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## A SUGGESTED LEGISLATIVE DEVICE FOR DEALING WITH ABUSES OF CRIMINAL RECORDS

Walter W. Steele, Jr.\*

Criminal records, such as records of arrests and records of convictions, are so generally available and frequently utilized in the United States that most people assume their use to be entirely legitimate. However, the ready availability and wide dissemination of such records is an important source of a certain socio-legal stigma borne by those persons processed in the criminal justice system. Subjecting a person to the criminal justice system may not only affect his civil rights and increase his chances for heavier penalties upon subsequent convictions, but may also taint his image in the community at large.<sup>1</sup>

A discrepancy exists: although some measure of due process is required when a person is arrested,<sup>2</sup> jailed,<sup>3</sup> tried,<sup>4</sup> or sentenced,<sup>5</sup> the stigma of a criminal record attaches automatically, without a semblance of due process. Two recent developments, however, have caused increased awareness of this discrepancy and of the concomitant need to guard against untoward use of criminal records.<sup>6</sup> The first was an increase in the number of educated

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<sup>1</sup> The United States Supreme Court has held that because of the fact that most criminal convictions entail adverse collateral legal consequences, a criminal case does not become moot upon the expiration of the sentence imposed. *Benton v. Maryland*, 395 U.S. 784, 790 (1969); *Sibron v. New York*, 392 U.S. 40, 55 (1968). See also Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929 (1970), an extensive article dealing with the civil disabilities resulting from a criminal conviction. Many of these disabilities, such as loss of property and domestic rights or the offender's ability to obtain occupational licensing, arguably contribute to his loss of social status.

<sup>2</sup> *McCray v. Illinois*, 386 U.S. 300, 304-05 (1967) (dictum).

<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 456-58 (1966) (dictum).

<sup>4</sup> *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

<sup>5</sup> *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948); *Mempa v. Rhay*, 389 U.S. 128, 137 (1967).

<sup>6</sup> Illustrating this growing contemporary concern is the proposed Criminal Justice Information Systems Security and Privacy Act of 1971, S. 2546, 92d Cong., 1st Sess. (1971), also introduced as H.R. 10789, 92d Cong., 1st Sess. (1971), and H.R. 10892, 92d Cong., 1st Sess. (1971) [hereinafter cited as S. 2546]. Hearings on the proposed bill were held June 29, 1972. 1971-72 CCH CONGRESSIONAL INDEX 2466. The differences between

middle- and upper-class young people being arrested, primarily for drug offenses or political demonstrations.<sup>7</sup> The second was the introduction of computers to maintain and disseminate information about criminal records on a centralized basis. Obviously, a centralized computer, filled with criminal records, and available to a multitude of users, enhances the dangers of the improper use of these records.<sup>8</sup>

Seemingly, the purpose of the socio-legal stigma which attaches to every person processed in the criminal justice system is to protect the general public; but the public needs protection only from relatively few people involved in comparatively few crimes.<sup>9</sup> That the stigma attaches to an excessive number of people may be a result of the imbalance in the competing interests. On one side are the people with a criminal record, who alone represent their interests. On the other side are the interests of employers and business associates, law enforcement agencies, courts, prosecutors, and the public at large.

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the proposed bill, S. 2546, and the statute proposed herein are indicated in notes 80-85 *infra*.

<sup>7</sup>Few realize the rate at which records of arrests are made in this country. For example, 5,773,988 arrests were reported to the Federal Bureau of Investigation (FBI) in 1969 alone. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS 107-08 (1969). Through the years the fingerprints of over 85,000,000 people have been placed in FBI files. These files do not lie dormant; the FBI receives about 29,000 requests for fingerprint checks *per day*. FEDERAL BUREAU OF INVESTIGATION, 1970 ANN. REP. 33.

<sup>8</sup>The threat of the computer in this respect has been recognized by the United States Congress. Subsection 7(7) of the Omnibus Crime Control Act of 1970, 42 U.S.C. § 3767(b) (1970), provides that

Not later than May 1, 1971, the [Law Enforcement Assistance] Administration shall submit to the President and to the Congress recommendations for legislation . . . promoting the integrity and accuracy of criminal justice data collection, processing, and dissemination systems funded in whole or in part by the Federal Government, and protecting the constitutional rights of all persons covered or affected by such systems.

It is possible that in the foreseeable future states will be required to comply with congressional standards for the maintenance of criminal records as a condition to receiving federal money. It follows, therefore, that the luxury of ignoring the plight of persons stigmatized by a criminal record may soon be a thing of the past. In order to obtain their share of federal money, states may be forced to deal with the questions of how best to collect and disseminate criminal records for legitimate purposes, while at the same time protecting "the constitutional rights of all persons covered or affected by such systems." *Id.*

<sup>9</sup>See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 88-92 (1967).

Clearly, the public interest demands that various disabilities and disqualifications attach to persons who engage in some types of criminal activity. No one would advocate hiring a convicted embezzler as a bank teller, or a convicted robber as a security guard. If appropriate disabilities and disqualifications are to attach to certain kinds of criminal activity, the records of that activity must be available. Nevertheless, according to current practices, no matter how blameless or rehabilitated a person might be, his criminal record will haunt and follow him. Thus, the problem with criminal records is not that they are used, but rather *how* they are used.

Another plausible explanation for tolerating pervasive stigmatization of persons with criminal records is the lack of a workable alternative. One of the most obvious alternatives is to expunge, under proper circumstances, all or portions of a criminal record. But, as one author has commented, "Statutes approaching expungement legislation have been enacted only in a minority of states. None in practice has succeeded in accomplishing what the philosophy of expungement seeks to do."<sup>10</sup> One drawback to expungement is that criminal records are located in so many different places that it is impractical to fashion an order to expunge them all.<sup>11</sup> Furthermore, because of the very real and legitimate interests of the public in knowing about some types of past criminal activity, expungement statutes are often so riddled with exceptions that they are of little practical use.<sup>12</sup>

Another suggested alternative for lessening the impact of a criminal record is to narrow the spectrum of persons or institutions who may hold or receive the records. This, too, is unworkable in practice because of the difficulty of enforcing rules of limited access among diverse institutions, such as all courts and police departments. Furthermore, rules of limited access do not normally prevent an employer from asking a prospective employee whether he has ever been arrested or convicted.<sup>13</sup>

There are other pitfalls apparent in ameliorating the overuse of criminal records. For example, techniques of expunging, sealing, and limiting access do not affect legal status. No amount of expunging, or sealing, or limiting access is truly useful unless civil rights, such as the right to vote, are restored as well.<sup>14</sup> Another problem is the inherent breadth of a criminal record, which can involve acts or allegations of acts ranging from traffic offenses to murder or rape. Thus, it is difficult to draw precise guidelines delineating those parts of the record which may be legitimately used. The apparently illegitimate use of criminal records does not lend itself to easy solution. The aims of this article are to explore some abuses of criminal records and to offer some tentative solutions, primarily in the form of a proposed statute.

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<sup>10</sup> Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CALIF. W.L. REV. 121, 125 (1967).

<sup>11</sup> See Kogon & Loughery, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378 (1970).

<sup>12</sup> See Note, *The Effect of Expungement on a Criminal Conviction*, 40 S. CAL. L. REV. 127, 132-43 (1967).

<sup>13</sup> For a discussion of some existing statutory approaches to the problem, see Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147 (1966); Comment, *supra* note 10.

<sup>14</sup> Cf. N.Y. ELECTION LAW § 152(2) (McKinney Supp. 1971), giving one convicted of a felony the right to vote upon the expiration of his sentence or his discharge from parole.

