehabilitation. (See *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 *FORDHAM URBAN LAW JOURNAL* 101 (2003).

The bottom line is that it is evidently too much to ask of pardon that it serve as the primary mechanism for relief from collateral consequences, at least where it remains the sole responsibility of the chief executive. The very fact that so many jurisdictions have nothing other than pardon speaks volumes about the need for law reform. It is shortsighted and potentially dangerous to expect offenders to reintegrate and remain law-abiding, while at the same time depriving them of the tools for doing so. Pardon can be adapted to large scale use by making it more bureaucratic, as the experience of several

states shows. But other relief mechanisms, judicial and administrative, may provide even more reliable alternatives. Above all, employers and other decision-makers must be persuaded that it is safe to go behind the fact of a criminal record, to see the entire person. The nuanced case-specific approach taken in the post-9/11 federal Transportation Safety Administration regulations combines elements of all of these approaches, and will be the subject of the final installment of this series in next month's newsletter.

#### **IV. Relief from the Collateral Consequences of Conviction: Notes from the "Laboratories of Democracy"**

"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.<sup>1</sup>

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 without any criminal record at all. 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.<sup>2</sup> All eight of the states whose officials testified before the Commission make some provision for "clearing" a

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<sup>1</sup> 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*.

<sup>2</sup> 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?"

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.

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 applicant's 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 longshoremen 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.