STATUTE

PRIVACY AND POLICE INTELLIGENCE DATA BANKS: A PROPOSAL TO CREATE A STATE ORGANIZED CRIME INTELLIGENCE SYSTEM AND TO REGULATE THE USE OF CRIMINAL INTELLIGENCE INFORMATION

HAYWARD L. DRAPER*

Revelations about domestic intelligence files maintained by the F.B.I. and C.I.A. have alerted the public to the risk of massive invasions of individual privacy inherent in the existence of data banks filled with gossip, wiretap information, and surveillance data. Mr. Draper discloses how, with federal funding, intelligence data banks presently are being set up in many states by police organized crime intelligence units, all without legislative oversight or regulation. He explores in detail the many beneficial uses of this type of system in dealing with the peculiar problems involved in investigating organized crime. He then considers the inadequacy of present and proposed legal controls on existing organized crime intelligence systems, including discussion of the impact of the Freedom of Information Act. After noting the unlikelihood that many states will choose to prohibit these systems, Mr. Draper presents as an intermediate solution a unique, comprehensive Model Statute to regulate the use of criminal intelligence information.

Introduction

Many serious crimes, including loansharking, fencing stolen property, narcotics smuggling, and extortion, often involve a high degree of permanent organization over a broad geographical area.[1] The existence of such permanent criminal networks also encourages further crimes such as bribery of public officials.[2] As the incidence of these crimes has continued to increase, many law enforcement officials have recognized the utility of combating them by pooling information about or-

* B.A., Yale University, 1971; J.D., Harvard University, 1976; Member, Massachusetts Bar.

1 The reasons why certain criminal activities have a tendency to be conducted in an "organized" manner are discussed in the text accompanying notes 80-82 *infra*.

2 *See* J. GARDINER, THE POLITICS OF CORRUPTION: ORGANIZED CRIME IN AN AMERICAN CITY (1970).

ganized criminal groups and analyzing it to produce "strategic intelligence" concerning patterns of associations and emerging trends in criminal activity. In recent years, the more than $70 million provided by the Law Enforcement Assistance Administration (LEAA) for combating organized criminal activities[3] has greatly accelerated the creation at the state level of large, sophisticated police units which collect and analyze many types of intelligence information.[4]

This trend, however, collides with a growing public awareness of the threat that government data banks pose to individual privacy. State legislatures have responded to public concern over the inadequacy of traditional legal restraints with statutes designed to help preserve individual privacy from undue encroachment by governmental units storing non-law enforcement information,[5] and also by those storing police arrest records and other criminal history information.[6] Yet little attention has been given to the more obscure, but potentially much more dangerous, field of criminal intelligence systems. Recent exposure of the domestic intelligence activities of the C.I.A., U.S. Army, and F.B.I. against political "subversive" groups[7] has produced some efforts to restrict political intelligence activities.[8] No adequate response has developed, either in legislatures[9] or in the courts,[10] to the parallel privacy problems posed by the rapid growth of organized crime intelligence units.

This article will survey the growth of organized crime intelligence systems, consider both the advantages they provide in dealing effectively with organized criminal activities and the serious threats to individual privacy inherent in such systems, and note the inadequacy of present legal controls in protecting

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3 LEAA Commissioner Velde, at the National Conference on Organized Crime, Washington, D.C., October 1-4, 1975, in [1975] 18 CRIM. L. REP. (BNA) 2082.

4 *See* text accompanying notes 45-51, 60 *infra.*

5 *See, e.g.,* Privacy Act of 1974, 5 U.S.C.A. § 552a (West Supp. 1975); Freedom of Information Act, 5 U.S.C.A. § 552 (West Supp. 1975). *See also* HEW SECRETARY'S ADVISORY COMMITTEE ON AUTOMATED PERSONAL DATA SYSTEMS, RECORDS, COMPUTERS AND THE RIGHTS OF CITIZENS (1973) [hereinafter cited as HEW REPORT].

6 *See* text accompanying notes 16-20 *infra.*

7 *See* SENATE COMM. ON INTELLIGENCE ACTIVITIES, FINAL REPORT, S. REP. NO. 755, 94th Cong., 2d Sess. (1976) [hereinafter cited as CHURCH COMMITTEE REPORT].

8 *See* cases cited in note 176 *infra.*

9 *See* text accompanying notes 114-48 *infra.*

10 *See* text accompanying notes 149-91 *infra.*

privacy. Some issues involved in fashioning the necessary legislative response will then be raised, and a comprehensive Model Act will be proposed which would create a state-level organized crime intelligence unit and regulate the use of criminal intelligence information.

I. An Overview of Police Information Systems

Three types of police information systems which contain information not generally available to the public[11] can be identified: criminal history systems, investigative systems, and intelligence systems.

A. *Criminal History Systems*

Criminal history systems consist of files on people who have been arrested. The files are indexed by the arrestee's name, and contain basic personal information and a chronological record of each arrest, the charges, and their disposition. The arrest records provided by this kind of "name files" system are used throughout the criminal justice process.[12] Consequently, files of this sort are kept by virtually all police departments, courts and parole boards, and many other agencies.

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11 This paper does not deal with the many police files, such as police booking records, which are often considered to be public records under state statutes. *See, e.g.*, Cal. Gov't Code §§ 6253-6254 (West Supp. 1976); 65 Pa. Cons. Stat. Ann. § 66.1 (Purdon 1959 & Supp. 1976). Likewise, the many police reports and files compiled during investigations, and not generally considered to be public records, are not treated. *See, e.g.*, Cal. Gov't Code § 6254 (f) (West Supp. 1976); 28 C.F.R. § 50.2 (1976) (regulations as to what the Dept. of Justice may tell the press about pending investigations). Investigatory records are not normally indexed in a way that permits the easy retrieval of information on a particular person for use in future investigations or for dissemination outside the particular police department. Title 4 of the Model Statute, *infra*, includes provisions which affect such current police investigatory records, but the primary focus of this article is on manual or computerized permanent data storage systems.

12 Police checking out a suspect may want to know if he has ever been arrested for similar crimes, or if he has a history of violent actions (such as assaulting police officers). Prosecutors can often introduce a defendant's past convictions as evidence at trial. *See, e.g.*, Mass. Gen. Laws Ann. ch. 233, § 21 (West 1959 and Supp. 1976). Sentencing judges and parole boards rely heavily on such records in determining the appropriate disposition for a particular defendant after his conviction. *See generally* Coffee, *The Future of Sentencing Reform: Emerging Issues in the Individualization of Justice*, 73 Mich. L. Rev. 1361 (1975); Project, *Parole Release Decision-making and the Sentencing Process*, 84 Yale L. J. 810 (1975) [hereinafter cited as *Parole Project*]. *Cf.* Conn. Gen. Stat. Ann. §§ 54-109a (West Supp. 1975).

Most local police departments simply keep manual criminal history files arranged alphabetically and make little use of them except during booking and at trial. However, a few have found that they now can afford to keep their records on computers, providing the rapid access necessary for regular use in conducting investigations. Such a system also minimizes errors and duplication and, by allowing easy cross-indexing of files, enables the department to note emerging crime patterns quickly and assign its patrolmen accordingly.[13]

In the past decade, sparked by a massive infusion of LEAA funds, most states have centralized all criminal history systems at the state or county level, often computerizing them at the same time.[14] The privacy problems inherent in this centralization of criminal history records have evoked a great deal of discussion and a sizeable volume of literature.[15] Many states, led by Massachusetts, have responded to these privacy problems with detailed statutory and regulatory controls on their criminal history systems, although the strictness of the controls has varied somewhat.[16] Most states limit dissemination of in-

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13 *See* Ward, *System Updates Police Clerical Methods,* COMPUTERWORLD, April 20, 1975, at 29. *See also New Haven 'Targets' Cruisers; Crime Rate Down,* Boston Globe, June 1, 1976 at 1 (concerning the LEAA-funded "Directed Deterrent Patrol" in New Haven, Conn.).

14 Not only does LEAA pay for such centralization and computerization, but LEAA-funded Project Search has provided the plans for most such state-level systems. *See* PROJECT SEARCH, DESIGN OF A STANDARDIZED CRIME REPORTING SYSTEM, TECHNICAL REPORT #9 (1973). The Alaska legislature recognized the high degree of federal involvement when, in the enabling legislation for the Alaska system, it defined the key term "criminal justice information" as anything kept in a "criminal justice system," and the latter term as any system set up with LEAA funds. ALASKA STAT. § 12.62.070 (1972).

15 *See, e.g.,* PROJECT SEARCH, SECURITY AND PRIVACY IN CRIMINAL HISTORY SYSTEMS, TECHNICAL REPORT #2 (1970); GOVERNOR'S COMMISSION ON PRIVACY AND PERSONAL DATA, A REPORT ON CERTAIN ASPECTS OF THE MASSACHUSETTS CRIMINAL JUSTICE INFORMATION SYSTEM (1974); Comment, *Maintenance and Dissemination of Criminal Records, A Legislative Proposal,* 19 U.C.L.A. L. REV. 654 (1972); Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records,* 6 U. MICH. J. L. REF. 32 (1972); Comment, *Amplification of Arrest Records by Criminal Courts: A Judicial Compromise,* 13 AM. CRIM. L. REV. 139 (1975).

16 MASS. GEN. LAWS ANN. ch. 6, § 167-176 (West Supp. 1976) created a Criminal History Systems Board, authorized it to issue regulations limiting release of records, required regular purging of records if there were no subsequent arrests, and allowed individuals to inspect their own records and challenge their accuracy. *See* Massachusetts Criminal History Systems Board, Rules and Regulations (Dec. 27, 1974). For other states' approaches, *see, e.g.,* ALASKA STAT. §§ 12.62.010 *et seq.* (1972); Civil Admin. Code Act, ILL. REV. STAT. ch. 127, § 55a (1973); IOWA CODE ANN. § 749B.2-.5 (West Supp. 1975).

formation, require that it be updated, and allow individuals to challenge the accuracy of information in their files.[17]

The LEAA itself has issued similar regulations effective for all systems "directly or indirectly" funded by LEAA and even for agencies exchanging records with the F.B.I. or with any LEAA-funded system.[18] Parallel regulations cover criminal history information in the F.B.I.'s National Crime Information Center (NCIC).[19]

The primary piece of federal legislation introduced in the 94th Congress dealing with criminal history systems was S.2008.[20] Drafted by LEAA, the bill would have codified the general system set up by LEAA's regulations but would have prohibited the release of criminal history records to private parties except in very limited situations. The bill was never reported out of the Judiciary Committee.[21]

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17 Most states do not, however, follow Massachusetts in requiring the purging of the record of an arrest not leading to court proceedings within seven days and of a conviction record after seven years if there are no subsequent arrests. Massachusetts Criminal History Systems Board, *supra* note 16, §§ 1.15, 1.17.

18 28 C.F.R. § 20.1 *et seq.* (1976).

19 28 C.F.R. § 20.31 *et seq.* (1976). These regulations have remained basically intact since their original promulgation, although amendments have been made so that they will not override state laws making certain criminal history records public records, and further amendments now allow computerized systems to share computers with other government agencies rather than going to the expense of acquiring a computer "dedicated" to law enforcement use. 28 C.F.R. § 20.21 (1976).

20 S.2008, 94th Cong., 1st Sess., 121 CONG. REC. S11,554 (daily ed. June 25, 1975) (remarks of Sen. Tunney). Sen. Tunney introduced three bills in the 94th Cong., 1st Sess., dealing with criminal history systems. S.1427, 121 CONG. REC. S5873 (daily ed. Apr. 14, 1975), was originally proposed by Sen. Ervin. S.1428, 94th Cong., 1st Sess., 121 CONG. REC. S11,554 (daily ed. June 25, 1975), was a Justice Dept. proposal. According to Sen. Tunney, S.2008 was a compromise between S.1427 and S.1428. "It is stronger than the old Justice Department bill in its protection of the individual. It is less complex than the Ervin bill and more conducive to the preservation of efficient law enforcement." 121 CONG. REC. S11,554 (daily ed. June 25, 1975) (remarks of Sen. Tunney).

21 "[I]n an effort to accommodate the Justice Department and State and local criminal justice agencies in their desire to have a specific criminal justice bill enacted before September 27, 1975, when the Privacy Act of 1974 [went] into effect," 121 CONG. REC. S 11,554 (daily ed. June 25, 1975) (remarks of Sen. Tunny). Sen. Tunney did hold public hearings in his Subcommittee on Constitutional Rights of the Senate Judiciary Committee. SENATE COMMITTEE ON THE JUDICIARY, LEGISLATIVE AND EXECUTIVE CALENDAR, 94th Cong., No. 12 (July 12, 1976). Rep. Edwards did likewise with the House companion bill, H.R.8227, conducting hearings on July 14 & 17, 1975, in his Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee. HOUSE COMM. ON THE JUDICIARY, LEGISLATIVE CALENDAR, 94th Cong., No. 6 (July 7, 1976).

The courts also have played a direct role in regulating criminal history systems. Although arrest records are generally considered historical facts that may constitutionally be kept by police, *Sullivan v. Murphy*[22] reaffirmed that courts can order information expunged from criminal history systems where the Constitution so requires. The D.C. Circuit also held, in *Menard v. Saxbe*,[23] that the Constitution requires at a minimum that a centralized criminal history system, in that case the F.B.I.'s, be updated when it is learned that records are out of date. Later cases have further developed this idea of some minimal required level of reasonable care.[24] In addition, some states have statutes which give courts the power to seal or expunge arrest records,[25] although there is no corresponding federal statute. Increasingly, courts are exercising equitable expungement power ancillary to their general judicial authority.[26]

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22 478 F.2d 938 (D.C. Cir.), *cert. denied,* 414 U.S. 880 (1973).

23 498 F.2d 1017 (D.C. Cir. 1974).

24 *Menard* turned in part on an interpretation that 28 U.S.C. § 534 (1970) did not authorize the F.B.I. to maintain records of police "encounters" not rising to the level of "arrest." However, the doctrine was enunciated in more general constitutional terms by Judge Bazelon in Tarlton v. Saxbe, 507 F.2d 116 (D.C. Cir. 1974). *But see* Paul v. Davis, 421 U.S. 909 (1976) (damage to reputation by distribution to police of incorrect criminal information does not involve "liberty" or "property" for purposes of due process clause). Whether any constitutional basis for judicial oversight of criminal history systems survives *Paul* is discussed in the text accompanying notes 189-91 *infra*. *See also* Note, *Safeguarding the Accuracy of FBI Records: A Review of* Menard v. Saxbe *and* Tarlton v. Saxbe, 44 U. CIN. L. REV. 325 (1975); Comment, *Amplification of Arrest Records by Criminal Courts: A Judicial Compromise,* 13 AM. CRIM. L. REV. 139 (1975).

25 *See, e.g.,* CAL. PENAL CODE §§ 851.7, 1203.45 (West Supp. 1976); CONN. GEN. STAT. ANN. § 54-90(e) (West Supp. 1975); N.Y. CRIM. PROC. LAW § 160.50 (McKinney); OR. REV. STAT. § 137.225. Sealing, however, is only a partial solution if one is still required to give details of the arrest to employers. *See* Cohen, *Forgiving the Criminal Offender British Style: The Rehabilitation of Offenders Act,* 14 HARV. J. LEGIS. 111, 147-49 (1976); Kogon & Loughery, *Sealing and Expungement of Criminal Records — The Big Lie,* 61 J. CRIM. L.C. & P.S. 378 (1970). The Connecticut statute specifically provides that a person can swear under oath that he has never been arrested if his record is expunged. CONN. GEN. STAT. ANN. § 54-90(e) (West Supp. 1975). *See also* Beardon v. City of Boulder, 507 P.2d 1034 (Nev. 1973) (Nevada arrest for failure to register as felon because F.B.I. rap sheet did not include California expungement).

26 In some cases expungement powers can be found pursuant to other statutory policies, such as the special purposes behind juvenile court statutes. *Cf., e.g.,* In Re Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Fam. Ct. 1970). An argument that courts have expungement power ancillary to their jurisdiction of the case was used in Morrow v. District of Columbia, 418 F.2d 728 (D.C. Cir. 1969). A few courts have found no legitimate public purpose for the retention of arrest records after acquittal or if the arrest was without probable cause, often citing a general right to privacy. *See, e.g.,* Urban v. Breier, 401 F. Supp. 706 (E.D. Wis. 1975); Sullivan v. Murphy, *supra* note 22; Eddy v. Moore, 5 Wash. App. 333, 481 P.2d 452 (1971). *Contra,* Herschel v. Dyra, 365

B. *Investigative Systems*

If one begins cross-indexing the information within the name files of a criminal history system, or in some other way creates a mechanism that can tie a piece of factual information to a particular name, one has a simple investigative system. A well-known example is the F.B.I. fingerprint files, which can be manually searched for a fingerprint with characteristics matching those of one found at the scene of a crime.[27] Another commonly used investigative system is the F.B.I.'s list of the registration numbers of stolen cars, which is fully computerized, with remote terminals in police departments nationwide. Using this system, when a policeman sees a suspicious car, or pulls a car over, he can get an immediate check on its status.[28] The F.B.I. is currently computerizing the entire National Crime Information Center system.[29]

The lead in developing centralized investigatory systems has been taken by the states, with help from LEAA funding and with models recently provided by Project Search.[30] Local and state police departments have long maintained manual investigatory files of various types. However, the prototype of a sophisticated state-wide system was the New York State Identification and Intelligence System (NYSIIS), first authorized by the New York legislature in 1965.[31] Through use of various

F.2d 17 (7th Cir. 1966). *See generally* Annot., 46 A.L.R.3d 900 (1972); Comment, *supra* note 24.

27 Virtually every state has a system similar to the F.B.I.'s. *See* PROJECT SEARCH, REPORT ON LATENT FINGERPRINT IDENTIFICATION SYSTEMS, TECHNICAL MEMORANDUM #8 (1974).

28 *See* NATIONAL ACADEMY OF SCIENCES, DATABANKS IN A FREE SOCIETY 48-51, 80-81 (1972) [hereinafter cited as DATABANK STUDY].

29 *Id.* 57-64. NCIC is created pursuant to the very brief provisions of 28 U.S.C. § 534 (1970). LEAA regulations authorize computerization at 28 C.F.R. § 20.36 (1976). The files were not computerized earlier because J. Edgar Hoover was suspicious of any change in the way the Bureau functioned. Interview with W. Sullivan, formerly Assistant Director, Intelligence Division, Federal Bureau of Investigation (Feb. 8, 1976). *Cf.* Note, *Protection of Privacy of Computerized Records in the National Crime Information Center,* 7 U. MICH. J.L. REF. 594 (1974).

30 *See, e.g.,* PROJECT SEARCH, DESIGN OF A MODEL STATE IDENTIFICATION BUREAU, TECHNICAL REPORT #8 (1973); PROJECT SEARCH, CRIMINAL JUSTICE COMPUTER HARDWARE AND SOFTWARE SECURITY CONSIDERATIONS, TECHNICAL MEMORANDUM #6 (1974).

31 N.Y. EXEC. LAW §§ 600-608 (McKinney 1972). In 1972, NYSIIS was renamed the "Criminal Justice Services Division." N.Y. EXEC. LAW § 836 (McKinney 1976 Supp.). *See* NYSIIS, SYSTEM DEVELOPMENT PLAN (1967); PROJECT SEARCH, NEW YORK STATE IDENTIFICATION AND INTELLIGENCE SYSTEM, SPECIAL REPORT #2 (1970). *See also, e.g.,* CAL.

computer programs, in a few seconds many different kinds of characteristics can be checked through the entire data base, and directly correlated with the state criminal history records and the state Department of Motor Vehicles list of automobile registrations. For example, if a mugging victim notices a scar on his attacker, the computer can produce a list of all people in the system with similar scars. In an investigation of a fraudulent check, various characteristics of the way the check was written (e.g., "00/100" vs. "no/100"; "28 Aug." vs. "8/28" vs. "Aug. 28") can tie the check to a group of suspects or to other fraudulent checks, allowing the police to discern any pattern in the banks to which the checks are being passed. Characteristics of the *modus operandi* of other crimes can also be checked. Conceivably the system could spot a series of antique thefts all involving the same method of entry into the home and correlate these with a description of the thief obtained in one of the cases, a description of a truck obtained in another, a list of the owners of all such trucks in the area, and a list of people with arrest records for such offenses. The LEAA has recently given a grant to a Texas professor to develop computer software that could take a police artist's drawing and pull from the criminal history files, for the victim to examine, only those mug shots that closely resemble the drawing.[32]

Comparatively little has been done to regulate such investigative systems.[33] Since the systems handle criminal history records, they come under LEAA regulations which require updating and prohibit dissemination of arrest records outside of law enforcement groups.[34] State statutes creating such systems include broad grants of power to the investigative authorities operating them, restricting only the release of criminal history records.[35] Where states have enacted the pre-1974 version of

PENAL CODE § 11100 *et seq.* (West 1970 & Supp. 1975) (California Criminal Identification Bureau); Civil Admin. Code Act, ILL. REV. STAT. ch. 127, § 55a (6) (1973) (Illinois Dept. of Law Enforcement's Bureau of Identification).

32 5 LEAA NEWSLETTER, no. 5, at 3 (1975).

33 Concerning NCIC, *see generally* Note, *supra* note 29; HEW REPORT, *supra* note 5, app. E.

34 28 C.F.R. § 20.1 *et seq.* (1976), with regulations for NCIC in Subpart C. S.2008, § 211, would have applied similar strict dissemination standards to all criminal investigative information except that disseminated in the form of wanted posters and the like.

35 *See, e.g.,* CAL. PENAL CODE §§ 11100, 11120, 11143 (West 1970); ILL. REV. STAT. ch. 38, §§ 206-1, 206-7 (1973); MINN. STAT. ANN., ch. 299C (West 1972 & Supp. 1976).

the federal Freedom of Information Act,[36] information on named individuals that was not gathered during or for an investigation may be open to the public, such as fingerprint records obtained upon induction into the Army and forwarded to the F.B.I. or motor vehicle registration lists. However, even under the 1974 amendments to that Act, and under the Privacy Act of 1974, information collected by police during an investigation and used in a system directly tied to the current investigation of crimes is not open to public view.[37] S.2008 would have required the eventual destruction of investigative information in order to prevent systems from accumulating random surveillance data on people no longer involved in any criminal investigation.[38] However, no provisions of S.2008 would have prevented a computerized system from collecting, collating, and using vast amounts of public record information or information "voluntarily" given to the government.[39]

The courts have concerned themselves very little with investigative systems as long as they are used only by law enforcement groups.[40] While courts have imposed numerous restrictions on certain types of police surveillance, it remains clear that police can take reports from witnesses, observe people in public

36 Freedom of Information Act, 5 U.S.C.A. § 552 (West Supp. 1975). *See, e.g.,* N.Y. PUB. OFF. LAW § 88 *et seq.* (McKinney Supp. 1976); CAL. GOV'T CODE § 6254 *et seq.* (West Supp. 1975).

37 These "investigatory records" exceptions are at 5 U.S.C.A. § 552 (b)(7) (West Supp. 1976) and 5 U.S.C.A. §§ 552a (j) (2)(B), (k)(2) (West Supp. 1976).

38 S.2008, § 211(a), states that such information "shall not be maintained beyond the expiration of the statute of limitations for the offense concerning which it was collected or the sealing or purging of the criminal [history] information related to such offense, whichever occurs later." This appears to say that information on a case where no arrest is made may be kept even after the statute of limitations has run. Whether this is the result of an intention to support investigative systems or just poor drafting is unclear. Neither S.1427 nor S.1428 imposed any limit on the length of time for which investigative information might be maintained.

39 The special risks to privacy of such "data surveillance" of peoples' lives is discussed below in relation to intelligence systems, and in broader terms in A. WESTIN, PRIVACY AND FREEDOM, ch. 7 (1967). As Judge Bazelon has said, the process of compiling otherwise scattered and innocuous records "energizes" them. Tarlton v. Saxbe, 507 F.2d 1116, 1126 (D.C. Cir. 1974). A system's ability to generate suspect lists not only provides new opportunities for police investigation but also creates the potential for a great deal of harassment of all the innocent "suspects" on the lists.

40 As discussed in the text accompanying notes 156-67 *infra,* a qualified privilege from suit for defamation exists as long as such information is used in a reasonable manner and for a law enforcement purpose. Keeping the information within law enforcement groups also minimizes the possibility of suits for public disclosure of private facts. *See generally* W. PROSSER, TORTS 792-93, 810 (4th ed. 1971).

places, take samples of blood and hair, and freely compile and collate such information.[41] So far, any power that a court may have to expunge a person's criminal history records has generally not been held to extend to that person's entire investigative file, although this distinction is becoming much less clear.[42]

C. *Intelligence Systems*

The third category of police information systems, intelligence systems, is both the broadest and the least developed of the three. The terms "intelligence system" and "investigative system" overlap somewhat in that they both involve the use of name files and cross-referencing in investigation of criminal activity. It is also possible for a particular system to be both an investigative system and an intelligence system at the same time, though this is uncommon.[43]

The difference between these systems lies in the kinds of information they store. Investigative systems use "hard" data about specific past criminal acts, which is collated with criminal history information and selected public record information in order to connect physical evidence obtained in a current criminal investigation with a name or list of names. Intelligence systems, on the other hand, store information that does not itself relate directly to any specific criminal act but rather concerns the activities and associations of people thought likely to engage in criminal activity in the future. Most commonly, police using such systems already have the suspect's name and want information on that person which will aid further investigation.

41 *See* Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957); and cases cited in notes 168-74 *infra*.

42 CONN. GEN. STAT. ANN. § 54-90 (West Supp. 1975) is not unusual in providing that acquittal leads to expungement of "all records pertaining to such charges," allowing some judges to try to push at the line between information "pertaining to" an arrest and "pure" investigative information about the person arrested. Some courts have asserted a more general power to expunge investigative and intelligence files. Paton v. LaPrade, 524 F.2d 862, 865-66 (3d Cir. 1975); Urban v. Breier, 401 F. Supp. 706 (E.D. Wis. 1975). *But see* Paul v. Davis, *supra* note 20, undercutting much of the basis for these cases. *See also* DeGrazia v. Justice of the Municipal Court of the Dorchester District Court, S.J.C. No. 708 (Mass.), where a judge ordered the expungement of all police records on a juvenile first offender.

In general, courts still hold themselves "without any authority" over investigatory files. *See* State v. Bellar, 16 N.C. App. 339, 192 S.E. 2d 86 (1972).

43 The two usually are kept separate because of the need for special security measures to safeguard intelligence data.

They may instead be investigating a type of criminal activity in their area (such as narcotics smuggling), rather than an individual crime, and want a list of people suspected of such activity.

One can distinguish two general functions that an intelligence system could serve: (1) providing a large, cross-referenced information pool, and (2) analyzing the data to spot patterns and trends, thereby generating hypotheses and conclusions. The first function is commonly referred to as a systems "tactical intelligence" function and the second as its "strategic intelligence" function.

1. *Tactical intelligence systems:* As an information pool which provides "tactical intelligence," an intelligence system may take many different forms. At the local level there may be only a few name files on people whom police expect to become involved in criminal activity, but who have not yet been tied to any specific crime. Such a system may be as informal as the practice of police in a small town of keeping information in their heads such as the names of local bookies. However, even local systems may be much more sophisticated. With LEAA support, Kansas City included in its computerized investigative system a mechanism that permits a patrolman to obtain an immediate check through both the Kansas City and NCIC files not only on whether a particular car is stolen or whether a particular person is considered "wanted" or dangerous, but also on whether that person is a "law enforcement intelligence subject."[44]

The larger intelligence systems that are the focus of this article are similar, but they more fully categorize and cross-index the information they contain. This can be done efficiently in a manual system only to a limited extent. The New York City Police Intelligence Division, one of the largest in the country, files by name and cross-indexes data only by classes of crime, producing a basic "people-and-activity" oriented system.[45] The Los Angeles Police Department's Intelligence Division files are indexed by names, classes of crime, areas of crime, and businesses.[46] With computerization, detailed cross-indexing by classes

44 DATABANK STUDY, *supra* note 28, at 81.

45 Interview with Chief James Meehan, Intelligence Division, New York City Police Department (April 2, 1976).

46 Blakey, Local Law Enforcement Response to Organized Crime (1967) (unpub-

and sub-classes of crime, friends and associates, telephone numbers, and other relevant factors becomes practicable, although the essential nature of the information pool remains the same.[47]

Intelligence systems also vary widely as to the sources of the information that is collected. The Organized Crime Strike Force's Intelligence Unit files only information gathered during specific investigations, using the system primarily for analysis and for facilitating interchange between the different regional Strike Forces.[48] At the other extreme are the F.B.I., Army, and C.I.A. national security systems, which may conduct blanket surveillance of certain activities, sometimes without any suspicion of illegality.[49] More common are state systems collecting many types of information about persons suspected of involvement in some type of illegal activity.[50] The primary sources of information usually are not wiretaps or photo-

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lished), *cited in* THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 12 n.110 (1967) [hereinafter cited as PRESIDENT'S COMMISSION].

47 Computerization of intelligence files has been achieved by the Organized Crime Strike Force's Intelligence Unit and was almost implemented within NYSIIS. *See* UNITED AIRCRAFT CORP., NYSIIS ORGANIZED CRIME INTELLIGENCE MODULE SYSTEM DESCRIPTION (1968); Fishbach, McCoach & Associates, Inc., NYSIIS Organized Crime Intelligence Pilot Project Evaluation (1970) (unpublished).

Placing all files on the core memory of a computer is expected to become much more common over the next decade. D. HARRIS, BASIC ELEMENTS OF INTELLIGENCE: A MANUAL FOR POLICE DEPARTMENT INTELLIGENCE UNITS, app. D (The Computer and the Intelligence Unit) (1976) [hereinafter cited as HARRIS MANUAL]. Such use of computers for data storage should not be confused with the use of mini-computers to collate and analyze public record information so as to produce usable intelligence information that is entered into the main system files. This is discussed in the text accompanying note 63 *infra*.

48 Interview with Gerald Schur, Attorney-in-Charge, Intelligence and Special Services Unit, Organized Crime and Racketeering Section, Dept. of Justice (April 1, 1976).

49 National security wiretaps are explicitly excepted from warrant requirements by 18 U.S.C. § 2511(3) (1970). National security information is exempted from the Freedom of Information Act by 5 U.S.C.A. § 552(b)(1) (West Supp. 1976). *See* 5 U.S.C.A. § 552a(k)(1) (West Supp. 1976). *See also* United States v. Nixon, 418 U.S. 683 (1974). *See generally* CHURCH COMMITTEE REPORT, *supra* note 7, DATABANK STUDY, *supra* note 28, at 264.

50 Such systems are sometimes charged with stretching "suspicion" to the point of paranoia. The F.B.I., for example, has compiled intelligence files on hundreds of thousands of people. A. WESTIN, PRIVACY AND FREEDOM 159 (1967). *See also* Neier, *FBI Files: Modus Inoperandi*, 1 CIV. LIB. REV. 50 (1974); Donner, *Political Intelligence: Cameras, Informers, and Files*, 1 CIV. LIB. REV. 8 (1974). *Cf.* Black v. United States, 389 F. Supp. 529 (D.D.C. 1975).

graphic surveillance but confidential informers and newspaper clippings.[51]

There are innumerable uses for the information pool provided by a large state or city intelligence system. For example, if a local police force suspected organized illegal activity in the construction business in its area, it could acquire background information from the system on those persons in their files suspected of being involved. If no suspects had yet been identified, a fully cross-indexed system might be able to tell them what organized crime figures were active in the construction business, providing a starting point for further investigation. If a bookie were murdered, the system might provide investigative leads such as the names of his superiors, clients, and competitors.

Notice that an efficient intelligence system will have information on more people than just those actually suspected of wrongdoing. There will likely be information on people who deal with a suspect in business. There may be information on girlfriends and other social associates of a suspect so that police can question them if the suspect should mysteriously disappear. There may even be information on people known to be in bad financial shape and thus likely to become involved in illegal activity such as a loanshark racket.

Ironically, for all the legitimate uses of tactical intelligence systems, and despite myths about enormous, sophisticated, interlocking computer networks,[52] the primary concern of those actually working in the police intelligence field is not in perfecting these systems so much as in getting them implemented at all beyond the most rudimentary level. Part of the problem is that most police chiefs, having come up through the ranks, are not oriented toward diverting manpower from street patrol to the less glamorous job of compiling and analyzing information. An even greater problem is the lack of trust between many police departments, particularly regarding the sharing of information

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51 Interview with Don R. Harris, Ph.D., consultant, C.A.C.I., Inc. (March 1, 1976).

52 The F.B.I.'s intelligence files, and all major state systems, are strictly manual. A typical manual system is set out in HARRIS MANUAL, *supra* note 47, app. C (Operational Procedures for an Intelligence Information Control and Filing System).

from confidential informers.[53] Intelligence systems are notoriously averse to losing any control over "their" files by sharing them except during a joint investigation. Their concern may be aggravated where the other department may receive the credit for and publicity from any arrests that result from sharing of information.[54] The New York City system, for example, exchanges only a moderate amount of information with the New Jersey system, and was uncomfortable with the idea of NYSIIS possibly becoming an intelligence system "superior to" the City's system.[55]

Consequently, despite the obvious advantages in large metropolitan areas, no regional systems have been created, although in the mid-sixties the New England states did ratify an interstate compact to create the stillborn New England Organized Crime Intelligence System (NEOCIS).[56] An unofficial working relationship, and some minimal intelligence interchange between departments with permanent intelligence units is provided by the Law Enforcement Intelligence Unit (LEIU), but LEIU has no central files of its own.[57] In addition, LEIU has recently set up an Interstate Organized Crime Index (IOCI) operating out of Michigan. A number of state systems in the Midwest have remote terminals from which they can obtain references to information held by other participating departments. However, the department seeking information must go directly to the other department to obtain the information itself. This procedure preserves each system's control over its own files.

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53 Harris, *supra* note 51.

54 *Id.* This problem was particularly severe with the F.B.I. under Hoover, who opposed any sharing at all with local units. Sullivan, *supra* note 29.

55 Meehan, *supra* note 45; interviews with R. Gallatti, Chief, Brockton, Mass. Police Dept., and formerly Director of NYSIIS (April 16 and August 20, 1975). Yet a good deal of hesitancy does seem in order when confidential informers are involved, since their lives may depend upon their identities remaining secret. Between 1961 and 1965, twenty-five informants involved in Justice Dept. efforts to combat organized crime were killed. Blakey, *supra* note 46, at 105. *See generally Invasions of Privacy: Hearings on S. Res. 39 Before the Subcomm. on Admin. Practices and Procedures of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt.3, at 1158 (1965) (testimony of Nicholas de B. Katzenbach).

56 The compact was drafted by the Council of State Governments. *See* R.I. GEN. LAWS § 42-37-1 to -3 (1969).

57 The history of LEIU, conceived in 1956, is set out in PRESIDENT'S COMMISSION, *supra* note 46, at 13 n. 113. LEIU is as much a fraternal organization as a formal system.

2. *Strategic intelligence systems:* An individual who works with a large pool of information on criminal activities over a long period will acquire expertise concerning many of the activities being chronicled. With respect to criminal activities that are generally unorganized, such as muggings, burglaries, and fraudulent checks, this expertise is similar to that possessed by police. However, where there are individuals or groups engaging in an ongoing, planned series of criminal activities, the analyst who can survey the overall situation may begin to detect patterns and trends that the police would miss. Given a large enough information pool, various statistical techniques can be used to help uncover such patterns and trends.[58] Having uncovered possible patterns, the analyst will also be able to define specific items of information that should be collected by investigators to complete the intelligence picture. Once the picture is complete, the analyst will have a basis for predicting what the organized criminal group is likely to do next.

