

# Our New Criminal Sealing Law Is a Win For Behavioral Economics

By Alexander R. Klein, Esq.

We live in an era of labeling. Grocery stores highlight when their food is “Non-GMO,” shampoo bottles differentiate the “Volumizing” from the “Clarifying” from the “Everyday,” restaurants boast menu options that are “Gluten-Free,” and shoe companies offer “Walking Shoes” in addition to “Running Shoes,” which of course are not “Aerobic Shoes,” “Tennis Shoes,” “Basketball Shoes,” or “Cross Trainers.” These labels make for stressful days at the mall. But they also sprout from a principle of classical economics: that as rational actors, we make better decisions when we get as much information as possible.



What happens when this basic assumption of rationality is wrong? What happens when labels draw too much attention? If it turned out that tennis shoes worked better for playing hoops than basketball shoes, for example, would Air Jordans fetch the same premium? If genetically modified food were just as healthy as non-GMO, would “Non-GMO” labels be alarmist?<sup>1</sup>

What if people with a short criminal record were just as good at their jobs as people who had never been arrested: would labels about their criminal background make for better—or worse—hiring decisions?

In April 2017, New York State answered this question with a new pair of laws that, together, allow some people to apply for jobs without having their candidacies tarnished by criminal records. While these criminal histories add to the body of information otherwise available about job candidates, the state legislature recognized that such data can cause more harm than good—that they induce alarmism rather sobriety, fear rather than diligence.

The mechanics of the law are straightforward. On one hand, under new CPL § 160.59, anyone with up to two convictions on their record can apply to have those convictions sealed, as long as only one of the convictions is a felony. Generally, the sealing process is available for any class of crimes other than certain sex or violent crimes, requires the passage of ten years from sentencing or incarceration, must include certain documentary evidence submitted by the defendant to the Court, and must be initiated by a motion on notice to the District Attorney’s Office.<sup>2</sup> There cannot be any intervening convictions during and since the ten year period and having another open case pending would also make one ineligible for sealing.



If and when courts grant these applications, “all official records and papers relating to the arrests, prosecutions, and convictions...on file with the division of criminal justice services or any court shall be sealed....”<sup>3</sup> The new law does not, however, provide for expungement of the conviction as for example in New Jersey and Pennsylvania. In those states a person may petition for expungement of certain criminal dispositions and, if granted, the court will issue an order which clears the record completely; as though the arrest and disposition had not occurred.

.....

**Alexander R. Klein** is an associate in Barket Marion Epstein & Kearon, LLP, where he practices commercial litigation and white collar crime.

While the new sealing statute is not an expungement statute, amended Executive Law § 296 takes the legislation a step further towards leveling the playing field for job applicants. Unless specifically required or permitted by another statute, the amended law makes it an “unlawful discriminatory practice ... for any person [or entity] ... to make any inquiry about ... any arrest or criminal accusation of such in-

1 See, e.g., Cass Sunstein, *On Mandatory Labeling, with Special Reference to Genetically Modified Foods*, 165 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1043 (2017).

2 See CPL §160.59(2-3).

3 See CPL §160.59(8). See also CPL §160.59(9) (making exceptions for certain agencies, including law enforcement; firearm licensors; employers of police or peace officers; and a division of the FBI that responds to queries on background checks for gun purchases).

**Continued on next page**

## Criminal Sealing

Continued from previous page

dividual ... sealed pursuant to section ... 160.59....”<sup>4</sup> So if Jane Doe got good grades in school, has strong work experience and a series of glowing reference letters, she is more likely now to get the new job she is qualified for rather than being turned down because of a mistake she made when she was 19. It is important to note that although potential employers cannot directly inquire about a sealed arrest or conviction, it is still possible that they may obtain information about such arrest or conviction via the internet, news accounts, or court reported decisions.

