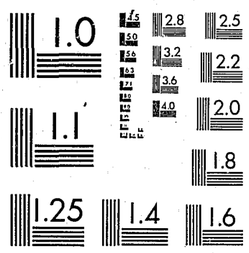

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Criminal Justice Information Policy

PRIVACY AND THE PRIVATE EMPLOYER

U.S. DEPARTMENT OF JUSTICE
BUREAU OF JUSTICE STATISTICS

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PRIVACY AND THE PRIVATE EMPLOYER

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PREFACE

The rapid changes which have occurred in computer technology over the past decade have substantially expanded the potential for access to all categories of personally identifiable information. During this period, the increased availability of data has provided the basis for establishment of more relevant operational and administrative criteria, and in turn has altered the decision-making processes in both the private and governmental sectors. Over this period, increasing concern has also arisen, however, over the potential impact of such data availability on current information policies, procedures and legal doctrines.

In keeping with its congressional mandate, the Bureau of Justice Statistics has responsibility for the collection and dissemination of statistics describing both the criminal justice offender and operation of the criminal justice system. In this connection the Bureau is charged also with responsibility for insuring the confidentiality of data and for the analysis of overall information policy impacting on the collection, storage and dissemination of criminal justice data.

This document identifies and analyzes those issues relating to the use of criminal justice data for private employment decisionmaking purposes. The book addresses both legal and operational questions and is specifically designed to provide the reader with background material reflecting current concerns, policies and legal decisions in these areas.

The book represents the second in a series of documents addressing criminal justice information policy. The preceding document, entitled Privacy and the Media, is available through NCJRS and the GPO.

BENJAMIN H. RENSHAW
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INTRODUCTION

Should private employers have a right of access to criminal history record information in order to make employment decisions about applicants and employees?[1] Access by private employers to criminal history record information turns out to be a critical and a complex issue: complex because it involves more than just a simple, direct conflict between societal interests in disclosure and offender interests in secrecy. Critical because society's interests in the effective functioning of its economy, and the welfare of all of its citizens are profoundly affected by the standards that govern employer access to criminal history data.

Employer access to criminal history record information may minimize risks occasioned by the employment of chronically violent, anti-social or untrustworthy individuals. However, employer access to this data may instead threaten society's interest in rehabilitating offenders and assuring that they contribute to society by working, as opposed to burdening society by requiring welfare or other assistance, or worse, by commiting new crimes. In addition, employer access may frustrate society's interest in providing equality of employment opportunity to ethnic and racial minorities. At the same time, employer access may do irreparable damage to a record subject's reputation, sense of privacy, and other sensibilities.

Developments that Influenced the Publication of this Report

While there can be little question that the issue of private employer access to criminal history records is of critical importance, several developments influenced SEARCH to write this report at this time. First, both statutory and case law appear to be moving in the direction of permitting, if not requiring, broader dis-

closure of criminal history records. If in fact privacy standards for criminal history records are relaxing, then it is an appropriate time to take a comprehensive look at policies governing private employer access.

Second, and perhaps paradoxically, both statutory and case law appear to be moving toward fuller recognition of legal concepts that directly or indirectly support workplace privacy. In particular, employment law may come to require private employers to be able to demonstrate that any personal information that they obtain about applicants and employees is relevant to the subject's employment.

A third and related development concerns the increasingly important role that employment plays in individual lives. Beyond the financial rewards, numerous ancillary benefits, such as insurance and medical benefits, come from employment. Employment also offers recreational and social opportunities. In a very real sense, individuals get acceptability, status, and a sense of self concept from employment. For all of these reasons, access to employment is critical for most Americans.

Not surprisingly, public opinion surveys indicate that the American public is interested in employer policies for collecting criminal history record information about applicants and employees. A 1979 national opinion research survey of attitudes toward privacy conducted for Sentry Insurance by Louis Harris and Associates, Inc. found that 62 percent of the public believes that it is improper for an employer to ask an applicant for a non-sensitive job whether he or she has an arrest history.[2]

Approach and Organization

This report is not intended to be prescriptive--no standards or even recommendations are presented. Instead, the report is intended to be informative and analytical. The body of the report is in three parts. Part One describes current actual practice among private employers in obtaining and using criminal history records. In addition to describing employer conduct, this part of

the report describes the current thinking concerning the extent to which a criminal history background is predictive of an individual's work performance.

Part Two provides an overview of statutory and case law that bears on employer access to and use of criminal history records. This part of the report looks at: (1) the legal principles, including privacy law principles, governing the disclosure of criminal history records to employers; (2) state statutory law provisions; (3) the affect of equal employment opportunity law on employer collection and use of such data; (4) employer liability for collection or use of criminal history data; and (5) employers' common law duty to hire safe employees.

Having provided a background and context for consideration of this issue by first describing employer practices and by second identifying the applicable law, the report turns in Part Three to an analysis of the policy considerations. The report presents the policy considerations that support employer access as well as those that support restricting such access. The analysis turns on two key variables: (1) the nature of the criminal history record; and (2) the nature of the job in question.

The analysis in Part Three suggests that where the record involves definitive, negative judgments about an individual that are both serious and recent, such as a record of a felony conviction that has occurred within the prior few years, the policy considerations in favor of private employer access are most persuasive. At the same time, the analysis suggests that where the job in question involves the assumption of significant responsibility or places employees in unsupervised settings where the interests of other employees, customers or the employer are at risk, employers can make persuasive arguments for access to at least those records of criminal conduct that are related to the employee's duties or responsibilities. Conversely, where the record is less definitive, significant or current, or where the job exposes employers and their employees and customers to minimal risk, the arguments in favor of secrecy are most persuasive.

The report focuses on private as opposed to public employer access. The principal reason for making this distinction is that public employers obtain and handle criminal history record data in an entirely different legal environment. Public employers are governed by constitutional and statutory restraints, as well as statutory privileges, that do not apply to private employers. Furthermore, the nature of the common law standards that apply to private and public employers differ enough to require separate analysis. Then too, the public policy debate and accompanying research and analytical work has generally distinguished between public and private employers.

Research Methodology

Just a few words should be said about the approach used to conduct research for this report. First, in order to marshall the relatively slim and somewhat obscure literature concerning the collection and use of criminal history records by private employers, and the relevancy of criminal history records to offender employment performance, a rather complete search was conducted of all indexes of potentially germaine published material for the period 1970 to the present. Specifically a search was conducted of the following indexes:

1. The National Criminal Justice Reference Service: a compilation of 40,000 reports, books and audio-visual presentations, as well as a computerized document data base, covering all aspects of law and criminal justice and operated by the National Institute of Justice;

2. Inform: a compilation of 86,000 publications in the areas of business management and administration;

3. Management Contents: a compilation of approximately 200,000 publications including all business literature and business journals;

4. PAIS: international coverage of public affairs and social science from 1,400 periodicals, books, pamphlets, and Federal, state and local government documents; and,

5. Current Law Index and Index to Legal Periodicals: 660 law periodicals covering all of the major U.S. legal periodicals.

In addition to a comprehensive search of secondary materials, all relevant case law and statutory law was researched. In particular, statutory law in all 50 states was researched by reviewing both the official statutory codes and the Privacy and Security of Criminal History Information: Compendium of State Legislation published by the Department of Justice's Bureau of Justice Statistics (BJS) in 1978.

Finally, after completing enough initial research to frame the issues, SEARCH convened a one-day conference of experts to further refine the issues and provide empirical and practical information and reactions. The conference was chaired by Alan F. Westin, Professor of Public Law and Government at Columbia University and President of the Educational Fund for Individual Rights, a research and policy analysis organization which concentrates on workplace policy issues. Approximately 20 individuals participated in the conference, representing the Bureau of Justice Statistics, the Federal Bureau of Investigation, the Department of Labor, the National Telecommunications and Information Administration, the Congress, state and local criminal justice organizations, the American Civil Liberties Union, and private industry, including the American Society of Personnel Administrators.[3]

PART ONE

CRIMINAL HISTORY RECORDS IN THE WORKPLACE

One threshold question should be addressed before it makes sense to discuss the use of criminal history records in the workplace. How many people in the work force have a criminal history record? After all, if the percentage of offenders (using the term to include individuals with either an arrest or conviction history) in the work force is small, then the issue of employer access to criminal history records is not so critical. However, if it is true, as preliminary research suggests, that between 36 and 40 million people have criminal records, roughly one-quarter to one-third of the work force, then the nation's policies for employer access have the potential to gravely affect the nation's economy and its citizens.[4]

According to research done for the Department of Labor, criminal history record subjects have the following specific characteristics: males outnumber females 85 to 15 percent; Blacks outnumber whites 70 to 30 percent; and adults outnumber juveniles 94 to 6 percent.[5] It is also estimated that about 40 percent of reported arrests are for a serious crime.[6] Conversely, this means that about 60 percent of reported arrests are for minor crimes, primarily victimless crimes such as prostitution, drug use and gambling. About 20 percent of all offenders have multiple arrest histories. However, approximately 50 percent of criminal history record subjects have not been arrested in at least ten years.[7] Further, studies show that approximately 40 to 60 percent of all arrests do not end in conviction.[8]

Assuming that these statistics are largely correct, the impact of reliance on criminal history record information for employment decisions is substantial. Indeed, even if the 30 to 40 million estimate is substantially

inflated, the number of people in the work force with criminal history records is still likely to be quite large.

What this suggests is that criminal histories have the potential of restricting employment opportunities for large numbers of people and may adversely affect individuals who have never been convicted of a crime or never arrested for a serious offense or who have established a substantial period of time free from criminal involvement.

USE OF CRIMINAL HISTORY RECORDS

Even assuming that the number and nature of criminal history records is such that policymakers ought to be concerned, one must also ask whether there is any reason to believe that criminal history records, where available, influence private employers' decisions. If it turns out, for example, that private employers tend to ignore criminal history record information, then its availability is not a significant issue.

Some commentators have speculated, for instance, that the importance of the criminal history record/employment issue is overstated because most applicants lie about their criminal history background and most employers are never the wiser.[9] It has also been suggested that most offenders are only qualified for (and only look for) unskilled jobs for which a criminal history record poses little or no barrier to employment.[10] It is also argued that most offenders have so many other handicaps to employment such as race, youth, and educational deficits, that a criminal history record makes little incremental contribution to the offender's employment problems.[11] Finally, a few especially sanguine observers minimize the impact of employer access policies because, in their view, legal and social barriers to the employment of offenders are disappearing. In one celebrated case, for example, an ex-convict recently became a state court judge.[12]

Despite these arguments, the overwhelming consensus of the literature indicates that criminal history record information is regarded by the private business community as a legitimately significant factor in determining employment suitability. A study done for the Department of Labor in 1979 reviewed the published literature concerning employment barriers for individuals with criminal history records. While the empirical work that has been done on the topic of employer use of criminal history records is far from definitive, the Department of Labor study tentatively concludes that: (1) 15 percent of private employers flatly refuse to hire any offenders; (2) 5 to 10 percent ignore offender status; and (3) the remaining 75 to 80 percent of private employers take criminal history record data into account but make case by case determinations.[13]

Apparently, private employers seldom express their policies for using criminal history records in writing. Nevertheless, there appears to be little question that a criminal history record of violent crimes or of dishonest, fraudulent acts is treated by almost all employers as an extremely negative factor.[14] Indeed, in one somewhat aged study, 66 of 75 employers interviewed said that they would not consider hiring an applicant with an assault arrest even if the arrest never led to a conviction.[15]

Furthermore, the "fraudulent or dishonest" clause in most commercial fidelity bond contracts reportedly has the effect of preventing or at least discouraging many employers from hiring applicants with arrests or convictions for theft, fraud, or other crimes which imply that the record subject has a dishonest or untrustworthy character.[16]

Logic would suggest that the position being applied for also affects an employer's interest in obtaining criminal history data. For example, employers can be expected

to try especially hard to exclude violent or dangerous employees from unsupervised settings or from settings where these employees are exposed to children or other vulnerable individuals. Similarly, employers can be expected to make special efforts to exclude dishonest or untrustworthy employees from positions in which they will handle large sums of money, or be responsible for expensive or sensitive tangible resources, or be entrusted with proprietary information.

A spokesman for a public utility made the industry argument for access to criminal record data about employees in sensitive positions in the following manner:

> "In connection with its supply of gas and electricity to members of the general public, this company is vitally concerned in obtaining and retaining employees of high caliber who do not have criminal records so that we are in a position to assure ourselves and our customers that employees of this company who enter their homes on Company business, e.g., reading of meters, activating and terminating service, customer relations contacts, etc., are trustworthy and reliable. Hence, we are opposed to any limitations being imposed upon us... with respect to obtaining records relating to criminal conduct.[17]

Surveys of parolees indicate that many parolees certainly believe that they are discriminated against by private employers because of their criminal history record. In one survey 55 percent of the parolees polled said that they had encountered specific incidents of job discrimination based on their criminal history record.[18]

There is also some evidence, although it is by no means definitive, that private employers seldom distinguish between arrest and conviction records.[19] In the view of some observers, employers do not want to absorb the expense of investigating the circumstances surrounding an arrest and thus they treat arrests as they would

treat convictions.[20] Reportedly, some employers also take the view that an offender's actual criminal history record, whether it includes arrest data, conviction data or both, is only the tip of the iceberg and therefore understates the true dimensions of the offender's criminal behavior.