## I. COLLECTING AND CIRCULATING CRIMINAL RECORDS

If the illegitimate use of criminal records unreasonably embarrasses and prejudices those people subjected to the criminal justice system, then the collection and distribution of criminal records should be reexamined.<sup>15</sup> This reexamination should establish by what authority criminal records are collected and distributed, determine whether arrest records should be subject to the same treatment as conviction records, and ascertain the benefits of utilizing records of arrests and convictions.

In most cases, the police make a written record of the fact that a person has been arrested.<sup>16</sup> This record generally states the reason for the arrest and includes the arrestee's name, fingerprints, and photograph. The courts look upon this record as a customary facet of arrest, implicit in the police function.<sup>17</sup> According to one court, "The taking of the fingerprints in the first place and the whole process of arrest of a possibly innocent person are a humiliation to which he must submit for the benefit of society."<sup>18</sup> Moreover, several courts have held that the return or destruction of an arrest record is entirely within the discretion of the police department, absent a statute to the contrary.<sup>19</sup>

One study indicates that approximately 40 percent of the male children in the United States will be arrested for a nontraffic offense sometime during their lives.<sup>20</sup> Therefore, the nation's police departments have considerable discretionary power over information that is potentially damaging to a large segment of the American public. The mere fact that police have that information is not particularly threatening. The threat arises when the police release the information to someone outside the realm of law enforcement. That practice appears to be common: one court in New York City has taken judicial notice that private investigators have access to police records.<sup>21</sup>

<sup>15</sup> As a result of a thorough analysis of the impact of criminal records upon its citizens, the District of Columbia has implemented certain changes, described in *Morrow v. District of Columbia*, 417 F.2d 728, 731, 740-43 (D.C. Cir. 1969).

<sup>16</sup> Note, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 850-53 (1971).

<sup>17</sup> See, e.g., *Shannon v. State*, 207 Ark. 658, 660, 182 S.W.2d 384, 384-85 (1944); *Hansson v. Harris*, 252 S.W.2d 600 (Tex. Civ. App. 1952).

<sup>18</sup> *Fernicola v. Keenan*, 136 N.J. Eq. 9, 10, 39 A.2d 851 (Ch. 1944), cited with approval in *Roesch v. Ferber*, 48 N.J. Super. 231, 240, 137 A.2d 61, 69 (App. Div. 1957).

<sup>19</sup> See cases collected in Note, *supra* note 16, at 854 n.20.

<sup>20</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 247 (1967).

<sup>21</sup> In the Matter of *Smith*, 63 Misc. 2d 198, 200 n.4, 310 N.Y.S.2d 617, 620 n.4 (N.Y. City Fam. Ct. 1970).

The rationale underlying the practice of keeping arrest records, as stated by one court, is that

[a]rrest records are available in uncovering criminal conduct, they play a significant role in the prosecutor's exercise of discretion, they greatly aid in setting bond, determining sentences an[d] facilitating the work of penal and other institutions of correction.<sup>22</sup>

The problem stemming from the abuse of this practice is to seek a balance of conflicting interests. The humiliation of those arrested, resulting from having an arrest record which can be illegitimately used to their detriment must be weighed against the value of arrest records as a law enforcement tool and their consequent benefit to the public. Predictably, the courts tend to favor the public interest when striking the balance on the issue of collecting and circulating criminal records.<sup>23</sup> However, we should not overlook the fact that essentially the same two competing interests, *i.e.*, the individual and law enforcement, were balanced when the exclusionary rule was devised; in that instance the balance was struck in favor of the *individual*.<sup>24</sup>

There are some obvious differences between records of conviction and records of arrest. A conviction follows a trial, with all its attendant forms of due process, while an arrest results from either a warrant issued *ex parte* or a decision made by an individual policeman in the course of his patrol. Therefore, conviction records can be deemed more reliable and meaningful than arrest records. Furthermore, trials not followed by a conviction may be followed by an acquittal, which will also be recorded. A record of acquittal, amounting to a judicial admission that the defendant is not guilty of the crime charged, can be as widely disseminated as a record of conviction. Where arrest records are concerned, however, there is nothing corresponding to a record of

<sup>22</sup> *Menard v. Mitchell*, 328 F. Supp. 718, 727 (D.D.C. 1971). *Cf.* *Schware v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957).

<sup>23</sup> For example, in sustaining against constitutional attack a law under which defendant's fingerprints and photograph were obtained and held, the court in *State ex rel. Mavity v. Tyndall*, 225 Ind. 360, 366, 74 N.E.2d 914, 917 (1947) said:

With full recognition of the rights of the citizen we must nevertheless hold that the safety of the people is the first law and this law must prevail even as against some of the apparent rights of privacy.

Further illustration of the point is seen in cases which refuse to interfere with discretionary dissemination of criminal records by police. *Kolb v. O'Connor*, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957); *Poyer v. Boustead*, 3 Ill. App. 2d 562, 122 N.E.2d 838 (1954); *State ex rel. Reed v. Harris*, 348 Mo. 426, 153 S.W.2d 834 (1941); *Hansson v. Harris*, 252 S.W.2d 600 (Tex. Civ. App. 1952).

<sup>24</sup> *See Davis v. Mississippi*, 394 U.S. 721 (1969), and *Mapp v. Ohio*, 367 U.S. 643 (1961).

acquittal. In fact, many arrest records do not indicate any disposition at all.<sup>25</sup>

Although there are obvious differences in form, records of conviction are collected and disseminated by law enforcement agencies much in the same way as records of arrest. It is therefore probable that conviction records, like arrest records, are available for illegitimate use. Similarly, persons with conviction records are denied employment opportunities in much the same way as those with arrest records, at times with the approval of the courts.<sup>26</sup>

A state statute or a judgment of a state court restricting the use of criminal records would not extend beyond the state boundaries. There is recent precedent, however, suggesting that federal courts have jurisdiction over criminal records maintained by a state. In *Mendez v. Aponte*,<sup>27</sup> the petitioner alleged that she had been unconstitutionally convicted of a minor offense in the District Court of the Commonwealth of Puerto Rico. Although the conviction was final and a fine had been paid, the petitioner sought return of all records of that conviction because of the adverse consequences such records would have on her reputation. The United States District Court in Puerto Rico agreed with the petitioner, and invoked its jurisdiction under Section 1983<sup>28</sup> to order the judge and the clerk of the District Court of the Commonwealth of Puerto Rico to deliver up all records, documents, entries, references, and papers relative to the petitioner's trial and conviction.<sup>29</sup>

Issues of jurisdictional authority to restrict the collection and circulation of criminal records become more complex when the record has been sent to the Federal Bureau of Investigation (FBI) by the local police.<sup>30</sup> Local police, state police, and the FBI exchange their criminal record files on a reciprocal basis. The FBI

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<sup>25</sup> *E.g.*, in *Menard v. Mitchell*, 328 F. Supp. 719, 722 (D.D.C. 1971) the court stated:

While the [FBI] has vigorously sought to develop complete records and particularly to learn of dispositions resulting from each arrest, this effort has not been successful due to the failure of arresting agencies to send in follow-up data on forms provided.

<sup>26</sup> *E.g.*, "Barring convicted felons from certain employment is a familiar legislative device to insure against corruption in specified vital areas." *DeVeau v. Braisted*, 363 U.S. 144, 158-59 (1960).

