



# Redefining Pardons: On the Leading Edge of National Reform

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*Brenda was a victim of years of domestic violence and had a Protection From Abuse order against her ex-boyfriend. When he showed up at her house one night, she grabbed her handgun and went outside to confront her abuser. The police came and they apprehended her ex, but they also charged her with reckless endangerment and carrying a firearm without a license. In the 25 years since she was convicted, she's been in no other trouble with the law. She feels called to go into nursing or social work, especially now, but her criminal conviction permanently puts an end to that.<sup>1</sup>*

COVID-19 has brought to the forefront many aspects of life that most of us had not previously thought much about—like who are “essential workers,” and how increasingly at-risk humans are from globally—spread viruses. The coronavirus has also focused attention on criminal history records. That is because we need more health care workers, more childcare workers, more elder care workers—jobs that are unattainable for those with criminal records.

Criminal records are also integral to another growing concern: the conduct of the police, the courts, and the fairness of our criminal justice system. Too many examples abound. In Philadelphia, the fuse was lit in 2017 when a Common Pleas Judge sentenced internationally acclaimed rapper Meek Mill to two-to-four years in prison for violating the terms of his probation. Here's how Philadelphia defense lawyer Michael Coard wrote about it:

Following Meek's 2007 arrest, 63-year-old [Judge Genese] Brinkley convicted him in 2009 of seven drug and weapon-related charges, five of which, it must be made clear, were mere misdemeanors. She gave him an 11 ½ – 23 month county jail sentence followed by three years probation. But he allegedly violated probation in 2011, 2013, 2014, and 2015. However, they weren't for killing, robbing, shooting, or otherwise hurting anyone.

They were for technical purported violations involving motorcycle wheelies, drug use, a petty altercation, and performances at concerts without Brinkley's permission. Although what he did might have been wrong, it certainly did not warrant the draconian two-to-four year state prison sentence she imposed in 2017 for those mere technical supposed violations. The idea of sending a nonviolent parole/probation violator to state prison for two-to-four years with convicted murderers, rapists, armed robbers, and kidnappers is mean-spirited, arbitrary, capricious, and conscience-shocking.<sup>2</sup>

Appeals followed and, in the summer of 2019, the Superior Court tossed the sentence, removed the Judge, and ordered a rehearing. Mill was soon freed, entirely, thanks to a plea deal. Commenting on the release, Philadelphia District Attorney Larry Krasner said:

Today, Robert Williams (Meek Mill) pleaded guilty to a misdemeanor firearms violation that he committed at the time of his arrest in Philadelphia more than a decade ago. All other charges have been dropped. His negotiated sentence is No Further Penalty, meaning there is no further sentence of incarceration and no further supervision (on probation or parole).

Following a careful review by my office of Mr. Williams' decade-plus-long involvement in the justice system, I know [this] to be true: Mr. Williams was unfairly treated in a case that exemplifies the destruction caused by excessive supervision, instances of corruption, and unfair processes in our criminal courts....<sup>3</sup>

Whoa! This isn't just innocent people sent to prison and helped by the Innocence Project. Meek Mill was guilty. But our city's chief law enforcement officer zeroed in on the real issue when he told us there was no fairness, no justice in his punishment.

For hundreds of thousands of Pennsylvanians who were once entangled in the criminal justice system, there is similarly no escaping their past, the unfairness of criminal record history continuing to punish those who have served their sentences and proven themselves deserving of a second chance.

### ***The Long-Lasting Legacies of a Criminal Conviction***

*Ethan's experience with the criminal justice system resulted from having been prescribed an opioid after he was injured in a motorcycle accident. When his prescription ran out, he turned to the streets. The addiction led to crime, four convictions, and several years in prison. Since his release in 2008, he has obtained his GED, an Associate Degree, and a bachelor's degree. He has almost completed his work to earn a master's degree in Social Work. His exemplary work in the recovery community has earned him press attention and many accolades. Now supporting his wife and three young children, he needs a job with an adequate salary and health benefits. Earlier this year, he was a finalist for a job with the City of Philadelphia, only to be denied because of what he did 14 years ago.*

Pennsylvania is among the three most heavily incarcerated states in the country, and the United States is the most heavily incarcerated country in the world. In addition to those in prison, Pennsylvania has the third-highest per capita rate of people under supervision (probation and control) in the country.<sup>4</sup> Beyond these are those who were convicted of a crime but not sentenced to prison or probation, and those who have completed their sentences. They—hundreds of thousands of Pennsylvanians—have criminal records.

