

**AMERICAN BAR ASSOCIATION  
COMMISSION ON EFFECTIVE CRIMINAL SANCTIONS  
CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RECOMMENDATION**

1 RESOLVED, That the American Bar Association urges federal, state, territorial and local  
2 governments to limit access, to the extent permitted by the First Amendment, except by  
3 agencies and employers that are engaged in law enforcement, to:  
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- 5 (i) Records of closed criminal cases in which charges were dismissed,  
6 nol prossed, or otherwise not pursued; cases that resulted in  
7 acquittal; cases in which the judgment of conviction was reversed  
8 or vacated; or cases in which a guilty plea was set aside; and  
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- 10 (ii) Records of misdemeanor and felony convictions after the passage  
11 of a specified period of law-abiding conduct, which may vary  
12 depending upon the seriousness of the offense, unless the  
13 conviction involves substantial violence, large scale drug  
14 trafficking, or conduct of equivalent gravity.  
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16 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
17 territorial and local governments to adopt the following policies in connection with  
18 limits on access to criminal records:  
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- 20 (i) Any limitation on access to conviction records may have the effect  
21 of lifting collateral sanctions and disqualifications, but it should  
22 not preclude reliance on the conviction in a subsequent prosecution  
23 or sentencing;  
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- 25 (ii) Any person or entity may file in the court in which the conviction  
26 occurred or in any other court specified by statute or regulation a  
27 petition seeking access to a conviction record to which access has  
28 been limited, and for good cause shown the court may give the  
29 moving party access to the record;  
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- 31 (iii) Any person or entity may file in the court in which the conviction  
32 occurred or in any other court specified by statute or regulation a  
33 petition seeking to revoke an order limiting access to the record,  
34 and the court may revoke that order when the interests of justice  
35 and the public welfare support revocation, which may be the case

36 when the person whose record is at issue is convicted of another  
37 offense; and  
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- 39 (iv) Appropriate remedies should be made available when unauthorized  
40 disclosure of a record to which access has been limited occurs.  
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42 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
43 territorial and local governments to require that applications for employment or licensure,  
44 or other benefit or opportunity, other than an application for employment with a law  
45 enforcement agency, state that the applicant is neither required nor expected to report a  
46 prior arrest or conviction record to which access has been limited. Employers and other  
47 decision-makers should be prohibited from:  
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- 49 (i) Requiring as a condition of employment, or other benefit or  
50 opportunity, that an individual produce a copy of or otherwise  
51 disclose an arrest or conviction record to which access has been  
52 limited; and  
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- 54 (ii) Denying employment, or other benefit or opportunity, based on any  
55 arrest or conviction record to which access has been limited.  
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57 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
58 territorial and local governments to clearly indicate that, where access to a criminal  
59 record has been limited, the subject of the record may state in response to any inquiry,  
60 other than an inquiry from a law enforcement agency, that the arrest or conviction in  
61 question did not take place.  
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63 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
64 territorial and local governments to prohibit credit reporting agencies, including any  
65 company providing background screening services, from disseminating any arrest or  
66 conviction record to which access has been limited, and to provide appropriate penalties  
67 for prohibited dissemination of such a record.  
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69 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
70 territorial and local governments to require that, where access to a criminal record has  
71 been limited, all public agencies authorized to retain criminal records (including state  
72 records repositories) should impose similar limits on any records in their possession.  
73 National government databanks like the FBI III system should be promptly notified of  
74 any limits on access to records.  
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76 FURTHER RESOLVED, That the American Bar Association urges federal, state,  
77 territorial and local governments to make evidence of an individual's conviction  
78 inadmissible in any action alleging an employer's negligence or wrongful conduct based  
79 on hiring as long as access to a criminal record has been limited.

## REPORT

The recommendation urges jurisdictions to limit access to criminal history records except to agencies and employers engaged in law enforcement. These limitations are justified by the following three research findings:

- ❖ Steady employment and stable housing are the two most reliable predictors of desistance from crime;
- ❖ After a certain crime-free period, the risk that a person will recidivate is greatly reduced, and is similar to that of a person without any criminal record;
- ❖ Employers and landlords are predisposed to reject people with convictions without regard to the actual risk they may pose.

It is important to public safety that we find a way to limit the disqualifying effect of a criminal record in cases where 1) an offender has served the sentence imposed, lived for a period of time in the community, and may be presumed not to pose a risk of reoffending; and 2) there has been no finding of guilt, including cases where charges have been dismissed. The most effective way to accomplish this is to limit access to the record itself, after a certain period of time and under certain conditions.

### **Collateral Consequences and Criminal Backgrounding**

A criminal conviction is, in a very real sense, a “mark of Cain,” which sets its bearer permanently and indelibly apart from the rest of society.<sup>1</sup> Even after an offender completes the sentence imposed by the court and fully complies with all conditions of probation or parole, collateral legal disabilities and the stigma of conviction remain. A criminal conviction is seen as a sign of a character flaw, evidencing the likelihood that the individual will commit other criminal and/or dishonest acts. The “stigma of conviction” limits opportunities for offenders both formally, through legal prohibitions on the employment or licensing of people with a felony record, and informally, “by communicating to the potential employer that this individual is a higher than average employment risk.”<sup>2</sup>

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<sup>1</sup> See Webb Hubbell, “The Mark of Cain,” San Francisco Chronicle, June 10, 2001, (reprinted in 13 Fed. Sent. Rept. 223 (200-2001)(a criminal record “shackles former offenders like me with restrictions barring us—often permanently—from the means to live a normal life”).

