

To Seal or not to Seal that's the Ethical Dilemma

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Recently, there has been an increasing political climate to expanding employment opportunities for people with a history of involvement in the criminal justice system. Experimental research, surveys, and collected data supports the premise that job applicants with a criminal history are more likely to be disfavored by employers (Agan & Starr, 2017). This research paper will examine an ethical dilemma associated with criminal record clearing procedures such as expungement and record sealing. The ethical dilemma is how should ex-offender answer questions regarding their criminal history on job applications once their record is expunged or sealed. This paper shed light on how ethical influencers such as Immanuel Kant would resolve this dilemma.

Incarceration Population

In 2016, 10.6 million inmates spent time in United States jails, resulting in a 229 inmate per 100,000 U.S. resident according to statistician Zhen Zeng (Bureau of Justice Statistics, 2018b). With such a larger incarceration population, the United States also has a significant number of prisoners released each year. An estimated nine million inmates return to communities each year from incarceration (Bureau of Justice Statistics, 2004). When an ex-offender reenters society, he or she is marked with the scarlet stigma of the rap sheet (Murray, 2018). The stigma associated with incarceration affects those reentering society abilities to find sustainable housing, attain reliable transportation, affordable healthcare, and adequate employment (Visher & Travis, 2011; Visher, Debus-Sherrill &Yahner, 2011). This indelible stigma of incarceration ranks ex-offender low on the job candidates list due to trustworthiness, potential employer legal and financial liability and the ability for offenders to hold some professional licenses (Bushway, 2004; The Pew Charitable Trusts, 2010).

Expungement and Sealing

Gradually policymakers, researchers, and members of the legal community have taken steps to address the burden a criminal record has on individuals reentering society (Ispa-Landa & Loeffler, 2016; Maruna, 2011; Collins & Shapiro, n.d). Two legal mechanisms or record clearing laws that are used to allow individuals to ease the burden of a criminal record are expungement and sealing. Expungement is a court-ordered process or practice of erasing legal records of arrest or criminal convictions; an expunged record is inaccessible to government officials and police. Sealing a criminal record refers to removing public access to case-related information while allowing specific government entity or police/arresting agency to access the data (Collins & Shapiro, n.d; Ispa-Landa & Loeffler, 2016).

The practice of expungement and sealing of criminal records started in the 1940s as an effort to give juveniles motivation to reform and complete the juvenile justice system rehabilitation process. Today, expungement and sealing is a widespread practice across most of the United States. The District of Columbia and all but nine states practice some form of expungement or record sealing. Each state and the federal government carry different eligibility criteria to utilize sealing or expunging a record such as waiting periods, type of charges, number of charges, prior criminal record, cost, and accessibility (Love, Gaines & Osborne, 2018).

Record Clearing and Job Applications

During the hiring process, most employers gather information from self-reported information by applicants, and criminal history checks and social media. Job applications typically inquire about past criminal history including convictions history, the time frame of the history, for example, have you ever been convicted of a crime or has you been convicted in the last ten years (Aamodt, 2015). In the digital age of Google, social media, police blotters

and quick and cheap criminal history checks, job applicants are forced to disclose past criminal history. Failure to disclose criminal history will often result in the applicant being dismissed from the hiring process. With the implementation of record clearing procedures such as record expungement and record sealing, there is now a growing debate on how questions of criminal involvement should be answered post record clearing on typical job applications.

According to the New York State Department of Labor (n.d), once a criminal record is sealed, ex-offenders do not have to disclose their criminal history.

Ethics of Record Clearing

One of this writer's core belief is that once an offender serves their sentence, they should be able to reenter society without the stigma of a criminal rap sheet. The exceptions to this core belief are violent offenses such as rape, pedophilia and mass murder. This writer is in agreeance with New York State procedure that once a crime is sealed, it should be as if the offense never took place. There is a punitive effect of the criminal record in the hiring process, which continues to punish ex-offender long after serving court-mandated sentences. This punitive punishment is inhumane, unjust, and are violations of the principle of beneficence and Kantism. Dr. Kimberly DeSimone (2018), notes that the principle of beneficence states that there should be good in all actions, striving to prevent harm and should actively promote the well-being of others.

