U.S. DEPARTMENT OF COMMERCE
National Technical Information Service

PB-256 654

Artificial Barriers to Employment of Criminal Offenders

Neal Miller

Prepared For
Assistant Sec for Plng, Eval, & Res (Labor)

May 1975

ARTIFICIAL BARRIERS TO EMPLOYMENT OF CRIMINAL OFFENDERS

Consultant Paper to U.S. Department of Labor

Neal Miller, May 1975

SEC.301.(a) The Secretary shall use funds available under this title to provide additional manpower services as authorized under titles I and II to segments of the population that are in particular need of such services, including offenders.

(c) With respect to programs for offenders referred to in subsection (a), the Secretary shall establish appropriate procedures to insure that participants are provided with such manpower training and related assistance and support services (including) basic education, drug addiction or dependency rehabilitation, health care and other services) which will enable them to secure and obtain meaningful employment. To ensure the objectives of this subsection, the Secretary may, wherever feasible, provide for appropriate arrangements with employers and labor organizations, appropriate parole, probationary and judicial authorities, and for the utilization of training equipment comparable to that currently used for the job in which training is furnished. To support such programs, the Secretary shall develop information concerning the special needs of offenders for such services, including special studies regarding the incidence of unemployment among offenders and the means of increasing employment opportunities for offenders.

SEC.311.(a) To assist the Nation in expanding work opportunities and assuring access to those opportunities for all who desire it, the Secretary shall establish a comprehensive program of manpower research utilizing the methods, techniques, and knowledge of the behavioral and social sciences and such other methods, techniques, and knowledge as will aid in the solution of the Nation's manpower problems. This program will include, but not be limited to, studies . . . for improvements of opportunities for employment and advancement through the reduction of discrimination and disadvantage arising from poverty, ignorance, or prejudice.

SEC.314. The Secretary, in consultation with appropriate departments and agencies of the Federal Government, shall conduct a continuing study of the extent to which artificial barriers to employment and occupation advancement, including civil service requirements and practices relating thereto, within agencies conducting programs under this Act, restrict the opportunities for employment and advancement within such agencies and shall develop and promulgate guidelines, based upon such study setting forth recommendations for task and skill requirements for specific jobs and recommended job descriptions at all levels of employment, designed to encourage career employment and occupational advancement within such agencies.

The Comprehensive Employment and Training Act

BIBLIOGRAPHIC DATA SHEET	1. Report No. ASPER/PUR-74/3341/A	2.	3. Recipient's Accession No.
4. Title and Subtitle Artificial Barriers to Employment of Criminal Offenders			5. Report Date May 1975 6.
7. Author(s) Neal Miller			8. Performing Organization Rept. No.
9. Performing Organization Name and Address Neal Miller 5138 Nebraska Avenue, N.W. Washington, D.C. 20008			10. Project/Task/Work Unit No. 11. Contract/Grant No. OAS 74-3341
12. Sponsoring Organization Name and Address U.S. Department of Labor/ASPER 200 Constitution Ave., N.W. Washington, D.C. 20210			13. Type of Report & Period Covered Final 6/74 - 3/75 14.

15. Supplementary Notes

16. Abstracts The emphasis here is on the Department of Labor's(DOL) efforts under Title III of the Comprehensive Employment Training Act (CETA) to present alternatives for what might be done under that authority. A description and analysis is given of the artificial barriers to employment facing the offender. It is shown that much of the information provided by arrest records is irrelevant and improperly used. The suitability of the applicant can be determined by the use of more relevant information such as his/her work history. It is concluded that there are two areas in which discrimination of this sort can be fought: by changing employers' beliefs in the relevancy of criminal records, and by limiting the availability of criminal records to employers. Numerous recommendations are made for action by the DOL through the Public Employment Program under CETA, through coordination of other DOL activities such as Job Corps and Bureau of Apprenticeship and Training, through work with other federal agencies to increase access to federal civil service employment, state and local government employment and private sector employment under their jurisdictions. The DOL should continue efforts to encourage repeal of state and local governmental barriers to offender employment, to inform employers of the illegality of present barrier practices. It should also work with the criminal justice system for the development of new manpower linked criminal justice models, and to link manpower services with bail agencies or probation. Further research should also be done on employer discrimination.

17. Key Words and Document Analysis. 17a. Descriptors

Attitudes
Business
Civil service
Crimes
Criminal investigations
Demand(economics)
Discrimination
Education(includes training)
Governmental policies
Law enforcement
Local government
Personnel selection
Placement
Qualifications
National government
Rehabilitation
State government
Supply(economics)

17b. Identifiers/Open-Ended Terms

CETA, Manpower programs

17c. COSATI Field Group 5I

PRICES SUBJECT TO CHANGE

18. Availability Statement	19. Security Class (This Report)	21. No. of Pages
Release unlimited - Available from National Technical Information Service, Springfield, Virginia 22161	UNCLASSIFIED	86
	20. Security Class (This Page) UNCLASSIFIED	22. Price $5.00

CONTENTS

CONTENTS (continued)

EXECUTIVE SUMMARY

A minimum of 30 million and perhaps as many as 50-60 million individuals have criminal records of arrest or conviction. Most of these individuals, (80-90 percent) are labor force participants; their criminal records, however, constitute an artificial barrier to employment commensurate with the individual's skills and qualifications. Thus, these records are commonly used by employers, public and private, as the sole basis for their employment decisions in hiring, firing, promotion, placement, etc. This paper will discuss the Department of Labor's involvement in manpower programs for offenders and how the effectiveness of these programs is often minimized by employers' use of criminal records as artificial barriers to employment. Present efforts to minimize or eliminate artificial barriers will be described and assessed and recommendations will be presented for a coordinated strategy to achieve the manpower, criminal justice and humanistic goals of the department's offender program.

1. Defining the Problem

The Comprehensive Employment and Training Act defines an offender as any individual subject to pretrial, probationary, parole or institutional stages of the judicial, correctional or probationary process where manpower services may be beneficial. Thus, individuals with records of arrests or of conviction are within the scope of the Department of Labor's jurisdiction. Based on information provided by the Federal Bureau of Investigation, it is estimated that at least 30 million, and perhaps as many as 50-60 million, individuals have records of arrest or conviction.

In all probability, at least half of all arrests do not result in convictions; and of those convicted, perhaps 25 percent receive jail sentences (less than one year) while no more than 1 percent of all arrestees receive prison sentences.

The public's stereotype of the offender as an imprisoned felon is therefore is highly erroneous. Yet because of this stereotype, employers refuse employment to individuals on thebbasis of a past criminal record. Fear of customer or client reaction, of co-worker non-acceptance, or of becoming the victim of any new crimes by the offender, are some of the reasons given for refusing to hire.

Public policy has been, however, strongly opposed to artificial barriers to employment, in general, (e.g., those based on race, sex, age, or any other irrelevant criteria) and appears to be moving to one opposing such barriers to the offender. What information there is available suggests that offenders can often be better employees than "non-offenders." Moreover, the relationship between crime and unemployment, highly complex as it may be, indicates that the elimination of criminal records as an artificial barrier to employment can be an important weapon in the war on crime. The primary utility of criminal records lies in their relative low cost as permitting screening of "undesirable" employees. Yet the low cost results from the lack of attention to employment related characteristics, and results in an artificial barrier to employment. Only the use of records of offenses which are directly related to the employment position in question does not constitute an artificial barrier to employment. Yet no attempt has yet been made to empirically link crime with jobs (job-nexus).

2. The Status of Artificial Barriers

A single contact with the criminal justice system (arrest) will generate numerous records of that arrest from local police files, to state identification

bureaus, to the Federal Bureau of Investigation--not to mention local newspaper reports of arrests collected by credit bureaus. Often their records are both inaccurate and incomplete, commonly failing to show dismissal of charges or a not guilty finding in court. These records are used by employers in three distinct situations:

-Public employment

-Private employment

-Licensing and Security clearances requiring government approval for third party employment

A. Public employment artificial barriers are usually based upon statuatory provisions either denying employment or permitting public employers at their discretion to deny employment based upon criminal records. While the discretionary bar is most common, rarely is there any legislative guidance for its application; on the contrary, the use of such vague phrases as "good moral character" is much more prevalent than specifications such as a heroin abuse conviction job bar for medical employment.

And, although the U.S. Civil Service Commission (CSC) does seemingly provide guidance through its 8 point "suitability" standards, several studies indicate this guidance is illusory at best. Congressional concern has resulted in a provision of CETA requiring the CSC to report to Congress on ways in which federal employment of offenders can be increased with special references to CSC suitability criteria. On October 10, 1974, a report was forwarded to the Congress. It may be characterized, however, as unresponsive to the Congressional intent for determining ways in which offender employment might be expanded within the Civil Service. A separate study by the Government Accounting Office is also underway. It should be noted that in addition to civil service, the federal government provides employment opportunities through the semi-autonomous Postal Service, which appears to have a policy against hiring offenders.

A major difference between federal (excluding the Postal Service) and state and local government as employers is the latter's use of records of arrest without a conviction as the basis of employment denial. Two Department of Labor funded studies have shown that 50 percent of state governments and 75 percent of local governments will not hire individuals with arrest records. In contrast, the CSC has removed questions about arrest from employment questionnaires--although it has not conceded that it lacks the right to use and evaluate arrest records in those situations which the CSC solely believes to be relevant.

B. Governmental regulation of third party employment through licensing or security clearances procedures are similar in operation to non-federal civil service in (1) failing to have guidelines, (2) using vague criteria such as "general moral character," (3) often having per se disqualifications, and (4) using records of arrest without any conviction. Of special concern are those states which provide training to offenders in prison for occupations where they cannot receive a license.

C. Numerous studies have shown that private employers deny employment on the basis of arrest records. In part, the use of arrest records rather than conviction records was due to their relatively greater availability to employers, either directly from local police or through private detective agencies and credit bureaus. In the past few years some large employers have begun to replace the use of arrest records with those of conviction. In part, this change is due to EEOC investigations of minority hiring practices since minorities are arrested out of proportion to their numbers.

3. Impact of Artificial Barriers

Artificial barriers to employment of offenders are clearly a substantial factor in the labor market, acting to limit individuals with criminal

records (perhaps 25 percent of the labor force) from employment in millions of jobs. Formal barriers to public employment are in some respects a greater problem than that posed by private employer practices, since this public stigmitization acts to reinforce both the offenders' sense of lack of worth and private employers' discriminatory practices.

A second result of these artificial barrier practices is the increased crime from the higher probability of recidivism that flows from lack of financial resources, excess leisure time and other consequences of un- and underemployment.

4. Legal Environment

Nothwithstanding any commonality of practice, the use by employers of criminal records as the basis of decision making is often not permitted by law. Thus, the use by public employers or licensing authorities of records of arrest without conviction has been barred by the courts as violative of constitutional due process requirements. However, considerations of due process permit the use of conviction records in those instances where there is a "direct relation" or nexus between the conviction and the duties and responsibilitites of the employment position in question.

While public employers are legally restricted in their use of criminal records, no such broad prohibition limits private employers. Private employers must, however, refrain from directly or indirectly discriminating against minorities in their hiring policies under Title VII of the Civil Rights Act of 1964. As interpreted by the courts, Title VII provides the same limitations to private employers as due process does to public employers. State laws (e.g., human rights laws, fair employment laws and in two states--Massachusetts and Hawaii--offender and anti-discrimination laws broader than Title VII) may also be applicable to all job applicants.

Most employers, public or private, are not aware of the law's limitations on their use of arrest or conviction records; there has been little or no attempt by government to inform them--with the exception of case litigation by the Equal Employment Opportunity Commission and individual litigants.

5. Looking Toward Solutions

The two prime factors in the artificial barriers problem are (1) employers' belief in the relevancy of criminal records and (2) the availability of criminal records to employers. Proposed solutions to this problem address one or both of these concerns.

The availability of criminal records has resulted in two different proposals: the expungement or removal of arrest and conviction records from law enforcement files, and "security and privacy" laws setting forth comprehensive procedures to ensure that non-law enforcement personnel do not receive criminal records. What evidence there is, however, suggests that neither procedure has had complete success and there are no plans at present to study how these laws can be made to become more effective. Indeed, there are no studies to determine which criminal records are useful to law enforcement, although LEAA has indicated its belief that no more than 25 percent of criminal records in state files need be retained in a computer criminal record system.

Efforts to change employer practices have begun with lessening in the public stigmatization of offenders through repeal of state restrictions on offender employment and in several instances the passage of anti-discrimination legislation prohibiting the use of arrest records or (in two states) con-

victions. A Certificate of Good Conduct for ex-offenders has been proposed but presents dangers which should be studied.

Programs to change employer attitudes have been numerous, particularly job development efforts. DOL has also worked with the American Bar Association, National Alliance of Businessmen and the Jaycees to gain institutional support for its efforts; a noticeable omission has been that of the AFL-CIO and its affiliates.

Concern for coordination of efforts lead first to the Model Ex-Offender Program and then the Comprehensive Offenders Manpower Program. The most ambitious of these, COPE, has not been tested, although federal funding is expected to begin soon.

6. A Comprehensive Strategy

The problem of artificial barriers to offender employment may be treated as one element (although by far the largest excluding race and sex) of the larger problem of artificial employment barriers in general. The dimensions of the problem (25% of the work force) are such, however, that the offender perspective can well be the primary emphasis of concern. Either approach finds support in the Comprehensive Employment and Training Act and DOL's program history. What is needed now is to go beyond this history and the earlier view that the artificial barrier question is merely a technical-operational issue to a policy concern for its resolution.

A comprehensive strategy for DOL is needed--for ad hoc policy determination is no policy at all. This strategy must encompass (1) all DOL program activity, directly and indirectly relating to offenders; (2) other federal agency actions relevant to offender employment barriers; (3) labor market strategies to impact upon state and local government and private employment

barriers; (4) linkage between criminal justice system and the labor market; (5) the supporting research ard development of new strategies; and (6) DOL planning to support the strategy development.

DOL's Federal Role:

- Public employment program under CETA should be used by DOL to encourage state and local government changes in their offender employment policies.
- Other DOL activities such as Job Corps, Bureau of Apprenticeship and Training, etc. should be coordinated in their efforts to encourage labor market changes in offender employment practices and policies.
- Work with other federal agencies to increase access to federal civil service employment (CSC, EEOCC), state and local government employment (EEOC, DOT Office of Revenue Sharing, LEAA Office of Civil Rights Compliance) and private sector employment under their jurisdictions(id).

Labor Market Role:

- Present DOL efforts to encourage repeal of state and local governmental barriers to offender employment should be continued and expanded to link with job development.
- Guidelines for job development should be prepared to emphasize quality of placement; R&D development of job-nexus relationships with past criminal activity should be part of such guideline activity.
- Continuation of present organizational educational efforts (e.g., NAB) should be expanded to organized labor.
- A special effort is needed to inform employers of the often illegality of present barrier practices.

Criminal Justice Role:

- DOL should work with the federal criminal justice systems for the development of new manpower linked CJ models.
- New programs such as linking manpower services with bail agencies or probation should be tested.

Research and Development Role:

- Research should focus on why and how employers discriminate; personnel managers could be given special training for use of job-nexus criteria.

Implementation of these recommendations will require a policy committment by DOL for the elimination of artificial barriers to offender employment. Operationally, this will require specialized staff assigned to develop and implement an offender plan, for leadership is needed, both within DOL and within the federal government as a whole. In the past, DOL has provided the leadership (albeit inconsistently), particularly insofar as its activities have prompted proposed federal and state legislation. The Department indicated its belief in 1971 in testimony to the Congress that the time for action is now. We agree.

INTRODUCTION

In the early 1960's the Department of Labor began to develop a policy of concern and involvement with the criminal offender as a special focus for manpower services.[1/] In 1973, the Congress formalized this involvement with the first permanent grant of authority to DOL for special manpower services to offenders under the Comprehensive Employment and Training Act (CETA) of 1973.[2/] The reasons for this long involvement are many; among them are: (1) the potential reduction of criminal recidivism,[3/] (2) the identification of individuals in need of manpower services through the criminal justice system,[4/] and (3) humanistic concerns for reform of criminal justice to ensure individualized treatment for the offender.[5/]

Whatever the department's motive, the provision of manpower services to the offender is rapidly becoming a permanent part of the fabric of criminal justice from pre-trial release[6/] through incarceration and parole.[7/] The effectiveness of these manpower services is, however, limited by external forces within the larger community. Through the existence of artificial barriers to employment based on criminal record histories unrelated to actual employment capabilities and qualifications, discriminatory personnel practices limit the ability of offenders to utilize manpower services. Thus, millions of individuals in the labor force are adversely affected by the mere existence of a criminal record of arrest or conviction.[7a/]

Past research of the Department of Labor has documented the existence of these barriers;[8/] and present program efforts are to some extent a reflection of departmental concern for this problem.[9/] However, there has been no

systematic review of the status today of this special employment problem of artificial barriers to employment by DOL or anyone else. To that end, this paper shall focus on:

--identifying and describing artificial barriers;

--describing the extent to which they operate;

--describing and assessing the effect of major efforts to remove barriers and obstacles to such removal; and

--presenting recommendations for new program and research and development initiatives.