<sup>27</sup> 294 F. Supp. 311 (D. P.R. 1969). See also *United States v. McLeod*, 385 F.2d 734, 749-50 (5th Cir. 1967); *Hughes v. Rizzo*, 282 F. Supp. 881, 885 (E.D. Pa. 1968).

<sup>28</sup> 42 U.S.C. § 1983 (1970).

<sup>29</sup> 294 F. Supp. at 316.

<sup>30</sup> The Attorney General of the United States is authorized to acquire, collect, classify, and preserve identification, criminal identification, crime, and other records and to exchange these records with authorities of the federal government, the states, the cities, and penal and other institutions. 28 U.S.C. § 534(a) (1970). The FBI is authorized to perform these services for the Attorney General. 28 C.F.R. § 0.85 (1972).

maintains the central depository for this information, and it currently has information on some sixty million arrests of approximately nineteen million people.<sup>31</sup> These records are shared with approximately 8,000 different agencies across the United States, including many state or county officials, banks insured by the Federal Deposit Insurance Corporation, the Federal Civil Service Commission, and some hospitals.<sup>32</sup> Therefore, local attempts to limit the collection and circulation of criminal records are of little consequence unless there are also some limitations placed on use of the central files maintained by the federal government.

The recent case of *Menard v. Mitchell*<sup>33</sup> has thoroughly considered the problem of restricting the use of central files. Menard was arrested and later released without charges by the Los Angeles, California, police. The Los Angeles police forwarded a record of his arrest to the FBI. Menard brought suit in federal court seeking to have the FBI remove his record from its files. The court denied Menard's request, holding that after exhausting his administrative remedies, he could seek relief in the California state courts, who may order a local police agency to request that the FBI remove a record from the central files and return it.<sup>34</sup> The FBI automatically honors such requests by returning the record to the local agency without retaining a copy in its files. Therefore, by limiting the authority of the police agencies to collect and transmit those records, or by requiring them to seek return of records already transmitted, a state legislature or state court can alleviate the abusive uses of criminal records.<sup>35</sup>

## II. THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT OPPORTUNITY

More than fifty million people in the United States have a criminal record of some form.<sup>36</sup> Their opportunity to secure employment is limited, despite the fact that the United States Supreme Court has declared that "[t]he right to follow any of the common occupations of life is an inalienable right . . . ."<sup>37</sup> To make matters worse, many of these people have never been

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<sup>31</sup> These figures do not include records of conviction. *Menard v. Mitchell*, 328 F. Supp. 718, 721 (D.D.C. 1971).

<sup>32</sup> *Id.* at 721-22.

<sup>33</sup> *Id.* at 718, *on remand from* 430 F.2d 486 (D.C. Cir. 1970).

<sup>34</sup> 328 F. Supp. at 723-24.

<sup>35</sup> See generally *T.N.G. v. Superior Court*, 4 Cal. 3d 767, 777 n.12, 94 Cal. Rptr. 813, 819 n.12, 484 P.2d 981, 987 n.12 (1971).

<sup>36</sup> Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306 at 306 (1970).

<sup>37</sup> *Butcher's Union Co. v. Crescent City Co.*, 111 U.S. 746, 762 (1884) (dictum).



convicted of a crime, but merely arrested and subsequently released. Despite the almost sacrosanct legal presumption that those who have not been convicted are innocent, employers attempt to screen out prospective employees who have any criminal record.

### A. Discriminatory Hiring

Several phenomena combine to deny job opportunities to people with a criminal record.<sup>38</sup> Foremost is the ease with which a prospective employer may learn of the record.<sup>39</sup> Many law enforcement agencies make that information available on request. Furthermore, most employers routinely ask job applicants to reveal whether or not they have a record. Although some jurisdictions have enacted expungement legislation, employers, law enforcement agencies, and even the courts have ignored the policy of that legislation. For example, in the case of *Taylor v. Macy*<sup>40</sup> the petitioner was discharged from his job after his employer had learned of his conviction for an offense, even though that conviction had been expunged. In upholding the right of the employer to discharge the petitioner the court commented:

[W]hile the State of California has forgiven the petitioner . . . , the acts continue to exist and it would be absurd to find that the executive authorities were arbitrary and capricious in considering these expunged convictions . . . .<sup>41</sup>

Another reason that persons with criminal records have difficulty obtaining jobs is aptly expressed in the following quotation:

I think that the chief handicap that this [person arrested] has is that for the rest of his life, when he seeks employment, he will have, in many cases, and perhaps most cases, to admit to the prospective employer that yes, indeed, he was once arrested, and he will, perhaps, try to explain the circumstances.

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<sup>38</sup> The weight of law and opinion is set against employment of ex-criminals. At least in the areas of public employment and licensing, this position is a sad commentary on the state's opinion of its ability to reform offenders. The position is also self-sustaining: each refusal to hire an ex-criminal contributes to a massive barrier to employment and thus encourages recidivism, which in turn justifies the next refusal to hire.

Note, *supra* note 36, at 317.

<sup>39</sup> See, e.g., A. MILLER, ASSAULT ON PRIVACY 34-35 (1971); Karst, "The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data, 31 LAW & CONTEMP. PROB. 342, 365-66 (1966).

<sup>40</sup> 252 F. Supp. 1021 (S.D. Cal. 1966).

<sup>41</sup> *Id.* at 1023.

Perhaps the employer will be satisfied with the explanation, but many times, I think, you'll find that the employer doesn't want to be bothered . . . . I think it's human nature on his part to hire the guy whose record is perfectly clean.<sup>42</sup>

The attitude of the employer gives rise to a curious incongruity. Although there is strong public sentiment demanding that prison inmates work,<sup>43</sup> an ex-convict has difficulty obtaining a job not because of his unwillingness to work, but because he is an ex-convict. The incongruity is that there is considerable interest in a convict's being productive while he is incarcerated, but once he is released, and again a potential danger to society, there is very little interest in his being usefully and gainfully employed.

Obviously employers must have a right to know about criminal records in some cases; otherwise, it would be difficult to avoid an anomalous result such as employing an embezzler as a bank teller or a robber as a security guard. It nonetheless seems equally apparent that an employer's right to know should be balanced against the public's interest in obtaining full employment for persons with criminal records.<sup>44</sup> The notion that public interests might override the private interests of employers is not new, but it has yet to include persons with criminal records. For example, a New York statute prohibits employment discrimination against ex-mental patients.<sup>45</sup> Doubtlessly, many New Yorkers would prefer to discriminate against ex-mental patients, but the public interest prohibits it. Another example of balancing public interests against private interests in employment is found in federal civil rights legislation which denies employers the right to discriminate by race, sex, or age.<sup>46</sup> Similar statutes covering persons with criminal records could be drafted, but without greater public support than now exists, legislatures would not be willing to enact such a statute.<sup>47</sup>

### B. Occupational Licensing

Occupational licensing by the state likewise discriminates

<sup>42</sup> *Hearings Before the California Assembly Committee on Criminal Procedure* at 4 (June 10, 1964) (remarks of John O'Connell, Commissioner of the California Industrial Accident Commission).

<sup>43</sup> Hard labor sentences, one indicator of this public sentiment, are an integral part of the penal law of some jurisdictions. See, e.g., ALA. CODE tit. 15, § 342 (Supp. 1970); HAWAII REV. STAT. §§ 748-4, 748-7 (1968); MANUAL FOR COURTS-MARTIAL § 127 (1969) (included in 10 U.S.C.A. following § 856 (Supp. 1972)).

<sup>44</sup> See notes 82 and 84 and accompanying text *infra*.

<sup>45</sup> N.Y. MENTAL HYGIENE LAW § 70(5) (McKinney 1971).