Link analysis provides us with an example of this process. The statistical analysis of a great number of reports of seemingly random contacts among a group of individuals over a broad geographical area, weighted for their intimacy and for the reliability of the reports, may indicate patterns and suggest links between some of these individuals. If the individuals are suspected bookies and loansharks, these links might indicate the overall structure of their operation. Similarly, link analysis may uncover a strong connection between a suspect and a person previously overlooked by police, suggesting that more investigation of that person may be in order.[59]

Analytical techniques may also be applied to public record data not in the intelligence system. Recently, for example, the Miami Police Department used a mini-computer to examine the records of all real estate transactions occurring over a long period in the Miami area. They discovered that one individual was a witness in a significant percentage of all transactions, and further investigation of his heretofore unnoticed activities revealed that he was acting as an agent for an organized criminal

58 *See generally* HARRIS MANUAL, *supra* note 47, app. F (Analyst Manual).

59 Harper & Harris, *The Application of Link Analysis to Police Intelligence*, 17 HUMAN FACTORS 157, 158-60 (1975).

group investing its illegal profits.[60] The Miami experience tends to confirm the assumption that the efficiency of an analytical intelligence system rises, up to the point of system overload, as the amount and degree of organization of information in the system increases. While intelligence files could not accommodate great masses of raw information such as real estate records, many law enforcement groups find the results of this sort of analysis of such records to be a valuable addition to their files.

It is important to realize that a system with an advanced analytical capability that produces significant amounts of "strategic intelligence," in addition to the "tactical intelligence" provided by the information pool, is a significantly different entity from a purely tactical system. First, when dealing with ongoing organized criminal groups, the system may develop the ability to predict specific activities. If the system spots evidence of a particular criminal group becoming involved in the construction business in a number of different areas across the state, the system can warn police in the remaining areas to be alert for such activity in their own areas and can tell them specifically to watch for certain key individuals, types of crimes, and methods of operation. Second, the system may take the lead in energizing local police groups dealing with organized criminal activities by sparking new investigations, as in the Miami case, and coordinating law enforcement activities.

These advanced capabilities have led to the development of significant analytical capabilities in many intelligence systems in recent years. The LEAA has supported this trend with direct grants and through the publication of an intelligence unit manual urging the creation of such systems.[61] Although NYSIIS no longer exists,[62] systems presently possessing or developing specialized units with significant strategic intelligence

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60 Interview with Stephen Cooley, Organized Crime Specialist, Enforcement Program Division, Law Enforcement Assistance Administration (Feb. 2, 1976). The project was funded in part by LEAA.

61 E. GODFREY & D. HARRIS, BASIC ELEMENTS OF INTELLIGENCE (1971).

62 The name was changed in 1972 to the Criminal Justice Services Division and the intelligence role was dropped from the list of authorized activities. N.Y. EXEC. LAW § 837 (McKinney Supp. 1975).

capabilities include New York City, New Jersey, Florida, Illinois, Michigan, and California.[63]

The rush to develop state-level strategic intelligence systems raises serious questions about both the law enforcement efficiency of such units and the threat to individual privacy posed by their activities. It is not at all clear whether these systems actually provide significant efficiency benefits, despite their theoretical promise. Moreover, such systems inherently exact a high cost in personal privacy.

II. Organized Crime and Analytical Intelligence Systems: A General Efficiency Perspective

Virtually all existing analytical intelligence systems restrict themselves to "organized crime." There also exist systems which deal with organized "subversive groups" allegedly engaged in illegal activities such as arson and bombings. This article will not deal directly with subversives files. Except in wartime, the efficiency and privacy objections to analytical intelligence systems clearly weigh less heavily in the case of organized crime than in the case of politically motivated "subversives." On the efficiency side, there generally is greater doubt as to whether significant permanent organization and structure exists among "subversive groups," and there is less condemnation of their activities than of organized criminal activities such as extortion, loansharking, and fencing stolen goods. On the privacy side, subversives files present special problems of defining the breadth of investigation, and the first amendment issues are much sharper than in the case of organized crime.

To the extent that non-political organized criminal groups do exist, an intelligence system with the prediction and coordination attributes discussed above could be very useful in detecting and proving criminal violations. This is particularly true with subtle crimes such as the investing of illegal profits in legitimate business.[64] However, one must be careful to judge systems not

63 Harris, *supra* note 51.

64 Under federal law, and also in a few states, it is a crime knowingly to invest illegally obtained money in a legitimate business. 18 U.S.C.A. § 1962 (West Supp. 1976). A poll of state Attorneys General concerning what areas for new organized crime

solely in terms of their theoretical usefulness, but to consider also the practical realities of interdepartmental distrust and the apparent inability to form effective regional networks. In most instances a single organization does not control organized criminal activities throughout the state, vitiating the potential advantages of the greater geographical coverage of a statewide system.[65] The inevitable inefficiencies involved in administration must also be considered. There is a strong bureaucratic tendency for systems to become so obsessed with the gathering, storing, and indexing of information that they forget that the whole point of the system is not to gather information but to use and disseminate it.[66]

In addition, the cost of creating and maintaining such systems may be prohibitive outside of more populous areas. NYSIIS, for example, used a pre-existing computer hardware system for its intelligence module, did not require the greater numbers of personnel necessary for a manual file system, and planned to restrict its files to 5000 "top" criminal figures. Yet optimistic cost estimates made in 1970 for the first three years of implementation and operation averaged $338,000 annually.[67]

The most complex question in determining the law enforcement efficiency of an analytical organized crime intelligence system is one that cannot be fully considered in this paper: just what should constitute the most economically and socially efficient approach to combating "organized crime"? Part of the problem in dealing with this question is the widespread confusion of criminal activities that involve an ongoing network of organization (what I have called "organized criminal activities")

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control legislation they thought most pressing found "Infiltration of business" second only to "Protection of witnesses." NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, ORGANIZED CRIME CONTROL LEGISLATION 1 (1972).

65 For example, in New York there are two geographical centers of organized criminal activity — Buffalo and New York City. To the extent that organized criminal activities in these two cities are essentially distinct and unrelated, there is less advantage to a statewide system containing information concerning both cities.

66 HARRIS MANUAL, *supra* note 47, at 55.

67 Fishbach, McCoach & Associates, Inc., *supra* note 47, at 8. The estimators could not fully determine personnel requirements and so added that "the requirements for implementation and the initial system may be higher than projected."

with the supposed national criminal conspiracy run by a group of Sicilian "families" that is known as "the Mafia."

The existence of a social group in Sicily referred to as the Mafia is relatively well documented,[68] as is the existence in the United States of Italian emigrants with strong family connections. It is not surprising that the conjunction of Prohibition, which produced a demand for the services of organized smuggling groups, with the arrival in America of the stream of Italian refugees leaving Mussolini's Italy resulted in the handling of much of the smuggling by Italian entrepreneurs.[69] It is also clear that various Italian "families" became heavily involved in organized criminal activities, resulting in a number of well-publicized gangland killings.[70] However, many have used this historical pattern as evidence of a unified, centralized, national criminal conspiracy, a conception dating back at least to 1890.[71] The term "Mafia," representing this idea of a national confederation of criminal "families," has now "become one of the most ubiquitous labels in American society."[72]

Popular attention was focused on this idea of a "super-organization of crime" by Senator Kefauver's televised Committee hearings in 1950-51. The Committee concluded that:

> 1. There is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities. . . .
> 2. Its leaders are usually found in control of the most lucrative rackets in their cities.
> 3. There are indications of a centralized direction and control of these rackets, but leadership appears to be in a group rather than in a single individual.
> 4. The Mafia is the cement that helps to bind the Costello-Adonis-Lansky syndicate of New York and the Accardo-Guzil-Fischetti syndicate of Chicago. . . .

68 *See, e.g.*, A. BLOCK, THE MAFIA OF A SICILIAN VILLAGE, 1860-1960: A STUDY OF VIOLENT PEASANT ENTREPRENEURS (1974). *See also* SENATO DELLA REPUBLICA, APPUNTI BIBLIOGRAPHICI SULLA MAFIA (1963).

69 *See generally* H. NELLI, ITALIANS IN CHICAGO, 1890-1930: A STUDY IN ETHNIC MOBILITY (1970); F. IANNI, A FAMILY BUSINESS: KINSHIP AND SOCIAL CONTROL IN ORGANIZED CRIME (1972) (traces the history of one family in some detail), J. ALBINI, THE AMERICAN MAFIA: GENESIS OF A LEGEND (1971).

70 *See generally* G. TYLER, ORGANIZED CRIME IN AMERICA: A BOOK OF READINGS (1962).

71 D. SMITH, THE MAFIA MYSTIQUE (1975), identifies the source of the term "Mafia" in the United States as an article, *The Mafiosi*, 9 CHAMBERS J. 385-87 (1892).

72 D. SMITH, *supra* note 71, at 4.

> 5. . . . The Mafia is a secret conspiracy against law and order which will ruthlessly eliminate anyone who stands in the way of its success . . . .[73]

Some subsequent studies argue that the idea of such a grand conspiracy was fabricated by the Bureau of Narcotics and was seized on by some liberal politicians at the same time as Senator Joseph McCarthy was rooting out other conspiratorial foes.[74] Yet the conception has had remarkable staying power with law enforcement groups dealing with suspected Mafia figures.[75] The President's Crime Commission of 1967 similarly assumed a centralized Sicilian Mafia.[76]

Yet, despite general agreement that Italian "families" have played a major role in organized criminal activities, the written evidence of their leading a national conspiracy is more cumulative than substantial.[77] As evidence accumulates indicating that organized criminal activities in many cities today are controlled by wholly non-Italian groups,[78] the concept of a national Mafia

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73 SENATE SPECIAL COMMITTEE TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, 3d INTERIM REPORT, S. REP. No. 307, 82d Cong., 1st Sess. 150 (1951). *See also* E. KEFAUVER, CRIME IN AMERICA (1951).

74 D. SMITH, *supra* note 71, ch. 5; Interview with M. Haller, Professor of History Temple University (March, 1976). *See also,* N. MORRIS & G. HAWKINS, THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL, ch.8 (1970).

75 *See Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations*, 88th Cong., 1st Sess. (1965); NYSIIS, COMBATTING ORGANIZED CRIME: REPORT OF THE 1965 OYSTER BAY, N.Y., CONFERENCE; C. MOLLENHOFF, STRIKE FORCE: ORGANIZED CRIME AND THE GOVERNMENT (1972). Mollenhoff's book includes a detailed organization chart, with the names of all reputed major Mafia figures. *Id.* at 238-58.

76 Cressey, *The Functions and Structure of Criminal Syndicates, in* PRESIDENT'S COMMISSION, *supra* note 46, at 25. *See also* D. CRESSEY, THEFT OF A NATION (1969); F. IANNI, BLACK MAFIA: ETHNIC SUCCESSION IN ORGANIZED CRIME (1974); F. COOK, THE SECRET RULERS (1966) ("an invisible government of crime, its heritage and structure derived from the Sicilian Mafia").

77 N. MORRIS & G. HAWKINS, *supra* note 74, ch. 8, contains a short summary of and attack on the literature. "Writings about the Mafia and organized crime have been noted for emotional content, not 'disciplined objectivity.' " D. SMITH, *supra* note 71, at 291. "[T]he process of bringing a continuing, ever-sharper focus to bear on the Mafia has itself been conspiratorial. There existed during this period a distinct line of continuity within investigative staffs 'uncovering' the Mafia that would merit a kinship study. The craftsmen who drew the 'family' charts can themselves be charted and explained. . . ." *Id.* at 125-26.

78 New ethnic groups taking over the rackets in major cities have, at most, only loose, high-level contact with any traditional Mafia "families." Cooley, *supra* note 60. *See also* F. IANNI, *supra* note 76. In an extensive study of organized crime in "an Eastern industrial city which has been controlled by a crime syndicate for most of the last fifty years," J. GARDINER, *supra* note 2, at 5, one commentator found "little evidence" that the local organization was controlled by "the Mafia." *Id.* at 17 n.1. However, this fact seems

conspiracy is undermined.

Such continuing dispute over the "Sicilian conspiracy" should not obscure the existence of very real organized criminal groups. As even one skeptic points out:

> [T]here is no doubt that small groups of criminals organized for carrying out particular kinds of crime have existed for centuries . . . , 'together with the development of plans by which detection may be avoided, and the development of a fund of money and political connections by means of which immunity may be secured in case of detection.' It is only necessary to say that, about the existence of organized crime in this sense, there is general agreement.[79]

Indeed, such on-going criminal enterprises may become quite large. Hawkins continues:

> In the field of what we may call 'service' crime involving the supply of consumer goods and services for which there is a widespread demand, it would be surprising if there did not develop, as in legitimate business, what Harvard economist Professor Schelling . . . refers to as 'large-scale continuing firms with the internal organization of a large enterprise, and with a conscious effort to control the market.'[80]

That particular criminal activities almost certainly are dominated by organized groups follows from economic realities. For example, a Cambridge bookie, faced with a run of Harvard bets on the Harvard-Yale game, must inevitably make some arrangement to balance off his bets with a New Haven bookie. Loansharking also tends to grow into a sizeable organization because of its close relationship with gambling losses and the necessity of having an efficient enforcement mechanism.[81] A

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to have been recognized only recently. As one highly placed law enforcement official said during the investigation of a major local bookmaker named Hugh Mulligan, "we never really heard about him before two years ago. . . . When we went after organized crime, we only went after Italians." New York Times, July 24, 1970, *quoted in* D. SMITH, *supra* note 71, at 324.

79 N. MORRIS & G. HAWKINS, *supra* note 74, at 210 (quoting E. SUTHERLAND & D. CRESSEY, PRINCIPLES OF CRIMINOLOGY (6th ed. 1960)).

80 *Id.* at 211 (quoting Schelling, *Economic Analysis and Organized Crime, in* PRESIDENT'S COMMISSION, *supra* note 46, at 114-26). Schelling goes so far as to imply that, as long as so many services are illegal, society may find itself better off by reaching some tacit accommodation for "organized" crime to provide these services than be left with "disorganized," violent criminal groups providing them.

81 *See* Seidl, Upon the Hip — A Study of the Criminal Loanshark Industry (1968) (unpublished Ph.D. thesis, Harvard U.); Comment, *Loansharking: The Untouched Domain*

fence commonly is a legitimate businessman with a mechanism for marketing illegal goods.[82] These are the kinds of organizations with which an analytical intelligence system should be able to deal significantly more effectively than traditional police techniques.

The national conspiracy conception, however, has distorted the focus of intelligence gathering into a war against the Mafia.[83] For example, in New Jersey in 1969-71, 90 percent of all arrests resulting from wiretaps were for gambling offenses.[84] One stated reason for this emphasis on gambling offenses is that the target of investigation is "organized crime," and organized crime "gets its money from gambling."[85] Thus law enforcement agencies seem to be operating under the assumption that the overall structure of the Mafia can be destroyed by drying up the source of funds provided by gambling.

If the existence, or at least the significance, of a nationwide "Mafia conspiracy" is questionable, though, these efforts of law enforcement agencies would appear misdirected. Loansharking, fencing, and organized white collar crime, for example, are far more socially harmful activities than gambling.[86] But police

of Organized Crime, 5 COLUM. J. L. & SOC. PROB. 91, 93 (1969); N.Y. TEMPORARY COMM'N OF INVESTIGATION, THE LOAN SHARK RACKET (1965). "Loan sharking is attractive to organized crime because of the low risks involved and the enormous profits possible.... The low risks are attributable to the effectiveness of collection practices and the ineffectiveness of traditional statutory controls and law enforcement practices." NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *supra* note 64, at 69.

82 *See* C. KLOCKARS, THE PROFESSIONAL FENCE (1974), for a detailed account of a local New Jersey fencing operation.

83 Perhaps a better analogy than the usual military one of a "war on organized crime" would be an analogy to state anti-trust divisions which specialize in monitoring large, legal enterprises much like an intelligence unit would specialize in monitoring large, illegal enterprises.

84 NAT'L ASSOC. OF ATTORNEYS GENERAL, *supra* note 64, at 49. Based on current figures from the Administrative Office of the United States Courts, as reported in the Boston Globe, May 2, 1976.

85 NAT'L ASSOC. OF ATTORNEYS GENERAL, *supra* note 64, ch. 6.

86 No reliable estimates exist of the costs to society of organized criminal activities. Some victims of loansharking and extortion are killed each year. The easy availability of fences for stolen goods probably encourages high theft rates. In 1972 the stock brokerage industry estimated that $1.2 billion in stolen securities were being used in illegal operations. *Hearings Before the Subcomm. on Securities of the Comm. on Banking*, 92d Cong., 2d Sess. 65-69 (1972) (statement of Senator Percy). Furthermore, some would label a good deal of white collar crime as organized crime. Price fixing, for example, has been called "self-imposed extortion," and certainly involves an ongoing criminal network. Schelling, *supra* note 80, at 117. Perhaps because the line between the criminal activities

efforts to attack gambling have little effect on any other organized criminal activities, with the possible exception of certain loanshark rackets associated with gambling operations. Another problem stemming from the preoccupation with "going after the Mafia" is that organized crime units give all their attention to the largest criminal organization in their area, ignoring smaller organized groups which may be engaged in more serious criminal activities.[87] To the extent, then, that organized crime intelligence systems are geared to deal with a nationwide "Mafia conspiracy" rather than more localized criminal organizations, it is likely that the systems are being employed in a socially and economically inefficient fashion.

III. Privacy Problems in State Intelligence Systems

Alan Westin has defined privacy as

> . . . the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others. . . . [E]ach individual is continually engaged in a personal adjustment process in which he balances the desire for privacy with the desire for disclosure and communication. . . . The individual does so in the face of . . . the processes of surveillance that every society sets in order to enforce its social norms.[88]

Society has a critical interest in the protection of privacy, for its own sake as well as for the sake of the individuals and groups of which it is composed. An individual's ability to control information about himself is a critical element in his capacity to engage in trusting relationships with others.[89] Similarly, a social

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of legitimate businessmen and the infiltration of legitimate business by career criminals is not always clear, many state organized crime intelligence units have not concerned themselves with white collar criminal information.

87 A good example of how, because of a fixation with the Mafia, "organized crime" can come to be seen as involving only gambling and loansharking is illustrated by C. Rogovin & G. Higgins, Organized Crime in Massachusetts (1968).

88 A. Westin, *supra* note 50, at 7. *See also* A. Miller, The Assault on Privacy 173-87 (1972).

89 *See* Fried, *Privacy*, 77 Yale L.J. 475 (1968).

> It is my thesis that privacy is not just one possible means among others to insure some other value, but that it is necessarily related to ends and relations of the most fundamental sort: respect, love, friendship and trust. Privacy is not merely a good technique for furthering these fundamental relations; rather without privacy they are simply inconceivable. . . . To respect, love, trust, feel

group can preserve the integrity of its internal processes only by maintaining a sphere of confidentiality free from outside surveillance. A pluralist society that values individual autonomy must regard the protection of privacy as one of its central principles.[90]

Some invasion of privacy is inherent in any system that collects information about people. Privacy problems will occur whether an intelligence system is analytical, non-analytical, computerized, manual, sophisticated, or rudimentary, although the problems are most acute in a large, analytical system. The privacy problems are not significantly limited by the desire of police to maintain the security of their files. The interest of law enforcement efficiency taken alone would warrant the collection and use of files to the point of administrative overload, and would encompass collecting information on the most intimate affairs of suspected criminals.[91] Virtually all information the system has the capacity to handle could conceivably help police detect crimes and apprehend suspects. The problem of how much information police should be allowed to collect is, then, as Pound put it, "one of compromise; of balancing conflicting interests and securing as much as may be with the least sacrifice of other interests."[92]

The privacy problems inherent in the use of criminal intelligence information systems may be conveniently grouped into five categories: (1) the lack of citizen access to collected data; (2) the "branding" and "targeting" of individuals; (3) the system's encouragement of increased surveillance; (4) the collection and

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> affection for others and to regard ourselves as the objects of love, trust and affection is at the heart of our notion of ourselves as persons among persons, and privacy is the necessary atmosphere for these attitudes and actions, as oxygen is for combustion. . . . To be friends or lovers persons must be intimate to some degree with each other. But intimacy is the sharing of information about one's actions, beliefs, or emotions which one does not share with all, and which one has the right not to share with anyone. By conferring this right, privacy creates the moral capital which we spend in friendship and love.

Id. at 477-78, 484.

90 *See generally id.;* Parker, *Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

91 One system director summarized his system's data collection policy for organized crime suspects as "all the information we can get."

92 R. POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY 18 (1922).

collation of data on innocent people and their activities; and (5) the over-broad dissemination of collected information.

1. *Lack of citizen access to collected data:* The very nature of an intelligence system requires that the information it contains be secret, in order to give analysts and police a jump on or ganized criminal activities. Requiring intelligence systems to allow people to see their own files is tantamount to forbidding such systems.[93] On the other hand, secrecy makes it more difficult to check the system for errors, fosters popular myths and fears, and eliminates the possibility of making the scope and operation of the system accountable to anyone other than a system official. As we shall see, the federal Freedom of Information Act and the federal Privacy Act, both of which have been copied by a number of states, attempt to put some limits on the information that may be kept secret; but as presently interpreted, they exempt the most significant information from examination.[94]

2. *The "branding" and "targeting" of individuals:* The primary purpose of an analytical system is to target people as "suspects" and then provide law enforcement agencies with information about the individuals so identified. Being branded as an "organized crime figure" can have a number of adverse effects on a person even if the branding is mistaken. First, under the Organized Crime Control Act of 1970, a person so identified who is convicted of a felony is now subject to a special sentence of up to twenty-five years as a "dangerous special offender."[95] Even if this new statute eventually fails to satisfy constitutional standards,[96] older federal Parole Board regulations blocking

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93 MASS. GEN. LAWS ANN. ch. 66A (West Supp. 1976) originally appeared to open all files to inspection, but this was unintentional and was amended by 1976 Mass. Acts, ch. 249 (July 16, 1976), to delay applicability of the public access provisions for one year for non-employee records maintained by any "criminal justice agency."

94 *See* text accompanying notes 120-47 *infra.*

95 18 U.S.C.A. § 3575(e)(2) (West Supp. 1976). THE NAT'L CENTER FOR CRIME & DELINQUENCY, MODEL SENTENCING ACT (1965) also contains such provisions. Efforts are underway to enact them at the state level. *See* NAT'L ASSOC. OF ATTORNEYS GENERAL, *supra* note 64, ch. 1; CONN. GEN. STAT. ANN. § 53a-40(e), (f), (g) (West 1972).

96 Only a few cases concerning the statute have been decided. In United States v. Duardi, 384 F. Supp. 874 (D. Mo. 1974), *appeal dismissed,* 514 F.2d 545 (8th Cir. 1975), the district court declared that the statute was vague and amounted to criminal punishment without proof beyond a reasonable doubt. In United States v. Holt, 397 F. Supp. 1397, 1399-400 (N.D. Tex. 1975), another judge upheld the statute as a valid

furlough, parole, or any other rehabilitative programs for "special offenders" have been consistently upheld.[97] How targeting can be used to help put someone in prison and alter his treatment once there is best illustrated by the *Hoffa* case.[98] Once Hoffa was targeted by the Justice Department a major effort was undertaken to set up wiretaps, recruit informers, and otherwise ferret out supposed wrongdoing. Moreover, where the police fail to make their case, but are told by an intelligence unit that someone is an "organized crime figure," they may take out their frustration by harassing him.[99] Finally, should the stigmatizing label leak to the public, private harassment could become unbearable. Many employers would be extremely hesitant about retaining someone "suspected of associations with organized crime figures."[100]

3. *The system's encouragement of increased surveillance:* The *Hoffa* case illustrates the voracious appetite for information a successful intelligence system could develop. The more positive results a system produced, the more it would be used and its data base expanded. Furthermore, system analysts would constantly be generating requests for new information to confirm their hypotheses about links or patterns.

4. *The collection and collation of data on innocent people and their*

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exercise of sentencing discretion and criticized the *Duardi* decision. In United States v. Stewart, 531 F.2d 326 (6th Cir. 1976), the court ruled that the statute was constitutional, and also criticized *Duardi.*

97 28 C.F.R. § 2.20; Cardaropoli v. Norton, 523 F.2d 990 (2d Cir. 1975). There need only be a "reasonable basis in fact" for concluding that the prisoner is a "prominent figure in a structured criminal syndicate. . . ." Masiello v. Norton, 364 F. Supp. 1133, 1135 (D. Conn. 1973). *See also Project, Parole Release Decision-making and the Sentencing Process,* 84 YALE L.J. 810 (1975).

98 United States v. Hoffa, 385 U.S. 293 (1966).

99 *See* Giancana v. Johnson, Civ. No. 63-C-1145 (N.D. Ill.), *preliminary injunction stayed sub nom.* Giancana v. Hoover, 322 F.2d 789 (7th Cir. 1963), *rev'd,* 335 F.2d 366 (7th Cir. 1964), *cert. denied,* 379 U.S. 1001 (1965) (F.B.I. harassment of the reputed leader of the Chicago Mafia included parking cars all around his house, telling visitors that he was "suspect", and tailing him with a crowd of agents inches from his body).

100 *Cf., e.g.,* Paul v. Davis, 424 U.S. 693 (1976) (newspaperman almost lost job when listed on a circular as a shoplifter); Brown v. Port of Newport, Civ. No. 74-82 (D. Ore. July 2, 1975) (job lost because of record of police "detention" in 1963). Concurring in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 175 (1951), Justice Douglas noted that this is not just "namecalling" but an "official" government designation of "status," and thus it naturally carries serious consequences. *See generally* MILLER, THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES, U.S. DEPT. OF LABOR MANPOWER ADMIN. STUDY 81-09-70-02 (1972).

activities: The likelihood of the collection of information on large numbers of people endangers basic privacy values as well as compounding the secrecy and branding problems. As noted above, to be successful an analytical system must include information about the associates and contacts of a suspect.[101] In fact, an efficient intelligence system would store information on many wholly unsuspicious people, since link analysis is useless without a great deal of raw data to survey. At least one computerized investigative system has attempted to include in its files a list of every registered gun owner.[102]

This inclusion of innocent people raises much more serious privacy problems than the hotly debated criminal history systems. At least with criminal history systems one has the sense that the individual must have done something suspicious enough to warrant his arrest before being included in the system.[103] But strategic intelligence systems can endanger the privacy and reputation of those without the slightest contact with the criminal justice system.[104]

The collation of large amounts of public record information by intelligence analysts may itself be seen as somewhat improper. In a paper society like ours, most people could hide very little of their private lives from truly effective "data surveillance" of this sort.[105] The storage and collation of such material produces a synergistic effect: analysts become able to synthesize apparently unrelated data to bring to light patterns of activity in ways individuals could not reasonably have foreseen when

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101 *See* text following note 51 *supra*. The director of one large system told the author that he is unhappy with S. 2008 because the bill would prevent the system from entering into its files the names of everyone who patronizes a particular restaurant often used as an organized crime meeting place.

102 *See* Lupo, Boston Globe, May 20, 1976, at 3. The list of gunowners will not be in the Boston Police Department Intelligence Unit's files but merely in the "hazards file" of the proposed LEAA-funded dispatch system, a simple investigative system that will tell police what to watch out for when they go into a certain area. Were Boston ever to put its intelligence files on this computer, however, it could crossreference the gunowner list.

103 "[I]ndividuals who are arrested . . . become persons in whom the public has a legitimate interest. . . ." Tennessean Newspaper Inc. v. Levi, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975).

104 For example, a girl assigned a school project on the Socialist Labor Party misaddressed a letter to the Socialist Workers Party and ended up with her name in the F.B.I. subversives file. *See* Paton v. LaPrade, 524 F.2d 862, 865-66 (3d Cir. 1975).

105 A. WESTIN, *supra* note 50, ch. 7.

they made the information public.[106] There is all the more reason for concern given the practice of law enforcement agencies of including in the files of an organized crime suspect highly intrusive information such as political beliefs and sexual practices. Even a slight risk of such intrusion into the lives of innocent people poses a serious problem.

5. *The over-broad dissemination of collected information:* Criminal intelligence systems also contain the potential for abuse through dissemination of collected data to parties outside the system such as the press or friends of law enforcement officers. Problems may lie in inadequate system security or in the operation of the system in bad faith with the intention of harassing individuals about whom information has been accumulated.[107]

IV. Present Legal Controls on Intelligence Systems

A. *Statutory Regulation*

Since very little has been published dealing with the privacy problems created by organized crime intelligence systems,[108] it is not surprising that little thought has yet been given to the systems' regulation. To date, Iowa is the only state that has enacted legislation squarely confronting the problem.[109] The Iowa legislation distinguishes "intelligence data" — information collected where there are "reasonable grounds" to suspect involvement or participation in criminal activity "by *any* person"

106 Tarlton v. Saxbe, 507 F.2d 1116, 1126 (D.C. Cir. 1974) (Bazelon, J.).

107 *Cf.* Databank Study, *supra* note 28, at 387-88.

108 Americans for Effective Law Enforcement (A.E.L.E.), Legal Defense Manual #74-6, #75-2 (1974-75), collects many cases concerning "intelligence gathering activities" but does not deal directly with privacy problems or suggest alternative approaches.

109 The only federal legislative attempt to deal directly with intelligence systems is included in some brief provisions of S. 2008, 94th Cong., 1st Sess., 121 Cong. Rec. S 11,554 (1975). The bill's standard for the data that can be maintained is that "grounds exist connecting such individual with known or suspected criminal activity and . . . the information is pertinent to such criminal activity." S. 2008, § 210(b). Information not meeting this standard would be liable to court-ordered expungement. As the bill is presently drafted, an extremely loose construction by the courts of the terms "grounds," "connecting," and "pertinent" would be required to keep the bill from unintentionally but effectively precluding the efficient functioning of all analytical organized crime intelligence systems in police departments with general plenary responsibility. As presently drafted, S. 2008 certainly would keep out all information about non-criminal associates and might also require some reasonable belief of the individual's commission of a crime before any information about him, even public record information, could be collected.

(emphasis added) — from "surveillance data" — information collected where such reasonable grounds are lacking.[110] The Act requires that intelligence data never be kept in a computer data storage system and that it be disseminated only to governmental agencies showing a need-to-know and reasonable intended use.[111] The collection of "surveillance data" is altogether prohibited[112] and a Confidential Records Council monitors compliance, although it cannot examine data from which identities are ascertainable. While this provides only a very loose regulatory structure (not surprising in a small state with few intelligence files), it does impose a relevance requirement on the data collected. The phrase "any person" in the definition of "intelligence data" would appear to allow the collection of information on associates of suspects.[113]

More commonly states strictly regulate data banks but provide explicit exceptions for "intelligence data."[114] Even more commonly statutes grant blanket authority to compile law enforcement data without even mentioning intelligence data,[115] or hint at an intelligence role without defining or limiting it in any way.[116] Many of the systems created under blanket grants of authority have publicly issued guidelines for the operation of their systems. These may help dispel public apprehensions, and the very act of drafting them forces unit personnel to think more carefully about privacy problems. In general, however, they set up rather loose standards,[117] and do not appear to be civilly enforceable.[118]

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110 IOWA CODE ANN. § 749B.1 (West Supp. 1975).

111 *Id.* § 749B.8.

112 *Id.* § 749B.9.

113 If this phrase is interpreted to mean "the suspect," then it would effectively prohibit systems employing link analysis techniques. *See* text accompanying note 59 *supra*. One might question, however, Iowa's need for an analytical intelligence system.

114 *See, e.g.*, MASS. GEN. LAWS ANN. ch. 6, § 167 (West 1976).

115 *See, e.g.*, CAL. PENAL CODE § 11100 *et seq.* (West 1970).

116 *See, e.g.*, ILL. ANN. STAT. ch. 127, § 55a (5)(a) (Smith-Hurd Supp. 1976-77), creating the Illinois Bureau of Investigation to "investigate the origins, activities, personnel and incidents of crime. . . ." This Bureau presently is setting up a large analytical intelligence system.

117 *See, e.g.*, ILLINOIS BUREAU OF INVESTIGATION, CRIMINAL INTELLIGENCE DIVISION GUIDELINES; NEW JERSEY STATE POLICE, INTELLIGENCE BUREAU MANUAL. The New Jersey Manual permits the collection of "[a]ny information concerning an individual's criminal activities that when properly analyzed would provide tactical and/or strategic intelligence." § VI(E) (6).

118 *See, e.g.*, Illinois Administrative Review Act, ILL. ANN. STAT. ch. 110, § 264 (Smith-Hurd Supp. 1976-77). If there is no statute permitting suit on the guidelines,

Other state statutes may affect the workings of intelligence systems without regulating them directly. For example, Massachusetts has forbidden the use of wiretaps or bugs by any individual except a state law enforcement agent with a court order or a federal officer.[119]

At least five states[120] have enacted legislation similar to the federal Privacy Act of 1974, which allows an individual to examine and challenge any files kept on him,[121] and requires the system to notify him whenever any information about him is disseminated.[122] However, the federal act allows complete exemption from most of the act for files "maintained by an agency . . . which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . and which consists of . . . information compiled for the purpose of a criminal investigation."[123] A specific exemption from the examination and challenge provisions of the act is allowed for files "within [any] agency [that consist of] . . . investigatory material compiled for law enforcement purposes . . . ."[124] It appears that any information reasonably relevant to the investigation of organized criminal activities would come within one or the other exemption.[125] Furthermore, most of the states that

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they would merely be admissible as evidence in an action alleging negligence by the system in collecting or disseminating information.

119 MASS. GEN. LAWS ANN. ch. 272, § 99 (West). This prevents police from using bugged informers, a practice permissible under the U.S. Constitution. White v. United States, 401 U.S. 745 (1971).

120 *See, e.g.*, ARK. STAT. ANN. §§ 16-801 to 810 (1975 Supp.); IOWA CODE ANN. § 749B (West Supp. 1975); 1974 Minn. Laws ch. 479, as amended by 1975 Minn. Laws ch. 401; MASS. GEN. LAWS ANN. ch. 66A (West Supp. 1976); UTAH CODE ANN. ch. 50 § 1ff (1976 Supp.).

121 5 U.S.C.A. § 552a(d) (West Supp. 1976).

122 5 U.S.C.A. § 552a(b) (West Supp. 1976).

123 5 U.S.C.A. § 552a(j)(2)(B) (West Supp. 1976), 88 Stat. 1897. This permissive exemption for information compiled in a criminal investigation allows exemption of the system from the more general reporting procedures of the Act. It does not permit exemption from the disclosure provisions mentioned in the text, but criminal investigation information is specifically excepted from these disclosure provisions by 5 U.S.C.A. § 552a(b)(7) (West Supp. 1976).

124 5 U.S.C.A. § 552a(k)(2) (West Supp. 1976). This applies to both civil and criminal law enforcement. There is a proviso in subsection (k)(2), however, that requires the government to show the individual any material used to deny him any "right, privilege, or benefit . . . for which he would otherwise be eligible," presumably including such things as jobs and security clearances.

125 This view is supported by the statement in the Senate committee report on the bill that the exemptions were designed to cover "information collected . . . in anticipation of criminal activity, such as by organized crime figures. . . . It was the Committee's

have enacted a Privacy Act have altered the investigative records exception to make it even broader. The California bill that would have narrowed the exception[126] and added substantive limitations as to the type of information that could be maintained by an intelligence unit[127] was vetoed by Governor Brown. The lack of any exception at all for investigative files in the original Massachusetts statute was largely unintentional and the statute was amended upon discovery of this oversight.[128]

States adopting rules modelled on the federal Freedom of Information Act as amended in 1974,[129] either by statute or by judicial reinterpretation of the pre-1974 version,[130] would re-

judgment . . . that . . . it would not be appropriate to allow individuals to see their own intelligence and investigative files." S. REP. No. 1183, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6938. However, the report advocated further legislation to directly regulate law enforcement files. To date, litigation has focused entirely on the parallel exemption in the Freedom of Information Act rather than on these two provisions. *Cf.* 41 Fed. Reg. 12,640 (1976) (Justice Department Regulations on Exemption of Record Systems under the Privacy Act of 1974).

126 The bill contained an exception for systems of records meeting *all* of the following five requirements: (1) The agency maintaining the records must perform "as its principal activity any activity pertaining to enforcement of criminal laws"; (2) the system must be used "exclusively for law enforcement investigative information"; (3) the information must be acquired "in conjunction with the investigation of criminal activity"; (4) the head of the agency must determine that any disclosure would "seriously damage or impede the purposes for which the information is maintained"; and (5) the investigative information must not have been "maintained for a period longer than is necessary to commence criminal prosecution." S.852, ch. 13, § 1798.28(a) (April 10, 1975).

