

Getting Past the Past *Bill Analysis: House Bill 1344*

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Some 20 percent of American adults have a criminal record, which would amount to nearly 5 million Texans.¹ While it is critical that offenders be held accountable for their actions, the question raised by HB 1344 is whether a time ever comes when selected ex-offenders, have not only satisfied their sentences, but spent many years beyond that abiding by the law and therefore should no longer be branded as criminals.

Texas has sought to answer this question affirmatively. If an individual received deferred adjudication and successfully completed deferred adjudication probation, the person can obtain a nondisclosure of the record at some point unless the offense involved a serious violent or sex felony, domestic violence, or another excluded offense. For most low-level misdemeanors, the nondisclosure is available immediately upon completing deferred adjudication probation. For other misdemeanors, there is a two year waiting period beyond that, while for those eligible felonies, the waiting period is five years.

With this nondisclosure procedure in place, the question arises as to why it is necessary to consider HB 1344, which would make expunction available to an ex-offender whose offense was nonviolent, after five years had elapsed since successful completion of deferred adjudication probation, with nothing more than a speeding ticket within that subsequent five years. The reason for considering expunction is that nondisclosure does not always fulfill the intended purpose—enabling individuals to move on with their lives without being shadowed by their distant past.

There are several reasons for this. First, it is a function of the genie being out of the bottle. The Texas Department of Public Safety sells criminal records to an untold number of vendors, who in many cases in turn sell those records to other vendors. An expunction results in records being destroyed. Since a nondisclosure does not remove the record from court documents and the files of numerous agencies, it is very difficult to sanction those who continue to make that record publicly available after the nondisclosure order was obtained. Also, nondisclosed records, unlike those expunged, can still be viewed by occupational licensing agencies and used as a basis for denying a license. Furthermore, since so many individuals connected with the government can still view nondisclosed records and companies that run background checks have contracted with numerous sources, information that is not physically destroyed and remains accessible often leaks out.²

The question of whether expunction should be available beyond circumstances when an individual is acquitted due to innocence brings into sharp relief the rationale for publicly tracking ex-offenders well beyond the date when they have not only obtained a dismissal upon completing deferred adjudication probation, but even beyond five years after that. The rationale of punishment is inapplicable since the sentence was already completed. Similarly, it is apparent that branding someone a criminal for life does not do anything to advance another central goal of the criminal justice system—achieving justice, including restitution, for victims. Instead, the rationale must be public safety—protecting society from future exposure to a dangerous individual. Thus, the critical question becomes whether there is a public safety benefit that outweighs the harm to ex-offenders from having records that follow them for the rest of their lives.

By excluding serious violent offenses, which are those found in Title 5 of the Penal Code such as murder and rape, HB 1344 draws the line between public safety and redemption at that point. Fortunately, there is empirical research that sheds light on how long after a previous offense the person remains at a higher risk of committing an offense relative to the average individual. A longitudinal study found that after six or seven years have passed since a person's last offense, that ex-offender has virtually the same chance of committing another offense as the average person.³

This timeframe parallels that in HB 1344. Misdemeanor probation lasts up to two years, with felony probation lasting up to five or ten years, depending on the gravity of the offense. The average probation term in Texas lasts 63 months.⁴ By adding

five years on to that, ex-offenders would typically be eligible for obtaining an expunction about a decade after their last offense. Accordingly, given the data on the probability of re-offending after such a long period without another offense, there is a negligible public safety benefit to denying expunction after so much time has passed during which the individual has been on the right side of the law.

Moreover, there is some reason to believe that positive incentives such as this can enhance public safety. First, given the research showing that a criminal history often contributes to unemployment and being unable to find a stable place to live, and that these factors themselves are correlated with recidivism, to the extent expunctions boost stability in employment and housing, they could make it even more likely an individual will not slip back into a criminal lifestyle.⁵ Second, the prospect of an expunction provides a very tangible incentive for an ex-offender to not only successfully complete deferred adjudication probation, but more importantly stay on the “straight and narrow” for another five years when there is no supervision. Considerable research has shown that such positive incentives positively impact behavior of ex-offenders.⁶

The role of government should be limited both in the number of functions it performs and in performing those necessary functions only as long as needed. Public criminal records, particularly for serious offenses, do serve a purpose in warning society of someone who may be dangerous at that point in time. However, once an individual has successfully completed deferred adjudication probation for a nonviolent offense and stayed on the right track for another five years after that, there appears to be no public safety benefit associated with that individual being branded by the government as a criminal for the remainder of life. While Texas continues to hold offenders accountable and impose tough sanctions when necessary, it is also appropriate for policymakers to consider what they can do to assist those who have shown through their own actions that, after enough time has passed, they deserve to put the past behind them. ★

¹ Marc Levin, “Working with Conviction: Criminal Offenses as a Barrier to Entering Licensed Occupations in Texas,” Texas Public Policy Foundation (Nov. 2007).

² Adam Liptak, “Expunged Criminal Records Live to Tell Tales,” *New York Times* (17 Oct. 2006).

³ Megan C. Kurlychek, Robert Brame, Shawn D. Bushway, “Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement,” Ohio Ex-Offender Reentry Coalition.

⁴ “Overview of Probation for the 79th Texas Legislature,” Texas Department of Criminal Justice Community Justice Division (Jan. 2005).

⁵ Michael E. Morrissey, “A Description of the Employment Patterns of Persons Released from Virginia’s Correctional Institutes between July 1, 1998 and June 30, 2002,” Dissertation Submitted to Virginia Polytechnic Institute and State University (Aug. 2004); Jake Cronin, “The Path to Successful Reentry: The Relationship Between Correctional Education, Employment and Recidivism,” Institute of Public Policy, Truman Policy Research, Harry S. Truman School of Public Affairs, University of Missouri (Sept. 2011).

⁶ Susan Yeres, Ed.D., Betty Gurnell, M.Ed., Meg Holmberg, “Making Sense of Incentives and Sanctions in Working with the Substance Abusing Offender,” National Council of Juvenile and Family Court Judges (2005).