The emphasis here will be on DOL efforts under Title III of CETA and to present alternatives for what might be done under that authority. Implicit in the analysis will be questioning of what the balance should be between DOL involvement in criminal justice program reforms or with labor market. Before proceeding, two caveats are in order.

First, much of the data that is needed for full discussion is not available. Where this is the case, estimation will be provided. Parenthetically, the reader might note that the failure of data collection may be taken as a sign of society's low interest in that data [10/] and the offender.

Second, two studies of artificial barriers to federal employment are presently under way. One study is by the U.S. Civil Service Commission itself, the other is by the General Accounting Office for the U.S. Congress. Hopefully, these studies will add to our understanding of the dynamics of employment decision making regarding offenders for at least that federal segment of the labor market.

I. Some Preliminary Definitions

Before beginning with a description and analysis of the artificial barriers to employment facing the offender, we shall first briefly discuss:

(1) who the offender is--and where; (2) where criminal records are kept and they are obtained by employers; and (3) what types of employer practices are encompassed by the term artificial barriers.

1. The Offender

An offender shall be defined here as any individual with a criminal record of arrest or conviction. This definition conforms to DOL's responsibilities under CETA and parallels the reality of employers' equating arrest with conviction.[11/]

HOW MANY? The Federal Bureau of Investigation recently reported it had on file about 21 million individuals with records of arrest.[12/] Since not all arrests are reported to the FBI[13/] we estimate the sum total of offenders to be probably no less than 30 million individuals and possibly as high as 50 million.[14/] Moreover, the growth rate of first arrests is, we estimate, between one and two million per year.[15/] Not all of these offenders, however, are in the labor force.[15a/] No labor force data for offenders exist except that for incarcerated (prison) offenders which shows that 77 percent worked within the last ten years.[16/] On the basis of these and more generalized statistics on labor market participation, it is clear that a substantial number (probably 20-25 percent) of the nearly 91 million labor force[17/] are potentially affected by past criminal records.

WHERE? Few arrests result in convictions. Few convictions result in prison or jail. Thus, virtually all persons with criminal records are in the community, although on any one day there are probably 350,000 individuals in prison or jail--75,000 of them awaiting trial.[18/]

Thus, of the nine million arrests in 1974[19/] these will result in about

three and one-quarter million convictions;[20] of these, 500,000 will be for felonies with supervised and unsupervised probation rather than prison being the usual sentence;[21] only 100,000 will enter prison.[22] The two and three-fourths million misdemeanor convictions will result in about 1.2 million suspended sentences or fines, one million jail sentences, and 300,000 individuals on probation.[23]

Thus, the stereotype of an arrestee as a felon serving time in prison is far from the truth. Rather, he is simply arrested, the probability for arrest for an urban white male being 58 percent, for the urban black male being 90 percent. Moreover, once arrested an individual is likely to be rearrested (for reasons not necessarily related to criminal behavior); the median number of arrests for urban white males is 7, for blacks, 13.[24] Propensity to rearrest is not a uniform phenomenon, however. Perhaps one-third to one-half of those once arrested are never rearrested.[25]

WHO? Basic demographic data about offenders at various points in the criminal justice system is extremely limited. Some data are available about arrestees, while detailed data are available about those in prison. Virtually nothing is known about those at other intermediate steps in the criminal justice flow:

> Persons Arrested by Police: If one looks at all crime, serious and less serious, the typical arrestee is white (70 percent) under 25 (53.6 percent) and male (85 percent). Blacks represent 27.5 percent of all arrestees. For serious violent crime, blacks represent 54.8 percent, whites 43 percent.[26]
>
> Jailed Offenders: Offenders in jail may be awaiting trial, awaiting sentencing or serving sentences, normally for less than one year. In 1970 about 69,000 were on any given day serving sentences in jail following conviction. About 75,000 were awaiting trial and 5,000 awaiting sentencing. Virtually all those serving sentences in jail are male over the age of 18. About 4 percent are female, and 3 percent are juveniles.[27]

Offenders in Prison: Compared to arrestees, offenders in prison are older (only 33 percent are under 25), more are males (95 percent) and have a greater proportion of blacks (40 percent). As of 1970, about 25 percent have completed high school; the median grade level is 9.8[28], a grade higher than the 1960 census showed.[29] About one-third have had vocational training,[30] and the Uniform Parole Reports show that over half of the parolees released in 1970 accounting for 65 percent of all releases [31] were classified as alcohol abusers, and another 29 percent as drug abusers.[32]

Offenders in the Community, Probation, etc.: No data available, although one might assume that they are better risks than those in prison.[33]

WHAT? The offender stereotype of the mugger or violent felon is an inaccurate one. The large bulk of arrests (68 percent), are for minor misdemeanors, with victimless crimes such as prostitution, drug law violations, gambling, disorderly conduct, drunkenness, etc., accounting for 45 percent of all arrests.[36] Only 20 percent of all arrests in 1972 were for serious crimes, both those of violence and those involving only property.[34] And of serious arrests, nearly 4/5 were for property crime--burglary, larceny and autho theft.[35]

Juvenile Offenders

Special note should be given to the fact that juveniles comprise a significant proportion of arrests. Nearly 34 percent of all arrests are of individuals under 18.[37] Over half of these arrests will be referred to juvenile court intake, the remainder will be processed as adults by the police.[38] While presumably the records of cases referred to juvenile courts are kept confidential, this is often not the case. The police may treat an arrestee like an adult by forwarding the individual's fingerprints to state and federal criminal record files, notwithstanding juvenile status.

Fingerprints once received are rarely sent back.[39] Thus, juvenile arrest records are commonly treated the same as adult records for all practical purposes.[40]

2. The Criminal Record

For any single contact with criminal justice, records of arrest and/or conviction exist at a multitude of points. Police records are kept at the precinct "blotter," at central police files, in state criminal information systems and by the Federal Bureau of Investigation. As the individual proceeds through the criminal justice system, additional record files will be kept by the courts, by the corrections system and by the parole or probation officer. These files will contain name, fingerprint, past criminal record, demographic data and other information. Access to any of these criminal record files may be had by virtually any law enforcement agency, a multitude of personnel within those agencies, and other governmental bodies including civil service[41] and licensing agencies.[42] Private employers are often given access either by law,[43] or custom. In some instances, private employers have used private detective agencies or credit reporting firms to obtain criminal record information.[44] In at least one instance a metropolitan police department has made a practice of notifying employers of the arrest of an employee,[45] and the Federal Bureau of Investigation regularly informs federal government agencies of the arrest of an employee.[45a]

But while this information is readily available, often through computerized fingerprint-offender files, it is in all too many instances inaccurate or incomplete.[46] This is particularly the case for clipping services for newspaper reports of arrests used by credit agencies.[46a] Even police arrest records commonly fail to provide information about any subsequent disposition of the arrest.[47] Court and correctional records are also replete with inaccuracies.

While a criminal record of arrest may be the basis for employment denial, the availability of this information through law enforcement agencies, credit bureaus, private detective agencies, etc., is so common that the employer may not ask an applicant about his or her criminal record history and consequently the individual may never know the reason for the denial of employment. On the other hand, applicants will commonly reveal the fact of arrest or conviction to inquiries by a prospective employer - often, it should be noted, with inaccuracies, such as equating arrest with conviction.

In many instances, employers may not recognize the inequity or--as discussed later--the possible illegality of refusing employment on the basis of a criminal record. A derivative problem is, however, while a secretive rejection is itself objectionable, the mere asking of a job applicant about prior arrests or convictions may itself discourage the individual from even applying for a job.

3. Defining Artificial Barriers

Offenders are but one segment of the work force faced with artificial barriers to their employment. Federal and state legislation has been enacted in efforts to prevent job discrimination on the basis of age,[48/] ethnic or religious background, religious affiliation, sex[49/] or because the individual is physically[50/] or mentally handicapped.[51/] Where these and other factors such as positive educational requirements are unrelated to the individual's ability and aptitude for satisfactory job performance, the employment requirement or barrier may be said to be artificial.

The essence of artificial barriers then is the failure to individualize job requirements so as to relate the applicant's abilities to the actual

requirements of the position in question. The offender is often faced with such barriers because of employer assumptions related to the fact of a criminal record. Such assumptions include:

--an arrest indicates the individual committed a crime;

--commission of a crime indicates a lack of needed skills and inability to perform work satisfactorily;

--commission of a crime indicates an immoral or unworthy personality;

--commission of a crime indicates the probability of future crime - perhaps directed at the employer, co-workers, and clients or customers.

These assumptions about the relatedness of a prior criminal record to employability exist at all levels of the employment relationship from recruitment, selection, placement through promotion practices of employers and their agents. In the main, however, the impact of artificial barriers is felt strongest at the point of hiring. Thus, until recently the existance of a criminal record as revealed by the job application or pre-employment check resulted in the applicant's rejection without any evaluation of the individual's qualifications. Five factors supported this policy:

-The general practice of most employers was similar, hence reinforcing.

-Tacit acceptance of this policy prevented the policy question from even arising, as to whether the policy was fair to the applicant.

-Similarly, until the mid-60's,the unemployment rate was high enough so that most employers did not have to seek to find qualified applicants.

-Ease of decision making was enhanced by an automatic policy, reducing the cost of employee recruitment.

-The absence of an explicit policy for offender employment presents a potential threat to the hiring manager should the offender fail in the employment situation.

Recently, under the impetus of Title VII and other governmental activities, many large employers have reassessed their offender employment policies, giving no attention to arrests without conviction and individualizing, to some degree, decisions regarding offenders with conviction records. Nonetheless, the use of arrest records and automatic rejection of arrestees is still common.[51a/]

Where individualized consideration of conviction records occurs, the conviction is considered for its relevance to the duties and responsibilities of the job position. But, employers, both private or public, have failed, in the main, to provide hiring officers with specific criteria for evaluating conviction record relevance for employment. In the absence of such criteria to judge whether convictions for loitering or marijuana possession are relevant to a clerk-typist position, for example, personnel managers may be hesitant to hire the offender or may make decisions based on idiosyncratic moralisms. One study of employers personnel officers found that a critical determinant of decisions to hire was the personnel officer's review of the conviction and sentencing processes for a determination of whether the individual had been punished adequately or not.[52/] If there had been sufficient or excessive punishment, the individual was hired, if insufficient, the applicant was rejected.

The major import of conviction records is that the conviction signifies that there has been a judicial determination that certain behavior has in fact occurred. Arrest records, in contrast, signify that certain behavior may have occurred and that this behavior may have been criminal. Thus, over one third of all arrests are dismissed by the police themselves or by the prosecutor without any attempt to prosecute. And of those prosecuted, about 20% are not convicted. To illustrate, data from the Los Angeles Annual Police Report for 1973 show that of 487 homicide arrests, 116 were released without

a criminal complaint;[53] Kansas City's Annual Police Report for 1973 showed that of 115 homicide arrests, 53 were dismissed prior to trial.[54] In addition to the normal defects of a police arrest, even in the instance of homicide, it should be remembered that arrest may result from the issuance of a bench warrant by a lower court judge or magistrate on the untested and unverified word of a complainant (who is not a police officer).[55]

Despite these infirmities of arrest records, employers still claim the right to make factual determinations about the alleged crime and its putative relationship to employment.[55a] This "retrial" may seem objectionable to some, on the basis of constitutional-like arguments--such as the presumption of innocence, double jeopardy prohibitions and equal protection--but these arguments seem less significant than the due process needs for a fair hearing. Such a fair hearing does not seem possible for these reasons:

- There is a lack of impartiality of the fact finder (e.g., unpressured and unbiased judge)
- There is a lack of protection against ex parte proceedings and decision making (e.g., compulsory process, confrontation of witnesses and right to testify)
- There is a lack of counsel or other assistance
- There is a lack of rules of evidence to insure reliable testimony (e.g., hearsay rules)
- There is a lack of objective standards for fact finding or decision making.

Given these possibilities for abuse, it seems hard to justify (from the perspective of any cost versus benefit to society) the continuation of employers relying on arrest records for screening job applicants. At best, it appears that the sole utility of arrest records is to signal for an in-depth examination of an individual's job credentials. But, the

District of Columbia's personnel office has indicated its belief that arrest records do not add any information not obtainable from the mere examination of the applicant's work history.[55b/] If true, the same observation would also be applicable to conviction records except for those statistically few cases involving serious psychological maladjustment.[56/] The failure of employers to demonstrate in numerous public hearings any general utility for arrest records in their decision making supports the conclusion that the usefulness of the arrest records lies solely in their convenience. They eliminate a need for in-depth examination of the applicant's credentials; whatever adverse information they signify exists within the applicant's employment history. The difficulty is that this same convenience creates the artificial barrier to employment by denying individualized consideration. One cannot logically accept both the use of arrest records, with individualized consideration of employment credentials, and also expect a savings in the cost of reviewing job applicants. And since the same results might be expected, with or without the use of arrest records, their use must imply a loss of individualized job consideration. Such superficial use is by definition an artificial barrier to employment.

II. DESCRIBING ARTIFICIAL BARRIERS TO EMPLOYMENT

Artificial barriers to employment may be categorized into three types. These are:

--Legislative/administrative barriers denying governmental employment (e.g., civil service).

--Legislative/administrative barriers limiting private employment - through occupational or professional licensing or governmental security clearance requirements.

--Private employer practices and procedures.

In addition to these primary barriers, an offender may be denied employment because of an inability to gain a driver's license, bonding or employment agency referral.

A. Government (Civil Service) Discrimination

The employment practices of government act first to deny employment opportunities within the fastest growing sector of the economy[57/] and, secondly, as setting an example for private sector discrimination. The federal government is perhaps most conspicuous in its practices--including those of the Postal Service--but state and local governments have the largest share of the public sector labor force.[58/] But while numerous national commissions have recommended the abolition of legislation authorizing or requiring public employment offender restriction,[59/] change has been slow.

In the federal government the U.S. Civil Service Commission is initially responsible for determining the acceptability of job applicants. By virtue of Executive Order 10450[60/] the Commission checks arrest records of applicants through the FBI--with, of course, the numerous errors that such second hand records contain.[60a/] In 1966 President Johnson ordered the Commission to study its hiring practices regarding ex-offenders.[61/] As a result, the Commission in

1968 revised its procedures to remove questions about arrests without convictions from employment application forms for all but security sensitive positions.[62/] A second change was that individuals who had been convicted are not per se ineligible, but must have their "suitability" for employment determined by the CSC and the hiring agency.[62a/] However, the Commission has not changed its position that it has the right to refuse employment on the basis of a record of arrest without a conviction; how often the Commission or the federal agencies have exercised the right is unknown.

In practice, the procedures for suitability determinations are subject to criticism. Most significantly, there has been virtually no development of the job relatedness criteria, such as relating specific crimes to occupational groupings. Other problems have been documented by a study for the Inter-Agency Council on Corrections.[63/] These include the inability of incarcerated offenders to be examined, an extensive period of investigation for three to six months, and local and regional personnel ignoring suitability regulations' limits on their discretion.

In the past two years, Senators Percy and Javits have requested information about the impact of the suitability regulations. The CSC has refused to provide this data, claiming it would invade the privacy of ex-offenders. Perhaps in response, Section 605(e) of CETA, introduced by Senator Javits, requires the Commission in consultation with DOL to report to Congress on how its ex-offender regulations and procedures can be changed to expand ex-offender employment. On October 10, 1974, a report was forwarded to the Congress. It may be characterized, however, as unresponsive to the Congressional concern for determining ways in which offender employment might be expanded within the Civil Service. A separate study by the Government Accounting Office is also under way, due in April 1975.