<sup>46</sup> 42 U.S.C. § 2000e-2 (1970).

<sup>47</sup> For an interesting discussion of the civil rights model as a solution to the employment problems of persons with criminal records, see Note, *supra* note 36, at 317-20.

against persons with criminal records. Consequently, as vocational activities are increasingly brought under licensing statutes, persons with criminal records find diminishing opportunities for work.<sup>48</sup> In 1889, the Supreme Court of the United States recognized a state's power to set standards for certain occupations.<sup>49</sup> As originally conceived, that power represented the balance struck between the individual citizen's right to work and the state's obligation to protect its citizens.<sup>50</sup> Frequently, however, licensing protects licensees more than it protects the public. Increasing numbers of occupational groups demand and receive licensing legislation to deter competition and to satisfy a desire for a symbol of professional status.<sup>51</sup> As a result the delicate balance between the individual's right to work and the state's power to protect the public has unwittingly shifted in favor of the state. There can be no doubt that the Supreme Court originally intended to limit the state's power to license. In an early case on the subject, the Court stated:

To justify the State[s] . . . interposing its authority in behalf of the public, it must appear—First, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>52</sup>

Most states automatically deny licenses to persons with criminal records.<sup>53</sup> The public interest has prevailed to the extent that it is expeditious to exclude all applicants with criminal records rather than provide machinery for exercising some sound discretion among these applicants. Even the Supreme Court has generalized about the fitness of people with conviction records to receive a license:

It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the

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<sup>48</sup> See generally Reich, *The New Property*, 73 YALE L.J. 733, 734, 747 (1964).

<sup>49</sup> *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) (dictum).

<sup>50</sup> It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business . . . . But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will.

*Crowley v. Christensen*, 137 U.S. 86, 89 (1890) (Field, J.).

<sup>51</sup> Gellhorn, *Occupational Licensing—A Nationwide Dilemma*, 109 J. ACCOUNTANCY 39 (1960).

<sup>52</sup> *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

<sup>53</sup> Note, *supra* note 36, at 308-10.

question of character. It is not, as a rule, the good people who commit crime.<sup>54</sup>

Even where a conviction has been expunged, states have denied licenses to those with criminal records.<sup>55</sup> Persons who have received a pardon are also likely to be denied a license.<sup>56</sup> The underlying legal basis for these denials may, however, be changing. In *Schware v. Board of Bar Examiners*,<sup>57</sup> the Supreme Court analyzed the power of a state to deny an occupational license to a person who had an arrest record. While recognizing the power to insist that licensees be of good character, the Court ruled that standards of character must have a *rational connection* to the occupation in question. As for the presence of an arrest record, the Court said:

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. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense. When formal charges are not filed against the arrested person and he is released without trial, whatever probative force that the arrest may have had is normally dissipated.<sup>58</sup>

The requirement of a rational connection could also be applied to a prior conviction. For instance, if a conviction is very old or for an offense unrelated to the nature of the occupation, there may not be a legitimate reason to withhold a license. By calling for a closer examination of the nexus between the criminal record and the nature of the occupation,<sup>59</sup> licensing statutes could provide a more realistic balance between the right of the individual to work and the obligation of the state to protect the public.

### III. RECENT JUDICIAL DEVELOPMENTS ALLEVIATING THE ABUSIVE USES OF CRIMINAL RECORDS

Although many foreign countries have limited the availability and use of criminal records,<sup>60</sup> American courts have historically been hesitant to intrude into the problems inherent in collecting

<sup>54</sup> *Hawker v. New York*, 170 U.S. 189, 196 (1898).

<sup>55</sup> *Copeland v. Department of Alcoholic Beverage Control*, 241 Cal. App. 2d 186, 50 Cal. Rptr. 452 (Dist. Ct. App. 1966).

<sup>56</sup> See, e.g., *Stone v. Oklahoma Real Estate Comm'n*, 369 P.2d 642 (Okla. 1962); *Page v. Watson*, 140 Fla. 536, 192 So. 205, 126 A.L.R. 249 (1938).

<sup>57</sup> 353 U.S. 232 (1957).

<sup>58</sup> *Id.* at 241 (footnote omitted) (Black, J.).

<sup>59</sup> See *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907, 131 A.L.R. 226 (1940).

<sup>60</sup> Hess & Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494, 499-501 (1967).

and disseminating criminal records.<sup>61</sup> Recently, however, some American courts have shown a growing willingness to reexamine the process by which these records are gathered and to reassess the present balance between the rights of a person with a criminal record and the rights of the public. One example of judicial activism in this area is the *Menard v. Mitchell* decision discussed above.<sup>62</sup> The *Menard* court judicially noticed the fact that criminal records can be used to the subject's detriment. To alleviate some of this potential abuse, the court ordered the FBI to make Menard's criminal record available only to other law enforcement agencies and only "for strictly law enforcement purposes."<sup>63</sup> The court also restricted the federal government to the "discreet use of this information [Menard's record] already in its possession for its own limited purposes in aid of national security . . . ."<sup>64</sup> The *Menard* decision obviously does not provide complete protection, for some leaks or deliberate misuses are bound to occur in a records system as large as that in the United States. Nonetheless, the opinion is an unmistakable effort to enhance the individual's right to privacy.

Other recent decisions have relied on expungement as a method to alleviate the potential abuse of criminal records, especially arrest records.<sup>65</sup> Heretofore, courts have established that the police have the right, if not the duty, to record the fact that a person has been arrested.<sup>66</sup> That doctrine was aptly expressed in *Bartletta v. McFeeley*:

Whether any certain prisoner is to be fingerprinted and photographed is an administrative question to be determined by the head of the police department making the arrest . . . . The police department have [sic] the responsibility of the safety of the people and they must be given the necessary discretion to enable them successfully to assume this responsibility.<sup>67</sup>

Nevertheless, it is also established doctrine that an individual's right to privacy may limit the right to disseminate criminal records.<sup>68</sup> As systems for the collection and dissemination of

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<sup>61</sup> See cases collected in Note, *supra* note 16, at 854 n.20; cf. *Roesch v. Ferber*, 45 N.J. Super. 149, 131 A.2d 807 (Law Div. 1957), *rev'd*, 48 N.J. Super. 231, 137 A.2d 61 (App. Div. 1957).

<sup>62</sup> 328 F. Supp. 718 (D.D.C. 1971). See notes 33-34 and accompanying text *supra*.

<sup>63</sup> 328 F. Supp. at 727.

<sup>64</sup> *Id.*

<sup>65</sup> *E.g.*, *United States v. McLeod*, 385 F.2d 734, 749-50 (5th Cir. 1967).

<sup>66</sup> *Mabry v. Kettering*, 89 Ark. 551, 117 S.W. 746 (1909); *State ex rel. Mavity v. Tyndall*, 225 Ind. 365, 66 N.E.2d 755 (1946); *Fernicola v. Keenan*, 136 N.J. Eq. 9, 39 A.2d 851 (Ch. 1944).

<sup>67</sup> *Bartletta v. McFeeley*, 107 N.J. Eq. 141, 145, 152 A. 17, 19 (Ch. 1930).

