



# Collateral Consequence: Criminal Records, Their Effect on Reentry, and Recommendations for Policymakers

by Greg Glod, Dianna Muldrow and Derek Cohen

## Key Points

- Even a minor criminal record can be an insurmountable barrier to obtaining a job or housing.
- Without proper employment or housing, ex-offenders are much more likely to reoffend and cannot contribute financially to society.
- Orders of Nondisclosure can allow low-level offenders the opportunity to overcome their minor criminal past and become productive members of society while lowering recidivism rates and reducing liability for employers.
- Orders of Nondisclosure are limited to those whose charges are dismissed after completion of deferred adjudication. Careful expansion could help millions and make Texas safer.

## Introduction

In Texas, lawbreakers are rightly held to account for their misdeeds. State laws provide for punishment, by way of fines, community supervision, or incarceration to be justly doled out in commensurate proportion to the harm visited upon victims. Once the offender has completed the terms of their sentence and made any and all required restitution to the victim, they are free to return to society, provide for their family, and contribute to the diverse Texas economy.

Unfortunately, the ex-offenders path to redemption is often stymied by concerns of litigiousness and the desire to insulate one's private enterprise from the liability.

This is further complicated by federally-motivated campaigns to "Ban the Box," a policy that would punish businesses for inquiring about a job applicant's criminal history on the initial application form by opening them to heavy civil litigation. The Ban the Box campaign's website takes this a step further and justifies this type of litigation as a mechanism to combat "structural discrimination" against individuals with criminal records.<sup>1</sup>

Fortunately, there is a Texas solution to this problem which recognizes that it is the government that creates criminal records and that private businesses should make their own hiring decisions. Orders of Nondisclosure (ONDs) are a legal mechanism whereby access to some criminal records is restricted to those with a compelling public safety interest in the information. Currently, ONDs are only available for offenders that have had their charge dismissed after successful completion of deferred adjudication, which is a form of community supervision. Deferred adjudication can only be ordered by the judge for certain low/non-violent, non-sexual, non-family violent offenses.<sup>2</sup> With an OND, law enforcement as well as certain public and private entities whose employees are in positions that implicate public safety still have access to this criminal background information, and would require that the applicant answer truthfully pursuant to their records' status. However, when an individual who has received an OND applies for most jobs as well as housing, they can honestly state that at the present time they have no record of conviction.

Now, Texas has an opportunity to expand nondisclosure eligibility both to improve public safety and to allow those who have wronged society to transition from burdens to contributors. The paper recommends that OND's be expanded to certain eligible ex-offenders for low-level misdemeanors and felonies. Only ex-offenders with no prior or subsequent criminal record would be eligible for an OND for an adjudicated misdemeanor or felony. Further, the paper recommends that current OND procedure for misdemeanors not against the person be streamlined to be automatically granted after successful completion of deferred adjudication (assuming all other eligibility requirements are met), without the need to file a petition or pay the general petition fee.

## Current Nondisclosure Laws

Current law surrounding criminal records is notoriously complex. There are different procedures for different results upon adjudication, and the application varies drastically by jurisdiction. Each county and office has their own system, with little general practice to guide them.

Access to criminal records is determined by which tier of security the records are granted. This is a system that has been created by the Texas Department of Public Safety. There are four tiers, ranging from least to most secure. Level 1 is only accessible by criminal justice entities. Level 2 is more accessible; it allows named non-criminal justice groups such as organizations that work with children or in healthcare to access to the data. Level 3 is intertwined with Level 2, allowing groups that work with Level 2 groups to access the same information, except for offenses that have ONDs. Finally, Level 4 has the widest access. It allows information upon request and frequently involves records being published online. These tiers usually determine who can access records.<sup>3</sup>

The two ways in Texas to restrict access to a criminal record are either expunction or nondisclosure. Expunctions are only available if the charge has been dismissed, the defendant was acquitted or pardoned, or a charging instrument had never been filed. Expunctions are permanent and very rarely awarded. ONDs, while still infrequent, are more common. Currently, only some individuals who have been awarded a dismissal after completing a deferred adjudication are eligible to petition for an OND.<sup>4</sup>

Deferred adjudication is a form of community supervision occasionally offered to offenders. The key difference is that after successful completion, the case is “dismissed” without a final conviction. However, even without a finding of guilt, the arrest and record are still available to the public unless there is an OND. ONDs limit access to one’s record to level 1 and 2 groups, meaning that only criminal justice entities and organizations with vulnerable populations have access. If an offender has obtained an OND, they are also not required to disclose a criminal record to employers when asked.