127 The information maintained in the system would have been subject, under the bill, to a number of substantive limitations, as follows: (1) the information maintained was required to be "relevant and necessary to accomplish a purpose of the agency required by statute"; (2) information was to be collected "to the greatest extent practicable directly from the subject individual"; (3) the subject individual was to be informed, when information was requested from his file, of the name of the requesting agency, the authority under which the records were maintained, and other details relating to the dissemination; (4) records were to be maintained, "to the maximum extent possible, with accuracy, relevancy, timeliness, and completeness"; (5) no records could be maintained describing "how any individual exercises his rights guaranteed by or in violation of" the First Amendment or various provisions of the California Constitution, "unless expressly authorized by statute"; and (6) no records could be "modified, transferred, or destroyed to avoid compliance" with any of the provisions of the bill. S.852, ch. 6, § 1798.21 (April 10, 1975).

128 MASS. GEN. LAWS ANN. ch. 66A (West Supp. 1976). *See* note 93 *supra.*

129 5 U.S.C.A. § 552 (West Supp. 1975). The pre-1974 version of the Act had no more impact on intelligence systems than the Privacy Act because of a blanket exemption in subsection (b)(7) for all "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency. . . ." 5 U.S.C.A. § 552(6), (7) (West Supp. 1976). *See, e.g.,* N.Y. PUB. OFF. LAW (Consol.) §§ 85-89.

130 In Jensen v. Schiffman, 544 P.2d 1048 (Or. App. 1976), the court noted that the legislative history of the 1974 amendments stated that they were merely a "clarification"

quire public release of records upon request. Exceptions include records "specifically exempted from disclosure by statute,"[131] analysts' work-product under the "intra-agency memoranda" exception,[132] and certain "investigatory records."[133] This last exception applies most directly to organized crime intelligence units, exempting all

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings . . . , constitute an unwarranted invasion of personal privacy, . . . disclose the identity of a confidential source . . . , [or] disclose investigative techniques and procedures. . . .[134]

Lacking explicit statutory exception for any organized crime intelligence files,[135] a state system operating under a state Freedom of Information Act modelled on the federal act would have to rely on recent federal court cases interpreting the investigatory records exemption quoted above.[136]

Although the conference report considered the 1974 amendment to be just a "clarification" of the legislative intent of the previous blanket exemption,[137] on its face the amended statute appears to create a two-step test, and most courts have treated the section in that manner.[138] As to the first step —

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of congressional intent in the original Act. The court therefore interpreted "investigatory information compiled for law enforcement purposes" in OR. REV. STAT. § 192.500(1)(c) to subsume all the detailed provisions of the federal amendments.

131 5 U.S.C.A. § 552(b)(3) (West Supp. 1975).

132 5 U.S.C.A. § 552(b)(5) (West Supp. 1975).

133 5 U.S.C.A. § 552(b)(7) (West Supp. 1975).

134 *Id.*

135 Section 315(c) of the Model Act, *infra,* does not explicitly provide such an exception but does make a legislative finding as to what constitutes "investigatory records compiled for law enforcement purposes."

136 State courts generally have held that they should follow federal precedents in interpreting state Freedom of Information Acts modelled on the federal. *See, e.g.,* Jensen v. Schiffman, 544 P.2d 1048 (Or. App. 1976); Burke v. Yudelson, 368 N.Y.S.2d 779 (Sup. Ct. 1975); Black Panther Party v. Kehoe, 39 Cal. App. 3d 900, *rev'd on rehearing,* 42 Cal. App. 3d 645 (1974).

137 S. CONF. REP. No. 1200, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 6291. *See also* S. REP. No. 813, 89th Cong., 1st Sess. (1965), which stated that the intent of the original language was to protect files where their release "could harm the government's case in court."

138 *See* Philadelphia Newspaper Inc. v. United States Dep't of Justice, 405 F. Supp. 8, 11-12 (E.D. Pa. 1975); Temple-Eastex, Inc. v. NLRB, 410 F. Supp. 183, 185-86 (E.D. Tex. 1976); Tax Reform Research Group v. IRS, 419 F. Supp. 415, 419-20 (D.D.C. 1976). For example, one can imagine records having nothing to do with law enforce-

"investigatory records for a law enforcement purpose" — few cases pose any restriction on intelligence files compiled and used in reasonable fashion, although courts have consistently ruled that they must look at selected information *in camera* to make an independent determination, thus creating a limited breach in the absolute security that systems had previously enjoyed.[139] Early cases differed over whether the test covered the files on an investigation that had been completed,[140] and the 1974 amendments apparently were designed to overrule some cases that exempted such files without a determination in each case of any continuing investigatory use.[141] However, it would appear sufficient for the first step that intelligence information relate either to an individual suspected of criminal activity or to an ongoing investigation of a particular area or business for possible violations of law.[142] Only one reported case has ordered the release of an intelligence file as not investigatory, and that involved information which was found to be

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ment that would involve a confidential informant. Certainly the 1974 amendments did not intend to broaden the exemption to cover such records. It follows that there must be a two-step process at work. *Cf.* Title Guarantee v. NLRB, 534 F.2d 484 (2d Cir. 1976).

139 *See* Cowles Communications v. United States Dep't of Justice, 325 F. Supp. 726 (N.D. Cal. 1971). The Organized Crime Strike Force Intelligence Unit has submitted much data for *in camera* inspection and has not had security problems as a result of the procedure. Schur, *supra* note 48. However, some state trial court judges may prove more troublesome and corruptible than federal judges.

140 *Compare* Aspin v. Dep't of Defense, 491 F.2d 24 (D.C. Cir. 1973) *with* Wellford v. Hardin, 444 F.2d 21, 23-24 (4th Cir. 1971). *See also* 17 A.L.R. Fed. 522 (1973).

141 Chamberlain v. Alexander, 419 F. Supp. 235 (S.D. Ala. 1976). The Supreme Court in NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), identified the problem cases, all from the D.C. Circuit. *See also* Title Guarantee Co. v. NLRB, 534 F.2d 484, 488 (2d Cir. 1976). However, files from a "closed" investigation might still be exempted under the Act as amended if their release could hinder future investigations by exposing informants and investigative techniques.

142 There is an "investigation" whenever inquiry "focuses with special intensity on a particular party." Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974). It is sufficient that an actual court proceeding be merely "conceivable." Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir. 1974), *cert. denied,* 419 U.S. 974 (1974). *See also* Mobil Oil v. FTC, 406 F. Supp. 305, 313-14 (S.D.N.Y. 1976). Legislative history concerning the need for "a concrete prospective law enforcement proceeding," Senator Hart, 120 CONG. REC. 59,329 (daily ed. May 30, 1974), should not be interpreted so strictly as to override this part of the holdings of *Center for Nat'l Policy Review* and *Ditlow* as long as the courts test information item by item rather than enforcing a blanket exemption for whole files as had been the previous practice. *Cf.* NLRB v. Sears, Roebuck & Co., 95 S.Ct. 1504, 1523 (1975); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 82 (3d Cir. 1976); Chamberlain v. Alexander, 419 F. Supp. 235, 240 (S.D. Ala. 1976).

collected by the F.B.I. with no intention of ever using it for a law enforcement proceeding against anyone and which appeared to the court to be of no use in future proceedings.[143]

The second step of the test forces an intelligence system to convince the court that each item of information sought to be exempted would harm the system or the subject of the information in some way if released.[144] This was a change from the per se rule the D.C. Circuit had been using to protect the entire contents of a file once it passed the "investigatory" standard, and it served to shift the burden of proof in Freedom of Information Act cases to the government.[145] No clear rules have emerged from the cases, and judges and intelligence system directors will presumably continue to handle cases on an *ad hoc* basis.[146] Certainly in the organized crime area, the intricate nature of investigation and the history of violent retribution by organized criminal groups provides a good case for a high degree of confidentiality.[147] Even information on non-criminal associates of suspects might "disclose investigative techniques and procedures" if released where it could expose the types of links and patterns intelligence unit analysts were developing.[148] Yet the final impact of the Freedom of Information Act on intelligence unit operations will likely remain unresolved for a few more years.

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143 Black v. Sheraton Corp. of America, *supra* note 126 at 97. The information was ten years old.

144 *See* text accompanying note 133, *supra,* for the statutory language upon which this second step is based. "[The amendments' purpose] was to limit the exemption to instances where disclosure would interfere with one of a specific set of interests." Title Guarantee v. NLRB, 407 F. Supp. 498, 504 (S.D.N.Y.), *affirmed,* 534 F.2d 484, 489 (2d Cir. 1976). *See also* Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976).

145 Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976); Chamberlain v. Alexander, 419 F. Supp. 235 (S.D. Ala. 1976).

146 Ott v. Levi, 419 F. Supp. 750, 752 (E.D. Mo. 1976), illustrates the complex game of editing the records after *in camera* inspection goes on. The case-by-case approach should become less common as the courts define some general rules. *See* Cessna Aircraft Co. v. NLRB, 542 F.2d 835, 836 (10th Cir. 1976).

147 *See* Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976) ("peculiar character of labor litigation: the witnesses are especially likely to be inhibited by fear of . . . reprisal and harassment."); Local 50, United Slate & Tile Workers v. NLRB, 408 F. Supp. 520, 526 (E.D. Pa. 1976).

148 "In light of the legislative history, it is clear that the Congress did not intend to throw open the confidential files of law enforcement to the general public, and its intent to protect against disclosure of confidential information extends to material provided by any confidential source including law enforcement agencies." Church of Scientology v. U.S. Dep't of Justice, 410 F. Supp. 1297, 1303 (C.D. Cal. 1976).

B. *Damage Suits*

The most effective substantive limits on state intelligence systems are found in the laws of defamation, [from below]. Whereas existing statutory regulation merely imposes general standards of relevance on data collection, many states' tort actions[149] deal to some extent with the privacy problems discussed above.[150] However, tort actions recognize only certain types of personal damages, not including diffuse damages or damages to society. Moreover, tort suits can only be brought after the damage is done.[151] Thus, as a practical matter, tort suits can only affect certain aspects of intelligence system operations, such as methods of collection and overall breadth of dissemination of information, leaving the other aspects effectively unregulated.

Much of the information in an organized crime intelligence system is clearly defamatory because it labels the person as an individual connected in some way with organized crime.[152] That the system is just a carrier of other people's rumors does not exempt it from liability for passing them along,[153] although simple storage of defamatory information in files has been found not to be a tort.[154] Moreover, the dissemination of defamatory information to one other person is sufficient to support a cause of action.

The intelligence system authorities often will be unable to

149 Although in a number of states actions directly against the intelligence system are precluded by the lack of a Tort Claims Act, causes of action are available against unit personnel. This should produce the desired deterrence effect, even if the personnel prove largely judgment proof.

150 The exception is the inevitable problem of the secrecy of the data in the system, discussed in text accompanying notes 93-94, *supra*.

151 Since intelligence unit operations are secret, a potential plantiff is unlikely to find out about an impending illegal dissemination in time to bring a declaratory judgment action. If dissemination is not imminent, the mere likelihood of future misuse has been deemed too speculative to allow suit. Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973), *cert. denied sub nom.* FAPPC v. Kelley, 415 U.S. 948 (1974).

152 Colucci v. Chicago Crime Comm'n, 334 N.E.2d 461 (Ill. 1975) ("organized crime figure" defamatory); *cf.* Faulk v. Aware Inc., 231 N.Y.S.2d 270 (Sup. Ct. 1962) ($3.5 million damages for allegation of communism that resulted in black listing).

153 "Talebearers are as bad as talemakers," *quoted in* Cavalier v. Original Club Forest, 59 So. 2d 489, 491 (La. Ct. App. 1952).

154 Finley v. Hampton, 473 F.2d 180 (D.C. Cir. 1972) (report on friends' "homosexual mannerisms" in government personnel file, causing denial of security clearance, did not give rise to cause of action).

rely on the defense of truth in defamation actions. The need for secrecy in organized crime investigations, for example, could preclude producing in court the system's complete files on a plaintiff whom the investigation touches.[155]

A number of state courts have recognized an absolute privilege in defamation cases for police acting within the scope of duty even where "malice" is shown.[156] However, the majority of states recognize only a qualified privilege for police, looking to all the circumstances surrounding each defamatory statement.[157] An intelligence system should have no trouble fitting within even a qualified privilege as long as it restricts itself to disseminating information for law enforcement or other proper purposes[158] in a reasonable manner, without malice,[159] and in reasonable good faith as to the truth of the information disseminated.[160]

A few cases, however, have interpreted the "reasonable good faith" requirement to mean intelligence system authorities must

155 *Cf.* Black v. United States, 389 F. Supp. 529 (D.D.C. 1975) ($903,232 tort damages against the government where the Justice Dep't Organized Crime and Racketeering Section refused to divulge any files in defense).

156 *E.g.,* Munn v. Burks, 526 P.2d 1040 (Or. Ct. App. 1974) (police chief's statements to liquor licensing board about applicant); Shade v. Bowers, 199 N.E.2d 131 (Ohio Ct. Common Pleas 1962); Catron v. Jasper, 303 Ky. 598 (1946). Of course the "scope of duty" can be defined so as to exclude actions whose primary purpose is malice. By looking at the facts of each case in this way, the "absolute" privilege can be moderated into a form substantially similar to the "qualified" privilege discussed at text accompanying note 157, *infra*. The absolute privilege is also the federal rule. Barr v. Matteo, 360 U.S. 564 (1959); Scherer v. Morrow, 401 F.2d 204 (7th Cir. 1968), *cert. denied,* 393 U.S. 1084 (1969). A few states have enacted similar rules statutorily. *E.g.,* NEV. REV. STAT. § 41.034 (1965).

157 *E.g.,* Carr v. Watkins, 227 Md. 578, 585 (1961); Earl v. Winne, 14 N.J. 119 (1953); Ranous v. Hughes, 30 Wis.2d 452, 468 (1966) (citing RESTATEMENT (THIRD) OF TORTS, §§ 599-605. *See generally* W. PROSSER, TORTS 790-95 (4th ed. 1971); Annot., 13 A.L.R. 2d 897 (1950).

158 Clearly dissemination to law enforcement groups is proper. *Cf.* Nelson v. Eastern Air Lines Inc., 128 N.J.L. 46, 24 A.2d 371 (1942) (statement heard only by plaintiff and policemen not defamation). The limits on dissemination to private individuals also seem quite broad. *See* Patterson v. Phoenix, 103 Ariz. 64 (1968) (policewoman privileged to tell employer of allegations of incest by plaintiff because she needed employer's permission to speak to plaintiff while at work).

159 That there is ill-will by the police toward the plaintiff does not negate the privilege as long as dissemination is not solely for malicious reasons. Ranous v. Hughes, 30 Wis. 2d 452, 468 (1966) (citing RESTATEMENT (THIRD) OF TORTS, § 603, comment a).

160 B.C. Needlecraft Co. v. Dun & Bradstreet, Inc., 245 F.2d 775, 777 (2d Cir. 1957). Good faith may be presumed. Bonkowski v. Arlan's Dep't Store, 383 Mich. 90, 98-99 (1970). Since the qualified privilege for police applies to other torts besides defamation, Carr v. Watkins, 227 Md. 578, 582-83 (1961), the reasonable good faith defense arises in many different situations.

have "probable cause" to believe that each item of disseminated information is true.[161] Potentially this requirement would force intelligence systems to institute careful systems for checking the accuracy of data. Such a restricted conception of privileged police conduct could even open the door to suits alleging that a system's entire information-handling procedure was negligent, although no cases have yet gone this far.[162]

The threat of liability for the tort of public disclosure of private facts[163] effectively requires intelligence systems either to limit dissemination of information or to restrict its information collection practices slightly. The "public disclosure" of facts is necessary for liability to attach. Dissemination solely among law enforcement groups would clearly not constitute a "public disclosure"; dissemination of information to potential employers also probably falls short of the required level of publicity.[164] The facts circulated must also be "private," which has been interpreted to mean the facts must be sexual in nature or otherwise concern the most intimate private characteristics of conduct, such that they would be offensive and objectionable to reasonable people of ordinary sensibilities.[165]

The tort of "placing someone in a false light in the public

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161 *See, e.g.,* Altoona Clay Products, Inc. v. Dunn & Bradstreet, Inc., 367 F.2d 625, 631 (3d Cir. 1966) (citing Hartman & Co. v. Hyman, 287 Pa. 78 (1926): "a privileged communication is one . . . based upon reasonable and probable cause. . . . Want of reasonable care and diligence to ascertain the truth, before giving currency to an untrue communication, will destroy the privilege.").

162 *Cf.* Ford v. Breier, 383 F. Supp. 505 (E.D. Wis. 1974) (cause of action stated by allegation that police chief negligently failed to require procurement of search and arrest warrants); Johnson v. State, 372 N.Y.2d 638 (1975) (hospital negligently told woman that her mother had died, causing mental anguish). Such a theory would be analogous to the "reasonable care in maintaining records" requirement that some federal courts have found in the Constitution. *See* text accompanying notes 179-191 *infra*.

163 *See* N.Y. Civ. Rights Law § 51 (McKinney 1976). *But see* Yoeckel v. Samonig, 272 Wis. 430 (1956) (tort not recognized in Wisconsin). W. Prosser, Torts 804 (4th ed. 1971), terms this "truly an appalling decision."

164 *See generally* Santiestaban v. Goodyear Tire & Rubber Co., 306 F.2d 9 (5th Cir. 1962) (creditor repossessed tires off plaintiff's car while at club, humiliating him in front of friends; communication must be to public at large). *Cf.* Patterson v. Phoenix, 103 Ariz. 64 (1968).

165 The leading case is Melvin v. Reid, 112 Cal. App. 285 (1931), which involved a movie about a reformed prostitute. In Sidis v. F-R Pub. Corp., 113 F.2d 806 (2d Cir. 1940), the court held that a "where are they now" article on a child math prodigy who had not pursued mathematics and wished to be left alone was prying and embarrassing but not "intimate." *See also* Virgil v. Time Inc., 527 F.2d 1122 (9th Cir. 1975), *cert. denied,* 96 S. Ct. 2215 (1976); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).

eye" is a cause of action for disseminating technically true but misleading information.[166] Publicly releasing a list of "friends of organized crime suspects" would likely come within this tort. However, it would appear that the qualified privilege for police in defamation suits would apply to this tort as well.[167] Intelligence system authorities should thus be able to fulfill their essential purpose of providing intelligence to law enforcement groups and still avoid "false light" liability.

Finally, the torts of trespass and intentional invasion of privacy provide some limits on police surveillance and harassment.[168] Although an intelligence system seems unlikely to face suits of this sort except possibly to the extent it uses its own investigators in gathering information, the existence of the system may still serve to escalate damages. For example, in *Black v. United States*,[169] the plaintiff obtained over $900,000 in damages for a tortious F.B.I. wiretap which caused a Justice Department intelligence system to label him an "organized crime figure."[170]

C. *Constitutional Limits*

Constitutional limits on an organized crime intelligence system's handling of information can potentially be applied at three points in the system's operation: at the points of collection, maintenance, and dissemination. These potential constitutional limits, however, are unlikely to operate as significant restraints on intelligence system operations.

First, at the point of collection, there are two sets of restraints. One is the limitations on the use of unconstitutionally collected evidence through the exclusionary rule,[171] the *Alder-*

166 The information disseminated need not be as "intimate" as that required for liability for disclosure of "true" private facts. *See* Dietemann v. Time Inc., 284 F. Supp. 925 (C.D. Cal. 1968) (labelling person as a "quack"); Pinkerton Nat'l Det. Agency v. Stevens, 108 Ga. App. 159 (1963) (detectives shadowing a person on the street).

167 Carr v. Watkins, 227 Md. 578, 582-83 (1961).

168 The action complained of must be "truly intrusive" and designed to elicit information not available through normal inquiry or observation. Nader v. General Motors, 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970); Pearson v. Dodd, 410 F.2d 701 (D.C. Cir. 1969). *See generally* A.E.L.E., *supra* note 108, at 74-76; Bloustein, *supra* note 89.

169 389 F. Supp. 529 (D.D.C. 1975).

170 The case was set for rehearing to allow the government to prove intervening causes for the damages.

171 *See* Mapp v. Ohio, 367 U.S. 643 (1961).

man rule that the government must disclose wiretaps conducted against a defendant,[172] and the fruit of the poisonous tree doctrine.[173] The other involves the threat of a private right of action for damages against federal agents created by *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.[174] While these two restraints do provide incentives for an intelligence system to avoid illegal collection of information, they are aimed at the performance of police investigators in the field, and not at the handling of information by the system.

Second, the maintenance of information in an intelligence system's files can be limited by constitutional challenge to the information's content. The American Civil Liberties Union, for example, has successfully employed the theory that information about political activities and associations is protected by the first amendment.[175] A number of judges have applied this theory in ordering large intelligence systems to submit files for inspection so that the judge may order the destruction of material found to concern the political activities of citizens neither engaging in nor suspected of criminal activity.[176]

Recent actions have attempted to broaden the principle of the sensitivity of political information by asking courts to forbid the maintenance of all "non-criminal" information in individ-

172 Alderman v. United States, 394 U.S. 165 (1969).

173 *See* Wong Sun v. United States, 371 U.S. 471 (1963). The F.B.I. had to clean out its files completely after two Organized Crime Strike Force cases were blown by illegal wiretaps. Schur, *supra* note 48. *See* United States v. Schipani, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 992 (1970).

174 403 U.S. 388 (1971). *Bivens* involved a search violating the fourth amendment. The Third Circuit Court of Appeals, however, has held that first amendment violations also would support a private action against an agent. Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).

175 *See* Shattuck, *Tilting at the Surveillance Apparatus*, 1 CIV. LIB. REV. 59 (1974); ACLU PROJECT ON PRIVACY AND DATA COLLECTION, THE PRIVACY REPORT (periodical, 1973-76).

More general first amendment attacks on criminal intelligence systems, however, have failed. Laird v. Tatum, 408 U.S. 1 (1972), refused to find that the very existence of a surveillance program could be challenged for its chilling effect on free speech, and Anderson v. Sills, 56 N.J. 210 (1970), held that the simple existence of statewide intelligence files on political protest groups similarly failed to violate first amendment rights. *See generally* Comment, *Chilling Political Expression by Use of Police Intelligence Files: Anderson v. Sills*, 5 HARV. C.R.-C.L. L. REV. 71 (1970); Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970).

176 *See, e.g.*, Handschu v. Special Services, 349 F. Supp. 766 (S.D.N.Y. 1972) (pending *sub nom.* Handschu v. Murphy); Alliance to End Repression v. Rochford, Civ. No. 74-C-3268 (N.D. Ill., preliminary injunction granted, Nov. 10, 1976); Greater Houston ACLU v. Welch, Civ. No. 74-H-59 (S.D. Tex., question of class status certified for appeal, Oct. 1, 1976); Turbeville v. Goodman, Civ. No. C-C-74-47 (W.D.N.C.).

uals.[177] This attempt faces a conceptual difficulty, since the first amendment basis of the underlying theory suggests that it can be extended to prohibit only the maintenance of non-criminal information about people who come to the attention of the police primarily because of their political activities and associations. Courts in the ACLU cases have in fact been willing to allow information even as to purely political activities to be kept in intelligence files when it concerns individuals suspected of criminal activity.[178] Therefore, this constitutional limitation on the maintenance of information should have little impact on the operation of organized crime intelligence files.

Third, a constitutional limitation on the dissemination of intelligence system information is suggested by a recent line of cases in the District of Columbia Court of Appeals. In *Menard v. Saxbe*,[179] the court held that 28 U.S.C. § 534 (1970), which directs the Attorney General to collect and classify criminal information, implied a duty on the part of the F.B.I. to consider responsible information that a previously submitted arrest record was inaccurate and should not remain in F.B.I. files.

This implied statutory duty to safeguard the accuracy of material held for dissemination was expanded in *Tarlton v. Saxbe*.[180] There, Judge Bazelon read § 534 to probhibit the F.B.I.'s dissemination of inaccurate records unless it has taken reasonable precautions to ensure their accuracy.[181] The holding is explicitly based solely on statutory grounds.[182] Judge Bazelon noted, however, that two of the reasons he listed for implying a statutory duty (that Congress did not intend to give

177 *See, e.g.*, Greater Houston ACLU v. Welch, *supra* note 176. The impact of such a constitutional rule would go far beyond that imposed by the Freedom of Information Act because the remedy is not public disclosure of the information but rather its eradication from system files.

178 *See, e.g.*, Holmes v. Church, Civ. No. 70-5691 (S.D.N.Y. 1971) (motion to broaden relief to include all people or groups in New Rochelle engaged in political protest activities denied). In Avirgan v. Rizzo, Civ. No. 70—477 (E.D. Pa. 1970), the court distinguished between having information on political affiliations in criminal history records and keeping it in secret intelligence files. *But see* § 303 (e) of the Model Act, *infra*.

179 498 F.2d 1017 (D.C. Cir. 1974).

180 507 F.2d 1116 (D.C. Cir. 1974).

181 The determination of what constitutes reasonable precautions in this context was left up to the District Court on remand. That court's suggested precautions were minimal. 407 F. Supp. 1083 (D.D.C. 1976).

182 507 F.2d at 1124-25.

the F.B.I. the authority to libel or to defame) "refer to the value of individual privacy," as expressed in the first, fourth, and fifth amendments to the Constitution.[183]

Next, Judge Skelly Wright, upholding in *Utz v. Cullilane*[184] a challenge to local law enforcement dissemination procedures, picked up Judge Bazelon's constitutional hint and expanded it in dicta.[185] The plaintiff had argued that the routine dissemination of arrest records to the F.B.I. unnecessarily violated his constitutional rights, because the F.B.I. would redisseminate the information for non-law enforcement purposes such as employment and licensing. Judge Wright agreed, and found that the interference was primarily with the rights to a presumption of innocence and to due process.[186]

Thus, the D.C. Circuit suggests a constitutional limit prohibiting the dissemination of inaccurate information for a non-law enforcement purpose and without reasonable safeguards.[187] However, even this limitation is unlikely to impinge significantly upon the functioning of an organized crime intelligence system. The system's need to conceal from organized crime suspects the nature of the information it possesses about their activities militates against the dissemination of that information to non-law enforcement entities.[188]

In *Paul v. Davis*,[189] moreover, the Supreme Court blunted the development of this theory. The case involved the public circulation of a list of shoplifters which included the plaintiff, who had been arrested for shoplifting but never prosecuted. The Court's opinion, written by Justice Rehnquist, rejected the claim that the false publication deprived the plaintiff of "liberty" or "property" as protected by the fourteenth amendment. The Court held that damage to reputation alone, with no accompanying injury to legal status such as loss of government

183 *Id.* at 1124.

184 520 F.2d 467 (D.C. Cir. 1975).

185 The actual holding was based on narrow statutory grounds. 520 F.2d at 483.

186 *Id.* at 478-81. A constitutional right to privacy was treated in a footnote. *Id.* at 482 n.41.

187 A Pennsylvania District Court earlier endorsed precisely this theory, based on a right of privacy. United States v. Dooley, 364 F. Supp. 75 (E.D. Pa. 1973). However, the court refused to order expungement, and the source of the privacy interest to which the court referred is unclear.

188 *See* note 55, *supra,* and text accompanying notes 231-35, *infra.*

189 96 S. Ct. 1155 (1976).

employment, is an insufficient ground for invoking due process.[190] Despite the public stigma, the impact on his present employment, and the possible impairment of future employment, the plaintiff had suffered no harm to a constitutionally protected interest. He had done no more than arguably make out a claim under state defamation law.[191] While much of the *Utz* dicta may still be maintained despite *Paul* on an equal protection/rational basis theory, the more potent due process right to privacy may not survive.

D. *Inadequacy of Present Legal Controls*

Present legal controls on organized crime intelligence systems are inadequate to protect individual privacy. In most respects, administrative self-restraint provides the chief safeguard from abuse.[192] Furthermore, the lack of any external regulation of the procedures for processing information used by these systems can impair their law enforcement efficiency as well. The absence of any legislative regulatory structure forces courts to deal with administrative abuses by fashioning doctrines which can have serious unintended adverse effects on system operations. For example, loosening the rules limiting discovery of information held by the system could seriously compromise many files.[193] Similarly, efforts to broaden court-ordered remedies such as equitable expungement to include all records held by law enforcement agencies are more likely to be successful when no administrative or statutory remedies are available.[194] Finally, the existing legal restrictions on organized

190 *Id.* at 1163-67. Wisconsin v. Constantineau, 400 U.S. 433 (1971), was distinguished because there the damage caused by public posting of the names of dangerous drinkers was not solely to reputation. In addition there was a deprivation of a right "held under state law — the right to purchase or obtain liquor in common with the rest of the citizenry." Paul v. Davis, 96 S. Ct. 1115, 1164 (1976). The dissent in *Paul* argued that allowing unlimited police branding of suspects rendered the protection of a criminal trial system a sham. *Id.* at 1169-74.

191 *Id.* at 1159-66.

192 "[G]iven the vagueness and flexibility of the laws under which the government's surveillance apparatus operates, legislation may be essential to deal effectively with these issues. The difficulties in framing and bringing an anti-surveillance lawsuit to a conclusion represent in themselves a compelling reason for legislative action in this area." Shattuck, *supra* note 175, at 71.

193 *See* Doe v. Schneider, Civ. No. 75-38-C6 (D. Kan.) (action to notify persons named in files about to be destroyed of their inclusion so that they have right to pursue possible legal remedies for invasion of privacy).

194 *See* notes 42, 176 *supra*.

crime intelligence systems are too vague and diffuse to guide even a conscientious system administrator in balancing the interests of privacy and efficiency at stake in the implementation and operation of an intelligence system.

V. One Legislative Solution

It is the contention of this article that the existing legal vacuum can be filled by states enacting legislation setting standards and procedures for the handling of all information that is believed to relate to the possible commission of future illegal acts by particular named persons. Title 4 of the following Model Statute provides one possible approach for such legislation.[195] In addition, in states where it appears that organized criminal activity is a serious problem that cannot be adequately dealt with in any other manner, and where this activity is believed to cover broad geographical areas roughly contiguous with the state's boundaries, states should consider creating the analytical organized crime intelligence system established by Titles 2 and 3 of the Model Statute.

Alternatively, if legislative action is not politically possible, the intelligence unit could be implemented by adopting Titles 2 and 3 as administrative regulations. However, the privacy safeguards built into the intelligence system would be better protected by statutory enactment than by regulations subject to amendment by system administrators. Moreover, a major factor in a court's consideration of the reasonableness of an intelligence system's procedures would be a legislative mandate for the procedures.[196]

Five areas that are of primary importance in the design of a state organized crime intelligence system must be discussed before presenting the statute itself.

A. *Increasing Police Awareness of Privacy Concerns*

No form of statutory regulation can prevent conscious, bad-faith attempts by police to abuse the system to invade an indi-

195 This proposal assumes the state has enacted an equivalent of at least the pre-1974 version of the federal Freedom of Information Act, which would cover information that police do not reasonably believe is related to law enforcement. After enactment of the Model Act, the state would then be regulating all state government-held information except national security intelligence, which remains of necessity a federal problem.

196 *See* Paton v. LaPrade, 524 F.2d 862, 869 (3d Cir. 1975).

vidual's privacy. It is submitted that this type of behavior by police is unlikely, and does not amount to a serious threat. The primary privacy threat stems, instead, from an inadequate understanding by police as to the impact on the individual of entering many small pieces of information into the system, thereby building up a file on someone who perhaps should not be in the system at all. Moreover, the organizational impetus of law enforcement agencies inevitably subordinates privacy considerations to their traditional role of crime suppression. The Model Act is designed to counter these tendencies by building privacy safeguards into the structure of the intelligence unit as integral parts of the information-processing procedure, and by structuring that procedure so that privacy concerns are continually confronted directly. Then privacy safeguards can be bypassed only by a conscious decision to disregard them.

The Model Statute employs two methods to force confrontation of privacy considerations. First, individuals with a commitment to privacy interests as well as traditional law enforcement considerations are inserted at strategic points in the channel of information flow. The system staff includes both a legal advisor and a semi-independent privacy protection auditor.[197] An independent oversight committee similar to the one in Iowa[198] also could be added. The primary purpose in creating these positions is less to enforce privacy standards directly than to encourage the intelligence unit director, through informal consultation, to keep privacy in mind in decision-making.[199]

Second, the flow of information is structured so that at defined points along the route each item of information is assessed in relation to written standards that tie directly into privacy concerns. This extends privacy protection considerations to all aspects of system operations rather than to just police investigations and data dissemination, as under present legal controls. On the other hand, this bureaucratization of the information handling process inevitably cuts efficiency and

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197 *See* §§ 204, 206 of the Model Act *infra*.

198 IOWA CODE ANN. § 749B.19 (West Supp. 1975). The Iowa committee does not have the authority to see any actual criminal intelligence data.

199 *See* § 206 of the Model Act *infra*, and the Comment accompanying § 206.

flexibility and should not be carried to extremes. The purpose is to require consideration of privacy effects, not to generate paperwork.[200]

B. *Input*

The data input stage is the most critical point for protecting privacy. The best way of preventing the dissemination of improper or irrelevant information and the branding of innocent people is to keep such information out of the system altogether. In addition, careful coding of information at the input stage allows the creation of automatic, non-discretionary dissemination. Finally, to the extent that standards are imposed at the input stage, when the unit is dealing directly with the police providing information to it, the system will tend to give regular feedback to police investigators as to what kinds of information and surveillance practices are improper and should be avoided. In this manner the system may serve to offset the increase in surveillance that its creation should encourage, and may have a greater impact on day-to-day police practices than is produced by judicial doctrines such as the exclusionary rule.[201]

The approach of the Model Statute to input controls is multifaceted. First, the sources of information that can be entered into the system are left unregulated.[202] This is necessary to maintain the flexibility needed for imaginative and effective police investigation.[203]

Second, privacy-related policy considerations extrinsic to the need for law enforcement efficiency require that limited restrictions be placed on the methods of collection of information.[204]

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200 Lawyers might prefer a written record to make prosecuting and defending civil suits easier. However, this interest seems outweighed by the loss of efficiency and possible resentment detrimental to privacy protection engendered by having constantly to fill out forms.

201 Not only are court proceedings more disruptive of police procedure than restraints built into departmental administration, but studies indicate that court-imposed rules do not have nearly as much effect on actual police practice as do rules laid down by police administrators. *See* J. Q. WILSON, VARIETIES OF POLICE BEHAVIOR, ch. 4 (1968).

202 *See* § 302 of the Model Act *infra*.

203 Recent revelations of widespread use by the F.B.I. of journalists as confidential informants suggest that public policy concerns other than individual privacy may warrant limitations in this regard. *See generally* CHURCH COMMITTEE REPORT, *supra* note 7.

204 For example, doctrines of justiciability, such as standing and ripeness, have been

One must be careful here not to go too far in restricting what relevant and reliable information the system can maintain. However, it would seem prudent to prohibit the system from accepting information collected by methods that are already coming under legal attack, such as the use of information collected because of the religion or politics of the person to whom the information relates,[205] the use by police of *agents provocateurs,*[206] and random surveillance absent any suspicion of wrongdoing.[207] Certainly those restrictions on police surveillance methods which the legislature deems improper or illegal should be fully enforceable at an early point in order to avoid waiting until after dissemination, when the damage is already done.

Finally, the Model Statute employs a system of input standards and controls for the screening of incoming information on an item-by-item basis. The concept is to treat reports from the field not as single pieces of data for the files, but rather as conveying numerous items of information, each with a different potential value and use. Combining bad information in a report with good should not provide a basis for entering the bad information into the system. Moreover, since courts have been quick to require such item-by-item distinctions to be made in Freedom of Information Act and expungement cases,[208] the system might as well sort out its files accordingly right from the start.

Once field reports have been broken down into individual

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used by courts to allow police and other groups to violate various constitutional provisions regarding government surveillance without effective legal redress by anyone. While these doctrines may be necessary for the effective functioning of a judicial system, an intelligence unit is in a position to have a more direct, administrative influence on police investigation, or at least to minimize the harmful impact on a person of information improperly collected concerning him, by refusing to accept items of information collected in certain ways or about certain things. *See* § 302(a) of the Model Act *infra*.

