

# Clearinghouse REVIEW

Shriver  
Center 4@

July–August 2007

Volume 41, Numbers 3–4

Journal of  
Poverty Law  
and Policy

What's a Civil Lawyer to Do?

THE SHADOW OF  
CRIMINAL RECORDS



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Sargent Shriver National Center on Poverty Law

Name: JOHN D. DOE  
DOB: 08 / 08 / 70 Received:  
County: ██████████  
Age at time of offense: 30  
Weight: 166 LBS Eyes: GREY  
Native County: ██████████  
Prior Occupation: CONSTRUCTION  
Prison record:  
#488-7789 4 YEARS / OGBB - AT  
#366-0998 2 YEARS / POS - ASSA  
██████████ 4 YEARS / ██████████ NAR  
Summary: Sunday January, 16, 1

# When “Your Permanent Record” Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records

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**A**s children, many of us were warned about the consequences of mistakes or foolish actions becoming part of our “permanent record.” What was once a motivational tool that some strict schoolteachers used has become a reality for people with criminal records. Today any blemish on a criminal record—no matter how old, minor, or out of character—may become a lifelong and ubiquitous barrier to opportunity in employment, housing, higher education, and many other important life activities.<sup>1</sup>

In my civil legal aid program, one of the leading categories of cases in which clients need representation is legal problems related to criminal records. Cases related to criminal records have become the single biggest reason our clients seek employment representation. Issues concerning criminal records are also common in our public benefits and housing practices.

After a decade of working extensively with ex-offenders, our employment unit has come to one paramount conclusion about criminal records, and this guides our work: The best criminal record is no criminal record or, barring that, the most minimal possible criminal record. Our best outcome for our clients is when we can minimize or eliminate a client’s record so that the client faces fewer or no collateral consequences or less or no stigma. In this article I give practical guidance about how your program can, through individual representation and systemic advocacy, help clients minimize or eliminate their criminal records.<sup>2</sup>

## I. Basics about Criminal Records

Here I identify the multiple possible sources of “criminal records,” explain why criminal background checks for civil purposes have become so pervasive in recent years, and advise how a legal aid program can obtain a client’s criminal record for representation purposes.

<sup>1</sup>Regarding the employment barriers of criminal records, see Margaret Stapleton, *Chicago’s Title VII Working Group*, in this issue; Debbie A. Mukamal, *Confronting the Employment Barriers of Criminal Records: Effective Legal and Practical Strategies*, 33 CLEARINGHOUSE REVIEW 597 (Jan.–Feb. 2000).

<sup>2</sup>This article is based on my testimony entitled “Expanded Use of Criminal Records and Its Impact on Reentry” to the American Bar Association Commission on Effective Criminal Sanctions on March 3, 2006. The guidance that I present in this article is aimed at both legal aid programs funded by the Legal Services Corporation (LSC) and non-LSC-funded legal aid programs. For more information on the conditions under which LSC-funded legal aid programs may represent ex-offenders, see Alan W. Houseman and Linda E. Perle, *Representing Individuals with Criminal Records Under the LSC Act and Regulations*, in this issue.

### A. What Is a “Criminal Record”?

Unlike a high school or college transcript, there is no single document that is a “criminal record.” Rather, a person’s criminal record consists of information that numerous components of the criminal justice system, including the courts and various levels of law enforcement, maintain. When an employer or a landlord examines a criminal record, that document could have initiated from state criminal record “central repositories” (typically maintained by the state police), the courts, commercial vendors that prepare reports from public sources, and even correctional institutions and police records.<sup>3</sup>

Different laws and policies for the collection and dissemination of criminal record information apply to each of these sources.<sup>4</sup> In the 1970s the U.S. Department of Justice implemented regulations establishing minimum criteria for federally funded state and local criminal justice agencies’ handling of criminal history information.<sup>5</sup> As a result, every state enacted a statute governing the accuracy and dissemination of criminal records by the courts and the central repository.<sup>6</sup> Referred to as “state criminal record statutes,” they often provide different rules for the central repository and the courts, with statutes commonly allowing

the courts but not the central repository to make available information about arrests that did not lead to convictions.<sup>7</sup> State criminal record statutes do not govern background reports that commercial vendors prepare; rather, background reports are “consumer reports” that the Fair Credit Reporting Act governs.<sup>8</sup>