<sup>2</sup> Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, “Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement,” 53 Crime and Delinquency 64, 84 (2007)(citations omitted):

A criminal record of any type can be deemed as a character flaw on the part of the owner, thus portraying to others the potential of the individual to commit other criminal and/or dishonest acts. This stigma works to limit employment opportunities for offenders both formally—through legislation prohibiting the hire of ex-offenders into certain occupations – and informally – by communicating to the potential employer that this individual is a higher than average employment risk.

The collateral consequences of conviction have been increasing steadily in variety and severity for the past 25 years, limiting employment and other benefits and opportunities for people who have a criminal record.<sup>3</sup> These changes in the law, combined with greater ease of access to criminal history records, have fed a growing reluctance to hire ex-offenders. Even an arrest record may be enough, if discovered, to prevent a person from getting a job or a scholarship or a loan. Many employers and landlords now routinely conduct background checks on applicants for jobs or housing.<sup>4</sup>

Employer aversion to hiring or retaining people with a criminal record appears to have grown since 9/11, and is attributed to fear of workplace victimization, liability for negligent hiring, and federal laws that seem to discourage employment of ex-offenders even if they do not actually forbid it.<sup>5</sup> In most cases, it does not matter how long ago the conviction took place, or if the person's offense bears any relationship to the job they now hold or seek.<sup>6</sup> People with a criminal record of any type "experience more difficulty in obtaining steady employment than any other disadvantaged group (e.g., minorities, welfare recipients, illegal aliens, etc.)."<sup>7</sup>

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<sup>3</sup> According to the Bureau of Justice Statistics, as of December 31, 2003, over 71 million individuals had criminal history records in state criminal history repositories. (Note that an individual offender may have records in several States.) <http://www.ojp.usdoj.gov/bjs/crs.htm>. Ten years earlier, in 1993 BJS found that 47.3 million individuals had state criminal histories. In 1993 the FBI had records in its system of 25 million individuals; by 2006 that number had grown to 48 million. See *The Attorney General's Report on Criminal History Background Checks*, U.S. Department of Justice 13 (June 2006)(Attorney General's Report). Recent research shows that almost 16 million people in the United States have a felony record. See Christopher Uggen, et al., "Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders," *Annals, AAPSS*, 208 (May 2006).

<sup>4</sup> A recent employer survey found that over 50% of employers in the Los Angeles area check some type of criminal history records before they extend an offer of employment. Harry J. Holzer, Steve Raphael, and Michael A. Stoll, "Will Employers Hire Ex- Offenders? Employer Preferences, Background Checks and their Determinants," in Mary Patillo-McCoy, David Weiman, and Bruce Western (eds.) *The Consequences of Mass Incarceration on Families and Communities* (Russell Sage Foundation, 2004). Another survey reported that over 80% of large employers now use criminal history records checks in the hiring process. See Michael Stoll and Shawn Bushway, "The Effect of Criminal Background Checks on Hiring Ex-Offenders," National Poverty Center Working Paper Series, February, 2007.

<sup>5</sup> See Holzer et al., note 4 *supra*; Harry J. Holzer, Steve Raphael, and Michael A. Stoll, "Employer Demand for Ex-Offenders: Recent Evidence from Los Angeles," Discussion Paper: #1268-03, Institute for Research on Poverty, University of Wisconsin (2003). Federal laws and rules that require background checks in regulated areas like education, transportation, banking and finance and health care, have state counterparts that go further to impose hiring restrictions. See SEARCH, the National Consortium for Justice Information and Statistics, *Compendium of State Privacy and Security Legislation: 2002 Overview*, Bureau of Justice Statistics (2003), <http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsl02.pdf>.

<sup>6</sup> Notable exceptions are the federal laws and regulations governing employment in the transportation trades enacted after 9/11, which limit the seriousness and age of the offenses that may disqualify an individual from required security clearance, and provide for a "waiver" process. See National Employment Law Project, "A Summary of the New Federal Security Standards Regulating Transport Workers" (March 2005),

<http://www.nelp.org/docUploads/TransportationLaws%20Epdf>. The transportation trades unions were instrumental in negotiating these flexible provisions, and have more recently been active in pressing for similar rights for railroad employees.

<sup>7</sup> Holzer et al, "Employer Demand," *supra* note 5.