Simply put, there is no paying off your "debt to society" nor any release from the criminal justice system when the judicially imposed sentence is completed. Criminal history records are available over the Internet 24/7/365 in just three clicks. The American Bar Association has reported that "nationwide, a past conviction history raises well over 40,000 barriers to employment, education, housing, loan borrowing, professional licensing, voting among numerous other post-punishment punishments."<sup>5</sup> Once a criminal, always treated as a criminal.

It is beyond question that criminal records are a major cause of poverty.<sup>6</sup> This has broad implications for social service programs, as the United Way has noted:



It has been estimated that 60% of the people who live in Philadelphia's lowest income neighborhoods have criminal records, and that more than 80% of employers and landlords check those records as part of background checks. Our society can invest every dollar we have in job training and workforce development, but we have no chance to succeed if these individuals are still prevented by the bad choices they made decades ago from getting the jobs or housing for which they are qualified today.<sup>7</sup>

It goes even farther than that: criminal records impoverish entire communities. In its 2017 study *Philadelphia's Poor: Experiences from Below the Poverty Line*, the Pew Foundation reported that 91% of those released to Philadelphia from Pennsylvania's state prisons returned to zip codes identified as low-income.<sup>8</sup>

There is a way up and out, but just one. In April 2020, the Economy League issued its path-breaking report that proved just how much money was being returned to communities across the Commonwealth simply by having the Governor pardon people for having committed crimes that were far in the past: an estimated \$16.5 million in additional wages in less than a decade<sup>9</sup> without so much as a dime spent on public programs. The League urged "policy makers and government officials [to] broaden their understanding of pardons to include their potential to generate economic investment and growth in areas of the state in which formerly incarcerated individuals often live." Expanding access to pardons, they wrote, "stands to economically improve the individual lives of those formerly incarcerated, their families, the communities in which they live, and the Commonwealth as a whole."<sup>10</sup>

So, what are pardons, and how do they fit into the criminal justice system?

## Pardons

*Hakim's involvement with the criminal justice system began when he was just a kid. Caught with marijuana when he was 16, he was sent to reform school. In his early 20s, after several arrests, he was convicted of passing counterfeit money, which he probably took in a drug deal; then possession of cocaine with intent to deliver; and on the third drug bust, he was sentenced to prison. While incarcerated in 2006, he stopped using drugs, converted to Islam, and set his sights on becoming an accountant, for which he has completed the coursework – but the convictions bar him from that career. After a decade of being stuck in dead-end, low-paying work, he applied for a pardon with the help of Penn Law students. On September 4, 2020, the Board of Pardons voted 5-0 to recommend him to the Governor.*

From the very beginnings of this country, the chief executive officer of every state and of the federal government (when it came to be invented) has had the ability to forgive (pardon) offenders for almost any crime or offense. Pardons have been called "the exercise of the sovereign's prerogative of mercy,"<sup>11</sup> "an act of grace,"<sup>12</sup> and "forgiveness by the state."<sup>13</sup> Originally vested in William Penn by King Charles II in 1681,<sup>14</sup> the power to pardon has been in every Constitution of the Commonwealth of Pennsylvania. In response to "allegations and constant suspicion of abuse, real or imagined," the Constitution was amended in 1872 to include a "Board of Pardons" whose approval would thereafter be required before the Governor could act.<sup>15</sup> Here's what our Constitution says:

### § 9. Pardoning power; Board of Pardons.

(a) In all criminal cases except impeachment the Governor shall have power to remit fines and forfeitures, to grant reprieves, commutation of sentences and pardons; but no pardon shall be granted, nor sentence commuted, except on the recommendation in writing of a majority of the Board of Pardons, and, in the case of a sentence of death or life imprisonment, on the unanimous recommendation in writing of the Board of Pardons, after full hearing in open session, upon due public notice. The recommendation, with the reasons therefor at length, shall be delivered to the Governor and a copy thereof shall be kept on file in the office of the Lieutenant Governor in a docket kept for that purpose.