Presently, there is limited opportunity for offenders to obtain an OND. There are certain offenses that leave a petitioner ineligible for an OND if they were either convicted or given deferred adjudication for them at any time.<sup>5</sup> However, an OND is an option for certain misdemeanor and felony offenders, but only those that were sentenced to deferred adjudication and subsequently had their charge dismissed by the court. If the individual is eligible, they can petition for an OND. More severe offenses require that the individual wait a period of time before petitioning. This is in part because a judge has discretion over the order, and this time period assists in determining whether awarding an OND is in the “best interest of justice.”<sup>6</sup>

Misdemeanors not against the person are a category of small offenses that are determined to be “anti-social” but not serious enough to warrant even temporary incarceration and may result in eligibility for an OND. Offenses such as a minor in possession of alcohol, criminal mischief causing damage under \$50.00, or even misuse of laser pointers are all non-violent misdemeanors. Adults and children who are arrested for these offenses, have never committed any ineligible offense, and are granted deferred adjudication may petition the court immediately for an OND upon a dismissal of the charge. Then the judge has to evaluate the situation and award an OND on a case-by-case basis.

Offenders with misdemeanors against the person justifiably have a more difficult time obtaining an OND. They are bound by similar restrictions on offense type, blocking those that have been involved in specified serious offenses, but have a two-year waiting period before they are eligible to petition for an OND. Similarly, judges have to individually evaluate the cases and make a determination before granting the order.

Finally, the last category eligible to petition for an OND are certain felony offenses, such as fraud or other property crimes. Obtaining an order after this sort of offense can only happen after a five-year waiting period, after which the judge will make a decision based the “best interests of justice” standard.<sup>7</sup>

## Consequences of a Criminal Record, Concerns about Nondisclosure, and Empirical Support of Nondisclosure

### *The Effects of a Criminal Record and the Benefits of Proper Employment and Housing*

Whether they face incarceration or community supervision, ex-offenders face collateral consequences as a result of their crime once they leave the confines of the criminal justice system.<sup>8</sup> Two of the most common consequences ex-offenders face are finding stable housing and employment.<sup>9</sup> Studies have shown that a criminal record is associated with significant reduction in employment opportunities.<sup>10</sup> Moreover, a 2007 survey indicated that 66 percent of landlords and property managers would not accept an applicant with a criminal history.<sup>11</sup>

Although there are several other variables that contribute to an individual's propensity to reoffend,<sup>12</sup> it is unsurprising that lack of steady employment and housing are major contributing factors to successful reentry without reoffending.<sup>13</sup> Each time an ex-offender moves following release, their likelihood to reoffend increases by 25 percent.<sup>14</sup> And a study by the US Sentencing Commission showed that ex-offenders who arranged for post-release employment had a much greater propensity to not reoffend than those who did not.<sup>15</sup> The inverse correlation between employment (which by association relates to proper housing) and recidivism is so strong, that researchers have described it as a "rehabilitative necessity."<sup>16</sup>

### *Concerns about the Expansion of Nondisclosure*

Employers and landlords/property managers have multiple concerns when considering whether to hire or rent to ex-offenders. First, just like with any other applicant, is the concern about suitability and reliability. Does the applicant have the character and work ethic to be a good worker? Will the applicant pay his rent on time? Will he get along with coworkers or neighbors? There is nothing unique about these concerns when it comes to ex-offenders. And just like with applicants from the general population, past records of activity can be useful in helping employers and landlords to make determinations about the suitability of the applicant in these areas. In the case of ex-offenders, criminal records provide relevant information.