Unintended Consequences

Steven Raphael (2006), propose there are potential unintended consequences of having ex-offenders record wiped clean resulting in the criminal history being unavailable to potential employers. With limited access to criminal history, employers may engage in other imperfect and indirect screening practices such as attempting to identifying ex-offender status based on age, gender, race, where candidates are from, education, use of public assistance, and gaps in

employment history (Raphael, 2006; Stoll; 2009). According to Raphael (2006), "At worst, employers may systematically discriminate against workers from a groups that they perceive to have a high propensity to offend." This type of unintended consequence or adverse social effect is not serving the greater good going against utilitarianism desire to maximize utility by acting in the mean that produces the best well being to most people (Lee, 2016; Egan 2017). For example, employers may assume that African Americans are more prone to criminal behavior, which may result in African American workers being excluded from the hiring process. This practice is called statistical discrimination and may have a substantial adverse impact on minority men without criminal records in the labor market (Raphael, 2006; Stoll; 2009).

Immanuel Kant's categorical imperative preface the importance of treating humanity with respect and dignity, endless punishment is neither dignity nor respect. Kant's argument regarding punishment is that of the principle of an eye for an eye, nothing more nothing less (Egan, 2017). Subjecting ex-offenders to a lifetime of punitive punishment often far outweigh many crimes such as drug use, or harmless crime that many are convicted for. Examining criminal history from a utilitarianism perspective may support punishment as a necessary evil but only if in the end, it benefits the greater society (Lee, 2016). The endless punishment of ex-offenders with a criminal record does not benefit society long-term as it puts undue strain on governmental resources such as public assistance and welfare, increase criminal recidivism rates and strain on the criminal justice system, and creates macroeconomic losses to the economy based on ex-offender unemployment and underemployment (Lee. 2016). Not providing access to record clearing practice are also having extreme consequences on the families of ex-offenders. According to the Bureau of Justice Statistics (2008), half of America's state and federal prison population is comprised of parents of minor children. These children have to bear the responsibility of their

parents actions and furthermore continue to be punished with lack of access to quality education, sustainable housing, attain reliable transportation and affordable healthcare. As a society these type of action does not maximize welfare and provide people with what is due to them (Sandel, 2009).

Moral Criticism of Record Clearing

A moral criticism to criminal record expungement and sealing is that it is lying. The humanitarian of record expungement and criminal record sealing is called into question by Bernard Kogon and Donald Loughery Jr (1970), as these record clearing techniques,

Helps society to evade its obligation to change its views toward former offenders. Instead of accepting ex-law breakers and giving them a fair chance, the community requires them to lie, and the community lies to itself when it conceals their records in order to make them employable (p.378).

According to Immanuel Kant and his categorical imperatives lying is wrong and absolutely prohibited. Under Kantian, the employer should hire the ex-offender to restore dignity and respect as a moral agent in our society, while the ex-offender has a moral obligation, to be honest about their criminal record despite the sealed record (Lee, 2016; Egan 2017). Using the principle of respect for autonomy, business owners also have a right to hire whomever they believe would serve their organization the best. This principle states there is an obligation to respect the dignity and therefore the decisions competent adults' makeover their lives (DeSimone, 2018). "A just society respects each person's freedom to choose his or her own conception of the good life" (Sandel, 2009, p.9). Freedom is the key term in the entire ethical dilemma discuss above. Ex-offenders have served their time, and now they are free. Free to be a contributing member of society.

Conclusion

Ethical and moral decision making is often tricky, need to consider many different factors and have no correct answer. In the case of the ethical dilemma of how to answer criminal history questions after undergoing record clearing, there is no correct answer as the answer is based on what is more important to the person asking, ethics, moral or legality. What is legal is not always ethical, moral or just but in the case of record clearing, the legal answer is correct. Following New York State law to deny criminal involvement after record clearing will maximize the greatest good and well-being for all involved

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