Instead of reporting on how ex-offender employment may be expanded, the Commission issued in December 1973 a notice of rulemaking, which, if adopted, will broaden the ability of the Commission to deny ex-offenders employment on the basis that their employment would adversely affect the reputation of the agency and the government.[64/] More recently, it is reported that there are plans to utilize the federal suitability requirements as a replacement for national security requirements. The intent here is to get around the court's emasculation of the national security specifications in various executive orders by repackaging the same content in a new format.

About 700,000 federal jobs are under the U.S. Postal Service. While technically a semi-private corporation, its employment practices are regulated by the federal government through the Civil Service Commission. Until 1973, the Postal Service excluded job applicants on the basis of arrest records only. Since December 1973, a consent order signed by the Postal Service forbids such exclusions.[65/]

As for convicted offenders, the Postal Service regulations apparently required a local postmaster to justify hiring an ex-offender.[66/] As a result of these regulations, many local postmasters are understandably under the impression that they must refuse employment to ex-offenders. Litigation challenging this assumption may soon be resolved by a consent decree upholding the litigant.[67/]

State and local employment practices were studied by Herbert Miller for the Department of Labor.[68/] Among the major findings of this and an earlier DOL funded survey by the National Civil Service League [68a/] were:

--50 percent of state governments will not hire individuals with arrest records

--75 percent of county and local governments will not hire individuals with arrest records;

--four states have legislation forbidding civil service employment to many, if not all, convicted individuals;

--in another twelve states legislation provides for discretionary ("may not") refusal of civil service employment on the basis of a conviction;

--civil service hiring procedures in many states often result in "unreasonable delay" in processing applicants' papers due to their prior criminal record;

--the use by government agencies of questions on job application forms relating to arrest records serve to discourage ex-offenders from applying for civil service employment.

State and local governmental employment has been one of the most rapidly expanding sectors of the economy, rising from 8.6 percent in 1953 to 14.4 percent in 1970 of the total employment on non-agriculture economy payrolls. 69/

While public employment, then, constitutes a major segment of the employment market, millions of these jobs are closed to ex-offenders for reasons that bear little relationship to their qualifications. Thus, of those 12 states that by legislation either mandate or permit discretionary denial of employment, it is noteworthy that this group includes the most populous states, New York and California, as well as other large states such as New Jersey, Connecticut, Massachusetts, and Ohio. 70/ Another 21 states, including Illinois, Indiana, Maryland and Pennsylvania 71/ also permit denial of employment based on determinations of "good moral character", which is often declared lacking on the basis of a prior criminal record.

But as a National Civil Service League survey shows, 72/ county and local public employers discriminate against offenders, particularly those with arrests without convictions, to a far greater degree than do the states. 73/

While there has been progress in state employment of offenders, no such change is seen in local personnel practices. In part, this lack of change is due to the lack of attention paid to local government as an employer, a notable exception being an order of the Undersecretary of Labor in 1971 that local cities under the Public Employment Program be forbidden to deny

employment on the basis of arrest records.[74] In contrast, the Federal Equal Employment Opportunity Coordinating Council failed recently even to consider arrest or conviction records in preparing its draft guidelines for state and local public employers, under Title VII of the Civil Rights Act.[75]

B. Government Licensing

Licensing, it is claimed, is necessary to protect the public from unqualified or unethical practitioners.[76] With about 10 million individuals affected by licensing law,[77] there are approximately 2,000 licensing restriction in the 50 states related to crime records and which restrict the offender's right to work in nearly 350 different occupations.[78] Again, as with public employment, service occupations such as those encompassed by license laws are in an expanding sector of the economy.[79]

The manner in which these licensing barriers operate is very similar to those relating to civil service employment (described supra): Procedural delays discourage all but the most persevering; most licensing barriers are discretionary, not per se exclusions; and the phrase "good moral character" is defined in practice to encompass criminal "acts," including arrests.

A hybrid variant of state licensing laws operating to the disadvantage of ex-offenders of particular note is that of the Alcoholic Beverage Control (ABC) laws of several large states, including New York, California, New Jersey, Connecticut and Missouri. In these states, ex-offenders can not work in places where alcohol is sold without the permission of the ABC Commission. This may include not only retail liquor stores, but also restaurants, night clubs, grocery stores and even private garbage trucks, and includes the

occupations of waiters, busboys, bellhops, dishwashers, etc. In New York City alone, the Vera Institute of Justice estimates that 250,000 jobs are affected by this requirement of offenders needing ABC Commission approval--which often is not given.[80/]

State licensing laws are not, however, the sole licensing barrier facing offenders. Virtually all municipalities have local ordinances regulating numerous occupations including such low skill occupations as taxi drivers or even street vendors. A study of licensing laws for the Department of Labor by the Educational Testing Service indicates that local licensing laws have a greater impact on employment opportunities than state licensing laws do.[81/] Virtually no studies of local licensing laws exist, however.[82/]

A related consideration is the need to coordinate state licensing policy with state correctional policy. Thus, until recently, such states as New York, Illinois, and Kansas, to name but three, provided their correctional inmates training to become barbers, but state licensing laws forbade their getting a license in <u>those</u> states. While cynics might consider this training to be a subtle form of banishment or exile, a number of these states have recently taken steps to provide discretionary licensing and to mandate that correctional training is acceptable for the institutional hours requirements of state licensing regulations.[83/] The fact, however, that legislation was required does not make one hopeful about the concerns of the licensing boards for offender rehabilitation.[84/]

C. <u>Private Employment</u>

The great bulk of jobs in the economy are in the private sector. Here, as we have already noted, the offender faces barriers to employment based on

a record of arrest or conviction due in part to employer fears of employee or customer reactions as well as a fear of crime directed at the employer.

Numerous studies have documented the fact that private employers often refuse employment to individuals upon the basis of a record of arrest or conviction. The President's Commission on Law Enforcement and Administration of Justice, for example, noted that 67 percent of employers in New York City would not hire individuals with a record of arrest.[85/] A more recent report of the New York City Human Rights Commission reported that an estimated 28 percent of the positions available in those occupations embraced by manpower programs had disqualifications for any one with a conviction record.[87a/] While there is some suggestion that employers are changing their hiring policies to ask about convictions rather than arrests,[86/] evidence to show that individualized consideration of the offender will be provided is scanty. (Indeed, the reader might note that there are virtually no studies of employers' use of criminal records since 1967.) However, as the Equal Employment Opportunity Commission and other agencies press for crime-job relatedness criteria, private employment hiring practices may then become individualized.[87/]

But if we have some base of negative information about employers' offender hiring practices, we know nothing about how employers apply crime-job nexus tests. Nor are there any offender related studies of employer recruitment, promotion or placement practices. And, needless to say, there are no studies validating a crime-job performance nexus.

It is perhaps somewhat ironical, then, that the only other information available about offender employment is that which testifies to their success as employees.[88/]

D. Secondary and Other Barriers

In addition to the barriers already discussed, numerous secondary barriers exist--particularly at the federal level.[89/] Secondary barriers are those restrictions which relate to the obtaining of employment qualifications rather than employment per se.

The most important of these results from the necessity for many private contractors to obtain security clearances for their personnel so as to fulfill their government contracts.

The Department of Defense reported in Congressional hearings[88/] that over 1,000,000 private sector jobs (and about three times that number of federal, military, or civilian employees) are immediately affected by DOD security requirements. It is not known, nowever, how many jobs are indirectly affected through companies applying the same hiring qualifications to non-DOD related employment positions.

Secondary barriers affecting state and private employment also limit job opportunities. Chief among these are drivers' license laws. In about a dozen states,[90/] legislation permits or requires the withdrawal of drivers' licenses upon arrest or conviction of a crime or lack of good moral character. Since many jobs require a driver's license for their performance, the effect is to reduce job opportunities.[91/]

Fidelity bonding of individuals as a requirement for employment placement presents another secondary barrier. Until the Manpower and Development Training Act Amendments of 1965[92/] authorized a pilot Federal Bonding Program, employers were not able to obtain from commercial security companies a guarantee of recovery for dishonest acts of ex-offender employees. Expanded to a national program through the state employment services in 1971, it is unclear whether the bonding program is appropriately authorized by CETA.[93/]

It also appears that the bonding program is not reaching its maximum utility; efforts need to be made to explain to local ES personnel how to gain exceptions from "blanket" bonds, so that banks and other financial institutions can hire ex-offenders.[94/]

It is important to note, however, that fidelity bonding may often have a substantial deductable clause before becoming operative, so that in fact the employer (such as a banking institution) is in reality self-insuring against risk of loss in most positions for which offenders could be hired. But not withstanding any desire to hire, the employer will need a written waiver from the bonding company so as to keep the fidelity bond in effect for the non-offender employees. For some reason bonding companies seem reluctant to permit waiver without unnecessary and onerous conditions. And while the federal bond would give the employer protection for the deductable of the fidelity bond (thereby increasing his protection) the bonding companies will often request the employer not to obtain federal bonding as a condition of waiver. The main effect of the availability of federal bonding is not bonding itself, but as a source of pressure against bonding company discrimination.[94a/]

III. IMPACT OF ARTIFICIAL BARRIERS

The demonstration of the existence of artificial barriers and the supporting documentation of the congressional hearings on criminal justice data banks[95/] combined with the statistics on the number of offenders lead inevitably to the conclusion that the impact of offender discrimination is a significant factor in the labor market.[95a/] This is perhaps qualified by the possibilities that criminal records can be hidden from employers.[96/] Other facts suggest that this qualification is without merit where there has been a substantial period of incarceration; this period of time must be accounted for on resumes of employment experience, making concealment difficult. Incarceration for arrests, on the other hand, while perhaps of short duration, are difficult to hide from present employers. In any case, virtually all public employers and many private employers obtain criminal record information from local, state and federal law enforcement authorities.[97/] Computerization of criminal records threatens in the near future to make available the records of all offenders to any one who wants them,[98/] making concealment impossible. Finally, the point should be made that public policy should not be made on the assumption that offenders should be encouraged (or expected) to lie.

A. Offender Employability

Not all agree that artificial barriers are a significant factor for offenders in the labor force.[99/] Some argue that concern over artificial barriers, particularly licensing, is irrelevant to the realities of the labor market, since most offenders have such low skill and educational levels

that they do not compete for jobs subject to restrictions. Two points need to be made in response to this argument. The first is that this stereotype is based on perceptions of the skill level of offenders in prison,[100] not the millions of others with records of arrest—or, if convicted, those placed on probation. Secondly, even with reference to imprisoned offenders the argument about employability is wrong. At worst, the skill levels of ex-felons is not significantly different than that of other disadvantaged. Yet national policy, as discussed earlier, has been to work to eliminate employment discrimination affecting the disadvantaged for reasons of race, sex or whatever other non-job related rationale is used. It would be only equity to require similar efforts for even the ex-felon, and perforce, the arrestee, juvenile offender, or middemeanant.

More significantly, large numbers of those in prison are indeed employable by anyone's standards. Census data for 1970 indicate that about 25 percent[101] have completed high school. Earlier census data from 1960 show that only 33 percent were unskilled workers prior to incarceration,[102] the remainder being in professional, skilled or clerical work. Finally, it should be remembered that many jobs affected by formal statutory restrictions are well within the skill level of all but the lowest qualified individuals. Work as a busboy in a restaurant, driving a taxicab and so on does not require a college degree.

B. Symbolic Impact of Formal State Barriers

State legislative barriers may have an effect additional to that of denying employment. Some commentators have suggested that these formal barriers serve to "label" the offender to himself and the public as an "untouchable." Thus, these writers believe that people behave as others

expect them to behave. If society has labeled a person as untrustworthy, the individual will believe he or she is indeed not rehabilitatable and continue on a career of crime.[104/]

The existence of state barriers may also serve to reinforce private sector fears of hiring offenders. Support for this view comes from anecdotal reports on the Federal Bonding Program indicating that numerous employers have hired offenders on the strength of the ES demonstration of their being bondable, without requiring an actual bond. The rationale for this is their belief that the offender can not be such a bad risk if the government is willing to bond him.[105/] In some instances, state barriers may also serve as a direction to the private sector not to take any action prior to employment which might lead to eventual licensary review. For example law schools will often consider an applicant's arrest record in their admissions policy and decisions. The rationale for the policy is that the law school should not encourage an individual to spend finances in a futile attempt to gain bar admission. Of course, not every law school graduate applies for bar admission as legal training is often useful in business. And such practices also prevent the individual from challenging in court state policies discriminating against the offender.

C. Crime and Employment

Employment provides financial resources for the individual.[106/] In addition, the development of regular work habits, the avoidance of excess leisure time, the fact of participation in society, etc., all lead to the belief that employment is a necessary if not sufficient factor in offender rehabilitation.[107/] What data there is suggests that the relation-

ship between the two is highly complex. Looking at the single factor of financial resources, an unpublished U.S. Bureau of Prisons Study shows that prisoners released with relatively large sums of money ($8,000) are both more and less likely to recidivate depending upon their age.[108/]

However, the quality of manpower services suggests that we would be unrealistic in expecting major changes in client criminal behavior. Thus, for example, a study of vocational training in Michigan showed only 15 percent utilization of training upon release from prison.[109/] Nor have community corrections efforts been more successful. A recently completed evaluation of DOL pre-trial intervention programs showed that the impact of job placement and development services was of short duration - six months.[110/] A similar study of job placement assistance to parolees found no impact due to the poor quality of placements.[111/] Wtih so little primary effect (e.g., manpower services utilization) it is inevitable that studies focusing on the derived effect upon recidivism will have negative findings.

But, although research has not yet demonstrated any direct causal relationship between employment and crime,[112/] it is important to note that there is no research suggesting the contrary conclusion of no relation between crime to unemployment.[113/] Indeed, the likelihood of research demonstrating such a negative conclusion seems low, given both the *a priori* relationship between many types of crime and employment status as well as the numerous anecdotal descriptions of this relationship.

Future research should concentrate then on distinguishing between failure of manpower services upon, first, employment, and then, but only then, upon recidivism rates. Moreover such research should look at the offenders satisfaction with job placement, and not merely the fact of placement. Poor quality job placement may result in increased dissatisfaction with one self and society and thereby increase recidivism.[113a/]

IV. LEGAL ENVIRONMENT

Notwithstanding any commonality of practice, there are many circumstances where employers may not legally utilize criminal records of job applicants. Federal constitutional provisions and statutory legislation forbidding racial discrimination, as recently interpreted, prohibit the mere asking or utilization of applicant-arrest records and limit the inquiry into and use of conviction records in employment decisions. A brief discussion of these principles as they apply to both private and public sector employers is necessary to provide the framework for a more thorough understanding of the problems involved in alleviating or eliminating criminal records as an artificial barrier to employment.

A. Public Employment/Licensing

Like any other facet of government, public service employment and licensing are subject to the limitations of due process and equal protection guarantees of the Bill of Rights and 14th Amendment to the Constitution. The constitutional standard for due process and equal protection is that the action be rationally related to some legitimate governmental purpose.[114/] In some instances, this action must be the least drastic alternative available to government to attain that purpose.[115/]

Application of this constitutional standard to a public employment or licensing practice of rejecting applicants on the basis of arrests without convictions has resulted in a judicial finding of a lack of rational relationships between the arrest criterion and job fitness. Those court decisions such as the 8th circuit decision in Carter v. Gallagher,[116/] that have explicitly

dealt with this employment question have uniformly ruled to such effect; other cases involving state licensing privileges reach similar conclusions with the U.S. Supreme Court decision in Schwar v. Board of Bar Examiners being the leading case.[117/]

In addition to the federal due process requirements, a number of states have in recent years passed legislation[118/] or acted through administrative or executive order[119/] to prohibit state employers from denying employment or licenses on the basis of arrest records.

