



Keeping an Arrest from Resulting in a Life Sentence

in an Age of Full Disclosure of Criminal Records

By Hon. Cynthia Diane Stephens

Fast Facts:

The FBI processed approximately 10 million noncriminal-justice fingerprint checks in 2005 alone.

In Michigan, a prospective employer can access an applicant's criminal history—including data on arrests—online for only \$10.

Concerns of undue reliance and often inaccurate arrest records demand reconsideration of the policy of easy access to such records.

Imagine yourself with a criminal record. Can your prospective employer find out about arrests that never resulted in conviction? Can he or she receive information about ancient felonies having nothing to do with theft or dishonesty? Can a human resources department discover juvenile adjudications and misdemeanor convictions? The answer is probably “yes.” Felony arrests, convictions (even misdemeanors), and juvenile records are discovered by employers every day.

Federal and state laws allow employers broad discovery of an applicant's criminal history. Employers must research the backgrounds of many job applicants because certain convictions disqualify applicants from employment in many fields.

Is it sound public policy to afford public access to all this information? What legitimate purposes are served by such disclosure? What competing interests and values weigh against free access to full criminal histories?

Easily Accessible Felony Arrest Records

Felony arrest records are found in the limited-access FBI Interstate Identification Index. The Attorney General's 2006 Report on Criminal History Background Checks (Attorney General Report) noted that requests for criminal history checks increased by over two million between 2001 and 2005. The FBI processed approximately 9.8 million civil fingerprint-based background checks in

2005 alone!¹ Unfortunately, many of the databases are not as reliable as the FBI's.

Michigan State Police criminal history includes records of arrests that did not result in either detention for juveniles or incarceration or probation for adults. For \$10, employers can access such records online without the consent of the applicant; the records are retrieved by name and date of birth.² Arrests cannot be expunged and follow the arrested person in perpetuity.

Of what probative or predictive value are these records for employment purposes? The Equal Employment Opportunity Commission (EEOC) has consistently invalidated employment policies that create a blanket exclusion of persons with arrest records. Disqualifying an applicant on the basis of an arrest record is only fair if the employer determines that the person likely engaged in the conduct in question and that it is a relevant concern for the business. The EEOC's policy directive on the use of arrest records notes that they may not be used as an absolute bar to employment unless "the conduct is job-related and relatively recent."³

"Discrimination based upon criminal records can raise barriers to employment by ex-offenders and, as a result, undermine the reentry that makes us all safer."

In addition, the use of arrest records has been found to have a disparate effect on hiring of people of color. As a result, both the EEOC and the Michigan Civil Rights Commission have warned employers not to ask in employment applications about arrests that did not result in convictions.

In the ideal human resources environment, such criminal history checks precede the final job offer. How often does a cautious HR professional review an urban youth's "rap sheet" with multiple arrests (without convictions), conclude "where there is smoke there is fire," and deny him or her the job?

Juvenile Records in the Public Eye

Forty-two states have authorized the release and publication of names and addresses in some cases. Juvenile proceedings are open to the public and may be used for sentence enhancement on the federal level. Sentencing Guideline 4A1.2(d)(2) requires that two points be added for each juvenile sentence to confinement of at least 60 days and that one point be added for other juvenile sentences within five years of the current offense. In Michigan, the juvenile record is also considered at sentencing. Jack Kresnak, current executive director of Michigan Children, a child-welfare advocacy group, commented about this access change: "No state has gone further than Michigan in allowing access to juvenile court records and hearings."⁴

While some states allow the sealing of juvenile records after a period of years or good behavior, Michigan does not. Instead,

state law provides for both a public and a nonpublic file. The public file is open for inspection, while access to the nonpublic file is limited to entities with a legitimate interest.⁵ Notably, Michigan's comprehensive criminal history does not include even the public information, and there are penalties for disclosing expunged juvenile adjudications. However, other available databases, public and private, do contain the public file information in perpetuity.

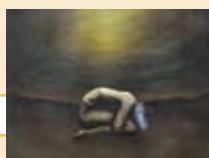
Misdemeanors

Misdemeanors are generally defined as crimes punishable by not more than a year of incarceration. There are now several two-year misdemeanors, sometimes called "high misdemeanors," principally under statutes with enhanced penalties for drunk driving. Under Michigan law, a significant number of misdemeanors—such as traffic offenses and dumping—are also punishable by local ordinances. These convictions are reported in federal and state databases and only one may be expunged. Yet Michigan law only precludes use of a misdemeanor arrest record as an absolute bar from employment.⁶

The U.S. Army has created a system to differentiate between misdemeanors and considers only "serious" ones when reviewing a candidate for enlistment. The Army has increased its use of "moral waivers" in recent years to enlist persons with one "serious misdemeanor" and even felonies such as aggravated assault and burglary.⁷ This would lead a casual observer to question the relevance of most misdemeanor convictions to an employer's legitimate concerns for workplace safety and productivity since the military in wartime is dependent on discipline and productivity for the very survival of its personnel. While the "broken windows" theory of community decline holds that ignoring minor offenses accelerates environmental decay, the thoughtful observer wonders if vigilant enforcement of misdemeanors should result in a lifelong criminal "tag" that, like the one on a mattress, cannot be removed under penalty of law.