Another concern of employers or housing managers is the risk that the ex-offender will re-offend. The concern could simply be that a new offense would make it difficult for the applicant to meet his obligations—prisoners generally can't show up to work or pay rent. However, the concern could also be that the new offense might have direct consequences in the workplace or neighborhood, such as would occur due to theft or to an offense against a co-worker or neighbor.

A third and related concern is that employers, landlords, and housing managers are potentially at risk of civil liability for hiring ex-offenders if they re-offend. Because of this concern, many employers, landlords, and housing managers use criminal background checks to ensure they do not expose themselves to liability.<sup>17</sup> Orders of nondisclosure limit an employer's liability by allowing an individual to truthfully state that they were not convicted of the offense.

## Support for Nondisclosure

Without a doubt, employers and landlords have the right to inquire into the past activity of applicants, including past criminal activity. That is the problem with efforts similar to the Ban-the-Box campaign, which seeks to ban employers and landlords from seeking this information during at least part of the application process.<sup>18</sup> While banning employers and landlords from even asking about previous criminal activity is wrong, research suggests simply that turning away applicants because of a criminal background is not the best approach either.

The main relevant finding of empirical research is that rates of recidivism decline over time for ex-offenders. In other words, the longer an ex-offender goes without committing another crime, the less likely he is to reoffend in the future. Blumstein and Nakamura found:

*Individuals who were arrested when they were 18 years old had the same arrest rate 7.7 years later as a same-aged individual in the general population. In contrast, those whose first arrest occurred at age 16 crossed the curve for a same-aged individual in the general population 8.5 years later, and individuals who were first arrested at age 20 crossed their curve 4.4 years after their first arrest.*<sup>19</sup>

One study regarding recidivism rates and their decline over time was performed by the Federal Bureau of Prisons in 1987. The study found that the monthly recidivism rate over a three-year period gradually declined for ex-offenders.<sup>20</sup>

This indicates that access to records of criminal history become less relevant over time. It also indicates that the relevance of past criminal activity fades more quickly if the offender is older.

Regarding potential liability of employers, evidence indicates that liability does not occur as frequently as some might think.<sup>21</sup> Additionally, some states have passed legislation that statutorily limits an employer's, landlord/housing manager's liability for hiring an ex-offender should be implemented as well. Last session, the Texas Legislature passed a bill that limited liability for employers that hired ex-offenders and similar legislation was presented this session.<sup>22</sup>

Finally, giving an ex-offender a greater opportunity to establish a proper vocation and housing will lead to lower recidivism rates and greater economic opportunities for the individual. The higher the wages, the less likely a person will reoffend.<sup>23</sup> Of course, it is not required that prospective employers and landlords take on this responsibility themselves, but it is clear that in doing so they can often benefit themselves as well as society.

## Policy Recommendations

Currently, ONDs provide relief for a limited subset of ex-offenders for a limited body of offenses, so long as the offender was given deferred adjudication probation. With careful policy adjustments, the positive impact that current ONDs have on criminal records stewardship can apply to other ex-offenders, allowing them to better return to productive society while improving public safety.

## Preserve and Expand Existing Safeguards

Meticulous vetting of the initial eligibility requirements for an OND is necessary to ensure that safety is the primary of any nondisclosure reform. It is paramount to societal security that prospective employers, landlords, and the public as a whole are aware of the full criminal past of the populace's higher-tier offenders. If a person was convicted or given deferred adjudication of any of the following at any time, they are automatically ineligible for an OND (hereinafter referred to as "global restrictions"):