Civil service employment and licensing decisions may, however, legitimately take into account records of conviction, but with some important limitations.[119a/] In Carter v. Gallagher,[120/] the appeals court indicated that those convictions that are directly or reasonably related to the position in question may be taken into account in hiring decisions. Application of the "direct relationship" principle is, however, unpredictable at present. In one recent case,[121/] a U.S. District Court struck down a Department of Transportation reguation denying an interstate commercial driving permit if there had been a drunk driving conviction within the past year. The court ruled that the regulation was too broad in not limiting its application to drunk driving convictions while employed.[122/]

Although due process will permit some employment use of conviction records, equal protection guarantees may also be violated by the selective use of these records to bar employment. In Muhammed Ali v. Division of State Athletic Commission the court ruled where some individuals are granted licenses, despite convictions, but similar individuals are denied licenses, and no distinction between the two is given by the licensing agency, equal protection of the law is violated.[123/]

In addition to Constitutional prohibitions, Title VII of the Civil Rights Act limits the use of arrest or conviction records by state or local government employers. Numerous cases have ruled that their use by government is discriminatory and have enjoined their use.[123a/]

B. Private Employment

Private employers discriminating against ex-offenders violate Title VII of the Civil Rights Act of 1964 where the job applicant is a member of a minority group.[124/] Thus, under EEOC rulings the asking or use in employment decision of arrest records is per se a violation of Title VII[125/] because of the differential impact upon minorities and the lack of any provable employment qualification justification. Gregory vs. Litton is the leading case prohibiting the using of arrest records by private employers.[125a/] However, under Title VII convictions may be asked about and used, where they are directly related to the job in question.[126/]

State Human Rights laws forbidding racial discrimination may also bar private employers from asking or using criminal records for employment purposes.[127/] Other state legislation may specifically bar employers inquiring about records of arrest[128/] or conviction[129/] without regard to racial impact.

C. Conclusions

While the court decisions are not numerous, virtually all agree that neither public nor private employers may inquire about or use records of arrest. They may, however, inquire about or use limited types of conviction records. This is not to say that an employer may not legitimately ask about conviction records, but rather that those court decisions upholding this right are limited to the particular facts of that case[130/] and will

not support any broad based claim to permit discrimination against offenders. And, perhaps just as significant as the explicit court decisions are the substantial number of court cases that have been settled by consent decrees, with financial settlements for the plaintiffs in many of these cases.[131/]

But while the state of the law seems clear, few employers seem aware of the law's requirements. There have been virtually no efforts by government agencies to inform employers directly; in at least one instance, however, an EEOC investigation of minority hiring practices has resulted in that company and its affiliates replacing questions about arrest with one about convictions.[132/]

V. LOOKING TOWARDS SOLUTIONS

The crux of the problem of artificial barriers to offender employment is two fold: (1) the belief of employers that criminal records are relevant to their employment decisions and, (2) the availability of criminal records (as described earlier). The variety of partial solutions presently available have been aimed at one or the other of these factors. Record availability has resulted in litigation or legislation to expunge (destroy) criminal records; in a few instances there has been criminal prosecutions enforcing a state or local law prohibiting dissemination of criminal records to non-law enforcement agencies or personnel. More recently, there have been efforts to limit access to criminal records through "security and privacy" legislation. With respect to employer attitudes towards the offender, program efforts have aimed at changing these attitudes. Often such "educational" efforts are combined with manpower service delivery programs for offenders. But, until recently there has been little coordination of these various programs and other strategies; our discussion here will describe DOL efforts to develop local, state and federal coordinating models for offender manpower services.

A. Data Availability: Expungement

Efforts to restrict the availability of criminal records focused initially upon expungement[133/] or sealing of those records through case by case litigation or through legislation setting broad parameters defining eligibility for expungement.[134/]

In the main, litigation to expunge records has been directed at arrests without convictions.[135/] With some exceptions, the trend of

court decisions is in favor of permitting expungement,[136] but often limited to those cases where the record is clear that the initial arrest itself lacked probable cause.[137] The rationale for such a qualification is, perhaps, unconvincing,[138] and combined with the difficulty of showing a lack of probable cause in a courtroom setting,[139] reflects the ambivalence of courts towards "rewriting history." Given the limited impact of any single court decision,[140] the major effect of these cases has been to illuminate the need for legislative action.

Twenty states presently have legislation which, to varying degrees, expunge records of arrest not followed by a conviction.[141] Most of these states have had such legislation for many years, although there does seem to be a trend towards their adoption -- or at least their expansion to include all arrests not previously included. The effectiveness of these provisions may be somewhat doubtful for a variety of reasons, particularly the failure to provide for automatic expungement; instead, most legislation requires the individual to petition the court for expungement, which may often be subject to judicial discretion. In a few instances, arrest records are required to be returned automatically when charges are dropped or a not guilty finding occurs, but there is evidence indicating that the statute's mandate is not always followed.[142] Where a failure of return often occurs, it is less reasonable to believe that all copies of the arrest records are returned or destroyed. Moreover, the multiplying nature of criminal records from the stationhouse to central police files to state, interstate and federal record systems makes numerous returns for records necessary. Yet few of the expungement statutes[143] provide for notification

of subsequent expungement or of demands for return of expunged records to the state and federal agencies[144] as a part of the expungement process. A related problem is whether the individual whose record has been expunged can legally deny being arrested upon inquiry by an employer. Recent legislation in Connecticut[145] and Maine[146] includes such provisions, but most earlier legislation does not; the Maine legislation is interesting in that its language may also bar employers from using arrest records in employment decisions, although the legislation provides no remedies for such action (as injunction) by itself.[147]

In a number of states legislation exists to "set aside" convictions after a specified period, most commonly after successful completion of probation.[148] In Georgia,[149] the legislation specifically provides that the conviction has no legal effect for any purpose, so that an applicant may deny to the employer the fact of conviction.[150]

Any evaluation of the merits of expungement must weigh the law enforcement utility of criminal records against their discriminatory employment effect. Yet no study of the actual usefulness of criminal records exists. Some evidence that most criminal records have little or no utility does exist, however. Thus, LEAA has testified to Congress that of 18 million arrest files in the states, only 5 million need be retained when these records are transformed to a computerized retrieval system.[150a] It may well be that a study of the actual utility of criminal records would reduce their number even further--leading to the possibility of a reduction in those files and consequently reducing the employment problems of millions of offenders.

B. Data Availability: Security and Privacy Laws

As indicated earlier, while numerous states and local jurisdictions may

have laws or policies prohibiting release of criminal justice records to non-law enforcement personnel, the piecemeal structure of these laws seemingly has had no effect in inhibiting employer access to such records.[151] With the simultaneous advent of both increased record availability through computer technology and federal funds for this technology from the Law Enforcement Assistance Administration, concern has turned from mere prohibition to devising regulations and procedures for ensuring the "security and privacy" of computerized criminal record data banks.[152]

As a result, legislation has been introduced into Congress to regulate both the Federal Bureau of Investigation[153] and the states[154] in their dissemination of criminal records. In the main these proposals would complement other state legislation now in effect such as the bans on release of information to employers.

A number of states have already passed security and privacy legislation, including Massachusetts, Arkansas, Alaska, California, Louisiana, Minnesota, and Iowa.[155] The experiences of these states with security and privacy legislation is, however, unknown. The question thus remains unanswered whether rules and procedures can inhibit unauthorized dissemination of criminal records.[156] Indeed, what evidence there is suggests that employers still obtain criminal records, either from local police files or in one instance, sealed state files.[157] However, while computer technology brings with it dangers relative to the concerns here for added dissemination of criminal records, it may well be that its expansion to local police precincts can be combined with expungement programs to effectively limit dissemination.

It should also be noted that the security and privacy laws, unlike earlier legislation, may not have criminal penalties.[158]

C. Employer Practices: Legislation and Litigation

State legislative employment barriers for offenders are thought to have a secondary effect on private sector employers' attitudes.[159] Repeal of these statutes would presumably have a positive effect on these same attitudes, as well as influencing civil service managers and licensing boards in their decisions.

Where mere repeal is not sufficient to effect change, anti-discrimination laws may be prepared. Discrimination on the basis of arrests is explicitly barred in several states,[160] while only Hawaii and Massachusetts bar discrimination based on convictions.[161] At present, a federal offender anti-discrimination law modeled on the federal age discrimination statute is presently under consideration, although it is uncertain whether it will even be introduced[162] in the Congress.

In contrast to the legislative prohibitions above are the legislative schemes for providing a "status elevation" ceremony comparable to the status stigma of conviction.[163] In two states, New York and California, legislation provides for a Certificate of Good Conduct which is given an offender after a specified period of release following sentence termination where the individual can demonstrate no subsequent arrests and good behavior. Analogous to the executive pardon, the certificates are, however, virtually unknown by employers.[164] But while the certificate rationale is to educate employers that there are differences between offenders relevant to employment performance, conceivably, the effect might be to dissuade employers from hiring offenders without a certificate during that period of time when

employment is most needed--right after conviction or release from prison. Little is known about the actual effect of these certificates, although the Department of Labor contracted for a limited evaluation of the similar Certificate of Exemplary Rehabilitation for veterans with dishonorable discharges, which it administers.[165] What evidence there is suggests potential discriminatory problems resulting from the necessity for application for a certificate -- with the built-in socio-economic bias that any procedure requiring an applicant to petition a government agency must overcome.

In addition to legislation, litigation to enforce existing laws, such as Title VII, can also positively affect employers' attitudes. Indeed, until recently there was a conscious effort at the local level to coordinate litigation efforts with other program activities to educate employers;[166] but with the demise of the OEO backup centers to the legal aid program, only a few lawyers in this specialized area of law may remain.[167]

D. Employer Practices: Program Efforts

One of the most important lessons of the MDTA prison training program was the discovery of the need to emphasize community acceptance of the offender and the development of programs which were aimed directly and indirectly at increasing employer acceptance of offender job applicants.[168] Thus, numerous job development programs were begun, such as Operation Dare in Chicago, as efforts to convince employers to hire prison releasees. Other projects have attempted to train supervisors in the special problems of integrating offenders into their work force,[169] while an AFL-CIO project funded by LEAA works with local unions to help offenders gain acceptance from their co-workers.[170]

On a larger scale the Department of Labor is working with the American Bar Association,[171] the National Alliance of Businessmen[172] and the Jaycees[173] to gain through these institutional affiliations greater acceptance of offenders with their memberships. Little effort has been made by DOL to work with organized labor, although some of the most successful manpower programs for offenders are sponsored by unions.[174]

In theory, these community acceptance efforts are linked with other programs for manpower service delivery to offenders, be they institutional training programs, pretrial intervention projects, etc. In practice, coordination at the local level may be minimal. For example, in some instances, competition may be inferred between different offender manpower programs[175] for job placement with a resultant employer antagonism to multiple hiring requests.

A gradual recognition of the inadequacy of a fragmented manpower service effort led to the Model Ex-Offenders[176] Program's efforts to coordinate state employment services (E.S.) manpower programs at the different stages of criminal justice processing from arrest through parole. These efforts were continued with the Comprehensive Offenders Manpower Program which provided grants to governors of eight states to develop a comprehensive program of services[177] to bring together all the relevant state agencies including the E.S. and Vocational Rehabilitation and Vocational Education.

Since the Department of Labor is but one of several federal and state agencies funding offender programs, any coordinating vehicle cannot be limited to DOL activities for it to accomplish its avowed task. As a result, the Secretaries of DOL and HEW and the Attorney General requested the state governors to prepare plans for coordinating the activities of their respective federal and state agencies.[178] Twenty-eight plans were

submitted by the states in 1971 using their own funding; of these, eleven states submitted revised plans in April 1975. Apparently agreement has been reached recently between the federal agencies to fund a two-year test of COPE in five selected states at a resource level of $5 million, and awards of COPE moneys are expected to be given by May 15, 1975.[179/]

VI. A COMPREHENSIVE STRATEGY

Development of a strategy to reduce and eliminate artificial barriers to the employment of offenders will be based upon these principal points:

- A minimum of 30 million individuals have records of arrest or conviction; in most other respects they are essentially indistinguishable from other participants in the labor force. Whatever subset differences might exist between some offenders and the general population should not be imagined to exist for all offenders.

- The records of arrest or conviction are available to private and public employers, forming the basis of an artificial barrier to employment.

- The effect is to eliminate the offender from consideration from employment in millions of jobs in government and private employment.

- This discrimination is often contrary to law inasmuch as the use of criminal records to deny employment is irrelevant to any bona fide occupational qualification.

The datum above indicate that after the problem of race and sex, offender discrimination is the major artificial barrier in the labor market. Thus, whether the concern is for offender discrimination as such, or artificial barriers in general (either focus is appropriate under CETA), the need for action to alleviate offender discrimination remains. However, future DOL efforts must go beyond those of the past--which may be characterized as considering artificial barriers to offender employment to be a technical-operational issue, with little or no policy concern.

But, given the view for the policy importance of the problem of artificial barriers to offender employment, DOL must then build upon past experience to

develop new program strategies. Coordination, however, will be required at policy making and operational levels within and without the department. For the most significant lesson of the past is that DOL can not successfully act alone. Thus, planning and action linkages must be reinforced or developed anew with:

-Other Federal agencies

-Major labor market entities

-Federal, state and local criminal justice systems

The first priority should be, however, to develop a policy level consciousness within the department for the offenders' employment problem, as such, or as a subset of the larger question of artificial barriers to employment. There should be increased emphasis on coordination, including a new involvement by DOL divisions not heretofor previously involved in the offender program. To accomplish these tasks, DOL should formulate a central planning unit responsible to the department's policy makers and which would direct or coordinate operational and R&D activities of the department.

A. The Federal Role

DOL's activities within the larger universe of Federal activities affecting the offender should be centered first upon coordinating its own internal activities and, secondly, as an advocate with other federal agencies and the executive branch for changes in policies and actions regarding the employment needs of the offender.

Within DOL itself:

-Public employment programs authorized by CETA provide a focus for DOL action to encourage change in state and local governmental employment policies.

-Title III (of CETA) programs for the aged, youth and other special (non-offender)manpower target groups have the potential for providing policy concern with offenders. Youth programs may be particularly important because of the interaction between offender labeling and labor market

entry problems. Other DOL activities under CETA such as the Job Corps should be reviewed for offender discrimination policies or practices of their sponsoring bodies. The Bureau of Apprenticeship and Training is yet another DOL unit with potential application for encouraging changes in private sector employment policies.

-The Office of Federal Contract Compliance can influence the private sectors' employment policies discriminating against the offender. At a minimum, employers should be made aware of the often illegality of discriminatory practices.

Within the Federal government, DOL should work to:

-Increase access to federal civil service employment by offenders. The Department's participation on the Equal Employment Opportunity Coordinating Council is one vehicle for this effort. Other Federal agencies with policies adversely affecting the offender's participation in the labor market should be encouraged to review their policies and practices. The Department of Defense national security requirements for governmental and private contractors employees should be so examined.

-Encourage other agencies such as the Equal Employment Opportunity Commission, Office of Revenue Sharing (Department of the Treasury), the offices for Civil Rights Compliance of the Law Enforcement Assistance Administration (Department of Justice) etc., to develop and apply policy on labor market activities under their jurisdictions insofar as those activities include the discriminatory use of criminal records in violation of Title VII of the Civil Rights Act of 1964. 180/

-Join with R&D efforts of other federal agencies such as the National Institute of Law Enforcement and Criminal Justice (NILE) of LEAA, the Center for Studies of Crime and Delinquency (NIMH) etc. Planning for common data collection, evaluation methodology, grants, awards should be instituted for these and other purposes.

-A final federal responsibility for DOL should be to respond to the Congressional directives for studies to reduce the effect of artificial barriers to the employment of offenders. Insofar as it is possible, DOL should examine legislative proposals to:

  -limit dissemination of criminal records through Security and Privacy legislation. 181/; limit the existence of criminal records through expungement legislation (inasmuch as dissemination cannot always be controlled)182/; provide specific legislative authorization for other employment barrier-related changes (e.g., prison industry reform,183/. employer incentives to hire 184/ changes in civil service laws 185/; or that of the Federal Deposit Insurance Corporation).186/

B. Labor Market Role

DOL's program expertise lies in general with the labor market. This expertise has not been systematically utilized to assist operational programs for the broad spectrum of offenders or for R&D of new program initiatives.

-Present R&D efforts to remove state legislative barriers to offender employment should be continued and expanded for a similar effort with local government.

-Clearinghouse activities for statutory employment restrictions should be linked to a new and similar clearinghouse effort for employment opportunities.

-DOL's practice[187] of funding non-governmental organizations such as the American Bar Association or the National Alliance of Businessmen should be continued and expanded. Organized labor, particularly the AFL-CIO Community Services and Human Resources Development Corporation or the United Auto Workers could provide vital and needed assistance to a program seeking to gain co-worker and management acceptance of the offender.

-DOL should provide guidelines and technical assistance to public and private employers. However, technical assistance efforts may require R&D development of job-nexus relationships with past criminal behavior[188]. But there is no such need for DOL to wait to inform local prime sponsors, ES personnel, etc., of their obligations for such issues as employer requests for applicants with no criminal records, which are violative of Title VII.