<sup>68</sup> See *Schulman v. Whitaker*, 117 La. 704, 42 So. 227 (1906); *Itzkovitch v. Whitaker*,

criminal records expand, a criminal record arguably becomes part of what amounts to a nationwide rogue's gallery. The opinion in *United States v. Kalish*<sup>69</sup> illustrates that some courts are beginning to reconsider the relationship between collecting records and prohibiting excessive dissemination of those records. Kalish was arrested, fingerprinted, and photographed by a United States marshal.<sup>70</sup> Later, all charges were dismissed, and Kalish sought an order directing the FBI to expunge his record.<sup>71</sup> The government argued that there was no statutory authority for such a procedure. The court sustained Kalish's petition, analyzing the problem as follows:

There can be no denying the efficacy of fingerprint information, photographs, and other means of identification in the apprehension of criminals and fugitives. Law enforcement agencies must utilize all scientific data in society's never-ending battle against lawlessness and crime. When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been.

However, when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is [sic] invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest [sic], fingerprints and a rogue's gallery photograph.<sup>72</sup>

Following the *Kalish* rationale, some states have passed statutes requiring expungement or sealing of all records upon an acquittal or dismissal of criminal charges.<sup>73</sup>

Automatic expungement upon dismissal or acquittal may be an overreaction to the need to balance the interests of good law enforcement against the interests of privacy. Admittedly, cases may be dismissed, and acquittals may result, for reasons other than innocence. In recognition of that fact, some courts are following what seems to be a more sophisticated approach. These

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115 La. 479, 39 So. 499 (1905); *Downs v. Swann*, 111 Md. 53, 73 A. 653 (1909); *McGovern v. Van Riper*, 137 N.J. Eq. 24, 43 A.2d 514 (Ch. 1945); *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971).

<sup>69</sup> 271 F. Supp. 968 (D.P.R. 1967).

<sup>70</sup> *Id.* at 969.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 970.

<sup>73</sup> See, e.g., CONN. GEN. STAT. ANN. § 54-90 (Supp. 1972); ILL. REV. STAT. ch. 38, § 206-5 (Supp. 1972).

courts examine such requests for expungement individually in an effort to determine where the equities lie. For example, the petitioner in *Henry v. Looney*<sup>74</sup> sought to have his arrest record sealed because he was released from custody without charges being filed. The state argued both that there was no statutory authority for sealing the record and that sealing would be ineffective since it would not protect the petitioner from being asked whether he had ever been arrested.<sup>75</sup> The court ordered the record sealed, stating:

At the least, the subject of whether or not petitioner had been arrested should be opened with petitioner's knowledge rather than through private investigation, so that petitioner may be afforded an opportunity to explain fully to those willing to listen. The protection afforded by the law is worthwhile if it does no more than assure petitioner that doors will not be closed, and opportunities precluded, on the basis of an arrest record, privately uncovered, but never mentioned.<sup>76</sup>

In reaching that conclusion, however, the court expressly recognized that "not every arrest record which fails to terminate with a conviction . . . should be automatically expunged . . . . Convictions frequently fail for reasons other than a defendant's innocence."<sup>77</sup> Utilizing the same approach, the Washington Court of Appeals stated in *Eddy v. Moore*:

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

We believe the right of an individual, *absent a compelling showing of necessity by the government*, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty.<sup>78</sup>

These cases represent an unmistakable movement by the courts away from the conventional laissez-faire attitude, and toward a willingness to scrutinize the relationship among criminal records, the abusive use of criminal records, the right to privacy, and the right to be free from permanent damage to personal reputation.

<sup>74</sup> 65 Misc. 2d 759, 317 N.Y.S.2d 848 (Sup. Ct. 1971).

<sup>75</sup> *Id.* at 760-61, 317 N.Y.S.2d at 850.

<sup>76</sup> *Id.* at 761, 317 N.Y.S.2d at 850.

<sup>77</sup> *Id.* at 762, 317 N.Y.S.2d at 852. *Cf.* *Spock v. District of Columbia*, 283 A.2d 14 (D.C. Ct. App. 1971).

<sup>78</sup> 5 Wash. App. 334, -, 487 P.2d 211, 217 (1971) (emphasis supplied).

Although these courts appear to be making some progress, judicial remedies are inherently slow and costly. If, in fact, the efforts by these courts are valid and viable ones, then the goals could be more directly reached through a statutory solution, which would be uniformly and expeditiously available.

#### IV. SUGGESTED STATUTORY REMEDY

Several fundamental considerations are involved in attempting to draft a statutory solution to the problem of criminal records. One is that the distinction between a record of arrest and a record of conviction can be a pivotal one. Another is that a conflict exists between the public's need to know of criminal records and the public's desire to facilitate an offender's return to society as a productive citizen.

Although expungement is the most common approach to the problem of abusive uses of criminal records, it is often cumbersome and unworkable.<sup>79</sup> A person who has been arrested is likely to find that the local police have retained a record of his arrest and that they have forwarded copies to the state police and the FBI. Thus, any scheme, whether imposed by a court or by a statute, to restrict the use of or expunge that record must be broad enough to deal with at least three different record depositories, each in turn operated by a different governmental unit: county, state, and federal.

At least two alternatives to expungement could be effectively used. One is to limit the scope of distribution or publication of criminal records. The other alternative is to prevent employers and licensing agencies from discriminating against persons because of certain types of criminal records. The statute suggested below utilizes all three approaches: expungement, limited distribution, and removal of employment and licensing disabilities. An attempt has been made to tailor each section of the statute to one particular aspect of the overall problem, and following each section is a short commentary describing the problem of concern in that section and explaining why one particular approach was chosen rather than any other. The statute deals solely with records of arrests or convictions. It does not deal in any way with the issue of restoring civil rights after expungement of a record or pardon of a conviction.

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<sup>79</sup> For a listing of expungement statutes, see Special Project, *supra* note 1, at 1148-50 & nn.619-39.



## CRIMINAL RECORD INFORMATION ACT

### SEC. 1. DEFINITIONS.

(1) "LAW ENFORCEMENT AGENCY" MEANS ANY PUBLIC AGENCY WHICH CREATES OR STORES CRIMINAL RECORD INFORMATION.

(2) "ARREST RECORD" MEANS ANY ENTRY BY A LAW ENFORCEMENT AGENCY INTO WRITTEN RECORDS OR ELECTRONIC DATA BANKS WHICH IDENTIFIES A PARTICULAR PERSON WHO HAS BEEN ARRESTED. THE TERM "ARREST RECORD" SHALL INCLUDE, BUT SHALL NOT BE LIMITED TO, THE FOLLOWING: PHOTOGRAPHS MADE OF A PERSON WHILE UNDER ARREST; FINGERPRINTS TAKEN OF A PERSON WHILE UNDER ARREST; WRITTEN OFFENSE REPORTS DESCRIBING THE CIRCUMSTANCES OF AN ARREST; RECORDS INDICATING THE FACT THAT A NAMED PERSON IS OR HAS BEEN IN A JAIL IN CONNECTION WITH PENDING CHARGES.

(3) "CONVICTION RECORD" MEANS A FINAL JUDGMENT OF CONVICTION OF A CRIME FOR WHICH A JAIL TERM MAY BE ASSESSED, TOGETHER WITH ANY SUBSEQUENT ORDERS OR JUDGMENTS OF A COURT CONCERNING THE SENTENCE, DETENTION, PROBATION, PAROLE, OR RELEASE OF A PERSON CONVICTED OF SUCH CRIME.

(4) "CRIMINAL RECORD INFORMATION" INCLUDES ARREST RECORDS AND CONVICTION RECORDS AND ABSTRACTS THEREOF AS WELL AS RECORDS MAINTAINED BY ANY PUBLIC AGENCY REGARDING THE DETENTION, PROBATION, PAROLE, OR RELEASE OF A NAMED PERSON WHO HAS BEEN CONVICTED OF A CRIME FOR WHICH A JAIL TERM MAY BE ASSESSED.