205 *See generally* Shattuck, *supra* note 175; Askin, *supra* note 175.

206 *See* § 302(a)(6) of the Model Act *infra*. *See* Kent State V.V.A.W. v. Fyke, No. C 72-1271 (N.D. Ohio) (agent offering guns to protest group and exhorting them to "kill the pigs").

207 § 302(a)(4) of the Model Act *infra*. *See, e.g.,* People v. Collier, 85 Misc.2d 529, 376 N.Y.S.2d 954 (Sup. Ct. 1975) (criticizing police for putting an agent into an area to gather "general information" without any reasonable suspicion of wrongdoing).

208 NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 164-65 (1975), and cases cited in notes 140, 142 *supra*. *Cf.* Greater Houston ACLU v. Welch, note 176 *supra*.

items, each item must satisfy minimum input standards of relevance and reliability.[209] All existing organized crime intelligence systems accept these two concerns to some extent.[210] However, the lack of external regulation in the organized crime area has meant that in practice some intelligence systems enforcing tight restrictions on information concerning political subversives follow a policy of "all the information we can get"[211] when it comes to organized crime. The problem here is that while the concerns of law enforcement efficiency and privacy both dictate including only reliable and relevant information in the system, the terms "reliable" and "relevant" are inherently too vague to allow formulation of clear standards. Although input standards expressed in those terms are included in the Model Statute[212] because they are necessary and helpful, what really is needed are alternate methods of controlling the information to be allowed in the system so as to strike a clearer, steadier balance between efficiency and privacy.

The approach of the Model Statute is categorization. The premise is that the system's capacity effectively to "brand" people as criminal figures, including people on whom the police have no information at all as to criminal activity, is a primary concern. The careful categorization of information at the input stage can deal with the problem early on, without its ever reaching the dissemination stage.

The Model Statute creates two kinds of categories, and law enforcement agencies must request information from the system by category.[213] The first kind are categories tied directly to specific illegal activities. Local police needing to know about loansharking in their area, for example, can obtain all information about it contained in the system, including the names of persons actually suspected of loansharking activity, but *not* the

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209 *See* § 304(a), (b) of the Model Act *infra*.

210 *E.g.*, ILLINOIS BUREAU OF INVESTIGATION, CRIMINAL INTELLIGENCE DIVISION GUIDELINES 4 ("... relevant to an organization or person or persons suspected of being or having been involved in activities which violate the criminal laws. ..."); NEW JERSEY STATE POLICE, INTELLIGENCE BUREAU MANUAL 15 (July 1, 1975) ("Information of this nature ['fairly reliable,' 'not usually reliable,' 'reliability cannot be judged'] ... *will not* be disseminated.").

211 This comment came from the director of a large intelligence unit.

212 *See* § 304(a), (b) of the Model Act, *infra*.

213 *See id.*, §§ 303(c), 311.

names of their casual associates. The second kind are categories about people suspected of organized criminal activities, with special standards for labeling a person as a "suspect."[214] When local police are investigating a particular loanshark, they could request information on his criminal associates or his social and business associates. The information then provided would include names and identifying information regarding people not directly suspected of organized criminal activity, since there would be a legitimate need to know of them. However, local police could not obtain systematic, collated information on the lives of anyone not actually suspected of organized criminal activity. Furthermore, no category could be created which treats the political or religious opinions or the nature of the sexual activities even of a suspect.[215] Thus individual privacy should be protected at the cost of minimal impairment of law enforcement efficiency, since these categories should provide investigators with what they want to know, while preventing dissemination of information they do not need to know.

Two special issues concerning the input of information are analysts' reports and "data surveillance." Analysts will need considerable flexibility to use information in the system's files in ways that would be prohibited to police in the field. Thus an analyst might well want to retrieve all information on a non-suspect to study how that person's pattern of observed activities compares to that of particular suspects. This should not be a problem as long as the analysts' own private files of information and hypotheses do not include irrelevant, unreliable, or improper information, and as long as analysts cannot be used to bypass normal dissemination standards and procedures. Special provision must be made, however, for the screening and categorizing of the various hypotheses and conclusions that analysts will produce where these constitute not just summaries of information in the system's files but "new" information resulting from analytical study.[216]

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214 *See* §§ 303(c), 304(f), 311 of the Model Act, *infra*.

215 *See id.* § 303(e).

216 An enormous loophole could develop in any purging system if an analyst could take two outdated sightings of two criminal figures together, conclude that they are "associates," and enter this new information into the files as a "current" conclusion. *See* § 306 of the Model Act, *infra*, for one solution.

The practice of "data surveillance" — randomly collating public record data such as real estate records so as to produce intelligence information — poses a special problem in deciding whether such information should be deemed "improper." At present this practice is entirely legal, and the Model Statute makes provision for it, though only when conducted by the system's own analysts and with further reservations in the commentary.[217] Should the legislature decide to prohibit intelligence systems from maintaining information obtained by random physical surveillances conducted without any suspicion of wrongdoing,[218] it would be a logical extension also to prohibit random collation of written records on people. The latter is not usually termed "surveillance," but that is mere semantics. Both practices appear to involve the use by the police of information about people that is in the public domain but which goes beyond those people's expectations when they ventured into the public eye. An intelligence system's setting up a camera on Main Street for the sole purpose of randomly gathering data on non-suspects appears no different from its randomly collating all the records of the local registrar of deeds. On the other hand, in both cases the action seems more justifiable where the investigators have some other legitimate reason to be conducting the surveillance or where they have some reason to think that evidence relating to illegal activity will be uncovered.

C. *Computerization and System Security*

The computerization of an intelligence system does not necessarily create any new privacy problems, except insofar as the resultant increase in system efficiency will aggravate existing concerns. However, if police administrators unfamilar with the limitations of computer technology fail to take sufficient precautions, serious breaches in system security could occur. Such security leaks could prove hazardous to confidential informants,[219] and could result in intimate information about people in the system being exposed to the public.

The basic problem is the natural tendency of police adminis-

217 *See* § 306(c) of the Model Act, *infra*.
218 *See id.*, §§ 302(a)(4), 403(c)(4).
219 *See* note 55, *supra*.

trators to take computer salesmen at face value when they explain that the computer's executive programs, which include software devices such as passwords, "trapdoors," subsystems, and protection rings, can fully safeguard a data base in a multi-user computer system from unauthorized access.[220] It is true that executive programs can successfully prevent someone from accidentally reaching the intelligence files. It is also true that a computer can automatically produce audit trails of the use of the data base and can perform many other checks to help administrators oversee the work of intelligence unit personnel. However, no software system exists, or could be designed, that can prevent a trained person with malicious intent from eventually reaching both the data base and all the programs controlling the intelligence system.[221] The data in a computer is stored in the form of configurations of electrical switches — intelligence data is not and cannot be physically separated from other data. If one reaches the executive program in an intelligence system one could remove, add, or alter any data in the system's files, and could change the audit trail programs so that no one would ever know a change was made. One could even alter the intelligence system's operation programs so that they would, for example, automatically erase any information entered which concerns specific activities. Just how easily this can be accomplished was demonstrated in 1974 by a group of Navy scientists who reached and copied files from a supposedly secure system used by the federal government for defense secrets.[222]

Thus any computerized system is only as secure from *intentional* breach as the physical security of its computer terminals. If an intelligence system uses the same computer hardware as a criminal history records system, putting locks and guards at the intelligence unit's doors is meaningless if less security is provided at any criminal history terminals having programming

220 *See, e.g.,* Saltzer, *Protection and the Control of Information Sharing in Multics,* 17 COMMUNICATIONS OF THE ACM 388 (1974). *See generally* L. HOFFMAN, SECURITY AND PRIVACY IN COMPUTER SYSTEMS (1973).

221 *See* Short, *Threats and Vulnerabilities in a Computer System,* 5 DATA SECURITY AND DATA PROCESSING 29 (IBM Publication E320-1375, 1974).

222 Anderson, Computer Experts Using Ordinary Telephone Crack 'Secure' Univac File System, Boston Globe, May 20, 1976, at 45. The full report of their operation remains classified.

capabilities.[223] If the intelligence files are kept on a computer shared with the Registry of Motor Vehicles, "security" becomes a myth. One simply cannot assume that people involved in organized criminal activities cannot acquire computer expertise.

An additional problem is breaches of security through wiretapping. It is not much more difficult to tap into a line to a remote computer terminal than into a telephone line. Once tapped, however, the computer line provides entry into the entire intelligence system data base. There are measures that can be taken to minimize this problem, such as coding techniques and leaded and buried cable,[224] but the only effective method is to use a computer wholly dedicated to intelligence system use and to keep all terminals in the same physically secure location.[225] Information can then enter the unit by courier, secure teletype, telephone, or other means without the risk of someone obtaining access to the entire system.

D. *Dissemination Standards*

The main privacy problem all output controls attempt to address is the over-broad dissemination of the private information about people which is contained in the system. The breadth of dissemination called for by privacy considerations is a good bit narrower than the limitations imposed by security fears that overly broad dissemination will allow information to fall into the hands of organized crime figures. As with system security, however, the two concerns of privacy and law en-

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223 This points up a weakness in the Director of the New York state identification system's statement that he opposed LEAA's requirement that criminal justice systems be "dedicated" to law enforcement use, but that he did strongly support a requirement of "criminal justice management control over that portion of a shared system which contains criminal justice information." A. D'Alesandro, in 5 LEAA Newsletter, No. 5, p. 3 (Dec. 1975). Of course, there may not be as great a danger of intentional breaches of an investigative system, in which case software controls and separate management might indeed prove adequate.

224 *See* Anderson, *Information Security in a Multi-User Computer Environment*, 12 ADVANCES IN COMPUTERS 1 (1972). *See also* note 220 *supra*.

225 §§ 308, 402 of the Model Act *infra*, require that criminal intelligence information, if computerized, be stored in a computer dedicated to law enforcement (Title IV) or Organized Crime Intelligence Unit (Title III) purposes. Practical methods for physical security of an intelligence unit can be found in HARRIS MANUAL, *supra* note 47, Appendix E (Security).

forcement efficiency do overlap somewhat and may be treated together.

The flow of information envisioned by the Model Statute is not significantly different from that in existing analytical systems.[226] Only members of the state intelligence unit would have direct access to the files,[227] and only screened and categorized data, as distinguished from unprocessed field reports, would be available to tactical police units. User agencies would request information by category, stating an intended use for the information. In addition, the Model Statute makes some attempt to offset the tendency of local police to treat the system's reports as somehow unduly reliable because they are written and "official" (a tendency doubly aggravated where the information comes from a computer) by requiring reports to include warnings after each item of information as to its age and reliability.[228] Finally, limited provisions are made for sending out update reports and analysts' new hypotheses and conclusions, and also for the emergency dissemination of information when the analysts learn or conclude that a particular person is in danger.[229]

The dissemination issue that has been the most difficult to resolve is what agencies will be allowed to receive information from the system. Dissemination to law enforcement agencies raises few problems as a policy matter as long as measures are taken to limit misuse and "browsing" through files.[230] However, dissemination to four other types of agencies has already provoked significant controversy and litigation: namely, dissemination to private and governmental employers, to researchers, to prosecutors and parole boards, and to other intelligence systems.

Freely providing reports to private employers for checking out employees other than security guards both evidences leaky system security and impinges on employees' privacy; it must be

226 *Compare* HARRIS MANUAL, *supra* note 47, ch. 2 & 3, *with* §§ 311-314 of the Model Act, *infra*.

227 How such a requirement can break down in actual practice if not strictly enforced is illustrated by the tendency of NYSIIS to allow certain "trusted" police officials direct access to files. *See* DATABANK STUDY, *supra* note 28, at 312-14.

228 *See* § 314(b) of the Model Act, *infra*.

229 *See id.*, §§ 313, 318.

230 *See* text accompanying notes 149-170 *supra*; Model Act §§ 311, 312 *infra*.

proscribed.[231] On the other hand, the system does have a direct interest in ensuring that people associated with organized criminal activities are not hired to run the intelligence system, to fill executive positions in state law enforcement agencies, or to sit as judges overseeing suits against the system. Thus the provision of reports on candidates for such positions is vital to efficient operation of the system itself, and proper exceptions are made in the Model Statute.[232]

The dissemination to public employers of data on tax investigators, police patrolmen and other law enforcement officials who have no direct relation to the investigation of organized criminal activities presents a difficult intermediate situation. An equally difficult question concerns dissemination to non-law enforcement government agencies for uses other than employee checks. As one system director has pointed out:

> These agencies often have a clear and articulable interest in obtaining files in order to discharge their organizational mission. For example, an agency is contemplating awarding a grant to, or entering a contract with a person or business which has a history of being involved in schemes to defraud the government. The information contained in the intelligence files may well reflect, not convictions, but patterns of association from which reasonable inferences of involvement can be drawn.[233]

Such situations are difficult because they raise the specter of a system which serves primarily to ferret out details of employees' private lives or to blacklist government contractors by labelling them as fronts for organized criminal activities, rather than concentrating on the investigation and arrest of criminal figures. The potential for abuse is enormous, not to mention the system's possible exposure to liability for defamation if the information turns out to be false.

Even where there is no risk of incurring legal liability, the system should be perceived not as a resource for all "good" (or

231 *See* § 312 of the Model Act *infra*.

232 These are the only job checks allowed through the system by the Model Act. *See id.*, § 312(a)(1).

233 Wayne Kerstetter, then Superintendent of the Illinois Bureau of Investigation, Police Intelligence Guidelines: A Response to Legal and Legislative Challenges (paper presented at the National Organized Crime Conference, Washington, D.C., Oct. 1-4, 1975).

even all law enforcement) uses, but as a special law enforcement unit attempting to help arrest and convict people actually engaging in organized criminal activities. There is a tendency, once information is compiled and ready to use, to find other ways to put it to "good use." If this tendency is not constantly resisted, an organized crime system could rapidly degenerate into a government clearinghouse for defamatory rumors of all sorts.

The intent of the Privacy Act of 1974 was to limit an expansion of the use of other government files.[234] Particularly in the context of sensitive intelligence information, this tendency should be suppressed entirely, with the single exception of dissemination of data on candidates for judicial appointment. Employees of the government not directly engaged in criminal work should be given the same protections as employees in the private sector. Finally, conceptions of organized crime as a grand national conspiracy also should not lead an intelligence unit to believe that its role is to do everything possible to frustrate the activities of the "Mafia," rather than to focus on aiding investigations of specific criminal activities.[235]

Such a conception of the system's files as existing solely for the purpose of investigating specific organized criminal activities, rather than the broader vision of attacking "organized criminals," also aids consideration of the next two dissemination problems. Dissemination for research use may be useful to supplement the work of a system's analysts and to gain fresh perspectives. As long as the researchers are simply consultants whose work is internal to the system's functioning, dissemination to them seems sensible and legal challenge may be avoided.[236] However, privacy considerations should warrant further restrictions not only tying their work to specific system objectives but also preventing the release to researchers of any data from which individual identities can be derived.[237]

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234 "The purpose of this Act is to . . . (2) permit an individual to prevent records pertaining to him obtained by such agencies for a particular purpose from being used or made available for another purpose without his consent." PUB. L. No. 93-579, § 2(b)(2), 88 Stat. 1897.

235 *See* text accompanying notes 68-87 *supra*.

236 *See, e.g.*, Bailey v. Affleck (R.I. Sup. Ct., TRO denied, 1975) (use of untrained volunteers to screen welfare files proper because they work for the state agency and are thus "internal").

237 *See* § 315(a) of Model Act *infra*. *See also* HEW REPORT, *supra* note 5, ch. 5 & 6.

Providing information to prosecutors and summary reports to parole boards also relates sufficiently to the system's objectives. The purpose is not just to arrest criminal figures but also to convict and jail them. Reports to parole boards must be kept to a minimum, however, both in frequency of use and in detail of information provided. Not only are parole boards potential sources of leaks, but their files are not "investigative" and thus have been found to be publicly available under a version of the Freedom of Information Act following the 1974 federal amendments.[238] Moreover, a good case can be made for preventing all dissemination for use by parole boards or in making up pre-sentence reports. Flooding the criminal justice process with large amounts of hearsay material and analysts' inferences could distort the process into a system where punishment turns more on police suspicions than on the seriousness of proven crimes. Absent reform on the fundamental flaws in present sentencing and parole procedures,[239] legislators might wish to keep any fledgling state organized crime intelligence system out of this morass.

In assessing the final problem area, dissemination to other intelligence units whose only intended use is storage, analysis, and redissemination, a distinction must be made between those within the jurisdiction of the state system and outside systems. In theory, local intelligence systems should be unnecessary since they would only duplicate state files. However, effective operation of a state intelligence system requires extensive cooperation with local police. Given the likely continuance of mutual suspicion between law enforcement agencies, local police would likely be uncooperative if the state attempted to abolish their own local intelligence units. On the other hand, extensive dissemination to such local units need not raise serious privacy problems as long as any redissemination by those units is strictly local and the local intelligence unit's files are

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238 Philadelphia Newspapers, Inc. v. U.S. Dep't of Justice, 405 F.Supp. 8, 11 (E.D. Pa. 1975). The court further noted that even if reports submitted to parole boards were somehow "investigative", they still could not be said to jeopardize in any way a legal proceeding if released, referring to 5 U.S.C.A. § 552(b)(7) (West Supp. 1975).

239 *See* Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972). A number of case studies illustrating the distortions caused by unclear standards and an excess of "soft" information are found in J. REMINGTON, CRIMINAL JUSTICE ADMINISTRATION, ch. 12 (1969). *See also* Parole Project, *supra* note 12.

themselves reasonably regulated, as by Title 4 of the Model Statute.

Similar regulatory controls on out-of-state systems are not possible. While the system can require certain minimal safeguards, such as limiting redissemination to certain specified purposes and requiring regular updating and purging of files, it would have no way to enforce its requirements except by refusing to give information in the future. Yet, given the importance of regional cooperation in dealing with organized criminal activities, it may be necessary to allow the system to enforce its safeguards on an *ad hoc* basis.

A different twist is provided in the case of federal intelligence systems to the extent that they can argue that their statutory mandate pre-empts the state system's safeguards under the Supremacy Clause of the Constitution.[240] However, for several reasons this is not likely to pose a serious problem in the near future.

First, the F.B.I. is not explicitly given pre-emptive status vis-à-vis the states, and only a weak argument can be made that a vague congressional statement creating the agency[241] could be interpreted to override clear state statutory policies of protecting individual privacy. Second, Congress may now be aware of this problem. One of the major findings of the Church Committee was that controls on dissemination and retention of information are inadequate.[242] The Committee recommended rather strict limitations on maintenance and dissemination of information.[243] Finally, as a practical matter, the inherent mistrust between law enforcement agencies should tend to minimize any tendency of state systems to freely pass information on to the F.B.I. unless compelled to by the federal gov-

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240 U.S. CONST. art. VI, cl. 2.

241 The F.B.I.'s statutory authority to maintain records is quite vague. 28 U.S.C.A. § 534. So is that of the Small Business Administration, 15, U.S.C. § 637, but the S.B.A. made this very argument in the context of criminal history records in Small Business Administration v. Commonwealth of Massachusetts (D. Mass., filed July 1973, voluntarily dismissed, 1973). It should be kept in mind as it might apply to intelligence files in the future. Of course intelligence information provides an even weaker case for preemption than criminal history records since there is no finite category of historical information involved but just a file of scattered observations.

242 2 CHURCH COMMITTEE REPORT, *supra* note 7, at 253.

243 *Id.* at 330-31.

ernment. Nevertheless, without federal legislation, one can never fully protect against the possible vitiation of the system created by the Model Statute resulting from the fact that the F.B.I.'s controls on dissemination of information remain less strict than those of the Model Statute.

E. *Role of Courts in Enforcement*

It is of the essence of a legislative approach to intelligence systems to bring the courts into the process to some extent rather than relying wholly on administrative self-restraint. On the other hand, care must be taken that systems not be disrupted by harassing law suits, or secrecy effectively eliminated by allowing discovery of the system's contents by the very criminal figures being investigated. *In camera* inspection is not a panacea since it cannot wholly replace adversary discovery and raises the additional problem of varying levels of enforcement between different judges.

One approach not followed in the Model Statute would be to specify the courts which could handle suits against the system, thus developing judges with more expertise concerning its attributes and needs and producing more consistent decisions. One might even carry this a step further by requiring all suits to be tried by the system's oversight agency, with court review only of questions of law and of facts for substantial evidence.[244] However, one cannot be sure that an agency really would be more protective of the system and less prone to leaks (or even more consistent) than a court with judges appointed for life and thus more independent of political pressures.[245]

A second approach would be to limit the class of people who could bring civil suit for violations of the statute to certain state officials (such as the Attorney General) and to persons proving certain, specified types and degrees of injury. The Model Stat-

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244 The standard of review would vary depending on the state's Administrative Procedure Act. The standard mentioned in the text is that for federal agencies provided by the Administrative Procedure Act, 5 U.S.C. § 706.

245 Few of the usual reasons for using an administrative rather than a judicial process seem present here. An agency is unlikely to develop much more expertise than a court since courts regularly hear cases involving criminal records, and the volume of cases is unlikely to be such as to require a non-judicial forum to handle them all.

ute creates a special standing requirement[246] that attempts to balance the concern for compensation for invasion of privacy against the systemic inefficiency of constant lawsuits, but more experience and empirical research is needed as to the relationship between various levels of damages and a plaintiff's need to bring suit. If a proper balance can be struck, though, the Model Statute's approach should result in court involvement in serious cases and administrative handling of minor breaches. Reasonable compensation for innocent parties subjected to privacy invasions would be expanded rather than compromised by enactment of such a provision, assuming it is not construed to pre-empt existing defamation law.

VI. Conclusion: Should Organized Crime Intelligence Systems Exist at All?

The conception of a statute creating and regulating organized crime intelligence systems ultimately is premised on the actual creation of unregulated systems in many states in recent years. If such systems are inevitable, regulation is appropriate. However, a legislator considering such proposals might do well to advocate another route altogether: legislation severely restricting the operation of such systems. At least four concerns would argue in favor of such legislation, and they must be briefly noted here lest the presentation of the regulatory statute be mistakenly assumed to infer advocacy by the author of the creation of such systems on a broad scale.

1. *Inherent privacy risks:* Statutory regulation can only reduce somewhat the risks which a state intelligence system poses to individual privacy. Data secrecy, suspect targeting, surveillance, inclusion of people not suspected of any crime, and accidental, over-broad dissemination of information will exist in any system, and may not themselves be worth whatever gains might be achieved against organized criminal activity.

2. *Possible breach of law:* Enacting a statute will not necessarily ensure its compliance where there is bad faith. Prosecutors are unlikely to enforce criminal provisions against police in every instance, and massive difficulties in conducting effective dis-

246 *See* § 503 of Model Act *infra*.

covery against a necessarily secret system limit the effectiveness of private civil suits.[247] Present statutory restrictions certainly have not curbed all illegal police harassment.[248]

3. *Long-term risks of degeneration of system integrity:* The very success of the system could prove its undoing were the legislature to decide to add to its mandate the function of fighting "subversives." The stress of wartime has in the past produced a strong public demand for law enforcement efforts against "fifth columnists." After the war, public passion can overflow into such phenomena as the Red Scare. The F.B.I. provides an excellent example of this scenario.[249] Forbidding criminal intelligence systems entirely is the only completely effective safeguard against this perversion of their proper objectives.

4. *Long-term systemic effects:* One must also consider how broad use of "soft" intelligence data throughout the criminal justice system might ultimately change the way the entire system operates. For better or worse, "data surveillance" may supplant most physical surveillance.[250] Concepts of "probable cause" could evolve dramatically with judges issuing search warrants as a routine matter on the basis of a mass of cumulative intelligence information. Sentencing parameters could change if judges themselves are subtly influenced by the stigmatizing effect of the "organized criminal" label attached by the system.[251] The simple fact of an enormous increase in the velocity of information flow has been found in many other areas to wreak fundamental changes in social and other relationships.[252] What the long term holds should successful computerized regional intelligence systems ever overcome the present practical obstacles to their implementation still goes unconsidered by anyone in the field. Consideration of these long-

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247 Just how much a run-around discovery can become is illustrated in Shattuck, *supra* note 175, at 68-70, which excerpts from depositions in Anderson v. Sills, 106 N.J. Super. 545 (Ch. Div. 1969), *rev'd,* 56 N.J. 210 (1970).

248 *See* P. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY 219-35 (1969).

249 *See generally* CHURCH COMMITTEE REPORT, *supra* note 7. *Cf.* J. E. HOOVER, COMMUNIST TARGET: YOUTH (1960).

250 *See* A. WESTIN, *supra* note 50, at 209-10.

251 *See* Billiteri v. United States Board of Parole, 400 F. Supp. 402 (W.D.N.Y. 1975).

252 *See* Weizenbaum, *On the Impact of the Computer on Society,* 176 SCIENCE 609 (1972).

term effects is beyond the scope of this article as well, but the issues must be addressed soon.

In sum, society may find that it deals with organized crime best by living with it. As one former proponent of organized crime intelligence systems recently asked, "Could they ever be worth the costs?"[253]

AN ACT TO CREATE A STATE ORGANIZED CRIME INTELLIGENCE UNIT AND TO REGULATE THE USE OF CRIMINAL INTELLIGENCE INFORMATION

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253 Interview with Charles Lister, Covington & Burling, in Washington, D.C., March 2, 1976. *Cf.* Lister & Longstreth, Privacy Evaluation of Proposed NYSIIS Organized Crime Intelligence System (unpublished, 1970).

III. Handling of Information by State Organized Crime Intelligence Unit

IV. General Standards for Criminal Intelligence Information

V. Penalties for Violations of the Act

I. SHORT TITLE, PURPOSE, DEFINITIONS

Section 101 *Short Title*

This Act may be cited as the [State] Criminal Intelligence Act.

Section 102 *Statement of Legislative Findings*

The Legislature hereby finds and declares that:

(a) certain illegal activities, including but not limited to loansharking, narcotics, trafficking in stolen property, gambling, extortion, smuggling, labor racketeering, bribery, and corruption of public officials, often involve some degree of regular coordination and permanent organization involving a large number of participants over a broad geographical area;

(b) the activities of persons who engage in such organized criminal activities on a regular basis pose a serious threat to the lives and property of the people of [State];

(c) the geographical spread of such activities is such that they cannot be dealt with adequately by local police work but require a statewide network of information exchange by law enforcement agencies;

(d) the exposure of such ongoing networks of criminal activities can be aided by the pooling of information about such activities so that they can be continually analyzed to spot patterns of associations and emerging trends of future criminal activity;

COMMENT: Findings (a) through (d) are critical to any decision to enact this legislation. In many small states organized crime

may not be a significant problem, existing merely as a few small local rackets or as incidental to the operations of larger enterprises centered out of state. Even in many large states dominated by a single city, finding (c) may not be met. Where organized criminal activities are not even roughly co-extensive with state boundaries, it may be more efficient to rely on an existing metropolitan area system, possibly incorporating some of the privacy safeguards of Title III of this Act, or to try to develop a multi-state regional system. While the high level of interstate police cooperation necessary for a successful regional system might appear a practical impossibility, in theory such a system could be set up along the same lines as this Act by the use of simultaneous legislation and an interstate compact. A quasi-regional system might be arranged simply by making use of the broad scope of dissemination possible under section 310.

(e) the mere creation of files and maintaining of information on persons suspected of being involved in criminal activities inherently impinges on the privacy of those persons by limiting their ability to control information about themselves;

(f) the exception from the [State Freedom of Information Act] for certain information compiled for law enforcement purposes necessitates special controls on the nature and handling of such information so long as it remains unavailable for public scrutiny;

COMMENT: This Act presumes that the state has enacted as state law the provisions of the federal Privacy Act of 1974, 88 Stat. 1896, 5 U.S.C.A. § 552(a) (1975 Supp.), and also the federal Freedom of Information Act as amended in 1974, 88 Stat. 1561, 5 U.S.C.A. § 552 (1975 Supp.). If it has not, section 401(c) provides that the scope of the standards and procedures of Title 4 will expand to encompass all non-public record information that is maintained in substantial part because it relates to possible future criminal activity.

(g) the creation of criminal intelligence systems, if not carefully regulated, poses substantial and unacceptable risks to the constitutional rights and privacy of all citizens due to the possibility of inclusion of non-criminals in the files, inclusion of irrelevant or improper information about suspects, overly broad dissemination

of private or misleading information, and the indirect encouragement of excessive surveillance of all citizens; and

(h) existing organized crime intelligence files are hampered by the lack of clear legislative authorization and are potentially dangerous to citizens' rights to privacy because of the lack of any clear external regulations.

Section 103 ***Statement of Legislative Intent***

The purposes of this Act are:

(a) to create a [State] Organized Crime Intelligence Unit to collect, store, analyze, and disseminate information about organized criminal activities;

(b) to aid in the arrest and conviction of individuals who engage in organized, ongoing, illegal enterprises by providing law enforcement agencies with accurate tactical intelligence information about these individuals;

(c) to aid in the exposure of organized criminal enterprises by providing law enforcement agencies with accurate analyses of their structure and reliable strategic estimates of future illegal activities;

(d) to provide local law enforcement agencies with training programs, informer relocation programs, and other programs to aid them in dealing with the illegal activities of organized criminal groups;

COMMENT: The primary advantage of a centralized intelligence system is its ability to analyze broad trends in organized criminal activity in order to predict future activity in time to prevent it, and to determine the organizational structure and leaders of criminal groups. This "strategic intelligence" function is reflected in purpose (c). Some systems, such as the New Jersey State Police Intelligence Bureau, have shied away from the "tactical function," reflected in purpose (b), of providing current investigative information and suspect lists, possibly fearing that this could bog them down in detail and divert them from their primary concern. However, some tactical role appears necessary, if only to give tactical police units an incentive to pass information on to the intelligence unit. Purpose (d) similarly

reflects not only a concern that the state system help coordinate a statewide attack on organized crime but also a desire to give local police agencies something in return for providing information. This coordination role can be narrowed by omitting purpose (d) and deleting section 202(a)(8) and section 209.

(e) to minimize as far as possible the invasion of personal privacy resulting from the operation of the [State] Organized Crime Intelligence Unit by imposing detailed and strict substantive and procedural standards on the unit's operation;

COMMENT: The key phrase here is "as far as possible." Some may prefer the greater privacy protection but reduced law enforcement efficiency of altogether prohibiting intelligence systems. The existence of an intelligence system, no matter how extensively regulated, is inherently a threat to individual privacy.

(f) to ensure that the [State] Organized Crime Intelligence Unit collects and maintains only information related to organized criminal activity and not information on criminal activities primarily concerned with political subversion, criminal activities involving no permanent organization, or criminal activities not engaged in for the purpose of monetary gain;

COMMENT: The entire subject of police "subversives files" is bypassed by this statute. They are excluded from the state system by restricting it, in section 304(a)(1), to particular kinds of organized criminal activity, but Title 4 is left broad enough to allow subversives files to be compiled at the local level or in a separate state unit. The intensive legal attack on the collection of intelligence information on "political subversives" and the trend of resultant court decisions would suggest that careful separation of subversives files from organized crime and other files is prudent.

(g) to protect the constitutional rights and privacy of individuals by imposing substantive and procedural limitations on the collection, storage, and dissemination of criminal intelligence information by any state or local governmental body; and

(h) to provide both criminal and civil remedies for the improper

handling by officials of criminal intelligence information about individuals.

Section 104 ***Definitions***

As used in this Act:

(a) "criminal history record information" means notations of arrest, detention, indictment, filing of information or formal criminal charge on an individual, and any pleas and dispositions arising therefrom;

(b) "criminal investigative information" means information associated with an identifiable individual compiled by any governmental agency or subunit thereof in the course of conducting a criminal investigation of a specific criminal act, including information pertaining to that criminal act derived from any type of surveillance;

(c) "criminal intelligence information" means information associated with an identifiable individual compiled or maintained by any governmental agency or subunit thereof in substantial part because it relates to possible future criminal activity of some individual, or relates to the reliability of such information, including information derived from reports of informants or investigators or from any type of surveillance. The term does not include criminal history record information or correction and release information;

COMMENT: The first two definitions are substantially identical, with only minor changes, to those used in S. 2008, 94th Cong., 1st sess., 121 CONG. REC. S 11,554. The definition of the critical term "intelligence information," however, is considerably broader than the definition given that term in S. 2008. In this Act the primary focus is not on how the information was collected but upon its present use. Intelligence and investigative information are not mutually exclusive, and a particular item of information may change in characterization over time even without leaving a file. Note, however, that the term "criminal intelligence information" is redefined in section 401 for purposes of Title 4, so as to limit the coverage of the broad regulatory requirements of Title 4 to secret information not collected during a current investigation of a specific criminal act.

(d) "surveillance data" means information associated with an identifiable individual which was obtained by a governmental agency from any surveillance or other investigatory activity undertaken without reasonable grounds for belief by the governmental agency that such activity would produce information that could be used in an investigation of illegal activity or persons suspected of involvement in illegal activity;

COMMENT: This term is intended to cover both physical surveillance and "data surveillance."

(e) "automated" means using electronic computers, or other automatic data processing equipment, as distinguished from performing operations manually;

(f) "files" means any system of storing information, whether in written form or in any form associated with the use of automated or mechanical equipment, for possible future retrieval. The term does not include non-systematic possession of information or information being temporarily held for current use or for an explicit future use;

COMMENT: The intent of this definition is to include only information being stored for an *unknown* future use, and to include *all* such information (even indexed folders put in a desk drawer). Thus an intelligence unit could circulate reports to police without each recipient being included within Title 4 restrictions on the maintenance of "files" so long as the recipients simply keep the reports in a non-systematic way for a particular use rather than filing them away for general future reference. *See* Comment to section 403(a).

(g) "Law Enforcement Agency" means a governmental agency or any subunit thereof having as its primary purpose the enforcement and investigation of violations of the civil and criminal laws of [State];

(h) "Unit" refers to the [State] Organized Crime Intelligence Unit created by this Act and all personnel of that unit;

(i) "Unit Files," "Unit Temporary Files," and "Unit Dormant Files" refer to files maintained by the Unit for the general use of personnel of the Unit, as distinguished from those maintained for the use of individual members of the Unit;

(j) "Name File" refers to all information in Unit Files related to an individual identified by name which the Unit may disseminate in response to a request for information on a person of that name.

COMMENT: The Name File concept is made an important part of this Act by section 303(d), section 303(h), and section 304(e). This is not an objective definition of a type of information or file; rather, it describes what the Unit may disseminate. Thus it directly involves the primary privacy problem of the overbroad dissemination of information labelling an individual as an "organized crime figure." An objective definition is unworkable because of the widely varying uses of names in the system. There will be organized crime "suspects" concerning whom local police will make requests by name. There will be non-criminal friends of suspects who should not be labelled as organized crime figures, but who must be included in a "suspects" file to give a full picture of the suspect. There will be other friends of the suspect who appear non-criminal, but may subsequently be found through investigation or analysis to be suspects themselves. In that case, all the information about the person appearing in other suspect files will be retrieved and collected in a new suspect file.

In a manual system one could imagine Name Files to consist of individual file folders for suspects, with other named individuals mentioned in them but this information not directly retrievable. There would also be a strictly in-house cross-indexing of all information on those other individuals for use only in analysis or in the event one later becomes a suspect. A definition of "Name File" geared to such a manual system would be totally inapplicable to a fully computerized system, where there are no physical "files," and every bit of information in the system could conceivably be accessed directly through cross-indexing.

II. CREATION OF [STATE] ORGANIZED CRIME INTELLIGENCE UNIT

Section 201 *Unit Created*

There is created within the [State] State Police [Alternative: State Identification Bureau] a unit directly responsible to the Chief of the

[State] State Police [Alternative: Director of the State Identification Bureau], to be known as the [State] Organized Crime Intelligence Unit.