State laws on the dissemination of central repository records vary widely from “open record” states in which records are readily available to “closed record” states in which dissemination is closely regulated.<sup>9</sup> By contrast, the historical presumption for access to court records has been one of open access.<sup>10</sup> Criminal justice system users of criminal records generally have access to virtually all information, while some information may be restricted for nongovernment users, such as employers and landlords.<sup>11</sup>

Nongovernment users of criminal records most commonly obtain “background checks” through commercial vendors.<sup>12</sup> ChoicePoint may be the best known of these vendors. The exact number of the hundreds, if not thousands, of commercial vendors is unknown.<sup>13</sup> These commercial vendors generally use court records as the primary source of their reports.<sup>14</sup> Because court records usually include information about arrests that

<sup>3</sup>SEARCH, REPORT OF THE NATIONAL TASK FORCE ON THE COMMERCIAL SALE OF CRIMINAL JUSTICE RECORD INFORMATION 22–26 (2005). Search is the National Consortium for Justice Information and Statistics. For more information, see [www.search.org/](http://www.search.org/).

<sup>4</sup>BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PUB. NO. NCJ 187669, REPORT OF THE NATIONAL TASK FORCE ON PRIVACY, TECHNOLOGY, AND CRIMINAL JUSTICE INFORMATION 1 (2001), available at [www.ojp.usdoj.gov/bjs/pub/pdf/rntftptj.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/rntftptj.pdf).

<sup>5</sup>28 C.F.R. pt. 20 (1975).

<sup>6</sup>See PAUL L. WOODARD & ERIC C. JOHNSON, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PUB. NO. NJC 200030, COMPENDIUM OF STATE PRIVACY AND SECURITY LEGISLATION: 2002 OVERVIEW (2003), available at [www.ojp.usdoj.gov/bjs/pub/pdf/cspsl02.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/cspsl02.pdf) (citing and summarizing each state’s statute).

<sup>7</sup>*Id.* at 10 (state laws in many jurisdictions do not permit central repositories to disseminate nonconviction data); SEARCH, *supra* note 3, at 45 (cases finding presumption of public access to court records; some are cases in which there were no convictions).

<sup>8</sup>15 U.S.C.A. §§ 1681–1681u (West, Westlaw through 2007).

<sup>9</sup>SEARCH, *supra* note 3, at 40.

<sup>10</sup>*Id.* at 45.

<sup>11</sup>See *id.* at 42 (in “intermediate record” states some, but not all, criminal justice information is available to the public).

<sup>12</sup>Probably the best source of information about the commercial vendor industry is the *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (*supra* note 3). Information on commercial vendors is also available from the National Association of Professional Background Screeners, [www.napbs.com](http://www.napbs.com).

<sup>13</sup>SEARCH, *supra* note 3, at 7.

<sup>14</sup>*Id.* at 22–23.

did not lead to convictions, commercial vendors often pass this arrest information along to employers and other non-government users.

Nongovernment users sometimes obtain records directly from public sources, such as court or central repository records. In many cases, nongovernment users who are required by law to perform criminal record checks (such as long-term care or child care employers) use central repository records.

### **B. Why Have Criminal Records Become More Accessible to the General Public?**

The explosion of criminal record accessibility during the past decade is the product of numerous complex factors. The following developments are among the most important of those factors:

- Technology, including automation of records and improvements in computing power, has enhanced the compilation of criminal records.<sup>15</sup> Moreover, according to a national task force report, “the Internet greatly facilitates (and encourages) access to information for which the browser would not be inclined to make a trip to the courthouse.”<sup>16</sup> In addition to making public records more available either for direct search on court or correctional facility websites or for purchase from the central repository, the Internet is a venue for the multitudes of commercial vendors to hawk their product.
- Increased employer demand has driven the increased availability of criminal record information. A member survey

that the Society for Human Resource Management conducted in 2003 revealed that 80 percent of its organizations conducted criminal background checks, up from a 51 percent response rate in a 1996 survey.<sup>17</sup> This employer demand increased sharply based on security concerns after the September 11, 2001, attacks, with the most prominent commercial vendors reporting immediate significant increases in business.<sup>18</sup> Employers also often articulate their desire to minimize risk, including cost of theft and potential negligent hiring lawsuits, as a reason for performing background checks.<sup>19</sup>

- New laws enacting collateral consequences for persons with criminal records have significantly increased the demand for criminal records. Laws now often mandate background checks in employment and prohibit the employment of persons with certain criminal records in certain fields.<sup>20</sup> Other laws create collateral consequences in areas such as public housing, public benefits, student loans, and immigration.<sup>21</sup>

### **C. How Can Advocates Get Clients’ Criminal Records?**

Each of the different types of criminal records—central repository, courts, and commercial vendors—has a different access point. Accessibility varies from state to state and from one source to another. In one extreme, a state repository may not provide clients’ records without the clients’ fingerprints. In the other, a court system may make its criminal docket sheets available in a name-based search on the Internet.