There is also some evidence in the literature which suggests that the effect of a criminal history record upon employers extends beyond the initial hiring decision. Some of the literature indicates that when employers do hire offenders they offer offenders less desired jobs, less pay or establish special probationary periods.[21]

However, the record on employer use of criminal history records indicates that the great majority of jobs in the private sector do remain open to offenders and the literature suggests that many jobs are made especially available to offenders who can demonstrate their rehabilitation.[22]

Moreover, many employers have been active participants in various types of offender employment opportunity programs. One study, in fact, concludes that the corporate record in providing employment for offenders has been quite positive.

> "The corporate and business communities have not deliberately obstructed or hindered efforts by ex-offenders to obtain suitable employment after their discharge from penal institutions, nor have they remained apathetic to the problems which these disadvantaged persons face. Rather, individuals within the business community are currently engaged in a number of innovative, risk taking steps to show their concern and to absorb the flow of partially rehabilitated ex-offenders."[23]

The lack of thorough empirical survey work about employer practices precludes confident summations about employer use of criminal history records. However, whatever ameliorating factors may exist, and whatever

complexities and deviations may exist, there is one point on which all analysts seem to be agreed: private employers use criminal history records to make adverse employment decisions about criminal history record subjects.

EMPLOYER ATTITUDES

It is difficult to reach a firm conclusion about employers' attitudes toward access to criminal history data. The available empirical data is by no means conclusive. Moreover, the available data is somewhat conflicting. The Harris Survey performed for Sentry Insurance found that 86 percent of the business employers from the "Fortune 500" list responding to the Survey said that they believe it is improper for employers to ask applicants for non-sensitive positions about their arrest history.[24] Similarly, the great majority of 100 employer representatives who testified in 1975 at hearings held by the Law Enforcement Assistance Administration (LEAA) to review criminal history record regulations then under consideration by LEAA said that they only sought to preserve employers' rights to ask for conviction information, not arrest data.[25]

The American Society of Personnel Administrators and Equifax sponsored a survey in 1979 in which personnel administrators expressed their reaction to the recommendations of the Privacy Protection Study Commission. The respondents agreed with the Privacy Commission's recommendation to, "use only conviction records relevant to an employment decision."[26]

By contrast, most of the available literature and research appears to suggest that many private employers do believe that both arrest and conviction history data is relevant to employment decisions. According to one survey, for example, 79 percent of employers solicit arrest and conviction information on application forms.[27] Many employers apparently believe that both an arrest and a conviction record have strong predictive value about the applicant's job performance and his likelihood of

repeating a criminal act.[28]

A 1979 study of the social impact of the interstate exchange of criminal histories done for the Congress' Office of Technology Assessment (OTA Study) concludes that substantial numbers of private employers still seek criminal history data.

> "All that can be concluded is that substantial numbers of employers do seek this information and that there is some scanty evidence that use is decreasing."[29]

This conflict in perceptions about employer attitudes also seems to be reflected in the discrepancy between employers' written and oral representations. Many employers' formal written personnel policies indicate that employers neither collect nor use arrest data and use conviction data only when it is timely and relevant.

However, in informal or private settings, many personnel executives may admit that they are in fact anxious to obtain both arrest and conviction data.[30] Personnel executives acknowledge that the bottom line for most employers is that they prefer to be able to obtain the maximum amount of data about applicants and incumbents. Even among employers that refrain from attempting to obtain arrest data, there is at least a sentiment for getting such data. This does not mean that employer representatives believe that the data should always be used. Rather, such data could be evaluated and used if appropriate.

OBTAINING CRIMINAL HISTORY DATA

Private employers ordinarily use one or more of three methods to obtain criminal history data. Easily the most common method is to seek such information directly from the applicant, usually by including the question on the application form. A second method used by employers is to hire consumer reporting agencies, private investi-

gators, or other third parties to obtain criminal history data. Occasionally there are public reports of abusive practices by investigators seeking criminal history data. For example, a New York City police detective was caught selling arrest record information to Wackenhut Corporation, a private detective agency, which then supplied the data to scores of employment agencies and credit bureaus along the East Coast.[31]

The third method employers use to obtain criminal history records is to request the data directly from criminal justice agencies, usually local police departments. The OTA Study reports that only a little data exists regarding the number of criminal history requests to criminal justice agencies made by private employers. However, what information has been compiled indicates that criminal justice agencies receive substantial numbers of requests from non-criminal justice agencies. For the most part, these requests appear to be for employment purposes from public and, to some degree, private employers. Up until 1974, for example, the Winston-Salem, North Carolina Police Department reportedly provided criminal history records to local, private employers for 50¢ a request.[32]

The OTA Study surveyed managers of criminal history record systems in 35 states, and found that 20.6 percent of the total number of access requests that they received were from non-criminal justice agencies. The managers speculated that most of these requests were for employment purposes of various kinds.[33]

In fiscal year 1978, 42 percent of all access requests made to the FBI's Identification Bureau were made by federal non-criminal justice agencies. Two-thirds of those requests were for employment purposes.[34]

JOB PERFORMANCE

Just as data is lacking about employer perceptions, policies and practices, data is also lacking about the actual job performance of offenders. In other words, even assuming that most private employers want to have

access to at least conviction data about their applicants, there is very little empirical data to indicate whether this is a reasonable wish. The OTA Study emphasized this phenomenon:

> "In short, justification for the use of criminal history records focus on the probative value that such records have in predicting the behavior of individuals. Little systematic information exists on this question."[35]

Of course, private employers may have reasons other than potential job performance for wishing to review applicants' criminal history background. It is possible to identify several other motivating factors, such as employers' heightened legal liability to victims in the event of a violent outburst by an offender, insurance bonding requirements, and public image. Some observers speculate that employers seek to obtain criminal history data because it provides a convenient basis for making hiring decisions. They believe that most employers have great difficulty making hiring and other employment decisions and, therefore, a criminal record is convenient and appealing cirterion.

Employers may also want to see applicants' criminal history records because employers may fear that offenders recidivate and thereby run a risk of losing the services of the new employee (or worse becoming the victim of the new criminal event). Although recidivism statistics are not always consistent or wholly reliable, they generally support the argument that once an individual is arrested or convicted he is likely to be in trouble with the law on future occasions.

Some of the recidivism statistics are plainly staggering. For example, a recent study by the United States Parole Commission indicates that 60.4 percent of arrested, but not convicted, individuals are convicted for a subsequent crime within six years. The same study shows that 27.5 percent of individuals released from prison have been convicted of a subsequent crime within

six years.[36]

However, available survey data also suggests that a principal factor affecting recidivism is employment. One analyst expressed the problem as follows:

> "Recidivism, defined as the tendency of former offenders to return to prison, poses a significant challenge to those who would alleviate the nation's serious crime problem, continually frustrating efforts to return ex-offenders to the mainstream of society. Currently, two out of every three former offenders return to a life of crime...
>
> The inability of many former offenders to obtain decent, rewarding jobs after they are released from prison contributes significantly to this high recidivism rate."[37]

Several recent studies and analyses indicate that offenders who find full-time employment are far less likely than unemployed or underemployed offenders to recidivate. One analyst, for instance, claims that unemployed or underemployed parolees are "four times as likely to return to prison as their fully employed counterparts."[38]

In addition to employer concerns about recidivism, most observers agree that the principal reason that employers seek criminal history record information is that they believe such data will help them to predict the applicant's potential value and trustworthiness as an employee.

As to trustworthiness, a small and admittedly inconclusive body of survey data suggests that ex-offenders are no more, and perhaps less likely, to be involved in job-related crimes than other employees. For instance, a 1976 Wisconsin study revealed that of more than 1,000 Wisconsin parolees, only 14 were accused of job-related crimes one year after release.[39]

Another ex-offender job program achieved almost

identical statistics. The program placed 450 ex-offenders in regular, full-time jobs with promotion potential. After two years, half of the offenders were still on the job and only 7 had returned to prison.[40]

Inconclusive survey data further suggest that ex-offenders not only make law abiding employees, they make valuable, contributing employees.[41] A survey of Maine employers, for example, who accepted referrals from an ex-offender placement program reported that the majority of employers rated ex-offenders' work as quantitatively and qualitatively superior to the work of other employees.[42] Similarly, research done for the Department of Labor summarizing relevant literature, finds ex-offenders in some circumstances make more efficient, effective employees than non-offenders.[43]

These generalizations ought to be qualified in two respects. First, almost all of the survey research has looked only at parolees. Thus, little is known about the job performance of arrestees. Second, it is difficult to generalize about crimes and criminals. Within certain sub-groups the propensity for both recidivism and poor job performance do in fact appear to be quite high.

In the absence of definitive, empirical data there is certain to be continued disagreement as to whether conviction records, much less arrest records, are probative or relevant for private employers. For its part the Supreme Court, in now famous words, declared that a fifteen year old arrest record was not probative of misconduct and therefore could not be used as an automatic bar to licensure for the practice of law.

> "The mere fact that a man has been arrested has very little, if any probative value in showing that he has engaged in any misconduct."[44]

A much celebrated federal district court case, Gregory v. Litton Systems, Inc., which held that automatic rejection of an employment application because of an arrest record violates federal equal employment opportunity law, was also very critical of the job relevancy of arrest records.

> "(T)here is no evidence to support the claim that persons who have suffered no criminal convictions but have been arrested on a number of occasions can be expected, when employed, to perform less efficiently or less honestly than other employees. In fact, the evidence in the case was overwhelmingly to the contrary. Thus, information concerning a prospective employee's record of arrests without convictions, is irrelevant to his suitability or qualification for employment."[45]

If it eventually turns out that criminal history record information is not relevant to employment decisions, many people feel that private employers should be denied access to all criminal history data. If, on the other hand, it turns out, as many believe it will, that at least some criminal history record information is in fact relevant to some private employers in some circumstances, then it is important to identify the likely benefits and drawbacks of employer access, in order to get a better sense of the interests at stake and the potential approaches to reconciling these competing interests.

PART TWO

CONSTITUTIONAL, STATUTORY AND COMMON LAW CONSIDERATIONS

This part of the report describes and analyzes relevant legal standards. The constitutional, statutory, regulatory and common law considerations that apply to employer access are discussed.

CONSTITUTIONAL LAW

At first impression, the question of employer access to criminal history records appears to involve the collision of at least two constitutional interests. Denial of employer access arguably impinges on employers' First Amendment interest in the free flow of information. Conversely, authorization for access arguably impinges on the subject's constitutional right of privacy.

Constitutional case law largely rejects both of these arguments. The case law indicates that, except in narrow instances, the Constitution is neutral. It neither commands that criminal history data be disseminated to employers nor prohibits that result.

Employers' Rights to Obtain Information

It is important to note at the outset that employers' "information rights" under the Constitution are no greater (and no less) than the information rights of any other member of the public. Although no constitutional decision discusses the information status of employers, the courts have refused to accord the media special status rights for access to government held data.

> (T)he first Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.[46]

The Court's failure to grant the media special access rights, despite the First Amendment's specific mention of the press and the unique role that the press plays in furthering First Amendment goals, makes it extremely unlikely that the Court would be receptive to arguments that employers ought to have special constitutional information access rights.

Public's Rights to Obtain Information

Although the Supreme Court has said, rather enigmatically, that access to information, at least for news gathering purposes, warrants some degree of First Amendment protection,[47] the Court has made clear that in general, the First Amendment does not grant citizens (or employers) a right to compel the government or other parties to turn over information. About as far as the Supreme Court has been willing to go in providing some kind of a First Amendment access right is to say that when criminal record information is contained in a public record the information must be available to the public. In Cox Broadcasting Corp. v. Cohn[48] the Supreme Court struck down a Georgia statute that prohibited the publication of a rape victim's name. The Court said that once the name had been placed in a public court record, statutory restrictions on access and dissemination violated the First Amendment.

But Cox really begs the question. The question is not whether criminal record information should be considered public, and thus available to employers, once it has been placed in a public record. The courts have long held that the public must be given access to court records, police blotters and other original records of entry traditionally considered public.[49] The real question is when should criminal justice data be placed in a public record. And here the Constitution does not provide definitive answers.

A couple of cases seem to suggest that the public has a right to obtain certain limited information about criminal justice events, such as factual information about

an arrest, when the information is newsworthy and contemporaneous.

For example, in Tennessee Newspaper Inc. v. Levi a newspaper claimed that the United States Attorney's policy of withholding information about individuals recently arrested of federal crimes violated the First Amendment, the Federal Freedom of Information Act and the Federal Privacy Act.[50] The court's opinion did not mention the newspaper's constitutional claim, but, in holding for the paper on statutory grounds, the court did stress the legitimate and extensive public interest in contemporaneous arrest information.