The development of technology has kept pace with the demand for more and more sophisticated background checks, so that even records that are unavailable to the public in official state repositories (such as nonconviction records) can be easily harvested and compiled from courthouses all over the country by companies that specialize in background screening.<sup>8</sup> Records that 20 years ago would have been practically unavailable, either because they were sealed from public view in central repositories or stored in inconvenient locations, are now immediately available for a small fee on the internet. The federal Fair Credit Reporting Act, which governs the use of consumer information, including criminal history records, was amended in 1998 to eliminate any restrictions on how far back conviction records could be reported.<sup>9</sup> An entire industry of professional background checkers has arisen, and has even formed its own lobbying organization. Many state agencies, including courts, now provide access to their records systems over the internet for a modest fee. The Justice Department has recently proposed making FBI rap sheets, long subject to restrictions on dissemination, available to the general public.<sup>10</sup>

Background checks indisputably increase the likelihood that a person with a record will on that account be denied jobs, licenses, housing, education, and a host of other benefits and opportunities that are essential to successful reintegration into the community. Studies have shown that where an employer is required by law to conduct a background check on employees or prospective employees, a person with a record is invariably rejected.<sup>11</sup> (Where an employer conducts a background check voluntarily, the results are less predictable, suggesting that employers may read a requirement to check for a criminal record as a not-so-subtle direction not to hire if a record is found.) There is a growing body of anecdotal evidence that long-time employees may be fired if a routine background check turns up a record predating their employment.

As both government and the private sector have moved toward a preference for more information and greater transparency in the name of preventing workplace victimization, they have failed to account for the trade-offs with another set of policy goals of equal importance to public safety: the successful reentry and reintegration of ex-offenders.<sup>12</sup>

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<sup>8</sup> For example, a private background screener may receive a copy of the criminal record when the case was preliminarily decided through public court records, and report this conviction despite the fact the criminal charge was later dismissed and sealed after successful completion of a diversionary or deferred adjudication program.

<sup>9</sup> See SEARCH, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005).

<sup>10</sup> See *Attorney General's Report*, *supra* note 2 at 51-52. In 1989 a unanimous Supreme Court upheld the Justice Department's policy of refusing to disclose FBI rap sheets to a FOIA requester. *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

<sup>11</sup> See Michael Stoll and Shawn Bushway, "The Effect of Criminal Background Checks on Hiring Ex-Offenders," National Poverty Center Working Paper Series, February, 2007.

<sup>12</sup> The Justice Department report to Congress recommending that FBI rap sheets be made publicly available contains only a cursory two-paragraph reference to reentry concerns in a 150-page report. See *Attorney General's Report*, *supra* note 3 at 51-52.

Acting on data showing that the risk of recidivism is greatest in the first three years following release from prison,<sup>13</sup> the federal government has put in place a regular program of grants to state and local governments for such transitional services as housing, substance abuse treatment, counseling, and job training. At this writing, Congress is on the brink of passing landmark legislation aimed at giving ex-offenders a “Second Chance.” But with all the government interest in what happens to offenders at the point of reentry, there has been little or no corresponding interest in what happens to offenders who successfully navigate the reentry process and are moving toward true reintegration.

One thing that would be helpful to employers and others is better guidance on when it is safe and appropriate to take a chance on a person with a criminal record. Another thing would be reasonable protection from liability if the person subsequently causes loss or injury in the workplace.

There is at present very little research data to guide an employer in assessing the level of risk of injury or loss they run by hiring a person with a record, or in otherwise determining the relevance of a particular individual’s criminal record for a particular job. Researchers have for many years studied the effect of certain “predictors” of desistance from crime, such as type of crime, age at time of conviction, time elapsed since conviction, education level, family stability, and conduct and employment since conviction. However, the social science research community has to date produced no verified risk assessment instrument or relevancy model incorporating a mix of these desistance predictors.<sup>14</sup> Without some verifiable means of assessing risk or determining relevance, it is difficult for someone refused employment to make out a case for unlawful hiring discrimination, even when the purpose of the law is to extend protection to people with criminal records.<sup>15</sup> And, without any threat of being sued by disappointed applicants

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<sup>13</sup> Patrick A. Langan and David J. Levine, *Recidivism of Prisoners Released in 1994*, Bureau of Justice Statistics (2002)(67% of individuals released from prison in 1994 were rearrested within three years, 42% were convicted of a new crime, and 24% were returned to prison for a new crime).

<sup>14</sup> Many of the identified predictors of desistance from crime (age at time of offense, criminal history, education level, and conduct and employment since conviction) are embodied in state nondiscrimination laws. See, e.g., Ky. Rev. Stat. Ann. §§ 335B.020(2); Minn. Stat. § 364.03; N.Y. Correct. Law § 753; N.D. Cent. Code § 12.1-33-02.1; Va. Stat. Ann. § 54.1-10H(B). A few states include specific timeframes for measuring “rehabilitation” in their laws barring hiring discrimination on the basis of conviction. See, e.g., N.M. Stat. Ann. § 28.2.4(B) (three years after imprisonment or completion of parole and probation); N.D. Cent. Code. § 12.1-33-02.1(2)(c) (five years after discharge from parole, probation or imprisonment). Most of these laws were enacted in the 1970s, and their application has been restricted in recent years by laws restricting employment of convicted persons in specific areas such as health care and education.