COMMENT: Including the Unit in an existing state identification bureau would increase its independence without isolating it from law enforcement agencies. However, since virtually everyone in the field suggests that the primary problem in making such a unit work at all is distrust by police units both of non-police and of other police agencies, following the current trend of forming such units within the State Police seems preferable. Another alternative would be not to create the Unit legislatively at all, but simply to enact the relevant portions of Titles 2 and 3 as restrictions on any state unit that may be administratively created.

Section 202 *Unit Objectives*

(a) Subject to all standards and procedures specified by this Act and all other limitations imposed by law, the Unit is entrusted with the responsibility to:

(1) establish and maintain liaison with governmental agencies at all levels in order to foster a meaningful exchange of information on matters of mutual interest;

(2) initiate inquiries and conduct investigations to obtain criminal intelligence information relating to organized criminal activities;

(3) develop and maintain a system for reviewing, storing, referencing, collating, and retrieving information to support tactical law enforcement operations and the development of strategic intelligence;

(4) develop an analytical capability to provide useful intelligence reports, both strategic and tactical;

(5) seek to enhance the flow of information to the Unit from all members of all state and local law enforcement agencies and to encourage supervisors and investigative officers of such agencies to make maximum proper use of the services and records of the Unit;

(6) maintain the integrity and security of all information entrusted to the Unit;

(7) adhere to ethical police procedures in obtaining information;

(8) develop methods with which to evaluate the effectiveness of the Unit both in accomplishing its law enforcement goals and in safeguarding the privacy of all individuals about whom the Unit has information;

(9) develop training programs and other programs to assist tactical units of the State Police and local law enforcement agencies in detecting, gathering information on, and combating organized criminal activities; and

(10) avoid to the greatest extent possible direct involvement in conducting tactical law enforcement operations.

(b) The Legislature declares that all law enforcement agencies should cooperate fully with the Unit in seeking to achieve the objectives specified in this section.

COMMENT: Subsection (a) is patterned on the Illinois Bureau of Investigation Criminal Intelligence Division's list of "Division Responsibilities," with the additional emphasis on privacy in (8), and the inclusion of (9) and (10). Subsection (a) (10) refers to operations such as investigating specific past criminal acts and making arrests, and is critical if the system is to fulfill its primary role of providing strategic intelligence rather than getting bogged down in the details of day-to-day operations. At the same time, (10) raises what may be a critical problem for most units in practice, since it will be hard to recruit good investigators if they are not allowed to carry investigations through to arrest. Furthermore, the resultant inability of the Unit to gain public notice of its successes (a problem compounded by section 315(b)) could lead to the Unit's being treated by tactical units as of secondary importance.

Section 203 *Appointment of Unit Director*

(a) A Unit Director shall be appointed by the Chief of the State Police [Alternative: Director of the State Identification Bureau], subject to the approval of the Attorney General of [State], for a term of two years.

(b) The Unit Director may be removed at any time by the Chief of the State Police [Alternative: Director of the State Identification Bureau] for cause.

(c) Subject to all provisions of law and to the unit guidelines, the

Unit Director shall have complete authority to control the operation of the Unit so as to achieve the Unit objectives specified in section 202.

COMMENT: The Act is structured so that the Unit Director is the "make it or break it" figure. On the other hand, the Unit could not function effectively without the strong support of the State Police Chief, and he is given the power to appoint the Unit Director to help obtain that support. It is anticipated that the Unit Director probably will be a member of the State Police force. The option of giving the State Police Chief the power of removal without cause would help ensure his close cooperation with the Unit Director, but, when combined with the Governor's power to appoint the State Police Chief, may present unacceptable risks of political intermeddling in the Unit's activities.

Section 204 *Unit Legal Officer and Other Unit Staff*

(a) The Unit Director shall appoint [subject to the approval of the State Attorney General] a Unit Legal Officer, who shall be a member of the bar of [State]. The Unit Legal Officer shall advise the Unit Director concerning all legal matters, including whether Unit procedures continue to reflect current statutory law and judicial decisions, and shall ensure that all members of the Unit receive training, upon initial assignment to the Unit and periodically thereafter, on the constitutional and statutory rights of individuals with regard to the collection, storage, and dissemination of information about them.

(b) The Unit Director shall create such other positions in the Unit as are appropriate to fulfill the Unit objectives, including but not limited to intelligence analysts, investigators, liaison agents, clerks, and security guards.

(c) All Unit personnel, including the Privacy Auditor and Special Liaison Agents, may be removed from their positions for any reason by the Unit Director.

COMMENT: All appointments are intended to be full-time positions, wholly at the discretion of the Unit Director except as section 501(b) may mandate removal. Section 312(a)(1) allows

all applicants to be checked out through the Unit Files before appointment.

Section 205 *Special Liaison Agents*

The Unit Director shall designate not more than ten state agencies, local police department intelligence units, local police departments or State Police sections or divisions as agencies with which a high degree of liaison is necessary to ensure a steady flow of information to and from the Unit. The individual in charge of each designated agency shall appoint, subject to the approval of the Unit Director, one member of the agency to serve in the Unit in a liaison capacity at the pleasure of the Unit Director. All such appointments shall be for a term of not more than one year, although an individual may be reappointed for multiple terms.

COMMENT: A smooth and steady flow of information cannot be achieved by organizational structure alone, but requires regular personal liaison to help generate reports. This section is only a first step, since mandating liaison is pointless unless effective representatives are appointed. The number of agencies selected should vary with the size of the state. A maximum number is set so that statutorily mandated liaison agents will indeed be "special," although additional liaison agents may be necessary for specific projects. The term of the appointment is kept short to avoid retarding the careers of liaison agents by lengthy assignments to a non-tactical group such as the Unit.

Section 206 *Privacy Auditor*

(a) The Unit Director [Alternative: Chief of the State Police] shall appoint, subject to the approval of the State Attorney General, a disinterested member of the [State] bar to serve as Privacy Auditor to check on the implementation of those sections of this Act designed to safeguard the privacy of individuals.

(b) For the purposes of this section, an attorney is not "disinterested" if he has been employed by a law enforcement agency within the previous six years or by a governmental agency within the previous three years.

(c) The Privacy Auditor shall, in addition to his other duties:

(1) every week check a random selection of information requests to insure that all the standards and procedures of sections 310, 311, and 312 are fully met;

(2) one day every month, or more often if the Unit Director deems it appropriate, observe the screening of incoming reports and the entering of information into the system;

(3) annually inspect all records concerning the dissemination of information to ensure that they are in order and indicate nothing improper or unusual.

(d) The Privacy Auditor shall not have access to any criminal intelligence information, except for the purposes of subsection (c) (2) of this section.

(e) Copies of all complaints concerning the system and concerning access to information in it must be given as soon as possible to the Privacy Auditor, who shall consult with the Unit Director and Unit Legal Advisor about the matters raised therein.

(f) The Privacy Auditor shall make an annual report to the Legislature, at the same time as the Unit Director's annual report, stating how well the privacy protecting features of this Act are functioning, outlining possible problem areas, and suggesting any changes he deems appropriate.

COMMENT: The Privacy Auditor is not envisioned to fill completely the Unit's need for regular outside audit under section 403(c)(8). The idea here is to have someone with a legal rather than police orientation, only part-time so as to have more independence and less self-interest in the job, with "privacy" in his title and job description, and yet not threatening to the Unit Director as might be the case if he were appointed by the Governor or Legislature. In practice, the checking required by subsection (c) may prove less significant than the informal consultation required by subsection (e). Since the Privacy Auditor is intended to provide another point of view to the Unit Director rather than to act as a wholly independent inspector, the state should also consider creating a wholly independent privacy committee to carry out general oversight of Unit activities, perhaps modeled on the Iowa Confidential Records Council. *See* IOWA CODE ANN., ch. 749B. Alternatively, the duties of an existing privacy committee supervising criminal history records might be expanded to include intelligence oversight.

Section 207 *Guidelines and Reports*

(a) Not more than two months after the first Unit Director is appointed, he shall issue written guidelines setting out in general form standards and procedures for all operations performed by members of the Unit. These guidelines shall include but not be limited to those matters required by section 403(c) of this Act, and shall be revised at the discretion of the Unit Director with the approval of the State Police Chief [Alternative: Director of the State Identification Bureau]. All revisions shall be transmitted in writing to the Legislature within a reasonable time after their adoption.

(b) The Unit Director shall make an annual report to the Legislature summarizing in general terms not violative of any provisions of this Act the activities of the Unit during that year, outlining possible problem areas in the operation of the Unit and its liaison with other agencies, and suggesting any changes he deems appropriate. The Unit Director shall attach to each such annual report an updated copy of the Unit guidelines, copies of any current reporting forms pursuant to section 303(a), and any other information required by Unit guidelines or by this Act.

COMMENT: Unit guidelines should serve as a model for the guidelines required by section 403 of all agencies holding criminal intelligence information. Note that Unit guidelines, unlike section 403 guidelines, are not civilly enforceable under section 503 because this Title does not make violations of the guidelines violations of the Act. Instead, section 501 provides administrative penalties for violations of the guidelines. The detailed specificity of Title 3 restrictions should make administrative penalties sufficient. If desired, however, a subsection could be added to this section making violations of Unit guidelines violations of the Act.

Section 208 *Priority Criminal Activities*

(a) The Unit Director shall, after consulting with the Governor or his representative, the Chief of the State Police, the Unit liaison agents and special liaison agents, the Unit intelligence analysts, and whomever else he deems appropriate, annually designate not more than five types of priority criminal activities that appear to:

(1) be undertaken for the purpose of monetary gain;

(2) produce a great amount of harm to the life and property of citizens of [State];

(3) involve a significant degree of permanent criminal organization; and

(4) involve participants over a broad geographic area.

(b) To the maximum extent feasible without compromising any of the ongoing operations of the Unit, the Unit shall place special emphasis on collecting and analyzing information concerning individuals and enterprises involved in the designated types of criminal activity.

(c) The Unit Director shall include this list of priority criminal activities in the annual report to the Legislature required by section 207(b).

COMMENT: The aim here is not to bind the Unit in any way but merely to force all concerned parties regularly to focus their thinking on individual types of criminal activity that involve permanent organization, rather than on an all-encompassing conception of "the Mafia." It is hoped that this will help turn Unit attention to the more harmful organized criminal activities such as loansharking, fencing, and extortion, and away from crimes such as gambling which are of less direct harm to society. A relatively small maximum number is used to prevent this priority list from degenerating into a laundry list of criminal conduct.

Section 209 *Training and Services Provided to Local Law Enforcement Agencies*

(a) The Unit is authorized, as the Unit Director deems appropriate, to develop and conduct training programs for local law enforcement agencies to enable them to set up units or develop specialists to deal with organized criminal activities.

(b) The Unit is authorized, as the Unit Director deems appropriate, to set up a program available to all [State] law enforcement agencies to aid the relocation of informers whose lives may be in danger as a result of their cooperation with law enforcement officials.

(c) Subject to section 202(a)(10), the Unit is authorized, as the Unit Director deems appropriate and as long as the process of collection, storage, analysis, and dissemination of criminal intelli-

gence information is not impaired thereby, to develop and operate any activity or program reasonably designed to supplement or support the efforts of [State] law enforcement agencies to apprehend individuals involved in organized criminal activities for the purpose of monetary gain.

COMMENT: Subsection (b) is derived from the experience of the federal Organized Crime Strike Force, which has operated an informer relocation program since 1970. That program not only provides a necessary service that is much harder to develop at the local level, but also has significantly increased the flow of information into the Strike Force. The level of cooperation of local law enforcement agencies desirous of using the relocation program has been high; 1400 witnesses have been given new identities and relocated to date. Schur, *supra* note 50.

The success of this federal program indicates that imaginative use of subsection (c) should be encouraged. Note, however, that programs created under subsection (c) are to be of a general support nature only, and should not lead the Unit to contravene section 202(a)(10) by involving itself directly in tactical police operations.

III. HANDLING OF INFORMATION BY [STATE] ORGANIZED CRIME INTELLIGENCE UNIT

Section 301 *Applicability of Title*

(a) All information collected, maintained, and disseminated by the Unit shall be subject to all applicable provisions of law not inconsistent with this Act.

(b) Unit guidelines adopted pursuant to section 207(a) may be inconsistent with the standards and procedures of this Title only to the extent that they serve to restrict further the collection, storage, and dissemination of information by the Unit.

Section 302 *Limitations on Collection of Information*

(a) The Unit is authorized to accept and collect only information that furthers the objectives specified in section 202, including but

not limited to information provided by federal, state, and local law enforcement agencies, other governmental agencies, newspapers and other public media sources, surveillance and other procedures conducted by Unit investigators, and informants; *provided,* however, that the Unit may not knowingly accept or collect, and must destroy if discovered after acceptance or collection, any and all information:

(1) which was obtained through the use of illegal activities or in violation of the constitutional rights of any individual;

(2) for which no substantial possibility exists that it may be used to further any of the purposes of this Act;

(3) for which no substantial possibility exists that it may fulfill the standards for entry into Unit Files specified in section 304;

(4) which includes surveillance data, as defined in section 104 (d) except as provided in section 306(c);

(5) which was gathered or collected at any time by any governmental agency, including the Unit, primarily because the individuals to whom the information relates were of a particular race or ethnic group, held particular religious or political beliefs, or engaged in particular religious or political activities;

(6) which was gathered or collected during any investigation that also involved the use of any individual as an *agent provocateur*;

(7) which was gathered or collected through the use of wiretaps for which no court order was obtained; or

(8) which concerns any activity proscribed from categorization by section 303, except as such activity may directly relate to organized criminal activities.

COMMENT: The matter of whom the Unit collects information from is effectively left to the discretion of the Unit Director. It is expected, however, that budgetary realities will limit the number of Unit investigators and will restrict their work to corroborating information to comply with section 304 and section 305 and to seeking to fill specific information gaps identified by analysis. Instead of regulating sources of information, this section concentrates on excluding improper methods of collection. The exception is subsection (a)(8), which acts as a double-check on the categorization process of section 303 and is intended to exclude exactly what the nonavailability of the categories listed therein would exclude. It is hoped that the increased police surveillance likely to result from a successful

intelligence system will be offset partially by this section's rigorous standards for tactical unit operations.

Subsection (a)(1) prohibits collection not only of information subject to the exclusionary rule and the "fruit of the poisonous tree" doctrine but also of information barred by doctrines of standing and ripeness from constitutional protection. Subsection (a)(4) attempts to prevent surveillance without a specific purpose, including public record "data surveillance," by anyone other than Unit investigators. Subsection (a)(7) is designed to exclude all information gained from national security wiretaps undertaken pursuant to 18 U.S.C. § 2511(3) but must be considered optional since the exclusion of all such information may prove an unacceptable burden on a system that could find international smuggling to be of major concern.

(b) The Unit Legal Officer shall advise the Unit Director concerning legislative actions or judicial decisions which would warrant changes in Unit guidelines to ensure that the Unit maintains no information violative of subsection (a)(1) of this section.

(c) No member of the Unit may seek out information on a particular individual or enterprise, whether by requesting information from other agencies, commencing surveillance, contacting informers, or any other means directly initiated by the Unit, without prior approval of the investigation of the individual or enterprise by the Unit Director. Before the Unit Director shall approve any such investigation of an individual or enterprise, he shall determine that additional information on that individual or enterprise will further the objectives of the Unit and the purposes of the Act.

COMMENT: The intent of subsection (c) is not to restrict the scope of the Unit's collection activities to Name File "suspects" but simply to require anything even approaching the "targeting" of individuals to be the result of a conscious decision by the Unit Director. The section should also reinforce section 208 (Priority Criminal Activities).

Section 303 *Procedures for Collection and Screening of Information*

(a) The Unit shall provide all [State] law enforcement agencies with standardized reporting forms to encourage the provision of

information in a form compatible with the Unit's needs and filing procedures. A copy of all current reporting forms shall be attached to the annual report required by section 207 of this Act.

(b) The Unit Director, or a Unit analyst designated by him for the purpose of initial screening of incoming information, shall review all reports collected or received by the Unit to determine that they are in accordance with section 302. The same individual also shall make an initial determination of the relevance, reliability, and sensitivity of the information in all reports for the purposes of subsection (d) of this section and of sections 304, 307, and 312(c).

(c) After the requirements of subsection (b) of this section have been fulfilled for a particular report, but before any entry is made into the Unit Files, the report must be screened by a Unit analyst other than the one designated pursuant to subsection (b) of this section, which analyst shall be selected in accordance with the Unit guidelines. This analyst shall extract from each report all information pertaining to one or more of a series of categories to be determined by the Unit guidelines but which shall consist only of the following types:

(1) categories concerning specific characteristics of each particular illegal activity, such as its geographical location and modus operandi;

(2) categories concerning specific characteristics of each individual organized crime suspect, such as his personal characteristics, criminal associates, business associates, social associates, connections with public employees or officials, legitimate interests and habits, and commonly frequented locations;

(3) categories concerning the source of information and methods of collection; and

(4) cross-indices of any information, such as names of individuals, vehicle registrations, or telephone numbers.

(d) For the purposes of this section, the term "suspect" shall include only individuals on whom the Unit has a Name File pursuant to section 304(f).

COMMENT: It is expected that the analyst doing the categorizing will be a specialist in a particular area of organized criminal activity and will handle all incoming reports for that area. The purpose of categorization is to limit the data in the system to information clearly related to specific illegal activities and to Name File "suspects." Subsections (c)(3) and (c)(4) are necessary to allow analysts to monitor the collection system and retrieve cross-indexed information for analysis purposes. The categori-

zation system has the advantage of putting the burden on the analyst to find where information fits in rather than checking it against some set of written standards to see if it might be improper. To work, however, the categories must be geared to the needs of those to whom the Unit disseminates information, so that the receiving agencies can conveniently ask for information in its categorized form. *See* Comments to sections 104(j) and 304(g) concerning the interrelationship of categorization by individual suspects and the special standard of section 304(f)-(g) for the creation of a Name File. One attribute of the categorization system is that it allows easy conversion to computerization.

(e) No categories shall be used which are substantially similar to the following:

(1) suspects' political or religious preferences, associations or opinions;

(2) nature of suspects' sexual activities;

[(3)]

[(4)]

COMMENT: These substantive restrictions on methods of collection, like the restrictions of section 302, are largely extrinsic to the law enforcement efficiency of the Unit, and reflect the judgment that certain areas of human life deserve special protection from surveillance. Only the three commonly raised in present litigation under the First Amendment and state tort law are included here, but consideration should be given to whether any new such "zones of privacy" should be established in this section.

(f) Information not clearly pertaining to any category shall not be entered into Unit Files or Unit Temporary Files.

(g) For each item of categorized information, a Unit analyst, other than the one designated pursuant to subsection (b) of this section, shall determine whether it meets the requirements of section 302, and shall assign indicators specified by the Unit guidelines to identify the date of collection of the information; the date it will be entered in Unit Files; its sensitivity pursuant to section 307; the type of source, whether informant, wiretap, physical surveillance, or other source, of the information; and any other matters relevant to

fulfilling the objectives of the Unit that Unit guidelines may provide. The analyst also shall assign an indicator of reliability in accord with subsection (j) of this section, and shall determine for each item of information whether it meets the standards of section 304 for entry into the Unit Files.

(h) Information shall be entered into Unit Files only in categorized form. Reports and other uncategorized information shall be stored for reference by the Unit but may not be disseminated outside the Unit, except as provided in section 316 and except that tapes, reports, or other information gathered directly by Unit investigators may be disseminated for use in civil or criminal trials as the Unit Director may authorize.

COMMENT: If a document not originating directly from the Unit's own investigations is needed for trial, it is expected that the Unit will refer the prosecutor to the agency that originally supplied the document. Section 316, however, creates an exception to this general pattern for surveillance photographs.

(i) All categorized information that is not entered into the Unit Files or Unit Temporary Files pursuant to section 304 shall be destroyed and may not be retained or disseminated by the Unit for any reason.

COMMENT: This subsection prevents the analysts' retaining improper information in their individual files.

(j) Unit guidelines shall specify various levels of reliability. In determining the reliability of information the Unit shall consider:

(1) the extent to which the specific source of the information has provided information in the past that has proven to be reliable or has proven to be unreliable;

(2) whether the specific source was a law enforcement official;

(3) whether the specific source acquired the information from personal knowledge, secondary knowledge, or more indirectly; and

(4) any personal interest the specific source may have in the matter.

Where no determination can reasonably be made by either experience or investigation concerning the reliability of the specific source, the information shall be given a designation indicating that determination of reliability cannot be made.

Section 304 ***Standards for Entering Information Into Unit Files***

(a) Information associated with a particular illegal activity pursuant to section 303(c)(1) may be entered into Unit Files only if:

(1) the information has been determined not to be highly unreliable, or

(2) no determination can be made as to the reliability of the information.

(b) Information associated with an identified individual pursuant to section 303(c)(2) may be entered into Unit Files only if:

(1) the new item of information, when considered in light of other information possessed by the Unit, is substantially relevant to the goal of providing tactical and strategic intelligence concerning organized criminal activities undertaken for the purpose of monetary gain; and

(2) a determination can be made pursuant to section 303(j) concerning the reliability of the specific source, and the information has been determined to have a level of reliability such that there is a substantial possibility that it is true.

(c) Information that does not meet the requirement of subsection (b)(1) of this section, but which a Unit analyst believes may fulfill that requirement upon the collection of further information may be placed in a Unit Temporary File.

(d) Information that does not meet the requirement of subsection (b)(2) of this section, but which has been determined to have a level of reliability pursuant to section 303(j) such that either no determination can be made as to its reliability or the information has been determined not to be highly unreliable, and which a Unit analyst also believes may be substantially corroborated upon the collection of further information that meets the requirements of subsection (a) of this section, may be placed in a Unit Temporary File.

(e) The contents of Unit Temporary Files may not be disseminated. After an item of information has been stored in a Unit Temporary File for a period determined by Unit guidelines but not to exceed 180 days, that information shall be destroyed.

COMMENT: The concept of information stored in temporary files awaiting corroboration as to its relevancy or reliability is taken from HARRIS MANUAL, *supra* note 47. The resulting improvement in the quality of information actually in the Unit Files helps the Unit avoid the dissemination of false information and information not clearly serving a valid law enforce-

ment purpose. The existence of Temporary Files should also be helpful in defending legal actions for disseminating false information by demonstrating that the Unit has taken reasonable care to prevent such occurrences. Information placed in a Temporary File pursuant to subsection (d) will never get into Unit Files unless subsequent information alters the reliability rating of the specific source, as would be the case if this were the first item of information ever acquired from an informant or other civilian source. However, even where such a change in reliability is not anticipated, an analyst may want to hold the information in a Temporary File for use in helping investigators track down the more reliable, corroborating information that will go into Unit Files. The fact that information from an unreliable source is corroborated should not then automatically permit its entry into Unit Files, as its reliability is merely cumulative at that point.

(f) Information associated with an identified individual pursuant to section 303(c)(2) may constitute a Name File whenever

(1) the Unit possesses items of categorized information associated with that identified individual, each item meeting the requirements of relevancy and reliability specified in subsection (b) of this section, and this information:

(i) is contained in or directly refers to two other Name Files;

(ii) raises a substantial possibility that such identified individual may in the future undertake criminal activity, in association with an organized criminal group, for the purpose of monetary gain; and

(iii) raises a substantial possibility that such identified individual has in the past undertaken, in association with an organized criminal group, criminal activities for the purpose of monetary gain; or

(2) the Unit possesses records of criminal convictions or items of information based upon the personal knowledge of a source that has provided information in the past that has proved to be consistently highly reliable, raising the substantial likelihood that such identified individual has in the past undertaken criminal activities for the purpose of monetary gain.

COMMENT: Special restrictions on the creation of Name Files are necessary not only because of the stigma of being labeled as an

"organized crime figure," but also because of the likelihood that Name Files status will mean vastly increased collection and dissemination of information on that person. The people most clearly protected by these restrictions are the many non-criminal business and social associates of suspects, whose names will not be disseminated except in response to a specific request for the associates of a suspect. Subsection (f)(1)(i) requires a minimal indication that the suspect is part of a network.

Subsection (f)(1)(iii) is a more significant check, but the "substantial possibility" standard will not be difficult to meet. The problem with too strict a standard is that the top figures in many organized criminal activities do not have arrest records and thus would not fit within a looser standard.

Section 305 *Media Information*

Information taken from mass media sources shall be considered to be of unknown reliability and shall not be entered into Unit Files unless substantially corroborated. Media information not contained in Unit Files may be retained by the Unit in a Media File, the contents of which shall not be disseminated and may be used only in analysis.

COMMENT: Press accounts are often highly exaggerated. Yet, many systems have used newspapers as a primary source of information and thus might find the "substantial corroboration" requirement to be unreasonably stiff.

Section 306 *Results of Analysis*

(a) No hypothesis or conclusion reached by Unit analysts or other Unit members concerning the structure of organized criminal groups, expected future criminal activities, or any other matters, shall be disseminated unless it fulfills the requirements of subsection (b) of this section for entry into Unit Files. Hypotheses or conclusions fulfilling these requirements may be entered into Unit Files, provided that, if they are so entered:

(1) an indicator shall be attached to the effect that they are hypotheses;

(2) an indicator shall be attached to identify the analytical process used to reach the hypothesis or conclusion;

(3) the date of entry indicator shall be that for the most recent item of information on which the hypothesis or conclusion was significantly based; and

(4) the reliability indicator shall be that for the most unreliable item of information on which the hypothesis or conclusion was significantly based.

(b) The entry requirements for a hypothesis or conclusion are that it:

(1) be categorized pursuant to section 303; and

(2) meet the requirements of section 304, treating the hypothesis or conclusion as if it were a new item of information.

COMMENT: Since analysis is the primary reason for the Unit's existence, the Unit analysts should be given substantial freedom to employ hypotheses, and the statute should encourage the dissemination of their conclusions. Subsections (a) and (b) are designed to avoid the loophole that could develop if information received different treatment simply if labeled "hypothesis." The term "significantly based" in subsection (a)(4) must be construed flexibly, or it could seriously hamper the Unit's analytical capability.

(c) The Unit may, without fulfilling the standards and procedures of sections 302, 303, and 304, collect public record information and, if the Unit employs an automated system, may enter such public record information into the system if not in such a form that it may be retrieved as if in any Unit Files stored in the automated system; *provided,* however, that the purpose for the collection of public record information is the production by means of collation or analysis of new information that may be entered into Unit Files pursuant to sections 302, 303, and 304.

COMMENT: This subsection acts as an exception to the general prohibition of random surveillance in section 302(a)(4). It allows the Unit to use its computer to collate and analyze public record information that otherwise could not be entered into the system, so as to produce new intelligence data that can fulfill the requirements of sections 302, 303, and 304 for entry into Unit Files. The only restriction is that this public record information

must be kept in a separate computer or in a protected subsystem so that it cannot be retrieved when searching the Unit Files. This use of public record information for general "data surveillance" potentially poses enormous privacy problems should the techniques of data surveillance be developed and its practice become widespread. Since most existing intelligence units function adequately without this capability, consideration should be given to eliminating this subsection or strictly defining what kinds of public record information may be collected and analyzed.

Section 307 *Security of Unit Files*

(a) All information possessed by the Unit shall be maintained and controlled in one location by Unit personnel only. Information in Unit Files shall be searched and removed only by Unit personnel specifically authorized by the Unit Director.

(b) The Unit Director shall develop a comprehensive program to ensure the physical security of all information possessed by the Unit, including provisions for mechanical and electrical protective devices, security guards, personnel security checks, and periodic inspections.

(c) Unit guidelines shall provide for varying indicators of the sensitivity of each item of information, to reflect the level of danger to individuals that may be caused by the improper release of such information. The Unit Director shall provide for special security measures for information of a high level of sensitivity.

Section 308 *Use of Automated Equipment*

(a) Except as provided in section (b), if the Unit mploys automated equipment, no information shall be entered into such equipment except information properly entered into the Unit Files or Unit Temporary Files, and information in the nature of programs designed to operate the system or to handle information as authorized by this Act. Any automated equipment employed by the Unit shall be dedicated solely to the use of the Unit.

(b) No automated equipment shall be employed by the Unit without Unit guidelines setting out in general terms the permissible nature and extent of such use.

(c) Direct remote terminal access to information in the Unit Files shall not be permitted.

(d) The Unit Director shall initiate measures to ensure that non-Unit personnel necessary to service automated equipment do not breach Unit security, including provision for hiring as a Unit member at least one individual knowledgeable in the maintenance of such equipment.

COMMENT: This section is directed entirely toward security concerns, with additional privacy protection as a by-product. Subsection (a) recognized that software cannot protect the Unit Files from being reached by a competent, malevolent individual from *any* terminal. Subsection (c) is the only way to prevent the use of wiretap to get directly into the entire Unit Files, a much more serious problem than intercepting individual reports disseminated over the telephone under section 314(a). Note that subsection (c) also forecloses the system from being adapted into an information index and referral unit such as that provided by LEIU. *See* text following note 57, *supra*. Subsection (d) recognizes that the services of non-Unit personnel, such as systems programmers and computer maintenance engineers, will be necessary, and that they will have the most intimate access to all aspects of the system, requiring the presence of someone capable of keeping an eye on them.

Section 309 *Information Purging Procedures*

(a) Unit guidelines shall provide that at some regular interval, not to exceed one year for any item of information, each item of information in Unit Files shall be reviewed to ensure that it continues to meet the entry requirements of sections 302 and 304 of this Act.

(b) Unit guidelines shall provide that at some regular interval, not to exceed 180 days for any Name File, each Name File shall be reviewed to ensure that it continues to meet the standards for creating a Name File of section 304.

(c) Any item of information contained in Unit Files for more than eight years after its date of entry into Unit Files shall be placed in a Dormant File unless it was obtained through the personal knowledge of a reasonably reliable source, is corroborated by information

of such level of reliability, or is a hypothesis or conclusion of such level of reliability. All items of criminal intelligence information contained in Unit Files for more than eighteen years after their date of entry into Unit Files shall be placed in a Dormant File.

(d) Any item of information contained in Unit Files for more than five years after its date of entry into Unit Files shall be placed in a Dormant File if it has not been disseminated for more than three continuous years, unless the Unit Director determines that there is a significant likelihood that it will be used by the Unit for analytical purposes.

(e) No information in a Dormant File may be disseminated.

(f) Information shall be removed from a Dormant File and placed in Unit Files at the discretion of the Unit Director, but not unless a determination is made that it continues to meet the entry requirements set out in sections 302 and 304 and no longer fails to meet the standards of subsections (c) or (d) of this section.

(g) Any information in a Dormant File may be destroyed at the discretion of the Unit Director, and any information that remains in a Dormant File continuously for more than one year shall be destroyed.

(h) Unit guidelines shall provide procedure for the eventual elimination from Unit possession of any report retained pursuant to section 303(h) where no information extracted from such report continues to be stored in Unit Files, Unit Temporary Files, or Unit Dormant Files.

COMMENT: This section could help insulate the Unit from court interference, since legislatively mandated purging standards and procedures may in practice make courts hesitant to order information to be purged from the system without a showing that the statutory procedure was not followed. Note that subsection (c) provides a maximum lifetime for information which is unrelated to the intrinsic concerns of relevance reliability, or use, but is in practice long enough to make obsolesence likely. Purging will prevent further dissemination of the information by the Unit, but the Act does not include any provision to require receiving agencies possessing the information to purge their files at the same time. Such a provision would be extremely complicated to administer, and the requirement of section 312(b) that information be destroyed once its original intended use is complete should be sufficient protection.

Section 310 *Authorized Agencies for Dissemination*

(a) Except as provided in sections 313, 315, and 318, no individual or organization may formally or informally receive from the Unit any information unless that individual or organization is designated in Unit guidelines as an Authorized Agency for Dissemination and follows the request procedure provided in section 311.

(b) Except for individual responsible for the appointment of judges, none of the following organizations, nor any individual directly associated with any of them, shall be an Authorized Agency for Dissemination:

(1) any non-governmental agency;

(2) any agency not performing a law enforcement function;

(3) any unit or division of any agency whose purpose is not primarily the detection and combating of organized criminal activities undertaken for the purpose of monetary gain;

(4) any individual or organization to whom dissemination is forbidden under Title 5 of this Act; and

(5) any individual or organization at the discretion of the Unit Director, including those which he believes may not fulfill the requirements of section 317.

COMMENT: Subsections (b)(2) and (b)(3) interact to exclude organized crime units in non-law enforcement agencies and also law enforcement agencies without a unit that deals primarily with organized crime. While there is an intention here, as in section 209(a), to encourage local police to set up special organized crime units, the phrases "unit or division" and "primarily" in subsection (b)(3) should be interpreted very flexibly or the usefulness of the Unit could be reduced by unduly limiting the dissemination of intelligence.

Section 311 *Screening of Information Requests*

(a) All requests for information in Unit Files or concerning information contained in Unit Files shall be made on, or shall be immediately transferred to by a Unit member, a standard request form; shall include information which clearly and unambiguously identifies the requesting individual or organization, the date of the request, the item(s), Name File(s), and category(ies) of information

requested; and shall include a brief statement for each item, Name File or category of information requested explaining the requesting individual's or organization's intended use of such information.

(b) All requests shall be screened by a Unit analyst or the Unit Director, and may be screened by the Privacy Auditor pursuant to section 206, or by any other Unit member pursuant to Unit guidelines. The Unit analyst or Unit Director performing this screening shall make a determination, before any information is disseminated in response to the request, that the request fulfills all the requirements of sections 310 and 312.

COMMENT: The phrase "concerning information contained in Unit Files" in section 311(a) is intended to include the reports of criminal activity which have been itemized, categorized, and entered in Unit Files, but is not intended to include information about the administration or operation of the Unit which section 312(b) authorizes the Unit Director to release.

Section 312 ***Standards for Dissemination of Information***

(a) No item, Name File, or category of information in the Unit Files may be disseminated by the Unit unless a determination is made pursuant to the procedure of section 311 that:

(1) the requesting individual or organization intends to use the information solely for a law enforcement purpose, including sentencing and parole decisions, involving organized illegal enterprises undertaken for the purpose of monetary gain, except that the information may be used to check the background of persons applying for executive positions in law enforcement agencies, applying for any position in a unit or division of a governmental agency primarily devoted to combating organized criminal activities undertaken for the purpose of monetary gain, or under consideration for appointment to a judgeship;

(2) the stated intended use is no broader then the actual intended use;

(3) the item(s), category(ies) or Name File(s) to be disseminated contain no more information than the requesting individual or organization reasonably requires for the particular intended use;

(4) the Unit Director determines that the requesting organization can maintain a reasonable level of security for the information and can fulfill the requirements of section 317; and

(5) the Unit Director does not, in his discretion, disapprove of such dissemination.

COMMENT: The purpose of this subsection is to restrict dissemination of information to law enforcement purposes and prohibit it for all other uses. The sole exception is for the purpose of selection of judges. The security of the system absolutely requires that no associates of organized crime have access to system data, and judges will have such access in *in camera* hearings. *See, e.g.,* Comment to section 315, *infra.* Only the person directly responsible for appointment of judges will be privy to the information in the Unit Files. *See* section 310(b), *supra.*

It is expected, however, that for purposes of dissemination for law enforcement use, the screening under this subsection will be very simple in most cases, and that an agency could ask for a series of categories briefly noting the same intended use for each. The primary protection is simply in forcing an item by item determination by Unit personnel who are not tactical police officers. The term "law enforcement purpose" as used in subsection (a)(1) is broad enough to allow dissemination to the files of local intelligence units, but could be narrowed to "purpose of investigating particular, past illegal activities" if the Unit proves successful and the Legislature then decides to require local police to use it exclusively. The narrower phrasing would require special provisions to be made for exchanging information with out-of-state intelligence units. The exception for very limited job screening does not include the additional requirement included in S. 2008, 94th Cong., 1st sess., 121 CONG. REC. S 11,554, that "the individual has been notified of the request for such information and has given his written consent to the release of the information." Since S. 2008 primarily concerned non-intelligence information, one presumes the draftsmen simply overlooked the difficulty of applying such a requirement in the organized crime situation.

(b) No individual or agency that receives criminal intelligence information pursuant to subsection (a) of this section may alter its use of such information in a manner such that it no longer would fulfill the requirements of subsection (a) of this section if the infor-

mation were being newly received. Information for which the intended use, as stated to the Unit pursuant to section 311, has been concluded shall be destroyed.