The opinion states that individuals who are arrested or indicted:

> ...become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become matters of legitimate public interest. The lives of these individuals are no longer truly private... this right (right of privacy) becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.[51]

Criminal Justice Agencies' Right to Disseminate Information

It is important to emphasize that once a jurisdiction decides to make conviction or arrest information public (bearing in mind that, with perhaps a few exceptions, they are not under a constitutional compulsion to do so), it is increasingly clear that neither the right to privacy nor any other constitutional doctrine prohibits such dissemination. This statement could not have been made during the first part of the 1970's. However, in 1976 the Supreme Court published an opinion, Paul v. Davis, that, in the words of one federal district court, "snuffed out" the constitutional right of privacy for criminal history records.[52]

Paul v. Davis Extinguishes Constitutional Claim

Paul v. Davis involved the following facts. In anticipation of the 1972 Christmas season the police chiefs of Louisville, Kentucky, and surrounding Jefferson County circulated a flyer to local merchants containing the names and photos of "active shoplifters." Davis had been arrested for shoplifting some 18 months earlier but had never been convicted (although the charges were still pending). Davis sued the police chiefs for a violation of the federal statute (42 U.S.C. Sec. 1983) that makes it unlawful to deprive a person of his constitutional rights under color of state law.

Davis claimed that circulation of the flyer violated several of his constitutional rights, including his right of due process, his right to liberty (which Davis argued had been violated by the damage caused to his reputation), and finally, his right to privacy.

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

> (Davis) claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based not on any challenge to the state's ability to restrict his freedom of action in a sphere contended to be "private" but instead on a claim that the state may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.[53]

This is not to say that Paul v. Davis eliminates all constitutional arguments for prohibiting the public's or employer's access to criminal history records. For one thing, Paul v. Davis only indirectly involves the Constitution. The Supreme Court has traditionally taken a narrow view of actions brought under Section 1983. It is possible that the Court would have given the constitutional arguments a better hearing in another context.

Secondly, the charges against Davis were still actively pending at the time when the police circulated the flyer. Had charges been dropped or Davis been acquitted, the Court might have been more receptive to Davis' constitutional arguments.

Thirdly, it is possible to argue that Paul v. Davis merely restates and emphasizes the message of Cox v. Cohn--if information is in public records it must truly be treated as public. (However, the problem with this argument is that in Paul v. Davis the information was contained in an "official" record and the opinion does not address the public record issue.)

Decisions Applying Paul v. Davis

To date, only a few decisions have given careful attention to Paul v. Davis' effect on the extent to which the constitutional right of privacy applies to criminal history records.[54] However, all of these courts have interpreted Paul v. Davis broadly to hold that arrestees do not have a constitutional interest in prohibiting the dissemination of their arrest records.

In Hammons v. Scott[55] a three-judge federal district court panel held that an arrestee was not entitled, on constitutional grounds, to an order purging his record. In this case all charges against the subject were dropped a day after his arrest for assault with a deadly weapon. The subject had no prior arrests and argued that maintenance and dissemination of this record violated his constitutional right of privacy and harmed him by impeding his opportunities for employment and licensing and causing an increased likelihood of police surveillance.

The court was emphatic in declaring that a constitutional action for purging or sealing does not exist in the wake of Paul v. Davis.

> However, by its opinion of March 23, 1976 in Paul v. Davis (citations omitted), the United States Supreme Court has snuffed out the short life of this action.[56]

The Hammons' opinion even extends the reach of Paul v. Davis somewhat to cover not only cases where the charges are still pending, but, as well, cases, such as that presented in Hammons, where all charges have been dropped.

In a more recent decision, Rowlett v. Fairfax,[57] a federal district court in Missouri cited Paul v. Davis as authority for holding that an arrestee whose charges were dropped shortly after his arrest had no constitutional interest that would support the purging of the FBI's rap sheet entries. The opinion criticizes those pre Paul v. Davis cases which hold that constitutional privacy and due process rights give subjects certain recordkeeping rights regarding their rap sheets. The Rowlett court states expressly that it "agrees with the comment in Hammons that Paul 'snuffed out the short life (of this action)'."[58]

In Jones v. Palmer Media, Inc.,[59] a former Congressional candidate sued a Congressional staffer for invasion of privacy after the staffer released to a newspaper a record of the candidate's prior arrest in Lorenzo Marques, Portuguese East Africa. The court cited Paul v. Davis to support its holding that the staffer's release of the candidate's arrest record did not deprive the candidate of his constitutional right of privacy. The court concluded that Paul v. Davis stands for the proposition that the constitutional right of privacy does not protect an individual's interest in his reputation. In order to involve a constitutional interest the court said that the alleged invasion of privacy must interfere with or alter a legal status or property right of the individual.

Interestingly, the court speculated that where the reputational damage could be coupled with some more tangible damage, such as interference with the subject's property interest in retention of a civil service position, the record subject might have a constitutional claim. This reasoning, were it to be applied in other cases, leaves the door open slightly for record subjects whose criminal history record is disclosed to employers and who consequently lose private sector jobs in which they have a property interest (such as tenured positions) to argue that their constitutional right of privacy was violated.

Most recently, a federal district court panel rejected the constitutional claims in an invasion of privacy suit brought against federal law enforcement officials. In Gonzalez v. Leonard,[60] Rodolfo "Corky" Gonzalez accused federal Immigration and Naturalization Service officials of defaming him and invading his privacy by disseminating a telex to law enforcement officials stating that Gonzalez and others were planning to kill police officers by luring them into ambushes. The court concluded:

> "Paul v. Davis clearly disposes of the plaintiffs' privacy claim. More broadly, Paul establishes that the interest which the plaintiffs' claim has been invaded by the defendants--their interest in preserving their good reputations--is not protected by the United States Constitution, although it may well be safeguarded by tort law of one or more States."[61]

In the wake of these decisions there can be little question that disclosure of criminal history records--even if incorrect, incomplete or dated--does not in and of itself violate the subject's constitutional right of privacy. For a violation to occur the record subject will have to show more than mere harm to his reputation or his sensibilities. The record subject will have to show that the disclosure damaged some specific property interest or

liberty interest recognized by the constitution or other law. In effect, the courts are saying that individuals will have to have some other constitutional or legal cause of action to supplement their information privacy claim.

Naturally, if it is now true that a criminal justice agency can release arrest record information or intelligence record information without constitutional privacy obstacles, these agencies can also release conviction information.

Pre-Paul v. Davis Privacy Opinions

Paul v. Davis and its progeny appear to be sweeping away a rich accumulation of earlier constitutional case law which held that criminal justice agency dissemination of arrest record information (but not conviction record information) to private employers could be a violation of the subject's constitutional right of privacy.[62]

Menard v. Mitchell[63] was perhaps the most influential and widely quoted pre Paul v. Davis constitutional privacy case involving dissemination of arrest record information. Menard was arrested for suspicion of burglary, but two days later charges were dropped, and Menard subsequently sued the FBI to purge his arrest record. The federal court of appeals' panel said that if the arrest was made without probable cause there is a real question as to, "(W)hether the Constitution can tolerate any adverse use of information or tangible objects obtained as a result of an unconstitutional arrest..."[64]

Even if the arrest were made with probable cause, but the charges eventually resulted in a favorable disposition, the Menard Court felt that an order limiting dissemination (sealing) might be appropriate (although purging would not be) if the plaintiff could show that: (1) his pictures would be publicly displayed in a rogues gallery; or (2) his arrest record would be disseminated to employers; or (3) retention of the record would be likely to result in harassment by government officials.

From a policy standpoint, one important point emerges from this analysis of the constitutional principles affecting employer access to criminal history records. Employer access to this data is now largely a matter of federal and state statutory law and its implementing regulations (and to a very limited extent, common law privacy standards). Thus, public consideration and debate of the pertinent policy issues becomes a far more important task now that the protections (and limitations) of constitutional standards are not available.

FEDERAL STATUTORY LAW

Federal statutory law does not comprehensively address the issue of private employer access to criminal history records. However, several federal statutes and regulations affect both federal and state disclosure of criminal history data to private employers.

FOIA and the Privacy Act

The Federal Freedom of Information Act[65] (FOIA) sets the basic pattern for disclosure of federally held written information. The FOIA requires that federal agencies make available to the public, upon request, all written information in their files unless the withholding of the information can be authorized under one of the FOIA's nine exemptions. The extent to which the FOIA's exemptions can be used to limit public access to specific types of criminal justice information is an area of unsettled and changing law.

Generally speaking, only three of the FOIA's exemptions are potential sources of authority for denying access to criminal history information: subsection (b)(3), if the information has been specifically exempted from disclosure by statute; subsection (b)(6), if the disclosure would constitute a clearly unwarranted invasion of personal privacy; and subsection (b)(7), if the information involves investigatory records and disclosure would result

in one of six types of harm specifically identified in the subsection.

The Privacy Act,[66] despite popular misconceptions, has little effect on employer access to criminal justice information. The Privacy Act prohibits federal agencies from releasing most types of personal information without the subject's written consent, unless the release is permitted under one of that Act's eleven exceptions. One of those exceptions permits agencies to release information that must be disclosed under the FOIA. Thus, if a criminal record is to be withheld it must qualify for one of the FOIA's disclosure exemptions. Otherwise, the FOIA requires its release and therefore the Privacy Act's exemption is met.

Department of Justice Regulations

In interpreting the FOIA, the Department of Justice has taken a generally protective, pro-privacy view of the release of criminal history record information. Its regulations prohibit the Federal Bureau of Investigation (FBI) from releasing summaries of arrest and conviction information to the general public.[67] The only exception that is recognized is for conviction and arrest record information that is "reasonably contemporaneous" with the event to which it relates.

The Department of Justice bases its regulation on language in 28 U.S.C. Sec. 534 which authorizes the Department of Justice to, "exchange these records (criminal history records) with, and for the official use of authorized officials of the Federal Government, the states, cities and penal and other institutions."[68] The Department of Justice reads this section as implicitly prohibiting the Department's release of criminal history records to non-criminal justice agencies.[69]

However, this dissemination prohibition has been slightly amended by Public Law 92-544 which authorizes the FBI to disseminate arrest records to federally chartered or insured banking institutions and with officials of state and local government for employment and licensing

purposes.[70] Even in these instances, the FBI is forbidden by regulation from releasing arrest records that are more than one year old and are not accompanied by a disposition. The regulation explains that the purpose of this policy is, "to reduce possible denials of employment opportunities or licensing privileges to individuals as a result of the dissemination of identification records not containing final dispositional data concerning criminal charges brought against such individuals."[71]

Whether this combination of regulatory and statutory law can properly be used to deny an FOIA request made to the Department of Justice for criminal history data is being tested in a federal district court suit underway in mid-1981. The Reporters Committee for Freedom of the Press and Robert Schackney, a reporter for CBS News, have brought an FOIA lawsuit against the Department of Justice for access to arrest and conviction information regarding the Medico's (Phillip, Charles and Samuel).[72] The Medico's are reputed to be organized crime figures and the plaintiff's claim that they are only seeking information that has already been contained in public court records. Many observers believe that when the lawsuit is over, the federal government, in most cases, will have to release conviction and perhaps arrest information upon receipt of an FOIA request.

Equal Employment Opportunity Law

One additional area of federal law affects private employer access to, and particularly use of, criminal history data. Title VII of the Civil Rights Act of 1964[73] and related law[74] prohibit an employer from using criminal history records for employment decisions if such use has an adverse impact upon a particular group, such as a racial, ethnic or religious group, and the adverse impact cannot be justified as job related. In other words, if adverse impact is established, the employer must be able to demonstrate that the use of the criminal history record is relevant or related to the duties and responsibilities of the particular position.[75]

Several decisions have found that use of either arrest or conviction records as an automatic bar to employment does have an adverse impact upon racial minorities and therefore violates Title VII. The courts have taken judicial notice that Blacks are arrested and convicted in proportionately far higher percentages than whites. One study, for example, estimates that about 90 percent of Black urban males may have an arrest record.[76] According to recent Uniform Crime Reports published by the FBI, Blacks account for about 35 percent of all arrests nationally for the seven "Index Crimes," while comprising less than 15 percent of the population.[77]

In 1970 in Gregory v. Litton Systems, Inc.,[78] a federal court of appeals panel held that it is a violation of equal employment opportunity law for a private employer to automatically deny jobs to persons with arrest histories. The court based its decision on the far higher incidence of arrest histories among Black males.

In Carter v. Gallagher, another federal appeals panel took Gregory one step further and found that Minneapolis' fire department's policy of automatically barring employment to individuals with a conviction record was discriminatory.[79] The court found that Black males make up 4.7 percent of the population of Minneapolis but account for 12.19 percent of its felony convictions. Other cases have also held that it is a violation of the nation's equal employment law to summarily reject for employment applicants who have conviction records.[80]

It is important to bear in mind that equal employment opportunity considerations do not bar employer access to data--merely its use in a discriminatory manner. It is also important to note that an employer who uses conviction record data (and, to a much lesser extent, arrest record data) on a case by case basis, without using the data as an absolute bar to employment, and who can show that it makes sense to take the data into account because it is job related, will often be upheld by the courts.

In Richardson v. Hotel Corp. of America,[81] for example, a hotel's discharge of a bellhop for convictions of theft was upheld. The court said that the theft convictions were related to the bellhop's employment responsibilities which included access to guest's rooms. Other courts have upheld a dismissal of a bus driver for conviction of aggravated assault[82] and denial of a taxi license to an individual convicted of drug offenses.[83]

However, there can be no question that employer use of criminal history data (and even its collection, to the extent that such collection implies use) for employment purposes exposes employers to a potential risk of liability under federal equal employment law.