<sup>15</sup> A number of states have laws prohibiting employment discrimination based solely on a conviction record, but only a few provide a mechanism for enforcement of these laws. See Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide* at 67 (2006). Only three states (Hawaii, New York, and Wisconsin) include conviction as a prohibited basis for employment discrimination in their fair employment laws. *Id.* at 64. Federal law extends some protection to people with convictions under Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of criminal record where it has a disparate impact on a protected class. See, e.g., *El v. SEPTA*, 479 F. 3d 232 (3d Cir. 2007). In *El*, the court of appeals held that criminal record policies that have a disparate racial impact must “accurately distinguish between applicants that pose an unacceptable level of

if they don't hire people with criminal records, and with reason to worry about being sued if they do,<sup>16</sup> most employers tend to take a conservative approach to hiring people with criminal records.<sup>17</sup> According to a national survey of criminal back-grounding practices,

As a society, we know very little about whether, and under what circumstances, criminal justice record information (and different kinds of criminal justice record information) is relevant to various determinations involving employment. . . . As a result, the current default, especially in an increasingly dangerous and risk averse society, is to allow all (or virtually all) criminal justice information to reach end-users and then permit end-users, based on their own needs, culture, and law, to sort out the relevancy of the information.<sup>18</sup>

What little relevant research has been done on risk prediction focuses on time elapsed since last conviction. This variable, the easiest to measure and least subjective, appears to be a significant predictor of desistance. While it is common knowledge that there is a high likelihood of recidivism in the first three years after release from custody,<sup>19</sup> research has shown that the risk of recidivism falls off rapidly and dramatically after that. If a person is not rearrested within the three years after conviction, the chances of that person's re-offending drop each year until "the risk of a new criminal event among a

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risk and those that do not." 479 F. 3d at 245. In a footnote describing the application of its test, the court distinguished between applicants who pose a "minimal level of risk" and those who pose "a higher level," suggesting that an employer cannot reject persons with criminal records on the grounds that the level of risk cannot be brought down to zero. The court conceded, however, that research provides little guidance on how to determine level of risk, in that case for a paratransit driver whose murder conviction had occurred 47 years before. The court granted summary judgment for the employer because the plaintiff had submitted no evidence to rebut its expert testimony that "former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act." *Id.* at 246.

<sup>16</sup> There have been some recent negligent hiring cases involving egregious facts, *see, e. g., Or v. Edwards*, 418 N.E. 2d 163 (Mass.App.Ct., 2004)(landlord acted negligently in entrusting apartment keys to casual custodial worker with an extensive criminal record, who raped and murdered child in vacant apartment unit). However, the widespread fear among employers that they will open themselves to lawsuits if they hire anyone with a criminal record is not supported by the research that exists. .

<sup>17</sup> There are exceptional cases where employers make a practice of recruiting and hiring people with criminal records. *See, e.g., "A Local Business Gets Involved to Reduce Crime," Michigan Prisoner Reentry E-News*, December 2006, describing the efforts of Cascade Engineering to train, employ and promote people coming out of prison. Fred Keller, President of Cascade Engineering, spoke at the Commission's national conference on "Overcoming Legal Barriers to Reentry" on April 30, 2007, and described his company's commitment to getting welfare recipients and former prisoners back to work as a function of his vision of corporate social responsibility. Other employers appearing on the same panel were making similar efforts to hire people with criminal records, often with the assistance of an intermediary organization like the Safer Foundation in Chicago or the City of Memphis Second Chance Program. A description of the panels at this conference, including Mr. Keller's presentation, can be accessed on the Commission's website, [www.abanet.org/cecs](http://www.abanet.org/cecs).

<sup>18</sup> *See* SEARCH report, *supra* note 9 at 75. .

<sup>19</sup> *See* note 13, *supra*.

population of non-offenders and a population of prior offenders becomes similar.”<sup>20</sup> This research seems to undercut the rationale underlying indiscriminate and categorical lifetime disqualification from opportunities and benefits. It also suggests that public safety is unlikely to be compromised – and may indeed be enhanced -- by eliminating these legal barriers after a certain period of time.<sup>21</sup>

It is of course important to eliminate formal legal barriers to employment and licensure, just as it is important to give offenders a way to demonstrate their rehabilitation, and private employers incentives to hire them, as we have elsewhere recommended.<sup>22</sup> But these steps may not be sufficient to cancel out the hostile attitude toward ex-offenders that seems to have become hard-wired into the fabric of the workplace. Additional research may assuage employer concerns about the actual risk of loss or harm that is posed by people with criminal records, and help to determine the relevance of a criminal record to different categories of employment and licensure.<sup>23</sup> At least for the time being, however, we are persuaded that the most effective and meaningful way to neutralize the effect of a conviction record is to permit offenders, after a certain period of time and under certain conditions, to put the past behind them by limiting access to the record itself.

### **State Sealing Laws**

At the very same time that private background screening is becoming commonplace, policy-makers are revisiting the old debate over the public’s right to information about a

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<sup>20</sup> Kurlychek, Brame, Bushway, “Scarlet Letters and Recidivism: Does An Old Criminal Record Predict Future Offending?,” 5 *Criminology and Public Policy* 1101, 1117 (2006)(after five to seven years of law-abiding conduct “the risk of a new criminal event among a population of nonoffenders and a population of prior offenders becomes similar”). See also Kurlychek et al., *supra* note 2 at 83 (“if a person with a criminal record remains crime-free for a period of about 7 years, his/her risk of a new offense is similar to that of a person without any criminal record”).

