U.S. Department of Justice
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Criminal Justice Information Policy

Public Access to Criminal History Record Information

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Joseph M. Bessette
Acting Director

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PUBLIC ACCESS TO CRIMINAL HISTORY RECORD INFORMATION[1]

INTRODUCTION

This paper addresses two questions. First, to what extent is criminal history record information[2] available to the public and other noncriminal justice requesters? Second, in light of relevant empirical and theoretical considerations, is it appropriate for criminal history record information to be available to the public and other noncriminal justice requesters?

The paper concludes that criminal history record information, and particularly conviction record information[3], is more readily available today to the public and other noncriminal justice requesters than at any time in the recent past. Legal and administrative

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[1] This report was prepared initially to serve as a background paper for the National Conference on Open Versus Confidential Records, co-sponsored by SEARCH Group, Inc. and the Bureau of Justice Statistics, United States Department of Justice. The conference was conducted in Washington, D.C., on September 29-30, 1987. Proceedings of that conference will be published by the Bureau of Justice Statistics.

[2] Criminal history record information is defined to mean "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information, such as fingerprint records, to the extent that such information does not indicate involvement of the individual in the criminal justice system." 28 C.F.R. § 20.3(b).

[3] Conviction record information is defined to mean a notation of a criminal transaction related to an offense that has resulted in a conviction, guilty plea, or a plea of *nolo contendere*.

restrictions, however, continue to place substantial limitations upon public access.

AVAILABILITY OF CRIMINAL HISTORY RECORDS TO THE PUBLIC: A LEGAL ANALYSIS

Public Availability of Original Records of Entry

Criminal history records, sometimes called "rap sheets", are cumulative, name-indexed histories of an individual's involvement in the criminal justice system. As such, criminal history data invariably is the most useful and the easiest to use record of arrests and convictions; however, it is by no means the only government record of arrests and convictions. Two other kinds of criminal record information exist, both of which customarily are available to the public.

First, virtually every police department keeps a daily record of arrests and other events involving police action. The title and character of these records varies some from department to department, but usually these records include a blotter or log of calls for assistance from the department; incident reports filed by police officers responding to these calls; and an arrest log or blotter identifying those individuals arrested or formally detained at the station house, along with a brief description of the reason for the arrest or detention. These daily records often are not retrievable by the names of records subjects and seldom, if ever, are cumulative—that is, the daily records do not contain or cross reference all of a record subject's arrests or encounters with a particular police department. Rather, to obtain an individual's total record of encounters with a particular agency, each day's record would have to be searched. By statute or case law in most states, and by

tradition in every state, these daily blotters and logs are available to the public.[4]

Second, every court keeps a record, usually called a docket, of events occurring in that court. The docket includes records of arraignments, adjudications, sentences, and other judicial events. In some courts these records are indexed by the names of record subjects and are cumulative—that is, all of the events in a given court, even events involving different cases, in which a particular individual participated can be obtained by searching under that individual's name; moreover, increasingly, courts are automating their docket systems. As a matter of constitutional right, statute, or court rule, dockets are open to public inspection in every state.[5]

Public Availability of Criminal History Record Information Prior to 1976

Early History

Until the mid to late 19th century criminal history record "systems" in the United States consisted of little more than random

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[4] *See*, Reporters Committee for Freedom of the Press, *Police Records: A Guide to Effective Access in the 50 States and D.C.* (1987). *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. 1984), *rehearing denied* (1985), is representative of the decisions that have dealt with the availability of police blotter data. In *Heard*, a Texas state appellate court held that under the Texas Open Records Act, most parts of a police offense report must be made available to the public and the press. *See also, e.g.*, Cal. Gov't Code § 6254(f).

[5] *See* Reporters Committee for Freedom of the Press, "Access to Public Record Criminal History Information: A Scale Out of Balance" (1984) (unpublished monograph), [hereafter "Reporters Committee Monograph"]; and *Reporters Committee for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 739 (D.C. Cir. 1987), *rehearing denied*, 831 F.2d 1124 (1987). *See also, e.g.*, Cal. Gov't Code, §§ 69842-69847 (Superior Courts) and §§ 71280.1-71280.3 (Municipal and Justice Courts).

and informal notes kept by police officers in a few urban centers.[6] By the early 20th century law enforcement agencies had begun to collect criminal history records in a more formal way and maintain these records in connection with fingerprint and other identification data.[7]

These early criminal history records were viewed as the property indeed, in a sense, as the "personal notes" of police officers and their agencies. Accordingly, decisions to create such records, maintain such records, use such records, or disclose such records were regarded, more or less exclusively, as matters of police discretion. Well into the mid-1960s, criminal history records in most states were exempt from open record or official record laws. A 1971 survey by a University of Chicago researcher found that, in general, arrest records were disclosed or, more often, withheld solely at police discretion:

> Courts usually refuse to interfere with the police practice of limiting public access to arrest records but circulating the records at their discretion.[8]

Early court challenges to the selective release of criminal history data by police departments were rebuffed on the grounds that the records were not confidential at common law or by statute.[9]

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[6] Office of Technology Assessment, *An Assessment of Alternatives for a National Computerized Criminal History System* (1981), at 21.

[7] SEARCH, *Criminal Justice Information Policy: Intelligence and Investigative Records*, Bureau of Justice Statistics (1985), at 16-17.

[8] "Retention and Dissemination of Arrest Records: Judicial Response," 38 *U. Chi. L. Rev.* 850, 863 (1971) (footnote omitted); *see also* Reporters Committee Monograph at 3.

[9] *See, e.g., Norman v. City of Las Vegas*, 177 P.2d 442, 445-48 (Nev. 1947), involving the selective release of criminal history data to employers.

Federal Legislation and Regulations in Early 1970s

By the late 1960s and early 1970s, the exercise of police discretion selectively to disclose criminal history record information outside of the criminal justice system was under attack. The basis for the attack included concerns about the computerization of criminal history record information, the potential for misuse of the records by noncriminal justice recipients, the poor quality of the records, and the unfairness to record subjects arising from selective release of criminal history and especially nonconviction data.[10] These concerns created a climate in which selective, discretionary release of criminal history records was politically unacceptable.

In November 1970, a suburban Kansas City police chief discovered firsthand that the rules of the game had changed. A local television reporter disclosed that the police chief had obtained criminal history record information from Kansas City's computerized criminal history system and then passed it along selectively to local businessmen and landlords. The purpose, according to the police department, was to "keep an eye on who was coming into town." All told, the press found that the police chief had selectively disclosed criminal history records relating to 32 individuals. When the media charged that, "for the computer data to be available to private interests suggests the 'Big Brother' of Orwell's book [1984] . . . .", the police chief retorted that, "without the use of this computer, these 32 people would now be residents in our community."[11]

In 1973, the Congress took halting steps toward regulating dissemination policy and assuring that criminal history record

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[10] Nonconviction record information is defined to mean arrest information without a disposition if an interval of one year has elapsed from the date of the arrest and no active prosecution of the charge is pending; or dismissals, acquittals, or other dispositions short of a conviction. 28 C.F.R. § 20.3(k).

[11] A. Westin & M. A. Baker, *Databanks in a Free Society*, Quadrangle Press (1972), at 87.

information maintained in state and local information systems would be as unavailable to the public as federally held records.[12] The Crime Control Act of 1973, amending the Omnibus Crime Control and Safe Streets Act of 1968, required that all criminal history record information in state and local systems that received federal monies (and by then virtually all state and most large, local systems had received federal monies through the Law Enforcement Assistance Administration ("LEAA")), "only be used for law enforcement and criminal justice and other lawful purposes."[13]

The Congress, of course, was not unaware that their statutory language limiting dissemination to "lawful purposes" was, at best, vague. The Conference Report admitted as much, and promised future, more definitive, action:

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[12] By the late 1950s criminal history records held by the Federal Bureau of Investigation ("FBI") (and these records included state and local records, as well as federal records) had already been made unavailable to the public. In this respect, the FBI was well ahead of the rest of the country. As early as 1924, when Congress appropriated funds to the Justice Department for the collection and preservation of criminal identification records, the Congress established general standards for the disclosure of such information by authorizing "their exchange with the officials of States, cities and other institutions; . . ." Pub. L. No. 68-153, 43 Stat. 205, 217 (1924).

In 1957 FBI Director J. Edgar Hoover complained that the FBI lacked authority to withhold records from officials who used them improperly. Accordingly, in that year the Congress amended the FBI's recordkeeping statute to permit the FBI to cancel the exchange of records to the federal government, states, cities, and penal and other institutions if officials of these agencies disseminated FBI records outside of their agencies. Pub. L. No. 85-49, 71 Stat. 55, 61 (1957); *see also* Department of State, Justice, the Judiciary, and Related Agencies Appropriation for 1958: Hearings before the Dept's of State, Justice and the Judiciary and Related Agencies Appropriations of the House Comm. on Appropriations, 85th Cong., 2nd Sess. (1957).

[13] Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701-3781 (1968), as amended by 42 U.S.C. § 3771(b) of the Crime Control Act of 1973, Pub. L. No. 93-83, 87 Stat. 197, 215 (1973) (sometimes referred to as the "Kennedy Amendment").

> The conferees accept the Senate version but only as an interim measure. It should not be viewed as dispositive of the unsettled and sensitive issues of the right of privacy and other individual rights affecting the maintenance and dissemination of criminal justice information. More comprehensive legislation in the future is contemplated.[14]

In late 1973 and early 1974, the Congress held hearings on several omnibus criminal history record bills. This legislation, among other things, would have established a national standard prohibiting the release of criminal history record information by state and local agencies to the public. Similar legislation was introduced in 1975; however, none of these bills emerged from committee due, in some measure, to fierce opposition by the media.[15]

Meanwhile in 1975, SEARCH Group, Inc. ("SEARCH") adopted comprehensive model standards for state and local criminal history record systems.[16] Among other things, these standards called for prohibiting public access to criminal history records except

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[14] U.S. Congress, Senate, Committee on the Judiciary, *Criminal Justice Data Banks—1974 Hearings Before the Subcommittee on Constitutional Rights on S. 2542, S. 2810, S. 2963, and S. 2964*, 93rd Cong., 2d Sess., 1974.

[15] U.S. Congress, Senate, Committee on the Judiciary, *Criminal Justice Information and Protection of Privacy Act of 1975, Hearings Before the Subcommittee on Constitutional Rights on S. 2008, S. 1427, S. 1428*, 94th Cong., 1st Sess., 1975.

[16] SEARCH is a state criminai justice organization comprised of Governors' appointees from each state, the District of Columbia, Puerto Rico, and the Virgin Islands. SEARCH serves as a national consortium for justice information and statistics. SEARCH, Technical Report No. 13, *Standards for Security and Privacy of Criminal Justice Information* (1975).

where access to these records was required to comply with federal or state law.[17]

Shortly thereafter, in 1976, the LEAA issued final regulations implementing the 1973 Kennedy Amendment. Although the LEAA regulations set detailed standards for some aspects of record handling, in particular security and subject access, the regulations did not set detailed standards for dissemination. Indeed, the regulations expressly provide that the "dissemination limitations do not apply to conviction data." [18] Furthermore, even with respect to nonconviction data, the regulations permit dissemination to any party, including the public, "for any purpose authorized by statute, ordinance, executive order, or court rule, decision, or order, as construed by appropriate state or local officials or agencies."[19] This provision is important, because it gives states and localities the freedom, for all practical purposes, to establish their own dissemination policies and to interpret and apply those policies, largely as they see fit.

State Legislation up to 1984

The LEAA regulations and the SEARCH standards gave impetus to the adoption of state criminal history record legislation. For instance, in 1974, statutes in only 24 states addressed the dissemination of criminal history data. By 1984 (the date of SEARCH's most recent comprehensive review of state criminal history record statutes) statutes in 52 states and territories addressed such dissemination.[20] By 1984 only a few states (Michigan, Mississippi and New Jersey) had failed to adopt statutory provisions

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[17] *Id.* at 16.

[18] 28 C.F.R. § 20.21(b).

[19] 28 C.F.R. § 20.21(b)(4).

[20] SEARCH, *Compendium of State Privacy and Security Legislation* (1984).

setting statewide policies for noncriminal justice access. A few other states (South Carolina and Maryland) delegated to designated officials authority to issue rules and regulations with respect to noncriminal justice access.

Also by 1984, several patterns were evident with respect to state statutory provisions governing noncriminal justice access; moreover, with a few changes, as discussed in the following pages, those patterns remain in place. First, statutes in most states recognize a hierarchy of noncriminal justice users and purposes. At the top of this hierarchy are governmental, noncriminal justice users, particularly federal agencies seeking information for background checks for employees with national security responsibilities and state agencies seeking information for licensing determinations. In the middle of this hierarchy are private organizations that require criminal history records for employment screening purposes, particularly for individuals who will be caring for children or placed in other positions of trust. At the very bottom of the hierarchy are the press and the public.

Another pattern clearly discernible in state statutes is a sharp distinction in treatment between conviction and nonconviction records. State statutes are far more apt to permit the dissemination of conviction records for noncriminal justice purposes than they are nonconviction records. Statutes in some states also treat the dissemination of open arrests up to a year old as equivalent to the dissemination of conviction data. In most states, nonconviction information may not be disseminated for noncriminal justice purposes, or may disseminated only for a few narrow and exceptional noncriminal justice purposes.

A third pattern discernible in state criminal history record statutes is that in many states noncriminal justice agencies and organizations must have specific statutory authority, independent of the criminal history record statute, in order to obtain criminal history record information. Alternatively, their access must be approved by a designated state board, council or official.

A fourth pattern visible in state statutory law, at least with respect to its application, is a distinction between in-state and out-of-state requesters. In many states central state repositories, in particular, will provide far more generous access to in-state, noncriminal justice agencies than they will for similar out-of-state

agencies.[21] Often this distinction is not so much a matter of state law as a matter of administrative discretion.