<sup>15</sup>WOODARD & JOHNSON, *supra* note 6, at 29.

<sup>16</sup>*Id.*

<sup>17</sup>EVREN ESEN, SOCIETY FOR HUMAN RESOURCE MANAGEMENT [SHRM], SHRM WORKPLACE VIOLENCE SURVEY 19 (2004).

<sup>18</sup>SEARCH, *supra* note 3, at 32.

<sup>19</sup>*Id.* at 35.

<sup>20</sup>E.g., Congress mandated background screening for hundreds of thousands of hazardous material drivers (USA Patriot Act of 2001, 49 U.S.C.A. § 5103(a) (West, Westlaw through 2007)) and aviation workers (Aviation and Transportation Security Act of 2001, 40 U.S.C.A. § 44963 (West, Westlaw through 2007)). Many more state laws supplement the federal laws. In Pennsylvania we identified at least forty-three occupations that are regulated. Community Legal Services, Legal Remedies and Limitations on the Employment of Ex-Offenders in Pennsylvania (2005), [www.clsphila.org/files/Employment%20of%20Ex-Offenders%20in%20PA.pdf](http://www.clsphila.org/files/Employment%20of%20Ex-Offenders%20in%20PA.pdf).

<sup>21</sup>See AMY E. HIRSCH ET AL., CENTER FOR LAW AND SOCIAL POLICY AND COMMUNITY LEGAL SERVICES, EVERY DOOR CLOSED: BARRIERS FACING PARENTS WITH CRIMINAL RECORDS chs. 2, 3, 5–6 (2002), available at [www.clasp.org/publications/every\\_door\\_closed.pdf](http://www.clasp.org/publications/every_door_closed.pdf).

If you need to obtain your clients’ criminal records to assist them but cannot determine how to start, check the National H.I.R.E. [Helping Individuals with criminal records Re-enter through Employment] Network’s website for state-specific information such as how to get a record from the state’s central repository.<sup>22</sup>

## II. How Legal Aid Programs Can Help Clients Minimize or Eliminate Their Criminal Records

The most useful approach for legal aid programs to help clients with criminal records is to minimize the damaging information in those records. State criminal record statutes and the federal Fair Credit Reporting Act are legal tools that legal aid programs can use to correct errors and avoid the reporting and consideration of cases in which arrests do not lead to convictions. Expungements, sealing, and pardons are also important tools.

### A. Correcting Errors

Both public and commercially prepared criminal records are incorrect more frequently than is generally known. Often these inaccuracies harm the person who is the subject of the record. Other than straightforward errors in reporting a person’s criminal history, criminal record inaccuracies include

- failure to report promptly dispositions of charges—failure that results in dropped charges appearing as though they were still pending;

- “mismatches,” in which another person’s criminal record is misreported as the client’s record usually because they share the same name;<sup>23</sup> and
- criminal identity theft, where someone who was arrested used the client’s name and personal identifiers as an alias, resulting in the perpetrator’s record being reported as the victim’s record.

For inaccuracies in public records, the state criminal record statute probably provides a legal handle to force a correction. Justice Department regulations require that individuals have the right to review their own records for accuracy and completeness.<sup>24</sup> Thus all but two state criminal record statutes require procedures for individual “access and review.”<sup>25</sup>

Advocates should locate and study their state’s criminal record statute.<sup>26</sup> Knowledge of this law not only permits challenges to inaccurate records in individual cases but also may be a legal handle for systemic improvements. For instance, Pennsylvania’s criminal record statute requires that its state courts have an access-and-review process, although no formal process existed.<sup>27</sup> This statute provided a legal handle to persuade the state courts to include an error correction procedure as part of its recently adopted policy governing Internet posting of criminal case dockets.<sup>28</sup>

The state criminal record statute also may provide a basis to challenge a state’s inadequate remedies for criminal identity

<sup>22</sup>National H.I.R.E. [Helping Individuals with criminal records Reenter through Employment] Network, Resources, Information, and Assistance, [www.hirenetwork.org/resource.html](http://www.hirenetwork.org/resource.html) (last visited May 27, 2007).