<sup>21</sup> Social science researchers have reached a similar conclusion. See, e.g., Patricia M. Harris and Kimberly S. Keller, “Ex-Offenders Need Not Apply: The Criminal Background Check in Hiring Decisions,” 21 *Journal of Contemporary Criminal Justice* 6, 19 (2005)(citations omitted):

[L]egislation that reduces the ex-offenders’ likelihood of securing or retaining gainful employment carries with it risk tradeoffs. Inasmuch as unemployed offenders pose greater risks to the public at large than do employed offenders in the workplace . . . , efforts to reduce risks of workplace crime by barring persons with criminal histories may coincide with increased risks of the same persons engaging in crimes in other contexts.

<sup>22</sup> See Report 103C, Report to the House of Delegates, ABA Midyear Meeting, available at [www.abanet.org/cecs](http://www.abanet.org/cecs). The resolutions urge governments to give offenders an opportunity to earn a certificate of good conduct, and private employers financial incentives to hire people with criminal records. They also urge jurisdiction to “make evidence of an individual’s conviction inadmissible in any action alleging an employer’s negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction.”

<sup>23</sup> Section 241 of the Second Chance Act of 2007, H.R. 1593, directs the National Institute of Justice to conduct “a study on the population of offenders released from custody who do not engage in recidivism and the characteristics (housing, employment, treatment, family connection) of that population.”



person's criminal record.<sup>24</sup> While in the past the debate has centered on an individual's privacy interests, access policies are now coming to be seen as an important aspect of the government's reentry strategy. Legislatures are coming to understand that pervasive criminal backgrounding practices, coupled with laws and policies that reinforce employer aversion to hiring people with criminal records, are working at cross purposes with efforts to reduce recidivism through successful reentry. Few jurisdictions currently provide meaningful relief from unfair discrimination based upon a criminal record, and pardon is available as a practical matter in only a handful of states. It is therefore not surprising that there has been as renewed interest in limiting public access to criminal records through court-ordered sealing in jurisdictions all over the country. The challenge is to tailor open access policies without sacrificing the values they serve.

The development of a consistent position on who should have access to records of closed criminal cases, and under what conditions, has been hampered by the wide variety of laws and practices in the states.<sup>25</sup> Many states limit public access to records in their central repositories, particularly nonconviction records, but screening companies have the resources to mine court records and other public data bases that are more open, if less convenient for the general public. Only if court records have been sealed or expunged<sup>26</sup> are records effectively closed to public scrutiny – though law enforcement and other authorized agencies (like licensing boards and employers who employ individuals in highly sensitive positions, such as school bus drivers or child care workers) are generally given access by statute to sealed court records.

More than two-thirds of the states currently provide for sealing of court records not leading to a conviction, either automatically or on a case-by-case basis pursuant to a court

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<sup>24</sup> See Robert R. Belair, Report of the National Task Force on Privacy, Technology, and Criminal Justice Information, NCJ 187669 (U.S. Department of Justice, Bureau of Justice Statistics, Aug. 2001) ("Privacy Report") The Task Force included among its recommendations that "criminal history record information should be sealed or expunged (purged) when the record no longer serves an important public safety or other public policy interest." Report at 6, 76. The report recognizes the wide variety of laws and practices among the states, on such issues as who may have access, to what kinds of information, under what conditions. Sealing may be automatic in some cases, and court-ordered in others. The Task Force recommended that whatever sealing policy a state may employ, it should apply equally to court records and records in a state repository.

<sup>25</sup> In the 1970s the federal government sought to impose a degree of uniformity on state records repositories, but over the years the states have gone their own ways, so that no two states treat issues of access in exactly the same way. The Justice Department's effort to coordinate state and federal databases has been a work in progress for over 30 years. See Privacy Report, *supra* note 23 at 10-11.

<sup>26</sup> The Commission's black letter recommendation uses the phrase "limiting public access" to criminal history records, by which we mean what is commonly referred to in most states as "sealing" a record. The terms "sealing" and "expungement" are sometimes used interchangeably, although in a few jurisdictions the term "expungement" signifies a more thorough purging of the record. Rarely is "expungement" accompanied by the literal "destruction" of a record. For clarity's sake, the term "sealing" will be used in this report. In almost every state a record that has been "sealed" from public view remains available for use by law enforcement agencies and by courts, and by certain other authorized agencies as well (including those that deal with vulnerable populations, with national security, and with banking and finance.)

order.<sup>27</sup> Some of these states provide for sealing only in the event of an acquittal or if charges are not pursued, but most also authorize sealing where charges are dismissed or a guilty plea is set aside pursuant to a deferred adjudication or deferred sentencing agreement. The Commission heard testimony in its hearings that when the record can be sealed upon successful completion of probation and/or diversionary program, this tends to encourage offenders to take greater advantage of such programs, and give them an additional incentive to comply with the terms of their probation.

A smaller number of states provide for sealing of some adult felony or misdemeanor convictions (though usually not serious violent offenses or sex offenses). Most of these states impose an eligibility waiting period that varies depending upon the seriousness of the offense, and exclude the most serious offenses altogether.<sup>28</sup> An additional number of states offer sealing to first offenders and/or non-violent offenders, or to probationers or misdemeanants, or to those who have received an executive pardon. The purpose of these statutes is generally to facilitate rehabilitation, and most of them permit an applicant for employment to deny having been convicted. They generally do not limit access by law enforcement agencies, or other agencies or entities with authorized access, such as health care and educational employers. Nor do they preclude reliance on the conviction in a subsequent prosecution or sentencing.

