

The Scarlet Letter: “F”

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A series of newspaper articles have called into question whether one convicted of a felony is a proper person to hold a position within a profession or in a regulated industry. The first story arose November, 2011, when it was questioned whether an individual, who pled guilty to various felonies dating back to 1994, was a suitable person to transport human remains. In that case, the governmental authority was aware of the prior convictions and even changed its own policies to allow the individual to continue providing services.

More recently, the State Bar chose to continue the suspension of the law license of former Governor Mike Easley rather than to apply the harsher penalty of revoking his license to practice law. The State Bar’s decision followed a felony plea relating to management and oversight of the Governor’s reelection campaign. In Governor Easley’s case he entered an Alford Plea, by which the defendant maintains innocence but acknowledges that there is sufficient evidence upon which a jury could find him guilty of the charge.

A “felony” is commonly defined as, “A crime more serious than a misdemeanor and which is punishable by incarceration of one year or more.” In the common vernacular, felonies are usually thought of as crimes of grave character such as murder, rape, burglary and the like. The historical significance of felonies related to the fact that, under early English law, such crimes were punishable by death or mutilation and resulted in the forfeiture of the lands and goods of anyone so convicted. It is worthy of note that England abolished any distinction between misdemeanors and felonies in 1967.

The referenced news stories espoused the position that a felony conviction is a material factor in evaluating subsequent actions or activities of the “convicted felon.” Persons who are

convicted of serious and violent crimes are often bad persons. Their badges as felons may be well deserved, and the public may be well advised to heed any notice or warning that may be associated therewith.

However, others, who wear the Scarlet "F" are no more a danger to society than the fictitious Hester Prynne, who wore her Scarlett Letter while dutifully caring for her illegitimate daughter, Pearl. Hester Prynne was punished and shunned by the citizens of Salem, Massachusetts. In the eyes of her Puritans neighbors, Hester Prynne committed adultery and her crime was worthy of a lifetime of rebuke and ridicule. Regardless of any wrong Hester Prynne may have committed in the eyes of seventeenth century society, her dedication to her daughter and the example of the life that she lived gave evidence that she was more honorable and caring than her pious accusers.

Many persons convicted of felonies are far from incarnations of evil. These persons did not consciously set out to harm or injure anyone. Given the broad expansion of statutory "crimes," particularly by the Federal Government, it is often the case that a person accepting a plea agreement and thus a felony conviction may have never known or realized that his actions were criminal.

Popular wisdom equates conviction with guilt, but the criminal justice system is not the arbiter of cosmic truths. The system is knowingly and admittedly flawed. Most persons would say that our system of justice is intentionally skewed in favor of criminals with the concept of "innocent until proven guilty," the increasingly high standard of "beyond a reasonable doubt," and the protections afforded by the Constitution. Those working in the criminal justice system accept that guilty persons will sometimes go free. Similarly, it is an unfortunate reality that innocent persons will face criminal prosecution and occasionally conviction.

There is a constant effort to maintain a teetering balance between the safety of society and the rights of individuals. The result is never perfect justice. Occasional imbalances are inevitable. The objectives of the system should be impartial justice and a commitment to learn from past mistakes and failings in developing a more efficient and effective system.

Two examples of imperfect justice stand out from my own experiences. Early in my legal career, my law partner asked me to meet with a client, who was facing a charge which could have put him in prison for the rest of his life. The prospect of an extended prison confinement was a direct result of two (2) prior felony convictions on drug charges as a young adult. We placed the odds at 2-to-1 that he would be found “not guilty” at trial, but the prospect of life in prison made even that bet unpalatable.

The client, then in his late 20’s, was no longer a drug user, and he had worked hard to improve his station in life. He was far from the career felon for whom “three strikes” laws were intended. Nevertheless, he faced allegations sexual molestation of a minor child brought by a bitter ex-spouse, and we knew that such allegations never sit well with juries.

There was no substantive evidence against our client, and as confident as I was that the sun would arise in the morning, I was certain that he was innocent of the charges. My law partner had negotiated a plea with an empathetic Assistant District Attorney (“ADA”). The deal did not require pleading to a “sex offense” and would put our client in a minimum security facility for less than a year. I was being asked, as someone close in age to the defendant, to impress upon him that this was a good deal. I was being urged to convince an innocent man to go voluntarily to jail rather than face the prospect of a lifetime incarcerated on a charge, which nearly everyone believed was unfounded.

Initially, the client balked at a plea hoping that his innocence would come through to a jury; however, just as the trial was beginning, he tugged on my coattail and said that he wanted to take the deal. It was the right thing to do under the circumstances, but that did not make it any less distasteful. Some would say that the system failed him, and an innocent man went to jail. Others of us would say that an imperfect system worked as best as it could, and the parts came together to make the best of a bad situation.

Despite the constitutional guarantee of trial by jury, rarely is any person convicted by a jury of his peers. Seldom, do twelve citizens listen objectively and dispassionately at the presentation of evidence in order to determine the guilt or innocence of the accused. Plea bargaining has become integral to our criminal justice system. The vast majority of criminal defendants choose to plea to fewer charges or less serious crimes than those originally charged rather than risk the uncertainty of a trial. Some analyses indicate greater than ninety percent (90%) of criminal cases are decided in this manner. The government (prosecutors and judges) participate in plea bargaining for the sake of judicial economy and efficiency, recognizing that trials by jury on all criminal charges are impracticable. Trying each case, for which trial by jury is allowed, would bring the criminal justice system to a screeching halt.