A fifth pattern found in state statute law is that most statues still leave repository and other criminal justice officials with some discretion with respect to noncriminal justice access. Although the days when criminal justice officials could exercise unfettered discretion in setting release policies for criminal history records is over, some discretion to adjust criminal history record access policies remains. In states where officials enjoy such discretion, they almost always exercise that discretion to restrict public and other noncriminal justice access. In other words, in many states the actual extent of noncriminal justice access to records held at the repository is more limited than it would appear to be from a reading of the state statute.

A final pattern that emerges from a review of state statutes is that state statutes seldom tie noncriminal justice access to a requirement that requesters obtain an authorization or waiver from record subjects. As of the early 1980s, only four states (New Mexico, Michigan, Mississippi and Ohio) required record subjects to approve the disclosure of records to noncriminal justice requesters.

Because of the heterogeneity of state law, and the still important role assigned to agency discretion, it is difficult to describe, with confidence, the extent of noncriminal justice access to criminal history records held by state repositories on a state-by-state basis. The picture is further blurred by the fact that in some states access to local criminal history data is subject to local rules rather than state law. Nevertheless, because central repositories maintain the only rap sheet data that attempt to be comprehensive, it is

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[21] Central state repositories are those state agencies which maintain centralized files of arrests and dispositions occurring within their state. Today most states have automated, operational central repositories in place. Every state has authorized the establishment of such repositories. SEARCH, "State Criminal History Record Repositories", Bureau of Justice Statistics (1986) (unpublished draft report), at 1.

important to review the extent of which these rap sheets are available to the public and other noncriminal justice requesters.

As of 1984, statutes in fifteen states permitted access to conviction-only information, or conviction information plus pending arrests up to a year old, to noncriminal justice, governmental agencies for specified purposes, but prohibited access of any kind to private employers or to the public (Alaska, Arkansas, Arizona, California, Connecticut, Illinois, Kansas, Minnesota, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon (with notice to the record subject), West Virginia and Wyoming).[22] Statutes in eight jurisdictions permitted conviction information or conviction information plus pending arrests up to a year old, to be given to private employers for specified employment background purposes (Delaware, District of Columbia, Georgia, Indiana, Kentucky, Maryland, South Carolina and Washington). Statutes in ten states provided both conviction and nonconviction information to governmental, noncriminal justice agencies for a narrow range of purposes, and to private employers for a few exceptional purposes (Idaho, Iowa (if authorized by an administrative board), Louisiana, Missouri, Montana, New York, Texas, Utah (with a statement of need), Vermont and Virginia). Statutes in only eight states permitted conviction-only information to be shared with the general public, but in many of those states this access is subject to special restrictions (Idaho, Iowa (if authorized by an administrative board), Louisiana, Massachusetts (if authorized by an administrative board), Michigan (if a waiver is obtained from the record subject), Mississippi (if a waiver is obtained from the record subject), Missouri and Montana). Finally, statutes in five states give the public access to both conviction and nonconviction information, but in most of those states this access is subject to special restrictions (Florida (except for sealed data), Nebraska (but only where there is a disposition,

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22 This summary is based upon SEARCH's *Compendium, supra,* and research which SEARCH did for the FBI in connection with "A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for NonCriminal Justice Purposes" (1984) (unpublished final draft report).

whether favorable or unfavorable), Pennsylvania (but not with respect to arrests that are over 3 years old and no longer pending), Rhode Island (but no access currently provided because of staffing limitations at the repository) and Wisconsin).

Pre-1976 Case Law

Prior to 1976, numerous court decisions promoted the confidentiality of criminal history record information by finding statutory, common law and constitutional bases for rejecting the public's claims for access to such data.[23] Many courts feared that if arrest record information, in particular, were available outside the criminal justice community, this data would unfairly stigmatize and penalize record subjects. In *Houston Chronicle Publishing Co. v. City of Houston*, for example, a Texas state court upheld provisions in the Texas Open Records Act that prohibited public disclosure of nonconviction information. The court denied public access to a criminal history arrest record stating that, "many persons who are arrested by the police are wholly innocent." The court also indicated that the record subject's privacy interests in withholding such information from the public have to be taken into account and weighed against the public's interest in access to such potentially misleading and erroneous entries.[24]

During this period, the Court of Appeals for the District of Columbia took the lead in developing a constitutional basis for preserving the confidentiality of arrest record information. In *Morrow v. District of Columbia*, for instance, a D.C. Appeals Court panel affirmed a district court order prohibiting dissemination of an

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[23] *See, e.g., Utz v. Cullinane*, 520 F.2d 467 (D.C. Cir. 1975); *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir. 1973); *United States v. Dooley*, 364 F. Supp. 75 (E.D. Pa. 1973); *United States v. Kalash*, 271 F. Supp. 968 (D.P.R. 1967); *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971); *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972), and *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971).

[24] 531 S.W.2d 177, 188 (Tex. 1975).

individual's arrest only record. The court found a constitutionally cognizable interest in preventing the distribution of government records which are potentially inaccurate, incomplete or unreliable.[25]

In *Menard v. Mitchell* another District of Columbia appeals court panel found a constitutional privacy interest in the confidentiality of arrest records.[26] Menard was arrested for suspicion of burglary, but two days later charges were dropped. Seeking to purge his arrest record, Menard subsequently sued the FBI. The court observed that if the arrest was made without probable cause, there is a real question as to "whether the Constitution can tolerate any adverse use of information . . . obtained as a result of an unconstitutional arrest . . . "[27] Even if the arrest were made with probable cause, but the charges eventually were dropped or they otherwise resulted in a favorable disposition, the *Menard* court felt that an order limiting dissemination might be appropriate if a plaintiff could show that: (1) his photograph was being publicly displayed in a rogue's gallery; or (2) his arrest record would be disseminated to private employers; or (3) retention of the record would be likely to result in harassment by government officials. On remand to the district court, Judge Gerhardt Gesell emphasized that the use of arrest record information for employment and other noncriminal justice purposes was improper and a violation of the record subject's constitutional right of privacy.

Public Availability of Criminal History Record Information After 1976

In 1976, the confidentiality standards in place were there as a matter of both legislative choice and constitutional precept. After

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[25] 417 F.2d 728, 749 (D.C. Cir. 1969).

[26] 430 F.2d 486, 495 (D.C. Cir. 1970); *on remand* 328 F. Supp. 718, 727 (D.D.C. 1971); *rev'd sub nom. Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

[27] 430 F.2d at 491.

1976 this changed, and dissemination policies for arrest and, of course, conviction record information, became almost entirely a matter of legislative choice.

Post-1976 Case Law

In 1976 the Supreme Court published a landmark decision which, to this day, has the effect of removing constitutional considerations from most policy decisions about the dissemination of arrest records. In *Paul v. Davis,* the Supreme Court declared that arrest records do not relate to private conduct and thereby do not qualify for constitutional privacy protection.[28] *Paul v. Davis* involved the following facts. In anticipation of the 1972 Christmas season, the police chiefs of Louisville, Kentucky, and surrounding Jefferson County circulated a flier to local merchants containing the names and photographs of "active shoplifters." The plaintiff's name and photograph appeared on the flier even though the plaintiff had been arrested for shoplifting some 18 months earlier and had never been convicted; the charges, however, were still pending.

In addressing the plaintiff's constitutional privacy claim, the Supreme Court said that the constitutional right of privacy protects certain kinds of personal conduct, usually related to marriage or procreation. The Court said that Davis' claim was unrelated to these types of privacy considerations and concluded that the constitution does not require criminal justice agencies to keep confidential matters that are recorded in official records:

> [Davis] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the State's ability to restrict his freedom of action in a sphere contended to be "private," but instead on a claim that the State may not publicize a record of an official act such as an arrest. None of

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[28] 424 U.S. 693 (1976).

> our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[29]

In his dissent, Justice Brennan worried that *Paul v. Davis* would sound the death knell for the line of cases then developing, which held that there were constitutional limits on the state's ability to disseminate unresolved arrest records to the public:

> A host of state and federal courts, relying on both privacy notions and the presumption of innocence, have begun to develop a line of cases holding that there are substantive limits on the power of the government to disseminate unresolved arrest records outside the law enforcement system, (citations omitted). I fear that after today's decision, these nascent doctrines will never have an opportunity for full growth and analysis.[30]

Justice Brennan's fear was well-founded.[31] With few exceptions, subsequent court opinions have relied on *Paul v. Davis* to find that an arrest, and the records relating to an arrest, do not

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[29] 424 U.S. at 713.

[30] 424 U.S. at 735, note 18.

[31] Although, it should be noted that the next year the Supreme Court did acknowledge that the government's right to collect and use intimate, personal information is accompanied by a constitutional duty to avoid unwarranted disclosures. In *Whalen v. Roe*, the plaintiffs challenged a New York regulation requiring physicians to report to the state the names of patients using certain restricted prescription drugs. The Court rejected the challenge but speculated that under some circumstances an individual's interest in avoiding disclosure of personal matters could merit constitutional protection. *Whalen v. Roe*, 429 U.S. 589, 600, note 26 (1977).

involve personal matters and hence do not warrant constitutional protection. In *Hammons v. Scott*, for example, a three judge federal district court panel held that an arrestee was not entitled on constitutional grounds to an order purging his arrest record. The court concluded that in the wake of *Paul v. Davis*, both pending arrest records and, as was the case in *Hammons*, records of an arrest where charges had been dismissed were unprotected by the constitution. The court concluded that *Paul v. Davis* "snuffed out the short life of this [privacy] action."[32]

Several other courts have agreed. For example, in *Rowlett v. Fairfax*, a Missouri federal district court cited *Paul v. Davis* as authority for holding that an arrestee whose charges were dropped shortly after his arrest had no constitutional interest that would support the purging of his arrest record.[33]

In 1985, a Third Circuit Court of Appeals panel upheld the constitutionality of a New Jersey statute requiring that solid waste license applicants be fingerprinted and a criminal history record check be conducted. The court rejected the contention that criminal history record information is private information within the ambit of the constitutional right of privacy:

> The disclosures most vociferously objected to are records of criminal conviction and pending criminal charges. These matters are by definition public. While it may be that when conduct resulting in the convictions or charges was engaged in the person who engaged in it expected that such participation would remain secret, that expectation was never reinforced by the law.[34]

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[32] 423 F. Supp. 618, 619 (N.D. Calif. 1976).

[33] 446 F. Supp. 186, 188-89 (W.D. Mo. 1978).

[34] *Trade Waste Management Ass'n, Inc. v. Hughey*, 780 F.2d 221, 234 (3d Cir. 1985), *rehearing denied* (1986).

The Third Circuit reaffirmed *Trade Waste* in a 1987 decision upholding the constitutionality of background checks for family members of applicants for employment in a police department special investigations unit. The decision emphasized that records of arrest are public, and therefore not entitled to constitutional privacy protection:

> In *Trade Waste,* we held that there was no privacy protection for "records of criminal conviction and pending criminal charges" because those matters were "by definition public" (citation omitted). Similarly, because arrests are by definition public, and because it is unlikely that anyone could have a reasonable expectation that an arrest will remain private information, we hold that arrest records are not entitled to privacy protection and we need not engage in the balancing analysis.[35]

Notwithstanding *Paul v. Davis* and its progeny, a few post *Paul v. Davis* decisions suggest, without holding as much, that in some circumstances the constitutional right of information privacy

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[35] *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia,* 812 F.2d 105, 117 (3d Cir. 1987). *See also N.C. Pemberton v. Bethlehem Steel Corporation,* 65 Md. App. 133, 502 A.2d 1101, 1118 (1986), holding that an employer's circulation of excerpts from conviction records to union members was not actionable on an invasion of privacy theory because a conviction is not a private fact or event; *Workers Union of America v. Nuclear Regulatory Comm'n,* No. 87, Civ. 3214 (S.D.N.Y. 1987), upholding a provision in the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 requiring nuclear reactor licensees to fingerprint each individual who is permitted unescorted access to a nuclear facility and to conduct a criminal history records check of those individuals. The court held that even though criminal history records might include older information or incomplete information, such information is already in the public domain and thus provides no basis for a constitutional complaint.

might apply to criminal history record information. For example, in *Natwig v. Webster*, a Rhode Island federal district court ordered a 15 year old arrest record expunged from the FBI's identification division.[36] Although the court declined to decide the issue on constitutional grounds, and instead relied on its equitable power of expungement, the court argued that *Paul v. Davis* did not entirely dispose of the constitutional right of privacy in criminal history records. The opinion notes that *Paul v. Davis* involved an arrest record where guilt or innocence were still in question and the charges still pending (albeit after 18 months).

As the court in *Natwig* saw it, *Paul v. Davis* should be distinguished from cases involving records of acquittal; or, as in *Natwig*, records that relate to an old arrest no longer pending; or records which relate to arrests found to be made without probable cause or otherwise defective. According to *Natwig*, these types of situations involve activities that can more properly be characterized as private and in which the governmental and public interest in retaining or disseminating the records is minimal.[37]

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[36] 562 F. Supp. 225, 228 (D.R.I. 1983).

[37] The case of *Doe v. Webster*, 606 F.2d 1226, 1238, note 49 (D.C. Cir. 1979), like *Natwig*, also suggests, but does not hold, that there may be some life left in the constitutional claim that arrest record information is private. "The right to privacy, . . . 'should encompass a substantial measure of freedom for the individual to choose the extent to which the government could divulge criminal records about him, at least where no conviction has ensued and no countervailing governmental interest is demonstrated,'" quoting *Utz v. Cullinane*, 520 F.2d 467, 482, note 41 (1975).

It is also possible to construe *Paul v. Davis* narrowly on the ground that it merely holds that damage to a plaintiff's reputation by a state official, without more, does not implicate a constitutionally protected liberty interest so as to state a cause of action under 42 U.S.C. § 1983. Rather, such actions must include a showing that some tangible harm occurred to the record subject. In that regard, *see also Jones v. Palmer Media, Inc.*, 478 F. Supp. 1124, 1130 (E.D. Tex. 1979), holding that a Congressional candidate did not have a cause of action under section 1983 against a former congressional staffer who released a record of an arrest of the candidate by authorities in Lorenzo Marques, Portuguese (footnote continued)

Recent Legislative Developments and Interpretations

After *Paul v. Davis,* the dissemination of arrest record information largely ceased to be a constitutional matter. This "deconstitutionalization" of arrest records gave the Congress and state legislatures room to develop their own dissemination policies. Most legislatures developed policies that made criminal history records, and, in particular, arrest records, unavailable to the public. However, in the last few years there have been some signs that legislatures are prepared to make criminal history record information, including to some extent arrest record information, more available to governmental, noncriminal justice agencies, private employers, and, occasionally, even to the public.