<sup>23</sup>These results are also often known as “false positives.” Search, Interstate Identification Index Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General 7 (1999), available at [www.search.org/files/pdf/III\\_Name\\_Check.pdf](http://www.search.org/files/pdf/III_Name_Check.pdf).

<sup>24</sup>28 C.F.R. § 20.21(g) (2007).

<sup>25</sup>WOODARD & JOHNSON, *supra* note 6, at 4.

<sup>26</sup>*Id.* The Legal Action Center wrote guides on how to obtain and correct “rap sheets” (an informal name often used for criminal records) in twelve states and from the federal government. These guides are available in Reentry Net’s Research and Policy Library, [www.reentry.net/library.cfm?fa=download&resourceID=78186&print](http://www.reentry.net/library.cfm?fa=download&resourceID=78186&print). For more information on Reentry Net, see McGregor Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, in this issue.

<sup>27</sup>18 PA. CONS. STAT. ANN. § 9014(a)(2) (West, Westlaw through 2007) (exempting Pennsylvania courts from all aspects of the state’s Criminal History Information Record Act except access and review procedures contained in Subchapter F); see also *id.* § 9120 (defining “criminal justice agency” as including “any court”).

<sup>28</sup>See 204 PA. CODE ch. 213 (2007).

theft. Criminal identity theft is a common problem; the primary criminal justice report examining this phenomenon estimates that 400,000 Americans were victimized during a one-year period.<sup>29</sup> In recent years, advocates from Michigan, Pennsylvania, and Massachusetts challenged the refusal of those states’ central repositories to correct situations in which clients indisputably proved criminal identity theft by showing that their fingerprints did not match those of the person who was arrested using their name.<sup>30</sup> In researching “best practices” as part of our litigation preparation in Pennsylvania, we found that almost no state, save for Virginia, had procedures that adequately severed the link between the innocent person and the person who gave the innocent person’s name when arrested.<sup>31</sup> Advocates should investigate their state’s policy on criminal identity theft correction and help ensure that clients are not wrongly saddled with a criminal record not of their making.

The Fair Credit Reporting Act governs the accuracy and the procedure for seeking a correction of commercially prepared criminal record reports.<sup>32</sup> Although the Act does not create strict liability for inaccurate reports, it does require that commercial vendors use “reasonable

procedures” to ensure “maximum possible accuracy.”<sup>33</sup> In many cases, this standard is broad enough to establish liability if an inaccuracy in a commercially prepared report was avoidable.<sup>34</sup> The Act requires that the commercial vendor reinvestigate disputes of the accuracy or completeness of a report.<sup>35</sup> It also requires that the purchaser of the consumer report give, among others, the name, address, and telephone number of the commercial vendor and the right to dispute the accuracy or completeness of the report to the subject of the report.<sup>36</sup>

## B. Limiting Reporting and Consideration of Arrests

Laws often limit the reporting and consideration of arrests that do not result in convictions but that result in favorable dispositions such as dropped charges or acquittals. Advocates should help ensure that these laws are enforced.

Criminal justice policy generally disfavors the reporting to nongovernment users of arrests that do not result in convictions.<sup>37</sup> Justice Department regulations provide that, in general, arrest information should not be disseminated outside the criminal justice system; however, broad exceptions may be made if “authorized by statute, ordinance, executive

<sup>29</sup>REPORT OF THE BJS [BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE]/SEARCH NATIONAL FOCUS GROUP ON IDENTITY THEFT VICTIMIZATION AND CRIMINAL RECORD REPOSITORY OPERATIONS 2 (2005), available at [www.search.org/files/pdf/NatFocusGrpIDTheftVic.pdf](http://www.search.org/files/pdf/NatFocusGrpIDTheftVic.pdf).

<sup>30</sup>Prelitigation settlements were reached in Michigan and Pennsylvania. In Massachusetts the parties settled after litigation was commenced. *Bland v. Flynn*, No. SUCV2004-01751-F (Mass. Super. Ct. Dec. 1, 2006) (settlement agreement) (Clearinghouse No. 55,714). In each case the central repository agreed that it would change its procedures so that nongovernment users would no longer receive information from the perpetrator’s criminal record when a background check was run on the victim. For more information on this advocacy, contact Miriam Aukerman at Western Michigan Legal Services in Grand Rapids, Fran Fajana at the Massachusetts Law Reform Institute in Boston, or me. Advocacy materials are in Reentry Net’s Research and Policy Library, [www.reentry.net/library.cfm?fa=detail&id=127083&appView=folder](http://www.reentry.net/library.cfm?fa=detail&id=127083&appView=folder).