Ironically, equal employment opportunity doctrines may have the unwitting effect of encouraging employers to use third party sources of information such as criminal records. The personnel administration literature has emphasized to employers that they run a risk that applicants and employees will bring equal employment opportunity complaints if the employer asks them directly about their criminal history background.[84] As an alternate and normally clandestine strategy, some writers have urged employers to seek criminal history record information from third party, public sources such as the courts and police agencies.[85]

JSIA Regulations

The regulations issued originally by the Law Enforcement Assistance Administration (LEAA)[86] and now administered under the Justice Systems Improvement Act (JSIA Regulations) are an important influence on state standards for employer access to criminal history records.

The regulations were issued pursuant to the single privacy standard that the Congress adopted during the 70's dealing with criminal justice information. The Crime Control Act of 1973 (which amended the Omnibus Crime Control and Safe Streets Act of 1968) directs the executive branch to assure that the privacy of all criminal

history information in state and local systems that receive federal monies is adequately provided for, and further directs that such information "only be used for law enforcement and criminal justice and other lawful purposes."[87]

Pursuant to this statute LEAA issued comprehensive regulations for the handling of criminal history records by state and local criminal justice agencies. Among other things, the Regulations affect state and local disclosure of criminal history data to non-criminal justice agencies, such as private employers.

Unlike the Department of Justice Regulations, the JSIA Regulations do not prohibit states and localities from disclosing conviction record information. Instead, the Regulations only regulate the disclosure of what the Regulations call "non-conviction data." Non-conviction data includes information about arrests without a disposition (if more than a year has elapsed from the date of the arrest) as well as all types of dispositions favorable to a defendant, such as acquittals.[88] The JSIA Regulations prohibit state and local criminal justice agencies from releasing non-conviction information to private employers or other parties outside of the criminal justice community unless dissemination is authorized by a state or local law, an executive order or a court ruling.

However, the JSIA Regulations' exception for state and local law is critical because it means that states and localities are free for all practical purposes to set their own dissemination policy. All that the JSIA Regulations do is set an optional, minimum standard. States and localities can set more restrictive dissemination standards and, most importantly, they are free to ignore the LEAA approach and enact more flexible dissemination standards. In sum, despite the JSIA Regulations, a state or locality can still decide to adopt standards to release criminal history data, including arrest record data, to private employers.

STATE STATUTORY LAW

Today, all of the states have adopted statutes that address at least some aspects of the maintenance, dissemination or use of criminal history records. Twenty-four states, for example, have enacted statutes that comprehensively regulate and limit public access to criminal history information (both arrests and convictions) maintained in criminal justice information systems.[89] Other states have adopted statutes that regulate at least some types of dissemination, either through regulation of the state agency responsible for criminal identification functions or by coverage of some types of criminal history records under the state public records law. Still other states, 39 at last count, have approved specific legislative provisions that require or permit the sealing or purging of criminal history record information under enumerated circumstances.[90]

Private Employer Access Generally

Despite the growing volume of state privacy and security legislation and the enactment of state statutory provisions limiting the dissemination of criminal history records, the rule in the majority of states continues to be that private employers can, and do, obtain at least conviction data and frequently arrest data as well. A review by SEARCH of the statutes of the 50 states (plus the District of Columbia, the Virgin Islands and Puerto Rico), undertaken in connection with this project, found that ten jurisdictions (Florida, Illinois, Kentucky, Minnesota, Montana, Nebraska, Nevada, Pennsylvania, the Virgin Islands and West Virginia) provide statutory authority for private employers to obtain both conviction and non-conviction arrest data.[91] Another seven states (Colorado, Connecticut, Georgia, Maine, New Mexico, Tennessee and Washington) provide for access to conviction data only.[92] Eleven states (Alabama, Arizona, Hawaii, Kansas, Louisiana, Maryland, Massachusetts, New Hampshire, South Carolina, South Dakota and Utah) have statutory provisions that delegate authority to some official body or person (such as a privacy and security council or the director of the state bureau of identification) to review and approve or disapprove requests for criminal records from non-criminal justice applicants, including private employers.[93]

In addition, thirteen jurisdictions (Idaho, Indiana, Michigan, Mississippi, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Puerto Rico, Texas, Vermont and Wisconsin)[94] do not provide in their statutes for access by private employers, but do not expressly prohibit such access either; thus, presumably private employers in these states might obtain access to some criminal history records under the state's public records law or by virtue of the exercise of official discretion.

A typical statutory provision in these states establishes a state criminal identification bureau with authority to collect and compile criminal identification and criminal history data and share it with other identification bureaus and with state and federal law enforcement officials. However, as noted above, these statutes do not say that law enforcement officials are the only permissible recipients of criminal history record data and therefore a good argument can be made that criminal history records may be made available to non-criminal justice applicants, particularly if the state has a broadly worded public records law.

Only twelve jurisdictions have adopted statutory schemes that appear to prohibit flatly access to criminal history records by private employers (Alaska, Arkansas, California, Delaware, the District of Columbia, Iowa, New York, North Carolina, Oregon, Rhode Island, Virginia and Wyoming).[95]

Factors Supporting Access

Two additional factors weigh in favor of employer access to criminal records. First, even in jurisdictions that ostensibly prohibit employer access to criminal history data, or that frequently and readily purge or seal criminal history records, employers can obtain both conviction and arrest data by checking non-name-indexed, non-cumulative original records of entry, such as police blotters or court arraignment records. Second, many state criminal justice information statutes regulate only the central state repository or records disseminated by

the respository.[96] Thus, in most states, even some of those with comprehensive criminal record statutes, local police agencies are still free--absent a local ordinance--to release to private employers whatever arrest or conviction data they choose to.

Although there is little empirical information regarding the extent to which local police oblige private employers, many observers believe that it is a frequent occurrence. As pointed out in Part One of this report, some commentators suggest that much of the traffic in criminal history records between local police and employers is done on a hidden, non-public basis. This may occur, in particular, in cases where the local police not only provide employers with information from local files, but as well make requests to the state repository or the FBI. The OTA Study makes this point:

> Another important approach for private employers obtaining these records involves channeling their requests through local law enforcement agencies. As a result, some of this type of use will appear not as a secondary private use, but rather as an instance of use by a law enforcement agency. States where the use of such information by private employers is open and recorded, such as Florida, which permits Jack's Cookie Company and Winn Dixie Stores, Inc., among other private employers, access to these files, represent rare exceptions to this pattern of hidden use.[97]

Specific Employer Access Statutes

A few states have adopted statutory or regulatory provisions that specifically, and sometimes comprehensively, regulate private employer access to criminal history records. State legislation which expressly addresses this issue seems to be increasingly common.

Georgia, for example, has adopted a detailed scheme for private employer access. Under Georgia's law

the Georgia Crime Information Center (GCIC) must make conviction records available to private employers for the purpose of making employment or job assignment decisions for employees or potential employees whose duties involve or may involve: (a) working in or near private dwellings without immediate supervision; (b) custody or control over or access to cash or valuable items; (c) knowledge of or access to secret processes, trade secrets or other confidential business information; or (d) insuring the security or safety of other employees, customers or property of the employer. The conviction history information may be made available only to persons involved in the hiring, background investigation or job assignment of the subject of the record.

The Georgia statute further provides that the GCIC shall not be liable for any inaccuracy in records that are shared with employers and nor shall it be liable for invasions of privacy. Provisions for fingerprinting and fees are also included.[98]

Nevada's statute makes conviction data available generally to the public; however, the statute expressly states that private employers have a right of access to such data.[99]

By contrast, Minnesota's statute expressly proscribes employer access to certain types of criminal history records, including certain kinds of conviction records. Minnesota prohibits dissemination for public employment and occupational licensing purposes of records of misdemeanor convictions for which no jail sentence can be imposed, purged conviction record information and records of all arrests not followed by convictions.[100]

A few states have adopted regulatory schemes that do not set hard and fast rules, but instead, give the employer or a state agency discretion to determine whether the criminal history record is a relevant or appropriate factor in light of the specific employment decision at issue.

Pennsylvania's new, comprehensive criminal justice information statute, for example, makes conviction data

and felony arrest data available to employers, but conditions its use on its relationship to the applicant's employment suitability.

> "Convictions for felonies, as well as misdemeanor convictions and arrests for felony offenses, which relate to the applicant's suitability for employment in the position for which he has applied may be considered by the employer. Misdemeanor convictions and arrests for offenses which do not relate to the applicant's suitability for employment in the position for which he has applied shall not be considered by the employer."[101]

Maryland, by regulation, prohibits the state repository from disseminating conviction record data to employers unless the employer demonstrates that the duties of the employee would bring the employee into such a sensitive position with the public that employer access to the conviction data will protect the public or avoid damage to the employer's reputation and good will. The regulation requires the repository to establish procedures under which employers can apply for access to conviction data. The regulation proscribes private employer access to non-conviction data unless such access is authorized by a statute or court order.[102]

The practicability of regulatory schemes, such as those in Pennsylvania and Maryland, that condition employer access to or use of criminal history data on determinations of relevance have been questioned. Some observers assert that state officials have neither the resources nor the expertise to make relevancy determinations on a case by case basis. On the other hand, employers are unlikely to be objective in applying a relevancy standard to their own determinations. In consequence, many analysts believe that the better course for state legislatures is to set broad but definitive rules regulating employer access, perhaps along the lines of the Georgia statute.

A few states have looked at the issue of employer use of criminal history records as an employment discrimination matter, rather than as an information policy matter. For example, statutes in New York,[103] Wisconsin,[104] and Hawaii[105] bar private employers from discriminating against ex-offenders. This approach is analogous to, though somewhat stricter than, federal equal employment opportunity standards.

Finally, a few jurisdictions place various kinds of procedural safeguards upon employer's access to and use of criminal history data. For example, at least five states (Illinois, Montana, Nebraska, Nevada and West Virginia) require that private employers seeking criminal history data must obtain written authorization from the record subject.[106] Such requirements for subject authorization are increasingly common.

Another relatively common procedural protection prohibits employers from requiring applicants or incumbents to exercise their access rights to obtain copies of their criminal history records for the employer. Today, virtually every jurisdiction permits criminal record subjects to inspect and/or obtain a copy of their criminal history record. Theoretically, such access provisions could be abused by employers. In an effort to avoid such abuse, Maryland, for example, has adopted the following provision.

> "It is unlawful for any employer or prospective employer to require a person to inspect or challenge any criminal history information relating to that person for the purpose of obtaining a copy of the person's record in order to qualify for employment."[107]

COMMON LAW DOCTRINES

Criminal Justice Agency Disclosure

In rare instances criminal justice agencies and their employees may have common law liability for disclosure

of criminal history data to private employers, even though the disclosure does not violate statutory or regulatory provisions. In order for a criminal justice agency to be liable for disclosures, several factors must be present: (1) the jurisdiction must have waived its sovereign immunity from law suits; (2) there must not be a statutory or regulatory provision that authorizes disclosure to private employers; (3) the jurisdiction must recognize the tort doctrine of invasion of privacy or some related cause of action; (4) the subject of the record must be damaged by the disclosure; and (5) the disclosure must not be privileged.

Ordinarily, criminal justice agencies and their employees will enjoy a qualified privilege to make disclosures of criminal history data. However, the privilege can be lost if the disclosure is overbroad, gratuitous or otherwise unreasonable. The privilege can also be lost if the disclosure was made with malice--a disregard for the data's truth or falsity, or if made in a manner that is entirely unrelated to the official's duties ("outside the scope of employment").

Carr v. Watkins[108] is one of the few and probably the most important case which holds that police dissemination of information can make the agency or its officers liable to the record subject for invasion of privacy. In Carr the court refused to dismiss an invasion of privacy claim leveled against two Montgomery County, Maryland, police officers for disseminating adverse investigative information about the plaintiff to his employer. The disclosure resulted in the plaintiff's firing. The court remanded the case for consideration of whether the police officers were acting within the scope of their employment and whether they acted with malice.

The Carr opinion cites several other cases that have recognized a common law cause of action against criminal justice agencies for improper dissemination of information.

> Cases which have sustained a claim of violation of the right of privacy which have some

analogy to the factual situation alleged by the declaration before us, include those in which the right of one arrested not to have his fingerprints and picture disseminated or exhibited prior to conviction, unless he becomes a fugitive from justice, has been recognized. (Citations omitted.)[109]

Private Employer Collection and Use of Criminal History Record Information

Traditionally the courts have held that the common law privacy doctrine does not place restrictions upon the type of information that a private employer can obtain from or about applicants or employees. Not one decision, for instance, has been found which holds a private employer liable on common law privacy grounds for collecting information about an applicant's criminal history background, or, for that matter, other personal information about an applicant or employee. In Spencer v. Toussaint,[110] for example, a federal district court panel held that it is not an invasion of privacy for a private employer to inquire into an applicant's psychological history on an application form.

Furthermore, an employer's collection of personal information about applicants and employees from a third party, such as a central repository or other law enforcement agency, customarily is not considered a violation of privacy because the information is already in the public domain because it is known to the third party.[111]

Even arbitration decisions involving employees who are covered by collective bargaining agreements have given employers wide latitude to collect and use criminal history records. In Alterman Transport Lines, Inc.,[112] for example, an arbitrator upheld an employer's discharge of an employee convicted of a felony after the employer learned of the conviction. The arbitrator did not find fault with the employer's policy of not hiring or retaining employees convicted of a serious crime.