This effort has taken two forms. A few states have opted to open records entirely to the public. Most states, however, have moved far more cautiously to expand access to criminal history records only on a piecemeal basis and only to selected types of noncriminal justice entities for certain narrow purposes.

• Open Record Statutes

In 1980, Florida adopted legislation requiring that all criminal history record information compiled by Florida's Division of Criminal Justice Information Systems from *intra* state sources be

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East Africa. The court held that the constitutional right of privacy does not protect an individual's interest in reputation alone. *See also Gonzalez v. Leonard*, 497 F. Supp. 1058, 1070-72 (D. Conn. 1980), denying a constitutional invasion of privacy claim against the Immigration and Naturalization Service for releasing criminal intelligence information about the plaintiff. The court concluded that *Paul v. Davis* clearly disposed of the plaintiff's privacy claim because *Paul* establishes that the interest which the plaintiff claimed had been invaded by the defendant—their interest in preserving their good reputation—is not protected by the United States Constitution; . . ." *See also Morris v. City of Danville*, 579 F. Supp. 900, 904 (W.D. Va. 1984), *Whelehan v. County of Monroe*, 558 F. Supp. 1093, 1100 (W.D. N.Y. 1983); and *Johnson v. Barker*, 799 F.2d 1396, 1399 (9th Cir. 1986).

available to any person upon request and the payment of fees established by the state.[38] Florida thereby became the first, and certainly the most celebrated, state to adopt an open records policy.[39] In 1985, Oklahoma also adopted an open records statute. Under Oklahoma's new statute, law enforcement agencies must make all arrest and conviction information available for public inspection.[40]

Two other states, North Dakota and Oregon, have recently adopted statutes which are similar to statutes in Nebraska, Pennsylvania and Rhode Island, in that they expressly provide for access by the general public but apply significant limitations to such access. North Dakota's statute authorizes the release of all conviction information and all arrest information occurring within one year of a request to any person, if that person provides at least two of the following five types of information: (1) fingerprints of the record subject; (2) a state identification number; (3) the record subject's social security number; (4) the record subject's date of birth; or (5) a description of the specific, reportable event identified by date and agency or court. The effect of these requirements, of course, may be to substantially close records to the general public by requiring requesters to obtain the cooperation of record subjects.

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[38] Laws 1980, c. 80-409 § 5; codified at Fla. Stat. Ann. § 943.053(3) (West).

[39] Wisconsin's public record statute was passed in 1917, and provides that all state-held records shall be open to public inspection unless expressly provided otherwise. Wisc. Stat. Ann. § 19.36(2) (West). Until recently Wisconsin's courts have not interpreted the statute literally and have permitted criminal justice officials to withhold records if they can cite reasons which outweigh the legislative policy of full disclosure. In *Newspapers, Inc. v. Breier*, 279 N.W.2d 179 (Wisc. 1979), however, the Wisconsin Supreme Court held that statutory and common law interests in disclosure outweigh any privacy interests in arrest lists and police blotters. Accordingly, Wisconsin can also lay claim to the distinction of adopting the nation's first open records statute.

[40] Laws 1985, c. 355, § 8, eff. Nov. 1, 1985; codified at Okla. Stat. Ann. tit. 51, § 24A.8 (West).

In 1981, Oregon adopted legislation which makes conviction information, and arrest information if less than one year old, available to any person.[41] Oregon's law requires that prior to providing the public with access the agency give the record subject notice of the request at the record subject's last known address and 14 days in which to contest any access.

In addition to these "open record" states, a number of other states have recently come close to adopting open records statutes.[42]

Reporters Committee for Freedom of the Press v. Department of Justice

Undoubtedly the most significant recent development with respect to open records is the 1987 decision of United States Court of Appeals for the District of Columbia in *Reporters Committee for Freedom of the Press v. Department of Justice.*[43] In *Reporters Committee,* the court ruled that under the Federal Freedom of Information Act ("FOIA") all criminal history record information held by the FBI would generally be available, upon request, to any person for any purpose. Although this decision does not so much reflect a policy decision in favor of open records as it does a judicial interpretation of a long- standing federal law, the potential impact of this decision upon the public availability of criminal history record information can hardly be overstated.

The Federal Freedom of Information Act requires federal agencies to make all agency records available, upon request, to any person, unless one or more of the nine exemptions in the FOIA apply. The FBI has always taken the position that its criminal

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[41] Laws 1981, c. 905 § 6; codified at Or. Rev. Stat. § 181.555.

[42] The legislature in Georgia, for example, has given serious attention to legislation making all criminal history record information available to the public.

[43] 816 F.2d 730 (D.C. Cir. 1987), *rehearing denied* 831 F.2d 1124 (1987).

history records are exempt from disclosure under the FOIA on the basis of at least two of those exemptions. First, the FBI relies upon the language in 28 U.S.C. § 534, described earlier, which authorizes the Department of Justice to "exchange [criminal history records] with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions" and further provides that, "The exchange of records and information . . . is subject to cancellation if dissemination is made outside the receiving departments or related agencies."[44] The FBI argues that this provision prohibits the FBI from releasing criminal history records to the public and thereby comes within the FOIA's exemption for matters that are "specifically exempted from disclosure by statute. . ."[45]

In addition, the FBI has long argued that the disclosure of arrest and conviction records would represent an "unwarranted invasion of privacy." Thus, the records come within the FOIA exemption which protects "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy."[46]

The court rejected the FBI's section 534 exemption claim on the grounds that the FOIA's exemption for information that is made confidential by another statute applies only if the statute "specifically" and "explicitly" exempts the matter from disclosure. According to the court, section 534 does not "specifically" and "explicitly" authorize the FBI to withhold criminal history records from the public. Instead, the court concluded that, at most, it is only

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[44] 28 U.S.C. § 534(a)(4) and (b). Pursuant to section 534, the FBI's regulations prohibit the release of arrest and conviction information to the general public except for information which is reasonably contemporaneous with the event to which the information relates. 28 C.F.R. § 20.33(c).

[45] 5 U.S.C. § 552(b)(3).

[46] 5 U.S.C. § 552(b)(7)(C).

by implication that the FBI's statute even addresses the recipient agencies' authority to disclose the rap sheet information to the public.[47]

Second, the court, in its decision on the petition for rehearing, rejected the FBI's privacy claim, explaining that the FOIA's privacy exemption requires a court to balance the extent and nature of the potential for invasion of privacy against the potential benefits of public disclosure. The court did not find a significant privacy interest in state and local records of arrests, convictions and sentences because, in the court's view, all of the records in question were likely to be publicly available as original records of entry on police blotters or in court records.[48] As for the benefits of public disclosure, the court made new law by concluding that courts could not calculate such benefits on a case-by-case basis. Rather, the public interest in disclosure is the disclosure policy or bias in all FOIA proceedings.[49]

Reporters Committee stopped just short of actually ordering the FBI to release the rap sheets at issue. Instead, the Court of Appeals remanded the case to the federal district court so that the district court could make a factual calculation as to whether the record subject's privacy interest has faded because the information in question appears on the public record—as, for example, in a police blotter or court docket.[50] There can be no real doubt, however, as to the conclusion that the district court will reach. As noted earlier, information contained in a rap sheet invariably is publicly available in original records of entry.

If the *Reporters Committee* opinion is not overturned by the Supreme Court, the opinion will have profound implications. In the wake of this decision, it is almost a certainty that criminal history

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[47] 816 F.2d at 736-37, note 9.

[48] 831 F.2d at 1127.

[49] *Id.* at 1126-27.

[50] *Id.* at 1127.

data relating to federal offenses will be publicly available, because information about federal arrests, convictions and sentences is publicly available at its original point of entry. Further, in the light of the *Reporters Committee* decision, it seems likely that state and local rap sheet information held at the federal level will be available, in one manner or another, from federal agencies.

Furthermore, many state open record and freedom of information statutes are based upon the federal act. Accordingly, federal FOIA case law is germane to the interpretation and application of state FOIA statutes. Therefore, it is entirely conceivable that as a result of *Reporters Committee*, courts in many states will apply their freedom of information statutes to require repositories and other state and local criminal justice agencies to make criminal history record information publicly available.

Finally, an analysis of the *Reporters Committee* opinion suggests that the FBI may have difficulty protecting information in the Interstate Identification Index (III) from FOIA requesters. III information consists of identifying data and an indication that a particular individual has a criminal history record in a particular state. Because the FBI does not have explicit and specific statutory authority to withhold this index information, and because the information underlying the index data relates to arrests or convictions, it does not appear, in the aftermath of the *Reporters Committee* opinion, that III index information held by the FBI could be withheld under FOIA.

• Special Claims for Access

Although a few jurisdictions have opted for open records, by far the more common, recent approach has been to give special classes of noncriminal justice requesters greater access to criminal history data for specified purposes. In particular, statutes in many states have been amended to permit entities involved in providing child care or other services to children to have access to criminal history record information for pre-employment, background

checks.[51] For example, California's statutory law has changed to permit access to conviction record information for pre-employment screening for individuals who work for or are otherwise involved in child care[52] and community care programs.[53]

In 1984, Illinois also expanded access to criminal history records for child care providers. Illinois now permits state regulated child care providers to obtain both conviction and nonconviction information about prospective employees.[54] In addition, Illinois' new law gives private, volunteer organizations that provide services to children, such as the Boy Scouts, the Girl Scouts, the YMCA and YWCA, access to conviction and nonconviction information for background checks.[55] Illinois has also expanded access to criminal history records for private detective agencies,[56] organizations employing security guards,[57] individuals holding liquor licenses,[58] and schools conducting background checks for current or

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[51] A 1984 federal law is the impetus for some of this activity. The federal statute prohibits the disbursement of certain federal social service block grant funds to a state unless the state permits public child care facilities, and juvenile detention, corrections and treatment facilities to obtain conviction information and arrests up to one year old for employment background checks. Act of October 12, 1984, Pub. L. No. 98-473, § 401(c)(2)(A), 98 Stat. 2196. *See also* 50 Fed. Reg. 2089 (January 15, 1985).

[52] Cal. Health and Safety Code §§ 1596.871 and 1597.80 (West Supp. 1988).

[53] Cal. Health and Safety Code § 1522(c) (West Supp. 1988).

[54] Ill. Ann. Stat. ch. 23, ¶¶ 2214.1 - 2230 (Smith-Hurd Supp. 1987).

[55] Ill. Ann. Stat. ch. 127, ¶ 55a. (27) (Smith-Hurd Supp. 1987).

[56] Ill. Ann. Stat. ch. 38, ¶ 206-3.1(a) (Smith-Hurd Supp. 1987).

[57] *Id.*

[58] Ill. Ann. Stat. ch. 38, ¶ 206-3.1(b) (Smith-Hurd Supp. 1987).

prospective employees.[59] Connecticut has passed legislation that makes conviction information available to the state's Human Services Department for checks on prospective licensees of family day care homes.[60] Over the last few years, Georgia's legislature has also adopted legislation which authorizes the dissemination of nonconviction information to governmental, noncriminal justice agencies for background checks regarding teachers,[61] individuals working in child care agencies[62] and individuals holding private detective licenses.[63]

Iowa has recently adopted legislation which permits agencies operating substance abuse treatment programs for juveniles to obtain criminal history record information about prospective employees.[64] The State of Virginia has new legislation which authorizes the dissemination of criminal history record information for background checks about adoptive or foster parents, about applicants for citizenship, and about individuals applying for employment in public service companies where "such employment involves personal contact with the public. . ."[65] As a final example, the State of Washington has recently adopted legislation which permits the release of conviction information to volunteer organizations for background checks about individuals who provide education,

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59 Ill. Ann. Stat. ch. 122, ¶ 10-21.9 (Smith-Hurd Supp. 1987), and ch. 127, ¶ 55a.(25) (Smith-Hurd Supp. 1987).

60 Conn. Gen. Stat. Ann. § 54-142k(h) (West).

61 Ga. Code Ann. §§ 49-5-110 - 49-5-114.

62 Ga. Code Ann. §§ 49-5-60 - 49-5-69 (Cum. Supp. 1987), and Ga. Code Ann. §§ 49-5-70 - 49-5-74.

63 Ga. Code Ann. § 43-38-10 (Cum. Supp. 1987).

64 Iowa Code Ann. § 692.2(5) (West Supp. 1987).

65 Va. Code § 19.2-389 (Cum. Supp. 1987).

training, treatment, supervision or recreational services to children under 16.[66]

At the federal level, changes in statutes and regulations also have the effect of making criminal history record information more available to special classes of noncriminal justice users. Easily the most important of these changes is the adoption on December 4, 1985 of the Security Clearance Information Act ("SCIA").[67] The SCIA requires state and local criminal justice agencies to make available, upon request, to the Department of Defense ("DOD"), the Central Intelligence Agency ("CIA"), the FBI and the Office of Personnel Management ("OPM") virtually all criminal history record information relating to individuals under investigation by the above-referenced agencies for federal security clearances, or for assignment to, or retention in, federal positions involving national security duties.

Prior to enactment of the SCIA, federal agencies' access to state and local criminal history record information was governed by state law. In some states, only some federal agencies involved in the security clearance process obtained access to records; in some states, only conviction information was provided; and in a few states, virtually no information was provided.

The SCIA is likely to have a profound impact upon the flow of criminal history data outside of the criminal justice system. It is estimated that the federal agencies perform up to a million security clearance background checks per year.[68]

It is noteworthy that the SCIA contains several significant restrictions upon federal agency access. First, under the SCIA, criminal history record information that has been sealed pursuant to

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[66] 1987 Wash. Legis. Serv., Ch. 486 (West).