<sup>31</sup>See VA. CODE ANN. § 18.2-186.5 (West, Westlaw through 2007).

<sup>32</sup>Fair Credit Reporting Act, 15 U.S.C.A. §§ 1681–1681u (West, Westlaw through 2007).

<sup>33</sup>*Id.* § 1681e(b). Elements of the cause of action are (1) the report contains inaccurate information; (2) the inaccuracy was due to the commercial vendor’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered an injury, which may include emotional injury; and (4) the inaccurate entry caused the injury. E.g., *Philbin v. Trans Union Corporation*, 101 F.3d 957, 963 (3d Cir. 1996).

<sup>34</sup>Moreover, in employment cases, a commercial vendor reporting public record information that “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either notify the person who is the subject of the public record that the public record information is being reported and give the name and address of the person who is requesting the information or maintain strict procedures to ensure that the information it reports is complete and up to date. Fair Credit Reporting Act, 15 U.S.C.A. § 1681k (West, Westlaw through 2007).

<sup>35</sup>*Id.* § 1681i(a).

<sup>36</sup>*Id.* § 1681m(a).

<sup>37</sup>BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 20.

order, or court rule, decision, or order, as construed by appropriate State or local officials or agencies....”<sup>38</sup> Thus, advocates must research state and local laws on the dissemination of arrest information, especially in the state criminal record statute.

Many of the central repositories do not make arrest information available to the public.<sup>39</sup> By contrast, courts generally do make arrest information available to the public, and the courts are the primary source of information for the commercial vendors.<sup>40</sup> But commercial vendors do not have unfettered discretion to report arrests to their customers; arrests or other adverse information (other than convictions of crimes) more than seven years old are considered “obsolete” and may not be reported, provided that the report does not concern employment of an individual who has an annual salary that is \$75,000 or more.<sup>41</sup>

Even if a criminal record legally reports arrest information, substantive laws sometimes limit consideration of that information. For instance, because the use of arrest records as an absolute bar to employment has a disparate impact on African Americans and Hispanics, a rejection of a job applicant based on an arrest may constitute race discrimination in violation of Title VII of the Civil Rights Act of 1964, the employment discrimination

law.<sup>42</sup> The Equal Employment Opportunity Commission’s policy guidance on this subject states that “a blanket exclusion of people with arrest records will almost never withstand scrutiny.”<sup>43</sup> Some states also have laws that prohibit employers from considering nonconvictions when making employment decisions.<sup>44</sup>

### C. Achieving Expungements, Sealing, and Pardons

The accuracy of a client’s criminal record or the reporting of the client’s arrests does not matter if the client’s criminal record can be eliminated or at least sealed from the public. Advocates may achieve this goal in some cases through an expungement or sealing by a court or law enforcement or a pardon from the executive branch (often the governor).

Procedures for the possible elimination or restriction of the public distribution of some or all of a criminal record vary significantly from state to state.<sup>45</sup> Advocates need to start by investigating the availability and use of expungements, sealing, and pardons in their state.<sup>46</sup>

Expungements and sealing typically are the preferable methods of eliminating a criminal record where those procedures are available because they are less difficult to obtain than a pardon and more subject to legal rules rather than to the discretion of the decision maker.<sup>47</sup> But only seven

<sup>38</sup>28 C.F.R. § 20.21(b)(2) (2007).

<sup>39</sup>WOODARD & JOHNSON, *supra* note 6, at 10.

<sup>40</sup>SEARCH, *supra* note 3, at 22.

<sup>41</sup>Fair Credit Reporting Act, 15 U.S.C.A. § 1681c(a)(5), (b)(3) (West, Westlaw through 2007).

<sup>42</sup>Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e *et seq.* (West, Westlaw through 2007); see *infra* note 62 and accompanying text.

<sup>43</sup>EEOC [Equal Employment Opportunity Commission], *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982)*, in 2 EEOC COMPLIANCE MANUAL (CCH), § 604, ¶ 2094, at 2133 (Sept. 7, 1990) [hereinafter *EEOC 1990 Policy Guidance*].

<sup>44</sup>MARGARET COLGATE LOVE, RELIEF FROM THE COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE 62–63 (2006).

<sup>45</sup>In most states, criminal records are not literally destroyed, and expunged and sealed records remain available to law enforcement and the courts, even though the public may not access them. *Id.* at 39. In this article, when I refer to an “elimination” of a criminal record, I mean that the information has been made unavailable to nongovernment users, such as employers and landlords.