The view that private employers can collect and use criminal history records without reference to applicants' or employees' privacy interests seems to rest on two philosophical legs. First the termination at will doctrine holds that employers hire (or not hire) or discharge an individual for any reason, at any time and without regard to any particular process.[113] Given a legal setting such as this in which employees do not have a right to obtain or retain a job, it follows that courts give employers wide latitude to collect and use criminal history records.

Second, the courts traditionally hold that employees do not have legally cognizable privacy interests in the employer/employee relationship.[114] This means that unlike doctor-patient or lawyer-client relationships, employees cannot hold employers to a standard of conduct that is protective of their privacy interests.

Today, both of these philosophical props are shakey. The termination at will doctrine is in considerable decline. Many courts are beginning to recognize that employees have basic rights and remedies in the workplace, at least where the employer's conduct conflicts with an enunciated public policy interest.[115] Furthermore, some courts, including the Supreme Court, have recently implied that employees have privacy interests in the workplace.[116]

The effect of these developments cannot be gauged with certainty. However, it begins to appear that given the right case, a court might provide relief on privacy grounds to an employee who is harmed by his employer's collection or use of criminal history data.[117] The "right case" would almost certainly involve an instance where: (1) the criminal history record was not public; (2) the employer could not argue that the record was job related; and (3) the employee had not given implicit or explicit consent to the employer to obtain his record.

As noted earlier, employees may also have a constitutional cause of action against the criminal justice agency which made the disclosure if courts eventually conclude that employees have a property interest in

private employment. In that event a court, reasoning as the federal district court did in Jones v. Palmer Media, Inc., could hold that disclosure of non-public criminal history data involves a violation of the record subject's constitutional interests because the privacy violation interfered with the subject's property interest in his job.[118]

Responsibility for Background Checks and Behavior of Employees

Two final and related common law doctrines are germaine to policies for employer access to criminal history records. First, under the common law doctrine of respondeat superior it is well established that private employers can be found liable for the tortious or criminal acts of their employees when the acts occur on, or arise out of, their jobs. Thus, the common law establishes the somewhat paradoxical dilemma that private firms can be held liable for the criminal acts of their employees but the firms are often not permitted to review applicants' criminal history records.

Lyon v. Carey,[119] is perhaps the most widely cited decision in a long line of cases holding employers liable for the criminal conduct of their employees. In Lyon a jury required a trucking company to pay its customer damages after its employee assaulted and raped the customer. The court concluded that the criminal act arose out of the employee's employment because the assault commenced during an argument over payment of the employer's bill.

Cases such as Lyon v. Carey give private employees an incentive to check criminal history records and, in effect, penalize employers for hiring applicants with criminal records--assuming that criminal records are predictive of an applicant's likelihood to commit future job related crimes.

The second common law theory, sometimes dubbed the "negligent hiring doctrine," has been accepted by the courts only tenuously. This doctrine holds that regardless of whether the tortious or criminal act occurs in the

course of the employee's employment, the employer is liable if the employer's failure to exercise care in hiring or supervising the employee made possible the tortious or criminal act. (This theory is closely related to the so-called "fellow-servant rule" which imposes upon employers the duty to use due care in the selection and retention of employees for the sole benefit, and protection of co-employees.) Thus, an employer may be liable to a member of the public or other employees if he negligently hires an employee with a past record of criminal conduct and then puts that employee in a position to commit a similar crime.[120]

The courts have not had too much trouble in deciding that employers have a general duty to exercise due care in hiring and supervising employees. In Fleming v. Bronfin, [121] for example, a grocery store owner was held liable to his customer after his deliveryman attacked the customer while making a delivery to her home. The court said that the grocer was negligent because a simple investigation would have disclosed that the deliveryman was an alcoholic who could not be trusted to make deliveries to customer's homes.

However, the courts have been more than a little reluctant to hold that the duty to exercise due care includes a duty to determine whether applicants have criminal history records. A few courts have been willing to go so far as to say that where the employee will be entering the homes of customers the employer has a duty to check the applicant's criminal history background or to supervise the new employee for at least an initial period of time.

In Blum v. National Services Industries,[122] a Maryland Circuit Court awarded damages against a moving company because an ex-felon employed by the mover entered an apartment adjacent to the apartment of the moving company's customer and killed a woman living there. The moving company, which apparently was aware of the employee's criminal background, was found negligent for failing to investigate that background (an armed robbery conviction) and for failing to supervise the employee.

In Kendall v. Gore Properties,[123] a landlord hired an individual to paint a young, single woman's apartment without checking the employee's background. The landlord gave the employee a key to the woman's apartment and did not supervise the employee. The landlord was found liable by a federal court of appeals panel after the employee strangled the young woman. While the employee apparently did not have a criminal background, he did have a background of hospitalization for emotional problems. In any event, the opinion indicates that the existence of an actual past record is irrelevant. The basis of the landlord's liability in this case was his failure to investigate the employee's background coupled with his failure to supervise the employee.

> "If a reasonable investigation had been made as to Porter's (the "employee") background which disclosed the basis for a conclusion of lack of competency, if he had been sufficiently long employed to have established himself as entitled to trust, if the landlord or tenants had had adequate opportunity to scrutinize him and his conduct and had found a basis upon which confidence could be reposed in him, and if, thereafter, he had suddenly gone beserk, a jury, we may suppose, would scarcely have deemed the landlord liable."[124]

One other case goes even further in establishing an employer's obligation to investigate applicants' criminal history backgrounds. In Becker v. Manpower, Inc.,[125] a federal appeals panel held that an employer of day laborers (Manpower) may be liable in a suit for negligent hiring for supplying two convicted felons to a customer who arranged with Manpower to provide movers for the customer's jewelry store. The movers not only moved the store but stole virtually its entire investory of jewelry and precious stones. The court faulted Manpower for "taking no action to discover if the men had a previous criminal record" and remanded the case for a determination of,

among other things whether Manpower was in fact negligent in failing to screen the employees' background.

Despite these decisions most courts, when presented squarely with the question, have concluded that employers do not have a duty to check the criminal history background of applicants. In Stevens v. Lankard,[126] a convicted sodomite was hired as a shoe clerk without investigation. The offender subsequently committed an act of sodomy on a child customer. The court refused to hold an employer negligent where routine application procedures would not have revealed the conviction. The court implied that to require an exhaustive search into an applicant's background would place an unfair burden on employers.

Other courts have refused to find employers liable for failing to check the criminal history background of an apartment complex handyman who stole from the apartments,[127] or a service station attendant who shot a customer,[128] or a tractor trailer driver who operated the vehicle negligently,[129] or a parking garage attendant who drove a car negligently.[130]

Of course, the conflicting case law is small comfort to employers. Particularly where their employees are called upon to enter customers' homes without supervision, employers at least run a risk of liability if they fail to check the employee's criminal history background and the employee, especially during his first months on the job, commits a related criminal act against the customer or his property. The possibility of employer liability increases still further if the employer is aware of the employee's criminal or unsavory background but fails to perform a thorough investigation.[131]

The effect of this case law is to "whip saw" employers. In one respect employers have an incentive to obtain and use criminal histories in order to minimize the chance of employing someone with a likelihood of committing a crime and in order to discharge their responsibility to exercise due care in hiring employees. In another respect employers have a disincentive to inquire about an applicant's background because once on notice about a

criminal history background the chances of employer liability for any subsequent wrong doing increase.

And in a third respect employers are either prevented by privacy oriented laws or penalized by equal employment oriented laws from collecting or using criminal history records.

Not surprisingly, spokesmen for personnel professionals and other industry groups express real concern and dismay over the exposed and untenable position in which employers are placed by these conflicting common law doctrines.

PART THREE

POLICY CONSIDERATIONS RELATED TO EMPLOYER ACCESS

This part of the report provides a comparative analysis of the rationale supporting arguments for and against employer access to criminal history records.

RATIONALE IN SUPPORT OF EMPLOYER ACCESS

Arguments supporting access not only touch upon the information needs of private employers, but also look at related federal and state government practices and examine non-employment benefits associated with such access.

Private Employers

Minimization of employer risk is perhaps the key benefit that can be ascribed to providing employers with access to criminal history data. Assuming that criminal history information is predictive of job performance, employers can use this information to minimize their risks and costs. For example, employers may reduce their exposure to theft if they can discriminate against individuals with convictions (or arrests) for fraud, robbery, burglary or breach of trust. Similarly, employers may minimize their risks (or their insurer's risks) to liability from legal judgments if they can discriminate against individuals with histories of violent or deviant behavior. For example, an employer who hires an individual with a history of child molestation and drunken driving to be a camp counselor or bus driver is exposed to significant potential for civil liability. (The law regarding employer liability for hiring individuals with criminal records is discussed in some detail in Part Two.)

In some cases, employers' insurance policies may not cover wrongdoing by employees with criminal history backgrounds. In this event, the employer undertakes a truly substantial risk in hiring a criminal offender. In other cases, the insurance carrier may increase its premiums in exchange for covering the conduct of criminal offenders.

Many observers believe that private organizations can make more persuasive claims for access to criminal history records for employment purposes than they can for insurance, credit, housing and other purposes. Employers routinely entrust their employees with vital responsibilities involving human health and safety, and critical physical and monetary resources. An employee's conduct may have a far more significant impact on an employer (and on the employer's customers) than a tenant's impact on his landlord, an insured's impact on his carrier, or a debtor's impact on his creditors.

Indeed, it is sometimes suggested that a good argument can be made that private employers in especially sensitive industries ought to be able to obtain criminal intelligence and investigative data concerning applicants and incumbents, at least for certain types of positions.

Federal Government

It is worth noting that the federal government's hiring policies represent a strong endorsement of the argument that criminal history data, and especially conviction data, is relevant to employment decisions. When the federal government acts as employer, it expressly requires a pre-employment criminal background check. At a minimum, applicants for federal employment receive a "National Agency Check", which includes a review of the FBI's identification and criminal history records. However, a 1978 law prohibits federal agencies from taking arrest record information (but not conviction record information) into account in making hiring decisions for non-sensitive positions.[132] But, in reviewing applicants for sensitive positions, agencies typically conduct a

very detailed criminal history check that includes criminal history records maintained by state and local police.[133]

In addition, federal law requires criminal history checks for employees who work in certain sensitive private sector positions. For example, applicants for many positions with defense contractors and nuclear power facilities must receive a criminal history check.[134]

State Occupational Licensing

In support of the rationale for employer criminal history checks, it is pointed out that every state has standards for at least a few occupational licenses that require a criminal records check. This check is usually intended to verify that the applicant does not have a history of convictions and/or is of "good moral character" (often interpreted to mean that the applicant does not have an arrest history). Most occupational licensing requirements apply to positions in service industries or state government. However, the rationale supporting the licensing requirement is sometimes obscure. For example, some states require a good moral character to obtain a license to be a septic tank cleaner or a limburger cheesemaker. Conversely, as of 1975 only one state, New York, used its licensing scheme to prohibit offenders from selling firearms.[135]

National statistics on occupational licensing compiled in a 1974 American Bar Association study estimated that seven million people are employed in licensed occupations.[136] This study counted a total of 1,948 separate state licensing statutes, for an average of 39 per state. Connecticut had a high of 80 categories of employment covered by occupational licensing statutes and New Hampshire had a low of 22. In California, for example, 47 different licensing boards can use state criminal history files for screening applicants.

New York State, for example, in addition to its firearms licensing requirement, requires a conviction records check for applicants for the following positions

(most, but not all of which, require licenses): professional boxers, referees and judges;[137] harness racing officials;[138] private investigators and guards;[139] users or transporters of explosives;[140] male employees of manufacturers or wholesalers of alcoholic beverages;[141] employers of migrant laborers;[142] most employees or members of national securities exchanges;[143] professional bondsmen;[144] operators of employment agencies;[145] longshoremen and related dockworkers;[146] employees of check cashing businesses;[147] top employees in insurance companies;[148] horse owners, trainers and jockeys;[149] employees of liquor stores and certain employees of bars;[150] and funeral directors.[151]

Interestingly, some of the literature suggests that even though licensing boards are often required to obtain criminal history records of applicants, these boards, when given discretion, seldom deny a license purely on the basis of the applicant's criminal history record. For example, a survey of nursing, veterinary science, embalming, barbering and psychology licensing boards found that over a three-year period only 0.02 percent of applicants were denied licenses on the basis of moral character or a criminal offense.[152]

Notwithstanding the apparent reluctance of licensing boards to use criminal history records as a basis for license denials, the criminal history records criterion has come in for heavy criticism. Many writers believe that licensing standards preclude offenders from obtaining good jobs and encourage offenders to obtain government financial assistance or resort to crime.[153] Recently a couple of court decisions have struck down licensing requirements that bar ex-offenders from particular occupations where the offender criterion is not shown to be job related. The courts found that such requirements discriminate impermissably against racial minorities.[154] At least a few states have recently amended their occupational licensing laws to limit the applicability of criminal history records.[155]

Despite these recent developments, the strong endorsement of criminal history employment checks implicit

in the nation's occupational licensing scheme makes it easy to understand why many private employers believe that they too should have the opportunity to obtain conviction, and perhaps arrest information, about at least some of their applicants.