(5) "SUPERINTENDENT" MEANS THE SUPERINTENDENT OF THE STATE CRIMINAL RECORD INFORMATION DEPARTMENT.

### *Comment*

These definitions make the essential distinction between a

record of arrest and a record of conviction.<sup>80</sup> It should be noted that these definitions are designed to include records maintained in such places as the offices of prosecutors or grand juries. For reasons of expediency, conviction records for minor offenses are not included in the definition of "conviction record" and, consequently, are not subject to expungement under the provisions of this act. See Sec. 6 *infra*. However, arrest records for *all* crimes are treated in this legislation.

SEC. 2. RESPONSIBILITY TO FORWARD AND MAINTAIN CRIMINAL RECORD INFORMATION.

(1) ALL LAW ENFORCEMENT AGENCIES, INCLUDING EVERY POLICE DEPARTMENT, SHERIFF, CONSTABLE, OR OTHER PUBLIC AGENCY; CLERKS, JUDGES, OR APPROPRIATE OFFICIALS OF THE VARIOUS CRIMINAL COURTS; PROSECUTING, PROBATION, AND PAROLE OFFICERS; HEADS OF EVERY DEPARTMENT, BOARD, COMMISSION, BUREAU, OR INSTITUTION OF THE STATE OR ANY POLITICAL SUBDIVISION THEREOF HAVING TO DO WITH ARRESTED OR CONVICTED PERSONS SHALL FURNISH CRIMINAL RECORD INFORMATION TO THE SUPERINTENDENT.

(2) ANY LAW ENFORCEMENT AGENCY MAY REQUEST THE SUPERINTENDENT TO FURNISH A COMPLETE TRANSCRIPT OF THE CRIMINAL RECORD INFORMATION CONCERNING ANY PERSON.

(3) THE CLERKS, JUDGES, OR APPROPRIATE OFFICIALS OF THE VARIOUS COURTS IN THIS STATE SHALL IMMEDIATELY REPORT TO THE SUPERINTENDENT THE FINAL DISPOSITION OF EVERY CRIMINAL CASE IN THAT COURT WHEREIN THE ALLEGED CRIME WAS ONE FOR WHICH A JAIL TERM COULD HAVE BEEN ASSESSED.

(4) IT IS HEREBY MADE THE DUTY OF THE ARRESTING OFFICER, OR SUCH OTHER OFFICIAL AS SHALL BE DESIGNATED BY THE LOCAL LAW ENFORCEMENT AGENCY, TO REPORT IMME-

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<sup>80</sup> S. 2546, 92d Cong., 1st Sess. § 2(2) (1971), does not distinguish between arrest and conviction records. Moreover, that bill does not apply to conviction records maintained by the judicial system, but only to those records maintained by any agency funded, in whole or in part, by the Law Enforcement Assistance Administration. *Id.* § 2(1).

DIATELY TO THE SUPERINTENDENT THE FACT THAT A SUSPECT HAS BEEN RELEASED FROM ARREST STATUS WITHOUT CHARGES BEING FILED.

(5) IN ANY CASE WHERE THE CRIMINAL RECORD INFORMATION HAS BEEN PREVIOUSLY FORWARDED TO THE FEDERAL BUREAU OF INVESTIGATION, ALL SUBSEQUENT ADDITIONS TO THE CRIMINAL RECORD INFORMATION SHALL LIKEWISE BE FORWARDED TO THE FEDERAL BUREAU OF INVESTIGATION.

### *Comment*

Criminal records are seldom maintained in a current and up-to-date condition. This section creates a central depository for all criminal record information and requires that the records be continually updated.<sup>81</sup>

#### SEC. 3. DISSEMINATION OF CRIMINAL RECORD INFORMATION.

(1) ANY LAW ENFORCEMENT AGENCY OF THIS STATE OR ANY POLITICAL SUBDIVISION THEREOF MAY FURNISH CRIMINAL RECORD INFORMATION TO ANY OTHER LAW ENFORCEMENT AGENCY UPON PROPER REQUEST STATING THAT THE INFORMATION REQUESTED WILL BE USED SOLELY IN THE ADMINISTRATION OF THE OFFICIAL DUTIES OF THAT AGENCY.

(2) THE SUPERINTENDENT MAY FURNISH CRIMINAL RECORD INFORMATION TO ANY AGENCY, PERSON, OR ORGANIZATION OF ANY TYPE, PROVIDED THE REQUEST FOR INFORMATION IS ACCOMPANIED BY A WRITTEN AUTHORIZATION SIGNED AND ACKNOWLEDGED BY THE PERSON ABOUT WHOM THE INFORMATION IS REQUESTED. NO OTHER LAW ENFORCEMENT AGENCY OF THIS STATE SHALL FURNISH CRIMINAL RECORD INFORMATION TO SUCH AGENCIES, PERSONS, OR ORGANIZATIONS.

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<sup>81</sup> Subsection 4(b) of S. 2546, 92d Cong., 1st Sess. (1971), requires only that operating procedures be established which insure accurately revised records. No central depository is created.

*Comment*

This section maintains the freedom which law enforcement agencies currently have to exchange information among themselves for law enforcement purposes. The availability of criminal record information to private concerns, however, is drastically curtailed.<sup>82</sup> Violation of this section gives rise to penalties. See Sec. 8 *infra*. Private concerns who are investigating an individual for private purposes will be forced to seek authorization from the person being investigated. Thus, the balance between public and private interests is struck so that beneficial law enforcement may proceed unimpeded, while private prying must be revealed. Better control over dissemination of information to private sources is maintained by making that information available from the central clearinghouse only, thus foreclosing all local agencies from supplying that information.

**SEC. 4. RETURN OF ARREST RECORDS.**

IT SHALL BE THE MANDATORY DUTY OF ALL LAW ENFORCEMENT AGENCIES TO RETURN TO ANY PERSON ARRESTED ALL ARREST RECORDS PERTAINING TO THAT ARREST WHENEVER SAID PERSON IS RELEASED WITHOUT A CRIMINAL CHARGE BEING FILED AGAINST HIM, OR WHENEVER A CHARGE IS FILED AND SUBSEQUENTLY DISMISSED; PROVIDED SUCH PERSON DEMANDS RETURN IN WRITING WITHIN TEN DAYS OF THE RELEASE OR DISMISSAL. IN THE EVENT OF SUCH DEMAND, THE ARREST RECORDS SHALL BE RETURNED IMMEDIATELY BY MAIL TO THE ADDRESS DESIGNATED IN THE WRITTEN DEMAND, ALONG WITH THE DEMAND ITSELF. IN THE CASE OF ELECTRONIC DATA, THE LAW ENFORCEMENT AGENCY SHALL CERTIFY THAT SUCH DATA HAS BEEN PERMANENTLY REMOVED FROM THE DATA BANK. THE AGENCY SHALL FURTHER CERTIFY THE NAMES OF ANY OTHER AGENCIES WHICH HAVE BEEN FURNISHED WITH COPIES OF SAID ARREST RECORD AND SHALL SEEK THE RETURN OF SAID RECORDS FROM SAID AGENCIES.

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<sup>82</sup> S. 2546, 92d Cong., 1st Sess. § 3 (1971) allows access to criminal record information only to law enforcement agencies. Exceptions are made only for those engaged in research related to law enforcement and for individuals who believe that information concerning them is being inaccurately or illegally maintained.