(b) The Board of Pardons shall consist of the Lieutenant Governor who shall be chairman, the Attorney General and three members appointed by the Governor with the consent of a majority of the members elected to the Senate for terms of six years. The three members appointed by the Governor shall be residents of Pennsylvania. One shall be a crime victim, one a corrections expert and the third a doctor of medicine, psychiatrist or psychologist. The board shall keep records of its actions, which shall at all times be open for public inspection.<sup>16</sup>

Because the Board of Pardons (BOP) is a “constitutional agency,” the courts have ruled that the legislature cannot regulate it,<sup>17</sup> the courts cannot review it,<sup>18</sup> and it can pretty much do anything it wants, whenever it wants, without ever having to explain why.<sup>19</sup> All that’s required is that it act openly and keep public record of what it does which, in all but two areas, requires only the affirmative vote of 3 of its 5 members. After that, clemency is up to the Governor, for whom there are no requirements of any kind.

As Pennsylvania’s Auditor General noted in his June 2020 report Criminal Justice: Reforms to Improve Lives and Save Money, “The pardons process in Pennsylvania has remained virtually the same since its inception in 1872—nearly 150 years.”<sup>20</sup> All that changed when John Fetterman became Pennsylvania’s Lt. Governor and became the Chairperson of the Board of Pardons in February 2019.

The changes that followed have been called “revolutionary.”<sup>21</sup> Today, the application form is simple, straightforward, and available for free over the Internet. All filing costs have been waived. Applications have more than doubled. Processing times have been cut in half, from four to just over two years. Hearings are being held via Zoom instead of in the Supreme Courtroom in Harrisburg. Lawyers are not required. The BOP has recommended scores of pardon applicants in just a single vote.

Most remarkably of all, the Board has recommended approval of over 80% of the pardon applications they have heard since February 2019, and the Governor has signed 99% of them.

### ***Rebalancing the Scales***

*A bad choice in 1998 led to a conviction for theft/embezzlement that has been holding Sheila back for over two decades. She’s been unemployable despite the 4.0, summa cum laude record she achieved in college while completing her sentence of probation. She’s held a number of jobs since then, but they’ve all been low-pay, no-benefits; last in, she’s always first-out when staff is reduced; and when COVID-19 hit, she lost her last job as a bus driver. She knew about pardons but found the process overwhelming; she didn’t want to try if she was just going to get rejected. With the help and encouragement of a pardon coach volunteering with PLSE, she filed her pardon application last month.*

In its report, the Economy League of Greater Philadelphia urged the Board of Pardons to continue its reforms, reach more people, and accelerate the process. Those recommendations were quickly seconded by Pennsylvania’s Secretary of Labor & Industry in April,<sup>22</sup> the Auditor General in June,<sup>23</sup> and the statewide Workforce Development Board in August.<sup>24</sup> Then PLSE released the results of its ten-year recidivism study that confirmed that those who applied for pardons—not only those who received them, but also those who did not—raised no reason for concern about public safety<sup>25</sup> (primarily because they had completed their sentences years if not decades earlier<sup>26</sup>), providing even greater cause to expand the use of pardons.

In just twenty months, we have come an unimaginably long way towards reforming the pardon system—and Pennsylvania is the first state in the country to do so. Pardons are now understood to be an essential part of workforce development and neighborhood investment. The Board is on track to recommend over 500 people for pardons in just one year—the most ever in Pennsylvania, by far.<sup>27</sup>

Without question, this is the result of the energy, creativity and commitment of Lt. Governor John Fetterman, Attorney General Josh Shapiro, the three other members of the Board of Pardons, and Board Secretary Brandon Flood, himself the recipient of a pardon. But they cannot work this social change alone.

What is needed now are coaches to guide applicants through the application form and process—people who know what the Board of Pardons is looking for and who are willing to help those with records



complete the form. While it looks straightforward, there are traps for the unwary. Neglecting to put "N/A" in an "if applicable" box, or not attaching a required document, or not thinking ahead two years to when the interview will happen—these can cause not just delays, but "administrative withdrawals" that end the opportunity without notice. What does an applicant say (under oath) when asked to take ownership of their crime, and in truth they were innocent but took the plea because it was the best option at the time? Do they really have to disclose, in a public document, the things that had taken them to Juvenile Court, twenty years earlier?