Possible Indirect Benefits

Three possible indirect benefits support arguments for private employer access to criminal history record information. First, providing employers with access to criminal history data about applicants and incumbents may assist criminal justice agencies. Such access, for instance, may help to reduce crime. This effect might occur, in part, because a prospective offender's knowledge that employers will learn of his intended criminal conduct may act as a deterrent. This effect may also occur because employers who are armed with the knowledge of an applicant's or an incumbent's criminal history may be more vigilant in policing the ex-offender's conduct. In addition, employer access may help to improve the quality of criminal history records. If agency officials know that the criminal history records they create and manage may be reviewed by private officials and used to make employment decisions, they are likely to spend more time making the records more accurate and complete.

Second, employer access to criminal history information may be recommended because, in the absence of such access, employers may resort to informal means to obtain this data. For example, employers already use consumer reporting agencies, industry federations, and other private entities that compile or maintain criminal history data, presumably because their access to official criminal history records is cut off. Use of such informal sources decreases the subject's procedural protections and increases the likelihood that the data will be erroneous, incomplete or dated. For these reasons the "lesser evil" may be to permit private employers to obtain official criminal history records.

Third, employers may sometimes desire to obtain criminal history data for purposes other than making a traditional hiring, promotion or other employment decision. For instance, industrial security departments frequently want criminal history data in conjunction with an investigation of on-the-job crime or a campaign to insure protection of individuals or assets. Records obtained in this situation are seldom shared by the security department, almost never become part of the employee's personnel file and are seldom used to make employment decisions.

Employees may also seek criminal history records in order to assist applicants or incumbents who are participating in the employer's offender employment program or various counseling programs.

Public Information

One additional rationale supports private employer access to criminal history records. Some analysts, including for example many media representatives, believe that criminal history records ought to be public. They argue that these records document an individual's involvement in an event that is of real importance to the public--an alleged violation of law that results in an arrest and perhaps in a court proceeding and a conviction. The public has a legitimate curiosity and interest in the criminal justice system and the people who become involved in it. Criminal proceedings are by their nature interesting, often sensationally so, as are the participants, particularly suspects and defendants. Aside from the public's interest in particular criminal justice events and participants, the public has an interest in insuring that the criminal justice system, and the officials responsible for its operation, are visible and accountable. This interest may be served by permitting employers (as well as the media and other members of the public) to have access to criminal history records.

RATIONALE IN SUPPORT OF LIMITING EMPLOYER ACCESS

Several considerations in support of limiting employer access take into account the substantial damage that record subjects may suffer if employers obtain their records.

Employment Prospects

Perhaps the most direct and serious damage, of course, is the effect that employers' access to arrest or conviction records can have on the subject's opportunities for employment. As discussed in Part One, anecdotal information, as well as available empirical data, suggest that a criminal history record, even an arrest only record, is a significant barrier to employment.

The Department of Labor study described in Part One of this report summarizes its findings about the effect of a criminal history record on employment as follows:

> The findings reinforce earlier views that criminal records are a significant barrier to employment of many offenders, particularly those under community supervision or recently released from supervision.[156]

The damage to employment prospects that can be caused by arrest records, in particular, has received considerable judicial recognition. In Menard v. Mitchell a federal court of appeals panel catalogued the problems presented by arrest records.

> Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an

individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.[157]

Whether employers obtain conviction only, or both conviction and arrest records, it is widely recognized that such access extinguishes or greatly reduces a record subject's job prospects.

Redissemination

Employer access to this criminal history data has other consequences as well, because the employer may redisseminate the information. Many jurisdictions do not place specific restraints on redissemination, and even where restraints exist, there appears to be little oversight or accountability. Society's apparent inability, or at least failure, to hold employers accountable for the use of criminal history data is the principal reason in the view of many to insist that private employers receive less data than public employers. Under current law and practice, once criminal history information gets into private employers' hands, it not only may adversely affect a subject's employment opportunities, but may be redisseminated and subsequently used to restrict opportunities for insurance, credit or other desired resources.

Reputation and Privacy

Even when employer access does not lead to specific, adverse determinations, it may damage the employee's reputation and may violate his "sensibilities," or sense of privacy. Although the courts have been unwilling recently to accord this interest much legal recognition, from a policy standpoint there is little question that it

represents a significant consideration. One commentator has expressed the psychological threat posed by employer access to arrest records in the following manner.

> Finally, and independent of these harms, unrestricted dissemination of the arrest record disregards the individual's psychological interest in preventing disclosure of "personal information" without his consent. The concepts of intimacy, identity, role-playing, and autonomy all involve the notion that the individual ought to have some control over what others know about him.[158]

Timeliness and Relevancy

In addition, employer access to criminal history records may involve unfairness to record subjects because the record is not timely or relevant. For example, even when only conviction information is disseminated, the conviction may be old and thus no longer a valid barometer of the subject's behavior. The Supreme Court recently considered the plight of a first offender who had a 20 year old conviction record. The Court said that after 20 years, the individual was no longer a public figure merely by virtue of that conviction.

> This reasoning leads us to reject the further contention that... any person who engages in criminal conduct automatically becomes a public figure for purposes of comment on a limited range of issues relating to his conviction.
>
> * * *
>
> To hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime.[159]

Another unfairness problem associated with employer access occurs when employers use either conviction or arrest information in circumstances where such information is not relevant. For example, a misdemeanor conviction for a breach of the peace may not be relevant to a decision about employing the record subject as a clerk typist. Similarly, a history of convictions for embezzlement and theft may not be relevant to a decision about employing the record subject as a construction worker.

Despite this problem, spokesmen for employers often assert that relevancy criteria should be left to employers. Doubts exist as to the ability of legislators to draft suitable relevancy standards, and the ability of agency officials to make case-by-case relevancy determinations. Experience with the design and application of relevancy criteria in the equal employment opportunity context has been a failure in the view of many employer representatives.

Moreover, it is generally felt within the private sector that employers use criminal history records in an appropriate manner and are eminently capable of giving weight to criminal history records according to their relevance to the pending employment decision.

Incompleteness and Inaccuracy

Another potential unfairness results from a common failure of criminal history records to include dispositions. Often, the dispositions would show acquittals, dismissals, failure to bring charges or other entries favorable to the subject. One commentator has described the problem as follows:

> "The greatest problem in this area is the failure of most criminal record storage systems to record the disposition of cases after arrest. (citations omitted) Of 1.7 million arrests for serious offenses in 1972, 20% of the adults were never prosecuted and of those prosecuted, 30% were not convicted. This suggests that there are probably several million so-called criminal records on persons who were never prosecuted or convicted, but whose names were added to FBI files for distribution to police departments and other public and private agencies. In several states, as many as 70% of the records do not contain dispositions."[160]

The report of the Privacy Protection Study Commission charges that use of arrest records to make an adverse employment decision is fundamentally unfair. The Privacy Commission recommends that, except as specifically required by law, private employers should not seek or use a record of an arrest pertaining to an individual applicant or employee.

> "Arrest information raises perplexing questions of fairness. Although the Commission's record indicates that some employers no longer use arrest information in their employment decisions, many still do. The use of arrest information in making employment decisions is questionable for several reasons. An arrest record by itself indicates only that a law enforcement officer believed he had probable cause to arrest the individual for some offense; not that the person committed the offense. For instance, an individual may have been arrested for breaking and entering a building, while further investigation revealed that he had the owner's permission to be in the building. Constitutional standards specify that convictions, not arrests, establish guilt. Thus, denial of employment because of an unproved charge, a charge that has been dismissed, or one for which there has been an adjudication of innocence, is fundamentally unfair."[161]

The risks posed by employer use of arrest records are compounded by the fact that employers may not distinguish adequately between arrest and conviction data. Indeed, as noted in Part One, many observers believe (although admittedly without definitive empirical verification) that employers seldom distinguish between arrest and conviction records. However, many employer spokesmen dispute this claim and assert that employers are increasingly sophisticated in their understanding of the distinction between arrest and conviction records. Assuming though that at least some employers fail to make a distinction, it means that individuals who were never found guilty of a crime are treated in the same manner as individuals who were found guilty. The unfairness of such a result is manifest.

Defining the Term Employer

Another possible shortcoming of arguments in support of special access rights for employers is the difficulty of defining "employer." As a practical matter, private employers may have to accept the same degree of access that is offered the general public. Otherwise, an individual who employs a domestic servant, participates in the Social Security Program and has an employer identification number assigned by the Internal Revenue Service could argue easily that he should enjoy the same access rights as a Fortune 500 member. Moreover, once access is available to any employer, private investigative organizations and similar organizations could be expected to blur the distinction between employer and public or the distinction among different types or sizes of employers by offering to any member of the public, for a fee, a criminal records check of prospective "applicants."

The problems associated with defining the term employer are similar to the problems that the courts and the legislatures have faced in defining the term media. Those problems are sufficiently grave so that the Supreme Court has cited this as one reason for refusing to consider arguments that the media should be recognized as having

a special status under the First Amendment.[162] Furthermore, giving certain kinds of private employers special access rights not enjoyed by other private employers would raise extremely difficult legal and policy issues.

Criminal Justice Agency Impact

Although it is sometimes asserted that employer access may result in law enforcement benefits, such access may also create burdens. First, if employers were given access to cumulative information maintained in central repositories, the terms of such access might require the repositories to segregate conviction and arrest data, and only disseminate the former. Many repositories may not have the technical or manpower resources to comply with such a requirement.

Second, it is possible that private employer access requests would turn out to be overwhelming. As noted in Part One, the FBI estimates that about 25 percent of the access requests made to its Identification Bureau are for public employment purposes. It is not clear whether access requests from private employers would appreciably swell this percentage, but many criminal justice representatives certainly fear this result.

Rehabilitation and Equality

In addition to the potential for unfairness and damage to record subjects, employer access to criminal history records may involve at least two societal costs. First, if employers use criminal history records to discriminate against record subjects, these individuals, presumably, are less likely to become rehabilitated, contributing members of society. Indeed, many experts believe that if past offenders are denied private employment opportunities, they will be encouraged to make a livelihood through illegal, or at least antisocial behavior. At the very least, they will be dependent upon governmental welfare and benefit programs. Although empirical information to support this hypothesis is lacking, logic suggests

that employment discrimination against criminal history subjects would have this effect.

Second, employer access to criminal history data may ultimately amount to employment discrimination against Blacks and certain other minorities. As previously noted, available statistics indicate that Blacks account for perhaps 70 percent of the offender population.[163] Officials of the Equal Employment Opportunity Commission have testified that they believe that use of arrest information for employment purposes has a racially discriminatory impact.[164] As discussed in Part Two of this Report, the courts have largely accepted this argument.

CONSIDERATIONS IN SUPPORT OF PARTIAL ACCESS

As discussed in the Introduction to this Report, after the competing considerations are sorted out at least a couple of policy views emerge which, if they do not command a consensus, at least attract wide support.

For one thing, few participants in this policy debate, including many critics of private employer access to criminal history record information, support a complete bar on such access. In addition, there seems to be wide agreement today that recent, definitive and negative criminal history data, such as conviction information, should be available to employers if relevant to the job position for which the subject is under consideration.

The Privacy Commission's approach, for example, recommends that private employers be prohibited from access to arrest records, but would permit employers to obtain and use conviction records where the records are "directly relevant to a specific employment decision."

The emphasis on the concept of relevancy is also reflected in recommendations found in the legal and policy literature urging state legislatures to develop broad standards of relevancy that permit private employers who are considering applicants for certain types of positions to have access to certain types of criminal history data. As noted in Part Two, a few states have already begun to experiment with these kinds of statutes.

Where it cannot be shown that the conviction record is relevant to the job in question, there seems to be some support, certainly in the courts and legislatures, for the view that the record should not be available to, or at least not used by, the employer.

There also seems to be wide agreement that non-contemporaneous, non-definitive, negative data such as arrest information or "positive" data such as acquittals and *nolle prosses* should not be available to private employers. Only where the arrest record is relevant to the job in question and where it is also contemporaneous is there significant support for employer access. This type of arrest information may not only be an indicator of the employee's or applicant's behavior, but also is useful because it gives the employer warning that the applicant may soon be incarcerated.

Various limitations and safeguards that would attach to employer access also find support in the policy and legal literature. For example, some analysts have suggested that whenever employers have access to criminal history data, certain procedural limitations should attach. These limitations could include, for example, a prohibition on redissemination, or a requirement that employers notify an individual whenever they obtain his criminal history data and give that individual a chance to explain or rebut the information. And, as noted earlier, the importance of giving the applicant notice and a right to consent to the employer's access, is widely acknowledged.

CONCLUSION

Should private employers have access to criminal history records? This extremely complex question defies simple or hasty answers. Nevertheless, what emerges are a few important observations, and inevitably, a few additional questions. Perhaps the most important issue to be addressed is the crippling lack of empirical information. Simply stated, not nearly enough is known about the extent of employer access, the effects of such access or the need for such access. For example, preliminary

research about the use of criminal history records by licensing boards suggest that such records are irrelevant. This research conflicts with the traditional view of the extent to which criminal history records influence private employers. Thus, it is clear that more empirical information about the real influencing criminal history records on private employer decisionmaking is needed.

A second point to emphasize is that the issue of employer access to criminal history records appears to be quite important. A staggering number of individuals in the workforce are saddled with criminal history records. These records appear to have an effect on record subjects' employment opportunities. And any factor that affects employment opportunities is important because employment plays such a key economic, social and psychological role in people's lives.

