Guest Articles

The Jurisprudence of Police Intelligence Files and Arrest Records

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Law enforcement involves the twin objectives of prevention and punishment. Criminal and conviction records are often used as parameters to determine the punishment appropriate for an offender. This article considers constitutional issues that arise from the creation of arrest records and police intelligence files, and the resulting stigma attached to the names contained therein. By discussing the use of these investigative aids, and highlighting the dissonance between the records and actual convictions, the article makes a case against the use of these records in ways that incorrectly stigmatise members of civil society. It concludes by suggesting models by which the benefits of investigative records can be availed of, without the wrongful stigmatisation of the persons names therein.

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I. Introduction

The criminal justice system, at every step of the process, creates and uses all sorts of criminal records. Unquestionably, such records play an important role in law enforcement, adjudication and correction. They also stigmatise the suspect/defendant as unreliable, dishonest and perhaps dangerous. This stain on reputation has a significant negative impact on employment prospects as well as on the individual's future interactions with the criminal justice system. Arguably, it is the purpose of a *conviction record* to convey such a stigma for retributive, expressive and deterrent purposes.[1]

But what about non-conviction records created for intelligence, investigative or administrative purposes? This article shines a light on intelligence databases and criminal investigative files that also stigmatise those who are listed. It also focuses attention on arrest records which, though based only upon a police officer's probable cause judgment, carry a stigma almost as potent as a conviction record.

II. Intelligence and Investigative Databases

While law enforcement agencies have long maintained intelligence files on criminal suspects who have not and may never be arrested, huge databases now contain names and other identifying information of people suspected of having committed or likely to commit crimes. The inclusion of an individual's name in these databases is not subject even to the probable cause requirement that governs arrests. Names are added without any review by a judge or magistrate. In other words, the police department, perhaps a single officer, may create an indelible criminal or quasi-criminal record that could last a lifetime. In our computer-

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[1] *See*, J.B. Jacobs, *The Community's Role in Defining the Aims of the Criminal Law*, *in*, In The Name of Justice 119-129 (T. Lynch ed., 2009).

dominated age, the number and types of criminal and quasi-criminal databases proliferate.

In 1967, the Federal Bureau of Investigation [hereinafter "FBI"] established the National Criminal Information Centre [hereinafter "NCIC"] with five 'files' (databases) covering convicted persons, wanted persons and suspicious persons.[2] By 2007, the NCIC contained 18 databases; several of them not dependent upon a conviction or even an arrest. Yet, the repercussions for an individual of being listed in one of these quasi-criminal or non-criminal databases may be the same or similar as being listed in a database of convicted offenders.

III. Gangs & Terrorists

Gang databases have proliferated at the local and state level. In some communities a significant percentage of minority male youth are labelled as gang members in databases that can be accessed by all law enforcement officers in that community and, increasingly, state-wide. Likewise, many state and local law enforcement agencies have created electronic databases on organised crime members and associates, gangs, suspected gang members, and others.

In the 1990s the U.S. Department of Justice recognised violent gangs as a major crime threat and later as a national security problem.[3] In 1995, the FBI added a Violent Gang File to the NCIC with the three fold purpose of: (1) alerting law enforcement officers to the potential danger posed by violent gang members; (2) promoting the inter-agency exchange of information about these organisations; (3) identifying a point of contact for agencies seeking information about the groups or individuals. Two FBI agents explained at a Congressional hearing that:

> [The Violent Gang File] acts as a pointer system, identifying known members of violent gangs and terrorist organisations and facilitating the exchange of information. By alerting law enforcement officers to potentially dangerous subjects, the VGF enhances their safety. In

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2 *See*, NCIC 2000: National Crime Information Centre: 30 Years on the Beat, http://permanent.access.gpo.gov/lps3213/ncic; Federal Bureau of Investigation, CJIS Division, National Crime Information Centre (NCIC), http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm. *See also*, 28 CFR sec. 20.32 (offences to be included in the III). The NCIC serves criminal justice agencies in all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Canada, as well as federal agencies with law enforcement missions.

3 For a recent statement, *see*, Congressional testimony of FBI Director Robert Mueller before the House Judiciary Committee, July 26, 2007, http://www.fbi.gov/congress/congress07/mueller072607.htm.

> short, the VGTOF provides every U.S. law enforcement agency access to valuable information on a growing crime problem that threatens the safety of officers and citizens in an increasing number of communities.[4]

The Violent Gang and Terrorist Organisations File [hereinafter "VGTOF"] is comprised of two sub-databases, one on violent groups and the other on members/associates of these groups. Neither a criminal conviction nor an arrest is a prerequisite to being entered into the members/associates sub-database. The FBI instructs participating state and local law enforcement agencies that

> when entering a record for an individual into the VGTOF, agencies must ensure that, at the time of arrest or incarceration, the subject either admits membership in the gang or meets any two of the following criteria:
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> 1. Has been identified by an individual of proven reliability as a group member[;]
> 2. Has been identified by an individual of unknown reliability as a group member and that information has been corroborated in significant respects[;]
> 3. Has been observed by members of the entering agency to frequent a known group's area, associate with known group members, and/or affect the group's style of dress, tattoos, hand signals, or symbols[;]
> 4. Has been arrested on more than one occasion with known group members for offences consistent with group activity[; or]
> 5. Has admitted membership in the identified group at any time other than arrest or incarceration.[5]

Suppose a police officer stops X for a traffic violation, initiates an NCIC background check and receives information that X is a member of a violent street gang. Police officer may decide to arrest X and conduct a thorough vehicle search

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4 P.F. Episcopo and D.L. Moor, The Violent Gang and Terrorist Organizations File, (1996), http://www.fbi.gov/publications/leb/1996/oct965.txt.

5 P.A. Lautenschlager, Att'y Gen., Wis. Dep't of Just., Time System Manual 285–86, *available at* http://www.doj.state.wi.us/dles/cibmanuals/files/TIME/PDF/Time.pdf. *See also*, Memorandum from Richard A. Weldon, FBI/CJIS Global Initiatives Unit on Violent Gang and Terrorist Organization File Entry Criteria Code (ECR) Change,

http://www.acjic.alabama.gov/documents/violent_gang.pdf (describing VGTOF codes pertaining to gang characteristics).

rather than issue a summons. If drugs or other contraband is found, the 'case' may be turned over to a gang task force. X will likely be charged as severely as possible. While a private employer to whom X has applied for a job cannot directly access the VGTOF, he may know a friendly police officer (or one who takes bribes) who can access the database and pass along the information.[6] The negative consequences of being listed in the VGTOF might be as significant as the consequences of an arrest or even conviction.