This law is a victory for behavioral economics. The uncomfortable point it makes—that *more* information is occasionally *worse*—is, after all, in the soil of what modern behavioral economists are emphasizing. In brief, people usually benefit from an additional strand of information, but sometimes they can be trusted to overvalue it to their own detriment. As Christine Jolls, Cass Sunstein, and Richard Thaler explained in *A Behavioral Approach to Law and Economics*,<sup>5</sup> human rationality is imperfect. Our judgments in real life show “systemic departures” from how models suggest we should act. Our actual decisions “often violate the axioms of expected utility theory.” Or as others have stated more succinctly, we are “Predictably Irrational.”<sup>6</sup>

Rather than modeling human behavior on assumed rationality, economics and the law do better when they acknowledge where rationality breaks down.<sup>7</sup> To simplify complex choices, for example, humans resort to rules-of-thumb—heuristics—that cause predictable errors. We measure risks by what makes headlines, so we fear planes more than cars.<sup>8</sup> We predict the future based upon the past, so we buy stocks that have already skyrocketed.<sup>9</sup> And we conform to other people’s choices, so we buy cigarettes when we see our favorite movie stars lighting up.<sup>10</sup> Facing complicated decisions, we all want to make optimal choices. But when we know that certain data will trigger a misguided heuristic; less information—about plane crashes, prior stock performance, others’ smoking habits, or decade-old crimes—can actually improve decision-making.

4 See Executive Law §296(16) (excepting certain applications, like for firearms or jobs with law enforcement).

5 50 STANFORD LAW REVIEW 1471, 1477 (1998).

6 See Dan Ariely, *Predictably Irrational: The Hidden Forces that Shape our Decisions* (2010).

7 See, e.g., Russel B. Korobkin, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIFORNIA LAW REVIEW 1051, 1074 (2010) (“legal scholars seeking to understand the incentive effects of law in order to propose efficacious legal policy should not be limited to rational choice theory”).

8 See, e.g., Cass Sunstein, *Moral Heuristics* (2004), at 3, available at: <http://web.mit.edu/14.160/www/papers/Sunstein%20on%20moral%20heuristics.pdf>. See also Christopher Ingraham, *The Safest—and Deadliest—Ways to Travel*, THE WASHINGTON POST, WONKBLOG (May 14, 2015) (showing that from 2000 to 2009, for each 1 billion passenger miles, there were 0.07 deaths in planes versus 7.28 deaths in cars—meaning, car deaths were one hundred times more likely).

9 See, e.g., Breaking Down Finance, *Representativeness Heuristic*, available at: <http://breakingdownfinance.com/finance-topics/behavioral-finance/representativeness-heuristic>.

10 See, e.g., James D. Sargent, M.D., *Smoking in Movies: Impact on Adolescent Smoking* (2005), available at: <http://tobacco.cleartheair.org.hk/wp-content/uploads/2012/08/SargentJames-SmokingMovies.pdf>.

---

When we know that certain data will trigger a misguided heuristic, less information – about plane crashes, prior stock performance, others’ smoking habits, or decade-old crimes – can actually improve decision-making.

---

“Every time I’ve done something that doesn’t feel right, it’s ended up not being right.”

—Mario M. Cuomo

---

As crude examples, consider how many people have achieved success despite having made mistakes in their youth. Barack Obama and George W. Bush both allegedly experimented with cocaine as youngsters.

---

Grounded in these principles of behavioral economics, New York's new sealing law will benefit both employees and employers. Jane Doe will benefit by getting the job she wants, and Company XYZ will benefit by hiring a talented professional whom it otherwise would have spurned. This win-win stems from three basic platforms.

First, it is ensured by the law's flexible methodology. The new sealing legislation does not permit sealing for everyone. It does not take a classic one-size-fits-all approach typical of government intervention. Instead it simply redirects questions about criminality and rehabilitation into more specialized hands: judges rather than HR reps. By text, the legislation requires courts to consider a wide array of factors before sealing a criminal record. Some factors are directly pertinent to hiring, like how sealing will affect the defendant's "rehabilitation and ... reintegration into society," the impact sealing will have "on public safety," and "measures that the defendant has taken toward rehabilitation"; and others are more general, like the "amount of time that has elapsed since the defendant's last conviction," "statements made by the victim," and the "circumstances and seriousness of the offense" for the matter in question or for any other convictions.<sup>11</sup> Defense attorneys and judges consider factors like these every day. They form the backbone of most sentencing decisions. Yet many HR representatives have no experience with criminal law at all. By letting criminal-record lifespans be determined by the justice system rather than the employment system, then, New York's new rules promote a more appropriate division of labor.