-Job development programs at the local level for gaining employer acceptance of the offender should be emphasized. However, stress should also be placed on employment acceptability to the offender; "unsatisfactory" job placements may result short term in increased offender recidivism and long term in increased employer discrimination.[189] Reliance on local level programs (e.g., COMP or local prime sponsor funded) is necessary but not sufficient; these should be operationally joined with national employer efforts (e.g., NAB). Other prime activities such as a clearinghouse effort, technical assistance to prime sponsors should be used to provide communication between state and local projects, on the one hand, and national job development on the other.

C. Criminal Justice Role

The provision of manpower services, training, job development, counseling has often been by itself a major criminal justice system change. The need to develop linkages between those programs and the labor market has generated even more change within the system - e.g., Mutual Agreement Parole - and parallel to the system - e.g., pre-trial intervention. Moreover, DOL's own concerns for criminal justice system change is matched by the prospect to criminal justice of increased effectiveness in reducing recidivism. The development of new models for cooperation between labor market delivery vehicles and criminal justice should continue in the future. Utilization of information and lessons gained should also continue. However, direct DOL funding of CJ reform for reform as such would divert needed model development funding and is to be avoided.[190/]

Specific R&D recommendations include:

-DOL should invite the U.S. Bureau of Prisons and the Probation Division of the Administrative Office of the U.S. Courts to share DOL's expertise for the benefit of the 40-50,000 new federal arrestee's each year - each of whom may well be affected by the discriminatory practice of employers. In this manner, DOL could assist in the Federal responsibility to prevent unnecessary estrangement between the offender and the community as well as gain an accessible testing ground for new program ideas.[191/]

-Federal criminal justice system programs could be expanded to include the needs of local/state CJ system arrestees. Conversely, local program planning should be encouraged to serve all area offenders, federal, state releasees or local.

-New programs for reducing pre-trial detention rates, such as through joining manpower services to bail release staff functions, should be tested.

-Another focus should be on increased utilization of probation. A variety of activities could be considered, including: assistance for defense counsel to develop offender workplans as an alternative for the judiciary to consider at the point of sentencing; para-professional assistance for defenders to provide rehabilitative services 192/; greater stress on criminal law in legal education on such topics as judicial sentencing, correctional law and other curriculum innovations; efforts to increase the quality of probation services; and increased emphasis on the probation officers' role of community change agent (including job acceptance for the offender.)

D. Research and Development Role

Past DOL research and development efforts may be characterized as operationally focused, being aimed primarily either at increased effectiveness of manpower services delivery vehicles or criminal justice system change. And, while attention has been paid to R&D testing of planning mechanisms through the Model Ex-Offender Programs, COMP and COPE, little attention has been given to the dynamics of the labor market, such as employers' preferences, training for management and supervisory personnel,193/ etc. Since the discussion of a criminal justice role for DOL incorporated specific R&D recommendations, the discussion below will focus primarily on labor market knowledge needs.

-Research should examine the realities of how and why employers discriminate; attention should be paid to identifying what factual data about offenders as a class or in particular would change the pattern of discrimination.

-The labor exchange functions performed by employment agencies or the ES should be examined insofar as they impact upon offender discrimination.

-Information is needed on how best to influence discretionary decision-making affecting offender employment. Personnel managers might be given training for substantive issues such as job-crime nexus, while the fact of training would emphasize to the managers the importance of the issue to their policy makers. Other initiatives such as training supervisors should be tested.

-Development of job-crime relationship criteria can be an interim step towards individualization of employment decisions. Such criteria would be used to screen through all those offenders whose convictions are not related to the particular job in question. Those not screened through would then be rejected or accepted for employment on the basis of such criteria as passage of time, age at time of offense, etc. A federal pilot project to examine DOL's employment criteria would be a first step in such a development.

-Employer incentive programs, similar to the WIN programs could be explored. State programs such as that in Illinois 194/ should be evaluated.

-Past R&D products such as The Closed Door 195/ should be updated and maintained. The role of local government should be emphasized in the process of updating.

-New initiatives such as support work should be expanded, while the feasibility of public employment proposals forooffenders is tested. However careful evaluation of the effectiveness of supported work in returning individuals to the labor market should be part of the study design.

Needless to say, the R&D process should be based upon a firm grasp of the relevant literature. But such a review should go beyond DOL's own activities to examine those of vocational rehabilitation, vocational education and others.

E. DOL Planning

This paper cannot stress strongly enough the importance of the Department of Labor's planning for systematic application of its resources in research and operations. This view is premised upon several assumptions:

-The employment problem of offenders involves the matching of offender skills with employer needs. Skills may need to be upgraded, while employer demands may have to be lowered to reflect actual needs. THE PROBLEM OF ARTIFICIAL BARRIERS MUST THEREFORE BE RELATED TO THE OPERATIONAL TASKS OF JOB TRAINING, DEVELOPMENT AND COUNSELING. Moreover, insofar as DOL's capabilities and concerns relate to the labor market, the problem of artificial barriers should be given predominance in policy formulation due to the LARGER NUMBER OF PERSONS AFFECTED BY BARRIERS COMPARED TO THAT SMALL NUMBER WHICH DOL CAN REACH IN ITS OPERATIONAL SIDE. Training alone does not improve employment opportunities, and hence operations planning for a comprehensive effort to increase offender employment must join the concern for artificial barriers with other tasks such as training (which have heretofore been the major planning concern).

-Coordination of efforts, exchange of information, technology, etc. is required for limited funds to be used to effectively change the habits of employers and criminal justice administrators.

-This coordination must include federal, state and local government where their responsibilities include providing services to or custody of the offender. In addition, this coordination will require inputs from employers and organized labor and other community organizations.

xxxxxxxxxxxxx

The concept put forth in the form of COPE for state level coordination of the services and custody responsibilities is a major step forward, but one requiring some modification and expansion. Yet, even as originally conceived, COPE is yet to be tested. Nonetheless, the lessons of the past emphasize the need for external coordination within DOL of its own activities (as well as the COPE linkages with other agneices), thus,

-Research and operations should be coordinated within one planning program.

-Other components of DOL, such as discussed earlier, should be given policy direction consistent with the offender program, particularly with reference to the problem of artificial barriers to employment of offenders. Indeed, such action would be fully consistent with, if not demanded by, CETA.

-Similar coordination and policy direction with respect to DOL's involvement with other federal agencies and state and local goverament, local prime sponsors, etc., as discussed earlier.

Such a policy commitment should be reflected in the assignment of specialized staff assigned full-time to the development and implementation of DOL policy ofor its offender program. One modification of the recommendation might be to split the staff into a Manpower Administration Unit (e.g., to coordinate operations and research) and another unit responsible for those other duties which require closer identification with DOL policy making. Finally, it is critical that DOL personnel and others understand the rationale for the department's involvement in correctional programs both pre-CETA and under the present statutory provisions. Such understandin is indispensable to continued policy commitment to the program.

VII. A FINAL WORD

It has been only within the past few years that concern has been expressed about the indirect consequences of criminal records. With a few exceptions, this concern at the federal level has been seen in bits and pieces of legislation such as the Consumer Credit Reporting Act provision prohibiting the use of current arrest records older than seven years.[196/] Other legislation such as the "set aside" provision of the Youthful Offender Act apply to relatively few individuals.[197/] But these initiatives may be characterized as piecemeal and tentative at best.

The states on the other hand have shown greater interest in alleviating the problems created by dissemination of criminal records to employers and other non-law enforcement personnel. Part of their activity, it should be noted, is due to the actions of the Department of Labor itself.[198/]

But more must be done. The Department of Labor should recognize the need for its lead in the creation of a national policy aimed ateelin eliminating artificial barriers to employment of the offender. For, to the extent that this problem is identified with record availability, it is one largely of federal making. A federal initiative, then, is both appropriate and needed-perhaps similar to the recent actions of the Canadian government in dealing with the same problem.[199/]

Moreover, a decision for an explicit Department of Labor policy would be nothing more than a logical extension of its testimony at hearings[200/] before the Senate Subcommittee on National Penitentiaries which have led to several legislative proposals reflecting the recent manpower stress

in corrections.[201] Thus, the then Assistant Secretary of Labor said:

> "We envision the Federal role as being one of providing national guidance, developing model system(s), . . . and conducting an intensive and innovative research and demonstration program . . . Last year Bernard Segal, then president of the American Bar Association, said with respect to correctional facilities and services: 'We have enough research and studies. This is the time for action.' We agree."

FOOTNOTES

1/ See R. Rovner-Pieczenck, A Review of Manpower R and D Projects in the Correctional Field (1963-1973), Manpower Research Monograph No. 28 (1973) for a fuller discussion of the history of DOL's involvement with correctional manpower programs. See also C. Phillips, "A Case Study: Development and Implementation of a Manpower Service Delivery to the "Criminal Offender in the U.S." (mimeo)(1974).

2/ Earlier grants of authority were either drawn from generalized legislation for research and demonstration under the Manpower Development and Training Act of 1962 or the 1966 amendments to MDTA providing for experimental training programs within correctional institutions. Title II, Sec. 251. See Rovner-Piecznick supra, note 1 at 5-9.

3/ See notes 106-113 infra and accompanying text for a discussion of the literature on the relationship between crime and employment.

4/ Compare the explicit rationale of the criminal justice programs of the Special Action Office for Drug Abuse Prevention as being based on criminal justice identification of drug abusers so as to offer treatment services.

5/ While not a departmental goal, the elimination of amelioration of the lack of concern on the part of the criminal justice system for the criminal justice system for the individual. The Vera Institute of Justice, which was funded by DOL for several projects, including the Manhattan Court Employment Project (a pre-trial intervention demonstration) typifies this concern.

6/ See P. Venezia, Pretrial Release with Supportive Services for 'High Risk' Defendants, Evaluation Report No. 3 (1973). In only a few jurisdictions, however, is pretrial release coupled with manpower services.

7/ The National Institute for Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration is presently preparing a "Prescriptive Package" for institutional vocational education and training programs entitled Job Training and Placement for Offenders and Ex-Offenders. See also, A Guide to Correctional Vocational Education (1973) prepared for HEW, describing some 90 education and training project then operational. DOL has sponsored the Mutual Agreement Parole project of the American Correctional Association which is intended to coordinate correctional programming for offenders with release decision.

Compare Rosow, "The Role of Jobs in a New National Strategy Against Crime," Federal Probation 14 (Sept. 1970) and Bryon, "Needed: A Special Employment Clearinghouse for Offenders" Federal Probation 53 (Sept. 1970) to Hurd, Feverly and Crull, "Organized Against Crime: A Full Service Clearinghouse" Federal Probation (Dec. 1974) describing the Kentucky vocational assistance center for offenders) for illustration of how far we have come in the past

7a/ See notes 13-17 infra and accompanying text.

8/ See H.S. Miller, The Closed Door: The Effect of a Criminal Record on Employment with State and Local Agencies (1972); National Civil Service League, "Survey of Current Personnel Systems in State and Local Government." Good Government, Vol. 87, No. 1 (Spring 1971); ABA National Clearinghouse on Offender Employment Restrictions, Removing Offender Employment Restrictions (1972); B. Shimberg, B. Esser and D. Kruger, Occupational Licensing and Public Policy (1972). P.W. Cayton, N. Schutz & J. Gwozdeckig, Barriers to the Employment of Released Male Offenders (1970). R. Plotkin, Constitutional Challenges to Employment Disability Statutes (1974). See also, J. Martin, The Invisible Prison: An Analysis of Barriers in Inmate Training and Post Release Employment in New York and Maine (1972); P. Sultan and G.E. Elmann, The Employment of Persons with Arrest Records and the Ex-Offender (1971): C. C. Whelan, Civil Disabilities: The Penalty Does Not Fit the Crime (1973); H. Banks, S. Shestcikofsky, and G. Carion, Civil Disabilities of Ex-Offenders; Legislating a Change (1975).

9/ Two examples of DOL programs reflecting a concern for the impact of the criminal record upon employment are the federal bonding program, infra notes 92-94 and accompanying text and DOL funding of pretrial intervention programs which result in no final record of conviction for many participants who successfully complete the program. The American Bar Association's National Clearinghouse on Offender Employment Restrictions is the only DOL funded operational program to focus entirely upon the problem of artificial barriers to offender employment but limited to public employment and licensing barriers.

10/ The Crime Control Act of 1973 continuing the authorization of the Law Enforcement Assistance Administration does contain provisions requiring the states to collect rehabilitation data perhaps signifying a change in the until now low priority of corrections in society. Public Law-93-83, 93rd Congress August 6, 1973, Section 453(11).

11/ Section 601 (a)(6) of the Comprehensive Employment and Training Act defines offender as:

> .....any adult or juvenile who is confined in any type of correctional institution and also includes any individual or juvenile assigned to community based facility or subject to pretrial, probationary, or parole or other stages of the judicial correctional or probationary process where manpower training and services may be beneficial, as determined by the Secretary, after consultation with judicial, correctional, probationary, or other appropriate authorities.

The use of the term "offender" here is not without its problems. Zeisel, "The Future of Law Enforcement Statistics" in President's Commission on Federal Statistics, 540 Vol. II (1971) criticizes the Federal Bureau of Investigation for equating arrestees with those convicted of a crime; he believes this is one reason that the public, including employers, similarly equate an arrest with conviction. Unfortunately, there is no term for succinctly describing an individual who has had contact with the criminal

in fact not been proven to have "offended". The use of the term offender thus implicitly judges the individual arrested. This paper explicitly rejects such sudgment and uses the term offender out of convenience only.

12/ Federal Bureau of Investigation, 43 Law Enforcement Bulletin 8, (July 1974).

13/ In 1973, 2.5 millions arrests (but not of individuals) resulted in fingerprints being sent to the FBI compared to an estimated 9 million arrests nationally. Most misdemeanors and arrests of juveniles are under present FBI policy not to be reported and if reported, are sent back to the arresting agency. About 10 percent of all fingerprint cards are sent back by the FBI for this reason or because of illegibility (i.e., unusable). Personnel communication from Frank Stills, Identification Division, Federal Bureau of Investigation (September 1974).

14/ One might simply multiply the 21 million in FBI files by a factor of three (9 million divided by 2.5 million); however, one should assume a higher rate of multiple arrests for minor crimes. The President's Commission on Law Enforcement and Criminal Justice, Task Force Report: Science and Technology found the "virgin" arrest rate to be 12 and 1/2 percent or 1 in 8 of the 9 million. The FBI reports that its virgin arrest rate is about 33 percent--for serious crimes, however. With these adjustments the multiple then becomes 1.5(assuming these relationships are stable over time). It is unclear, however, what the base for the multiple should be: 21 million or a higher figure. Thus, the FBI has in its own files approximately 9 million individuals with only one arrest and who hence have never been given FBI Identification Numbers (personnel communication from Frank Stills, supra note 13.). This writer is of the view that the 9 million files are not included within the 21 million individuals reported by the FBI. Attempts to obtain clarification have not been successful. Since the FBI is unable to say exactly how many single arrest files there are without ID numbers, this would seem to confirm that these files are in addition to the 21 million. It should also be noted that since July 1971, all arrest fingerprint files are given ID numbers (Id).

Multiplying either 21 or 30 million by the factor of 1.5, we estimate the number of individuals with criminal records to be between 33 and 45 million. This figure does not take into account those juveniles not formally arrested, but rather referred directly to juvenile court with its own record system. See also, A. Nussbaum, First Offenders - A Second Chance (1956) who estimated the offender population at 50 million.

15/ Applying the Task Force Report: Science and Technology, Appendix J, virgin arrest rate of 12 and 1/2 percent or the FBI rate of 33 percent gives a range of 1 to 2 million new arrestees each year.

15a/ About one million files have been purged by the FBI for those individuals with birth dates making them 80 years or over. Frank Stills, supra note 13. Based on National Center for Health Statistics, Life Tables, Vol. II, Section 5 (Vital Statistics of the United States--1972 58 (1975), we estimate that the ratio of individuals 65-79 compared to those 80 or more is about two to one. About 2/3 of all males live to age 65, but only 25 percent to 80 years. Of those living, about 24 percent

are labor market participants. National Planning Association, note 17 infra. Thus, a rough estimate of 2 million should be subtracted from the larger figures of 21 or 30 million FBI listed arrestees(the living over 65 and who are labor force participants will roughly balance out those born less than 65 years ago, but now deceased). Multiplying by 1.5 we now get 28.5 to 42 million offenders.

Alternative estimates may be obtained from Census data on offenders in prison infra notes 16 and 17.