### **Prior Consideration of Access to Records by the Commission**

In its initial report to the House in February 2007, the Commission specifically did not recommend judicial sealing of criminal records, preferring the more transparent device of a certificate of good conduct as a means of neutralizing the effect of a criminal record. It did recommend that jurisdictions should develop policies governing access to and use of criminal records in state repositories that would “balance the public’s right to information against the government’s interest in encouraging successful offender reentry and

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<sup>27</sup> See Margaret Love, Relief from the Collateral Consequences of a Criminal Conviction, supra note 15, Chart 5 (“Judicial Expungement, Sealing, and Set-Aside”), updated state charts at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486>.

<sup>28</sup> For example, Nevada courts have authority to seal all records related to a conviction, upon the offender’s request, after an eligibility waiting period ranging from three years for misdemeanors, to 15 years for more serious felonies. Nev. Rev. Stat. § 179.245(1)(a). This relief is unavailable to sex offenders, and also to anyone who has been arrested during the eligibility waiting period. Massachusetts permits sealing of most adult felony and misdemeanor convictions, after a waiting period of 15 and ten years, respectively. Mass. Gen. Laws ch. 276, § 100A. In Rhode Island the analogous waiting periods are ten and five years. R.I. Gen. Laws § 12-1.3-3(b)(1). In New Hampshire, convictions may be “annulled” following completion of the sentence and expiration of a waiting period ranging from 1 to 10 years. N.H. Rev. Stat. Ann. §§ 651:5(III) and (IV). Washington courts are authorized to “vacate” the record of conviction, upon application, for Class B felonies after 10 years, and for Class C felonies after five. Wash Rev. Code §§ 9.94A.640, 9.95.240, 9.96.060. Oregon’s expungement remedy applies only to misdemeanors and minor (Class C and D) felonies. Or. Rev. Stat. § 137.225(1) through (12).

reintegration.”<sup>29</sup> The House approved this recommendation, and it now constitutes ABA policy.

The Commission also more specifically recommended that jurisdictions limit access by non-law enforcement agencies to non-conviction records in state records repositories. Objections were raised by representatives of the media and by the background screening industry, on both legal and policy grounds. As a result, the Commission decided to withdraw this recommendation for further study.

### *First Amendment Concerns*

The Reporters Committee for Freedom of the Press and other representatives of the media took the position that the common law guarantee of access to judicial records is grounded in the First Amendment, and that accordingly there is a constitutional right to of access to judicial records in a criminal proceeding that outweighs a defendant’s privacy concerns. They argued that this right of access applies to records of closed criminal cases as well as to records of on-going matters, without regard to whether a conviction resulted, and without regard to how long ago the conviction occurred. The Reporters Committee also argued that, as a policy matter, public access to criminal records is essential to the media’s ability to police the integrity of the justice system.

The Reporters Committee grounded its constitutional argument in the test developed by the Supreme Court in *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555 (1980), as applied by the Court of Appeals to records of closed criminal matters in *Globe Newspapers v. Pokaski*, 868 F. 2d 497 (1st Cir. 1989). The *Pokaski* decision invalidated a Massachusetts statute calling for the automatic sealing of certain criminal matters that did not result in conviction, holding that these records met the two-part test of *Richmond Newspapers* because 1) they had historically been open to the public, and 2) “public access plays a significant positive role in the functioning of the particular process in question.” 868 F. 2d at 502, quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Accordingly, the constitutional balance must be struck in favor of openness and against the criminal defendant’s privacy interest. The *Pokaski* court left open the possibility that case-by-case court-ordered sealing under a “compelling state interest test”

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<sup>29</sup> The report accompanying our recommendations on access to and use of criminal history records stated as follows:

The resolutions recommended by the Commission urge jurisdictions to establish records systems that control access to and use of criminal history information for non-law enforcement purposes, balancing the public’s reasonable right to know against the government’s compelling interest in encouraging successful offender reentry and reintegration. States that have open access policies should consider whether systems that regulate public access, such as the Massachusetts CORI system, would better serve the several competing social interests. Open access systems, like some registries, tend to be ineffective in enhancing public safety, insofar as they discourage the sort of offender reintegration that reduces recidivism.

Report 103D, Midyear Meeting, 2007, at 3-4.

might be permissible, but noted that records “cannot be sealed on the basis of general reputation and privacy interests.” 868 F. 2d at 507, n. 18.<sup>30</sup>

The Commission appreciates the strong interest of the media in having access to records of closed criminal cases so that it can carry out its function of ensuring the proper functioning of the criminal justice system. It is true that closing court records may make it more difficult to inquire into systemic irregularities and improprieties by government agencies or officials. The Commission also recognizes that in the First Circuit, it might not be possible to limit public access to criminal records in the manner envisioned by the Commission. But, there are few decided cases addressing state efforts to limit access to criminal records in circumstances when, as provided in the Resolution, any interested party may seek access to records not generally available and a court may grant such access if cause is shown.