Second, decade-old criminal records have little bearing on whether an employee will excel in a new company. As crude examples, consider how many people have achieved success despite having made mistakes in their youth. Barack Obama and George W. Bush both allegedly experimented with cocaine as youngsters,<sup>12</sup> something they could have been prosecuted for if they had been caught.<sup>13</sup> They eventually became the leaders of the free world. Further into the past, in his 30s Ted Kennedy famously pled guilty to leaving the scene of an accident causing bodily injury, a case where his victim was found deceased.<sup>14</sup> He remained in Congress and went on to become the Lion of the Senate. Then even longer ago, a group of men executed a conspiracy to commit treason against the English Crown. After their rebellion proved successful, they became Founding Fathers of a country called the United States of America.

Third, letting employers label people with old criminal records was over-aggressive even in theory. If companies wanted to hire people based on their morality, or

---

<sup>11</sup> See, CPL § 160.59(7).

<sup>12</sup> Raf Sanchez, *A Brief History of Presidential Drug Taking*, THE TELEGRAPH (Oct. 31, 2014), available at: <http://www.telegraph.co.uk/news/worldnews/barackobama/11191599/A-brief-history-of-presidential-drug-taking.html> (quoting Obama as stating that, in his youth, "pot had helped, and booze; maybe a little blow when you could afford it"; and stating that Bush "has not denied that he used cocaine and gave up alcohol after a drunken blowout for his fortieth birthday").

<sup>13</sup> See, e.g., Penal Law § 220.03.

<sup>14</sup> *Ted Kennedy Car Accident in Chappaquiddick*, NEWSWEEK (Aug. 3, 1969).

**Continued on** next page

## Criminal Sealing

Continued from previous page

on their ability to follow rules, the natural question would be whether they have ever *broken the law*, not whether they have ever been *caught* doing so. The job applicant who laundered money is not more employable than the one who drove drunk—even if the launderer got away with it and the driver got arrested. By focusing only upon who gets arrested, employers make hiring decisions often based on decisions by police rather than decisions by job-applicants. In doing so, they penalize job applicants who receive more police scrutiny as a discriminatory matter of course—like racial minorities. Making it harder to label people with criminal histories will make it harder for these offensive hiring practices to proliferate.

---

In the end, criminal convictions are like plane crashes. They are often one-time freak events that have no bearing on dangerousness. Yet they receive headline attention and thus induce people to make sub-optimal decisions

---

In the end, criminal convictions are like plane crashes. They are often one-time freak events that have no bearing on future dangerousness. Yet they receive headline attention and thus induce people to make sub-optimal decisions—like staying in more dangerous cars or passing over more talented job applicants. Therefore, yes, more information is usually good and sunlight is often the best disinfectant. But when we know in advance that people will stare directly into the sun for too long, the law is occasionally warranted in stepping in with sunglasses.

New York's new sealing law is not a global solution to problems in the criminal justice system. But it is a small step in the right direction. **A**

.....

“The answer to injustice is not to silence the critic but to end the injustice.” —Paul Robeson



**NY TRAFFIC FIRM**  
#1 Traffic Ticket Lawyers in NY & NJ

**TRAFFIC TICKETS**  
**LICENSE REINSTATEMENT**  
**DUI/DWI**  
**MOVING VIOLATIONS**

NY TRAFFIC FIRM  
741 MADISON AVE, 4TH FL.  
NEW YORK, NY 10065  
(212) 300-2832  
[HTTPS://NYTRAFFICFIRM.COM](https://nytrafficfirm.com)