After the September 11, 2001 terrorist attacks against the World Trade Centre and the Pentagon, the U.S. Department of Justice and the U.S. Department of Homeland Security added suspected terrorists to this file. They also added a fourth rationale for the creation of the database – *"enhancing national security by including the names and identifiers of known or suspected domestic and international terrorism suspects in the VGTOF, thereby enlisting the aid of local and state law enforcement agencies in the federal fight against terrorism."*[7]

When an individual is identified by the VGTOF as a known or suspected terrorist, the Terrorist Screening Centre consolidates this information with other databases into a terrorist watch list.[8] As of 2007, the Terrorist Screening Centre's watch list contained 720,000 names.[9] Law enforcement officers are able to access this information through routine background checks and are instructed to contact the Terrorist Screening Centre when they encounter an individual who is on this watch list.[10] At a minimum, local police and prosecutors are likely to exercise their discretion to arrest and charge an individual whose name appears on this watch list.

Additionally, those added to the Terrorist Screening Centre's watch list face substantial barriers to travel. Those not officially on the 'No Fly List' still encounter extensive, humiliating searches or interrogation at the airport.[11] This is

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6 C.M. Katz, Issues in the Production and Dissemination of Gang Statistics: An Ethnographic Study of a Large Midwestern Police Gang Unit 485, 508-509 (2003) (police officers may notify school officials or potential employers of an alleged gang member's status).

7 J.B. Jacobs & T. Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y. U. J. Leg. Pub. Pol'y 177, 193 (2007).

8 *Ibid.*, at 194-95.

9 E. Nakashima, *Terrorism Watch List Is Faulted For Errors*, Wash. Post, Sept. 7, 2007, at A12.

10 J. Jacobs & T. Crepet, supra n.7, at 194-5.

11 One Canadian man who shares the same name as one on the list was interrogated for *six* hours on a layover in Miami. He subsequently changed his name and thereby avoided further airport interrogations. L. Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, N. Y. Times January 13, 2009.

particularly problematic due to improper control and maintenance of this database. A 2009 Inspector General report showed that *"many of the nominations submitted directly to the National Counterterrorism Centre by the Criminal Justice Information Services were processed with little or no information explaining why the subject may have a nexus to terrorism*".[12] Although the FBI had created criteria and standards for information entered into this database, the report found that many entries were inaccurate or incomplete and that the FBI had regularly failed to update or remove information when necessary.[13] While 81,793 people have requested to be removed from this watch list over the past three years, 25,000 petitions are still pending.[14] Furthermore, the FBI has been slow in removing suspects who have been cleared. One individual remained on the watch list for 5 years after his case was favourably resolved.[15]

IV. Immigration Violators File

The NCIC's Immigration Violator File represented a major expansion of the federal criminal record system because it brought violators of administrative regulations into the NCIC.[16] The Immigration Violator File includes names and/

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12 U.S. Department of Justice, Office of the Inspector General, Audit Division, The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices, v (May 2009), http://www.justice.gov/oig/reports/FBI/a0925/final.pdf.

13 US Department of Justice, Office of the Inspector General, Audit Division, The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices, 2 (May 2009), http://www.justice.gov/oig/reports/FBI/a0925/final.pdf.

14 L. Alvarez, *Meet Mikey, 8: U.S. Has Him on Watch List*, N. Y. Times January 13, 2009. One 8 year old boy was repeatedly interrogated at airports because he had the same name as someone on the watch list. His family's strenuous efforts to rectify the situation were, at least until recently, unsuccessful.

15 US Department of Justice, Office of the Inspector General, Audit Division, The Federal Bureau of Investigation's Terrorist Watchlist Nomination Practices vi (May 2009), *available at*, http://www.justice.gov/oig/reports/FBI/a0925/final.pdf.

16 According to plaintiffs' brief in *National Council of La Raza* v. *Gonzales*,

> …the NCIC statute…limits the FBI's power to collect and exchange criminal justice information to narrowly delineated categories. The civil immigration records and administrative warrants at issue in this case are not "criminal records" under the statute. In addition, the individuals who are the subjects of those records have not been charged or convicted criminally, and are nor subject to criminal warrants. These individuals are not criminals" merely because the defendants so label them.

Brief for Petitioner-Plaintiff at 2, Nat'l Council of La Raza v. Gonzales, 468 F. Supp 2d 429 (United States District Court, E.D. New York 2007).

See also, Congressional testimony of Michael D. Kilpatrick, Assistant Director in Charge, Criminal Justice Information Services Division, FBI, Before the Subcommittee on Immigration, Border Security and Citizenship, Committee on the Judiciary, U.S. Senate, November 13, 2003, http://www.fbi.gov/congress/congress03/ncic111303.htm.

or fingerprints of 1) persons previously convicted of a felony and deported; 2) persons resident in the U.S. who are subject to final deportation, exclusion or a removal order; 3) persons with outstanding administrative warrants for failure to comply with the national security registration requirements.[17]

The consequence of including the Immigration Violators File in the NCIC is to enlist state and local law enforcement personnel in enforcing the federal immigration laws. If a police officer anywhere in the U.S. stops a driver for a traffic violation and initiates a computer search of the NCIC database, the officer may be told via an electronic transmission that the U.S. Department of Immigration and Customs Enforcement (ICE) has issued an *administrative warrant* for the individual's detention.[18] If so, the police officer is instructed to contact the U.S. Department of Homeland Security's (DHS) Law Enforcement Support Center for confirmation. The officer is usually told to arrest or detain the person until DHS can take custody of him/her.[19]

There is growing use of criminal and immigration records as a tool for enforcing the U.S immigration laws. Visa applicants with criminal records in their home countries are excluded from entering the U.S.; those foreigners in the U.S. who have violated the terms of their visas or other immigration laws are deported or sent home "voluntarily".