The Commission shares the concern that any closing of records reduces transparency and the amount of information available to the public as it considers whether to support governmental efforts to deal with crime in a variety of ways. At the same time, those efforts to deal with crime may at times require some limitations on transparency. The Commission concludes that the balance struck in the Resolution is appropriate. It assures that information is always available to law enforcement while protecting individuals against discrimination in employment, housing and other decisions based upon a criminal record that either contains no conviction, or contains a conviction that has become stale in light of a substantial period of law-abiding behavior. It is not unusual for law enforcement to have access to records not generally available to the public. *Cf. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S.749 (1989)(FBI rap sheets properly withheld pursuant to law enforcement exemption of Privacy Act).

The Commission notes that two state supreme courts have rejected the *Pokaski* court’s view that the weight to be given to the privacy interest of an individual who has not been found guilty, when coupled with the state’s interest in encouraging reentry, is not sufficient to counter the public’s First Amendment interest in open court proceedings. *See State ex rel. Cincinnati Enquirer v. Winkler*, 805 N.E. 2d 1094 (Ohio 2004)(record of acquittal) and *State v. D.H.W.*, 686 So.2d 1331 (Fla. 1996)(record of dismissed charges). As the Florida Supreme Court observed in upholding that state’s sealing statute as applied to a ten-year-old case in which adjudication had been deferred and probation imposed, “the policy of public access to old records must be weighed against the long-standing public policy of providing a second chance to criminal defendants who have not been adjudicated guilty.” 686 So. 2d at 1336.<sup>31</sup> Both of these decisions are more recent

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<sup>30</sup> Relying on the *Pokaski* decision, the Massachusetts Supreme Court held that records of closed criminal cases may be sealed by a court only if there has been an individualized finding that sealing is necessary to effectuate a compelling state interest. *Comm. v. Doe*, 420 Mass. 142 (Mass. 1995).

<sup>31</sup> In *Winkler*, the Ohio Supreme Court also rejected the balance struck in the *Pokaski* case, pointing out that

than the First Circuit's contrary decision, and both support the Commission's recommendation with respect to records not resulting in a conviction.

With respect to conviction records, there is little reason for the press, academics, social critics or others to fear that there will be any substantial diminution in transparency of public accountability. The Resolution calls upon jurisdictions to determine how long an individual must demonstrate law-abiding behavior after being convicted to qualify a conviction for limited access. During the entire period prior to access being limited, the records will be publicly available. Indeed, researchers would have the ability to document any and every conviction and use it for reporting, publishing, and other purposes. Once access is limited to a conviction, it will no longer be generally available, but if it is known to the press or to a researcher, it still may be used – though it may not be relied upon by an employer to deny employment. If the press, a researcher, or anyone else wants access to a record that has become generally unavailable, an application to a court would be required. But, this would not be necessary until a time period had elapsed between the conviction and the limitation on access. If the record has not been of interest during this period, it is doubtful that it will be generally of interest once access is limited. But, if a specific interest is demonstrated, the application process should accommodate genuine needs for information.

The undeniable fact, as explained in the conclusions of the preceding section of this report, is that many states have laws authorizing limited access to closed criminal records. The fact that few First Amendment cases are reported challenging these laws suggests that reasonable limitations on access pose no threat to public accountability, transparency in government, or an informed citizenry.

#### *Security Concerns of Employers*

The Commission appreciates the willingness of many entities involved in screening to engage in a dialogue about the best way to balance the public's need for information against a policy of encouraging those who have violated the law but have changed their ways to have a second chance. LexisNexis, a company that prepares background screening reports for business clients, argued against the Commission's original approach to criminal records. It reflected the security concerns of its clients and the difficulty of determining risk without such access. LexisNexis has acknowledged that "Depending upon the job, and with the passage of time, a conviction could become less relevant

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The only function of this statute is to allow a court, after balancing the public and private interests, to limit the life of a particular record. The public's ability to attend a criminal trial is not hindered. The media's right to report on the court proceedings is not diminished. The statute does not restrict the media's right to publish truthful information relating to the criminal proceedings that have been sealed. In addition, the public had a right of access to any court record before, during, and for a period of time after the criminal trial. In fact, the public's access to the records is unrestricted until a decision is made to seal records. The statute ensures fairness by balancing the competing concerns of the public's right to know and the defendant's right to keep certain information private.

805 N.E. at 1097-98.

where the individual has otherwise avoided further trouble with the law.”<sup>32</sup> At the Commission’s national conference in Chicago on April 30 and May 1, 2007, Arthur J. Cohen, Chairman of the National Association of Professional Background Screeners (NAPBS)<sup>33</sup>, went further and expressed support for a policy of limiting access to some conviction records after a certain period of law-abiding conduct. Because the concerns of background screening companies properly relate only to the issue of employer risk, we believe that their concerns can be allayed by the research showing that risk is attenuated with the passage of time. As to nonconviction records, we believe that the presumption of innocence should trump a potential employer’s interest in delving into an applicant’s past record.<sup>34</sup>

### **Analysis of the Resolution**

Having studied the issues further, and surveyed the laws and practices in states across the country, the Commission is persuaded that jurisdictions should seek a compromise between the values of open access and privacy that underlie criminal records policy, to better accommodate the important public safety value of successful offender reentry and reintegration. The Commission remains of the view that “[o]pen access systems, like some registries, tend to be ineffective in enhancing public safety, insofar as they discourage the sort of offender reintegration that reduces recidivism.” *See* Report 103D, 2007 Midyear Meeting at 4.