16/ This figure excludes those in prison for over 10 years (12 percent). U.S. Department of Commerce, Bureau of Census, Persons in Institutions and Other Group Quarters 41 (1970). Only 5 percent of those in prison have work disabilities serious enough to remove them from the labor force. Id. G. Powell, Employment Problems of Ex-Offenders (1969) found that 95 percent of his sample of federal offenders were labor force participants. A comparison of offenders with DOL studies of participation in the labor market suggests that work disabilities are approximately one-half of the non-participation reasons for males under 60. This, however, includes attendance at school which is not a permanent non-working disability for offenders as a class. Bureau of Labor Statistics, Employment and Unemployment in 1973. Special Labor Force Report 163 (1974) (Tables A-30 to A-34).

17/ Since 85-90 percent of all arrestees are male, according to the Uniform Crime Reports, a conservative estimate of offenders in the work force would be 90 percent or about 26 to 38 million of the 91 million labor force. (See Flaim, "Employment and Unemployment during the First Half of 1974" Monthly Labor Review 3 (August 1974). Some confirmation of the acceptability of this 90 percent estimate for offender participation in labor force can be seen from male labor force participation rates, which is below 93 percent only for males under 24 and over 55. National Planning Association, The U.S. Economy: 1973-1983, Table 522 (1974). The LEAA Survey of Inmates in Local Jails (advance report 1974) showed that, excluding inmates under 18, labor force participation defined as having worked in the last year was about 89 percent. Id at 3-4. It is unclear, however, as to whether this figure includes individuals incarcerated in jail for more than one year either pre-trial or post-conviction or both.

Probably the major reason for the invisibility of this large group is the relatively low socio-economic status of many offenders. See Bureau of Census, supra note 16. And those offenders who do achieve higher socio-economic status are not likely to try to bring attention to their past criminal record. Thus, there has been an absence of advocacy for the problems of the offender within the labor market until recently.

18/ U.S. Bureau of Prisons, National Prisoner Statistics: Prisons in Local and State Prisons for Adult Felons 1970 (1972) shows about 200,000 individuals in prison on any one day. Law Enforcement Assistance Administration, National Jail Census (1970) shows 150,000 - 160,000 in jail on any one day with about 50 percent awaiting trial, and another 5 percent awaiting sentencing.

The 1972 Jail Survey, supra note 17, cannot be used for estimating the number of individuals in jail on any given day due to methodological errors.

19/ FBI, Uniform Crime Reports - 1973 (1974).

20/ No data is available on arrest-conviction ratios;: guesses rang from highs of 40-50 percent (President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967) to lows of 20 percent, Comment, 46 Notre Dame Lawyer 830 (1971). Since the total number of incarcerations in jail and prison has remained stable since 1967, there has either been an explosion in the use of probation (unlikely, since most convictions are for misdemeanors and misdemeanor probation remains rare) in the use of suspended sentences or fines, a decline in arrest-convictions ratio since 1967 or a combination of the last two. The 1967 study provides an estimate of about two and three quarter million convictions, hence the estimate here of three and one-quarter million. Support for the conclusion that most arrests do not result in conviction comes from several sources. Since fines or suspended sentences often result from the fact of pretrial detention replacing post-trial detention, the fact that jail populations have only grown 10,000 on any given day negates any liklihood of any substantial changes in the total number of convictions. This inference is supported by Uniform Crime Reports data showing little increase in the total number of cases reaching the indictment or information stage. Since other UCR data suggests that many arrests are referred to juvenile court for final disposition (up to 50 percent) any increase in arrests since 1965 would not have as great an impact upon conviction. (Juvenile cases result in "dispositions" not convictions.)

21/ Task Force Report: Corrections (1967) Appendix, "Survey of Corrections in the United States."

22/ National Prisoner Statistics, Admissions and Releases from State and Local Prisons - 1970 (1972).

Note, however, that of those entering prison, 15,000 will be returning as parole violators. National Council on Crime and Delinquency, Uniform Parole Reports (personnel communication from William Mosley, assistant director July 1974). Data from the Uniform Parole Reports for 1973 confirm that the NPS data for 1970 is still substantially the same.

23/ Supra note 21.

24/ Task Force Report: Science and Technology, supra note 15.

25/ M. Wolfgang, P. Figlio and T. Sellen, Crime in a Birth Cohort (1972) studied all youths born in Philadelphia in 1945 finding that 46 percent of the juvenile cohort that were once arrested did not have any rearrests. Belken, Blumstein and Glass, "Recidivism as a Feedback Process". Journal of Criminal Justice 7 (1973) at 12-13 indicates that the Wolfgang study data replicates adult as well as juvenile experience.

26/ Federal Bureau of Investigation, supra note 19.

27/ LEAA, supra note 18.

28/ U.S. Bureau of the Census, Individuals in Institutions and Other Group Quarters (1970).

29/ U.S. Department of Labor, Training Needs in Correctional Institutions (1966).

30/ Id.

31/ Personnel communication from William Mosley, National Uniform Parole Reports Project. About 1/3 of all releasees from prison do so without being placed on parole, but by completing their sentences.

32/ Id.

33/ Presumably, sentencing decisions favor individuals with better work histories, more stable marriages, etc. For a general discussion of the employment needs of probationeers, see Summary of Proceedings: Workshop on "Work Preparation and Job Placement Services in the Youth Probation Process." December 11-12, 1967 (N.D.) (New York University).

34/ Federal Bureau of Investigation, Uniform Crime Reports - 1972, Table 26 at 119 (1973).

35/ Id.

36/ Id., The degree to which major victimless crimes such as dealing in heroin is included in this 45 percent is statistically insignificant.

37/ Id., at 110, Table 10.

38/ Id., at 115, Table 20 shows that about 20 percent of all arrests are referred to juvenile court after arrest. While some will be charged as adults, others may be referred by the adult court to juvenile court. Nor is there any information on direct referrals to juvenile court without arrest.

39/ Testimony before Congress indicated that 18,000 fingerprints were returned by the FBI in 1973 - but that may include 9,000 fingerprints in one court case Sullivan v. Murphy, 478F.2d938 (D.C. Cir. 1973) (May Day riots resulted in 9,000 illegal arrests). See testimony of Clarence Kelly in Criminal Justice Data Bank Hearings before the Senate Subcommittee on Constitutional Rights, 93rd Congress (March 1974) (Vol. I) (Hearinafter referred to as Senate Hearings).

40/ The practice of the FBI since February 1973 is to return to the states fingerprints of juveniles, which are discernible as such unless they are tried in adult court. Personnel communication from Frank Stills, supra note 13; Testimony of Patrick Gray in Senate Hearings at 28. See

40/continued

A. Coffee, "Privacy Versus Parens Patriae: The Role of Police Records in the Sentencing and Surveillance of Juveniles" 57 Cornell Review. It is of some interest that the state of Michigan in setting up its criminal record system has included school disciplinary records, going beyond even police arrests. See also, In the Matter of Richard S., 32 NY2nd 592 (1973) (sealing the court record of a "person in need of supervision"); Sparer, Employability and the Juvenile 'Arrest' Record (1966); Sussmann, "Confidentiality of Records on Juveniles in Family Court" New York Law Journal, January 6-8, 1971.

41/ The U.S. Civil Service Commission is required to check the current records of all applicants for federal employment. Executive Order 10450 3 C.F.R. 936 (1953).

42/ This writer, for example, represented an ex-offender at a license hearing in Chicago, Illinois, where the U.S. Bureau of Prison records were entered into evidence by the City, apparently obtained from the U.S. Parole Board.

43/ The Federal Deposit Insurance Corporation Act 12 U.S.C. 1829 prohibits member banks from hiring individuals convicted of a crime of dishonesty. The FBI will provide current record information to member banks. Banks, insurance companies and railroad police are permitted access under regulation. Checks of employees of private federal contractors are also permitted. 28 C.F.R. § 85. S. Carey, Law and Disorder III at 45. Cf. J. Runka, Restrictions on Employment of Ex-Offenders in Banking Institutions, New York City. Vera Institute of Justice (mimeo 1971).

44/ See e.g., Report of the Sixth Grand Jury for the March 1971 Term. County of New York presented October 1971 recounting the indictment of six police officers, five former officers, fifteen private corporations and eight other individuals (2 state employees) for making available "confidential" criminal records. Testimony in the Senate Hearings by credit agencies also documents their use of arrest records in providing reports to potential employers, at 371. The Retail Credit Co. maintains credit files on 50 million individuals, Privacy Report 1 (September 1974). For a look at the future, the New York Times plans to computerize its news articles and market their reserve to the public, including employers, Privacy Report 6 (September 1974).

45/ U.S. vs. Bryan Criminal No. 33829-73 (Decided August 8, 1973) (Superior Court of District of Columbia.

45a/ See testimony of U.S. Civil Service Commission in Hearings on Dissemination of Criminal Justice Information before House Judiciary Subcommittee on Civil Rights and ConstitutionalRights, 93rd Congress, 2nd Session (April 3,1974) at 511.

46/ President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 74-77 (1961).

46a/ Senate Hearings, Appendix at 1105 reports the use of newspaper clippings by credit agencies.

47/ Only a few cities such as Detroit, Michigan, Berkeley, California, Washington, D.C., and New York City even attempt to update their police records. Their success, of course, varies. Recent federal legislation requires updating of police files, yet according to a recent article in the New York Times, the New York State Criminal Information System has threatened to withdraw from the NCIC, claiming it cannot update policy arrest records. The National Criminal Information Center in a policy paper on the Computerized Criminal History program indicated that about 40.3 percent of its files have dispositional data, Senate Hearings at 692. This is probably a high estimate, being based on a selective sample.

48/ Age Discrimination in Employment Act of 1967, 29 USC 621-634 and 5 USC 3307.

49/ Title VII of the Civil Rights Act of 1964 prohibits job discrimination because of sex, religious or ethnic background.

50/ New York State amended its Human Rights law in 1974 to include the physically handicapped. New York Times, August 14, 1974. Maine, Kansas, and Pennsylvania also amended their state laws in 1974 to prohibit employment discrimination against the handicapped. State Government News (January 1975).

51/ See, e.g., D.B. Thompson, Guide to Job Placement of the Mentally Restored. President's Committee on Employment of the Handicapped 1969; NY Mental Hygiene Law S 70(5) (McKenney 1971).

51a/ See notes 55-57 infra and accompanying text.

52/ Personal communication from Dr. Rudi Winston, Graduate School of Business Harvard University at Public Affairs Counsel Workshop on "Corrections and the Corporate Community," November 15, 1973.

53/ Los Angeles Police Department, Annual Report - 1973 (1974).

54/ Kansas City Police Department, Annual Report - 1973 (1974). Very few police departments publish dispositional information in their annual reports. The Uniform Crime Reports includes dispositional information but only for those arrests referred to the prosecutor's office.

55/ See Laura Kiernan and Jane Reppeteau, "Va. Warrants Issued "Quickly" Washington Post, March 15, 1975, E.1 for a current description of how easily an arrest warrant may be obtained by a non-police officer.

55a/ See testimony of Civil Service Commission supra note 45a.

55b/ See, e.g., statement of the District of Columbia personnel office in Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (1967) reprinted in Senate Hearings, Appendix at 830.

56/ Those few instances of psychological maladjustment leading to crime such as sexual assault, rape, homosexuality can be segregated from the great bulk of criminal records and information provided to those public employers such as school boards without any need to bar comprehensive efforts to limit the dissemination to and use of criminal records by employer. A similar approach was successful in New Mexico in overcoming the governor's objection to restrictions on the use of criminal records by license boards, including the state racing authority.

57/ Bureau of Labor Statistics, The U.S. Economy in 1985: Bulletin 1809 (1974) predicts a growth of 3.26 percent for the state and local public sector during the 1970's compared to 2.30 percent for the non-agricultural private sector.

58/ Of 13.6 million public sector employees, 81 percent are with state and local government. Manpower Report of the President 312, Table C-1 (April 1974).

59/ E.g., President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society (1967); National Advisory Commission on Civil Disorder, Report of (1968); President's Task Force on Prisoner Rehabilitation, The Criminal Offender: What Should Be Done (1970); National Advisory Commission on Criminal Justice Standards and Goals, A National Strategy: Task Force Report: Corrections, standard 14.4, Task Force Report: Community Crime Prevention, Standard 3.4 (1973).

60/ E.O. 10450 3. C.F.C. 936.

60a/ For example, William Albers, U.S. Bureau of Prisons estimates that up to 1/4 of its records are erroneous. (Personnel Communication.) These records are, of course, used as part of the decision making process of the U.S. Parole Board and hence there is even more reason there to ensure their accuracy.

61/ In part, President Johnson was concerned with the need to rehabilitate ex-offenders through employment. Message to Congress March 9, 1966.

62/ Standard Form 86, C.S.C. (application for security sensitive positions) continues to ask about arrests without convictions. The Civil Service Commission has never conceded the right to deny employment solely on the basis of arrest records. See Nicholas J. Oganovic, Executive Director CSC, "Keynote Address" in New Horizons for Selective Placement: The Rehabilitated Offender--A Conference Synopsis, December 13, 1967 at 12 (1968).

62a/ An eight point criteria has been set, including: type and seriousness of crime, circumstances of the crime, age at commission of crime, relationship of crime to job, evidence of rehabilitation, whether the offense was an isolated or repeated one, and social conditions affecting the commission of the crime. These criteria are used for an "overall" evaluation of the applicant's reliability rather than a step-by-step evaluation with job-nexus being the primary screening issue.

62b/ Testimony of the Civil Service Commission, supra note 45a, indicates that this right is rarely The absence of any demonstrative example by the Commission may raise an inference that it is never used.

63/ Cf., Center for Human Systems, Study of the Feasibility of Developing a Pilot Project for the Employment of Ex-Offenders in Government (1971). In one recent instance, an individual's suitability application was finally accepted after the passage of over one year by the U.S. CSC Board of Appeals, which reaffirmed the CSC regulations permitting a parollee to apply for a job; the initial suitability investigation and review by the regional office director ignored the regulations and denied suitability.

64/ U.S. Civil Service Commission, Bulletin, No. 731-2, December 3, 1973. Another disconcerting idea is reported in rumors that the Defense Department and other agencies will attempt to reverse national security criteria for employment in the form of "suitability" requirements, thereby evading the Supreme Court decisions limiting security requirements.

65/ Correction ... st, June 27, 1973 at 2.

66/ Personal Communication from Harvey Letter, Asst. General Counsel, U.S. Postal Service.

67/ Communi ... ion from Mary Galbreath, National Employment Law Project, attorney for pl ... iff. A consent decree involved a convicted drug offender wa ... y signed by the Postal Service in Chicago. Id.

68/ H.S. Miller, supra note 8.

68a/ National Civil Service League, supra note 8.

69/ Supra note 57.

70/ See N. Miller, Expanding Government Job Opportunities for Ex-Offenders (1972).

71/ Id.

72/ Supra note 8.

73/ See also T. Eisenberg, D.A. Kent, and C.R. Wall, Police Personnel Practices in State and Local Government (1973) indicates that 23 percent of police agencies will not hear application with records of arrest without conviction of juveniles. Adult felony arrests are rejected by 77 percent of the agencies while 96 percent reject convicted felons, at 23. This is one of the few studies of local civil service hiring practices available.

74/ Personal communication from Jay Edelson, DOL; confirmed by Jesse Davis, DOL, former head of PEP. While the directive was issued in the Fall of 1971, the PEP Handbook (April 1972) does not reflect this order, indicating only that PEP program should recruit from those "significant segments of the unemployed . . . with special labor market problems such as persons with criminal records." However, the Civil Service Commission, Guidelines for Reevaluation of Employment Requirements and Practices Pursuant to Emergency Employment Act 8-9 (June 1972) indicates that "job application forms shall not ask for information on arrests not followed by convictions. . ., Guidelines for considering persons with records of criminal convictions should be developed. . ." (emphasis added) The more recent Guidelines for Evaluation of Employment Practices under the Comprehensive Employment and Training Act 3e(4) (July 1974) substitute "should" for the "shall" not ask about records of arrest.

75/ The Equal Employment Opportunity Amendment of 1972 extended the structures of Title VII to state and local government; Section 715 of Title VII as amended establishes the EEO Coordinating Council to set uniform federal policy under Title VII, including those for the Federal Contract Compliance Office of DOL. On June 24, 1974, a second staff committee draft, Uniform Guidelines on Employee Selection Procedures ...s issues. Discussions with Civil Service Commission staff indicate that they believe that no final guidelines will be issued without the CSC adopting them for federal employment procedures as well.