Even more important than advising on specific questions is helping them with their personal statement. Called "optional" in the form, it is not: in fact, it is the single most important part of the whole form. It is where the applicant addresses who they are today, where they are headed, how their convictions are holding them back, why the Board can be confident that the applicant has changed their ways, and what the applicant has done to prove they deserve the freedom that only a pardon can provide.

We, as attorneys, know exactly what this is: the closing speech to the jury. We have made scores if not hundreds of them. We assemble the facts, arrange them in a way that best tells the client's story, and deliver it with passion. We do it better than anyone else.

Bottom line, that is all that is being asked of us: to help someone who need help tell their story as best they can. Five or six hours, max. And for that little effort, the client's chances grow to almost 9-in-10.

Pardons make enormous good sense for individuals, their families, and the communities in which they live and work. The possibility of a pardon within a reasonably short time will keep hope alive for those leaving the criminal justice system, and likely reduce the incidence of recidivism as a result of the improved financial opportunities and security pardons provide. And every one of us can help. 🙏

#### NOTES:

<sup>1</sup> The stories in this article that appear in blue are those of actual clients. Their names have been changed, but nothing else.

<sup>2</sup> Michael Coard, Coard: Vote No for Meek Mill's Judge Brinkley, Trump, THE PHILADELPHIA TRIBUNE, Aug. 30, 2019, [https://www.phillytrib.com/commentary/michaelcoard/coard-vote-no-for-meek-mills-judge-brinkley-trump/article\\_b4002c01-e0a3-52f8-94e0-a2857e15882a.html](https://www.phillytrib.com/commentary/michaelcoard/coard-vote-no-for-meek-mills-judge-brinkley-trump/article_b4002c01-e0a3-52f8-94e0-a2857e15882a.html).

<sup>3</sup> Press Release, District Attorney Krasner Statement on Plea Agreement Resolving Robert Williams (Meek Mill), (Aug. 27, 2019), <https://medium.com/philadelphia-justice/district-attorney-krasner-statement-on-plea-agreement-resolving-commonwealth-v-da3839aa7851>.

<sup>4</sup> PENNSYLVANIA OFFICE OF ATTORNEY GENERAL, CRIMINAL JUSTICE: REFORMS TO IMPROVE LIVES & SAVE MONEY (May 2020) at 20, [https://www.paauditor.gov/Media/Default/Reports/RPT\\_CJR\\_060920\\_FINAL.pdf](https://www.paauditor.gov/Media/Default/Reports/RPT_CJR_060920_FINAL.pdf) citing <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

<sup>5</sup> Collateral Consequences of Conviction Project, AMERICAN BAR ASSOCIATION, (2016), [https://www.americanbar.org/groups/criminal\\_justice/niccd/](https://www.americanbar.org/groups/criminal_justice/niccd/).

<sup>6</sup> In January 2019, Earl Buford, Chief Executive Officer of Partner4Work, Allegheny County's Workforce Development Board, wrote "It is undeniable that criminal records are a major factor in keeping people in poverty" – a declaration that Patrick Clancy, President and CEO of Philadelphia Works, Inc. (Philadelphia's WDB) echoed a few months later. See Report of the Economy League, *infra* at n. 9, at p. 4, fns. 6, 7.

<sup>7</sup> Press Release, United Way Funds PLSE's First Two Pardon Hubs (Aug. 27, 2018), <https://www.plsephilly.org/wp-content/uploads/2020/07/PLSE-Press-Release-UWay-Pardon-Hub-Partnership.pdf>.

<sup>8</sup> Philadelphia's Poor: Experiences From Below the Poverty Line: How Financial Well-Being Affects Everything From Health and Housing to Education and Employment, PEW FOUNDATION (Sep. 26, 2018), <https://www.pewtrusts.org/research-and-analysis/reports/2018/09/26/philadelphias-poor-experiences-from-below-the-poverty-line>.

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## About the Author



**Carl (Tobey) Oxholm III.** A civil litigator for most of his 40-year legal career, Carl (Tobey) Oxholm III learned about rap sheets and criminal history records only after he retired from his second career (leading three Universities in the Philadelphia area) and began his third, as a volunteer for

Philadelphia Lawyers for Social Equity, [www.plsephilly.org](http://www.plsephilly.org), of which he is today the Executive Director. For information about being trained as a Pardon Coach or otherwise supporting PLSE, check the website or write him at [oxholm@plsephilly.org](mailto:oxholm@plsephilly.org).

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