The details of the proposed resolution sketch out the contours of such a compromise, one that relies on limiting access to (or “sealing”)<sup>35</sup> criminal history records after a period of time. Cases not resulting in a conviction are perhaps the most likely candidates for sealing, for the presumption of innocence weighs heavily in favor of nondisclosure. Those who have been convicted ought also to have a chance to close the public book on their past after the passage of a certain period of law-abiding conduct, and start over with a clean slate. As discussed above, available research indicates that the risk of recidivism

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<sup>32</sup> Letter from Andrew Prozes, Global CEO, LexisNexis Group, Reed Elsevier, to Laurel G. Bellows, Chair, ABA House of Delegates, February 7, 2007.

<sup>33</sup> Mr. Cohen is General Counsel of Concorde, Inc., a Consumer Reporting Agency. His comments were not on behalf of Concorde or NAPBS and do not necessarily reflect the official or complete position of either organization.

<sup>34</sup> The question whether a present employee’s arrest can serve as the basis for discipline or termination raises similar fairness questions.

<sup>35</sup> *See* note 27, *supra*, for a discussion of terminology. What we define as “sealing” is not a new feature in ABA policy. Until 2003, the ABA Criminal Justice Standards included a judicial procedure for “expungement” of a criminal conviction, “the effect of which would be to mitigate or avoid collateral disabilities.” Former Standard 23-8.2 (Legal Status of Prisoners, 2d ed. 1981). The commentary to these Standards explained that records of an “expunged” conviction should remain available to law enforcement agencies, and that there should be no bar to the use of an “expunged” conviction for sentence enhancement. Specific reference to “expungement” was deleted from the black letter of the Standards in 2003, and more general provisions for waiver, modification, and relief from collateral sanctions substituted for it. *See* Standards 19-2.5 and 19-3.2, Collateral Sanctions and Discretionary Disqualification of Convicted Persons (3d ed. 2003).

declines over time until it approximates that of the general population, at which point there would be little risk associated with not knowing about a person's prior record. The resolution does not recommend sealing of convictions involving substantial violence, large-scale drug trafficking, or conduct of equivalent gravity. Under the terms of the resolution, sealing would not affect access by law enforcement agencies. Moreover, the prosecutor or other interested party may move the court to revoke limitations on access to the record when the interests of justice and the public welfare require it, including where the person whose record is at issue is convicted of another offense.

Sealing would not depend upon individual application, but would be automatic upon a determination of eligibility. This has two advantages over case-by-case sealing: it will ensure that relief will be available to all persons, regardless of means; and, it will limit the burden on courts. Beyond this, the Commission does not recommend any particular sealing procedure, anticipating that jurisdictions will find different ways of accomplishing the goals of the policy. Where access to a criminal record has been limited, jurisdictions should require that all public agencies authorized to retain criminal records (including state records repositories) should impose similar limits on any records in their possession. National government databanks like the FBI III system should be promptly notified of any limits on access to records, so that they may modify their own records accordingly.

The resolution further provides that while a limitation on access to conviction records may have the effect of lifting collateral sanctions and disqualifications, it should not preclude reliance on the conviction in a subsequent prosecution or sentencing. Moreover, at any time for good cause shown a court may direct that a person be given access to a criminal record to which access has otherwise been limited.

Where access to a criminal record has been sealed, the subject of the record may state in response to any inquiry that the arrest or conviction in question did not take place. An application for employment or licensure, or other benefit or opportunity, other than an application for employment with a law enforcement agency, must state that the applicant is neither required nor expected to report a prior arrest or conviction record that has been sealed. Employers or other decision-makers should be prohibited from requiring as a condition of employment, or other benefit or opportunity, that an individual produce a copy of or otherwise disclose an arrest or conviction record to which access has been limited. Credit reporting agencies, including any company providing background screening services, should be prohibited from disseminating any arrest or conviction record to which access has been limited, and there should be appropriate penalties for prohibited dissemination of such a record. Some states make it a criminal offense to reveal information that has been sealed, but the Commission takes no position on what form a penalty should take.

Finally, we urge jurisdictions to make evidence of an individual's conviction inadmissible in any action alleging an employer's negligence or wrongful conduct based

on hiring as long as access to the record was limited at the time of hiring, so that the employer could not properly have known about it.<sup>36</sup>

Respectfully submitted,

Stephen Saltzburg, Co-Chair  
James R. Thompson, Co-Chair

August 2007

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<sup>36</sup> ABA policy now calls on jurisdictions to “make evidence of an individual’s conviction inadmissible in any action alleging an employer’s negligence or wrongful conduct based on hiring as long as the employer relied on a judicial or administrative order granting relief from statutory or regulatory barriers to employment or licensure based upon conviction.” See Report 103C, Report to the House of Delegates, ABA Midyear Meeting, available at [www.abanet.org/cecs](http://www.abanet.org/cecs).