### Comment

An arrest record which does not result in criminal charges being filed and prosecuted is most obnoxious to individual privacy and least indicative of criminal character. However, this section does not call for automatic expungement in such instances. Instead, this section places the onus upon the individual to protect his own privacy by making a written demand for return. There is some reason to anticipate that persons who are criminally inclined will be less likely to make such a demand. On the other hand, persons who are truly concerned about their reputations and privacy can avail themselves of the demand machinery with very little effort. The last sentence of this section is designed to advise the person filing the demand of the fact that his arrest record has already been forwarded to other agencies. Thus he is better able to monitor the efforts of the local agency seeking the return of his records from other agencies.<sup>83</sup>

The right to demand return based upon an *acquittal* of criminal charges is covered in Sec. 5 *infra*.

#### SEC. 5. RETURN OF CRIMINAL RECORD INFORMATION UPON ACQUITTAL.

(1) IT SHALL BE THE MANDATORY DUTY OF ALL LAW ENFORCEMENT AGENCIES TO RETURN TO ANY PERSON ACQUITTED OF A CRIMINAL CHARGE ALL CRIMINAL RECORD INFORMATION PERTAINING TO THAT CHARGE, PROVIDED SUCH PERSON DEMANDS RETURN IN WRITING WITHIN TEN DAYS AFTER SAID ACQUITTAL IS FINAL. IN THE EVENT OF SUCH DEMAND, THE CRIMINAL RECORD INFORMATION SHALL BE RETURNED IMMEDIATELY BY MAIL TO THE ADDRESS DESIGNATED IN THE WRITTEN DEMAND, ALONG WITH THE DEMAND ITSELF. IN THE CASE OF ELECTRONIC DATA, THE LAW ENFORCEMENT AGENCY SHALL CERTIFY THAT SUCH DATA HAS BEEN PERMANENTLY REMOVED FROM THE DATA BANK. THE AGENCY SHALL CERTIFY THE NAMES OF ANY OTHER AGENCIES WHICH HAVE BEEN FURNISHED WITH COPIES OF SAID CRIMI-

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<sup>83</sup> No provision for the return of records of arrest or conviction is included in S. 2546, 92d Cong., 1st Sess. (1971). Nonetheless, the bill does require that procedures be developed for removing criminal record information based on considerations of age, nature of the record, and a reasonable interval following the last release from the jurisdiction of a law enforcement agency. *Id.* § 4(c).

NAL RECORD INFORMATION OR ANY PART THEREOF AND SHALL SEEK THE RETURN OF SAID RECORDS FROM SAID AGENCIES.

(2) THIS SECTION SHALL NOT APPLY IF:

(a) THE PERSON HAS BEEN FINALLY CONVICTED OF THE SAME OFFENSE ON A PRIOR OCCASION WHICH CONVICTION HAS NOT BEEN REMOVED FROM THE CRIMINAL RECORDS; OR

(b) THERE ARE OTHER CRIMINAL CHARGES PENDING AGAINST THE PERSON AT THE TIME THE DEMAND IS MADE; OR

(c) THE PERSON HAS PREVIOUSLY BEEN CONVICTED OF AN OFFENSE INVOLVING MORAL TURPITUDE WHICH CONVICTION HAS NOT BEEN REMOVED FROM THE CRIMINAL RECORDS.

### *Comment*

Similarly to Sec. 4, this section puts the onus on the person most concerned to seek return of criminal record information. The second part of this section sets forth certain exceptions to expungement which represent a circumstance where the public interest in effective law enforcement outweighs individual interest in personal privacy. Furthermore, many individuals may want to leave their record of acquittal on file rather than have it automatically expunged.

#### SEC. 6. RETURN OF CRIMINAL RECORD INFORMATION AFTER CONVICTION.

(1) ANY PERSON WITH A CONVICTION RECORD MAY PETITION THE CONVICTING COURT FOR AN ORDER ANNULING AND RESCINDING THE CONVICTION AND DIRECTING LAW ENFORCEMENT AGENCIES IN THIS STATE TO RETURN ALL CRIMINAL RECORD INFORMATION PERTAINING TO THE ARREST, CONVICTION, AND SENTENCE IN QUESTION AND FURTHER DIRECTING ALL LAW ENFORCEMENT AGENCIES IN THIS STATE TO SEEK RETURN OF SAID RECORDS FROM ANY OTHER LAW ENFORCEMENT AGENCIES KNOWN TO POSSESS THE RECORDS OUTSIDE THE STATE.

(2) THE COURT SHALL SET A TIME FOR A HEARING ON SUCH PETITION TO BE HELD NOT MORE THAN THIRTY DAYS AFTER IT IS FILED,

AND A COPY OF THE PETITION AND NOTICE OF HEARING SHALL BE SERVED UPON THE LOCAL PROSECUTOR AND THE HEAD OF THE LOCAL POLICE FORCE.

(3) THE PETITION SHALL BE GRANTED WHENEVER THE COURT FINDS THE FOLLOWING FACTS AT THE HEARING:

(a) THE PETITIONER HAS FULLY DISCHARGED HIS SENTENCE;

(b) PETITIONER'S PROBATION OR PAROLE (IF ANY) WAS NOT REVOKED AT ANY TIME;

(c) THE PETITIONER IS NOT PRESENTLY CHARGED WITH ANY CRIME;

(d) THAT FOR A PERIOD OF FIVE YEARS FROM THE DATE OF EXPIRATION OF THE SENTENCE IN QUESTION THE PETITIONER HAS NOT BEEN CONVICTED OF A CRIME FOR WHICH A JAIL TERM MAY BE ASSESSED; AND

(e) GRANTING THE ORDER WOULD AID THE PETITIONER IN FURTHER REHABILITATION AND WOULD BE CONSISTENT WITH THE PUBLIC WELFARE. SHOULD THE COURT FIND THAT GRANTING THE ORDER WOULD NOT AID THE PETITIONER IN FURTHER REHABILITATION AND BE CONSISTENT WITH THE PUBLIC WELFARE, IT SHALL SET FORTH THE REASONS FOR SUCH FINDING.

(4) ANY CONVICTION WHICH HAS BEEN REMOVED FROM THE RECORDS BY ORDER OF A COURT SHALL NOT THEREAFTER BE ADMISSIBLE INTO EVIDENCE FOR ANY PURPOSE. THE PETITION FOR THE ORDER AND THE RECORDS OF THE HEARING SHALL BE SEALED AND MAY NOT BE REOPENED FOR ANY PURPOSE EXCEPT BY ORDER OF THE COURT.

### *Comment*

When a person has been law-abiding for at least five years after his conviction, there is good reason to believe that he is well on the road toward complete rehabilitation, in which event the public has little, if any, legitimate interest in knowing of his conviction.

Some statutes allow an expunged conviction to be used in evidence at a subsequent trial for a different crime. Obviously,

that practice results in less than complete expungement because the record must remain available somewhere if it is to be offered in evidence later. Therefore, the model adopted in this section calls for complete expungement and encourages complete expungement by denying the use of the record at later trials. The prosecution is thereby denied the opportunity to introduce evidence of convictions over five years old, assuming those convictions have, in fact, been ordered expunged. This seems a small price to pay when contrasted to the benefits complete expungement would bring to so many individuals who are diligently seeking to regain a productive place in society.

The court retains discretion to deny the petition if it is not in the best interests of all concerned. An example might be a case where the petitioner was convicted of child molesting and has been arrested, but not convicted, for the same offense on several subsequent occasions during the five year period.

Only convictions that give rise to a "conviction record" (see Sec. 1 *supra*) are treated in this section. Expunging convictions for lesser offenses would possibly create too great a burden on the courts in relation to the amount of good accomplished.