COMMENT: The procedure for getting Unit approval of a different use for previously released information is specified in section 317(a).

(c) Except for dissemination by the Unit Director of information not contained in Unit Files that concerns the operation and administration of the Unit, and except as provided by sections 303(h) and 316, no item of information may be disseminated by the Unit unless:

(1) it is contained in the Unit Files or paraphrases information contained in the Unit Files;

(2) a new determination is made for each item of information as to its level of reliability pursuant to section 303(j); and

(3) each item of information, when considered together with other information in Unit Files, is of such level of reliability as to suggest a substantial possibility of its being accurate.

COMMENT: Since "Unit" is defined to include all Unit personnel, this subsection acts as a gag rule on the staff. A second reliability check at dissemination is required to be sure to intercept information clearly contradicted by subsequent, more reliable information.

(d) Where the agency providing criminal intelligence information to the Unit so requests, that criminal intelligence information shall not be disseminated by the Unit; but the Unit shall inform agencies requesting the category containing that information of the existence of further information and of the agency that provided it.

COMMENT: This subsection is intended to help obtain information from police departments that remain suspicious of the Unit. It is hoped, however, that it will be rarely used. Otherwise, a non-automated Unit could become merely an analysis center and an index and referral service similar to the LEIU program.

(e) No criminal history record information contained in Unit Files may be disseminated by the Unit.

COMMENT: Most states have special statutes and procedures for criminal history record information, and the Unit should not be a means of circumventing them.

Section 313 *Unrequested Update Reports and Analyses*

(a) Unit guidelines may provide, and shall provide in the case of new information contradicting information previously disseminated, that the Unit may inform Authorized Agencies for Dissemination of the existence in Unit Files of information in a particular Name File or category that the Authorized Agency for Dissemination may be interested in requesting, *provided* that a Unit member makes a determination in each case that:

(1) such dissemination would not conflict with any of the Unit objectives specified in section 202 or with the purposes of this Act; and

(2) there is reason to believe, on the basis of prior requests by that Agency for information on the particular Name File or category, or on the basis of that Agency's particular law enforcement purpose that a request for such information would fulfill the standards for dissemination specified in section 312.

(b) Any agency possessing information obtained from Unit files shall, upon receiving notice, pursuant to subsection (a) of this section, of new information contradicting or otherwise altering the previous information, update its files accordingly.

COMMENT: This section does not bypass the regular request procedure but merely stimulates it where most appropriate. Retaining the regular request procedure here should not unnecessarily burden the dissemination of analytical information, since one phone call from the Unit could serve to both inform the local agency of the information's existence and accept that agency's request for it.

Section 314 *Procedures for Dissemination of Information*

(a) Information approved for dissemination pursuant to section 311 shall be communicated to the requesting Authorized Agency for Dissemination by such methods as are indicated by Unit guidelines;

***provided,* however, that the Agency shall receive the information in a written format, except that Unit guidelines may provide for telephonic or other oral communication in cases where the Unit Director personally determines that:**

(1) the intended use of the particular item(s) of information, considered in light of the objectives of the Unit specified in section 202, is such that speed in dissemination is imperative to fulfilling the information's intended use;

(2) no method of communicating the information in written form with the required speed is reasonably available; and

(3) the information is not of such sensitivity that the additional risk to the security of the information created by oral communication outweighs the gain likely to be achieved by rapid dissemination.

(b) Each item of information contained in Unit Files that is disseminated by the Unit, whether in oral or written form, to any individual or organization shall be followed by a clear statement of that item's level of reliability, the approximate time elapsed since its collection, the type of source from which it was collected, and such other indicators as the Unit Director may deem appropriate.

COMMENT: Subsection (b) will make for somewhat unwieldy communications from the Unit, since every few sentences will be followed by one or two qualifying sentences as to age, source, and reliability. This requirement should not be circumvented by the use of footnotes or numbered codes, however, since it is important to ensure that information from the Unit is not overvalued by local agencies who might otherwise perceive it as "new and official." The overvaluation problem becomes particularly acute in a fully automated system because of the commonly perceived infallibility of the computer.

(c) Each report disseminated by the Unit from Unit Files or concerning information contained in Unit Files shall be prefaced, in oral or written form to correspond with the form of the report, with a statement specified in Unit guidelines which would forbid such use of the information as is proscribed by section 316 of this Act.

(d) Detailed records shall be maintained for not less than seven years after the dissemination of information as to which items of information were disseminated, when, and to what individuals or organizations.

Section 315 *Dissemination for Research, for Media Use, and in Response to State Freedom of Information Act Requests*

(a) Unit guidelines may provide for the dissemination of information contained in Unit Files or concerning information contained in Unit Files for research use where:

(1) the requesting individual or organization fulfills all the requirements of sections 311 and 312 except that of section 312(a)(1) concerning intended use;

(2) each individual who may obtain possession of such information pursuant to this subsection shall have given written acknowledgement of the requirements of section 317 and the punishments authorized by section 502;

(3) all results of such research are communicated to the Unit, and may not be released publicly without prior authorization by the Unit Director;

(4) the intended research use is such that it will further the purposes of this Act by increasing knowledge of organized criminal activities;

(5) the information is disseminated only in a form in which individuals are not identified and from which their identities are not ascertainable;

(6) such other reasonable conditions are met as Unit guidelines may provide; and

(7) the Unit Director, in his discretion, approves the dissemination.

COMMENT: This subsection is optional, but some outside research to supplement Unit analysts may be desirable. The broad censorship provision of the second clause of subsection (a)(3) is also optional, although it probably could withstand legal attack if the Unit Director is not unreasonable. *See* Knopf v. Colby, 509 F.2d 1362 (4th Cir.), *cert. den.*, 421 U.S. 992 (1975) (selective censorship of book by former CIA agent Victor Marchetti). An alternative, narrower approach would be to prohibit all public release of research, thus limiting this section to consultants hired by the Unit strictly for its own purposes.

(b) No Unit personnel may communicate with any member of any public media concerning any information that is or has ever been contained in Unit Files.

COMMENT: This subsection adds nothing to section 312(b) except an explicit restatement.

(c) The Unit Director, after consultation with the Unit Legal Advisor, shall determine what information possessed by the Unit and otherwise not appropriate for dissemination shall be disseminated in response to any request under the [State Freedom of Information Act]. Notwithstanding any other provisions of this Act, the Unit Director is authorized to disseminate all information required to be disseminated by the [State Freedom of Information Act]. For purposes of the [State Freedom of Information Act], the Legislature hereby declares that all criminal intelligence information properly contained in Unit Files constitutes investigatory records maintained by the Unit for a law enforcement use.

COMMENT: The last sentence of this subsection is designed to tie the investigatory records exception of the state's version of the federal Freedom of Information Act to the broad definition of criminal intelligence information in section 104(c). However, the Unit is still within the coverage of the Freedom of Information Acts of those states which have enacted legislation reflecting the 1974 amendments to the federal Freedom of Information Act. The amended Act's investigatory records exemption requires that the intelligence authorities demonstrate that each item of information sought to be exempted would, if disseminated, harm the system or the subject of the information. *See* text accompanying note 144, *supra.*

The second sentence of this subsection is intended to permit *in camera* screening of some information by judges. The Organized Crime Strike Force Unit has found that the federal Freedom of Information Act has not proven to be a security threat to its intelligence system, although some *in camera* screening of information has been required. G. Schur, note 48, *supra.*

Section 316 ***Information Obtained from Photographic Surveillance***

Where information derived from photographic surveillance is approved for dissemination from Unit Files, the Unit Director may in his discretion authorize the dissemination to the requesting agency of such part of the actual photographs as is necessary for the

requesting agency to identify persons involved in organized criminal activities or to provide evidence of violations of law.

COMMENT: The Unit Files do not contain any photographs, but merely items of intelligence information derived from photographs. This section acts as an exception to sections 303(h) and 312(b)(1), and allows the release of the actual photographs for two specified purposes.

Section 317 *Impermissible Uses of Disseminated Information*

(a) Any individual or organization desiring to use information disseminated by the Unit for purposes other than those specified in a request made by that individual or organization pursuant to section 311 shall first file a new request with the Unit. Before so using the information, the individual or organization must receive from the Unit, after the Unit screens the new request pursuant to section 311, acknowledgement that the request fulfills all requirements for dissemination.

(b) Any individual or organization having possession of information disseminated by the Unit is prohibited from disseminating such information directly or indirectly to any individual or organization not already possessing such information that has not first filed a request with the Unit pursuant to section 311 and received from the Unit, after screening of the request pursuant to section 311, acknowledgement that the request fulfills all requirements for dissemination; *provided,* however, that a law enforcement intelligence unit not subject to the provisions of this Act to which the Unit has disseminated information for the intended use of redissemination may redisseminate such information to the extent indicated by the intended use filed with the Unit pursuant to section 311.

COMMENT: This section allows a local agency to get approval over the telephone for transfer of information to another agency. Forcing all redissemination to come directly from the Unit is the best theoretical solution, but it would greatly compound the already difficult enforcement problem inherent in this section. Special provision is made for dissemination to out-of-state intelligence units. Out-of-state units are required by sections 312(b) and 313(b) to destroy information when they

no longer need it and to update their files as the Unit sends them update reports.

Section 318 *Emergency Dissemination of Information*

Where the Unit Director determines that information in Unit Files indicates a substantial likelihood that any individual faces imminent danger to his life or property, the Unit Director may, exercising his discretion in such manner as to ensure that his action does not significantly harm any of the Unit objectives specified in section 202 or the purposes of this Act, disseminate a report to an appropriate individual. The report shall contain only such facts, conclusions, or other information contained in or derived from Unit Files as are necessary to avoid the imminent danger to life or property.

COMMENT: It is hoped that the courts will interpret the exception in section (k)(2) of the Privacy Act of 1974, 88 Stat. 1897, 5 U.S.C.A. 552a (1975 Supp.), to be no broader than this provision, although section 301(a) should give this Act priority over a State Privacy Act in case of conflict. Such a conflict might arise over whether the Unit Director's discretion here is reviewable on the merits as under the Freedom of Information Act of simply reviewable for abuse. To avoid these problems, the Legislature may wish to amend this section to specify one standard or the other. This section does not attempt to resolve the issue suggested by the recent *Dalitz* case of whether defendant in a libel suit could obtain discovery of police intelligence files to substantiate the veracity of its published statements that plaintiffs were involved in organized crime. *See* Dalitz v. Penthouse Int'l, No. C-124901 (Cal. Super. Ct., L.A. Co., June 25, 1976).

IV. GENERAL STANDARDS FOR CRIMINAL INTELLIGENCE INFORMATION

Section 401 *Scope of Title*

(a) Nothing in this Title shall be interpreted to contradict the explicit requirements of any other law of [State] or of the United States.

(b) Any local ordinance or agency regulation or practice which

places greater restrictions upon the maintenance, use, or release of criminal intelligence information or which recognizes any personal rights to privacy or other protections greater than those set forth in this Title shall take precedence over this Title and regulations issued pursuant to this Title with respect to the maintenance, use, or release of criminal intelligence information within that locality or agency.

(c) For the purposes of this Title, no information shall be included within the term "criminal intelligence information" where any party using, maintaining, releasing, or receiving such information would, in the normal course, be required to release such information to any individual to comply with the [State Freedom of Information Act], or where such party voluntarily complies with the provisions of that Act regarding such information.

(d) For the purposes of this Title, the term "criminal intelligence information" does not include criminal investigative information as long as such information is maintained, used, released, or received primarily for the purpose of investigating a specific past criminal act.

COMMENT: This Title regulates the use of criminal intelligence information by all government agencies, including the Organized Crime Intelligence Unit. However, the Unit is more extensively and specifically regulated in Titles 2 and 3.

To avoid placing unnecessary restrictions on a large number of state government files, subsections (c) and (d) narrow this Title to information that is secret, being used in substantial part because it relates to possible future criminal activity, and not primarily relating to the investigation of past criminal acts. The Title in no way attempts to deal comprehensively with the privacy problems involved in law enforcement agency data banks; however, it is not restricted to information on organized criminal activities. The phrase "in the normal course" in subsection (c) is included so that information released under state law corresponding to the exception in the Federal Privacy Act for imminent danger to life or property, 5 U.S.C.A. § 552a(k)(2), is still included within this subsection.

Section 402 *Maintenance of Criminal Intelligence Information by Individuals*

An individual employed by a government agency may place or maintain in a file criminal intelligence information relating to any

function performed by the individual in his capacity as a government employee only if:

(a) the file is under the control of or maintained by the agency employing the individual; or

(b) the individual is employed by a government agency for the primary purpose of engaging in civil or criminal law enforcement activity that is authorized by law, and the individual releases such criminal intelligence information only to:

(1) agencies fulfilling the requirements of section 403;

(2) individuals employed by the same government agency also for the primary purpose of engaging in civil or criminal law enforcement activity that is authorized by law; or

(3) individuals employed in a law enforcement capacity by a law enforcement agency, provided that such release is only for the purpose of aiding the investigation and arrest of individuals involved in illegal activities.

COMMENT: Subsection (a) is intended to prevent the storage of any criminal intelligence information in any non-law enforcement individual files, by restricting such information to files in the official charge of a governmental agency. For example, this would prohibit a state housing loan official from keeping indexed and stored in his desk drawer files on "suspected criminals" who might be involved in loan fraud schemes, although such files would be permissible if set up by the agency, as would be lists of suspects taken from the agency files and given to the official for current use, since these would not constitute a "file" under section 104(f).

Because of the way "criminal intelligence information" is defined in section 104(c), subsection (b) would prohibit a local policeman from telling the press that someone is "in the Mafia," but would not prevent his leaking that A is suspected of having killed B last week. The latter concerns a specific past criminal act, not possible future criminal activity, and thus does not come within the definition in section 104(c). The limits on dissemination in subsection (b) are left quite broad, so as not to restrict police from informally exchanging information while conducting a joint investigation.

Section 403 *Maintenance of Criminal Intelligence Information by Agencies*

No person shall place or maintain in any files under the control of or maintained by a government agency any criminal intelligence information, unless the following conditions are met:

(a) the agency controlling or maintaining the files, with the exception of the [State] Organized Crime Intelligence Unit, shall report annually to the Legislature as to the nature of all files in its possession which contain any criminal intelligence information; shall state why all or part of such information is not reasonably available to the agency without its maintenance in the agency's files; and shall include in its report an updated copy of the guidelines required by subsection (c) of this section;

(b) no criminal intelligence information is stored or processed by automated equipment not dedicated solely to law enforcement uses;

COMMENT: The purpose of this subsection is to safeguard file security. Agencies other than the Organized Crime Intelligence Unit which keep computerized files of criminal intelligence information are required to store the information in such fashion that accessibility to non-law enforcement personnel is restricted.

Such a broad "dedication" requirement quite likely will be strongly opposed since computers are expensive and the security risks noted in the Comment to section 308 are acute only in the case of organized crime information. Note, however, that this section requires only dedication to general law enforcement uses, whereas section 308 requires any automated equipment used by the Unit to be dedicated solely to Unit use.

(c) the agency controlling or maintaining the files has adopted written guidelines, which shall include but not be limited to:

(1) clear standards regarding the criminal intelligence information which may be placed in the files, to include but not be limited to standards for methods of collection, relevance to the agency's governmental mission, and levels of reliability;

(2) specific procedures for the screening by not fewer than two individuals employed by the agency of each item of criminal intelligence information before it is placed in the agency's files;

(3) measures reasonably sufficient to ensure the physical security of the files;

(4) clear standards and procedures for the regular review of all items of criminal intelligence information in the files and for the purging of such information not meeting specified standards; such standards to include, but not be limited to, time since collection, relevance to the agency's mission, levels of reliability, accuracy of the information in light of other information collected, and actual use of the item of information by the agency;

(5) a list of all individuals and organizations to whom criminal intelligence information in the files may be released, and standards concerning uses to which they may put such information;

(6) specific procedures for the release of criminal intelligence information from the files to any individuals, which procedures shall include: (A) provision that all requests for criminal intelligence information, other than by individuals employed by the agency maintaining such files, shall be made to the agency or reproduced by the agency in written form, and (B) provision for the screening of each item of criminal intelligence information prior to release from the files to ensure that it fulfills specified levels of reliability and relevance to the uses for which it is being released; and

(7) provision for a regular independent audit of the activities and procedures of the agency relating to criminal intelligence information in its possession; and

(d) the agency maintaining such files shall retain for at least five years after the release of any item of criminal intelligence information an accurate accounting of:

(1) the date of each such release;

(2) the nature of the information released; and

(3) the name and address of the individual or agency to whom the information was released and the use to which that individual or agency intended to put the information.

COMMENT: Section 403 includes organized crime intelligence in order to prevent the circumvention of Title 3 restrictions through the creation of similar units without adequate privacy safeguards. A local unit merely duplicating the work of the state Unit is not prohibited by this section, although the report required by subsection (d), it is hoped, will bring the duplication of files to the Legislature's attention. The enforcement mechanism for the guidelines required by subsection (c) is provided by section 406(a)(1), which makes certain violations of the guidelines violations of this Act, and thus civilly enforceable

under section 503. A violation occurs only if the information is released.

Section 404 ***Improper Criminal Intelligence Information***

(a) No individual shall place in any files maintained by a governmental agency any criminal intelligence information that he knows or has reason to know:

(1) does not raise a substantial possibility of aiding the agency in performing lawful duties delegated to it by a statute or ordinance;

(2) was obtained through the use of illegal activities or in violation of the constitutional rights of any individual;

(3) constitutes surveillance data as defined in section 104(d), except for public record information as provided in section 306(c);

(4) was gathered or collected at any time by any governmental agency primarily on the basis that the individuals to whom the information relates were of a particular race or ethnic group, held particular religious or policital beliefs, or engaged in particular religious or political activities;

(5) was gathered during any investigation that also involved the use of any individual as an *agent provocateur*;

(6) was gathered through the use of wiretaps for which no court order was obtained; or

(7) concerns any activity proscribed from Unit categorization by section 303(e), except as such activity may directly relate to criminal activities.

(b) Any official of a governmental agency which maintains any files shall destroy all criminal intelligence information in such files which he knows or has reason to know would fail to fulfill the requirements of subsection (a) of this section if he were placing that information in said files.

COMMENT: This section follows the limitations of methods of collection for the Unit set out in section 302. Subsection (a)(1) is added to incorporate a relevance requirement such as is provided for the Unit by section 303(c) and section 304(b)(1). Subsection (a)(7) is necessary because it is impractical to require all state law enforcement agencies to institute a categorization system, such as that prescribed for the Unit in § 303(c). Many of

these standards, which are generally derived from values and policies extrinsic to law enforcement, may require substantial changes in present procedures. However, if they were substantially moderated, it would only serve to undercut the effect of the Unit's safeguards. Note, however, that as presently written these standards do not apply to section 402 files, which should lessen their impact on day-to-day police work and avoid making patrolmen criminally liable for their methods of collecting information, even if they act in bad faith.

Section 405 *Determination of Source of Information*

(a) No governmental agency or individual employed by any governmental agency shall possess in written form, or in a form retrievable by the use of automated or other mechanical equipment, any item of criminal intelligence information without having made a reasonable attempt to determine the source of that information; *provided,* however, that such agency or individual may possess criminal intelligence information obtained by a law enforcement agency from a confidential informant without knowing the identity of that informant or the method by which such informant obtained such information.

(b) For the purposes of this section, "confidential informant" means an individual who provides to another individual an item of information believing that it may relate to criminal activity or may relate to persons suspected by a law enforcement agency of engaging in criminal activity, where the individual providing the information indicates at any time that he does not wish to be identified as the source of that information; *provided,* however, that the individual makes that indication in the reasonable belief that such identification, if it were to become public, might result in physical harm to himself, a substantial invasion of his privacy, or any harm that would constitute a tort under state law. No information shall be deemed to come from a confidential informant where that informant circulated the information publicly, or in any widespread manner.

COMMENT: Like all of Title 4, this section applies equally to the Unit. Note, however, that this section only concerns the source of information that qualifies as "criminal intelligence information" under the narrowed definition of that term in section 401.

Thus an agency using information solely for a current investigation of a past criminal act would not be required to know its source. Subsection (b) attempts to limit the extent to which law enforcement agencies can hide the source of information by simply stating that it came from a "confidential informant." Such problems have arisen in the past as the F.B.I. practice of referring to all wiretaps as "confidential informants."

Section 406 *Release of Criminal Intelligence Information*

(a) A governmental agency other than the Unit which maintains criminal intelligence information may release such information to an individual employed by a law enforcement agency, to a law enforcement agency, or to an individual responsible for the appointment of judges, when:

(1) the releasing agency follows its own guidelines concerning the standards and procedures for release of information, and has collected and maintained the information in accordance with such guidelines;

(2) the receiving individual or agency informs the releasing agency of the intended use of the information;

(3) the receiving individual or agency intends to use the information solely for the purpose of engaging in civil or criminal law enforcement activity authorized by law, except that the information may be used for the purpose of checking the background of persons applying for executive positions in law enforcement agencies or under consideration for judgeships;

(4) the receiving individual or agency will not use the information for the purpose of combating organized criminal activities engaged in for monetary gain, unless such individual or agency does not maintain the information as criminal intelligence information; and

(5) each item of information is determined by the releasing agency, when considered in light of all information possessed by that agency, to be of a known level of reliability such that there is a substantial possibility that it is true.

(b) No individual or agency which receives criminal intelligence information pursuant to subsection (a) of this section may alter the use of such information in any manner such that the individual or agency no longer would fulfill the requirements of subsection (a) of this section if the information were being newly received. Informa-

tion for which the intended use, as stated to the releasing agency pursuant to subsection (a)(2) of this section, has been concluded shall be destroyed.

(c) Notwithstanding any other provisions of this Title, any individual or organization may release any criminal intelligence information to the [State] Organized Crime Intelligence Unit in any manner approved by the Unit Director.

COMMENT: This section roughly parallels the dissemination standards for the Unit set out in sections 312 and 317. However, subsection (a)(3) employs a much narrower definition of proper intended use than does section 312(a)(1). Here a proper intended use is limited to actual criminal investigations, as opposed to "law enforcement purposes, including sentencing and parole decisions" in section 312. In addition, subsection (a)(4) effectively prohibits local intelligence units from exchanging organized crime intelligence directly. They must instead go through the Unit, thereby preventing the creation of any competing statewide network. Given the breadth of this Title, subsection (b) faces an overwhelming enforcement problem and may prove effective only in the case of very large files or particularly sensitive information. As drafted, subsection (b) interacts with subsection (a)(2) to require notice to the disseminating agency of the receiving agency's change in use. This may prove to be an unreasonable paperwork burden, particularly since civil remedies are available.

V. PENALTIES FOR VIOLATIONS OF THE ACT

Section 501 *Administrative Sanctions*

(a) The Unit shall disseminate no information to any individual or organization that the Unit Director has reasonable grounds to believe has, within six months of the date of any request for information, violated any provisions of Title 3 of this Act or of any Unit guidelines issued pursuant to section 207 of this Act.

(b) The employment with the Unit of any Unit member shall immediately be terminated by the Unit Director, whenever the Unit Director, or in the case of the Unit Director whenever the Chief of

the State Police [Alternative: Director of the State Identification Bureau], has reasonable grounds to believe that the Unit member has negligently or intentionally violated any of the provisions of this Act or of guidelines enacted pursuant to this Act.

COMMENT: The "reasonable grounds" test is intended to rule out any hearing requirement and to require, upon giving rise to significant suspicion of a violation of the Act, removal of an agency from the section 310 list of Authorized Agencies for Dissemination or of an individual from employment with the Unit. A negligence standard, rather than the absolute standard imposed by subsection (a), is used for Unit members because of the greater number and detail of provisions applying to them. The six month limitation in subsection (a) is arbitrary, but under section 310(b)(5) the Unit Director has full discretion to cut off an agency from receiving information for a longer period. Subsection (a) should expand the Director's freedom to cut off agencies in practice because he can point to the Act as forcing his hand.

Section 502 *Criminal Penalties*

(a) Any individual who willfully acquires, uses, maintains, releases, or disseminates information knowing such acquisitions, use, maintenance, release, or dissemination to be in violation of this Act shall be sentenced to not more than six months in prison and a $1,000 fine.

(b) Any individual who willfully and with intent to cause harm to any individual acquires, uses, maintains, releases, or disseminates information knowing such acquisition, use, maintenance, release, or dissemination to be in violation of this Act shall be sentenced to not more than five years in prison and a $10,000 fine.

Section 503 *Civil Remedies*

(a) Any person who is aggrieved by a violation of this Act and who shows a reasonable possibility of fulfilling the requirements of subsection (b) of this section shall have cause to maintain a civil action in [superior] court, against any person causing or responsible

for such violation, for compensatory damages or any other appropriate remedy in law or equity excepting punitive damages and excepting damages related to a criminal conviction (or arrest leading thereto) of, or a finding of violation of law by, such aggrieved person.

(b) No person may receive relief under this section unless he shall prove that the violations of this Act complained of, when taken together, have caused him:

(1) damage to his reputation or emotional distress in excess of $10,000 as a result of his being placed in a false light in the public eye and of the public disclosure of private facts concerning him; or

(2) damage to his reputation in excess of $5000; or

(3) physical harm to his person in excess of $500.

(c) The Attorney General of [State] [Alternative: and the Unit Privacy Auditor] shall have cause to maintain a civil action for such equitable relief as may be appropriate against any person or agency in order to enforce the provisions of this Act.

(d) Any person or agency responsible for violations of this Act shall be jointly and severally liable to a person fulfilling the requirements of subsection (a) of this section for damages granted pursuant to this section; *provided,* however, that good faith reliance by any agency or person upon the assurance of another agency or person to the effect that information provided to the former agency or person was maintained or disseminated in compliance with the provisions of this Act or any regulations issued thereunder, shall constitute a complete defense for the former agency or person to a civil damage action brought under this section but shall not constitute a defense with respect to equitable relief.

(e) For the purposes of this Act, [State] shall be deemed to have consented to suit.

COMMENT: This section may require some alterations to conform to local practice. Subsection (b) attempts to balance competing concerns. On the one hand, there is a need for some method of enforcement of the Act by persons other than government officials, and also a necessity for compensating truly innocent parties seriously harmed by violations of the Act. State tort law is an inadequate mechanism, even though this statute will assist in demonstrating negligence, because in many states the cause of action may not be recognized at all. On the other hand, allowing suit over every minor breach of agency

guidelines that produces the "trifling" injury necessary to have standing to sue in many states could swamp the system in harassing discovery proceedings. However, the balance struck by subsection (b) can be altered by modifying the dollar figures. Subsection (b)(3) should be included whether or not the state recognizes the two torts mentioned, and the language should be interpreted in light of general tort law precedents. Note that someone convicted as a result of violations of this Act can use the conviction to fulfill the requirement of subsection (b), but cannot collect such damages once he proves liability, though he may have other, lesser damages unrelated to his arrest and conviction. The most sensitive concept in subsection (b) is causation. Either too narrow or too broad an interpretation of causation would destroy the desired balance.

Section 504 *Inapplicability of Exclusionary Rule*

A determination by a court of a violation of this Act or of guidelines adopted pursuant to this Act should not be the basis for excluding evidence in a criminal case unless the violation is also a violation of a constitutional right or is otherwise so serious as to call for the exercise of the supervisory authority of the court.

VI. MISCELLANEOUS PROVISIONS

Section 601 *Severability*

If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

Section 602 *Appropriations Authorized*

For the purpose of carrying out the provisions of this Act, there are authorized to be appropriated such sums as the Legislature deems necessary.

Section 603 ***Effective Date***

The provisions of this Act shall take effect one year after the date of enactment; *provided,* however, that the Attorney General of [State] may for up to one additional year, except from the provisions of sections 403(b), 403(c), 404(c), 405, and 406(b), any files which he determines cannot be altered to conform with these provisions without imposing an unreasonable administrative burden on the individual or organization maintaining such files.

ARTICLE

FORGIVING THE CRIMINAL OFFENDER BRITISH STYLE: THE REHABILITATION OF OFFENDERS ACT

NEIL P. COHEN*

Modern penologists urge the rehabilitation and societal reintegration of persons convicted of crimes. But the prejudices of employers and the general public limit reformed offenders' opportunities for enjoyment of full citizenship. The British Parliament enacted the Rehabilitation of Offenders Act in 1974 with the goal of suppressing the public's opportunities to learn about the criminal records of offenders who are rehabilitated. The Act legitimates secrecy on the former offender's part and provides civil and criminal penalties for wrongful disclosure of his convictions by other parties.

Professor Cohen analyzes the theoretical bases of the Act and reviews Parliamentary struggles over its terms. He suggests that although the Act's present remedial provisions will not significantly deter disclosure of criminal convictions, the enactment of the bill was a moral imperative which could reshape British attitudes about former offenders and significantly enhance their prospects for leading stigma-free lives. He recommends its provocative scheme to American reformers for their consideration.

Introduction

In Britain,[1] as in the United States and most other nations, society believes that the criminal offender lacks the ability to be a responsible and productive citizen. As a result, the convicted offender bears an invisible version of the mark of Cain — his criminal history record — which is classified as a public document in many jurisdictions and perhaps is also reported to the

*Associate Professor of Law, University of Tennessee. B.A. 1967, Yale University; J.D. 1970, Vanderbilt University; LL.M. 1972, Harvard University. The author is grateful to Professor Nigel Walker, Director of the Institute of Criminology, Cambridge, Mr. Brian Napier, Queen's College, Cambridge, and Mr. Paul Sieghart, barrister, for their helpful comments on earlier drafts of this article, and to Trinity College, Cambridge, for a grant assisting his research. The author alone is responsible for the views expressed herein.

1 The Rehabilitation of Offenders Act applies to England, Wales and Scotland. The Act includes slight variations to accommodate peculiarities in Scottish law. The use of the word "Britain" in this article generally refers to all three countries. Spelling has been changed to reflect American usage.

public via the news media. Although he may be rehabilitated or reformed, the offender cannot escape his "record prison."[2] And he finds that a criminal record substantially decreases his alternatives in virtually every area of life. Employers are unwilling to hire "criminals"; insurers are unwilling to issue to offenders the fidelity bonds necessary for many jobs; government licensing agencies deny offenders the licenses necessary for certain professions; and attorneys rely upon conviction records to impeach the offender when he serves as a witness in judicial proceedings. As a consequence of these stigmata, persons with criminal records are under great pressure to conceal their past. But this desire for concealment creates a dilemma. If the offender lies about his past, he violates general moral prescriptions against lying and risks severe penalties if he is caught in the lie. If the offender is honest about his criminal history, he incurs discrimination which years of exemplary, crime-free living cannot prevent.

In 1974, the British Parliament acted to ease the burden of this dilemma by passing the Rehabilitation of Offenders Act,[3] a measure intended to eliminate discrimination against certain classes of rehabilitated offenders by prohibiting employment discrimination against them and by authorizing them to conceal and to deny their convictions. No statistical data are presently available to test the success of the Act, but its provisions can be evaluated in light of its purposes and examined for their utility for United States law reformers seeking keys to unlock the record prisons of this country.[4]

2 Some legal scholars in the United States and Canada analyzing this problem use the term "record prison" to describe the offender's dilemma. Conviction records, or arrest records alone, may trap the offender into low-prestige, low-income employment situations which encourage further criminal activity. *See* Note, *Employment of Former Criminals,* 55 CORNELL L. Q. 306 (1970); *see generally* DeWeese, *Reforming Our "Record Prisons": A Proposal for the Federal Regulation of Crime Data Banks,* 6 RUT.-CAM. L. J. 26 (1974); Comment, *Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees,* 47 WASH. L. REV. 659 (1972) (citing evidence compiled in 1967 by the President's Commission on Law Enforcement and Administration of Justice).

3 Rehabilitation of Offenders Act, 1974, c. 53 [hereinafter cited as the Act]. To date, little has been written about the Act. *See generally* Note, *Rehabilitation of Offenders Act 1974,* 38 MOD. L. REV. 429 (1975); Sieghart, *The Rehabilitation of Offenders Act 1974,* 125 NEW L. J. 760 (1975).

4 Although many American states now seal court documents relating to some criminal convictions, removing them from the public record, *see* note 172, *infra,* further statutory protection is needed to ensure rehabilitated offenders' privacy. *See* text accompanying notes 158-178, *infra.*

I. Overview and Background of the Act

In 1970 three English law reform groups voluntarily formed what became known as the "Gardiner Committee" to study discrimination against convicted persons.[5] This Committee was concerned with formulating a scheme, which Parliament would adopt, for integrating rehabilitated offenders into society. The Committee's recommendations, made in 1971, were altered extensively in a lengthy legislative process[6] and culminated in passage of the Rehabilitation of Offenders Act in 1974.

The basic mechanism of the Act is secrecy. Its provisions attempt to bar public knowledge of the criminal convictions of offenders who have "lived down" their criminal history. All persons judged guilty of a crime and receiving a non-custodial sentence or a custodial sentence no longer than thirty months are eligible for the Act's protection.[7] Convictions by military

5 The three groups were JUSTICE (British Section of the International Commission of Jurists), the Howard League for Penal Reform, and NACRO (National Association for the Care and Resettlement of Offenders). The Committee's official name was the Joint Committee on Previous Convictions.

Lord Gardiner was selected to lead the Committee because of his reputation as a law reformer, distinguished barrister, former Lord High Chancellor of Great Britain, and member of the House of Lords. Most of the Committee's thirteen members were lawyers and judges. No prisoner or ex-prisoner participated in its deliberations.

6 JUSTICE, HOWARD LEAGUE FOR PENAL REFORM, & NATIONAL ASSOCIATION FOR THE CARE AND RESETTLEMENT OF OFFENDERS, LIVING IT DOWN (1972) (report of Joint Committee on Previous Convictions) [hereinafter cited as LIVING IT DOWN]. The Gardiner Committee's recommendations, in statutory form, were introduced in the House of Lords in 1972. 337 PARL. DEB., H.L. (5th ser.) 1082 (1972). Although the government expressed grave reservations about specific parts of the bill, there was general agreement that something should be done to help the reformed offender. The bill passed the House of Lords after 67 amendments were considered. 338 PARL. DEB., H.L. (5th ser.) 707-25, 734-98 (1973) (second reading); 339 PARL. DEB., H.L. (5th ser.) 1305-82 (1973) (committee); 340 PARL. DEB., H.L. (5th ser.) 1321-33 (1973) (third reading). On October 27, 1973, the session of Parliament officially ended and the bill lapsed. In 1974 the bill was introduced twice in the House of Commons. Following a controversy over the bill's enforcement provisions involving defamation actions by offenders, COMMITTEE ON DEFAMATION, INTERIM REPORT, CMND. No. 5571 (1974), the bill was drastically amended at the Government's request, STANDING COMMITTEE C, H.C., OFFICIAL REPORT ON REHABILITATION OF OFFENDERS BILL (first sitting June 12, 1974; second sitting June 19, 1974), and finally passed the House of Commons, 875 PARL. DEB., H.C. (5th ser.) 1939-1984 (1974).

In the House of Lords, eighty-six amendments were considered, many of them passing, before the bill was approved. 353 PARL. DEB., H.L. (5th ser.) 32 (1974) (first reading); *id.* 873-933 (second reading); *id.* 1330-1408, 1806-52 (Committee of Whole House); *id.* 1995-2016 (third reading). The House of Commons considered and approved the Lords' amendments on July 31, 1974. 878 PARL. DEB., H.C. (5th ser.) 748-57 (1974).