Though many state and local police officials are opposed to being drawn into enforcing the federal immigration laws, some police departments are keen to do so.[20] Moreover, state-level social services agencies want immigration status information in order to make decisions on eligibility for various governmental social welfare programmes, like public housing, food stamps and student loans. Public and private employers have various reasons for desiring access to the Immigration Violators File: 1) because they do not want to violate federal law;

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17 NCIC 2000 Operating Manual, Immigration Violator File, https://olets-info.olets.state.ok.us/cjismanuals/pdf/Immigration_violator.htm.

18 In National Council of La Raza v. Gonzales, the federal court rejected, for lack of standing, a challenge to including the names of absconders and NSEERS violators in the NCIC. National Council of La Raza v. Gonzales, 468 F. Supp 2d 429 (United States District Court, E.D. New York 2007). (plaintiffs lack standing because injury remains speculative).

19 National Council of La Raza v. Gonzales, 468 F. Supp 2d 429, 434 (United States District Court, E.D. New York 2007).

20 *See*, A. Shahani and J. Greene, Local Democracy on Ice: Why State and Local Governments Have No Business in Federal Immigration Law Enforcement (2009). The authors point out that the police department of Hoover, Alabama was aggressively arresting illegal aliens, some of whom were gang members, in order to qualify for federal grant money.

2) because they want to hire individuals who have a secure place in the society; 3) because they want to hire undocumented aliens so as to avoid employment laws. The Government is steadily expanding the number of private individuals and businesses who have access to this database.

V. Criminal Investigation Databases

Computer technology has led to the creation of criminal investigation databases to which numerous investigators can contribute and obtain information about the progress of an investigation. This can be of considerable importance in a major investigation involving investigators from diverse agencies at the federal, state, and local level. However, it also creates the risk of investigative information being leaked to the media and the public. This is exactly what happened in the FBI's massive Amerithrax investigation which the FBI initiated in 2001 following the mailing of several anthrax-laced letters which resulted in five deaths, nineteen injuries and mass anxiety throughout the U.S.[21]

The Automated Case Support System [hereinafter "ACS"], the FBI's database that stored information on the investigation, was not password protected and could be accessed by thousands of law enforcement personnel.[22] Inevitably the name of an investigative target was leaked to the media. Ultimately, that individual was cleared of any connection to the anthrax-laced letters, but his personal and professional life was shattered. He successfully sued the government for having violated the Privacy Act.[23] The case demonstrates the enormous negative consequences that can result from inclusion in an investigative database.[24]

VI. Arrest Records

At first blush it seems inconceivable that every police officer has the *de facto* power to impose a lifetime stigma on any individual.[25] After all, an arrest means nothing more than that, at a particular point in time, a police officer thought,

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21 E. Murphy & D. Sklansky, *Science, Suspects, and Systems: Lessons from the Anthrax Investigation, Issues in Legal Scholarship* 8(2) New Dir. for the Dep't Just. (2009).

22 J.B. Jacobs & D. Curtin, *Remedying Defamation by Law Enforcement: Fall Out From the* Wen Ho Lee, Steven Hatfill *and* Brandon Mayfield *Settlements*, 46(2) Crim. L. Bull. 17, n. 65 (2010).

23 *Id.*

24 *See*, Unofficial Docket, Entry for May 31, 2006 http://www.anthraxinvestigation.com/Docket.html#Disclaimers.

25 *See*, U.S. Department of Justice, Privacy, Technology and Criminal Justice Information: Public Attitudes Toward the Use of Criminal History Information,

rightly or wrongly, that there was probable cause to believe that a particular person committed a particular offence.[26] The officer might have been completely mistaken or might even have been acting in bad faith, perhaps on account of a grudge or on account of the arrestee's race, religion, politics or organisational affiliation. That is why when an arrest is made without a warrant, the law requires a judicial finding of probable cause for the arrest.

However, a judge's probable cause finding establishes nothing more than probable cause to believe that the suspect committed an offence. To draw an inference of guilt from a cursory and *ex parte* finding of probable cause seems like a blatant violation of the presumption of innocence.[27] Nevertheless, the criminal justice system maintains arrest records permanently even when the arrest does not result in a conviction.[28] Moreover, public or private discrimination based upon recorded arrests is mostly permissible.[29] To understand how this could be true, we need to understand why and how arrest records are created, maintained and accessed.

VII. The Police Use of Arrest Records

The U.S. database of individual criminal history records, called 'rap sheets' (record of arrest and prosecution), is designed and operated for law enforcement

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http://www.obblaw.com/privacytf-survey.pdf at 5 (July 2001) (Regarding conviction records) "47% [of respondents] prefer what was labeled as a 'partially open system' where only conviction records are available to everyone;" for arrest records, "approximately 3 out of 10 adults would bar any access to arrest-only records to any employer or government licensing agency. About one half would allow limited access based on the sensitivity of the position, while only 15% would grant all employers or government licensing agencies access to arrest-only records."

26 *See generally*, W.R. LaFave, Arrest: The Decision to Take a Suspect into Custody (1964).

27 I say "seems like" because the Supreme Court has held that the presumption of innocence is only an evidentiary standard which applies at a criminal trial. The presumption of innocence emphasizes that the prosecutor must prove every offence element beyond a reasonable doubt. *See*, Bell v. Wolfish, 441 U.S. 520 (U.S. Sup. Ct. 1979) [hereinafter "*Bell* v. *Wolfish*"].

28 *See*, *e.g.*, Legal Action Ctr., How To Get and Clean Up Your New York State Rap Sheet 6 (7th ed. 2007), *available at*, http://www.hirenetwork.org/pdfs/NYS_Rap_Sheet_Final.pdf. ("If you have ever been arrested for a fingerprintable offense in New York State, even if you were never found guilty of the charges, you have an arrest record on permanent file at DCJS. These records— also called "rap sheets"—cannot be destroyed or expunged.")

29 *See*, J. Henry & J.B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 Crim. & Pub. Pol'y 755, 756 (2007).