76/ Cf., B. Shimberg, B.F. Esser, and D.H. Kruger, Occupational Licensing and Public Policy (1972).

77/ Personal communication from Karen Greene, DOL, as a rough approximation extrapolating from the 1960 census data indicating about 7 million individuals in licensed professions. See K. Greene, Occupational Licensing and the Supply of Non-Professional Manpower, Manpower Research Monograph No. 11 (1969).

78/ J. Hunt, J. Bowers, and N. Miller, Laws, Licenses and the Offenders Right to Work (1973).

79/ It should be noted that the number of occupations covered by licensing laws is also increasing.

80/ J. Runhka, "Memoranda on ABC Legislation" (mimeo 1972) (Vera Institute of Justice).

81/ B. Shimberg, et al., supra note 76. Unpublished materials analyzed by this writer in conjunction with the license study, supra note 78, indicate that between 1/3 to 1/2 of all license application forms ask about records of arrest without a conviction.

82/ But see R.P. Brief, Licensure and Employment in New York City (1968); Shinberg et al., supra note 76 investigated the licensing of specific occupations in selected cities to determine the variety of licensing barriers including records of arrest without convictions.

83/ E.g., Business and Professions Code. Sec. 23.9 (S.B. 607, August 13, 1971) provides that the California license boards must recognize institutional training. States with similar legislation include Michigan, Kansas, Illinois among others.

84/ See Stacy, "Limitations on Denying Licensure to Ex-Offenders," 2 Capital L. Rev. 1 (1973) for a fuller discussion of the licensing problems of ex-offenders. See also Bromberger, "Rehabilitation and Occupational Licensing: A Conflict of Interests," 13 William and Mary L. Rev. 794 (1972).

85/ Challenge of Crime in a Free Society 75 (1967); other studies with similar results are summarized in Note "Discrimination on the Basis of Arrest Records." Cornell L. Rev., 420 (1971); Report of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia (1967); Heckinger, Arrest, Conviction Employment: A Study (mimeo. 1972).

86/ A survey by the New York City Urban Coalition of Large Corporations Employment Practices (N.D. mimeo) showed a decrease in arrest record application form questions. The New York Bell Telephone Co., one of those surveyed, indicated through its general counsel's office to this writer that a conviction will still bar most job applicants for public relations reasons—telephone subscriber presumably would be afraid to permit ex-felons of any kind to enter their homes to repair telephones. See also, R. Bower, Ex-Addicts: Barriers to Employment in the Washington, D.C. Area (1973) showing that nearly 2/3 of D.C. private employers ask about conviction records, but only 1/3 ask only about arrests.

87/ Letter from Johnathan Peck, EEOC to Neal Miller, July 20, 1973 listing the following questions:

(1) How many criminal acts are involved?
(2) What types?
(3) Under what circumstances?
(4) How long ago did the conviction occur?
(5) What is the applicant's recent employment record?
(6) What findings have been made by the employer to determine the effect of past-criminal behavior on (1) ability to perform safetly and efficiently, (2) relationship to other employees and (3) relationship to public?

At a minimum these criteria demand individualized predictions.

87a/ E. Lynton, The Employment Problems of Ex-Offenders, A Report on Hearings Held by the New York City Commission on Human Rights, May 22-25, 1972 (1974).

88/ Pati, "Business Can Make Ex-Convicts Productive" Harvard Business Review 69 May-June 1974, describes a number of programs with success in hiring ex-offenders. See also, Pati, Curran & Wilhelmy, "Operation DARE--Help for the Ex-Offender," Business Horizons 51-57 (1973). The Polaroid Company in Boston has apparently had a success with its offender hiring, after an initial failure, but no literature exists. Personal communication from John Carver, Massachusetts Correctional Association. See also, B. Cohen and J. Chaiken, Police Background and Characteristics and Performance (1973) reporting that policemen with arrest records prior to joining the force received fewer citizen complaints but did not differ significantly on any other performance variable.

89/ E.g., the drunk driving conviction restriction on interstate truckers licensing by the Department of Transportation, 49 C.F.R.§391.15(b) (see Whalen v. Volpe, infra note 121); the policy of the Federal Communications Commission to allow prisoners released on parole to obtain commercial licenses, but not those released at full-term. (FCC Report No. 4269, March 15, 1972-G); Federal Aviation Administration regulation denying air certificates to individuals convicted of possession of drugs. 14CFR§65.12.

89a/ House Hearings supra note 45a at 469. Approximately one million checks are made each year. Id at 384.

90/ J. Hunt, J. Bowers & N. Miller, supra note 78.

91/ See, Halverson, "Driver-License Restrictions Put Working Ex-Inmates in A Bind", Christian Science Moniter, February 15, 1973. Twelve states have legislation permitting or requiring license revocation upon conviction of a crime. Hunt et al, supra note 78.

92/ Section 105 of the MDTA as amended.

93/ Cf. Training and Employment Service Letter No. 2624, January 25, 1971 expanding the bonding program to a national project. Manpower Administration News Release USDL 71-041, January 28, 1971. Title I of CETA authorizes local prime sponsors to buy fidelity bonding for ex-offenders for employers; one possible implication is that there is no authority in CETA for a national program. According to William Throckmorton of DOL, local prime sponsors can not buy fidelity bonding, because only one company sells it--and that company does not have local offices to offer all local sponsors, bonding.

94/ It has been this writer's experience that banks, insurance companies, etc. claim that their blanket bond, which covers all employees, will not permit them to hire an ex-offender. The claim is that even if the ex-offender is bonded, the provision of the blanket bond will be voided by the ex-offender being an employee. A written waiver from the bonding company is required to prevent voiding the blanket bond. Few E S personnel understand the problem so as to suggest the use of a written waiver. For a description of the bonding program, see, Contract Research Corporation, A Preliminary Assessment of the Federal Bonding Program (1973). A quantitative evaluation by Contract Research is now underway.

A unique state legislative provision is that of Iowa's forbidding the denial of public employment to an offender for failure to secure a bond. Iowa S.F. 272 (February 19, 1969).

94a/ Based on personal communication from Arthur Humphrey, Vice President, Chase Manhattan Bank.

95/ Senate Hearings at 4 et Seq.; Appendix at 1098-1109.

95a/ There are several studies showing unemployment of ex-offenders as being high in comparison to the civilian labor force as a whole, Cf. G. Pownell, Employment Problems of Released Prisoners (1969); D. Glaser, A Study of the Effectiveness of a Prison and Parole System (1964). For a variety of reasons these studies cannot be cited in support of the proportion that artificial barriers do in fact create unemployment. Among these reasons are: the studies are 10 to 15 years old, are only of federal prisoners, and are methodologically unsound in comparing ex-offenders to the whole civilian labor force without adjusting for age and other demographic differences. See Cooke, infra note 96.

96/ See P. Cook, The Effect of Legitimate Opportunities on the Probability of Criminal Recidivism (mimeo, Duke University) (N.D.).

97/ Supra notes 41 - 46a.

98/ Senate Hearings

99/ E.g., P. Cook, supra note 96.

100/ Cf. Louis Harris and Associates, The Public Looks at Crime and Corrections (1968).

101/ Bureau of the Census, Individuals in Institutions and Other Group Quarters, Table 24 (1970). To some extent the statistic may reflect the existance of high school degree equivalency programs in prisons; but the experience of the OEO New Gate College program for prisoners supports the view that about 25% of the offender population is able to do college work.

102/ Department of Labor, Training Needs in Correctional Institutions, Manpower Research Bulletin No. 8 (1966).

104/ E.g., E. M. Schur, Labeling Deviant Behavior: Its Sociological Implications (1971).

105/ Personal communication from William Throckmorton, DOL.

106/ Cf. K. Lenihen, The Financial Resources of Released Prisoners (1974); Theft Among Prisoners: Is it economically motivated (paper delivered at Eastern Sociological Association April 19, 1974), "Freedom, Finances and Funding a Job" Manpower Magazine 24 (August 1974).

107/ There have been numerous studies showing a positive correlation between parole success and employment, e.g., State of Wisconsin, Division of Corrections, 1969 Probation and Parole Terminations (May 1971); Cook supra note 96 summarizes their findings but concludes that these studies are not conclusive of any casual relationship due to the problem of selectivity--those employed seek employment because of factors related to crime avoidance, the converse for those repeating in crime.

108/ Personal communication from Dr. Kitchner, Chief, Research, U.S. Bureau of Prisons. Other unpublished data from DOL funded Project Life, supra note 106, seems to duplicate the finding of differential age effects.

109/ Michigan Department of Corrections, The Use of Correctional Trade Training (1969).

110/ Abt Associates, Pre-Trial Intervention: A program evaluation of more manpower-based pre-trial intervention projects (1974).

111/ Lenihan, supra note 106.

112/ If the relationship is nonlinear as the BOP data, supra note 108, indicates the poor research design used in fact studies are probably irrelevant since they assume linearity in analyzing the data. See N. Miller, Evaluation of Research in Pre-trial Diversion (mimeo 1974), for a full discussion of this and related issues.

113/ But see, R. Taggart, The Prison of Unemployment Employment Programs for Offenders (1972) for perhaps a different emphasis on the research findings. One should also note the numerous correlational studies of unemployment versus crime rates, e.g., Fleisher, "The Effect of Unemployment on Juvenile Delinquency" Journal of Political Economy, 543 (1963); Phillips and Votey, "Crime, Youth and the Labor Market", Journal of Political Economy 491 (1972). A recent Library of Congress study showed a .9 correlation between unemployment and prison admissions. W. Robinson, P. Smith and T. Wolf, Prison Populations and Costs: Illustrative Projections to 1980 (1974). Cf. Wellford, "Manpower and Recedivism: A Critical Analysis", (paper delivered to Department of Labor, November 15, 1971).

113a/ See P. Cook. The Correctional Carrot: The Prospects for Reducing Recidivism Through Improved Job Opportunities (Mimeo ND).

114/ Thompson v. Gallagher--F2d--(5 Cir. 1974) (veteran without honorable discharge not barred from public employment). Some other cases applying a reasonable relation test in employment are Baker v. Columbus Municipal Separate School District 462 F.2d 1112 (5 1972); Norton v. Macy 417 F.2d 1161 (D.C. C 1969).

115/ See Shelton v. Tucker 364 U.S. 479 (1960) (overbreadth).

116/ 452 F.2d 315 (5 Cir. 1971); affirmed en banc 4 CCH Emp. Prac. December § 7615 cert denied 405 US 950 (1972); See also Butts v. Nichols -- F. Supp.--(DC Iowa 1974).

117/ 353 U.S. 232 (1957)

118/ E.g., Ark. Act 280 (1973); Connecticut Bill No. 8758 (1973); and Hawaii Stat. Sec. 78-2.5 (Law 1970 ch. 27 Sec. 1).

119/ E.g., Maine Executive Order No. 8; the limitations of administrative action may be seen in the recently issued District of Columbia personnel regulations which permit use of current records, Offenders Employment Review January, 1974. Compare this action to that of the Civil Service Commission guidelines for PEP, supra note 74 or the views of the D.C. personnel office to the Duncan Committee supra note 55 and accompanying text.

119a/ See e.g., Hallinan v. Committee of State Bar Examiners 65 Cal2d 447, 421 P2d 76, 55 Cal Rptr. 228 (1966) (Civil rights conviction; In re Hugby, _____Cal2d_____, ____P.2d_____ (C.L.A. 29892) (February 3, 1972) (disbarment for marijuana conviction reversed); In re Fahey 505 P.2d 1369, 100 Cal Rptr 313 (1973) (income tax); Miller v. Bd of Appeals and Review, 292 A.2d 366 (DC Ct App 1972) (dictum); Avon v. Myers on Opinion 72 Civ 4100 (EDNY) (Dec. 18, 1972); Lane v. Inman No. 18752 (ND Ga, Nov. 19, 1973); See also Opinion of Attorney General (Md) June 1972.

120/ Supra note 116. See also Butts v. Nichols, supra note 116.

121/ Whalen v. Volpe -- F. Supp. --(D. Minn. 1972)).

122/ Note that the Department of Transportation acquiesced in the decision changing its regulation to meet the court's objections. 49 C.F.R. Sec. 391.15

123/ E.g., Muhammad Ali v. Division of State Athletic Commission, 316 F. Supp. 1246 (SDNY 1970).

123a/ See: U.S. v. City of Chicago (memorandum opinion and preliminary injunction in No. 73 C 2080, November 7, 1974). (Decree point 3 enjoining use of background investigation on base of evidence showing rate of disqualification due to arrest records has a ratio of 2 to 1 for blacks compared to whites); Commonwealth of Pennsylvania v. O. Neill 348 F. Supp. 1084, 1105 E.D. Pa. 1972), affirmed as modified 473 F. nd 1029 (3rd Cer. 1973), Doyles v. Chunka, Civil Action 73-447 (S.D. Ohio Feb. 11, 1975) (Memmorandum Opinion at 25-26).

124/ Letter from Johnathan Peck, EEOC to Neal Miller, supra note 87.

125/ The rationale for the EEOC letter is the disparate impact that use of arrest or convictions would have on blacks, since they have criminal records in disproportion to thier part of the population. This rationale was upheld in Gregory v. Litton 472 F. 2d 631 (9 Cir. 1972), citing the Supreme Court decision Griggs v. Duke Power Co. 401US 424(1971) setting forth the direct relationship test (psychological tests).

125a/
Supra note 125.

126/
E.g., Greene v. Missouri Pacific RR, EEOC decision Case No. 4562-006 (May 1, 1972). See also EEOC Decision 72-1497; CCH EEOC Decision §6352 71-2682; and 72-1460 CCH EEOC decisions § 6288 and 6341.

127/
Pennsylvania, "Guidelines on Employee Procedures" §14 (October 1971); Ohio Attorney General Opinion 72-008 (January 25, 1972) (arrest questions barred); Iowa Fair Employment Practice Guide (1972); see also Borom v. Milwaukee & Suburban Transport Corp., Wisc. Department of Industry, Labor and Human Relations, decision Feb. 16, 1973.

128/
Illinois Fair Employment Practices Act, Section 3, P.A. 1552 L.1971 and Sen Laws ch. 151 b Sec 4 par. 9; Massachusetts Ch 531 Acts of 1974; Alabama passed legislation in 1971 forbidding employers in counties of more than 90,000 but less than 100,000 to inquire about juvenile arrest records, HB778.

129/
Hawaii, H.B. 2485 (1974); Mass. Sen Law Ch 531 Acts of 1974 (misdemeanor convictions of more than five years age, with no more recent conviction); The Human Rights Commissions in New York City and Minneapolis bar employers from asking all applicant about records of arrest or convictions thru an equal protection rationale.

130/
E.g., Bergansky v. New York Liquor Authority, 39 A.D. 2d 849 (1972) (Appellate Term) affirmed. Memorandum Opinion Docket No. 55 (Nov. 1973); Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (Ed. No. 1971) affirmed(Fifth Circuit No. 71-3307, Nov. 27, 1972).

131/
E.g., McCray v. State Board of Barber Examiners No. A-259374 (Hamilton County Ohio CP May 22, 1972); (license granted despite conviction); Postal Service consent decree cited note 65 supra; Philadelphia police consent decree eliminating minor arrests w/o conviction, Clearinghouse Review 99-100 (June 1973) (Pennsylvania v. O'Neill, No. 70-3500 E.D. Pa. April 10, 1973); Bobby S. Chandler v. Goodyear Tire & Rubber Co. Civil Action No. 72-2472 (ED Pa) ($10,000 damages); U.S. v. Local 638 Steamfitters, Order, 6 E.P.D. § 8716 Par 9 B (2) (b) (only job related convictions within past five yars). The New York State Human Rights Division reported in 1973 that it was removing from its list of lawful practices, questions of arrest, letter from Jack Sable Commissioner to New York Urban Coalition, August 8, 1973.

132/ The company in question is the American Telephone and Telegraph Co.

133/ Expungement refers to the physical destruction of records, in practice such destruction often does not take place, but may instead be "sealed" or merely stamped expunged. According to the Associated Press, the Connecticut legislation calling for expungement results only in local and state police and court records being marked erased. New York Times October 2, 1974. The U.S. Civil Service Commission follows a similar practice of inserting a card marked "expunged" next to the criminal record information. House Hearings supra note 45a at 544. See Kegeen and Loughery "Sealing and Expungement of Criminal Records, The Big Lie," 61 Journal of Criminal Law, Criminology and Political Science 378 (1970).