[67] Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99-169, 99 Stat. 1009, codified in part at 5 U.S.C. § 9101.

[68] SEARCH, *Federal Access to State and Local Criminal Justice Information*, SEARCH Group, Inc. (1979), at 5.

state law is not available. Second, SCIA agencies can obtain criminal history data only after obtaining the record subject's written consent. Third, criminal history data obtained under the SCIA can be used and/or redisseminated only for national security and criminal justice purposes. Fourth, in limited circumstances, states can require a SCIA agency to submit fingerprints in connection with its access requests.

The SCIA is not the only relevant federal development. The FBI has proposed a change in its criminal history access law to broaden access for noncriminal justice agencies. At present, the FBI's regulations authorize the FBI to provide certain criminal history record information to state and local noncriminal justice agencies for licensing, employment and certain other purposes, and to federally-chartered or insured banking institutions, certain segments of the securities industry, and certain segments of the commodities industry. However, under the terms of the present regulation, "When no active prosecution of the charge is known to be pending arrest data more than one year old will not be disseminated . . . unless accompanied by information relating to the disposition of that arrest."[69] On September 10, 1987, the FBI proposed that this section be amended to permit the release of all criminal history record information, including nonconviction information, to authorized parties. The FBI's statement accompanying the proposed rule change explained their rationale:

> The new rule will make it possible for the FBI to disseminate all data on identification records, answer with finality the question of whether an individual has a criminal record, provide for the public safety, and yet protect the privacy interests of the individual with the record by giving him/her the opportunity to complete and/or challenge the accuracy of the information contained in the identification

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[69] 28 C.F.R. § 20.33(a)(3).

record prior to a determination being made . . . .[70]

Of course, this proposed change, even if adopted, will affect only a small segment of the noncriminal justice community. The proposed change, nevertheless, is one more indication that criminal history record information, and particularly arrest record information, is becoming more available to noncriminal justice requesters.[71]

• Noncriminal Justice Requests to Repositories

Not surprisingly in view of this legislative activity, state central repositories report substantial increases in the number of noncriminal justice access requests which they receive. A recent SEARCH survey, for instance, found that repositories' workloads had increased significantly because of inquiries from noncriminal justice users, such as schools and day care centers. Specifically, 26 repositories reported that a reason for the increase in the number of inquiries which they received in 1985 (ranging from an annual

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[70] 52 Fed. Reg. 34,242 (Sept. 10, 1987).

[71] In this Congress, as in most Congresses over the last few years, several bills have been introduced that would also provide criminal history record information to special classes of requesters for special purposes. For example, Senator Strom Thurmond (R-S.C.) has introduced legislation that would give railroad police and private police serving colleges and universities access to the FBI's criminal history records. S.238 "A Bill to Amend Section 534 to Allow Railroad Police and College Police Access to Government Identification Records."

In addition, Senator Mitch McConnell (R-KT.) has introduced legislation that would give the National Association of State Racing Commissioners authority to receive, store and disseminate criminal history information about individuals who are seeking employment in horse racing establishments. S. 1345.

increase of one percent to 59 percent) is new legislation giving access to criminal history records to noncriminal justice agencies.[72]

The increase in noncriminal justice traffic is sufficiently high so that some state criminal justice officials are sounding the alarm. The Director of Arizona's repository, for example, reported that, "Noncriminal justice use increases drastically every legislative year. During the last three or four years, we've had at least one or two new laws each year permitting additional governmental agencies to have access. We also have new executive orders—three or four every year—authorizing access to state agencies for licensing and employment purposes. They've become major consumers of our resources."[73] Similarly, the repository Director in Minnesota reports that, "We are right now servicing more noncriminal justice requests than criminal justice requests."[74]

Illinois' officials make the same point. In a letter to the Bureau of Justice Statistics dated June 11, 1986, the Executive Director of the Illinois Criminal Justice Information Authority stated: "We in Illinois are beginning to witness the advent of legislation calling for criminal background checks by noncriminal justice agencies for a variety of employment and licensing purposes."[75]

Summary of Current Status of Law Regarding Public Availability of Criminal History Records

It is not hyperbole to suggest that the nation is at a crossroads with respect to dissemination policy for criminal history record

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[72] "State Criminal History Record Repositories," Table #9 at 20.

[73] Interview with D.C. Britt, Division Manager, Arizona Department of Public Safety, in SEARCH *Interface* magazine (Spring 1985), at 14.

[74] Interview with Ken Bentfield, Director, Criminal Justice Information System, in SEARCH *Interface* magazine (Spring 1985), at 31.

[75] Letter (unpublished) to Steven Schlesinger, Director, Bureau of Justice Statistics, from J. David Coldren, Executive Director, Illinois Criminal Justice Information Authority, June 11, 1986.

information. The courts have largely "deconstitutionalized" the issue and thereby left most dissemination decisions to the Congress and the state legislatures. Thus far, there are at least some signs that the Congress and the legislatures intend to use their decision making discretion to make criminal history records more available to the public. Indeed, as previously noted, a few legislatures have opted to open all or most criminal history record information to the public. This may also be the effect at the federal level of the *Reporters Committee* decision.

Most often, legislatures and the Congress have acted more cautiously to make certain criminal history record information—usually conviction and recent arrest information—available to certain noncriminal justice entities, for special purposes. Such purposes include background screening of individuals providing child care services, national security purposes and certain licensing purposes, such as licenses for private police.[76]

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[76] As is always the case in a complex society, there are contraindications. For example, a few legislatures, even in recent years, have opted for more, not less, confidentiality.

Hawaii, for instance, adopted legislation that permits expungement, upon request, by a record subject if the record subject was arrested but not convicted, and the arrest charges are no longer pending. Haw. Rev. Stat. § 831-3.2. Similarly, Ohio recently adopted legislation that permits a record subject to request the court to seal the official records in the case where the subject is found not guilty or no bill of indictment is returned. Ohio Rev. Code Ann. § 2953.52 (Page).

The National Conference of Commissioners on Uniform State Laws ("NCCUSL") recently adopted model legislation that cannot be characterized as either promoting greater openness or greater confidentiality. The model law would make conviction information and information about an arrest that occurred within one year preceding the request available, upon request, to the public. The request, however, must include the fingerprints of the record subject, or the personal identification number assigned to the record subject by a central repository *or* at least two other items of information that the repository uses to retrieve criminal history record information. The likely effect of these requirements is to discourage access requests from the general public. (footnote continued)

Despite these changes, it certainly remains true that in the great majority of states criminal history record information is far more closed than it is open, especially with respect to nonconviction information and especially with respect to the general public. Thus, the question of whether criminal history record information, and especially nonconviction information, should be available to the public is timely. It is to a discussion of this question that we now turn.

AVAILABILITY OF CRIMINAL HISTORY RECORDS TO THE PUBLIC: A POLICY ANALYSIS

Introduction

Criminal history records are official records, compiled at taxpayers' expense by public officials for governmental purposes. Generally speaking, there is a presumption in this country that records of this sort ought to be publicly available. This presumption has some limited constitutional basis and is securely grounded in statutory law and recent case law.[77] At the federal level, and in every state, freedom of information or open record statutes make government held records available to the public, subject to a showing that the records are exempt from disclosure. The

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Nonconviction information is never publicly available under the NCCUSL's model law, even with subject consent. To date, the model law has not been adopted in any state.

[77] The First Amendment to the Constitution states that the Congress, "shall make no law . . . abridging the freedom of speech, or of the press; . . ." This statement has sometimes been interpreted to establish not only a right to speak, but a right to hear, and, therefore, a right to obtain information of legitimate interest to the public. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976). The established view, however, is that the First Amendment gives the public a right to obtain and publish public record information, but does not give the public a right to insist that all, or even most, types of official records be designated a public record in the first place. *Branzburg v. Hayes*, 408 U.S. 665, 684-86 (1972). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975).

exemptions represent a determination by Congress and the legislatures that the public interest in disclosure is outweighed by a superior interest served by confidentiality. For example, information that would compromise the national defense, or would interfere with foreign relations, or would uncover trade secrets, or would interfere with internal governmental communications has been deemed confidential by both legislatures and courts.[78]

Legislatures and courts also recognize that there are instances when personal information in the government's hands should be kept confidential. There are many examples. For instance, where the nature of a relationship between a record keeper and a record subject requires confidentiality in order to promote trust and candor in the relationship, confidentiality is honored if the relationship is of a kind which society wishes to encourage. In part for that reason, confidentiality is protected in the doctor-patient relationship, the spousal relationship and the priest-penitent relationship, to name three obvious examples.

Where a personal record relates to activities that are deemed to involve legitimate, but nonetheless private or intimate conduct, confidentiality customarily is preserved to avoid damage to privacy and personal sensibilities. Information about family affairs or sexual practices, for example, often fall into this category.

Where a personal record held by the government includes information which, if disclosed, would be likely to cast the subject in an inaccurate or false light, confidentiality customarily is preserved to assure that basic notions of fairness are met.

If the record relates to conduct which society seeks to encourage—or discourage— and it can be shown that confidentiality will promote positive conduct, or discourage negative conduct, confidentiality customarily is preserved. Information about membership in legitimate but unpopular organizations is an example of information which, in a pluralistic society, needs to be kept

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[78] *See, e.g.*, 5 U.S.C. § 552(b)(1)(4) and (5).

confidential in order to promote legitimate, but unpopular First Amendment conduct.[79]

In this part of the paper, then, we examine those interests served by confidentiality in order to evaluate whether some of all of those interests support preserving the confidentiality of criminal history record information.

Does Confidentiality Promote Rehabilitation and Reintegration?

Perhaps the most readily accepted reason for preserving the confidentiality of a particular type of government record is that doing so results in a manifest and material benefit to society. With respect to criminal history records, the manifest and material benefit potentially advanced by confidentiality is that offenders may be rehabilitated and reintegrated into society far more readily if they avoid the stigma and the tangible, adverse consequences which may arise if their criminal history records are widely available:

> Their [offenders'] social handicap is considerably aggravated by the stigma of a criminal record, requiring additional efforts from social agencies to support the arduous process of social reintegration.[80]

Employment Barriers

Perhaps the most serious potential adverse consequence of the public availability of criminal history record information is the

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[79] For a discussion of the policy interests served by information privacy protections, *see* Report of the Privacy Protection Study Commission, *Personal Privacy in an Information Society* (1977), at 1-36.

[80] E. Rotman, "Do Criminal Offenders Have a Constitutional Right to Rehabilitation?" 77 *Journal of Criminal Law and Criminology* 1023, 1027-28 (Winter 1986).

possible effect such availability has on the employment prospects of criminal history record subjects. Certainly, there appear to be significant statutory impediments, at both federal and state levels to the employment of offenders, particularly felony offenders. Individuals convicted of a felony may not serve as officers or directors of a labor organization.[81] Similarly, felons may be refused registration as commodities futures merchants and floor brokers.[82] At the state level, the range of occupations that require licenses and which, in turn, require that applicants be free of a conviction record is substantial and extends from the legal and medical professions to a variety of semi-skilled and even unskilled endeavors.[83] A 1982 study found that state and federal statutes bar or restrict offender employment in approximately 350 occupations employing approximately ten million individuals.[84]

Even if it is assumed, however, that the public availability of conviction records enhances employment barriers, the policy implications of such a finding are modest. It is now a matter of settled law that conviction record information should be available to virtually all federal employers and to state and local licensing boards for various types of employment and licensing eligibility determinations. The more relevant policy question is whether nonconviction information should continue to be unavailable to the public because public availability will frustrate rehabilitation and reintegration by denying or limiting access to employment and other valued statuses.

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[81] 29 U.S.C. § 504.

[82] 7 U.S.C. § 12a(2)(B), (Cum. Supp. 1987).

[83] *Doe v. Webster*, 606 F.2d 1226, 1239, note 51 (D.C. Cir. 1979); *see also* 38 *U. Chi. L. Rev.* at 864 (1971).

[84] David M. Downing, *Employer Biases Toward the Hiring and Placement of Male Ex-Offenders* (1985), at 62-65 (unpublished dissertation, Southern Illinois University, Carbondale) [hereafter "Downing"].

With respect to this question, there is little empirical evidence as to whether, and how, private employers would use nonconviction information. This lack of empirical evidence, however, has by no means stopped the courts from predicting dire consequences for offender employment if arrest records are publicly available. For example, in *State v. Pinkney,* an Ohio state court warned that, "The potential economic and personal harm that result if his arrest becomes known to employers, credit agencies and even neighbors, may be catastrophic."[85]

A Court of Appeals panel in *Menard v. Mitchell,* also catalogued the tangible adversities that can result from the public availability of arrest records:

> Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.[86]

Indeed, the number of opinions which cite the adverse economic impacts of the release of arrest records outside the criminal justice system are legion.[87]

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[85] 290 N.E.2d 923, 924 (Ct. of Common Pleas, Ohio, 1972).

[86] 430 F.2d 486, 490 (D.C. Cir. 1970) (footnote omitted).

[87] *See, e.g., Doe v. Webster,* 606 F.2d 1224, 1236 (D.C. Cir. 1979); *Menard v. Saxbe,* 498 F.2d 1017, 1024 (D.C. Cir. 1974); *Davidson v. Dill,* 503 (footnote continued)

Despite the judicial rhetoric, what little empirical evidence is available, is mixed. Certainly there is some evidence that private and governmental employers strive to obtain criminal history records for use in pre-employment screening. The Department of Defense, for example, declares that criminal history record information is the single most important piece of background information about prospective applicants, and the Defense Department has been tireless in efforts to obtain such information.[88]

The older research, in particular, suggests that private employers make significant efforts to obtain criminal history record information. A 1972 study, for example, found that 79 percent of private employers solicit arrest and conviction record information on application forms.[89] A somewhat more recent study done for the Congress' Office of Technology Assessment also concluded that substantial numbers of private employers still seek criminal history record data:

> All that can be concluded is that substantial numbers of employers do seek this information and that there is some scanty evidence that use is decreasing.[90]

There is, nevertheless, some evidence to suggest that some private employers at least, are relatively unconcerned about an

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P.2d 157, 159 (Colo. 1972); and *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211, 216 (1971).