<sup>46</sup>An invaluable resource in researching the expungement, sealing, and pardon laws and procedures of the fifty states and the federal government is LOVE, *id.* Much of the state-by-state information is available on the Sentencing Project’s website, [www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486](http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=486).

<sup>47</sup>LOVE, *supra* note 44, at 37.

states and Puerto Rico have expungement laws that apply to most adult felony convictions, and those laws typically require a waiting period before an expungement may be obtained.<sup>48</sup> In other states, expungement may be limited to first-time offenders, nonviolent offenders, probationers, people convicted of misdemeanors, or unconvicted arrestees.<sup>49</sup> Where a court or administrative body grants an expungement or sealing, most states permit the person with the criminal record to deny ever having been convicted.<sup>50</sup>

Pardons can fill in the gaps that narrow or nonexistent expungement or sealing laws create. Every state constitution permits the executive branch to issue pardons, and in forty-two states and the federal system a pardon is the only systemwide relief from collateral sanctions and disqualifications based on convictions available to persons with criminal convictions.<sup>51</sup> Pardons are sparingly granted, and only thirteen states have granted more than twenty-five pardons a year since 1995.<sup>52</sup> But since September 11, the increasing numbers of applicants have put more pressure on the pardoning authorities to provide relief.<sup>53</sup> The effect of a pardon varies from state to state, from erasing the conviction and permitting the person to deny being convicted to providing relief from some or all civil disabilities.<sup>54</sup>

Legal resources for persons seeking expungements, sealing, and pardons are generally limited. Few public defender offices handle such matters. Moreover, even where legal aid clients may proceed *pro se*, they often find the procedure too complicated for them to succeed with-

out help. Clients who receive from court personnel *pro se* expungement forms that they cannot begin to complete, particularly given the unfamiliar information that must be collected from the criminal justice system for the petition, often approach my program for assistance. Our state’s pardon system discourages attorney involvement; the Board of Pardons designed it for laypeople to use. Nevertheless, we find that our clients are much more likely to get a pardon if we work with them because pardon applications are most likely to succeed if they are well written by people who know the informal rules that the Board of Pardons applies. Where expungements, sealing, and pardons are available remedies under state law, legal aid assistance and representation can make those remedies a reality for clients.

### III. Systemic Advocacy Issues for Assisting Clients Who Have Criminal Records

Through policy and legal advocacy, legal aid programs can assist people who have criminal records on several broad sets of issues, especially on the availability of criminal records to the public.

#### A. Fight Proposals for Greater Accessibility of Criminal Records

There seems to be a constant movement to open criminal record information that is not currently available to the public. For instance, Federal Bureau of Investigation (FBI) records now are available to the public only if state law specifically requires such availability.<sup>55</sup> But a recent

<sup>48</sup>*Id.* at 39. Those states are Arizona, Kansas, Massachusetts, Nevada, New Hampshire, Utah, and Washington. *Id.* at 39–41.

<sup>49</sup>*Id.* at 39.

<sup>50</sup>*Id.* at 40.

<sup>51</sup>*Id.* at 18.

<sup>52</sup>*Id.* at 19–21. Nine states grant more than one hundred applications per year or a high percentage of pardon applications or both: Alabama, Arkansas, Connecticut, Delaware, Georgia, Nebraska, Oklahoma, Pennsylvania, and South Carolina. *Id.* app. A, tbl. 4. Four states—Hawaii, Illinois, Maryland, and South Dakota—although issuing pardons substantially less frequently than these nine states, are entitled to honorable mention for at least granting about twenty-five pardons per year. *Id.*

<sup>53</sup>*Id.* at 18.

<sup>54</sup>*Id.* at 22.

<sup>55</sup>Department of Justice Appropriation Act of 1973, Pub. L. No. 92-544, 86 Stat. 1115 (1972).

report from the U.S. attorney general recommends that FBI records be made broadly available to employers, commercial vendors, and others.<sup>56</sup> At the same time the Justice Department published a proposed regulation that would include juvenile offenses and “nonserious” adult offenses in the FBI “rap sheets” (an informal name often used for criminal records) that are available to the public.<sup>57</sup> Efforts to post court or corrections information on the Internet and to reduce the confidentiality of juvenile records are other parts of the movement to increase public access to criminal records.<sup>58</sup>

Advocates should fight these efforts. Even if information is already publicly available in some format, enhancing its obtainability is to our clients’ detriment. A useful concept that advocates can invoke is “practical obscurity,” a concept that the U.S. Supreme Court recognized almost two decades ago.<sup>59</sup> For instance, information that is now available only by making a trip to a courthouse is not nearly as accessible as if anyone with Internet access were able to obtain it. By using the

practical obscurity concept, advocates can help policymakers understand why greater access further compromises reentry and privacy interests. Even if advocates are unable to stop such efforts completely, they may be able to build in safeguards, such as methods to correct errors and suppress arrest information.