A third observation emerges--employer access to criminal history records is a complicated issue. Numerous potential advantages, as well as disadvantages, that flow from such access have been identified in this Report. Interestingly, the identified advantages and disadvantages were sometimes surprising. Some believe, for example, that employer access may help to reduce crime. Some believe that employer access may be impractical, perhaps because it would overwhelm repositories, or perhaps because it would ultimately mean that the entire public must be given access. Others assert that confidentiality protections are impractical, and ultimately counterproductive, because they simply drive employer access requests underground and breed the creation of private data bases.

Although no consensus emerged, at least a few points of agreement, as noted in Part Three, are visible: consensus can be achieved at this time if several points of widespread agreement can be reached. It makes sense to distinguish between private and public employers for access purposes; policies for employer access may have an impact on racial equality considerations; private employers should probably have access to conviction data; private employers should only use such conviction data

when it is relevant but, subject to guidelines, employers should make the relevancy decision; employers should probably not have access to arrest data, but this issue is so controversial and difficult, that hard and fast rules may be impossible; and employees should almost always have procedural protections, such as notice and consent rights, when employers obtain their records.

It appears that before further definitive policy judgments are made about private employer access to criminal history data, three questions should be asked. First, under what circumstances, if any, and in what ways is criminal history data predictive of employee job performance? Assuming that this question can be answered satisfactorily, a second question can be asked: can standards or requirements be formulated and implemented that will insure that private employers only use criminal history data when it is relevant to job performance?

And, apart from the answer to the second question, there is a third question which perhaps goes to the very heart of this whole issue. Even assuming that criminal history data is job relevant, and that employers will use the data only insofar as it is job relevant, does society want to make employment part of the penalty for criminal wrongdoing?

If the individual's only "wrongdoing" is an arrest, it is especially hard to argue that he should suffer employment penalities. If the wrongdoing leads to conviction, the argument is easier, but still raises unsettling questions about the merits of informal, extra legal punishment, the severity of such punishment, its duration, and its racially discriminatory impact.

One final observation should be made. Virtually every discussion of this issue, including this one, seems to suffer from an ephemeral, but nonetheless real, ambivalence. On the one hand, many believe that criminal history information really is relevant and important for employers and may serve an entirely appropriate role in connection with the screening of employment candidates.

On the other hand, it is also sensed that many people are not comfortable holding such beliefs. There

seems to be almost a sense of guilt about advocating employer access to criminal history records. The result is ambivalence, and a gap between formal statements and policies and real beliefs and practices.

If this assessment is correct, the best antidote for the problem is further discussion and debate.

FOOTNOTES

[1] This report uses the widely accepted criminal justice terminology found in the Justice System Improvements Act regulations at 29 C.F.R. Part 20 and in various reports and publications of SEARCH Group, Inc. (SEARCH).

Specifically "criminal history record information" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, informations, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system.

[2] Louis Harris & Assoc., Inc. and Alan F. Westin, The Dimensions of Privacy: A National Opinion Research Survey of Attitudes Toward Privacy, p. 33 (1979).

[3] See the Roster of Conference Participants attached as the Appendix.

[4] See, Miller, Neal, A Study of the Number of Persons with Criminal Records (Offenders) in the Work Force, monograph published by the Department of Labor, Office of the Assistant Secretary for Policy, Evaluation and Research (ASPER), under contract purchase order No. B-9-M-8-4119 (Nov. 1978).

[5] Id. See, pp. 22-23.

[6] Id. p. 24.

[7] Id.

[8] Id.

[9] Miller, Neal, Employers' Barriers to the Employment of Persons with Records of Arrest or Conviction, unpublished, unpaginated draft monograph written for the Department of Labor (May 15, 1979) citing Cook, Philip, "The Correctional Carrot: Better Jobs For Parolees," Policy Analysis (Winter '75).

[10] Id.

[11] Id.

[12] See, Gilman, "Legal Barriers to Jobs are Slowly Disappearing," Corrections Magazine, 5: 68-72 (Dec. '79).

[13] Supra, at n. 9.

[14] Barriers to Employment of Former Offenders, published by Louisiana Governor's Pardon, Parole and Rehabilitation Commission (1978).

[15] Schwartz & Skolnick, "Two Studies of Legal Stigma," Social Problems, Fall 1962 at 33.

[16] Analysis of Federal Bonding Program: Final Report, U.S. Department of Labor, Manpower Administration (1975).

[17] LEAA Regulations Hearings, Wash., D.C., Dec. 11, 12, 15, 1975, as reported in "Computerized Criminal Justice," Villanova L. Rev., 22:471,1195 (1976-1977).

[18] Berman, "Aspects of the Parole Experience," Psychology in the Legal Process, Sales, Ed., Spectrum Publications (1977).

[19] See, for example, Aryeh Neier, "Have You Ever Been Arrested," N.Y. Times Mag., April 15, 1973.

[20] Miller, Herbert, The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies, Wash. 1972, p. 11.

[21] Supra, n. 9.

[22] Supra, n. 9. Miller notes the importance of third party recommendations for rehabilitated offenders. These recommendations "credentialize" offenders and reportedly make them far more likely to be employed.

[23] Jensen & Giegold, "Finding Jobs for Ex-Offenders. A Study of Employers' Attitudes," Am. Bus. L. J., 14:196, 197 (1976).

[24] Supra, n. 2 at p. 33.

[25] Supra, n. 17 at p. 1195.

[26] Rahiya, "Privacy Protection and Personnel Administration--Are New Laws Needed?" Personnel Admin., 24:pp. 19, 20 (Apr. 1979).

[27] Supra, n. 22 at 203.

[28] Hess & LePoole, "Abuse of the Record of Arrest Not Leading to Conviction," Crime & Delinquency, 13: 494, 495 (1967).

[29] An Assessment of the Social Impacts of NCIC and CCH, prepared by the Bureau of Governmental Research and Service, University of South Carolina, for the Office of Technology Assessment, at p. 227 (1979) ("OTA Study"). Corporate security officials routinely encourage their corporations to check the criminal

history background of applicants. See, for example, Hernon, "Industrial Purchasing Safeguards--Reducing Criminal Frauds," Financial Executive, 44: 20-25, Mag. '76.

[30] Some of this report's descriptions of employer attitudes are based upon oral remarks made by industry representatives at the SEARCH conference of August 14, 1980.

[31] New Republic, 164: 15-16, Jan. 16, 1971.

[32] "Arrest Records," The Privacy Report, ACLU, Vol. 1, No. 8, June 1975, p. 5.

[33] Supra, n. 29 at p. 224.

[34] Id.

[35] Supra, n. 22 at p. 196.

[36] Hoffman, Stone-Meierhoefer, "Reporting Recidivism Rates: The Criterion and Follow-Up Issues," J. of Crim. Justice, 8:53, 57 (1980).

[37] Stickler, "Expungement--A New Aiternative to the Effects of Legal Stigma," Conference on Corrections 1978, Fox ed., Fla. State University (1978). See also, Becnel, "Crime-Unemployment Cycle," AFL-CIO American Federationist, 85: pp. 9-14 (1978); and Cost Benefit Analysis of Operation Dare, Illinois Governor's Office of Manpower and Human Development (1977).

[38] Feyerherm, "The Employment History of Prison Releases," Report of the Governor's Conference on Employment and the Prevention of Crime, Madison, Wisconsin, at p. 158, and see generally, "Employers' Use of Criminal Records under Title VII," Catholic Univ. L. Rev., 29:597, 602 (1980).

[39] Chaneles, "A Job Program for Ex-Convicts that Works," Psychology Today, 8:43-46 (March 1975).

[40] Jolson, "Are Ex-Offenders Successful Employees," Calif. Management Rev., 17:65-73 (1975).

[41] Supra, n. 38.

[42] Supra, n. 9.

[43] Supra, n. 9.

[44] Schware v. Board of Bar Examiners, 353 U.S. 232, 241 (1957).

[45] Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 402-403 (C.D. Cal. 1970). Modified on other grounds, and aff'd as modified, 472. F.2d 631 (9th Cir. 1972).

[46] Branzburg v. Hayes, 408 U.S. 665, 684 (1972).

[47] See, Estes v. Texas, 381 U.S. 532 (1972).

[48] 420 U.S. 469 (1975).

[49] In Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177 (Tex. Ct. of App. 1975), a Texas court upheld the validity of provisions in Texas' Open Records Act that discontinued public disclosure of some criminal history information. The opinion acknowledged, however, that both the press and the public have a "constitutional right of access to information concerning crime in the community."

The court held that the Constitution requires that the public be able to obtain chronologically arranged, factual arrest data which does not contain the personal history or arrest record of the defendant. Houston Chronicle is consistent with other state court

decisions. Holocombe v. State, 200 So.2d 739 (Ala. 1941) (Alabama Supreme Court held that jail dockets and records which contained information describing each prisoner received into a local jail, his age, sex, identifying characteristics and the charged offense were public records and could be inspected by newspapers); Dayton Newspapers, Inc. v. City of Dayton, 341 NE2d 576 (Ohio 1976) (Ohio Supreme Court held that a city jail log, which listed arrest numbers, names of prisoners,

[50] 403 F.Supp. 1318 (M.D. Tenn. 1975).

[51] 403 F.Supp. at 1321.

[52] Hammons v. Scott, 423 F.Supp. 618, 619 (N.D. Calif. 1976) referring to Paul v. Davis, 424 U.S. 693 (1976).

[53] 424 U.S. at 713.

[54] However, at least two other post Paul v. Davis decisions have rejected constitutional claims that arrest records should be purged after acquittal or dismissal because of damage to employment opportunities. In United States v. Schnitzer, 567 F.2d 536 (2nd Cir. 1977), cert. denied, 435 U.S. 907 (1978), a subject of a dismissed grand jury indictment sought a purge order because, as a rabbinical student, the record would cause him special embarrassment and harm. (In United States v. Singleton, 442 F.Supp. 722 (S.D. Tex. 1977), active and retired police officers sought a purging order after they were acquitted for alleged illegal wiretapping. The court held that, despite the high probability that the arrest record would damage their employment prospects, the court was without authority to order expungement.

[55] 423 F.Supp. 618 (N.D. Calif. 1976).

[56] 423 F.Supp. at 619.

[57] 446 F.Supp. 186 (N.D. Mo. 1978).

[58] 446 F.Supp. at 188-189.

[59] 478 F.Supp. 1124, 1130 (E.D. Tex. 1979).

[60] 497 F.Supp. 1058, 1070-1072 (D. Conn. 1980).

[61] Id. at 1072.

[62] See, for example, Davidson v. Dill, 503 P.2d 157 (Colo. 1972); see also, Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971); United States v. Kalish, 271 F.Supp. 968 (D.P.R. 1967); Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); and Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975).

[63] 430 F.2d 486 (D.C. Cir. 1970).

[64] 430 F.2d at 491.

[65] 5 U.S.C., Section 552.

[66] 5 U.S.C., Section 552a.

[67] "Federal System and Interstate Exchange of Criminal History Record Information," 28 C.F.R. (Subpart C), Section 20.30.

[68] 28 U.S.C., Section 534(a)(2).

[69] See, for example, Utz v. Cullinane, 520 F.2d 467, 490 n. 62 (D.C. Cir. 1975).

[70] And see also, 28 C.F.R., Section 50.12.

[71] 28 C.F.R., Section 50.12(b).

[72] Civil Action No. 79-3308, District of Columbia District Court, filed December 7, 1971.

[73] 42 U.S.C., Sections 2000e-17 (1970), as amended (Supp. 111 1973).

[74] See, for example, the Equal Protection Clause of the 14th Amendment and the Civil Rights Act of 1970, 42 U.S.C., Section 1981 (1970).

[75] See, Comment, "Employers' Use of Criminal Records Under Title VII," 29 Cath L. Rev., 597 (Spring, 1980), for a comprehensive treatment of applicable legal standards.

[76] President's Commission on Law Enforcement and the Administration of Justice, Report: The Challenge of Crime in a Free Society, 75 (1967).

[77] See, for example, Federal Bureau of Investigation, Uniform Crime Reports for the United States 133 (1973).

[78] Supra, n. 45.

[79] 452 F.2d 315, 326 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972).

[80] See, for example, Green v. Missouri Pac. R.R., 523 F.2d 1290, 1295 (8th Cir. 1975) and McDonnel Douglas Corp. v. Green, 411 U.S. 792, 804-805 (1973), dicta.

[81] 332 F.Supp. 519, 521 (E.D. La. 1971), aff'd., 468 F.2d 951 (5th Cir. 1972).

[82] 7 Fair Empl. Prac. Cas. 261 (Wis. Cir. Ct. 1973).

[83] Lane v. Inman, 509 F.2d 184, 186 (5th Cir. 1975).

[84] See, for example, McAuliffe, "Use of Information Relating to Arrests and Convictions," EEO Today, 5:77-86 (Sp. '78); Ledvinka & Gatewood, "EEO Issues with Pre-employment Inquiries," Personnel Administrator, 22: 22-26 (Feb. 1977).

[85] See, for example, Cohen, "Public Records as a Source of Employment Information", Personnel J., 57: 313-336 (June '78).

[86] "State and Local Criminal History Record Information Systems", 28 C.F.R. (Subpart B), Section 20.20 et. seq.