[88] D. Dinan, "Access to Criminal History Records," *The Police Chief* (Feb. 1983), at 20.

[89] H. Miller, *The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies*, Georgetown University Institute on Criminal Law and Procedures (1972), at 11.

[90] *An Assessment of the Social Impacts of NCIC and CCH*, prepared by Bureau of Governmental Research and Service, University of South Carolina for the Office of Technology Assessment (1979), at 227.

applicant's prior criminal history record and, accordingly, devote few resources to uncovering such records. A 1976 survey, for example, found that 44 percent of the employers responding to the survey indicated that they made no effort to verify police records of applicants; 39 percent said that they did make an effort to obtain complete police records; and 17 percent of the responding employers said they made an effort to obtain only local police records.[91] A 1979 survey by Louis Harris and Associates and Professor Alan F. Westin found that 86 percent of the 200 business employers, including corporate personnel officers, responding to the survey declared that it is improper to ask applicants for non-sensitive positions about their arrest history.[92]

A study conducted in the early 1980s by the Educational Fund for Individual Rights found that many private employers do not attempt to obtain criminal history record information.[93] The study posits two primary reasons for employers' relative lack of interest. First, in those instances where employers feel that they have a significant need to obtain criminal history record information—because, for example, the employee is being placed in a particularly sensitive position—employers customarily are able to obtain such records through illegal, informal access. Second, some employers reported that, in their view, most applicants do not have criminal records and, even if they do, the criminal records do not generally reflect areas of high interest to employers, such as workplace crime and drug use. In addition, employers identified several other negative factors with respect to obtaining criminal history records,

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[91] G. Beason & J. Belt, "Verifying Applicant's Backgrounds," 55 *Personnel Journal* 345 (1976).

[92] Louis Harris & Assoc., Inc. & A. Westin, *The Dimensions of Privacy*, Garland (1981), at 33.

[93] Westin & Baker, *Employer Perceptions of Workplace Crime*, Bureau of Justice Statistics (May 1987), at 15-16.

such as the cost of the check, the poor quality of the records, and the possibility of privacy lawsuits.

Notwithstanding the lack of interest of some employers, logic suggests that public and private employers should be interested in obtaining available criminal history record information. For one thing, many jobs do involve positions of trust which, in the private sector, may require employers to obtain fidelity bonds to insure against misconduct by the incumbent. Fidelity bonds generally make the employer liable if an employee with a fraudulent or dishonest background is placed in a position requiring the bond.[94] In addition, the negligent hiring doctrine requires that private employers exercise due care in the hiring and supervising of employees. In most circumstances, this doctrine does not require employers to check criminal history record information; however, if an employee is to be put into a position of special trust, or the employer should have been on notice that the employee or prospective employee's background bears further investigation, some courts have held the employer liable for breach of the negligent hiring doctrine because the employer failed to conduct a criminal history record check.[95]

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[94] *Analysis of Federal Bonding Program: Final Report*, United States Department of Labor, Manpower Administration (1975).

[95] SEARCH, *Criminal Justice Information Policy: Privacy and the Private Employer* (1981), at 42-46. This paper relies upon SEARCH's *Private Employer* report for its discussion of employer access to and use of criminal history records prior to 1981.

The following states recognize a cause of action under the negligent hiring doctrine: Alaska, Arizona, California, Colorado, District of Columbia, Florida [*see Abbott v. Payne*, 457 So.2d 1156, 1157 (Fla. Dist. Ct. App. 1984), holding that an employer has a duty to make reasonable inquiries into the backgrounds of employees, where the employees will enter houses of customers]; Georgia, Hawaii, Illinois, Indiana [*but see Baugher v. A. Hattersley & Sons, Inc.* 436 N.E.2d 126, 128-129 (Ind. App. 1982), holding that a third party does not have a cause of action against an employer, even where the employer knows of the criminal background of an employee, unless the third party is a customer or invitee of the employer]; Iowa [*see D.R.R. v. English*

(footnote continued)

If there are doubts about the extent to which private employers seek criminal history records, there is also uncertainty about what employers do with such records once they are obtained. Here too, the earlier studies suggest a more aggressive use of criminal history record information. For example, in 1967, the President's Commission on Law Enforcement and Administration of Justice found that individuals with arrest records are more likely to be denied employment than those who have never been arrested, even if the arrest is not followed by a conviction.[96] Similarly, in a 1970 survey of 475 potential employers, 312 stated that they would never hire an offender.[97] A 1979 study done for the Department of Labor reviewed the then-published literature concerning employment barriers for individuals with criminal history records, including arrest records, and found that: (1) 15 percent of private employers flatly refused to hire any offenders; (2) 5-10 percent ignore offender status; and (3) the remaining 75-80 percent of private employers take criminal history record data into account, but make case-by-case determinations.[98]

More recent studies and surveys suggest that employers may not, in fact, take such a harsh view of applicants with criminal

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Enterprises, CATV, 356 N.W.2d 580, 584 (Iowa 1984), holding that the hiring of a cable installer without checking his criminal background may be a negligent hiring if it can be shown that it is the cause of the plaintiff's injuries from rape]; Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah [*but note Stone v. Hurst Lumber Company*, 15 Utah 2d 49, 386 P.2d 910 (1963), holding that where information could not be uncovered in a routine background check, there is no breach of the negligent hiring doctrine]; Washington and Wisconsin.

[96] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967), at 75.

[97] Downing at 47.

[98] N. Miller, "Employers' Barriers to Employment of Persons with Records of Arrest or Conviction," unpublished, unpaginated draft monograph written for the Department of Labor (May 15, 1979).

history records. An Illinois study conducted in the early 1980s, for example, surveyed 375 businesses throughout the state. More than one-half of the businessmen responding indicated that they would hire ex-offenders; however, offenders with a long period of incarceration or with records of multiple arrests were viewed least favorably. In addition, survey respondents indicated that for certain types of positions involving special trust or critical responsibility almost any type of criminal history record would be a bar.[99]

Employment and Recidivism

For the purposes of analysis, let us assume—as logic suggests and the courts insist—that the more widely criminal history record information, including arrest record information, is disseminated, the more likely it becomes that record subjects will suffer tangible harm, including the loss of job opportunities. Does it then follow that this consideration should be given substantial weight by legislators and other policymakers who are struggling to decide whether confidentiality strictures on criminal history record information should be relaxed? Certainly, if it could be shown that by obtaining better jobs, or for that matter any jobs, criminal history record subjects are significantly more likely to be rehabilitated and reintegrated into society, and thereby less likely to commit new crimes, this factor should weigh heavily in favor of retaining confidentiality protections. On the other hand, if it turns out that criminal history record subjects, or at least individuals with certain types of criminal history records are likely to recidivate regardless of whether they obtain employment, then the argument that confidentiality strictures should be maintained so as to promote access to employment and other benefits carries considerably less weight.

A few studies do lend some support to the proposition that rehabilitation is promoted and recidivism declines among those offenders who obtain employment. For instance, one researcher, after reviewing the empirical literature available as of 1978,

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[99] Downing at 55.

concluded, "The inability of many former offenders to obtain decent, rewarding jobs after they are released from prison contributes significantly to this high recidivism rate."[100] A Wisconsin study from the same period found that unemployed or underemployed parolees are "four times as likely to return to prison as their fully employed counterparts."[101] A 1984 National Institute of Justice study found that persistent offenders are more likely to be underemployed and have a poor work history.[102] Similarly, studies by the Rand Corporation, in identifying characteristics of chronic offenders, have found that one of the notable characteristics of a chronic offender is chronic unemployment.[103] The federal Bureau of Justice Statistics (BJS) reports that of those in jail in 1983, about 41 percent had full time jobs at the time of arrest; 12 percent had part time jobs at the time of arrest, and 47 percent were not employed.[104] None of these studies and statistics, however, answer the question whether poor employment history is a causal factor in recidivism or is merely a result of recidivism.

Other research suggests, moreover, that no connection can be made between employment and recidivism. A 1974 survey of the then available empirical research found little evidence that

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[100] Stickler, "Expungement—A New Alternative to the Effects of Legal Stigma," *Conference on Corrections 1978*, Florida State University, (Fox ed. 1978).

[101] Feyerherm, "The Employment History of Prison Releases," *Report of the Governors Conference on Employment and the Prevention of Crime* (1979), at 158.

[102] J.A. Carbonell & E. Megargee, "The Early Identification of Future Criminals" (1984), at 45 (unpublished monograph).

[103] J. Petersilia, P. Greenwood & M. Lavin, *Criminal Careers of Habitual Felons*, The Rand Corporation (1977), at 85-90.

[104] Bureau of Justice Statistics, *Annual Report, Fiscal 1986* (1987), at 46.

occupational training in prisons or employment opportunities after prison affected recidivism rates.[105] Other theorists suggest that the effect of employment on recidivism varies depending upon the type of offender. They argue that for those offenders who are economically motivated, employment can have a positive impact on recidivism.[106]

Rehabilitation and Recidivism

More troubling are claims by some authors that, at least for younger and more active offenders, neither employment nor any other type of intervention works effectively to promote rehabilitation and reduce recidivism. If this is true, then it can be argued that not only is there little weight in the argument that confidentiality should be retained so as to promote access to employment, but quite the contrary, a strong argument can also be made that employers and the general public should be able to identify criminal record subjects to enable the making of appropriate decisions.

By way of background, rehabilitation as a penal ethic emerged in the early 20th century as an alternative to the long established punishment model.[107] In the period after World War II the rehabilitation model won acceptance throughout the criminal justice system.[108] In 1949, the Supreme Court observed that, "Retribution

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[105] Martinson, "What Works? Questions and Answers About Prison Reform," 35 *The Public Interest* (Spring 1974), at 25-27.

[106] T. Orsagh & M. Marsden, "What Works When: Rational—Choice Theory and Offender Rehabilitation," 13 *J. of Crim. Justice* 269-77 (1985).

[107] P. Kratcoski, "The Functions of Classification Models in Probation and Parole: Control or Treatment-Rehabilitation?" *Federal Probation* (Dec. 1985), at 49.

[108] F. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, Yale University Press (1981) [hereafter "Allen"].

is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."[109]

The 1966 Manual of Correctional Standards dismissed punishment and promoted rehabilitation as the appropriate model for sentencing and correctional philosophy:

> Punishment as retribution belongs to a penal philosophy that is archaic and discredited by history . . . . Penologists in the United States today are generally agreed that the prison serves most effectively for the protection of society against crime when its major emphasis is on rehabilitation. They accept this as a fact that no longer needs to be debated.[110]

The acceptance of the rehabilitation model is relevant to the acceptance of confidentiality policies. So long as the goal of the criminal justice system is to rehabilitate, it makes great sense, at least in theory, to shelter criminal histories from public access.

Beginning in the late 1960s, however, scholars and criminal justice officials began to question the efficacy, if not the desirability, of the rehabilitative ideal. In 1974, Robert Martinson posed what turned out to be a question that rehabilitation proponents had trouble answering. With respect to rehabilitation, Martinson asked, "What works?"[111]

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109 *Williams v. New York*, 337 U.S. 241, 248 (1949).

110 Quoted in Bainbridge, "The Return of Retribution," 71*ABA Journal* (May 1985), at 61 [hereafter "Bainbridge"].

111 Martinson at 23. Martinson answered his own question in a now-famous statement: "With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism." *Id.*
(footnote continued)

By the end of the 1970s, the vast bulk of research criticized the effectiveness of rehabilitation programs for criminal offenders.[112] Today the emphasis in sentencing and penal philosophy has shifted from rehabilitation and returned, once again, to a model of just deserts.[113] In 1984 a Senate Judiciary Committee Report pronounced the death of the rehabilitative model:

> Recent studies suggest that this approach [rehabilitation] has failed, and most sentencing judges as well as the Parole Commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.[114]

In the early 1980s, California and New Jersey changed their sentencing law to emphasize just deserts and to de-emphasize rehabilitation.[115] As one commentator put it, "Retribution has

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at 25. *See generally*, J.Q. Wilson, "'What Works?' Revisited: New Findings on Criminal Rehabilitation," 61 *The Public Interest* (1980), at 3.

[112] Allen at 5-32.

[113] *Id.* at 66-73.

[114] Senate Judiciary Committee Report to accompany the Sentencing Reform Act of 1984, codified in part at 18 U.S.C. §§ 3351-3586, cited in Bainbridge at 62.

[115] Bainbridge at 61-62.

returned to criminal justice. Rehabilitation is being passed over like a dish that didn't digest well."[116]

Why was the rehabilitation model abandoned? According to most writers, part of the reason has to do with basic changes in societal norms. Francis Allen in his book, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose*, writes that the rehabilitative ethic can flourish only if a culture accepts two key assumptions: (1) a strong and widespread belief in the malleability of the human character and behavior; and (2) a consensus of values as to what it means to be rehabilitated.[117] According to Allen, neither assumption is accepted in contemporary American culture. Allen and other writers also point to our culture's irreverence and loss of faith in the capacity of institutions and the government to change individuals or achieve social progress.[118]

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[116] Bainbridge at 61. This is not to say, of course, that the just deserts model has the support of all criminologists. On the one hand, a number of theorists, even in the 1980s, continue to promote the rehabilitation model, many of whom argue that this model was never fully or effectively implemented. *See, e.g.*, F. Cullen and K. Gilbert, *Reaffirming Rehabilitation*, Anderson Publishing Company (1982). Rehabilitation critics dismiss such arguments as more wishful thinking than wisdom. "In general, scientific ignorance has not inspired caution in the devotees of the rehabilitation ideal." D. Rothman, *Conscience and Convenience: The Asylum and its Alternatives in Progressive America*, Little, Brown & Co. (1980).

Perhaps at the other end of the penal spectrum, are proponents of the theory of predictive deterrence or selective incapacitation. These theorists argue that sentencing and punishment should be based on neither the rehabilitation model nor the just deserts model, but rather on a model that seeks to predict which offenders are most likely to engage in serious crime, and to incarcerate such offenders. M. Chaiken and J. Chaiken, "Offender Types and Public Policy," 30 *Crime and Delinquency* 195 (1984); S.F. Familton and K.R. Martinson, *Repeat Offender Program Experiment*, Maryland Criminal Justice Coordinating Council report published by the state of Maryland (1982).