30 For a discussion of the creation and use of rap sheets, *see*, J.B. Jacobs & T. Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y. U. J. Leg. Pub. Pol'y 177, 180-82 (2007).

purposes.[30] Rap sheets are based upon arrests. They should provide a complete chronological record of an individual's arrests and subsequent criminal justice system actions on those arrests, including pre-trial release or detention, indictment, plea, trial, sentence and parole.[31] The arrest is formally recorded at 'booking,' the processing procedure at the police station or central booking facility to which the police deliver a suspect whom they have taken into custody.[32] During the booking procedure, the details of the arrest as well as the arrestee's identity information (name, photo, fingerprints) will be entered into a computer information system, thereby creating a rap sheet. Each state has a criminal records repository which stores that state's rap sheets. The FBI's Interstate Identification Index (III system) coordinates all 50 states' repositories.[33]

When a police officer stops or just suspects someone of involvement in a crime, she can run a background check on the individual. If the suspect has ever been booked, anywhere in the U.S., that criminal record information along with accompanying identification data (name, photo, fingerprints) will be accessible electronically. When a suspect is booked, the police will run a fingerprint search that will reveal prior arrests, even if those arrests were recorded under an alias. Quite recently, some police departments have been experimenting with devices that can take and transmit fingerprints from the field.[34]

All U.S. states record felonies and serious misdemeanours in their criminal record system. However, states differ somewhat with respect to which misdemeanours are considered serious enough to be included on rap sheets. Up

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31 In reality, rap sheets often lack much post-arrest information. While typically the police reliably transmit arrest and arrestee information to the state repositories, prosecutors and courts are less reliable. An end user who wants to find out a particular arrest may have to contact the relevant police, prosecutor, or court.

32 *See*, J.B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 St. Thomas L. R. 387, 392-93 (2006).

33 For an explanation of the FBI's III system, *see*, *Ibid.*, at 394-95.

34 *See*, Roadside Fingerprinting in Texas, Texas Criminal Defence Lawyer, *available at* http://www.mytexasdefenselawyer.com/2009/02/24/roadside-figerprints-texas/ (2009); Press Release 2008: Florida Department of Law Enforcement (FDLE) & Collier County-RAPID-ID, Data Works Plus, *available at* http://www.dataworksplus.com/press.htm.

(DataWorks Plus has been working with the Florida Department of Law Enforcement (FDLE) to pilot the new FALCON RAPID-ID system using DataWorks Plus' SAF-ID…The hand held scanners weigh only 3 ounces and can easily fit in an officer's pocket or belt. It includes Bluetooth communication to wirelessly transfer scanned fingerprints to a PDA, laptop, or cellular phone.… Within one minute, DataWorks Plus' RAPID-ID software will display any warrants or criminal history for an individual).

until recently the FBI did not accept arrest information for "non-serious crimes", but in 2006, prompted by enhanced computer capacity, the FBI proposed changing its policy so that states could transmit to the FBI's Criminal Identification Division arrest information for non-serious crimes as well.[35] States can decide for themselves whether to comply. For example, Florida and Texas have begun adding to their rap sheet databases the names and fingerprints of individuals who are stopped, cited and released (without being booked in the police precinct).[36] Thus, more people have a permanent arrest record. It is likely that more than one-fourth of U.S. adults will have an arrest record for a substantial part of their adult life.[37]

To whom and for what is an arrest record relevant? Most importantly, the police consider an arrest to be relevant to their work. At a later date a previous arrest might provide a lead to solving a current case. The police may find fingerprints at a crime scene and match them to those of a person previously arrested and fingerprinted anywhere in the U.S. Moreover, if there is a spate of burglaries in a particular neighbourhood, the police will look carefully at individuals who, in the recent past, have been arrested for burglary in that neighbourhood, whether or not they were convicted.[38] Likewise, suppose that Ms. Smith has been murdered. It certainly makes sense to investigate Mr. Jones who was previously arrested for stalking her, whether or not his previous arrest resulted in a conviction. Previous arrests, perhaps with some additional evidence, may give the police probable cause to obtain a search warrant or to arrest a suspect.[39] To take another example, suppose the police arrest Mr. White for cyber-stalking and find that he was twice previously arrested for the same crime, but that charges were dropped because victims would not cooperate. Those previous arrests should persuade police officers and prosecutors to make a strong effort to press this current case to a successful conclusion.

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35 71 CFR 171 (September 5, 2006); *see*, 28 CFR Part 20; *see also*, J. Jacobs & T. Crepet, *supra* n. 30, at 187-88 (discussing the inclusion of non-serious crimes in the FBI's criminal record database).

36 *See*, J. Henry & J. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 Crim. & Pub. Pol'y 755, 756 (2007).

37 N. Miller, *A Study of the Number of Persons with Records of Arrest or Conviction in the Labour Force*, U.S. Dept. of Labour Technical Analysis Paper # 63 (1979).

38 *See*, Menard v. Saxbe, 498 F.2d 1017, 1024 (U.S. Ct. App., District of Columbia Cir. 1974) (quoting Davidson v. Dill, 503 P.2d 157, 159 (Sup. Ct. Colorado 1972)) ("*It is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny — the first to be questioned and the last to be eliminated as a suspect in any investigation.*").

39 G.T. Lowenthal, *The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act*, 28 Jurimetrics 9, 12 (1987).

VIII. Prosecutorial and Judicial Use of Recorded Arrests

Rap sheets are routinely and extensively used by prosecutors, judges, probation officers and prison personnel. Prosecutors enjoy practically unfettered discretion in deciding what charges to bring and what plea bargains to strike.[40] They are likely to treat a suspect or defendant with a record of prior arrests more severely; they are likely to be comparatively lenient with suspects and defendants who have no previous arrests.[41] Such discrimination would probably strike us as unfair if the previous arrest(s) was based on police error or on a personal vendetta against an innocent person. However, most of us would feel differently if the previous arrest(s) did not result in a conviction for a reason unrelated to guilt or innocence (*e.g.*, witness intimidation!).

Judges routinely take previous arrests into account in deciding whether to release a defendant pre-trial.[42] Many judges believe that, all things being equal, a defendant with several previous arrests for serious crimes poses a greater threat to the community and/or a greater risk of flight than a defendant who had never been previously arrested. If the judge orders pre-trial release of a person with an arrest record, she might impose certain conditions like drug testing or electronic monitoring which she would not impose if the person had no previous arrests. If the judge decides to set bail, she might decide that, in light of the defendant's previous arrest history, a higher bond is required to assure the defendant's attendance at future court dates.