#### SEC. 7. THE EFFECT OF CRIMINAL RECORD INFORMATION ON LICENSING APPLICATIONS.

(1) NO PERSON, BOARD, COMMISSION, BUREAU, OR OTHER ENTITY CHARGED WITH THE RESPONSIBILITY OF LICENSING OR OTHERWISE PERMITTING OR PROHIBITING PERSONS FROM ENGAGING IN PARTICULAR OCCUPATIONS, AVOCATIONS, PROFESSIONS, OR OTHER FORMS OF GAINFUL EMPLOYMENT, SHALL DENY A LICENSE OR PERMISSION BECAUSE OF AN ARREST OR CONVICTION WHICH IS NOT CURRENTLY MAINTAINED IN THE RECORDS OF THE STATE CRIMINAL RECORD INFORMATION DEPARTMENT.

(2) IN NO EVENT SHALL ANY SUCH PERSON, BOARD, COMMISSION, BUREAU, OR OTHER ENTITY DENY SUCH LICENSE OR PERMISSION BECAUSE OF A RECORD OF ARREST OR CONVICTION UNLESS THE FACTS INVOLVED IN SAID ARREST OR CONVICTION CONSTITUTE A BONA FIDE OCCUPATIONAL DISQUALIFICATION FOR THE TYPE AND CHARACTER OF WORK SOUGHT TO BE PERFORMED.



(3) ANY APPLICANT DENIED A LICENSE OR PERMISSION TO WORK BECAUSE OF A RECORD OF ARREST OR CONVICTION SHALL BE ENTITLED TO APPEAR BEFORE THE PERSON, BOARD, COMMISSION, BUREAU, OR OTHER ENTITY WHICH HAS MADE SAID DENIAL WITHIN FIFTEEN DAYS, WHEREUPON THE APPLICANT MAY PRESENT ANY EVIDENCE INDICATING THAT HIS ARREST AND/OR CONVICTION IS NOT A BONA FIDE OCCUPATIONAL DISQUALIFICATION. THEREAFTER, THE PERSON, BOARD, COMMISSION, BUREAU, OR OTHER ENTITY ISSUING THE DENIAL SHALL HAVE TEN DAYS TO RECONSIDER ITS DECISION.

(4) IF THE DENIAL IS NOT RESCINDED WITHIN TEN DAYS OF THE HEARING DESCRIBED ABOVE, THE APPLICANT MAY APPEAL TO THE DISTRICT COURT WITHIN THIRTY DAYS THEREAFTER. THE BURDEN OF PROOF SHALL BE UPON THE PERSON, BOARD, COMMISSION, BUREAU, OR OTHER ENTITY MAKING THE DENIAL TO ESTABLISH IN THE DISTRICT COURT THAT THE FACTS INVOLVED IN THE ARREST AND/OR CONVICTION CONSTITUTE A BONA FIDE OCCUPATIONAL DISQUALIFICATION.

### *Comment*

Licensing boards often consider criminal records even though they have been expunged, thus negating the benefit of expungement legislation. This section requires licensing bodies to honor the intent of the Act.

Not all records are eligible for expungement, and, doubtlessly, many of those that are eligible will not be expunged, because the individuals involved will not petition the court. Nevertheless, a licensing board should not arbitrarily use a record of arrest or conviction simply because it is available. The second and third parts of this section prevent such arbitrary use. Licensing is legal and proper if it serves the public health, or safety, or tranquillity. However, licensing is repressive when licenses are denied without any reasonable nexus between the character of the occupation and the reasons for denying the license. The second and third

parts of this section establish a mechanism for determining that essential nexus.<sup>84</sup>

#### SEC. 8. PENALTIES AND REMEDIES.

(1) ANY ARREST OR CONVICTION WHICH IS NOT IN THE RECORDS OF THE STATE CRIMINAL RECORD INFORMATION DEPARTMENT BECAUSE SAID RECORDS HAVE BEEN REMOVED, AS PROVIDED IN THIS ACT, SHALL BE DEEMED IN LAW NOT TO HAVE OCCURRED, AND A PERSON MAY LAWFULLY DENY THEIR OCCURRENCE WITHOUT BEING GUILTY OF PERJURY OR FALSE SWEARING UNDER ANY CIRCUMSTANCES. IN ANY APPLICATION FOR EMPLOYMENT, OR LICENSE, OR OTHER PERMISSION TO WORK, OR IN ANY APPEARANCE AS A WITNESS, A PERSON MAY NOT BE ASKED WHETHER OR NOT HE HAS EVER SOUGHT THE RETURN OF ANY CRIMINAL RECORD INFORMATION.

(2) ANY PERSON WITH RESPECT TO WHOM CRIMINAL RECORD INFORMATION IS BEING MAINTAINED, OR DISSEMINATED, OR USED IN VIOLATION OF THIS ACT SHALL HAVE A CAUSE OF ACTION FOR WRIT OF MANDAMUS OR MANDATORY INJUNCTION AGAINST THOSE RESPONSIBLE FOR SUCH VIOLATION AND SHALL BE FURTHER ENTITLED TO RECOVER FROM THEM ACTUAL DAMAGES AND REASONABLE ATTORNEY'S FEES AND OTHER COSTS OF LITIGATION REASONABLY INCURRED. SHOULD IT BE FOUND IN ANY SUCH ACTION THAT THE VIOLATION WAS WILLFUL, THE VIOLATORS SHALL BE ADDITIONALLY LIABLE FOR EXEMPLARY DAMAGES OF NOT LESS THEN ONE HUNDRED DOLLARS AND NOT MORE THAN ONE THOUSAND DOLLARS.

(3) INTENTIONAL NEGLIGENCE OR REFUSAL OF ANY PERSON OR AGENCY TO MAKE THE REPORTS REQUIRED BY THIS ACT, OR FAILURE TO DO OR PERFORM ANY ACT REQUIRED BY VIRTUE OF THIS ACT, SHALL CONSTITUTE A CRIME:

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<sup>84</sup> Although S. 2546 92d Cong., 1st Sess. (1971) contains no analogous provisions, licensing bureaus would not have access to criminal record information. *Id.* § 3(a).

AND ANY PERSON, UPON CONVICTION THEREOF, SHALL BE PUNISHED BY A FINE OF NOT LESS THAN ONE HUNDRED DOLLARD AND NOT MORE THAN ONE THOUSAND DOLLARS.

(4) NOTHING IN THIS ACT SHALL AFFECT THE RIGHT OF ANY PERSON TO APPEAL OR OTHERWISE CHALLENGE THE LEGALITY OF HIS ARREST OR CONVICTION IN BAR TO ANY SUBSEQUENT PROCEEDINGS.

### *Comment*

Courts have been reluctant to enforce strictly legislation prescribing restrictive use of criminal records. The remedies provided in this section have been chosen for two reasons. First, they tend to dramatize for the courts the necessity of a posture of aggressive enforcement and liberal interpretation in order that the Act may accomplish its purpose. Second, these remedies facilitate case-by-case litigation which may initially be necessary in order to encourage some law enforcement agencies to obey the Act.<sup>85</sup>

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<sup>85</sup> No provisions analogous to § 8(1) of this proposed act, are included in S. 2546, 92d Cong., 1st Sess. (1971). That bill, however, does authorize a civil cause of action for damages, attorney's fees, and litigation costs. *Id.* § 5(a). Willful violation of the act is punishable by a fine of not more than \$1,000 or imprisonment for not more than one year, or both. *Id.* § 5(b).