[117] Allen at 22-31.

[118] *Id.*

While it is possible to argue about whether changes in social mores have contributed to the decline of the rehabilitative ethic, there can be little argument that, empirically, rehabilitation has not worked. Many researchers conclude that recidivism seems unaffected by rehabilitative programs.[119] By any measure—and today we have many good measures—recidivism is quite high. Three recent studies published by the Bureau of Justice Statistics illustrate the extent of the problem. A 1984 BJS Special Report found a marked similarity in recidivism rates among 14 states surveyed. In those 14 states nearly a third of the prisoners released recidivated within three years, and a quarter were back in two years or less.[120]

In February, 1985 BJS published a second recidivism report which found that a very high percentage of individuals entering a prison had a history of prior incarcerations or convictions. Specifically, BJS concluded that, "An estimated 61% of those admitted to prison in 1979 were recidivists (i.e., they had previously served a sentence to incarceration as a juvenile, adult or both). Of those entering prison without a history of incarceration (an estimated 39% of all admissions), nearly 60% had prior convictions that resulted in probation and an estimated 27% were on probation at the time of their prison admission."[121] The study also found that recidivists were estimated to account for "approximately two-thirds or more of the burglaries, auto thefts and forgery/fraud/embezzlement offenses attributable to all the admissions."[122]

In May, 1987 BJS published a third report examining recidivism, this one focusing on recidivism among young parolees.

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[119] Bainbridge at 61.

[120] Bureau of Justice Statistics, Special Report, *Returning to Prison* (Nov. 1984), at 2.

[121] Bureau of Justice Statistics, Special Report, *Examining Recidivism* (Feb. 1985), at 1.

[122] *Id.*

The report found that, "Approximately 69% of a group of young parolees were rearrested for serious crime within 6 years of their release from prison, 53% were convicted for a new offense, and 49% were returned to prison."[123]

Statistics compiled by state agencies are consistent with BJS' numbers. For example, a 1985 study published by the state of Hawaii found that 58% of the offenders discharged from Hawaii prisons were re-arrested and 83 percent were re-arrested within two years.[124] A research bulletin published by the state of Illinois in July, 1986 found that, "In all, more than 60 percent of 539 former inmates in the sample were re-arrested during the 27 to 29 months following their release from prison."[125]

Of course, even if a high rate of recidivism among former inmates undermines confidentiality claims with respect to their criminal history records, it does not necessarily undermine confidentiality claims with respect to the histories of those individuals who have not been incarcerated—particularly those individuals whose criminal history records consist of arrests only. Research with respect to recidivism by arrestees, however, indicates that there is a relationship between an arrest record and the likelihood of recidivating through subsequent arrests and/or convictions.

In the May 1987 Special Report, the Bureau of Justice Statistics stated that, "The longer the parolee's prior arrest record, the higher the rate of recidivism—over 90% of the parolees with six or more previous adult arrests were rearrested compared to 59% of

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123 Bureau of Justice Statistics, Special Report, *Recidivism of Young Parolees* (May 1987), at 1.

124 State of Hawaii, *Rearrest after Release from Prison* (June 1985) (unpublished monograph).

125 R. Przybylski, *The Impact of Prior Criminal History on Recidivism in Illinois*, Research Bulletin, Illinois Criminal Justice Information Authority (July 1986), at 1.

the first-time offenders."[126] Of course, these statistics apply to parolees, not individuals with arrest only records; however, studies of individuals with arrest only records also indicate a high rate of re-arrest. For example, a 1985 California study found that among those arrested once, a large proportion, 49.1%, were arrested again by the time that they were 29 years old.[127] A 1985 Philadelphia study also found that if an individual had been arrested more than once, he was extremely likely to be arrested again.[128] Indeed, some scholars argue that the arrest record should be used as the principal indicator of recidivism because arrests are reported more reliably than convictions, and because arrests are an otherwise reliable indicator of wrongdoing.[129]

In summary, a review of available empirical information suggests that the release of arrest and conviction records to the public may not have a significant impact on the rehabilitation of record subjects and their reintegration into society—at least in the case of recidivists. For one thing, there is some evidence that private employers, in particular, may not base employment decisions on criminal history records, particularly arrest only records, and particularly if there is not a long history of violent or other serious arrests. Even if employers do use arrest information to bar or restrict employment opportunities, this may not be significant from a rehabilitative standpoint because recidivism statistics and some other research suggest that rehabilitation is difficult to achieve regardless of an offender's employment prospects.

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[126] Special Report, *Recidivism of Young Parolees* at 1.

[127] R. Tillman, *The Prevalence and Incidence of Arrest Among Adult Males in California*, State of California, Department of Justice (1985), at 4.

[128] A. Barnett & A. Lofaso, "Selective Incapacitation and the Philadelphia Cohort Data," *Journal of Quantitative Criminology* (1985), at 3.

[129] M. Maltz, *Recidivism*, Harcourt, Brace & Jovanovich (1984), at 60.

Is Confidentiality Necessary to Assure Fairness to Record Subjects?

Even if it cannot be shown that confidentiality serves a compelling public interest, such as offender rehabilitation, there may be other interests served by restricting the public's access to criminal history records. Another circumstance, for instance, in which confidentiality is appropriately applied to government-held, personal information involves situations in which the record in question does not reflect accurately or appropriately upon the record subject. In such an instance, fairness requires restricting the record's release so as to avoid inappropriate stigma or damage to the record subject.[130]

There are many circumstances in which release of criminal history record information to the public may cast the record subject in a false or inaccurate light. These circumstances, for instance, may include: (1) the record relates to a different person; (2) the record is inaccurate or incomplete; (3) the record is accurate and complete, but it relates to a conviction, or more often, an arrest which is unconstitutional or otherwise improper; or (4) the record is accurate and complete, but it is "old" and no longer reflective of the individual's character.

Misidentification of Record Subjects

If the public is given a right of access to criminal history record information, its record requests, in most instances, will have

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130 This principle finds support in both the constitution and in numerous privacy protection statutes. It has been recognized that constitutional notions of due process are offended if the government makes decisions about individuals on the basis of inaccurate information. *Tarleton v. Saxbe*, 507 F.2d 1116, 1124 (D.C. Cir. 1974); and *Maney v. Ratcliff*, 399 F. Supp. 760, 773 (E.D. Wis. 1975). The federal Privacy Act requires federal agencies to, "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure *fairness* to the individual in the determination; . . ." (emphasis added) 5 U.S.C. § 552a(e)(5).

to be processed on a "name only" basis. In other words, criminal justice agencies will have to search for records only on the basis of record subjects' names—without the benefit of subjects' fingerprints, or even state identification numbers. Studies show that when repositories conduct record checks on the basis of name only information, the search often results in a false negative—that is, the repository fails to find a record even though a record, in fact, exists.[131] Often the responsive record is held under an alias or for some other reason it is not obtained through a name search. Of course, in this instance there is hardly harm to the record subject; however, the requester is told that "no record" exists and therefore, may act inappropriately on the basis of inaccurate information.

Name only searches also produce a good many false positives—that is, a record is found but the record does not relate to the individual who is, in fact, the subject of the request. The release of the wrong record may do serious harm to the subject of the search. In an effort to address this problem, the model bill of the National Conference of Commissioners on Uniform State Laws (NCCUSL) requires public requesters to submit either fingerprints or at least two pieces of identifying information required by the repository; however, the probable effect of this kind of requirement is to limit public access to those circumstances in which the record subject cooperates with the requester.

The problems caused by permitting the public to request criminal history records on the basis of anything other than positive identification (fingerprints) are serious; however, these problems may not be insuperable. Repositories can be given the authority to refuse to release criminal history record information when a name only check produces multiple hits (that is, criminal history record information pertaining to several different individuals is obtained from a single name search). Repositories can also address the problem by placing warning labels on rap sheets indicating that the

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131 "A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for Noncriminal Justice Purposes," at 57.

information is obtained in response to a name only search and, therefore, may not pertain to the correct individual.

It is noteworthy that criminal justice agencies routinely submit criminal history requests on a name only basis, although they often follow-up with a "technical search"—a fingerprint check. It is also noteworthy that in states which permit criminal history record or conviction record information to be obtained by employers or the public, name only checks are commonplace, and our research has not found reports of problems.

Incomplete and Inaccurate Records

Another concern which relates to the fairness of releasing criminal history record information to the public is that many of these records, even when they relate to the correct persons, may be inaccurate or incomplete. Criminal history record information maintained in federal and state repositories and, in particular, in local criminal justice agency systems, is often incomplete because it fails to record available dispositions. Although inadequate disposition reporting is by far the most common and serious quality problem found in criminal history records, there are other problems as well. In a national survey, criminal justice officials estimated that between 20 and 35 percent of criminal history records in most systems are materially inaccurate or ambiguous.[132]

The criminal justice community has long recognized that inaccurate and incomplete criminal history record data is a serious information problem. Over the last ten years, much has been written about the quality of these records, and a great deal has been done to improve the quality of these records. Nevertheless, a 1985 report by SEARCH found that significant data quality problems remain. "According to most sources, disposition reporting levels, in particular, are too low and disposition reporting is too slow."[133]

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[132] SEARCH, *Criminal Justice Information Policy: Data Quality of Criminal History Records*, Bureau of Justice Statistics (1985), at 27.

[133] *Id.* at 28.

SEARCH also found that disposition reporting levels among criminal justice agencies varied markedly. Some agencies have had substantial success and report disposition reporting levels in excess of 90 percent. Other agencies have had little success and have disposition reporting rates that may be as low as 25 percent or lower. Across the nation, including the FBI's Identification Division system and state repository systems, most experts believe that disposition reporting levels average around 60 percent.[134]

Thus, if the public were able to obtain criminal history record data, they would, in a not insubstantial percentage of cases, obtain inaccurate or incomplete data. There are no studies or other research to suggest how the public would react to this data deficiency. It is mere speculation as to whether the public would treat an arrest without a disposition as the equivalent of a conviction, or the equivalent of an acquittal, or as neither.

Notwithstanding the seriousness of the data quality problem, a few factors argue in favor of not permitting this problem to serve as an absolute bar to public access. First, the accuracy and completeness of criminal history records is substantially better today than it was ten or fifteen years ago when most of the existing confidentiality policies were established.[135] Second, the records upon which the public relies at present may have their own problems. Court records, for example, pertain only to events in a particular court and hence are far from comprehensive. Police blotter or incident reports are also not comprehensive and are thought to seldom, if ever, reflect dispositions. Records held in private sector databases such as those maintained by credit reporting agencies or newspapers are thought to suffer from substantial problems of inaccuracy and incompleteness although no studies on this topic have been published. Such records include court records,

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[134] *Id.* at 19-23.

[135] SEARCH's recent survey of state criminal history record repositories found that the "information provided . . . indicates that disposition reporting levels are improving and are probably quite high in some states. "State Criminal History Record Repositories" at 26.

local police records, and records in private sector databases, such as those maintained by credit reporting agencies and newspapers. Third, in a few jurisdictions certain segments of the public already obtain criminal history data, including arrest data, and there are no reports of harm to record subjects arising from public access to inaccurate or incomplete data.

Improper Arrests or Convictions

In addition to obtaining misidentified records or inaccurate and incomplete records, there are other circumstances in which public access to arrest and conviction records may be unfair to record subjects. If, for example, a record relates to an unlawful arrest or to an arrest based upon an unconstitutional statute (or for that matter, if the conviction is unlawful or unconstitutional), public access to the record may be unfair to the record subject.[136] In those instances, courts have been willing to seal or purge arrest, and even conviction, information on the basis of constitutional doctrines or, more often, on the basis of the courts' inherent power to correct inaccurate, incomplete or otherwise inappropriate information.[137]

Many states have established statutory sealing or purging remedies for individuals whose arrest or conviction records are based upon illegal arrests or convictions. Sealing is the far more

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136 SEARCH, Technical Report No. 27, *Sealing and Purging of Criminal History Record Information*, Bureau of Justice Statistics (1981), at 5.

137 *See, e.g., Tatum v. Morton*, 386 F. Supp. 1308 (D.D.C. 1974), purging an arrest record based on an unlawful arrest; *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), purging an arrest record based on, among other factors, harassing action by the police; *Severson v. Duff*, 322 F. Supp. 4 (M.D. Fla. 1970), expunging a conviction record where the conviction was obtained under an unconstitutionally vague statute; and *United States v. Rosen*, 343 F. Supp. 804, 808-09 (S.D.N.Y. 1972), stating that a purge order may be appropriate when an arrest is improper or when it is accompanied by some kind of material governmental wrongdoing. *See also* SEARCH, *Case Law Digest* (1980), at 143-85.

common remedy. These statutes usually require record subjects to petition a court in order to obtain the seal or purge order. Interestingly, a substantial number of those statutes authorize a record subject who has obtained a seal or purge order to deny the occurrence of the criminal event to which the record relates. This authorization almost always applies to employment applications and may cover licensing and other governmental requests for data.[138]

Of course, even assuming that arrest and conviction records which relate to improper or unconstitutional arrests or convictions should not be retained—and not everyone would agree with that proposition—records of such arrests or convictions are relatively rare.[139] Because such records are rare, they probably do not provide an effective rationale for prohibiting public access to all criminal history records. Rather, the interests at stake in those exceptional circumstances can be protected by the selective sealing or purging of those records.

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[138] *Id.* at 112. Federal statutes do not provide a definitive right to seal or purge federal criminal history records. Some plaintiffs, however, have been successful in using the federal Civil Rights Act or the federal Privacy Act to obtain relief from records of illegal or improper arrest or convictions. *Id., e.g.,* at 147-184.

[139] In *Spock v. District of Columbia*, 283 A.2d 14, 21 (D.C. Ct. of App. 1971), the court harshly criticized the notion that the courts should be used to "rewrite history."