- ★ Aggravated Kidnapping, pursuant to Section 20.04, Penal Code;
- ★ Any offense requiring registration as a sex offender pursuant to Chapter 62, Code of Criminal Procedure;
- ★ Murder, pursuant to Section 19.02, Penal Code;
- ★ Capital Murder, pursuant to Section 19.03, Penal Code;
- ★ Injury to a Children, Elderly Individual, or Disabled Individual, pursuant to Section 22.04, Penal Code;
- ★ Abandoning or Endangering a Child, pursuant to Section 22.041, Penal Code;
- ★ Violation of Certain Court Orders or Conditions of Bond in a Family Violence, Sexual Assault or Abuse, or Stalking Case, pursuant to Section 25.07, Penal Code;
- ★ Repeated Violation of Certain Court Orders or Conditions of Bond in Family Violence Case, pursuant to Section 25.072, Penal Code;

- ★ Stalking, pursuant to Section 42.072, Penal Code;
- ★ Any other offense involving family violence, as defined by Section 71.004, Family Code;
- ★ Under this proposal, a person would also not be entitled to petition the court for an OND if the court made an affirmative finding that the offense for which the individual is petitioning for the OND involved family violence, pursuant to Section 71.004, Family Code; and
- ★ Under this proposal, Human Trafficking pursuant to Section 20A.02 or Section 20A.03, Penal Code.

With greater eligibility for ONDs, it is paramount that initial barriers are put in place to ensure that the complete records for violent, sexual, and family violent offenders are visible to the public at large. These pre-disqualifiers accomplish that goal to ensure the safety of all Texans.

## Expand ONDs to Other Types of Sanctions

By reconfiguring §411.081 of the Texas Government Code to apply to some convictions, rather than only deferred adjudication, more rehabilitated ex-offenders can obtain ONDs and be on the road to gainful employment. In addition to adding the individual to the tax rolls, aggregate public safety is improved by increasing the likelihood that the grantee of the OND finds gainful employment and housing. Studies have consistently shown that financial stability through legitimate employment is a major contributing factor to a person's likelihood of recidivism.<sup>24</sup>

Specific restrictions and waiting periods should be dependent upon the type of offense and the manner in which it is adjudicated. Research has shown that the risk of an ex-offender committing future crimes significantly declines after one to two years subsequent to the offense or incarceration.<sup>25</sup> Therefore, the waiting periods for the higher-level crimes, either by offense or by sentence are a proper measuring stick to determine whether the ex-offender has conformed to the law-abiding side of society and thus, deserving of a second chance.

Since prosecutors choose whether to offer deferred adjudication as opposed to regular probation, or seek a term of incarceration instead of any form of probation, prosecutors have already decided by virtue of offering deferred adjudication that the defendant merits a second chance. As we recommend expanding nondisclosure to some convictions that result in regular probation, the differentiation between deferred adjudication and regular probation should be that a person completing deferred adjudication is entitled to nondisclosure for eligible offenses whereas the current "in the interest of justice" standard would apply to those petitioning for nondisclosure upon completing regular probation, as well as for those who were incarcerated. Further, for the waiting period of two years following completion of deferred adjudication that is currently specified for certain misdemeanors should be limited to crimes against the person.

### *Streamline ONDs for Deferred Adjudication of Misdemeanors and Nonviolent Felonies*

Section 411, Government Code should streamline the process for these lowest-level offenders to receive an OND while ensuring that public safety concerns are met. To be eligible, the ex-offender must have been granted by the proper court a discharge and dismissal after completion of a deferred adjudication community supervision program. Under current law, an individual will not be disqualified under this section if they have been previously convicted or placed on deferred adjudication for another offense prior to the instant offense.

A judge should, assuming other restrictions previously discussed do not disqualify the individual, issue an order of nondisclosure at the time of the disposition of the offense. However, if the case is dismissed within 180 days after placement on deferred adjudication, the judge should grant the order as soon as practicable on or after the 180<sup>th</sup> day subsequent to the ex-offender being placed on deferred adjudication. In other words, an OND would not be granted until at least six months after being placed on deferred adjudication. This provides much incentive for the individual to successfully complete their deferred adjudication (i.e. obtain a discharge and dismissal from the judge) and stay on the right side of the law, thus making our society that much safer.