Many would argue that there are abuses on both sides. The system can be abused by guilty persons, who know that they are unlikely to face the maximum punishment possible for their crimes, and they become repeat offenders. Similarly, the government can abuse the system by tacking on numerous charges to increase the potential punishment faced by a defendant in a marginal or questionable case, with the objective being to encourage (some would say “coerce”) that defendant to plead to a reduced charge simply to assure a “conviction.”

Idealists may question why any defendant would plead to a charge for which he believes and maintains his innocence. Like my example above, the potential prison time faced by such a defendant may be measured in decades. Depending on the defendant's age, it may effectively be a life sentence. Sentencing guidelines, all but assure that a defendant found guilty at trial will receive the maximum possible sentence. Whereas, a negotiated plea, even on a felony charge, may result in a minimal prison stay or even probation. Additionally, the cost of a trial can be tens of thousands up to hundreds of thousands of dollars, depending on the complexity of the case. The costs of defense and trial can easily bankrupt a defendant and his family. Even court-appointed attorneys are not free, unless the defendant is found "not guilty."

Some time ago, I attended an administrative hearing in which a former professional licensee was seeking reinstatement of his license in a forum similar to the one recently utilized by former Governor Mike Easley relating to his law license. The former licensee had pled to and been punished for a felony conviction under federal law. Unlike the State Bar in considering the status of Governor Easley, the licensing board in question historically has taken that position that any felony conviction was sufficient cause in and of itself to revoke the licensee's privilege to practice his profession. Initially, there had been little or no consideration given as to how, or if at all, the actions giving rise to the felony impeded the licensee's ability to practice.

I attended the hearing with a colleague, who had formerly sat on the national board charged with determining the rules and procedures which the licensee had been accused of violating. That colleague, coincidentally, had testified on behalf of the licensee at the original revocation hearing. She had testified that there had been technical errors or omissions, but that these errors were at most inadvertent simple negligence. There was no indication of willfulness,

gross negligence, or reckless behavior, much less a knowing wrong or actual intent to harm on the part of the licensee.

It was interesting to hear the tenor of the debate and watch the responses of the members of the licensing board. For some, the issue was black and white, “He was convicted of a felony; therefore, he is unworthy to ever again be licensed in the profession.” Others realized, “There but for the grace of God go I.” The latter contingent was more inclined to consider the person as a whole rather than focus on an isolated act or incident (or his status as a “convicted felon”).

In the discussions that followed, the nature of the error was discussed, but more interesting was the explanation of how the licensee came to plead to the felony. He had been caught in the wide net of a series of federal criminal statutes known as “honest services laws.” Using these provisions, federal prosecutors often sought criminal convictions based upon fraud committed by denying someone the “intangible right” to one’s “honest services.” Under applications by some courts, no intent to do harm was required. All that had to be shown was an act or omission outside a prescribed standard of care. Additionally, each party allegedly harmed could represent an additional count or charge arising from the same isolated act or series of related actions. (The U.S. Supreme Court greatly curtailed the use of these laws after 2009.)

The licensee in question faced multiple counts, and convictions on all counts would have resulted in decades in a federal prison. Given the technical complexities and number of counts, defense against the charges was entirely cost prohibitive. In the end, he opted to plead to one felony and received probation with no active prison time. He did this to save himself and his family the trauma of a protracted trial and financial ruin. Only the most adamant among us would argue that he would have refused a plea under the circumstances.

By any measure, the individual paid his debt to society. A series of witnesses attested to his technical competence, work ethic, and personal character. Nevertheless, the hearing focused

on whether one convicted of a felony ever could be qualified thereafter to practice as a member of a regulated profession. The recent consideration given by the State Bar to Governor Easley would tend to hold open that possibility. For others, the thought is, "Once and always a felon."

As to the recent newspaper stories, I do not know the specific facts or details beyond what has been reported publically. I do not know the circumstances of the pleas. I do not know personally the individuals involved, and I am not qualified to make a judgment based upon those limited facts as to whether these persons are suited to perform the duties of their jobs or worthy of the confidence and franchise of the agencies charged with regulating their professions. Nevertheless, I am willing to allow those government agencies to do the jobs with which they are tasked and to trust those bodies to fulfill their obligations to protect the public interests. I am unwilling to forever brand an entire class of persons as outcasts based solely upon their status as felons and without consideration of them as individuals. None of us would want such a fate for ourselves.

Persons stereotype others because it makes interactions with those in the stereotyped group or class easy and predictable. It is much easier to paint with a broad brush than with a fine one. Society assumes that a felon is a bad person. This assumption may often prove true. However, not everyone fits the expected mold. People do not always adhere to the script that we write for them. We may take comfort in separating ourselves from felons, but a great harm comes from taking the next step in assuming that we are better than anyone who was convicted of a felony or that, as an individual, a convicted felon may not have something beneficial to contribute to society.

The collective experiences of society and we as individuals may support what we believe to be the personality and character traits of convicted felons. Undoubtedly, there are people who

are convicted of dangerous crimes and whose convictions properly serve as warnings for all to approach them with care. However, blanket assumptions seldom, if ever, apply to everyone in a given group or class. Perhaps, it is appropriate to decide that a convicted felon can never be rehabilitated sufficiently to perform certain jobs and duties. However, we should make that decision informed of all of the facts and circumstances, and we should ask ourselves whether the Scarlet Letter that they wear truly serves to protect society.

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