> No system of law can, with integrity, lend or appear to lend its aid to an unreal denial of the events, particularly as such denials may affect the lawful judgement of other persons who may in the future deal with them. It is one thing to say that the system of law will legally ignore an acknowledged fact and perhaps, pursuant to specific legislation, indulge in a fiction that what was once a conviction or a criminal charge shall no longer be deemed such; but it is quite another to assist in rewriting history at the expense of truth, particularly where, as outlined above, the full truth if effectively recorded can preserve the integrity of the individual as well as the rule of law.

"Old" Criminal History Record Information

Many analysts argue that it is unfair to record subjects to disclose records which relate to an arrest, or even a conviction, which occurred many years earlier if the arrest or conviction is no longer reflective of the individual because the individual has been free of any involvement with the criminal justice system for many years. Statistics also suggest that "old" criminal history data of this type is unlikely to be reflective of the record subject because individuals who recidivate customarily do so within a brief time after release from incarceration.

For example, BJS reported in a 1985 Special Report that, "Based on recidivist self-reports of how long it took them to reenter prison by 1979, it is estimated that nearly half (48.7%) of all those who exit prison will return within 20 years of release. Most of the recidivism, however, was found to occur within the first 3 years after release: an estimated 60 percent of those who will return to prison within 20 years do so by the end of the third year."[140]

Other research corroborates that finding. For example, a 1956 study of federal releasees conducted by Kitchener, Schmidt and Glasser found that 41.22 percent of the releasees had returned to prison within five years, whereas by 15 years the total number of releasees who had returned to prison had increased only another six percent to 47.44 percent.[141] Similarly, a recent Illinois study found that the longer an offender is out of prison, the less likely the offender is to be arrested. Illinois found that of the former inmates in its sample, 19 percent were arrested in the first three months after release; 32 percent had been arrested within six months; 40 percent had been arrested within nine months; and 60 percent had been arrested within 29 months. The Illinois Criminal Justice Information Authority concluded "very few of the former inmates

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[140] Special Report, *Examining Recidivism* at 1-2.

[141] *Id.* at 3.

who had not been arrested by the end of 29 months would ever be arrested again."[142] Finally BJS' 1984 recidivism report found that:

> [A]fter the first year, the greater the amount of time a releasee remains in the community without reincarceration, the less are his or her chances of returning to prison.
>
> * * *
>
> Data beyond the 3-year mark suggests that some recidivism is likely to occur at least up to 5 years after release, although at increasingly lower rates.[143]

Statutes in at least seven states also recognize that offenders with old criminal history records present a slight risk of recidivism and, accordingly, these statutes permit this information to be sealed or purged. Those states seal or purge such records, either "automatically" through administrative action or selectively through court petition.[144]

Even in the absence of statutory authorization, a number of courts have recognized that arrest or conviction record information should not be released after the passage of a substantial period of time. In *Natwig v. Webster*, the federal district court ordered the purging of a 15 year old arrest record, in part, on the grounds that the plaintiff had been free of involvement with the criminal justice system since the arrest, and the record was no longer reflective of

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142 J. Markovic, *The Pace of Recidivism in Illinois*, Research Bulletin, Illinois Criminal Justice Information Authority (April 1986).

143 Special Report, *Returning to Prison* at 2.

144 Alaska (10 years); Kansas (5 years); Massachusetts (10 years); Minnesota (10 years); Nevada (15 years for a felony and 5 years for a misdemeanor); New Jersey (5 years); and Oregon (3 years for certain types of offenses).

his character.[145] Several courts have also held that record subjects have a cause of action against private parties for disseminating "old" arrest or conviction information.[146] Moreover, the Supreme Court has observed that after twenty years an individual is no longer a public figure merely by virtue of a conviction:

> This reasoning leaves us to reject the further contention . . . that any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction.
>
> * * *
>
> To hold, otherwise would create an "open season" for all who sought to defame persons convicted of a crime.[147]

In summary, there are good arguments to support the proposition that some criminal history records ought not to be publicly available because such availability would be unfair to record subjects. Nevertheless, it could be argued that the interests served by confidentiality can be addressed by remedies short of a blanket prohibition upon public access to all arrest and conviction records.

In those instances where a record relates to an arrest, or even a conviction, that should not have occurred, the record can be sealed or purged, on a selective basis, just as is now done in some states. Similarly, for those individuals who have established a clean record period and for whom, at least as a statistical matter, the risk of recidivism is slight, confidentiality restrictions can be applied to their records without making all criminal history records confidential.

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145 562 F. Supp. at 231.

146 *Melvin v. Reid*, 112 Cal. App. 285, 292, 297 P. 91, 93 (Dist. Ct. App. 1931); and *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962).

147 *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157, 168-69 (1979).

As to the risks posed by misidentification and inaccurate or incomplete records, access by the public clearly raises significant issues; nevertheless public access may still be a better policy course than the alternative. The alternative encourages access to and use of records which are even less apt to be accurate and complete and less apt to pertain to the correct person; moreover as discussed above, there are various protections that can be employed to reduce the risk of adverse consequences arising from public access to misidentified records or to inaccurate or incomplete records.

Does Criminal History Record Information Relate to Private Conduct?

Another circumstance in which confidentiality is appropriate is to shelter records which relate to private conduct. Records relating to family matters, religious practices, and, in many instances, medical care, fall into this category. It has been argued that arrest information should also fall into this category because, in the absence of a conviction, an arrestee must be presumed innocent, and, thereby, an arrest becomes an essentially private event. This theory applies particularly with respect to arrests which end in an acquittal. In these instances, the presumption of innocence becomes a factual finding of innocence.

Prior to the Supreme Court's decision in *Paul v. Davis*, many courts were willing to accept, on constitutional grounds, privacy arguments with respect to records of acquittal. In *Davidson v. Dill*, for example, a Colorado state court cited with approval the suggestion that there is a right of privacy in arrest records once a record subject is acquitted:

> "We have now reached the point where our experience with the requirements of a free society demands the existence of the right of privacy in the fingerprints and photographs of an accused who has been acquitted, to be at least placed in the balance, against the

> claim of the state for a need for their retention."[148]

Even as late as 1977, a federal district court warned that record subjects should have a right of privacy in records of an arrests that end in acquittals:

> For the person who has been arrested and exonerated, the presumption of innocence is lost. He stands at a distinct disadvantage to others, also presumably innocent, citizens who do not have "a record." Though he has been found innocent of any wrongdoing, the record will remain as a cloud over his future, put there and maintained by the same system of justice that exonerated him.[149]

Notwithstanding these court opinions, it is now the established view that, whatever else it may be, an arrest, even an arrest ending in an acquittal, is not a private matter. In *Cox Broadcasting Corp. v. Cohn,* the Supreme Court noted that the commission of a crime, prosecutions resulting from them and judicial proceedings arising from the prosecution are matters of legitimate public concern.[150]

A 1975 federal district court decision was even more explicit as to the public character of arrests and arrestees. The opinion concludes that individuals who are arrested or indicted:

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[148] *Davidson v. Dill*, 503 P.2d 157, 161 (Colo. 1972) quoting *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211, 217 (1971); *see also State ex rel Mavity v. Tyndall*, 66 N.E.2d 755, 759 (Ind. 1946).

[149] *United States v. Singleton*, 442 F. Supp. 722, 724 (S.D. Tex. 1977).

[150] 420 U.S. at 491-92; *see also Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

> become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private. . . . [T]his right [the right of privacy] becomes limited and qualified for arrested or indicted individuals, who are essentially public person-ages.[151]

Logic would seem to support the view that allegations that an individual has broken society's laws, and the way in which society responds to those allegations, are inherently public matters;[152] moreover, information about arrests and related prosecutions does not seem to be analogous to information about family matters, religious conduct, medical care or other private matters. Furthermore, as stated earlier, arrest records are matters of public record, as original records of entry. While there may be other reasons to restrict public access to cumulative arrest records, it is difficult to argue that arrests, and the records relating to arrests, should be confidential because they involve private matters.

Upon examination, it seems clear that the thrust of most claims for the private status of an arrest relate not to the private character of the conduct, but rather, to the legal presumption of innocence that accompanies an arrest. If an arrest is treated by the public as the equivalent of a conviction, then the disclosure of an arrest record—any arrest record—has the same potential for unfairness as the disclosure of an "old" record or a record which relates to an improper arrest—that is, it casts the record subject in inaccurate and

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151 *Tennessean Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975) (footnote omitted).

152 *See* Hess & Le Poole, "Abuse of the Record of Arrest Not Leading to Conviction," 13 *Crime and Delinquency* 494, 495-96 (1969).

false light.[153] Proponents of confidentiality for arrest records fear—not unreasonably—that if arrest records are disclosed outside of the criminal justice system, they will be used inappropriately as a basis for adverse decisions about arrestees.

The doctrine of a presumption of innocence provides a reasonable basis for preserving the confidentiality of arrest records; however, this doctrine may not be dispositive because there are countervailing considerations. First, there is little empirical evidence describing the public's perception of arrest records, and what exists suggests that the public does distinguish between an arrest record and a conviction record.[154] Second, to the extent that those who have been arrested do not get treated by the public as well as those who have never been arrested, it is possible to argue that this adverse distinction is appropriate. It is well recognized that a relatively high percentage of arrests do not result in convictions for reasons that are entirely unrelated to guilt or innocence.[155]

Does the Release of Criminal History Record Information Pose Practical Problems?

Another factor relevant to the imposition of confidentiality protections for government-held, personal information is whether

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153 In *Morrow v. District of Columbia*, 417 F.2d 728, 741 (D.C. Cir. 1969), the court of appeals worried that private employers would not distinguish between arrest and conviction records.

154 *Criminal Justice Information Policy: Privacy and the Private Employer* at 12-13.

155 "The Impact of Arrest Records on the Exercise of Police Discretion," 47 *Law and Contemporary Problems* at 287 (Autumn 1984).

release of the data, even if theoretically justifiable, is impractical because of the potential adverse consequences that arise from the adoption of an openness policy.

Cost and Workload

One such "impracticality" is the potential for increased cost to and workload for repositories and other criminal justice agencies. Directors of federal and state repositories already report that their agencies' workloads have increased substantially because of a dramatic increase in the number of requests received from noncriminal justice agencies. The FBI, for example, performs approximately 3 million criminal history record checks per year for noncriminal justice agencies—primarily federal agencies involved in the security clearance process.[156] As noted earlier, several repository directors have publicly stated that their agencies' noncriminal justice request traffic is substantially higher than it was just a few years ago.

In theory, opening criminal history records to the public could well create a substantial burden for repositories and other criminal justice agencies; however, with few exceptions, experience to date has not borne this out. As previously discussed, Florida, and at least a few other states, make all criminal history record information available to the public. To date, none of these repositories report that this access has been a burden.[157]

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156 "A Study to Identify Criminal Justice Information Law, Policy and Management Practices Needed to Accommodate Access to and Use of III for Noncriminal Justice Purposes" at 23.

157 One of the few reports to the contrary comes from a 1963 District of Columbia experiment. That year, the District of Columbia police experimented with making all criminal record information available to the public. At its peak, District of Columbia police reported that they were receiving about 3,500 record requests a week. *The Report Committee to Investigate the Affects of Police Arrest Records on Employment* (1967), at 15, published by the District of Columbia.

To the extent that noncriminal justice requests result in costs to criminal justice agencies, the agencies can recover their costs by charging fees. As of 1984, for instance, 23 state repositories charged fees to noncriminal justice requesters ranging from $3.00 to $14.50. As of that date, several other states had fee legislation pending. Criminal justice agencies can also take other steps to minimize practical problems arising from noncriminal justice access. For example, most repositories give priority to criminal justice requests in order to assure that noncriminal justice traffic does not slow criminal justice response times.

Finally, a number of state repositories and other criminal justice agencies are sufficiently automated today so that the cost and burden of providing greater access to noncriminal justice requesters is substantially minimized. It should be noted, however, that for states which do not disseminate nonconviction information to noncriminal justice users, the automated record may require substantial editing before its release. Substantial editing may also be required when a record received from another state contains information that the recipient state cannot release under its dissemination provisions.

Misinterpretation of Rap Sheets

Another "practical" objection to public access is the possibility that the public will misread or misunderstand entries on the rap sheets. Without question, rap sheets can be difficult to read. Arrest charges often do not match prosecution charges, and often neither set of charges matches the dispositions. In fact, it is easy to misread charges and dispositions even when they do match.

At present, some kinds of noncriminal justice entities routinely obtain at least conviction record information and, in some states, arrest information; however, there are no published reports of problems arising from the public's misunderstanding or misinterpretation of rap sheets. Although it would not be an insignificant task, if necessary, rap sheets could certainly be revised to improve their clarity; training and instruction could be provided in the reading of rap sheets; and easy to read summaries could be provided.

Misuse of Criminal History Record Information

Undoubtedly, the most serious "practical" problem that could arise from public access to criminal record information is the potential that the records will be misused by the public. Perhaps the most frequent type of record misuse is unauthorized redissemination; however, if everyone were entitled to obtain the records, then unauthorized redissemination would hardly be a problem.

On the other hand, if information which is originally available to the public is subsequently sealed or made subject to other confidentiality protections—because, for instance, the criminal history record is old and no longer relevant—the success of those retroactive confidentiality strictures is problematic. That very situation obtains today because the public already has access to court records and police blotters and other original records of entry, not to mention rap sheet data consisting of convictions and recent arrests. There is no evidence that the existing degree of public access poses a threat to sealing and other confidentiality protections.

Of course, criminal history data can be misused not only through unauthorized redissemination, but also through the use of the information as a basis for inappropriate and adverse decisions about record subjects. A principal concern in this respect involves the use of criminal history data to exclude blacks and other minorities from employment and other valued statuses.