[87] Pub. L. 93-83 at 42 U.S.C., Section 3371(b).

[88] The Regulations define non-conviction data as "arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or dismissals, acquittals or other dispositions short of a conviction." 28 C.F.R., Section 20.3(e).

[89] Alabama (Ala. Code, Section 541-9-590 et. seq.); Alaska (Alaska Stat., Section 12.62.010 et. seq.); Arizona (Ariz. Rev. Stat., Sections 41-2210 et. seq., 41-1750); Arkansas (Ark. Stat. Ann., Section 5-1101 et. seq.); California (Cal. Penal Code, Section 11075 et. seq. (West)); Connecticut (Conn. Gen. Stat. Ann., Section 54-142 (West)); Georgia (Ga. Code, Section 92A-3001 et. seq.); Hawaii (Haw. Rev. Stat., Section 846-1 et. seq.); Iowa (Iowa Code Ann., Section 692.1 et. seq. (West)); Kansas (Kan. State Ann., Section 4701 et. seq.); Maryland (Md. Ann. Code 1957, Art. 27, Section 742 et. seq.); Massachusetts (Mass. Gen. Laws Ann., Section 6-167 et. seq.); Montana (Mont. Rev. Codes Ann., Section 44.5.101 et. seq.); Nebraska (Neb. Rev. Stat., Section 29.3501 et. seq.); Nevada (Nev. Rev. Stat., Section 179A-010 et. seq.); Oregon (Or. Rev. Stat., Section 181.010 et. seq.); Pennsylvania (Pa. Stat. Ann., Section 18-9101 et. seq. (Purdon)); South Carolina (S.C. Code, Section 23-3-110 et. seq.); Vermont (Vt. Stat. Ann., Section 20-2051 et. seq.); Virginia (Va. Code, Sections 19.2 - 388 to 390; 9.111.6); Washington (Wash. Rev. Code. Ann., Section 10.97.010 et. seq.).

[90] See, Privacy and Security of Criminal History Information: Privacy and the Media, U.S. Department of Justice, Bureau of Justice Statistics, at p. 16 (1980).

[91] Florida (Fla. Stat. Ann., Section 943.053 (West)); Illinois (Ill. Ann. Stat. Ch. 38, Section 206-7 (Smith Hurd)); Kentucky (Ky. Rev. Stat. Ann., Section 17.150(4) (Baldwin)); Minnesota (Minn. Stat. Ann., Section 15.1695 (West)); Montana (Mont. Rev. Codes Ann., Sections 44.5.301, 44.5.302); Nebraska (Neb. Rev. Stat., Section 29-3520); Nevada (Nev. Rev. Stat., Section 179A.100); Pennsylvania (Pa. Stat. Ann. Section 18-9121(b) (Purdon); Virgin Islands (V.E. Code Ann., Title 3, Section 881(g)); West Virginia (W. Va. Code Section 15-2-24(d)).

Note: In Illinois, Montana, Nebraska, Nevada and West Virginia, the written consent of the record subject is required in order for employers to obtain some types of data.

[92] Colorado (Colo. Rev. Stat., Section 24-72-305); Connecticut (Conn. Gen. Stat. Ann., Section 54-142k(b) (West)); Georgia (Ga. Code, Section 92A-3003(o)); Maine (Me. Rev. Stat., Section 16-615); New Mexico (N.M. Stat. Ann., Section 29-10-3); Tennessee (Tenn. Code Ann., Section 10-7-507); Washington (Wash. Rev. Code Ann., Section 10.97.050(1)).

[93] Alabama (Ala. Code, Sections 41-9-594, 41-9-642); Arizona (Ariz. Rev. Stat., Sections 41-2203, 41-1750); Hawaii (Haw. Rev. Stat., Section 846-10(3)); Kansas (Kan. Stat. Ann., Section 22-4707(b)); Louisiana (La. Rev. Stat. Ann., Section 15-578(3) (West)); Maryland (Md. Ann. Code 1957, Art. 27, Section 746(b)); Massachusetts (Mass. Gen. Laws Ann., Section 6-172(c) (West)); New Hampshire (N.H. Rev. Stat. Ann., Section 106B:14); South Carolina (S.C. Code, Section 23-3-130); South Dakota (S.D. Comp. Laws Ann., Section 23.6.9); Utah (Utah Code Ann., Section 77-59-18.

[94] Idaho (Idaho Code, Section 19-4812); Indiana (Ind. Code, Section 10-1-1-13); Michigan (Mich. Comp. Laws Ann., Sections 15.231, 4.462); Mississippi (Miss. Code

Ann., Section 25-53-53); Missouri (Mo. Rev. Stat., Sections 610.100 et. seq. (Vernon)); New Jersey (N.J. Stat. Ann., Section 29-10-3 (West)); North Dakota (N.D. Cent. Code, Sections 12-6001, 44-04-18); Ohio (Ohio Rev. Code, Section 109.57(1) (Page)); Oklahoma (Okla. Stat. Ann., Sections 74-150.9, 51-24 (West); Puerto Rico (P.R. Laws Ann., Section 32-1781 et. seq.); Texas (Tex. Civ. Code Ann. Title 110, Art. 6252-17a (Vernon); Vermont (Vt. Stat. Ann., Section 20-2053(a)); Wisconsin (Wis. Stat. Ann., Section 165.83 (West)).

[95] Alaska (Alaska Stat., Section 12.62.030); Arkansas (Ark. Stat. Ann., Section 5-1102); California (Cal. Penal Code, Sections 11105, 13300 (West)); Delaware (Del. Code Ann., Section 29-10002(d)(4)); District of Columbia (D.C. Code Encycl., Section 4-135 (West)); Iowa (Iowa Code Ann., Section 692.2 (West)); New York (N.Y. Exec. Law., Section 837-6 (McKinney)); North Carolina (N.C. Gen. Stat., Section 114-15); Oregon (Or. Rev. Stat., Section 181.555); Rhode Island (R.I. Gen. Laws, Section 12-1-9); Virginia (Va. Code, Section 19.2-389); Wyoming (Wyo. Stat., Section 9-2-568).

[96] Only nineteen jurisdictions have statutes that apply to local agency dissemination policies. The rest limit only the state central repository or information disseminated by the state repository. The nineteen jurisdictions with statutes that apply to local units are Alabama, Alaska, California, Colorado, Connecticut, Florida, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, Nevada, Pennsylvania, the Virgin Islands, Virginia and Washington.

[97] Supra, note 29 at 227.

[98] See, Ga. Code Ann., Section 92A-3003(o)(1). See also, Section 140-2.01.

[99] See, Nevada Revised Statutes, Section 179A.010, et. seq.

[100] Minn. Stat. Ann., Section 364.04 (1970).

[101] See, 18 Pennsylvania Statutes, Section 9101, et. seq., specifically Section 9125.

[102] Title 12, Code of Maryland Regulations, Department of Public Safety and Corrections, State Police Services, Section 12.06.08.10.

[103] N.Y. Correc. Law, Section 750 (McKeiney Supp. 1979-80).

[104] Wis. Stat. Ann., Section 111.31 (Supp. 1979-80).

[105] Hawaii Rev. Stat., Section 378-2 (1976).

[106] Supra, n. 91.

[107] Ann. Code of Maryland, Art. 27, Section 754(a) (Supp. 1979).

[108] 177 A.2d 841, 846 (Md. 1962).

[109] 177 A.2d at 846. But see, Norman v. City of Las Vegas, 177 P.2d 442 (Nev. 1947) which rejected an invasion of privacy claim against the City of Las Vegas for sharing the plaintiff's criminal history record with his employer. The court said that disclosure to an employer was sufficiently limited and thus protected by privilege.

[110] 408 F.Supp. 1067, 1074 (E.D. Mich. 1976).

[111] See, for example, Earp v. Detroit, 167 NW2d 841 (Mich. 1969); Pittan v. Jacobs, 78 NW2d 784 (Ind. 1948); & Hawley v. Professional Credit Bureau, Inc., 76 NW2d 835 (Mich. 1956).

[112] 69 LRRM 387 (1968).

[113] See, Berry v. Donovan, 74 NE 603, 604, appeal denied, 199 U.S. 612 (1905).

[114] See, for example, Donaldson v. United States, 400 U.S. 517, 530, 531 (1971).

[115] See, for example, Perks v. Firestone Tire and Rubber Co., 611 F.2d 1363, 1366 (3rd Cir. 1979).

[116] See, Detroit Edison Co. v. National Labor Relations Board, 99 S. Ct. 1123, 1133 (1979).

[117] In that regard see, "The Revolving Door: The Effect of Employment Discrimination Against Ex-Prisoners", Hastings, L.J., 26: 1403, 1420 (1975).

[118] Supra, n. 59.

[119] 385 F.Supp. 272, 274 (D.D.C. 1974). In Lyon the jury held against the employer, but the judge gave judgment to the employer "notwithstanding the verdict," claiming that assault, battery, and rape was remote from actions of a sort which an employer should reasonably expect. The Court of Appeals reversed and said that it was a question for the jury whether the assault stemmed from purely personal sources, or arose out of conduct of the trucking company's businesses. 533 F.2d 649, 655 (D.C. Cir. 1976).

[120] See, 34 ALR 2d 390; and Employing the Ex-Offender: Some Legal Considerations, American Bar Association (1976).

[121] 80 A.2d 915, 197 (D.C. App. 1951).

[122] Circuit Court, Montgomery County Md. Case #37,669 (1975).

[123]236 F.2d 673, 677 (D.C. Cir. 1956).

[124]Id. at 677.

[125]532 F.2d 56, 57 (7th Cir. 1976).

[126]254 NE2d 339 (N.Y. 1969).

[127]Argonne Apt. House v. Garrison, 42 F.2d 605 (D.C. Cir. 1930).

[128]Strawler v. Harrall, 251 So.2d 514 (La. App. 1971).

[129]Large v. B & P Motor Express, 257 F.Supp. 319, 325 (N.D. Ind. 1966).

[130]Abraham v. Onorato Garages, 446 P.2d 821 (1968).

[131]See, Hersh v. Kertfield Builders, Inc., 189 NW2d 286 (Mich. 1971).

[132]Civil Service Reform Act of 1978, P.L. 95-454, Section 2302(b)(10) at 5 U.S.C., Section 3110.

[133]Executive Order 10450 (April 27, 1963).

[134]See, Executive Order 10865 and DOD Directive 5220.6.

[135]Larkin, "Removing the Ex-Offenders' Catch-22," J. of Employment Counseling, 12: 126-131 (Sept. 1975).

[136]See, OTA Study supra note 8 at 226, citing James E. Hunt, James E. Bower and Neal Miller, Laws, Licenses and the Offender's Right to Work: A Study of State Laws Restricting the Occupational Licensing of Former Offenders, ABA 1974.

[137]Unconsolidated Laws, Section 8917(b).

[138]Unconsolidated Laws, Section 80.10(2).

[139]General Business Law, Section 74(2), 81(1).

[140]Labor Law, Section 459(1).

[141]Alcoholic Beverages Control Law, Section 102(2).

[142]Labor Law, Section 212-a(5a).

[143]General Business Law, Section 353.

[144]Insurance Law, Section 331 (36).

[145]General Business Law, Section 174.

[146]Unconsolidated Laws, Section 9814(b); 9821(e); 9829(a); 9841(b); 9941(b) and 9918(3a).

[147]Banking Law, Section 369(6).

[148]Insurance Law, Section 48(8c).

[149]Unconsolidated Laws, Section 7915(8).

[150]Alcoholic Beverage Control Law, Section 102(2) and 126(1).

[151]10 NYCRR, Section 77.2, Dept. of Health, "Rules for Funeral Directors."

[152]Olson, Criminality and Morality - Occupational Licensing Laws and Practices, Doctoral Dissertation published by University Microfilms (1978).

[153]See, for example, Larkin, supra, n. 134.

[154]See, Miller v. Carter, 547 F.2d 1374 (7th Cir. 1977), and see Salsbury, "Licensing Restrictions Against Ex-

Offenders - Miller v. Carter - Ex-Offenders Must be Treated Equally - Is that Bad or Good." Univ. of Toledo L. Rev., 10: 562-605 (Winter, 1979).

[155] See, for example, Minn. State Ann., Section 36404 (West Supp. 1979) and see "Ex-offender Employment Discrimination," Ohio St. L. Rev., 41:77,99 (1980).

[156] Supra, n. 9 at p. 1.

[157] 430 F.2d 486, 490 (D.C. Cir. 1970).

[158] Comment, "Retention and Dissemination of Arrest Records: Judicial Response," Univ. of Chi. L. Rev., 38:850, 864-65.

[159] Wolston v. Readers' Digest Assoc., 443 U.S. 157, 99 S. Ct. 2701, 2708-9 (1979).

[160] Comment, "The Press and Criminal Record Privacy," St. Louis L. Rev., 20:509, 512 (n. 16) (1976).

[161] Report of the Privacy Protection Study Commission, Appendix 3, Employment Records, at p. 50 (1977).

[162] Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

[163] Supra, note 4 at 23.

[164] Testimony of John Pemberton, Deputy General Counsel of the EEOC on H.R. 188, before the Subcommittee on Civil and Constitutional Rights, Senate Judiciary Committee, 93rd Cong. 2nd Sess.

APPENDIX

ROSTER OF PARTICIPANTS

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