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40 Prosecutors have enormous discretion over charging. *See*, M. Miller & R.F. Wright, Criminal Procedures: Prosecution and Adjudication 134 (3rd ed., 2007) ("Prosecutors…have the most to say about whether to file charges against a suspect and which charges to select. Granted, they react to an initial charge proposed by the police,…[b]ut in the end, the prosecutor can overrule police charging decisions without interference, and judges and grand juries only rarely refuse to go forward with the prosecutor's charging decisions.").

41 *E.g.*, The Diversionary Program Rules of the Office of the District Attorney, Orleans Parish, Louisiana states that "The program is offered to persons who are first time arrestees of state misdemeanor or felony statutes (no prior convictions and no significant arrest history including any acts of violence; have not been arrested for a violent crime, drug distribution, illegal carrying or use of a weapon, or heroin possession.") *See*, M. Miller & R.F. Wright, Criminal Procedures: Prosecution and Adjudication 160 (3rd edn., 2007).

42 Twenty-four states either require or permit criminal records to be considered in bail decisions, and thirty-two states have statutes authorizing consideration of criminal histories in corrections classifications. B. Harrison, *State Criminal Records*, 27 Nat'l Conf. of St. Legis.: St. Legis Rpt. 1, 2 (2002). *See also*, Russell v. U.S., 402 F.2d 185 (U.S. Ct. App., District of Columbia Cir. 1968) (A judge may consider arrest record in deciding whether to grant release pending appeal.).

Judges can also consider previous arrests in their sentencing decisions.[43] Historically, under indeterminate sentencing regimes, judges could rely on any and all information in sentencing.[44] (Interestingly, however, no federal or state sentencing guidelines assign criminal history score points to arrests.[45]) The judge might believe that a convicted defendant with a history of previous arrests is a recidivist who needs to be incapacitated. The U.S. Supreme Court has held that there is no constitutional impediment to enhancing a sentence on account of previous arrests.[46] Prison officials may use a history of previous arrests to assign the convicted defendant to a particular prison and/or to a particular prison program or housing unit. Parole officials might take prior arrests into account in assessing the parole applicant's risk of future criminal conduct.

IX. The Presumption of Innocence

It is popularly but incorrectly believed that the presumption of innocence protects the individual against detrimental governmental actions until after a verdict or plea of guilty. The U.S. Supreme Court explained in *Bell* v. *Wolfish* that the presumption of innocence is merely an evidentiary standard that applies to the trier of fact at a criminal trial.[47] It does not prevent the government from detaining or freezing an accused defendant's assets before trial. The Court opined that pre-trial detention in jail is "*regulatory*", not "*punitive*", because the state's intent is not to punish but to prevent the defendant from becoming a fugitive.[48] Likewise, recording arrest information is not meant to inflict punishment, but to increase the likelihood of solving crimes and of efficiently processing criminal cases.

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43 The Supreme Court has held that it is not unconstitutional for a sentencing judge to consider prior arrests and even prior acquittals as negative factors. U.S. v. Witte, 515 U.S. 389 (U.S. Sup. Ct. 1995); U.S. v. Watts, 519 U.S. 148 (U.S. Sup. Ct. 1997). *See also*, U.S. v. Cafarelli, 401 F.2d 512 (U.S. Ct. App. 2d Cir. 1966) (for sentencing purposes, trial judge may consider arrests that did not lead to conviction).

44 Williams v. New York, 337 U.S. 241 (U.S. Sup. Ct. 1949).

45 *See*, *e.g.*, United States Sentencing Commission, Guidelines Manual, § 4A1.3 (a)(1) (allowing a sentence to be increased "[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crime"), 4A1.3 (a)(2) (considering factors such as prior sentences, "[p]rior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order," or similar conduct as an adult that did not result in a conviction). The guidelines, however, do note that "[a] prior arrest record itself shall not be considered for purposes of an upward departure under this policy statement." *Id.* at § 4A1.3(a)(3).

46 U.S. v. Witte, 515 U.S. 389 (U.S. Sup. Ct. 1995).

47 Bell v. Wolfish, 441 U.S. 520 (U.S. Sup. Ct. 1979).

48 Bell v. Wolfish, 441 U.S. 520, 537 (U.S. Sup. Ct. 1979).

X. Employers Use of Arrests

Most states withhold from non-criminal justice organisations and individuals information on arrests that have been pending for more than one year.[49] When the FBI conducts nationwide criminal background searches on behalf of some non-criminal justice entities, it does not provide information on arrests that have been pending for more than a year.[50] This reflects a presumption that after a year a pending arrest is not likely to result in a conviction.

While most public employers and licensing boards do not ask applicants to divulge information about prior arrests that have not resulted in convictions, many private employers do ask; increasingly, they can independently obtain arrest information from private information vendors.[51] The federal Fair Credit Reporting Act permits credit reporting agencies to include in their reports to clients information about an individual's arrests over the preceding seven years.[52] Discovery of an arrest record, even without a subsequent conviction, may cause an employer not to offer employment to the job applicant. Skolnick's and Schwartz's famous field study in the late 1960s found that an arrest for assault followed by an acquittal had as much negative effect on obtaining employment as an assault conviction.[53]

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49 *E.g.*, Criminal History Record Checks For Non-Criminal Justice Purposes: A Fact Sheet Prepared by the Kansas Bureau of Investigation, *available at*,

http://64.233.167.104/search?q=cache:GYKVi4sJu6cJ:www.kshousingcorp.org/display/Section8/Program%2520Requirments/KBI%2520Criminal%2520Records%2520Check%2520Fact%2520Sheet.pdf+FBI+regulations+arrests+non+criminal+justice+purposes&hl=en&ct=clnk&cd=3&gl=us.

50 28 CFR Part 20.