A person who successfully completes deferred adjudication probation for a misdemeanor or a felony not against the person should be entitled to an order of nondisclosure following successful completion of deferred adjudication probation. The term of deferred adjudication probation is generally two years for a misdemeanor and up to five years for nonviolent felonies.

Under current law, these offenses require the individual to file a petition for the court, give notice to the prosecutor, and pay all court costs and fees associated with the petition. This is a complicated process that routinely requires the assistance of counsel. Instead of requiring the filing of a separate civil suit as is now required, the criminal court should be empowered to issue the order of nondisclosure upon successfully discharging the individual from deferred adjudication probation.

#### *Adjudicated Misdemeanors and Nonviolent Felonies Given Community Supervision (Crimes Not Against the Person)*

For misdemeanor convictions resulting in a sentence of community supervision, an otherwise eligible ex-offender should be permitted to apply for an OND on or after the date community supervision was completed. Individuals should still be required to pay all fees associated with filing a civil petition for an OND.

This should be a second chance only. Individuals that have been convicted of any crime or placed on deferred adjudication for any crime (other than a minor traffic violation) should not be eligible under this expansion. This again would guarantee that individuals eligible for ONDs for adjudicated misdemeanors are only those who made one mistake, learned from their mistake and are ready to become productive citizens.

#### *Adjudicated Misdemeanors Given Community Supervision (Crimes Against the Person) and Incarceration*

For misdemeanors against the person such as an assault that may involve pushing someone but not causing a substantial injury, a two-year waiting period after completion of community supervision (misdemeanors against the person) or incarceration should be required before an individual may petition. Petitioners are required to pay all fees associated with filing a civil petition for an OND. For nonviolent felony convictions resulting in regular probation or incarceration, the OND should be available after five years of living in the community with no new offense or successful discharge from probation, whichever is sooner.

## Summary

Adjusting the current process for receiving an OND is not an overhaul of the current system, nor is it “soft on crime.” It is a conservative approach to give individuals who have proven themselves to be a law-abiding a better chance to be positive contributors to our economy. It is critical that members of society take personal responsibility for their actions. That first and foremost means facing consequences for criminal misdeeds. Yet, once a non-violent, non-sexual offender has paid their debt to society and has proved that he can be a productive, tax paying citizen, it only makes sense from a safety standpoint, a recidivism standpoint, a redemption standpoint, and an economic standpoint to give that individual the best opportunity to succeed. A criminal record, even a minor one can be crippling to each of these goals, which not only damages the individual, but society as a whole. A reasoned expansion of nondisclosure eligibility would allow those who have made—and atoned for—a mistake to reenter productive society and contribute to the Texas miracle. ★

## Notes

<sup>1</sup> Ban the Box Campaign. “FAQ.”

<sup>2</sup> *Texas Code of Criminal Procedure*, Art. 42.12, § 5.

<sup>3</sup> *Ibid.*, at 20.

<sup>4</sup> Texas Government Code, Title 4, Subtitle B, §411.081.

<sup>5</sup> Texas Government Code, Title 4, Subtitle B, §411.081(e).

<sup>6</sup> Texas Government Code, Title 4, Subtitle B, §411.081(d).

<sup>7</sup> *Ibid.*

<sup>8</sup> Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment*, Marc Mauer & Meda Chesney-Lind eds. (2002), p. 25-27.

<sup>9</sup> *Housing Needs & Barriers For Formerly Incarcerated Persons, Austin/Travis County Reentry Roundtable Report* (2008), p. 17

<sup>10</sup> Devah Pager, *The Mark of a Criminal Record*, Doctoral dissertation. Department of Sociology, University of Wisconsin-Madison (2002), p. 54-57.

<sup>11</sup> Lahn R. Silva, *Clean Slate: Expanding Expungements and Pardons for Non-Violent Federal Offenders*, 79 U. Cin. L. Rev. 155 (2010), p. 170; citing Lynn M. Clark, *Landlord Attitudes Toward Renting to Released Offender*, 71 Federal Probation (2007), p. 22.