7 Rehabilitation of Offenders Act § 5(1)(b).

tribunals[8] and foreign courts[9] are not excepted. To benefit from the Act's secrecy provisions, the offender must complete the "rehabilitation period" prescribed for the sentence he received[10] without being convicted of an indictable offense during that period.[11] If he is successful, conviction becomes "spent." Rehabilitation periods range from six months to ten years. Conviction for an indictable offense during the rehabilitation period can delay the conclusion of the period,[12] or, if the second offense is very severe, prevent the first offense from ever becoming spent.[13]

Once an offender completes the required rehabilitation period, he becomes a "rehabilitated person" who

> shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offenses which were the subject of that conviction. . . .[14]

The Act spells out the legal results of this change in status. (1) The rehabilitated offender does not have to disclose his spent conviction if he is questioned about it.[15] (2) Evidence of the spent conviction may not be introduced in proceedings before a "judicial authority."[16] Such proceedings include all judicial and quasi-judicial proceedings in which rights of the offender are to be determined,[17] *e.g.*, civil trials and labor dispute arbitrations. Criminal trials, military disciplinary proceedings, and child custody determinations are not included in this category.[18] (3) Employers may not discriminate against rehabilitated offenders on the basis of spent convictions.[19]

To enforce its provisions, the Act provides for civil and criminal liability. A criminal charge may lie against any person

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8 *Id.* § 2.
9 *Id.* § 1(4)(a).
10 *See id.* § 5 Tables A and B.
11 *Id.* §§ (1)(b), 6(6)(a).
12 *Id.* § 6(4).
13 *Id.* § 6(4)(b).
14 *Id.* § 4(1).
15 *Id.* § 4(1)(b), (2), (3)(a).
16 *Id.* § 4(1)(a).
17 *Id.* § 4(6).
18 *Id.* § 7(2) (a)-(c).
19 *Id.* § 4(3)(b).

who, by dishonest means, improperly obtains information in official records concerning spent convictions.[20] In addition, public officials who have access to the records and who disclose such information other than in the course of their official duties may be prosecuted.[21] The rehabilitated offender may bring a defamation action against persons who maliciously disclose his spent conviction.[22] There is no provision for enforcement of the rule against employment discrimination.

All rehabilitated offenders are not protected in the situations outlined above, however. Acting pursuant to his statutory authority to promulgate exceptions to the Act[23] with Parliamentary approval,[24] the Home Secretary has issued an extensive list of professions and proceedings related to them which are exceptions to the Act.[25] An offender who applies for or engages in one of the excepted professions loses his right to conceal his spent conviction. The list of exceptions is subject to revision by the Home Secretary, who must secure Parliament's approval each time he seeks modification of the Act.[26]

Central to the Act is its broad conception of the criminal "sanction." Although traditionally the term applies only to such direct, official consequences as prison, banishment, or the death penalty, the Act's more realistic approach is to enlarge the concept to include all direct and indirect results of a criminal conviction. This broad view of sanctions includes such unofficial consequences as the loss of employment and related opportunities, increased stigma, and a host of other disabilities flowing from a conviction.[27]

Criminal sanctions are usually rationalized in terms of one or more theories of punishment: rehabilitation, retribution, incapacitation, deterence, and education.[28] The drafters of the

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20 *Id.* § 9(4).
21 *Id.* § 9(2)-(3).
22 *Id.* § 8(3), (5), (6).
23 *Id.* §§ 4(4), 5(11), 7(4), 9(5).
24 *Id.* § 10.
25 STAT. INST. No. 1023, *The Rehabilitation of Offenders Act 1974* (Exceptions). *See* notes 49-52 *infra.*
26 Rehabilitation of Offenders Act § 10.
27 *See generally* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 17-34 (1968).
28 *See generally* W. LA FAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 21-25 (1972); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35-61 (1968). For a review of the

Act believed that the numerous forms of discrimination against offenders are inconsistent with several of these rationales.[29] In their hierarchy, rehabilitation is the primary aim of punishment.[30] Disturbed by the fact that existing practices of discrimination are disincentives to rehabilitation, the Gardiner Committee sought to create a legal environment supportive of rehabilitation by providing the offender an incentive to reform. His record would be forgiven and forgotten if he demonstrated his rehabilitation by conviction-free living. Access to and use of information about his convictions would be forbidden in many circumstances. The Committee hoped that giving Parliamentary expression to this incentive would improve offenders' self-image and reduce public bias against them.

The drafters of the Act did not dispute society's right to punish the criminal. But they did believe that punishment should be confined to the sanction directly imposed by the sentencing authority and that following the imposition of the sanction, society has a moral duty to show its forgiveness and to welcome the offender back into its midst.

The drafters also accepted the validity of incapacitation, expressed as society's legitimate interest in restricting an offender's full participation in social life until the former criminal demonstrates that he is once more a trustworthy member of society. Thus the Committee found justifiable exposing the offender to a period of social discrimination from the expiration of his sentence until his conviction is "spent."[31]

The Committee's view of the deterrence and education rationales is unclear. By reducing some of the long-term social

historical evolution of theories of punishment, *see* Radzinowicz and Turner, *A Study of Punishment: Introductory Essay,* 21 CANADIAN B. REV. 91-97 (1943).

29 Some of the information in this and other sections was obtained in confidential interviews with three members of the Gardiner Committee.

30 The Act's philosophy is not original. The Act is an attempt to fulfill what one scholar in 1940 called "the proper aim of criminal procedure . . . to reform the criminal so that he may become adjusted to the social order. . . . Even from the strictest economic point of view, individual men and women are the most valuable assets of any society. Is it not better to save them for a life of usefulness rather than punish them by imprisonment which generally makes them worse after they leave than before they entered?" Cohen, *Moral Aspects of the Criminal Law,* 49 YALE L. J. 987, 1012 (1940). Characteristically ahead of his time, Cohen argued for probation as an alternative to incarceration, but even probation cannot succeed when the stigma attached to a criminal record prevents the offender's useful reintegration to society.

31 *See* the explanation of "spent" convictions at text accompanying note 11, *supra.*

stigma of a criminal conviction, the Act may have reduced the impact of the deterrent functions of criminal sanctions.[32] On the other hand, the Committee did not challenge the propriety of the court's direct sanctions. If prison sentences or fines serve the goal of deterrence, the proponents of the Act did not indicate a desire to interfere with such sanctions and the goals they serve.

II. Analysis of the Act

A. *Limitations on Coverage*

Considering the Committee's goals,[33] the specific proposals which emerged were surprisingly modest. The Act applies, for example, only to offenders whose sentences do not exceed thirty months in prison and who do not lose its protection under one of the exclusions promulgated by the Home Secretary.

1. Thirty Month Limit

Early in their deliberations the drafters of the Act decided to mollify anticipated opposition by limiting their work to removing discrimination against reformed criminal offenders who had not been convicted of a serious criminal offense for a considerable period after the initial conviction.[34] This would give assistance to those offenders who had proven themselves worthy of leniency and who, by resuming full participation as citizens, would pose no danger to the public. One reason for this decision was practical: the Committee believed that the public and Parliament would reject a proposal which entitled convicted rapists and murderers to hide their convictions.[35] Another reason was the general feeling that in some circumstances the public has a right to be informed about, and take action based on, convictions for very serious offenses, even if

32 Query what weight potential offenders give to social sanctions for their offense in those cases where, prior to criminal activity, they weigh the benefits to be gained from crime against the consequences of conviction.

33 Living It Down, *supra* note 6 at 5-9.

34 *Id.* 15-16.

35 *Id.* 19-20.

those convictions occurred many years ago and even if the offender had since proved himself to be rehabilitated. Some Committee members, accepting incapacitation as a legitimate rationale, felt that a conviction for a serious crime indicated that the offender posed such a substantial threat of recidivism that discrimination against him was appropriate to protect the public.[36] However, no empirical support was offered by the Committee to show that offenders receiving stiff sentences presented any special risk after they had been released from custody and lived crime-free for a substantial period of time. Committee members may have reasoned that since the public, rightly or wrongly, believes some offenders with a history of serious criminal activity cannot be rehabilitated, continued discrimination against these offenders is necessary to allay such fears by letting the public feel that it is being protected from potential serious harm.

Once the decision was made to exclude serious offenses, the Committee considered using the offender's crime as its criterion, but abandoned this idea because this factor would not take into account the offender's personal characteristics or the facts of the case. Instead, the Committee decided to use the sentence imposed as the measuring rod of seriousness. It reasoned that the magistrate or judge imposing the sentence would do so only after considering such factors as the offender's background and the gravity and facts of the crime.[37] There was no attempt by the Committee or Parliament to study recidivism statistics to determine whether any given sentence separates the "redeemable" from the lost. And no poll was taken or consulted to measure the public's perception of who is a "hardened crimi-

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36 *Id.*

37 *Id.* 15-16. In Britain, as in the United States, sentences are determined by judges or magistrates (usually citizens who are appointed to adjudicate cases handled by the magistrates court, the lowest level judicial body in Britain). Statutes often establish the maximum permissible sentence, but in practice the maximum sentence is rarely given. In deciding the actual sentence, the British sentencing authority considers roughly the same factors as would an American judge or jury. Thus, the following data would be relevant: the theory behind the sentence (*e.g.*, deterrence), the severity and facts of the offense, and various aspects of the offender's history (*e.g.*, previous criminal record, age, work history, family situations, mental and physical health, attitude, and social skills). *See generally* R. CROSS, THE ENGLISH SENTENCING SYSTEM (2d. ed. 1975) [hereinafter cited as CROSS].

nal" and which offenses evoke "strong feelings of resentment."[38]

The thirty month period[39] has some weaknesses which cannot be ignored. As with any fixed point the formula has the advantage of easy application but the disadvantage of rigidity.[40] In borderline cases, the sentencer, because of his temperament or judicial philosophy, might pronounce a sentence exceeding thirty months even though the seriousness of the offense does not warrant so harsh a punishment.[41]

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38 Conceding that there is "room for argument" over the precise line to draw, the Committee suggested that a two-year maximum distinguishes "between redeemable offenders and those whom society is likely to regard either as hardened professionals, or as people whose offenses have been such that the notion of rehabilitation evokes strong feelings of resentment." LIVING IT DOWN, *supra* note 6 at 17. The other reason given, which appears more as an afterthought than anything else, is that a two year sentence "is the longest which, under our present law, can be suspended." *Id.* Members of Parliament more experienced in the workings of the British criminal justice system argued that the thirty month sentences, not the two year sentences, were the real threshold between serious and very serious crimes. *See* 339 PARL. DEB., H.L. (5th ser.) 1333-35 (1973) (remarks of Lord Hunt).

Unlike most American jurisdictions, in Britain an offender may appeal the sentence given by the trial court. CROSS, *supra* note 37, at 99-100. One result of this procedure is the creation of a body of appellate decisions establishing sentencing principles, which, among other things, list appropriate sentences for certain kinds of offenders or offenses. These sentences are virtually always less than the maximum authorized by statute. *See generally* D. THOMAS, PRINCIPLES OF SENTENCING (1970). According to British sentencing practices, the actual dividing line between a sanction for serious and very serious crimes is a three year custodial sentence. The Act reflects the fact that judges tend to use a six month interval scale in assigning sentences near the three year point. Therefore, a thirty month sentence is, in practice, the next sentence below a three year sentence. Interview with Mr. D. A. Thomas, Assistant Director of Research, Institute of Criminology, Cambridge University (April 1, 1976).

In Britain, a three year custodial sentence would be an average minimum sentence for such serious offenses as rape, robbery, breach of trust involving sums exceeding £1000, and distribution of large quantities of marijuana. D. THOMAS, *supra,* at 110, 128, 147, 164.

The thirty month period is computed by looking at the length of the actual sentence, not the period of time actually served. Under British law a prisoner generally receives a remission of one-third of his sentence and, if paroled, can be relieved of as much as two-thirds of the sentence. *Id.* at 46.

Since the Act does not apply to persons receiving prison terms longer than thirty months, it also excludes sentences of life imprisonment and certain indefinite commitments. Rehabilitation of Offenders Act § 5(1).

39 Rehabilitation of Offenders Act § 5(1)(b). The section was added by the House of Lords; *see* 339 PARL. DEB., H.L. (5th ser.) 1335 (1973).

40 *See generally* 1 VON IHERING, THE SPIRIT OF ROMAN LAW 51-56 (2d ed. Fr. trans. 1883).

41 Disgruntled offenders may appeal their sentences. CROSS, *supra* note 38 at 99-100. The Gardiner Committee mildly suggested the establishment of a procedure whereby such persons could apply to a tribunal for special permission to be included

Another more fundamental shortcoming is that the thirty month limitation unjustifiably excludes more serious offenders from the Act. If any offender has lived crime-free for a substantial time period, such as ten years, there is little reason to continue discriminations ôn the basis of the gravity of the offense. Certainly the offender has demonstrated that he poses little risk of recidivism, thereby strongly suggesting that the public no longer needs protection from him, and that he does not need to be further deterred from committing other crimes. Also, continued discrimination cannot foster rehabilitation which should have already been achieved during the rehabilitation period. The only rationales for the existing practices are retribution and deterrence of illegal actions by other persons. It is also arguable that the thirty month limit could induce the clever criminal, carefully weighing the alternatives, to commit an offense with an average penalty of thirty months or less rather than a more serious offense. Although society has a legitimate interest in encouraging criminals to commit less serious offenses, the proposition that the thirty month limit serves this goal is, at best, too speculative to justify the limit. The only sufficient explanation for distinguishing serious from minor offenses is that it was deemed politically necessary.[42]

2. Exceptions

Persons covered by the Act do not enjoy total protection from disclosure of their criminal histories. In many situations, the Act elevates the public's need to know about a person's past

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under the Act. LIVING IT DOWN, *supra* note 6, at 20. The Act includes no specific authorization for a case-by-case waiver of the thirty month limit, but it does generally empower the Home Secretary to change the thirty month limit in either direction. Rehabilitation of Offenders Act § 5(11)(a). He can increase it to five years or decrease it to five months. His discretion is limited by the requirement that any such order must be approved by resolution of both Houses of Parliament. *Id.* § 10(2). This procedure was designed to ensure that Members of both Houses of Parliament would be kept informed about, and have an opportunity to reject, the Home Secretary's actions in modifying the impact of the Act. In actual practice, however, it would be unusual for either House to do more than briefly discuss and automatically approve an administrative matter such as a change in the thirty month limit. This was the case in the discussion of the initial list of exceptions to the Act promulgated by the Home Secretary. *See* 894 PARL. DEB., H.C. (5th ser.) 169-77 (1975).

42 "There will be many who will argue that there are some crimes which society should never forget." LIVING IT DOWN, *supra* note 6 at 19.

convictions above the offender's need for secrecy. It authorizes the Home Secretary to exclude from coverage appropriate judicial and quasi-judicial proceedings,[43] questions about criminal records,[44] obligations to disclose convictions,[45] and employment situations.[46] In determining the exceptions, the Home Secretary tried to identify occupations involving: (1) close dealing with young people, (2) close dealing with vulnerable people, (3) involvement with the administration of justice, (4) national security, (5) other strong public interests, and (6) access to drugs.[47]

The current list of exceptions[48] makes parts of the Act inapplicable to specific professions,[49] offices and employments,[50] and occupations.[51] A convicted person qualifying for the Act's protection loses that security only in conjunction with queries concerning his fitness for an excepted position. If requested, he is obligated to disclose his entire criminal record and the record can be used to deny him the job he seeks or to remove him if he already holds the job. A person seeking certain licenses, permits, and certificates[52] must disclose spent convictions if asked; the existence of a spent conviction can be used to deny him the necessary permission. Spent convictions may be introduced in judicial and quasi-judicial proceedings conducted with relation to excepted occupations, such as disciplinary hearings of many

43 Rehabilitation of Offenders Act § 7(4). *See* text accompanying note 17 *supra.*

44 Rehabilitation of Offenders Act § 4(4)(a).

45 *Id.* § 4(4)(b). Ordinarily, rules of law or contractual obligations requiring disclosure of convictions do not apply to spent convictions. *Id.* § 4(3)(a).

46 *Id.* Although the Home Secretary is also authorized to change the thirty month limit and the rehabilitation periods, *id.* § 5(11), and to permit official records about spent convictions to be disclosed in certain cases, *id.* § 9(5), no such orders have been submitted for required Parliamentary approval.

47 894 PARL. DEB., H.C. (5th ser.) 169-73 (1975) (remarks of Mr. Alexander W. Lyon). The criteria did not include access to large sums of money or other valuable items. In theory, the Home Secretary excepted from the Act persons falling in any of the specified categories. However, the broad scope of the categories necessitated a number of choices in order to limit the number of exceptions and avoid emasculating the Act by having virtually all offenders exempted from it.

48 STAT. INST. No. 1023 (1975).

49 *E.g.*, physician, barrister, solicitor, dentist, veterinary surgeon, nurse, optician, and pharmacist. *Id.*, schedule 1, part I.

50 *E.g.*, judicial appointments, policemen, and most elementary and secondary school teachers. *Id.*, schedule 1, part II.

51 *E.g.*, firearms dealers, security dealers, gambling house employees, and managers of abortion clinics. *Id.*, schedule 1, part III.

52 *E.g.*, certificates concerning possession of firearms and explosives. *Id.*, schedule 2.

professional bodies and hearings on various licenses.[53] Exceptions are made for job applicants in sensitive government departments[54] and for "any action taken for the purpose of safeguarding national security."[55] This catch-all phrase is not defined.

The apparent overinclusiveness of the list of exceptions[56] should not be condemned too quickly, for it was the result of a conscious decision to proceed slowly in order to avoid a negative public reaction to the Act. A government spokesman has pledged that the Home Secretary will monitor the Act and redraft the exceptions as necessary.[57] The spokesman specifically noted that changes in the list will probably involve deletions, not additions.

A shortcoming of the present list is that it permits disclosure of all spent convictions with no provision for determining whether a particular offense is relevant to a judgment of the offender's fitness for the job sought. In effect, rehabilitated offenders well qualified for the excepted jobs, many of them highly paid and prestigious,[58] may well be inadvertently barred. As criteria for future modifications, the government spokesman hinted that the Home Secretary would eliminate occupations from the list of exceptions if he found that offenders are excluded from these occupations without any consideration for their individual characteristics.[59] Such veiled threats indicate that the Home Secretary knows that some exceptions to the Act are merely political concessions.

The effect of these exceptions is to frustrate offenders aspiring to professional positions. This waste of human talents violates the basic principle of penal reform that the offender

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53 *Id.*, schedule 3. Rules of evidence may bar the introduction of information pertaining to an offender's criminal record. *Cf.* FED. R. EVID. 609.

54 Rehabilitation of Offenders Act § 3(b).

55 *Id.* § 4(c).

56 The Act's critics objected to unnecessary exceptions for some medically-related jobs and the failure to except persons handling large sums of money, the guard-security industry, and members of the Armed Forces. For example, the order excepts dispensing opticians, a profession which would not seem to qualify under any of the Home Secretary's criteria for granting exceptions. Other questionable exceptions are dental hygienists and dental auxiliaries. *See* 894 PARL. DEB., H.C. (5th ser.) 175-97 (1975).

57 894 PARL. DEB., H.C. (5th ser.) 173 (1975). *See* text accompanying note 26, *supra.*

58 *See* note 49 *supra.*

59 894 PARL. DEB., H.C. (5th ser.) 173 (1975).

should be encouraged to further his education and seek responsible jobs.[60] As a minimum effort, there should be a judicious paring of the list of excepted jobs to eliminate those exceptions which are marginally necessary for public safety. If the rehabilitated offender's criminal record can be used only to the extent necessary to protect the public, interference with rehabilitation will be minimized.[61]

B. *Rehabilitation Period*

The Act applies only to eligible offenders who have generally complied with their sentences,[62] and who are not convicted of an indictable offense during the rehabilitation period. The length of the rehabilitation period varies with the severity of the sentence. If the offender is convicted of one or more subsequent offenses before the rehabilitation period has elapsed, that period may be increased or the opportunity to have the offense spent may be forfeited altogether.[63]

1. The Initial Offense

Tying the length of the rehabilitation period to the severity of the crime, as measured by the harshness of the sentence, was based on the logic that "the more serious the offense, the longer it will be before one can be reasonably sure that the offender has reformed."[64] The prescribed rehabilitation periods range from six months (for an absolute discharge) to ten years (for a prison term exceeding six months but not exceeding thirty

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60 D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 329 (1974); Note, *Expungements of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool,* 13 WASHBURN L. J. 93 (1974).

61 The ideal solution from the point of view of rehabilitation would be to provide individualized determinations for each offender as to the convictions that he need reveal for each application for an excepted job. The administrative difficulties and costs of such determinations, however, would be prohibitive. In fact, the Home Secretary has rejected as impractical the suggestion that the exceptions be drafted to corollate specific offenses to specific jobs (*e.g.,* statutory rape conviction for high school faculty post).

62 In a few cases noncompliance with a sentence does not stop the conviction from becoming spent. For example, an offender can still become rehabilitated if he has failed to pay a fine or has breached a condition of a suspended sentence. Rehabilitation of Offenders Act § 1(2).

63 *Id.* § 6(4).

64 LIVING IT DOWN, *supra* note 6 at 16.

months).[65] In some cases, the period is halved for persons under the age of seventeen at the time of their convictions.[66] The Act does provide some flexibility in that it permits the Home Secretary, with Parliament's approval, to change the stated rehabilitation periods.[67] Since no criteria are given for when the changes would be appropriate, presumably the Secretary's actions could be based on such evidence as experience with the present scheme and new penological data.

The list of rehabilitation periods is lengthy and complex. This is due in part to the decision to base the prescribed period on the sentence. In an effort to make the criminal justice system more responsive to both the seriousness of the offense and the offender's individual needs, British sentencing law has increased the flexibility of sentencing authorities by creating a vast and ever-expanding range of possible sentences, including seven non-custodial measures.[68] The Act had to prescribe a rehabilitation period for each alternative. The process was further complicated by an attempt to ensure that sentences of equal gravity, whether custodial or non-custodial, should carry the same rehabilitation periods.[69]

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65 Other examples are: imprisonment for a term not exceeding 6 months (7 years rehabilitation perod), fine (5 years), probation (counting from date of conviction, 1 year or date probation order lapses, whichever is longer), and confinement in a mental hospital under a hospital order (counting from date of conviction, 5 years or 2 years after hospital order ceases, whichever is longer). Rehabilitation of Offenders Act § 5.

Once the decision was made that there should be a rehabilitation period based on the sentence, the question became when the period should begin to run. If the rehabilitation period started at the completion of the sentence, questions of dealing with parole and other early release possibilities would have arisen. To avoid these complexities, the Gardiner Committee decided to begin the computation at the date of *conviction.*

66 *Id.* § 5(2).

67 *Id.* § 5(11).

68 Non-custodial measures are the absolute discharge, conditional discharge, binding over, probation, fine, community service order, and deferment of service. For an explanation of these options, *see* CROSS, *supra* note 37 at 6-30.

69 The difficulty of weighing the many relevant factors can be illustrated by arguments put forth about the appropriate rehabilitation periods for a person whose sentence was a fine. The major question was whether the rehabilitation period for a fine should vary according to the amount of the fine. One argument was that since serious offenses, especially commercial fraud cases, often resulted in a stiff fine, these sentences marked offenses of the same gravity as crimes meriting a prison term. Therefore, the Act should include a scale of rehabilitation periods based on the size of the fine, larger fines incurring longer rehabilitation periods.

This argument has several loopholes. The most basic one is that it is inconsistent with the views of modern penology that even the shortest term in prison should be recognized as a greater sentence than a large fine. This suggests that the longest rehabilita-

2. Reconviction

The most complex parts of the Act deal with the impact of subsequent convictions. An offender is not permanently barred from having a conviction spent because he subsequently is convicted of a crime during the rehabilitation period. However, to ensure that the offender really is rehabilitated, subsequent convictions increase the time necessary for the first conviction to become spent. It, and any intervening offenses, do not become spent until the termination of the rehabilitation period for the last conviction falling within the original or an extended rehabilitation period.[70] However, convictions for minor offenses (*e.g.*, traffic violations) which are tried summarily, rather than by indictment, do not extend the rehabilitation period.[71]

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tion period for a fine should be shorter than the shortest period for a custodial sentence. Another problem with scaling the rehabilitation period to the amount of the fine is that in British law a fine is supposed to be based not only on the possibility of rehabilitation or the gravity of the offense, but also on the offender's ability to pay. D. THOMAS, *supra* note 38 at 221-23. Scaling the rehabilitation period according to the amount of the fine could discriminate against the affluent, thus making wealth a primary criterion for determining the rehabilitation period.

Parliament eventually decided to attach a five year rehabilitation period to any fine, irrespective of the amount or the offense. Rehabilitation of Offenders Act § 5(2).

This decision solved one problem but left others unaffected. Attention turned to the question of what to do with a person who fails to pay all or part of a fine, or pays it late. Should he be denied rehabilitation until the fine is paid in full? Practical considerations about this problem carried the day. The government's position was that the immense administrative work in administering a no-pay-no-rehabilitation rule was not worthwhile because it would require a new country-wide record-keeping system or a time-consuming process of determining whether each individual offender has paid a fine, is still paying on it, or has been relieved of future payments. 353 PARL. DEB., H.L. (5th ser.) 1359 (1974) (remarks of Lord Gardiner).

70 Rehabilitation of Offenders Act §§ 1(1)(b), 6(6)(a).

71 *Id.* § 6(4). The only offenses excluded as non-indictable are "summary" offenses carrying a maximum sentence of three months incarceration. *Cf.* J. SMITH & B. HOGAN, CRIMINAL LAW 27 (3d ed. 1973).

The following is an illustration of how these provisions work. Assume that a person is convicted of theft in 1970 and fined. Since a fine carries a five year rehabilitation period, the conviction should become spent in 1975. Assume further that he is convicted of assault in 1973 and is given a six month prison term. Because this sentence requires a seven year rehabilitation period and the second conviction occurred before the rehabilitation period for the first offense had elapsed, both offenses will become spent in 1980. Had the second offense been so serious as to merit a sentence exceeding thirty months, neither offense would ever become spent. On the other hand, if the second conviction were for a minor, nonindictable offense, the rehabilitation period for the first offense would not be affected by the new crime.

A conviction after the close of a rehabilitation period does not renew or extend that period, even though the new conviction may result from a crime committed during the rehabilitation period. Consequently, some offenders who are not truly rehabilitated (according to the Act's standard of crime-free living) nevertheless will enjoy the Act's

C. *Conviction*

The Act applies to persons "convicted" of a crime.[72] Pressures to expand the Act to protect more persons resulted in a broad, somewhat novel definition of this term. The Act applies, for example, to the "absolute discharge,"[73] which is a determination of guilt but is not considered to be a conviction.[74] This "sentence" means that the offender, though technically guilty of the crime, is not morally blameworthy, or that further punishment is unnecessary for what was an isolated offense.[75] The absolute discharge may be used to penalize any crime for which other punishment is not specified.[76] The stigma of such a "conviction," despite the triviality of the punishment, can prejudice the offender.

The Gardiner Committee recommended that a six month rehabilitation period be required before an absolute discharge becomes a spent conviction.[77] The Committee rejected the idea of an immediate (zero) rehabilitation period because (1) an immediate period would mean that the press could not report the discharge; and (2) a court should be permitted to receive information about the conviction if a new offense is committed within six months after discharge.[78] The Act incorporates this recommendation.

Because of the nautre of the absolute discharge, however, it seems inappropriate to postpone rehabilitation for even a second. By definition, the offender poses no public threat. The Act reclassifies the discharge as a conviction,[79] then forces the morally guiltless offender to wait six months to live down the stigma. Although it is conceivable that a zero rehabilitation

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advantages. If the Act relied upon the commission of crimes, rather than convictions, as the impetus for extension of rehabilitation periods, some provision would be required to deal with the period which might elapse between the date for regular expiration of the rehabilitation period and conclusion of the trial for the alleged subsequent offense. For the offender innocent of the second charge, it would be unfair to extend the first rehabilitation period until innocence is established. A "provisional spent conviction," pending conclusion of trial, would solve this problem.

72 Rehabilitation of Offenders Act § 1(4).

73 *Id.* § 5(3).

74 Powers of Criminal Courts Act, 1973, c. 62, § 13(1).

75 *See generally* Cross, *supra* note 37 at 7-10.

76 Powers of Criminal Courts Act § 7(1).

77 Living It Down, *supra* note 6 at 26.

78 *Id.*

79 Rehabilitation of Offenders Act § 1(4).

period could breed public disrespect for the law, consideration of the burdens of disclosure on persons who receive an absolute discharge compels the conclusion that only a substantial loss of deterrence (measured by an increase in the number of acts which usually receive an absolute discharge) would justify this institution of a rehabilitation period for this sentence.

The Act also expands the concept of conviction by embracing convictions "by or before a court outside Great Britain."[80] To handle foreign convictions which may carry sentences unknown to British law, the Act provides:

> a sentence imposed by a court outside Great Britain shall be treated as a sentence of that one of the descriptions mentioned in this section [of the Act] which most nearly corresponds to the sentence imposed.[81]

The task of translating foreign sentences into comparable British sentences will sometimes be difficult. The indeterminate sentences employed in Massachusetts[82] are a good example of this problem.

The treatment of foreign convictions has other weaknesses. The major one is that there is no adequate provision for dealing with foreign convictions for an offense or by a procedure (such as trial in absentia) unknown to British law. Also, the Act specifies that the foreign *sentence* be treated as a similar British sentence,[83] but nothing is said about making a similar comparison for the foreign *offense.* For example, assume that private homosexual conduct by consenting adults carries a three year prison term in a certain foreign country. A person so sentenced who moves to Britain upon release from prison will never be able to become rehabilitated, due to the length of his sentence, despite the fact that a similar deed would not be a criminal offense in Britain.[84]

Nor does the Act accommodate differing sentencing practices in other countries. This problem could only be solved by

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80 *Id.* § 1(4)(a). Another expansion is the inclusion of military penal proceedings. *Id.* § 2(1). Minor military offenses are *not* covered by the Act and therefore can never become spent. *Id.* § 2(4)(d). It was felt that such offenses carried no stigma and therefore did not need to be hidden from public view.

81 Rehabilitation of Offenders Act § 5(9)(d).

82 MASS. GEN. LAWS ANN. ch. 279, § 24 (West 1972).

83 Rehabilitation of Offenders Act § 5(9)(d).

84 The Act's only recognition of this problem is contained in § 6(6)(c), which states

"resentencing" of foreign offenders, according to British standards, upon their application for rehabilitated status in Britain. Principal drawbacks of such a scheme include costs of its administration, unavailability of facts required for sentencing, and unfamiliarity with the laws of all the jurisdictions of the world.

D. *Rights and Remedies*

The most controversial parts of the Act provide the rehabilitated offender with a legal arsenal, albeit of dubious strength, to assist him in living down his criminal past. The objective in general terms is to limit dissemination and use of information about spent convictions and events related to spent convictions, such as arrests and appeals.[85] In certain specified situations the offender may not be questioned about his spent convictions and, if questioned, may deny the conviction.[86] The Act directly prohibits some courts, employers, insurers, and others from using information about such convictions to the offender's detriment.

1. Evidence in Judicial and Quasi-Judicial Proceedings

Early in the history of the Act it was agreed that rehabilitated offenders could best be protected in proceedings before judicial authorities[87] by the simple expedient of not admitting evidence of spent convictions, except in a few limited areas.[88] It turned out to be easier to establish the principle than to work

that in the case of a foreign conviction extending the rehabilitation period, the foreign conviction is counted only if the "conduct" of the accused would have been an "offense" in Britain.

85 Rehabilitation of Offenders Act § 4(5).

86 *See id.* § 4(1)-(3).

87 "[P]roceedings before a judicial authority" include, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(*a*) by virtue of any enactment, law, custom or practice;

(*b*) under the rules governing any association, institution, profession, occupation or employment; or

(*c*) under any provision of an agreement providing for arbitration with respect to questions arising thereunder;

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.

Rehabilitation of Offenders Act § 4(b).

88 LIVING IT DOWN, *supra* note 6 at 14.

out the details. In the end, all criminal trials were excluded from the Act's coverage.[89]

The original draft of the Act removed all penalties for failing to disclose a spent conviction and excluded all evidence disclosing the existence of a spent conviction.[90] This permitted the rehabilitated offender to lie about his criminal record without incurring any legal liability for the untruth. Many persons strongly objected to this "legalized lying," arguing that truth is a value paramount to rehabilitation.[91]

Lord Gardiner attempted to answer critics of "legalized lying" by offering an amendment to treat a spent conviction as "if it had been quashed."[92] Magically, an offender who denied a spent conviction was no longer technically lying, for a "quashed" conviction is not a conviction. The amendment wiped out the spent conviction for the limited purposes of the Act. The rehabilitated offender could now "tell the truth" without disclosing his spent convictions. This legal fiction did not satisfy all critics. Some noted that the offender would still be telling a moral (though perhaps not legal) lie in answering "no" to the question, "Were you convicted of theft in May, 1960?"

In later revisions of the bill,[93] the government drafters rejected the quashed conviction approach. The final draft was simple and straightforward. All questions about a person's

89 Rehabilitation of Offenders Act § 7(2)(a).

90 Rehabilitation of Offenders Bill, House of Lords, § 2 (Dec. 20, 1972).

91 *See, e.g.*, 353 PARL. DEB., H.L. (5th ser.) 915-16, 922 (1974) (remarks of Lords Hunt and Simon).

Proponents of "legalized lying" countered with two justifications: (1) Truth is only one value. Other values, like compassion and mercy, must be considered and, when inconsistent with truth, should sometimes be paramount. (2) Often the law does not admit the truth into evidence because the truth would cause unfairness. For example, the Children and Young Persons Act, 1963, C.37S.65(2) § 16(2), provides that an adult need not answer questions about a conviction that occurred before he had reached age 14. 353 PARL. DEB., H.L. (5th ser.) 900 (1974) (remarks of Lord Salmon).

92 339 PARL. DEB., H.L. (5th ser.) 1321 (1973) (remarks of Lord Gardiner).

93 In the June 1974 revision, a new clause distinguished between general questions (Have you ever been convicted of a crime?) and specific questions (Were you convicted of theft in May, 1960?). General questions, whether asked in or out of court, were "deemed not to refer to spent convictions or to any circumstances ancillary to spent convictions, and the answer to any such question may be framed accordingly." Specific questions could not be asked in court, and if improperly asked, need not be answered. OFFICIAL REPORT, HOUSE OF COMMONS STANDING COMMITTEE C, REHABILITATION OF OFFENDERS BILL, FIRST SITTING 31-34 (1974). The government's proposal did not prohibit specific questions asked out of court. Note, however, that an offender who lied in answer to a specific out-of-court question would be protected against resulting judicial action.

criminal record were "deemed not to relate to spent convictions or to any circumstances ancillary to spent convictions."[94] This applied to general and specific questions, and to in-court and out-of-court questions. A rehabilitated person could not be penalized for ignoring a spent conviction in answering such questions.

When this version came to the floor of the House of Lords, there were still complaints that it fostered legalized lying. But opponents seemed to have mellowed. They were willing to accept what were called "white lies" for out-of-court responses, but refused to approve falsehoods in court.[95] Thus, questions relating to spent convictions asked in proceedings before a judicial authority need not be answered,[96] while equivalent questions asked out-of-court may be answered in the negative.[97]

There was general agreement in Parliament that most civil court proceedings should be covered by the Act. In addition, it was felt that the Act should govern a wide range of quasi-judicial proceedings determinant of rehabilitated offenders' rights, such as labor arbitrations and hearings of non-excepted professional societies, in order that the policies of the Act might be implemented across a broad spectrum of social activities.

A few civil and quasi-judicial matters, such as certain occupational licensing and disciplinary hearings,[98] are excepted on the theory that the public interest requires that in these cases information about all criminal convictions, including spent convictions, is relevant and should be available.[99]

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94 875 PARL. DEB., H.C. (5th ser.) 1962 (1974).

95 *See* 353 PARL. DEB., H.L. (5th ser.) 1387-93 (1974).

96 [A] person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.
Rehabilitation of Offenders Act § 4(1)(b).

97 "[W]here a question seeking information with respect to a person's previous convictions, offenses, conduct or circumstances is put to him or to any other person otherwise than in proceedings before a judicial authority—
(a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; . . .
Rehabilitation of Offenders Act § 4(2).