134/ Expungement however is often granted only at the discretion of the judge hearing the petition.

135/ But see Peters v. Hobby 349 U.S. 331 (1955) (federal employees personnel records expunged of findings made by Loyalty Board); United States v. McLeod, 385 F2d 734 (5 Cer 1967) (civil rights conviction voided and records expunged); Korvall v. U.S., 53 F.R.D. 211 (W.D. Mich 1971) (selective service conviction).

136/ E.g., Doe v. Commander, Md. App. No. 63 (Dec. 4, 1974); Davidson v. Dill, 503 P2d 157 (Colo 1972); Hughes v. Rizzo 282, F. Supp. 881 (EDPa 1968); Sullivan v. Murphy 478 F2d 938 (D.C. Cir. 1973); Eddy v. Moore 5 Wash App 334, 487 P2d 211 (1971); Tarlton v. Saxbe, ____ F2d ____ (DC Cir 1974) (No. 72-1209, decided Oct. 22, 1974); U.S. v. Hudson, ____ A.2d ____ (D.C. Superior Court) (No. 49590-74, decided Feb. 19, 1975).

137/ The District of Columbia Court of Appeals for the D.C. Circuit has formally adopted the probable cause test. E.g., Morrow v. District of Columbia 417 F2d 728 (DC Cir 1969); Menard v. Mitchell 430 F2d 486 (DC Cir 1970).

138/ See Menard v. Saxbe, 498 F2d 1017 (DC Cir 1974) for an illustration of how far courts will go to preserve the myth that it is retaining the "probable cause" test despite the statement of the trial court that the record did not permit such a determination. The rationale of the Appeals Court for the probable cause test is based upon the uncritical acceptance of the utility of arrest records for law enforcement purposes. See, Project Search, Security and Privacy Considerations in Criminal History Information Systems Technical Report No. 2 (1970) for an explanation of the law enforcement uses of arrest records. But see Davidson v. Dill supra note 136 for a rejection of this argument. Note also that European countries do not use arrest records in their criminal investigations. Damaska, "Adverse Legal Consequences of Conviction and Key Removal: A Comparative Study," 59 J of Crim Law Criminol and Political Science 347, 348 (1968);

139/ In Menard v. Mitchell 328 F. Supp. 271 (DCDC 1971) the trial court found it impossible to determine probable cause of an arrest 3000 miles away.

140/ In Bilick v. Dudley 356 F. Supp 945 (SDNY 1973) (Docket No. 68 Civ. 3317), the District Court ordered the expungement of the records of 86 individuals. See also Sullivan v. Murphy supra note 114. Class action suits have been brought but with little success.

141/ E.g., Smith -Hurd Ill Ann Stat., Ch 38 Sec. 206-5; Minn. Stat Ann, Ch 626.40. A listing of 11 more states may be found in the appendix to H. Miller The Closed Door (1972). Since that study, the state of Main has passed arrest expungement legislation, H.P. 1957, L.D. 2492 (Feb. 7, 1974); Connecticut has passed legislation for returns of fingerprint and other identifying material to expunge arrest records, replacing prior legislation. S.B. 434 Public Act 74-163. A Library of Congress survey of state laws is included in the Senate Subcommittee on Constitutional Rights Appendix to Hearings on Data Banks. According to the Council on State Government, State Government News, the states of Tennessee, Arizona, Missouri, South Carolina and Florida passed arrest expungement legislation in 1973 or 1974.

142/ Personnel communication from Robert Leonard, Prosecuting Attorney, Genosee County Michigan who indicates that as part of his deferred prosecution program he has had to threaten to prosecute police officials to get them to comply with the Michigan law requiring return of criminal records.

143/ The recent Connecticut and Maine statutes supra note 118, do require such notification.

144/ The court in Menard v. Saxbe supra note 138 stated that the FBI now returns about 6,000 fingerprint records each year.

145/ Note 141 supra.

146/ Id.

147/ "No person, firm, corporation or employer shall use information concerning an offense for which an acquittal or dismissal has been granted in any manner to the detriment of the person who is acquitted or against whom charges have been dismissed." Common law remedies in tort may lie without any explicit statutory remedy. See Kegan & Loughergy", Sealing and Expungement of Criminal Records, The Big Lie" 61 J. of Crim. Law, Criminology and Political Science 378 (1970).

148/ E.g., California Penal Code §1203.4; A total of 11 states had expungement legislation as of 1973: Note: Expungement of Criminal Convictions in Kansas: A necessary reliabilitation tool" 13 Washburn LJ93, 94 note 8 (1973); See also Youth Offenders Correction Act 18 USC5020. Since 1973, Connecticut, Colorado, Minnesota nad Ohio have passed expungement legislation.

149/ Ga. Code Ann. 27.2727,28,30. Courts may interpret a set aside provision to accomplish the same result, Tatum v. United States, 310 F.2d 854 (D.C. Cir 1962). These statutory provisions seem to have results similar to pretrial intervention programs, supra note 9, insofar as avoidance of a final conviction is avoided. See N. Miller, supra note 92; R. Nimmer, Diversion: The Search for Alternative Forms of Prosecution (1974). Statutory or court authorization to deny the fact of arrest or conviction is important for individuals to avoid giving "cause" for dismissal from public employment or denial of unemployment benefits. See Roredietcher v. Levine No 18083 (NY Crt App. filed May 1973).

150/ Gough, however, suggests that employers may ask if an applicant has ever had a conviction expunged. "The expungement of adjudication records of juvenile and adult offenders: a problem of status." 1966 Wash U L Quart 149, 164-165 (1966).

150a/ Senate Hearings at 314.

151/ See notes 44 and 46a supra. See also J. F. Heckinger, Arrest, Conviction, Employment: A Study (mimeo 1972) documenting the availability of arrest records in St. Louis, Mo. despite city ordinance §803.010 prohibiting disclosure.

152/ Congressional concern was manifest in Senator Mathias' 1970 amendment to the Omnibus Safe Streets and Crime Control Act of 1968, establishing LEAA, which required the Administration to submit legislation to establish the security and privacy of LEAA-funded criminal record systems. Such legislation was introduced in the 92nd Congress by Senator Hruska as S.2546, First Session. Senator Hruska later submitted S.3384, 92nd Congress, Second Session in behalf of the Department of Justice and intended to affect FBI authorization to maintain a national criminal record system under 28 USC534. LEAA earlier established Project Search whose purpose was to demonstrate the feasibility of developing state criminal record systems and interchange criminal histories between the states systems. As the project developed it was taken over by the FBI at the national level, becoming part of the National Crime Information Center (NCIC). See GAO letter report B-171019 of March 1, 1974 to Senator Ervin for a fuller discussion.

153/ In addition to S. 3384, supra note 152, Senator Burdick introduced S. 1308 93rd Congress, January 1973, to permit the FBI to disseminate only those records of arrests that resulted in a conviction, plea of guilty, or nolle contendere when their use is authorized by state statute for purposes of employment or licensing. But earlier in response to the court's decision in Menard v. Mitchell 328F. Supp 718 (DCDC 1971), Congress amended the Department of Justice appropriation bill to restore the rights of the FBI to disseminate criminal records to non law enforcement personnel. Senator Ervin sponsored in 1972 and 1973 subsequent amendments to repeal this authorization which twice passed the Senate but were defeated in coference with the House of Representatives. Remarks of Senator Ervin, Congressional Record Nov. 14, 1973. See also H.R. 379, 93rd Congress introduced January 3, 1973.

154/ E.g., HR 61 and 62, 94th Congress, 1st Session. H.R. 9783 93rd Congress, introduced August 1, 1973; S.2964, 93rd Congress introduced February 5, 1974, by Senator Hruska for the Department of Justice; and S.2963 93rd Congress introduced February 5, 1974, by Senator Ervin.

155/ Arkansas, Statutes Ch5-832 et sec (cum Supp 1971); Alaska Statutes 12.62 010 etal; Louisiana Revised Statutes 15.575 (1973); Mass. Ann. Laws Ch6 Sec. 167; Minnesota H.F. No. 1316, April 11, 1974; Iowa S.F.115; and California Penal Code 11100 et.seq., 11075-81, Several local jurisdictions have also passed recently privacy ordinances. E.g., Wichita Falls, Texas Ordinance 2688, Berkeley California City Council Res #44825 (1971). See also Oregon Executive Order EO-74-6 (1974).

156/ This writer has not been able to find any state with privacy and security legislation that is planning to evaluate their effectiveness.

157/ In Massachusetts, several probation officers were dismissed for giving sealed files to private detectives for employment purposes. This action apparently resulted from a Boston newspaper exposing the practice. Personnel communication from William Schroeder, Mass. Governor's Committee on Criminal Justice.

158/ In addition to legislation, J. Caplan has prepared Model Rules for Law Enforcement; Release of Arrest and Conviction Records (1973) for police administrators using their internal policy making powers.

159/ See notes 104, 105 supra and accompanying text. See also, President's Task Force on Prisoner Rehabilitation, The Criminal Offender: What Should be Done? (1970).

160/ Illinois and Massachusetts supra note 128.

161/ Supra note 129.

162/ The Omnibus Corrections Reform Act which is being drafted by Congressional staff, the Office of Manpower and Budget and other groups such as the American Bar Association is presently being reviewed by the Department of Justice. This proposed legislation would reenact these parts of Title 18 United States Code which relate to the U.S. Bureau of Prisons.

163/ New York provides both a Certificate of Relief from Disabilities for first offenders and a Certificate of Good Conduct. See, How to Regain Your Rights (N.D. New York Urban Coalition). New York Civil Rights Law S79-c; California Penal Code § 4852.01 et seq.

164/ In New York, the state Urban Coalition has published a brochure describing the Certificate and the eligibility outline which has been distributed to over 100,000 ex-offenders and others, supra note 163.

165/ T. R. Wilson, R. M. Madsen and J. A. Richards, Employment Assistance to Ex-Servicemen With Other Than Honorable Discharges: A Study of the Department of Labor's Exemplary Rehabilitation Certificate Program (1972).

166/ E.g., the National Employment Law Project funded by OEO had one full-time attorney concerned only with correctional/employment litigation and whose efforts were often coordinated with other litigation offices and program activities such as those of the Vera Institute of Justice.

167/ Two are the Legal Action Center of NY and the National Law Office of the Legal Aid and Defenders Association. Of course, the US Equal Employment Opportunities Commission may still bring actions against employers--as may also the state and local human relations commissions.

168/ Supra note 88.

169/ Mentec Corporation, Final Report: Operation Pathfinder (1972).

170/ The Community Services Division of the AFL-CIO has a five man staff for criminal justice reforms including an offender acceptance program.

171/ ABA, National Clearinghouse on Offender Employment.

172/ E.g., the JOBs program for disadvantaged includes ex-offenders. Senator Javits in a speech to NAB on June 11, 1974 indicated 4,620 jobs for ex-offenders have been provided thru this program.

173/ The Jaycees have established chapters in a number of penal institutions, which are the basis for job development efforts in conjunction with "civilian" chapters.

174/ See, A Guide to Correctional Vocational Education (1973) describing some half dozen union sponsored projects. The AFL-CIO Human Resources Corporation is presently providing training to U.S. Bureau of Prison inmates at the Fort Worth Texas Correctional Center.

175/ In New York City, a study by Professor Zimring of the Court Employment Program in 1973 found nearly 70 community offender programs, pre- and post-trial, with most having employment components seeking jobs with many of the same employers.

176/ See Manpower Report of the President 57 (1971); see also, G. Gundersen, Evaluating the Model Ex-Offender Projects, Reports 1-3 (mimeo 1971).

177/ See Manpower Report of the President (1972). The COMP states are: Florida, Illinois, Maryland, Michigan, New Jersey, North Carolina, South Carolina and Texas.

178/ Letter to state governors from Attorney-General Mitchell and Secretaries Richardson and Hodgson of November 29, 1971.

179/ Personal communication from Reggie Moore, U.S. Department of Labor.

180/ See R. Nathan, Jobs and Civil Rights (1969) for a description of governmental agencies responsibilities as of that date. See also, U.S. Civil Rights Commission, The Federal Civil Rights Enforcement Effort - 1974, Vol. 1, To Regulate In the Public Interest (November 1974); and Vol. IV, To Provide Fiscal Assistance (February 1974). DOL's responsibilities under CETA are described in Making Civil Rights Sense Out of Revenue Sharing Dollars (February 1975).

181/ E.g., H.R. 61 and H.R. 62, 94th Congress, 1st Session.

182/ Senator Burdick has introduced bills in the 92nd Congress (S.2732) and 93rd Congress to expunge conviction records of federal offenders in certain instances.

183/ E.g., H.R. 3044, 94th Congress, 1st Session, introduced by Congressman Railsback, S.2161, 93rd Congress, 1st Session, introduced by Senator Percy.

184/ H.R. 3373, 93rd Congress, 1st Session, introduced by Representatives Daniels and Esch.

185/ E.g., 5U.S.C. 7313 prohibits civil service employment of any individual convicted within the past five years of travelling in interstate commerce for purposes of causing civil riots.

186/ The Federal Deposit Insurance Corporation Act r ohibits the employment of individuals convicted of a crime of dishonesty witl out FDIC approval.

187/ Such a clearinghouse could publicize unique experiments such as the California job-placement program using computers to match applicant with openings. Calif. A.B. 1948 (1972) legislation supports the experiment.

188/ Several states have taken steps to attempt to provide for development of job-crime nexus criteria. E.g., Calif. S.B. 1349 (Ch 903, Session Law of 1973 amends the Business and Profession Code to add new sections 448 and 492 requiring license boards to develop criteria "to evaluate the rehabilitation of a person" denied or whose license is revoked because of a prior conviction.

189/ Vitually all commentators seemingly agree that the view one has of one's work is just as significant as the work itself in preventing recidivism. See Social Forces and the Prevention of Criminalty United Nations Working Paper for the U.N. Congress on the Prevention of Crime and Treatment of Offenders. Par. 107 (1965).

190/ The past DOL concern with criminal justice reform goals has resulted in project evaluation being excessively focused on recidivism and other non-labor market criteria. Not that recidivism is irrelevant, but that it is only one of several project impact measures. The result of their concern for recidivism has been that less attention is paid to the labor market impact. See Lenihan, note 106 supra for an illustration of the irrelevancy of research findings to the planning of delivery of labor market services.

191/ In addition to those annually arrested according to the Annual Report, Administrative Office of U.S. Court 1973, as of June 30, 1974 there were 59,434 individuals under correctional supervision in the community; only 14,571 were on parole, the remainder being on probation or deferred prosecution (1,058). Personal communication from James McCafferty. Another 23,498 as of August 1974, were under the custody of the U.S. Bureau of Prisons and 4,300 federal arrestees and individuals awaiting sentence or final release were in local jails under contract to the Bureau of Prisons. Personal communication from Chris Erlwein, U.S. Senate Subcommittee on National Penitentiaries.

192/ See Boroch, "Offender Rehabilitation Services and the Defense of Criminal Cases: Criminal Law Bulletin 215 (1971); Portman, "The Defense Lawyer - New Role in the Sentencing Process" Federal Probation 3 (March 1970).

193/ Note 169 supra.

194/ The Illinois COMP program has six program components in vocational counselling, job placement, control-data self-placement, Secretary of State employment project (using WIN monies), private industry and NAB. Communication from Reggie Moore, DOL. In addition to these, the Illinois Department of Corrections has advertised a private employment subsidy (WIN type) program using DOL money.

195/ H.S. Miller, The Closed Door.

196/ 15 U.S.C. 1681.

197/ 18 U.S.C. 5220.

198/ Supra note 171.

199/ Canadian Committee on Corrections, "Significance of Criminal Record and Recognition of Rehabilitation" in Towards Unity: Criminal Justice and Corrections, (1969) reprinted in Radzinowicz and M. Wolfgang (ed.) Crime and Justice, Vol. III, The Criminal in Confinement (1971).

200/ Testimony of Jerome Rosow, Assistant Secretary of Labor, at Hearings on "Priorities for Correctional Reform" before Senate Subcommittee on National Penitentiaries, May 19, 1971.

201/ E.g., S.2732 Offender Rehabilitation Act of 1972, 92nd Congress, 1st Session October 20, 1972; S. 798 Community Service and Supervision Act, 93rd Congress, 1st Session 1973.

END