All Felonies, All the Time

As a community, we are rightfully concerned that we are aware of persons who pose a danger to our health, safety, and property. To that end, felony records, fingerprints, and now DNA are stored in multiple databases. Sealing, expunging, or otherwise concealing felony convictions is severely limited. In Michigan, only a few felony convictions are eligible for erasure under diversion programs and only one criminal conviction may be expunged. Employers are required under federal and state laws to vet employees for a multiplicity of felony convictions, especially when the employment places the person in a position of trust over vulnerable populations. However, employers are routinely provided with felony convictions that are more than 10 years old not involving violence, theft, or dishonesty. Most common are drug possession convictions. An employer is rationally concerned that the former



Fear of What by Larry Karkanen

drug user may relapse. However, aren't random drug screens a more reliable indicator of drug use than a yellowed rap sheet?

Can We Do Better?

"With the number of young men, especially young black men, having some sort of criminal history record increasing, it would be fruitful to know how criminality and productivity are related, how to improve the productivity of ex-offenders, and how to design a policy of record openness that improves employment outcomes for ex-offenders."⁸

Several considerations must inform a rational record disclosure policy:

- **Public and workplace safety.** The most potent argument for broad access to criminal history data is to preserve public safety. The right to a safe and peaceful environment is a core value for a civilized society, and employers cannot allow known dangers in the workplace.
- **Economic productivity.** Released felons and misdemeanants must have some ability to reenter the workforce and provide for themselves. Each bears the gift or burden of his or her education, talent, and training. Should they also bear the burden of their unfiltered criminal histories?
- **Due process and accuracy.** Individuals who are the subjects of criminal history checks are entitled to accurate reports.

Additional research is needed to determine the extent to which dated felonies, misdemeanor convictions, and juvenile adjudications and arrests are accurate predictors of low productivity and dangers to the workplace and the public. In the interim, we must strive to address legitimate public values while affording reasonable opportunity to the prospective employee for economic productivity.

The Attorney General Report offers several suggestions to fairly reform access to criminal histories. Chief among the concerns are accuracy and some level of due process protection. The U.S. attorney general recommended three policies worthy of consideration nationwide:

- Tell the applicant in advance which databases will be accessed.
- Allow the applicant information concerning the data to be disclosed with the opportunity to either challenge its accuracy or explain its inclusion.
- Enhance and enforce uniform reporting standards within the law enforcement community.

Beyond the attorney general's concerns on access and accuracy are a few issues ripe for policymaker consideration; these considerations involve expansion of the concept of a public versus nonpublic file. For employment purposes, the concept of

public information might more fairly be narrowed. Some worthy ideas include:

- Creating databases that eliminate from the public file all arrests except active cases
- Sealing juvenile records to the public for status offenses
- Sealing all adjudications for behavior that would not be a felony for an adult after a period of years
- Creating a database that will allow the aggregation of misdemeanors to at least segregate those involving predatory behavior from those that do not

These important issues have a profound effect on the quality of life in our nation. Perhaps the Attorney General Report put it best in concluding: "The individual's interest in the fair use of criminal history information is mirrored by the broader social policy of facilitating the reentry of ex-offenders into the workforce. Steady gainful employment is a leading factor in preventing recidivism. The unfair use of or discrimination based upon criminal records can raise barriers to employment by ex-offenders and, as a result, undermine the reentry that makes us all safer."⁹ ■



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FOOTNOTES

1. U.S. Department of Justice, *The Attorney General's Report on Criminal History Background Checks* (June 2006), p 21, available at <http://www.usdoj.gov/olp/ag_bgchecks_report.pdf>. All websites cited in this article were accessed October 20, 2008.
2. Michigan State Police, Internet Criminal History Access Tool (ICHAT) <<http://apps.michigan.gov/ICHAT/Home.aspx>>.
3. U.S. Equal Employment Opportunity Commission, Notice No. 905.061, *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), (September 7, 1990), available at <http://www.eeoc.gov/policy/docs/arrest_records.html>.
4. Kresnak, *How Journalists Can Negotiate the Juvenile Justice System*, in *Covering Crime and Justice*, Ch 2, available at <http://www.justicejournalism.org/crimeguide/chapter02/chapter02_pg05.html>.
5. See MCL 712A.28 and MCR 3.925(D).
6. MCL 37.2205a.
7. Alvarez, *Army Giving More Waivers in Recruiting*, NY Times, February 14, 2007 (with article correction appended at <<http://www.nytimes.com/2007/02/14/us/14military.html?pagewanted=1>>).
8. Finlay, *Employer Access to Criminal History Data and the Employment of Young Black Men* (September 5, 2006) (unpublished paper, Univ of Cal Irvine), p 26.
9. *Attorney General's Report*, n 1 *supra* at 2.