## B. Expand Access to Expungements, Sealing, and Pardons

Advocates can do valuable law reform work for people with criminal records by trying to expand access to expungements, sealing, and pardons. The grounds for expungement, for at least minor crimes or arrests, may be increased through legislation or even creative litigation.<sup>60</sup> Given growing public concerns about problems related to “reentry,” generally understood to mean the release of incarcerated people into the community, unusual partnerships—such as among legal aid programs, mayors, district attorneys, and correctional experts—supporting such advocacy may be possible.<sup>61</sup>

<sup>56</sup>OFFICE OF THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 59 (2006), available at [www.usdoj.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.usdoj.gov/olp/ag_bgchecks_report.pdf). The U.S. attorney general made this recommendation even though Federal Bureau of Investigation (FBI) records are notoriously unreliable. E.g., the attorney general’s report conceded that 50 percent of the charges listed in the FBI’s Interstate Identification Index (its database of all arrests under federal and state criminal laws) lacked final dispositions. *Id.* at 15, 17.

<sup>57</sup>71 Fed. Reg. 52302, 52303–4 (Sept. 5, 2006).

<sup>58</sup>MARTHA WADE STEKETEE & ALAN CARLSON, DEVELOPING CCJ [CONFERENCE OF CHIEF JUSTICES]/COSCA [CONFERENCE OF STATE COURT ADMINISTRATORS] GUIDELINES FOR PUBLIC ACCESS TO COURT RECORDS: A NATIONAL PROJECT TO ASSIST STATE COURTS 1 (2002), available at [www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf](http://www.courtaccess.org/modelpolicy/18Oct2002FinalReport.pdf) (noting that technological innovations have led to more court records being made available in electronic form); JANET MASON, SCHOOL OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, CONFIDENTIALITY IN JUVENILE DELINQUENCY PROCEEDINGS 5 (2004), available at [www.ioq.unc.edu/pubs/electronicversions/pdfs/ss19.pdf](http://www.ioq.unc.edu/pubs/electronicversions/pdfs/ss19.pdf) (movement at the national and state levels to open access to juvenile records previously protected by confidentiality); see also Katherine E. Walz, HUD v. Rucker *Opened Door to Kids’ Juvenile Records*, 39 CLEARINGHOUSE REVIEW 144 (July–Aug. 2005) (trend of housing authorities illegally obtaining access to confidential juvenile court and arrest records is increasing, and resulting judicial and legislative actions have eroded the confidentiality afforded minors in the juvenile court system).

<sup>59</sup>*U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 780 (1989).

<sup>60</sup>E.g., advocates in Minnesota are seeking to establish that courts have inherent authority from the state constitution to expunge executive branch criminal records. *Minnesota v. V.A.J.*, No. A07-0071, 2007 Minn. LEXIS 90 (Minn. 2007) (decision without published opinion) (ordering expungement of judicial records but denying expungement of executive branch records), appeal docketed, No. A07-0071 (Minn. Ct. App. Jan. 9, 2007). In Pennsylvania expungement remedies also have been derived through litigation. The courts recognize a state constitutional right to seek expungement of an arrest record. See, e.g., *Commonwealth v. Armstrong*, 434 A.2d 1205, 1206 (Pa. 1981) (first-time offenders in program permitting them to earn a clean record are entitled to an expungement unless the Commonwealth shows overriding societal interest in keeping the record); *Commonwealth v. Wexler*, 431 A.2d 877, 879 (Pa. 1981) (because of harm to reputation from an arrest record, substantive due process sometimes guarantees the right of expungement of an arrest). More recently, the Pennsylvania Supreme Court concluded that, despite a lack of statutory authority to expunge protection from abuse records, the state constitution provided a right to expunge these records where petitioners sought to protect their reputation. *Carlacci v. Mazaleski*, 798 A.2d 186, 188 (Pa. 2002).