<sup>12</sup> Amy L. Solomon, Kelly D. Johnson, Jeremy Travis, and Elizabeth C. McBride, *From Prison to Work: The Employment Dimensions of Prisoner Reentry. A Report of the Reentry Roundtable*, Urban Institute (2004), p. 4.

<sup>13</sup> Lahn R. Silva, p. 165; citing Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 Connecticut Law Review (2002) p. 1286.

<sup>14</sup> Jamie Watson, Amy Solomon, Nancy La Vigne, and Jeremy Travis, *A Portrait of Prisoner Reentry in Texas*, The Urban Institute (2004)

<sup>15</sup> Miles Harer, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, US Sentencing Commission (2004)

<sup>16</sup> Lahn R. Silva, p. 1286.

<sup>17</sup> Rebecca Vallas and Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Center for American Progress (2014), p. 9, 19.

<sup>18</sup> All of Us or None, *Ban the Box Campaign*, Legal Services for Prisoners with Children.

<sup>19</sup> Alfred Blumstein and Kiminori Nakamura, *'Redemption' in an Era of Widespread Criminal Background Checks*, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice (2009).

<sup>20</sup> Miles D. Harer, *Reidivism Among Federal Prisoners Released in 1987*, Federal Bureau of Prisons, Office of Research and Evaluation (1994), p. 10.

<sup>21</sup> Helen Gaebler, p. 17-18; citing *The Exaggerated Threat of Negligent Hiring*, National WorkRights Institute White Paper (2012).

<sup>22</sup> [H.B. 1510](#) and [H.B. 1188](#).

<sup>23</sup> *Ibid.*

<sup>24</sup> Robert J. Sampson, John H. Laub, *Crime in the Making: Pathways and Turning Points Through Life*, Harvard University Press (1993), p. 140.

<sup>25</sup> Kurlycheck, et al, at 8. Visher, C.A., Lattimore, P.K. & Linster, R.L. (1991). Peter Schmidt and Anne Witee, *Predicting Recidivism Using Survival Models*, Springer-Verlag (1988) (study in which two release populations were monitored for recidivism rates. The study found that by the 20<sup>th</sup> month out of prison, the percentage of inmates returning to prison dropped by 50 percent compared to the 10-month mark).

## About the Authors

**Greg Glod** is a policy analyst for Right on Crime as well as for the Center for Effective Justice at the Texas Public Policy Foundation. Based in Austin, Texas, Glod is an attorney who began his legal career as a law clerk in Maryland and subsequently practiced at a litigation firm in Annapolis. In 2010, he graduated from The Pennsylvania State University with B.A. degrees in crime, law, and justice and political science. In 2013, Glod received his J.D. from the University of Maryland School of Law.

**Dianna Muldrow** is a research associate with Right on Crime who is currently in her last semester at the University of Texas School of Law. She is a graduate of Charter Oak State College and has focused on criminal justice and education policy by examining corrections and juvenile justice in her classes and in internships for the Governor's Office, as well as for the chair of the State Board of Education.

**Derek Cohen** is a policy analyst in the Center for Effective Justice at the Texas Public Policy Foundation and the Right on Crime campaign. Cohen graduated with a B.S. in criminal justice from Bowling Green State University and an M.S. in criminal justice from the University of Cincinnati, where he is currently completing his Ph.D. dissertation on the long-term costs and outcomes associated with correctional programming.

## About the Texas Public Policy Foundation

The Texas Public Policy Foundation is a 501(c)3 non-profit, non-partisan research institute. The Foundation's mission is to promote and defend liberty, personal responsibility, and free enterprise in Texas and the nation by educating and affecting policymakers and the Texas public policy debate with academically sound research and outreach.

Funded by thousands of individuals, foundations, and corporations, the Foundation does not accept government funds or contributions to influence the outcomes of its research.

The public is demanding a different direction for their government, and the Texas Public Policy Foundation is providing the ideas that enable policymakers to chart that new course.