51 *See*, Nat'l Consortium for Justice Information and Statistics, Nat'l Task Force on the Criminal Backgrounding of America 7 (2005), *available at*

http://www.search.org/files/pdf/ReportofNTFCBA.pdf [Hereinafter "Report of NTFCBA"] (discussing the multitude of state laws allowing private information vendors to access state databases). When the FBI conducts nationwide criminal background searches on behalf of some non-criminal justice entities, it does not provide information on arrests that have been pending for more than a year. *See*, *supra* n. 45. The FBI carries out almost as many criminal background checks for non-criminal justice purposes as for criminal justice purposes. Private information vendors provide this information almost exclusively to private sector clients. *See*, Report of NTFCBA.

52 Fair Credit Reporting Act, 15 U.S.C. § 1681 et. seq.

53 R. Schwartz & J. Skolnick, *Two Studies of Legal Stigma*, 10 Soc. Prob. 133-142 (1963); *See also*, J. Grogger, *The Effects of Arrest on the Employment and Earnings of Young Men*, 110(1) Q. J. Eco. 51-71 (1995); D. Pager, Marked: Race, Crime and Finding Work in an Era of Mass Incarceration (2007).

XI. Why Arrests Do Not Lead to Convictions

Before jumping to the conclusion that arrests that do not result in convictions (within a certain period of time, like a year) should be purged from the rap sheet, we need to consider why arrests do not result in convictions. One obvious reason is that the case is still pending; there may eventually be a conviction. Sometimes cases can take many months to reach final judgment. The processing of the case may be interrupted and delayed because the defendant is not available (sick, fled the jurisdiction, etc.). The defendant may have requested a trial postponement to accommodate his defence lawyer's schedule or to obtain more forensic testing. Obviously, while the case is pending, there has to be a record of it. Because court records are open to the public and the media,[54] a pending criminal case is a matter of public record. Consequently, it would be very difficult, perhaps legally and logistically impossible, to keep the fact of an arrest confidential or secret.

The strongest case for destroying an arrest record or keeping it confidential arises when police supervisors or prosecutors concluded no crime was committed or that, although there was a crime, the arrestee had nothing to do with it. An arrest record in such situations could not provide information to police or other criminal justice system decision makers that would be relevant to future investigations (although anyone's fingerprints *might* some day prove useful). While, in such circumstances, some states require that the arrest record be 'sealed,' most states do not.[55] Moreover, in the computer age, where information is diffused so rapidly, sealing can hardly be counted on to be effective.

If the defendant is acquitted of all charges, the case for purging the recorded arrest, indictment, and verdict is stronger. But it is important to remember that a not guilty verdict means that the prosecution has not carried its burden of proving every material element of the offence beyond a reasonable doubt. It does not mean that the arresting officer lacked probable cause to make the arrest or that the grand jury lacked probable cause to issue an indictment. (One need only recall the not guilty verdict in the O.J. Simpson double murder case.[56]) The arrest

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54 C.M. Morrison, *Privacy, Accountability, and the Cooperating Defendant: Towards a New Role for Internet Access to Court Records*, 62 Vand. L. R. 921, 937-941 (2009).

55 *Compare* New York State Criminal Procedure Law (2009) §160.50 (Order Upon Termination of Criminal Action in Favor of the Accused) *with* S.D. Stuckey, *Collateral Effects of Arrests in Minnesota*, 5 U. St. Thomas L.J. 335, 342 (2008) ("Arrest records are publicly available until individuals take the proper steps to seal their records…. Few individuals are able to take the proper steps to seal their records, however, because these options are not well known and may be cost-prohibitive.")

56 *See*, V. Bugliosi, Outrage: The Five Reasons Why O.J. Simpson Got Away With Murder (1996).

and indictment are historical *facts*, just like the acquittal. They are a matter of public record unless somehow erased from the public record.

Other reasons why arrests do not lead to convictions present a much weaker case for purging the arrest from the rap sheet and/or withholding the information from criminal justice and non-criminal justice users. The most prevalent reason for an arrest not ripening into a conviction is lack of victim or witness cooperation, a reason that has nothing to do with the arrestee's actual innocence. The victim or witness may have died or become too ill to testify or have moved away. Some victims and witnesses do not want to take time off from work. Some have a criminal record themselves and fear police and prosecutorial scrutiny. Others have reasons for not wanting to cooperate with police and prosecutors. For example, the victim may have a relationship with the defendant and 1) fear that cooperating with the prosecutor would jeopardise the defendant's financial and emotional support or 2) fear that cooperation would lead the defendant to retaliate.

An arrest may not result in conviction because of evidentiary and other legal problems. For example, crucial evidence may not be admissible at trial because of an unconstitutional search and seizure, identification procedure ("line-up") or interrogation. The court may dismiss charges because the time limit for moving the case forward (*e.g.*, statutory speedy trial rules) has been exceeded. The judge may have dismissed the charges because of prosecutorial misconduct before or during trial. Despite the failure to convict, the police will regard the arrestee as factually guilty and the arrest itself as an indicator of criminal propensity.

Another reason why an arrest might not result in a conviction is that the police or prosecutors concluded that a non-criminal justice diversion program, or just a warning, would produce a more desirable disposition. In such cases, the police and prosecutors need to retain a record of the arrest/warning or arrest/diversion so that if the same person is arrested in the future, she is not again treated as a first offender eligible for lenient treatment.[57] In deciding whether and how to charge a particular defendant, criminal justice decision-makers want to know as much as possible about the suspect/defendant's criminal career. If arrest records had to be purged after a decision not to charge, police and prosecutors might be much less likely to exercise leniency in the first place.

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[57] For example, in England, the police can issue a "police caution" to an arrestee. If a person accepts this "caution," the case is not forwarded to the Crown Prosecution Service. However, the "caution" remains on the cautioned individual's record to guide future decisions of police and prosecutors. *See*, M. Miller & R.F. Wright, Criminal Procedures: Prosecution and Adjudication 134 (3rd edn., 2007).