<sup>61</sup>Regarding reentry, see Anthony C. Thompson & Debbie A. Mukamal, *Permitting a New Start for People with Criminal Records*, 40 CLEARINGHOUSE REVIEW 124 (May–June 2006); Cynthia Works, *Reentry—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REVIEW 328 (Sept.–Oct. 2003).

Because every jurisdiction has a pardon process, advocates might consider strategies to enhance the effectiveness of the pardon system. These strategies might include public education about the increased need for pardons, advocacy on system reforms, or efforts to enhance staff or other resources in the pardon system. If the pardon process proves to be not amenable to reform, its resistance to reform supports expanded access to expungement or sealing.

### C. Consider Legal Theories Based on Racially Disparate Impact

Policies and practices that disadvantage persons with criminal records disproportionately affect African Americans and Hispanics because African Americans and Hispanics are disproportionately involved in the criminal justice system.<sup>62</sup> Thus precedent under Title VII long has recognized this disparate impact and rejected absolute bars against the employment of persons with conviction records.<sup>63</sup> The Equal Employment Opportunity Commission has a series of policy statements on the application

of Title VII to arrest and conviction records; one policy statement presumes disparate impact on African Americans and Hispanics.<sup>64</sup>

Advocates who work in areas other than employment should consider adapting this legal theory to their practices. For instance, landlords who reject applications based on a criminal record may be violating the Fair Housing Act, and advocates might attempt a disparate-impact claim in the complaint procedure of the U.S. Department of Housing and Urban Development.<sup>65</sup> Or advocates might press a disparate-impact theory in a Title VI complaint against a state or local government agency for a denial, based on a criminal record, of services.



Criminal records are widely available and present many serious barriers to low-income people and people of color. Advocates can begin to demolish these barriers by challenging the very availability and extent of their clients' criminal records.

<sup>62</sup>Taken together, African Americans (39 percent) and Hispanics (18 percent) constituted a majority of those who have ever served prison time. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, PUB. NO. NCJ 197976, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001, at 5 (2003). Almost 17 percent of adult black males had ever served prison time, a rate twice that of Hispanic males (7.7 percent) and six times that of white males (2.6 percent). *Id.*

<sup>63</sup>E.g., *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232, 245 (3d Cir. 2007) (employers must craft criminal record policies that accurately distinguish between applicants who pose an unacceptable level of risk and those who do not); *Green v. Missouri Pacific Railroad Company*, 523 F.2d 1290, 1298 (8th Cir. 1975) (business necessity does not justify automatic disqualification of every person convicted of any crime other than a minor traffic offense), on appeal after remand, 549 F.2d 1158 (8th Cir. 1977); *Carter v. Gallagher*, 452 F.2d 315, 326 (8th Cir. 1972) (permitting trial court to require defendants to produce policy that does not treat a conviction as an absolute bar to employment); *Field v. Orkin Exterminating Company*, No. 00-5913, 2001 WL 34368768, at \*2 (E.D. Pa. Oct. 30, 2001) (that a blanket policy of denying employment to any person having a criminal record violates Title VII is a long-recognized principle); *Washam v. J.C. Penney Co.*, 519 F. Supp. 554, 561 (D. Del. 1981) (rejecting defendant's position that plaintiff could not be reinstated because of a felony conviction); *Dozier v. Chupka*, 395 F. Supp. 836, 842–43 (S.D. Ohio 1975) (disapproving discontinued policy of automatic disqualification of applicants with felony convictions).

<sup>64</sup>EEOC, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. §§ 2000e et seq. (1982)*, in 2 EEOC COMPLIANCE MANUAL (CCH), § 604.10, ¶ 2088, at 2113 (Feb. 4, 1987); EEOC, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, in 2 EEOC COMPLIANCE MANUAL (CCH) § 604.10, ¶ 2089, at 2114 (July 29, 1987); EEOC 1990 Policy Guidance, *supra* note 43. For convictions, the EEOC February 1987 Policy Statement requires employers to consider (1) the nature of the gravity of the offense or offenses; (2) the time that has passed since the conviction or the completion of the sentence or both; and (3) the nature of the job held or sought. For arrests, the EEOC 1990 Policy Guidance adds the requirement that even where the conduct alleged in the arrest record is related to the job at issue, the employer must evaluate whether the arrest record reflects the applicant's conduct. EEOC 1990 Policy Guidance, *supra* note 43, § 604, ¶ 2094, at 2135.

<sup>65</sup>Fair Housing Act, 42 U.S.C.A. §§ 3601 *et seq.* (West, Westlaw through 2007).

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