There can be little question that if criminal history record information is widely disseminated and if by virtue of that wide dissemination the information is used to make adverse decisions about record subjects, that process will have a disproportionately adverse effect upon blacks, since blacks are disproportionately represented in criminal history records.[158] The Equal Employment Opportunity Commission ("EEOC") has argued that the use of arrest

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158 The Bureau of Justice Statistics reports that of the persons admitted to state prison in 1983 approximately 45 percent were black. *Annual Report, Fiscal 1986* at 45. California reports that by age 29, 33.9 percent of white males and 65.5 percent of black males have been arrested. Tillman at 3.

data by employers to make adverse employment decisions has a racially discriminatory impact. The courts have largely agreed with the EEOC, except in those instances where employers can show that their use of arrest data is job related and the data is evaluated on a case-by-case basis and not used as an absolute bar to employment.[159]

Concern about the discriminatory impact of the public availability of arrest records provides a basis for preserving confidentiality protections. Of course, this concern, theoretically at least, could be addressed by statutes prohibiting the use of arrest, or even conviction records, for employment decisions, or other benefit or status decisions.

There are many examples of such statutes. The Fair Credit Reporting Act, for instance, prohibits consumer reporting agencies from disclosing public record information, including arrests and conviction records, that are more than seven years old.[160] Other federal statutes, such as the Equal Employment Opportunity Act and the Equal Credit Act, could be used to prohibit the misuse of certain kinds of criminal history record information in employment and other decisions.

Some states have already placed limits on the use of criminal history record information for employment purposes. New York,

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[159] *Criminal Justice Information Policy: Privacy and the Private Employer* at 29-31. *See also Smith v. American Service Co.*, 611 F. Supp. 321, 327 (D. Ga. 1984), *modified on other grounds*, 796 F.2d 1430 (11th Cir. 1986) (employer's use of polygraph examination, which included questions about an arrest record, in order to determine *deception* on the part of applicant was not shown to have disparate impact on minorities); *Reynolds v. Sheet Metal Workers, Local 102*, 498 F. Supp. 952, 973 and 975 (D.D.C. 1980), *aff'd* 702 F.2d 221 (D.C. Cir. 1981) (court found no attempt by employer to validate arrest record inquiries as job related; employer, therefore, was ordered to cease reliance upon arrest records in selection of apprentice applicants), and *Washam v. J.C. Penney Co., Inc.*, 519 F. Supp. 554, 561 (D. Del. 1981) (court recognized that employer may be able to establish that a felony conviction is related to suitability for employment as a security guard manager).

[160] 15 U.S.C. § 1681c.(a)(5).

for instance, forbids employers, under some circumstances, from denying licenses or employment to an individual because of a prior conviction unless there is a relationship between the offense for which the conviction was obtained and the employment sought, or unless such employment would involve an unreasonable risk to property or to personal welfare or safety.[161]

Of course, such protections could be outflanked because if arrest records are freely available to employers they may provide the "real" basis for an adverse employment decision even though employers may cite other, more acceptable bases for the adverse decision. As best as can be determined, there is no research to indicate whether in states such as Florida, which provide all criminal history record information to private employers, the use of such data has had a discriminatory impact.

The Public Interest in Disclosure

Thus far, this paper has identified types of situations in which American law and policy customarily apply confidentiality protections to government-held, personal records.[162] In each case

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161 New York Human Rights Law, N.Y. Exec. Law § 296 (16) (McKinney) and N.Y. Correc. Law § 752 (McKinney). *See also* Reporters Committee Monograph at 12.

162 There are, of course, other circumstances in which confidential treatment is accorded to personal records. These circumstances have not been addressed in this paper. For example, records are sometimes kept confidential in order to promote the relationship in which the records are created or maintained. Primary examples include the doctor-patient privilege in the health care relationship, the spousal privilege in the marital relationship and the priest-penitent privilege in the religious relationship. With respect to the relationship between criminal record subjects and law enforcement agencies, it is farfetched to argue that confidentiality is necessary in order to promote the efficacy of that relationship.

Another recognized basis for imposing confidentiality involves records or information which have been submitted to the government by the record subject and which remain the "property" of the record subject. In those cases, (footnote continued)

the paper has analyzed whether those circumstances apply to criminal history records—particularly arrest records; however, the paper has not addressed, except indirectly, the extent to which the general public has a valid interest in obtaining criminal history record information.

With respect to the public's interest in access, it is certainly possible to argue that this interest is so trivial that it cannot outweigh even a minimal confidentiality interest. Such an argument begins by asserting that the general public has no special or compelling need for access to criminal history record information as is the case, for example, with respect to access by noncriminal justice, governmental agencies for national security purposes. In that vein, it could be argued that the public customarily cannot show that criminal history record information is relevant to any particular decision or need. Rather, the public's interest can be characterized as "mere curiosity"—an interest in obtaining titillating data that serves no valid public purpose. Certainly, in many contexts, the courts have recognized that there is a hierarchy of interests in access to government-held data and that access by the public for purposes of mere curiosity, as opposed to oversight of governmental functions, ranks low in that hierarchy.[163] On the other hand, it is possible to identify a number of interests that theoretically could be served by providing the public with complete access to criminal history record information.

First, given that recidivism is so high, it can certainly be argued that the public has a legitimate interest in whether an

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the records customarily are not released without the record subject's consent. Although it is true that some criminal history record schemes do rely upon the record subject's consent, record subjects do not submit rap sheet data to the government and do not "own" their rap sheet records; therefore, while some rights are appropriately given to record subjects with respect to these records (inspection being the most notable), record subjects generally do not have the right to control dissemination decisions about these records.

163 *National Ass'n of Atomic Veterans, Inc. v. Director, Defense Nuclear Agency*, 583 F. Supp. 1483, 1487 (D.D.C. 1984).

individual has a criminal history record and the nature of that record. It may make sense, both as a personal matter and as a matter of social policy, for the public to take criminal history data into account in making employment decisions, credit decisions, and other status decisions.

Second, the public can argue that access to criminal history record information improves the public's oversight of the operation of the criminal justice system and, in particular, the system's record keeping operation. The courts have recognized that public access to courtrooms and to information filed in court tends to improve the administration of the courts and the criminal justice system.[164]

Here too, however, there is no evidence to indicate that public access to criminal history records, in fact, has the effect of improving the quality of the public's oversight or otherwise improving the courts or the criminal justice system. Moreover, this argument seems to make far more sense when applied to the public's right to attend courtroom proceedings or to obtain documents actually filed in such proceedings. On the other hand, it does seem logical that if those responsible for maintaining criminal history record systems know that the records in such systems are freely available for inspection by the public, this knowledge should have a salutary impact upon their record keeping efforts and the priority that such efforts receive within criminal justice agencies.

Finally, perhaps the best argument that can be made in support of the public's interest in obtaining criminal history record information is that these records are government records created at taxpayer expense, about a matter in which the public has a legitimate and basic interest—crime and the operation of the criminal justice system. Therefore, the presumption should be that the public has a right to obtain criminal history record information absent some

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164 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571-73 (1980).

showing of material and manifest harm to record subjects or society.[165]

CONCLUSION

The foregoing analysis of the circumstances in which confidentiality customarily is applied to government-held, personal information casts light on two fundamental matters. First, the analysis helps to identify those factors which seem to be moving the nation's information policy in the direction of enhancing the public's access to criminal history record information. Second, the analysis should assist policymakers in reaching a conclusion as to whether enhanced public access is appropriate in view of the relevant considerations.

There can be little doubt that there are a good many factors responsible for the still nascent movement toward opening criminal history records to the public. Perhaps the principal factor at work—although this is open to discussion—is the public's loss of faith in the rehabilitative ideal. At bottom, confidentiality policies for criminal history record information rest on the degree to which the public believes that offenders can be rehabilitated. If, on the other hand, the public believes that it is not possible to rehabilitate offenders, then the public is much less apt to worry about the stigma and the adverse, tangible consequences for offenders that may arise from the public availability of criminal history data. The empirical factor that undermines the public's optimism about rehabilitation, and conversely, encourages the public to seek access to criminal history data, is the nation's stubbornly high recidivism rate.

The decline of faith in the rehabilitative ideal and the implacable and high level of recidivism may be the key factors driving demands for more public access to criminal history records, but they are, by no means, the only factors. For example, there is little doubt that while significant problems of accuracy and completeness remain, criminal history record information is

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[165] *See Reporters Committee for Freedom of the Press v. United States Dep't of Justice*, 816 F.2d 730, 740-41 (D.C. Cir. 1987).

considerably more accurate and complete today than it was in the early to mid-1970s when existing confidentiality standards were developed. Improvements in data quality lend weight to arguments to relax confidentiality safeguards because the risk of adverse consequences arising from wide dissemination and use of inaccurate and incomplete data is reduced.

Another factor which may well be encouraging the enhanced availability of criminal history data is the use of automation in the handling of criminal history records. Fear of the computer and automated personal data bases is generally thought to have been a principal factor motivating the imposition of confidentiality safeguards for all types of personal information, including criminal history record information. As the public becomes more comfortable with automation, the public's concern about privacy may be declining; moreover, as a practical matter, automation makes it far easier and less expensive for criminal justice agencies to comply with public and other noncriminal justice requests for records.

Still another factor that may be encouraging the opening of criminal history records is the continued development and automation of criminal justice record systems containing original records of entry. In addition, there are some signs that the private sector may be developing its own criminal justice record systems. To the extent that criminal record information is readily available to the public from noncriminal history record sources, it obviously makes less sense to apply rigorous confidentiality strictures to criminal history record information.

Another factor that may be encouraging adoption of openness policies is the development of central state repositories; the establishment of the Interstate Identification Index; and the related emergence of an effective, national system for the exchange of criminal history record information. This system may prove to be an almost irresistible information resource for governmental, noncriminal justice agencies, private employers, the press and the public.

Finally, there can be little question that since 1976 many public attitudes have changed in ways that create a hospitable climate for opening access to criminal history records and an inhospitable climate for closing access to such records. For instance, there is

undoubtedly more public concern today than there was in the early to mid-1970s about preserving both national and personal security. This concern is reflected in national defense initiatives; in the dramatic growth of the private security industry; in concerns about the reliability of organizations which provide child care and related services; and in the emphasis on protecting the public against terrorism, to name just a few examples. Not surprisingly, the public seems less concerned today about the rights of offenders and more concerned about the rights of victims and other participants in the criminal justice process.

Do these developments mean that arguments for reserving the confidentiality of criminal history record information are no longer germane? Certainly not. After all of the various considerations that customarily support confidentiality policies are sorted out, it seems inescapable that—whatever other confidentiality considerations may or may not apply to criminal history records—there are some circumstances when it is manifestly unfair to record subjects to publicly release criminal history record information. Disclosure in these circumstances simply runs too great a risk of placing record subjects in a false and inaccurate light.

This fear is perhaps least germane with respect to recent conviction information and most relevant with respect to arrest records. It is useful in this regard to compare dissemination policies for investigative data and arrest record data. There remains a consensus that criminal investigative record information should not be publicly available. The primary, although not the only reason for this view, is that investigative information carries an implication of wrongdoing when, in fact, the subject of the investigation may not have broken the law or otherwise engaged in any wrongdoing whatsoever. Arrest only information may also carry the same implication of wrongdoing and, yet, like investigative information, the record subject may not have broken a law or engaged in any wrongdoing.

What makes the question difficult, however, is that arrest record information, unlike investigative record information, is already in the public domain through original records of entry. Arrest record information, moreover, unlike investigative record information, relates to a more or less formal event to which at least some protections attach and in which the public arguably has a

legitimate interest. Finally, and perhaps most importantly, there seems to be a widespread perception that many people who are arrested have, in fact, engaged in wrongdoing, and if they escape conviction, the reason often has nothing to do with their guilt or innocence.

In conclusion, it seems inescapable that regardless of where the line between openness and confidentiality is drawn, substantial controversy will remain. The interests at stake—public safety versus fairness, privacy and personal freedom—are too important, and the effectiveness of various policy options too uncertain to produce a consensus. Substantial changes, nevertheless, have occurred in the ten plus years since most existing legal standards for public access to criminal history data were adopted. Accordingly, it is important that policymakers take a fresh look at the issue.

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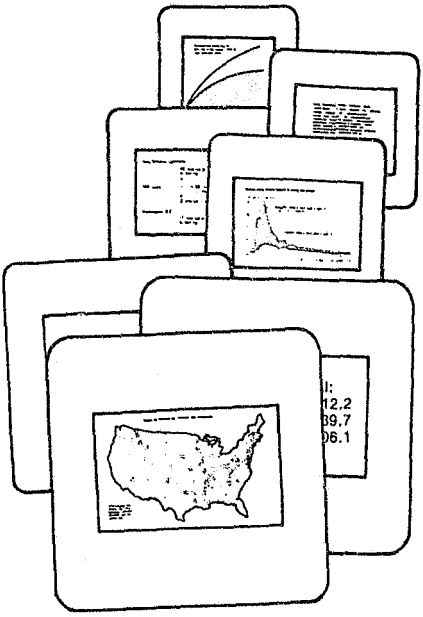

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  - Profits

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- Enforcement
  - Border interdiction
  - Investigation
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  - Prosecution
- Consumption reduction
  - Prevention
  - Education
  - Treatment

Consequences of drug use

- Abuse
  - Addiction
  - Overdose
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- Crime
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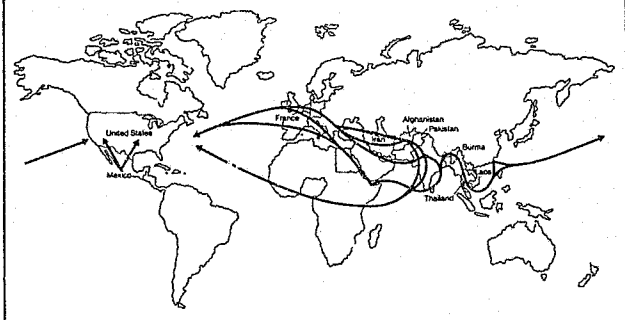

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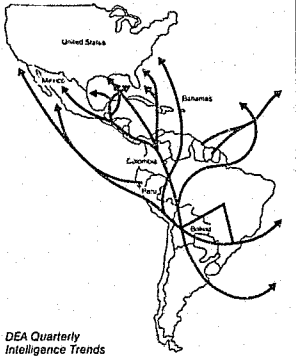

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