Many state legislatures, prosecutorial agencies and courts have developed various pre-judgment diversion strategies that allow certain defendants to avoid a conviction record. In New York State a disposition called "*adjournment in contemplation of dismissal*" (or ACD) is frequently used.[58] It is a kind of pre-judgment probation supervised by the prosecutor. If, within the one year "probationary period," the defendant is arrested on new charges, the prosecutor will reactivate the former case. However, if the defendant is not rearrested, his case will automatically be dismissed and the arrest record sealed. If the police and prosecutors do not have access to a record of the previous arrest (and the previous adjournment in contemplation of dismissal disposition), the individual might be offered another adjournment in contemplation of dismissal if he is arrested again. In effect, he would perpetually qualify for first offender leniency.[59]

In many cases, the defendant is convicted (by trial verdict or guilty plea) of an offence other than the most serious offence for which he was arrested. For example, Alpha may have been arrested for rape and pled guilty to assault and battery; or, at trial, he may have been acquitted of rape, but convicted of the lesser offence. Should the arrest for rape be purged from his permanent rap sheet? If it is not, the rap sheet's reader might infer that Alpha actually committed a rape. However, if it is purged from the rap sheet, what should the rap sheet show as the arrest offence? Even if the charge and arrest for rape is purged from the court's docket, should it be purged from the rap sheet as well?

XII. What's to be Done?

Were we to conclude that pre-conviction criminal records carry an unfair stigma, what should be done? The next section considers several possibilities; sealing arrest records; prohibiting non-criminal justice entities and individuals from obtaining and/or using arrest information; and prohibiting employment discrimination based on intelligence and arrest records.

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58 New York Criminal Procedure Law (2009) §170.55. The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

59 While, in New York state, the state-level individual criminal history record system seems to regularly seal successfully completed ACDs, it is not always the case that county-level criminal justice system agencies — police, prosecutors, probation, children's services — seal the arrest information that exists in their independent databases.

XIII. Sealing Arrest Records

Some states provide for expunging or sealing of records of arrests and charges that did not result in convictions; some of these states permit individuals to deny to a potential employer the existence of an expunged or sealed record.[60] For example, New York State seeks to prevent arrests that result in an outcome "*favourable to the accused*" from becoming permanent. When charges are dismissed or when they result in an acquittal, arrest information should be 'sealed' and fingerprints, photographs, and records should be destroyed or returned to the defendant or his attorney.[61] (However, the arrest is not sealed or removed if the arrestee was convicted of a lesser offence.) Once sealed, the record is only available to a person who can persuade a judge that s/he has "good cause" to see the record.[62]

In practice purging and sealing records works imperfectly, especially in this age of high-powered computer technology. It is increasingly unlikely that an arrest that has been sealed can truly be kept confidential. With some digging, an even moderately motivated and competent investigator can obtain the arrest information from the daily log ('police blotter') kept at the police station (sometimes regularly published in the local newspaper) or from the court's docket kept at the courthouse. Some private information vendors maintain their own criminal record databases based on information obtained en masse from court records; they provide this information to clients for a modest fee. The electronic or print media may have reported the defendant's name and the charges against him, especially if there was a trial. Of course, individual police officers are likely to have 'filed' facts about the arrest and arrestee in their independent police information system, in their own memo books or just in their memories.

Under current practice in most American jurisdictions, the arrest remains on the rap sheet even if the case is dismissed by the prosecutor, dismissed by the

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60 D.A. Mukamal & P.N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1509 (2003).

61 New York Criminal Procedure Law (2009) § 160.50 (providing that upon termination of a case in a manner favourable to the defendant all photographs and fingerprints taken of the defendant and other identifying information be destroyed or sealed). However, in a 1991 case, the New York Court of Appeals decided that when police violated this law and used information retained in a subsequent case, e.g. to identify the defendant, that the defendant was not entitled to suppression of the unlawfully retained material and the use thereof. People v. Patterson, 78 N.Y.2d 711 (Ct. App. New York 1991).

62 New York Criminal Procedure Law (2009) § 160.50(1)(d).

court, adjourned in contemplation of dismissal or resolved by a not guilty verdict. The rap sheet is supposed to contain the notation that the case was dismissed or was resolved by an acquittal or some other non-conviction resolution but, in practice, dispositions often do not get reported to the criminal records repository and are not recorded on the rap sheet.

XIV. Prohibit Non-Criminal Justice Entities from Obtaining and/or Using Arrest Information

Another potential option is to restrict access to intelligence and arrest records to law enforcement and criminal justice officials. This policy would alleviate many of the concerns raised by the dissemination of arrest records to the general public:

> Judges and lawyers…should be better able than laypersons to recognise the important distinctions between arrests and convictions and to give appropriate weight to non-conviction records when exercising discretion. In addition, the criminal process includes procedural checks against the improper use of arrest records. The presence of defence counsel and the availability of appellate review lessen the risks of misinterpretation and misuse of such records.[63]

However, this option is easier said than done because court dockets are open for public inspection, and arrest information may be obtained while a case is pending. In addition, pre-trial hearings are open to the public as well. Once information gleaned from records and proceedings is injected into the public domain, it is hardly possible later to restrict access to it. Even if access to arrest information could initially be successfully limited to criminal justice system personnel, there would remain the huge problem of preventing 'leaks' to the media and the public.[64]

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63 G.T. Lowenthal, *The Disclosure of Arrest Records to the Public Under the Uniform Criminal History Records Act*, 28 Jurimetrics 9, 14 (1987).

64 *See*, J.B. Jacobs, *Mass Incarceration and the Proliferation of Criminal Records*, 3 St. Thomas L. R. 387, 411 (2006); J.B. Jacobs & D. Curtin, *Remedying Defamation by Law Enforcement: Fall Out From the* Wen Ho Lee, Steven Hatfill *and* Brandon Mayfield *Settlements*, Crim. L. Bull. 17, n. 65 46(2) (2010). (discussing the leak of investigative info when only law enforcement officials had access to the database where the investigative information was stored).

XV. Prohibiting Employment Discrimination Based on Intelligence and Arrest Record

Some states prohibit employers from asking or even considering arrest information, but most do not.[65] For example, California prohibits public and private employers from procuring by any means job seekers' arrest records and also prohibits asking job seekers to disclose information regarding an arrest or detention that did not result in a conviction or information about a referral to or participation in a pre-trial diversion program.[66] An employer who violates this prohibition is subject to a $500 fine. (However, this prohibition does not apply to arrest information during the time that a prosecution is pending.)

Gregory v. *Litton System* stands as the leading federal case on the use of previous arrests to disqualify a job applicant.[67] The employer required all job applicants to disclose previous arrests and then disqualified applicants with numerous arrests. The federal district court held that the policy violated Title VII of the Civil Rights Act[68] because, though neutral on its face, it disproportionately impacted job opportunities for African-Americans who are disproportionately likely to be arrested.

In 1990, the Federal Equal Employment Opportunity Commission (EEOC) issued its Policy Guidance on the Consideration of Arrest Records in Employment

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65 D.A. Mukamal & P.N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1502 (2003). Eleven states- Alaska, Arkansas, California, Illinois, Massachusetts, Michigan, Nebraska, New York, North Dakota, and Rhode Island- have statutory prohibitions on employers making arrest record inquiries. Thirteen other States have done so administratively. Others require employers to show business necessity in order to obtain such records.

66 Labour Code of the State of California, Capt. 90, Statutes of 1937, Chapt 3, Art. 3, § 432.7:

No employer, whether a public agency or a private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pre-trial or post-trial diversion program, nor shall any employer seek from any source whatsoever, or utilise, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to and participation in, any pre-trial or post-trial diversion program.

67 Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (U.S. Distt. Ct. California 1970), modified on other grounds, 472 F.2d 631 (U.S. Ct. App. 9th Cir. 1972).

68 42 U.S.C. § 2000 et seq (2009).

Decisions Under Title VII of the Civil Rights Act of 1964.[69] The Policy Guidance states that a business must demonstrate a compelling business justification for using arrest records. Moreover, "*a business justification can rarely be demonstrated for a blanket exclusion on the basis of arrest records*." Employers are strongly cautioned against making pre-employment inquiries into arrest records because "*information which is obtained is likely to be used*." An arrest record per se cannot be used to reject job applicants, but it can be used if it indicates *underlying conduct* that would satisfy the compelling business justification standard. In other words, the employer may go behind the fact of arrest and determine whether the job applicant is likely to have engaged in the conduct for which he or she was arrested.[70]

How is an employer to determine whether a job applicant is 'likely' to have engaged in the conduct for which he was arrested? Obviously, the employer, who may be handling hundreds of job applications, is not going to expend the time and money to hold some sort of "hearing" so he can resolve the conflicting stories of police, witnesses, and the job applicant. Therefore, his operating assumption is likely to be that a person who is arrested for a criminal offense likely engaged in the conduct for which he was arrested. Minnesota provides that the Department of Human Services shall determine, by a preponderance of evidence, whether an applicant applying for a job requiring contact with children committed the crime for which he was arrested (but not ultimately convicted), thereby rendering the applicant ineligible.[71]

The second question that the employer has to face is no easier to resolve: when is there a compelling relationship between alleged criminal conduct and the job he is seeking to fill? The employer might plausibly take the position that

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69 *See*, Equal Employment Opportunity Commission Policy Guidance on Consideration of Arrest Records in Employment Decisions Under title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000 et seq (1990), *available at*, 1990 WL 1104708.

70 The EEOC offers the following example of an arrest being relevant to the hiring decision. A black male applicant for a position as a police officer had been acquitted of burglary, but admitted to his employer that he actually did commit the crime. The EEOC notes that the police department's decision not to hire the applicant would be justified because the applicant's ability to testify in court as a credible witness would be severely damaged.

71 J. Brennan and M. Haase, *Minnesota Reforms Address Important Employer Liability and Notification Issues*, 13(3) Offender Prog. Rep., 42 (2009). *See also*, U.S. v. Lope, 704 F. Supp. 1055 (U.S. Dist. Ct. S.D. Florida. 1988) (licensing board for private investigators should have access to arrest record).

all employees must be reliable, honest, and self-disciplined. No matter what the specific job responsibilities, an employee who is dishonest and unreliable can cause problems. In addition, an employer could easily evade the EEOC Policy by explaining his decision not to offer employment to a previously arrested applicant on some pretextual ground (*e.g.*, the job applicant lacked the right experience, had an unstable work history, failed the interview, etc.) or the employer could explain his failure to make an offer of employment to Applicant A by saying that he simply preferred Applicant B's experience and personality. Thus, a prohibition on employment discrimination on the basis of prior arrest(s) will be extremely difficult to enforce.

XVI. Conclusion

There are more than 10,000 police departments in the U.S.; practically every city and town has its own police department. It is no small challenge to keep track of arrestees, criminal defendants, convicted offenders and ex-offenders. The U.S. rap sheet system was established for the convenience of police agencies long before there were computers. It rapidly became a critical source of information for prosecutors, courts, probation, and parole agencies and other criminal justice system actors and agencies. Over time public and private employers, schools, social welfare agencies and numerous other agencies and individuals began to use criminal history information in their decision-making. The IT revolution made it possible to connect the whole system on a nationwide basis and made retrieval practically instantaneous. We now have to face such questions as whether the system collects and disseminates too much information and, if so, what can be done about it?

This article focuses just on arrest records and intelligence files. Arguably, unlike conviction records, neither type of information should harm an individual's reputation or opportunities. Most people would probably agree that the simple fact that a person has been arrested should not result in negative consequences. Unfortunately, however, this is not the case. An arrest record can have devastating consequences for the individual. While arrest records are not aggressively disseminated to the public, they are now available from many sources. It's not clear what, if anything, can be done. Once the genie has been let out of the bottle, it is very hard to see how it can be rebottled. Indeed, because of a confluence of factors—an arrest-based criminal history system, open court records, private information vendors—it may be too late for the U.S. to effectively remediate the negative effects of arrest records.

The situation with respect to intelligence files and databases is a little more hopeful, but just a little. Intelligence files and databases are not nearly as well developed, coordinated and comprehensive as rap sheets. At least until recently, the police maintained intelligence files on only a small number of people and then only for a small number of threats. But the lure of computer technology has proved irresistible. It is so easy to create new databases—suspected terrorists, suspected organised crime members, suspected gang members, suspected immigration law violators. The list is likely to expand inexorably. While the contents of these databases are not nearly as publicly accessible as rap sheets, including arrest records, they are becoming more accessible. Federal, state and local law enforcement agencies' need for such information generates powerful pressure to provide each other access to databases. But a system operated to fulfil that goal is likely also to be a system that provides wide access and is not effectively secured against unauthorised users and hackers.