98 These professions, occupations, etc. are partially listed in notes 49-52, *supra.*

99 Other statutory exceptions include: various proceedings involving application for

The major controversy centered on the use of spent convictions in criminal proceedings. The Gardiner Committee recommended that evidence of spent convictions be inadmissible for sentencing purposes after a new criminal conviction for a non-serious offense. Such evidence would be admissible, however, after convictions for serious crimes.[100] The practical effect of the Gardiner Committee's recommendation would have been to limit the evidence admissible in magistrates courts, in which less serious offenses are tried summarily, but not in crown courts, in which serious crimes are tried on indictment.[101] Naturally, the magistrates were outraged at the suggestion that they be denied information they considered necessary to assess accurately the persons they sentence.[102] The government, too, was dissatisfied with the suggested departure from the accepted principle that the rules of evidence should be the same in magistrates and crown courts.[103]

The weight of this pressure and its own misgivings about the Act led the government to offer an amendment making it inapplicable in all criminal[104] or military disciplinary[105] proceedings. To ensure that the spirit of the Act is followed in criminal cases, the government issued directives to provide criminal courts with guidance in their use of spent convictions.[106] In essence, these non-binding "practice directions" request criminal courts to follow the intent of the Act by limiting the use of spent convictions and, even when used, limiting their oral presentation in open court. When the court is given a

guardianship of minors, Rehabilitation of Offenders Act § 7(2)(c), (d), (e), cases in which the rehabilitated offender consents to the admission of evidence of a spent conviction, *id.* § 7(2)(f), situations in which "justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions," *id.* § 7(3), testimony by defendants in certain defamation cases, *id.* § 8(3), (4), and proceedings excluded by order of the Home Secretary, STAT. INST. No. 1023 (1975), schedule 3.

100 LIVING IT DOWN, *supra* note 6 at 18-19.

101 *Id.* 18. The latter involves more formal procedures. For a concise summary of the functions of magistrates and crown courts *see* D. BARNARD, THE CRIMINAL COURT IN ACTION 50-112 (1974).

102 *See, e.g., Rehabilitation or Dissimulation?*, 138 JUSTICE OF THE PEACE 28 (1974).

103 867 PARL. DEB., H.C. (5th ser.) 2129-30 (1974) (remarks of Mr. Carlisle).

104 Rehabilitation of Offenders Act § 7(2)(a).

105 *Id.* § 7(2)(b). The Act, of course, prevents the results of those proceedings from being introduced in civil trials if the criminal or military conviction is spent. *Id.* § 4(a).

106 Magistrates courts were instructed by Home Office Circular 98/1975, Part IV (June 24, 1975). Crown Courts (the general criminal trial courts) were instructed by a Practice Direction issued by the Lord Chief Justice, 2 ALL. E. R. 1072 (1975).

list of an offender's convictions to use in sentencing, convictions which are spent are to be designated as such and presumably given little weight.

The Act's inapplicability to criminal proceedings could make little difference to its success if criminal courts adhere to the practice directions. If these directives are followed scrupulously, there will be no difference between civil proceedings, covered by the Act, and criminal proceedings guided by the practice directions. This writer's observations in many British criminal courts, together with numerous conversations with British criminal lawyers, suggest that the practice directions are generally followed to the letter. As long as this is the case, the decision to make the Act inapplicable in criminal proceedings will have little bearing on the law's success or failure in alleviating discrimination against offenders.

The Act's ban on evidence of spent convictions[107] poses substantial practical problems, particularly in the context of quasi-judicial adjudications. For example, if a witness is mistakenly asked a question about a spent conviction and the presiding officer does not interrupt, the witness is placed in a difficult position. He cannot lie and deny the spent conviction for he would be liable for perjury.[108] His only escape is to assert his right to refuse to answer. But to do this, he must also state *why* he does not have to respond. As soon as the witness divulges that the Act protects him from answering, he will have communicated that he has a criminal record, the very information the rule was designed to keep out of evidence. And since the

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107 Section 4(1)(a) of the Act provides:

> [n]o evidence shall be admissible in any proceedings before a judicial authority . . . to prove that any . . . [rehabilitated] person has committed or been charged with or prosecuted for or convicted of or sentenced for any offense which was the subject of a spent conviction. . . .

Likewise inadmissible is evidence of "ancillary circumstances" such as the conduct constituting the offense, any process or proceedings preliminary to the spent conviction, any sentence or review of the conviction, and "anything done in pursuance of or undergone in compliance with any such sentence." *Id.* § 4(2), (5).

108 The Act says nothing about perjury. However, the legislative history of § 4(1) makes it clear that Parliament intended that the Act would not authorize persons to lie under oath without committing perjury. *See* 353 PARL. DEB., H. L. (5th ser.) 1387-92 (1974). Lies about a stale, irrelevant conviction, however, might be held immaterial and therefore incapable of supporting a perjury conviction. *See* R. v. Sweet-Escott, 55 Crim. App. 316 (1971).

Act creates special rules for the admission of spent convictions but not for other convictions, it will be necessary for the presiding officer to determine which convictions are spent and which are not, and whether any of the exceptions apply. To do this he will have to be made aware of the spent convictions and then disregard them, as he does other inadmissible evidence.

Many quasi-judicial proceedings covered by the Act,[109] however, are presided over by persons untrained or inexperienced in applying the rules of evidence. Such officials are probably more likely to be prejudiced by information about spent convictions than are judges accustomed to disregarding legally inadmissible information presented in court.

In civil cases covered by the Act, the difficulties created by the Act's bar to evidence of spent convictions are less severe. Few civil cases are tried by jury,[110] so the problem of inadvertant airing of a witness's spent offenses before members of the community should not be very significant. Judges attuned to the policies of the Act will disregard attempts of cross-examining counsel to impugn a witness's credibility by reference to the witness's spent convictions.[111] Indeed, some critics have contended that existing rules of evidence and the exercise of judicial discretion have already eliminated the use of stale convictions in most cases, so that the Act was unnecessary.[112] The major significance of the Act in the civil arena is probably that judges, aware of Parliamentary intent, will tend to give less weight in their evaluation of an offender's testimony to evidence of prior convictions at the borderline of admissibility.

2. Disclosure of Spent Convictions in Other Contexts

Proponents of the Act realized that the reformed offender's past unfairly haunts him in many matters which never reach a judicial or quasi-judicial proceeding. For example, the offender or some other person may be questioned about his criminal

109 *See* note 87 *supra*.

110 R. FIELD & B. KAPLAN, CIVIL PROCEDURE 580 n. e (3d ed. 1973).

111 Ordinarily, convictions may be proven in civil cases only when they are at issue or when they are offered in cross-examination to rebut evidence of a witness' credibility. *See* R. CROSS, EVIDENCE 222-23 (4th ed. 1974).

112 *E.g.*, 353 PARL. DEB., H.L. (5th ser.) 1378, 1383 (1974) (remarks of Viscount Dilhorne and Lord Diplock).

record in applications or references for a job or insurance. To protect the offender from such queries, section 4(2) of the Act states that:

> (a) the question shall be treated as not relating to spent convictions or to any circumstances ancillary to spent convictions, and the answer thereto may be framed accordingly; and
> (b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose a spent conviction or any circumstances ancillary to a spent conviction in his answer to the question.

These provisions apply to any person asked about his own or another person's[113] spent conviction.

The most noteworthy aspect of these provisions is that they are carefully written to permit the offender to hide the truth without actually lying.[114] Despite the potential of this approach to generate confusion, it has considerable merit as a practical solution to a difficult problem. Improper questions about spent convictions may be generally prevented in judicial and quasi-judicial proceedings where, in theory, an experienced judge or presiding officer would screen most improper questions. In other contexts, however, the law cannot effectively prevent questions from being asked. It can only regulate the answers which must be given.[115] Section 4(2)(a) does this by creating a legal fiction which comes close to authorizing the offender to lie. This result, though, is necessary if the rehabilitated offender is to escape from his past. If he cannot publicly deny the existence of his criminal past, he will never be liberated from it.

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113 A person disclosing the spent conviction of another incurs civil liability to the rehabilitated offender. But there is little risk that the offender will enforce his rights. *See* text accompanying note 149 *infra*.

114 Unfortunately this is accomplished in a way that makes nonsense out of plain speech. For example, assume an offender were convicted of burglary twenty years ago. That conviction is now spent. The offender is applying for a job and is asked, "Have you ever been convicted of a crime?" Under § 4(2)(a), he may answer as if the question really were, "Have you ever been convicted of a crime, *which conviction is not spent*?" His negative reply is not technically a "lie" since the question he answered was answered truthfully. But the question he answered was not the question which was asked.

115 The Gardiner Committee rejected a proposal that persons such as employers and insurers be prohibited from asking questions about spent convictions. The Committee reasoned that "people must go on being free to ask any question they like." LIVING IT DOWN, *supra* note 6 at 13.

If a person does answer a question as if it asked only about non-spent convictions, section 4(2)(b) provides that no legal prejudice can result from the failure to mention the spent conviction.[116] Moreover, to handle those few situations where there is a legal or contractual duty to disclose criminal offenses,[117] section 4(3)(a) provides:

> any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose a spent conviction or any circumstances ancillary to a spent conviction (whether the conviction is his own or another's). . . .

These provisions will be of special assistance in the area of insurance. A criminal conviction can adversely affect an offender's insurance interests in two ways. First, it can be used as a criterion to deny him insurance[118] including a fidelity insurance bond often required to hold certain jobs which require handling large sums of money.[119] Second, it can cause denial of the proceeds of the policy in some circumstances.[120] Insurance application forms often contain questions about criminal convictions.

3. Employment Anti-Discrimination Measures

A major goal of the Act is the encouragement of rehabilitation by elimination of employment discrimination based on spent criminal convictions. One way this is accomplished is by limiting the information given the employer. A job applicant

116 For example, a person supplying a reference would not be liable in tort for deceit or negligence for failing to list a spent conviction when asked about another person's criminal record.

117 In some cases British law requires a party to a contract to show *uberrima fides*. The party is thereby bound to make a full voluntary disclosure of all material facts or face the possibility of having the contract rescinded. A criminal record could be considered material in many contracts, such as insurance, to which *uberrima fides* has been applied. *See generally* G. CHESHIRE, C. FIFOOT, & M. FURMSTON, THE LAW OF CONTRACT 274-77 (8th ed. 1972).

118 Apex Charitable Trust, Fidelity Bonds for Ex-Offenders 2 (1971) (mimeo, on file at the HARVARD JOURNAL ON LEGISLATION).

119 *See* note 47 *supra*.

120 Under British law an insurance contract can be voided for non-disclosure or misrepresentation of a material fact. Failure to list a criminal conviction could qualify as either. *See generally* MACGILLIVRAY & PARKINGTON ON INSURANCE LAW 260-66, 271-338 (6th ed. 1975).

need not disclose spent convictions when completing the application form and a person writing a reference is not obligated to mention a spent conviction. Moreover, since spent convictions are inadmissible in various quasi-judicial proceedings, an employer cannot introduce a spent conviction in such a proceeding to explain an employment-related action.[121]

After analyzing these protections, the government realized at the eleventh hour that the new law still would not adequately assist an offender in overcoming employment discrimination by private employers in cases where the employer knows about or discovers the offense without direct inquiries.[122] For such cases, the Act was amended to include an anti-discrimination provision resembling those used to counter discrimination based on race and sex.[123] Section 4(3)(b) makes the use of a spent conviction an "[im]proper ground for dismissing or excluding a person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment."[124] Although this edict applies to "any" job, the Home Secretary has issued, as authorized by the Act, an order excepting a number of professions, employments, and occupations from compliance with the anti-discrimination clause.[125]

Evaluating this provision of the Act is difficult, for both the goal and the means of achieving it are suspect. Everyone connected with the Act assumed that it would materially help a needy group improve its employment situation. But there was little evidence that the group the Act covered actually needed assistance. It is arguable that the employment problems attacked in the Act are more fiction than fact, at least in the case

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121 This could happen in several situations. For example, if an employer were charged with firing an employee because of the employee's race (in violation of the Race Relations Act, note 127 *infra*), the employer may be required to justify the dismissal in defense of the discrimination claim. Section 4(1) of the Act does not permit the employer to claim that the discharge was based on the discovery that the employee had been convicted of a spent conviction.

122 353 PARL. DEB., H. L. (5th ser.) 2005-09 (1974).

123 *See* note 126 *infra*.

124 The term "prejudice" is not defined. Presumably it includes a refusal to hire or to promote on the basis of a spent conviction. Note that the clause is expressed in the negative; it would not bar the use of a spent conviction as favorable criterion by, say, a probation department hiring ex-offenders as counselors.

125 STAT. INST. No. 1023 (1975), schedule 1. *See* notes 49-51 *supra*.

of unskilled jobs.[126] But such arguments provide little solace for the rehabilitated offender seeking job advancement or professional status. For him, the Act offers a chance for happier employment prospects. But in fact it may be of little assistance. The anti-discrimination provision boldly prohibits discrimination, but, unlike Britain's race discrimination[127] and sex discrimination[128] laws, provides no specific remedy or enforcement machinery to bring discriminating employers into line. By this omission, the Act may forego the most effective remedy yet conceived for job discrimination against offenders.[129] Persons claiming that they have been discriminated against because of a spent conviction must rely on existing remedies of questionable adequacy.[130] Certain rehabilitated offenders unfairly dismissed might be aided by an industrial tribunal,[131] but those wrong-

126 Poor work habits antedating criminal offenses may be the cause of employment problems. J. MARTIN & D. WEBSTER, THE SOCIAL CONSEQUENCES OF CONVICTION 113-14, 193-98 (1971). Offenders who are able to secure jobs during the rehabilitation period may accrue good work records which override their criminal histories. Many British employers do not ask about criminal records when interviewing a job applicant, especially if the job is unskilled. And even those employers who do make such inquiries often do not apply a rigid rule, preferring to look at such factors as the nature and seriousness of the offense, and the length of time and work record since conviction. PAKENHAM/THOMPSON COMMITTEE, PROBLEMS OF THE EX-PRISONER 34-37 (1961). If a present employee's criminal record is discovered by his employer, most employees, according to one study, "who had worked well for a few months would probably be fairly safe from dismissal." J. MARTIN, OFFENDERS AS EMPLOYEES 70 (1962).

127 The Race Relations Act, 1968, c. 71, §§ 19-24, bans most discrimination on the basis of color, race, or ethnic or national origins. It applies to all aspects of employment and is enforced generally by the courts.

128 The Sex Discrimination Act, 1975, c. 65, §§ 63-65, bars discrimination on the basis of sex in hiring, promotion, and dismissal. Remedies include conciliation procedures and proceedings before an industrial tribunal with authority to award extensive damages for such injuries as loss of past and future earnings and emotional harm.

129 *See generally* Note, *Employment of "Criminal-Record Victims" in Missouri*, 41 MO. L. REV. 349, 363-69, 377-81 (1976).

130 British common law has traditionally recognized the employer's right to use any criteria in deciding whether to hire a job applicant. Allen v. Flood, [1898] A. C. 1. The two recent changes have been restrictions on using race and sex as factors. These laws have specifically provided enforcement procedures. *See* note 127 *supra*. The Act's failure to provide a remedy for a rehabilitated offender who was refused employment may prevent courts from granting relief in such cases. Offenders will have to argue that the employer committed the tort of breach of statutory duty. This tort provides a remedy where a statute creates a duty and the legislature's unexpressed intent was to extend civil liability for breach of that duty. SALMOND ON TORTS 245-50 (16th ed. 1973). Section 4(3)(b) of the Act may impose a duty on employers not to use spent convictions to discriminate in hiring.

131 Currently no statute specifically authorizes the industrial tribunals to handle such cases. However, under the Trade Union and Labour Relations Act, 1974, c. 52,

fully refused employment are effectively without a remedy.

In spite of its lack of adequate remedies, the anti-discrimination clause may turn out to be one of the most successful parts of the Act. One government official told this writer that many employers are actually following the letter and spirit of the Act. Compliance has brought the revision of employment application forms and interview procedures to ensure that employers do not get information about irrelevant convictions. The result, according to this official, is a better employment climate for *all* offenders.

4. Criminal and Civil Liability for the Unauthorized Dissemination of Information About Spent Convictions

Knowing that much discrimination against rehabilitated offenders could be prevented only if the public does not learn of spent convictions, draftsmen of the Act provided criminal penalties for the unauthorized use of official records and civil liability for the malicious publication of spent convictions.[132]

Criminal liability for the unauthorized disclosure of official records was seen as necessary to stem the flow of information from careless or unethical public officials to private detectives and even the general public.[133] The Act creates two criminal offenses. The first can only be committed by someone who, "in the course of his official duties," has had access to official government records or the information contained in such records.[134] Liability occurs if this person "with reasonable cause to

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sched. 1, § 4, an industrial tribunal can deal with claims of unfair dismissal. Under that Act the employer must show that an employee's dismissal was "fair." *Id.* § 6. Dismissal because of an employee's spent conviction would not be "fair" and, under the Rehabilitation of Offenders Act § 4(1)(a), the spent conviction itself would be inadmissible in the industrial tribunal. To obtain redress under the Trade Union and Labour Relations Act, however, an employee must meet certain qualifications, such as having been employed for twenty-six weeks prior to the dismissal.

132 Rehabilitation of Offenders Act § 8. Framers of the Act rejected "sealing" criminal records to avoid depriving criminological researchers of valuable information and denying public officials the use of information considered essential in preparing social histories of such persons as mental patients, convicted offenders awaiting sentence, and applicants for sensitive jobs. LIVING IT DOWN, *supra* note 6 at 11-12. For "sealing" practices in American jurisdictions, *see generally* Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1148-50 (1970).

133 LIVING IT DOWN, *supra* note 6 at 32-34. *See generally* J. RULE, PRIVATE LIVES AND PUBLIC SURVEILLANCE 78-84 (1973).

134 Rehabilitation of Offenders Act § 9(2).

suspect they [the records] contain information about a spent conviction" discloses the information to someone "otherwise than in the course of . . . [his official] duties."[135] Presumably the offending official must directly or indirectly obtain the information from these records rather than from other sources, such as a popular book. Disclosure of spent convictions is permitted to a person, or the agent of that person, reasonably believed to be the individual having the spent conviction.[136]

The Act also creates a second, more serious criminal offense for obtaining information about spent convictions from public records by fraud, dishonesty, or bribery.[137] This penalty is intended primarily to reach persons using illegal means to convince public servants to give out information from public records, but also reaches the public servant participating in dishonest schemes.

The Act includes procedures to prevent hasty prosecutions for the less serious offense of disclosure outside the course of official duties.[138] This restraint may stem from a concern that public employees be treated leniently because their violations can result from inadvertence, rather than intentional wrongdoing, since the Act does not define "course of official duties."[139]

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135 *Id.*

136 *Id.* § 9(3).

137 *Id.* § 9(4).

138 To establish the offense, the prosecution must prove that the offender knew or had "reasonable cause to suspect" that the information was about a spent conviction. *Id.* § 9(2). To remove the risk of frivolous prosecutions, all prosecutions for the less serious offense must be brought by or on behalf of the Director of Public Prosecutions. *Id.* § 9(8). The Director of Public Prosecutions is a high-ranking public official supervising a staff of lawyers and other civil servants. Although most prosecutions in England and Wales are conducted by local police, in certain cases the Director of Public Prosecutions initiates or intervenes in prosecutions on his own volition or at the request of local authorities. Since the Director's office is considered independent of the national and local governments, it is entrusted by statute with many delicate criminal matters, such as prosecuting most complaints against the police. In cases under the Act, the Director's criteria for prosecution are "whether the evidence is sufficient . . . , and whether a prosecution would be in the public interest." 896 PARL. DEB., H.C. (5th ser.) 415 (1975) (written answer of the Attorney General). The latter criterion would suggest that public officials would not be prosecuted for inadvertent or perhaps even negligent violations of the Act.

139 The Home Office has issued a circular suggesting a broad interpretation of the scope of "official duties" which excludes "disclosures which are clearly improper or malicious." One improper disclosure of a spent conviction is to convey the information to persons "whose only possible use for the information could be in the employment context." Home Office Circular 98/1975, Part III (June 24, 1975).

Another source of difficulty is that officials covered by the Act may not be able to tell if a conviction is spent or not, for the records would not necessarily show subsequent crimes which would stop the earlier conviction from being spent.

Thus far the criminal prosecution provisions have attracted little attention. This writer is aware of no prosecutions being considered under the Act. The Home Secretary, authorized to provide exceptions where information of spent convictions can be disseminated,[140] has promulgated no such regulations, perhaps because the Act is not preventing relevant information from being disseminated when necessary.

The criminal provisions do have one anomaly. Since they only limit disclosure of spent convictions, they do not address the issue of disclosure of such stigmatizing information as non-spent convictions, interrogations which did not result in prosecutions, and acquittals.[141] Remedies for these disclosures are confined to the traditional sources, which were considered so inadequate as to require the creation of a new offense to prevent disclosures of spent convictions.[142] A more sensible approach may be to expand the Act's sanctions to punish any improper disclosure of official criminal records. There is no reason to make access to records of spent convictions more difficult than access to records of police interrogations caused by a mistaken identification.

The criminal penalties for the unauthorized disclosure of spent convictions are limited to persons involved with getting information from official records. They do not cover the more pervasive problem posed by persons disseminating information

140 Rehabilitation of Offenders Act § 9(5).

141 Records less serious than conviction records result in employment discrimination in the United States. *See* Comment, *supra* note 2. A survey of New York City employment agencies showed that 75% of them refuse to refer applicants with arrest records. *Id.* 660. *See generally* DeWeese, *supra* note 2; Karst, *"The Files": Legal Controls over the Accuracy and Accessibility of Stored Personal Data,* 31 L. & CONTEMP. PROB. 342, 367 (1966).

142 One traditional remedy is found in the Official Secrets Act, which criminalizes the unauthorized communication or reception of information obtained from government records. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28, § 2. The Gardiner Committee dismissed this provision as a "sledgehammer which is unpopular with the Press and juries alike, and is therefore seldom invoked except in flagrant cases." LIVING IT DOWN, *supra* note 6 at 33. Another remedy is police regulations which prohibit inappropriate uses of criminal records. The Gardiner Committee apparently felt these rules would not provide sufficient public protection. *Id.* 32-33.

acquired from other sources. To deal with this concern the Act includes a civil weapon in its arsenal. Persons who maliciously spread news of spent convictions, regardless of its source, are liable in tort for defamation of the reputation of the rehabilitated offender.[143]

The major difficulty encountered in adapting the law of defamation to protect the rehabilitated offender is that in British law a defendant in a defamation suit can rely upon the justification defense[144] by proving that the alleged defamatory publication was true. An early version of the Rehabilitation of Offenders bill attacked the problem of the justification defense by simply eliminating it as a defense in most cases involving the publication of spent convictions.[145] In such cases truth no longer would have been a defense and evidence of spent convictions would have been inadmissible. The proposal encountered such violent opposition from the press and adherents to the truth-above-all philosophy that several compromises were made.[146] The Act now provides that the justification defense is

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143 Rehabilitation of Offenders Act § 8.

144 SALMOND ON TORTS 159-61 (16th ed. 1973). The Act also deals with the defense of absolute privilege, which in a few situations recognizes that free speech is so important that it must prevail over reputational harm. If absolutely privileged, a publication cannot be the object of a successful defamation suit even if the publication was made maliciously and with knowledge that the information in it was false. One example of an absolute privilege is a fair and accurate report of current public judicial proceedings. *Id.* 162-65. Because of fear that newspapers would use this defense as an excuse to report a spent conviction mentioned in a civil trial, perhaps in a hearing to determine if a conviction is really spent, the Act removes the absolute privilege defense for the publication of a conviction which was ruled inadmissible as a spent conviction. Rehabilitation of Offenders Act § 8(6). A spent conviction not ruled inadmissible can be reported and the publication is protected by absolute privilege. To avoid limiting the information available to lawyers and other persons having legitimate interests in a complete report of such proceedings, the Act restores the absolute privilege for law reports and other educational, scientific, and professional publications. *Id.* § 8(7).

145 The first bill, introduced by Lord Gardiner, excluded the justification defense except for publications made before the conviction became spent or before the Act was passed, or when the defendant proved either that publication was in a book or article for scientific, educational, or professional purposes, or that he innocently republished before the conviction became spent or the Act became effective. Rehabilitation of Offenders Bill, House of Lords, § 6(2) (Dec. 20, 1972).

146 In March, 1974, the Faulks Committee on Defamation, established in 1971 to review the law of defamation, took the unusual step of releasing an INTERIM REPORT which argued that truth should always be a defense in a defamation suit. The Rehabilitation of Offenders Bill, it was claimed, would leave newspaper reporters, booksellers, librarians, and historians in a perpetual state of fear of a defamation suit. COMMITTEE ON DEFAMATION, INTERIM REPORT CMND. NO. 5571, at 3 (1974). Supporters of the bill were quick to counter with the claim that the removal of the defamation provision, as

generally available to the defendant charged with publishing information about a spent conviction. However, the defendant cannot rely on this defense if the plaintiff can prove that the defendant acted with "malice."[147]

This change emasculates the Act's provision for defamation liability. Since proof of malice requires proof of the defendant's mental processes, the plaintiff will often be hard put to find the evidence necessary to establish the claim. This difficulty, combined with the burden of legal fees,[148] will discourage many aggrieved rehabilitated offenders from using the defamation provisions of the Act.

The defamation provisions were once tagged as being so important to the bill that it would be "without meaning" if stripped of this remedy.[149] This is, however, an exaggerated view. The weakness of the clause will harm only marginally the Act's chances of success, for it would be surprising if offenders took advantage of even a strong defamation provision. Persons aggrieved by the publication of information about a spent conviction are unlikely to seek redress in court when the publicity attached to the trial would cause them more harm than did the original defamatory publication. It is true that in the long run, if the values underlying the Act are not accepted by the press and public, the restraints on employment of the defamation remedy may have little force as a deterrent of illegal publicity. However, at least until it becomes evident that litigation under

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recommended by the Faulks Committee, would emasculate the bill. Some time after the release of the INTERIM REPORT, the press and other interested groups became mobilized against the defamation provision. *See, e.g.*, The Times, June 1, 1974, at 15, col. 1. The bill's sponsors retreated. The redraft of the bill permitted the justification defense in an additional situation: when the defendant could prove that he acted in the "public interest." HOUSE OF COMMONS STANDING COMMITTEE C, OFFICIAL REPORT, at 97-98 (June 19, 1974). This provision also failed to satisfy the critics, who noted the vagueness of the term "public interest." Another retreat was necessary; it resulted in the present bill.

147 Rehabilitation of Offenders Act § 8(5). "Malice" is not defined. Since under general defamation law malice will also defeat a qualified privilege defense, presumably the meaning of malice in the Rehabilitation of Offenders Act will be determined by reference to the many defamation cases in which the term has been construed. *See generally* SALMOND ON TORTS 176-78 (16th ed. 1973).

148 Under British procedure in civil cases, the losing party is usually ordered to pay all or most of the winning party's legal fees. These fees can be quite substantial since the winner may have employed at least one solicitor and one or more barristers.

149 872 PARL. DEB., H.C. (5th ser.) 1547 (1974) (remarks of Mr. Alexander W. Lyon).

the section is highly unlikely, the deterrent value of the defamation provision should remain high.

E. *Impact of the Act*

Although the Act has not been in effect long enough to be judged in anything but tentative terms, a few generalizations can be made. The Act is the brainchild of private, generally non-political citizens who conceived of the need for reform, staffed the Gardiner Committee, and persisted in lobbying the bill through a lengthy legislative process involving substantial, influential opposition. The resulting legislation is narrow in scope and will probably have little effect for most offenders, but it may mark a turning point in legal development in Britain, where the courts and the Parliament have not recognized a right to privacy.[150]

The Act does not help the relatively few persons who have received sentences longer than thirty months.[151] Although this limitation may be justified as politically necessary, other restrictions cannot be so easily explained. The Act does not deal with groups of persons who may be more in need of help than those covered by the Act. For example, the new law does not apply to persons stigmatized from less dispositive contacts with the criminal justice system than convictions, such as arrests, acquittals, and warnings. The Act could easily be amended to extend its remedial provisions to persons potentially harmed by these official activities. The Act only protects offenders who have not been convicted of an indictable offense for a substantial time

150 A leading British case in 1930 expressly rejected the existence of an independent right of privacy, directing aggrieved persons instead to traditional tort remedies. "[U]nless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory, it cannot be the subject matter of complaint by action at law." Tolley v. Fry & Sons, Ltd., 1 K.B. 467, 478 (1930). This basic principle still governs. "England does not recognize a right of privacy as such but nevertheless affords incidental protection to privacy under existing heads of liability." Neethling, The Right to Privacy: A Comparison of the American and English Law (preface) (1973) (unpublished LL.M. thesis, McGill U.). *See generally* Brittan, *The Right to Privacy in England and the United States,* 37 TUL. L. REV. 235 (1963).

151 It is impossible to state exactly how many persons receive sentences above thirty months because existing criminal statistics do not employ this category. Based on statistics for England and Wales, a gross estimate is that perhaps 300 persons per year (1 1/2% of those receiving prison terms) are excluded by the thirty month limit. This figure would not include persons convicted in Scotland. *Cf.* CRIMINAL STATISTICS, ENGLAND AND WALES 1974, CMND. No. 6168, at 210-15 (1975).

after the initial conviction, despite the fact that the period immediately following conviction or release from prison may be the time when the offender most needs to be free of discrimination in order to achieve rehabilitation.

A different approach, more consistent with the goal of fostering rehabilitation without endangering the public, would be to permit an offender to obtain a waiver of all or part of the scheduled rehabilitation period if he could convince a court or administrative agency that the public safety would not be jeopardized if his conviction were rendered spent prior to the end of the prescribed rehabilitation period. Presumably, the decision-maker would look at such factors as the facts of the case and the offender's pre-conviction and post-conviction social history.[152]

The Act has other major flaws. It contains no directives or funds for a publicity campaign to make the public aware of the requirements of the new law. A financially pressed government has responded with limited efforts to disseminate the necessary information.[153] In addition, the Act is so "complex, ill-drafted and, in parts, incomprehensible"[154] even lawyers will have difficulty understanding it. The result is that both offenders and the general public may be unaware of their rights and duties under the Act.[155] As a practical matter, however, awareness may be irrelevant in many cases, for the Act's civil and criminal remedies are so weak that they will rarely be used.

It is even arguable that the Act could have a negative impact in some cases. A judge imposing sentence in a criminal case could alter his sentencing practices in view of the Act.[156] For

152 It is not foreseeable that the British government will bear the cost of establishing such a tribunal. *See* note 155 *infra*. If the program were to be instituted, effective realization would require development of standards for decision-making based upon sociological and/or psychological criteria. The inherent difficulty of determining exactly when "rehabilitation" occurs probably precludes development of precise formal principles.

153 The Home Office has published two documents. A GUIDE TO THE REHABILITATION OF OFFENDERS ACT (1975) is a 19 page explanation in lay terms. WIPING THE SLATE CLEAN is a short brochure distributed free of charge at such places as employment agencies, citizens' advice centers, and free legal services offices.

154 38 MOD. L. REV., *supra* note 3, at 430.

155 Early versions of the Act required each convicted person to be given a certificate stating the date and conditions on which the conviction would become spent. This provision was deleted as being too burdensome for court personnel.

156 This possibility was suggested by David A. Thomas. Interview with David A.

example, a judge who believed a certain offender should never be able to hide his conviction may be prone to give a custodial sentence exceeding thirty months in order to exclude the offender from the Act's beneficent provisions. Before the Act was passed the same offender would have gotten a shorter sentence. Of course, a similar process could breed more lenient treatment in some cases as judges give shorter sentences in order to give a redeemable offender a chance to live down a criminal conviction.

Despite these substantial flaws, the Act could be of material assistance to some offenders. One major impact of the Act should be an increase in the rehabilitated offender's ability to benefit from insurance. The Act also should enhance offenders' employment prospects by deterring questions about criminal convictions.

On balance, the Act is a limited measure.[157] Fortunately, its history suggests that it was intended to be a cautious first step rather than a final solution. Amendments could expand its coverage; the flexibility provided by the Home Secretary's statutory discretion could be used to give it broader scope. But even these changes would disappoint many reformers who will find that no law, short of a rule keeping all criminal convictions completely private, can effectively stop discrimination against reformed criminal offenders.

III. Relevance of the Act to Law Reform in the United States

American law reformers share the British reformers' concerns about harmful, unnecessary discrimination against rehabilitated offenders. In recent years American penologists have focused attention on the host of laws and practices which hinder the offender's reintegration into society.[158] A major

Thomas, Assistant Director of Research, Institute of Criminology, University of Cambridge, in Cambridge, England (April 1, 1976).

157 When it became clear that the Lords would not pass the Act except with extensive amendments, its staunch supporters bemoaned the revisions but praised the Act's rehabilitative ideal. As Lord Leatherland remarked, "You do not spurn a beautiful lady because she happens to have a mole on the sole of her foot." 353 PARL. DEB., H. L. (5th ser.) 2030 (1974).

158 For the most comprehensive description and analysis of such laws, *see* Special Project, *The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929,

problem faced by American offenders is the dissemination of information about their criminal past.[159] Regardless of whether this information comes from the offender or someone else, it can precipitate loss of social status, employment and insurance coverage.[160] A major strength of the Act is its attempt to limit community knowledge about a rehabilitated offender's criminal past. It offers American law reformers a provocative model for attacking the problem of discrimination against former criminal offenders in several ways.

First, the Act makes an across-the-board decision that spent convictions are not relevant as evidence offered to impeach a witness's credibility in civil and quasi-judicial proceedings.[161] In contrast, many United States courts employ a rule of relevance under which each prior conviction of a witness is evaluated to determine whether it involves bad character and thus bears upon the issue of credibility.[162] An offender's criminal history may also be raised in a number of quasi-judicial proceedings. The technical rules of evidence usually are not applicable in administrative hearings.[163] Nor do they apply in private proceedings where a person's legal rights may be determined.[164]

952-1153 (1970) [hereinafter cited as "Special Project"]; Note, *New Approaches to the Civil Disabilities of Ex-Offenders,* 64 KY. L. J. 382 (1975). *See generally Hearings on Dissemination of Criminal Justice Information Before the Subcomm. on Civil Rights and Constitutional Rights of the House Comm. on the Judiciary,* 93d Cong., 2d Sess. (1974) [hereinafter cited as *Hearings,* 93d Congress]; J. HUNT, J. BOWERS, & N. MILLER, LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK (1974) (App. A lists the statutory conditions affecting ex-offenders for 307 occupations in 50 states and the District of Columbia).

159 *See Hearings,* 93d Congress, *supra* note 158.

160 *See* Special Project, *supra* note 158, at 1001-02, 1110-11, 1125-39; G. PARNALL, EMPLOYMENT PROBLEMS OF RELEASED PRISONERS (1969) (studies showed a 17% unemployment rate for offenders when national rate was 5%).

161 *See* text accompanying notes 87-99, *supra.*

162 Most states allow evidence of crimes involving "moral turpitude" to impeach witnesses' character and veracity. MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 85 (2d ed. 1972) [hereinafter cited as MCCORMICK]. *See, e.g.,* VT. STAT. ANN. tit. 2, § 1608. The Uniform Rules of Evidence propose that impeaching evidence be limited to crimes "involving dishonesty or false statement." UNIFORM RULES OF EVIDENCE 21. FED. R. EVID. 609 also uses this criterion. *See generally* MCCORMICK, *supra,* at 84-90.

Evidence rules bar admission only of very old convictions. *See, e.g.,* FED. R. EVID. 609(b) (evidence of conviction generally inadmissible 10 years after conviction or release from prison). *But see* Davis v. Alaska, 415 U.S. 308 (1974) (sixth amendment's right of confrontation requires that criminal defendant be permitted to impeach credibility of prosecution witness by questioning witness as to juvenile court record).

163 K. DAVIS, ADMINISTRATIVE LAW 271-90 (3d ed. 1972).

164 *E.g.,* labor arbitrations and disciplinary proceedings of professional and social organizations.

Hearing officers therefore have virtually unlimited discretion in admitting evidence of criminal behavior. The Act's determination of the irrelevance of spent convictions applies to all judicial and quasi-judicial proceedings and is superior to the current American rules and practices in the amount of protection afforded offenders.

Second, the Act impedes disclosure of convictions in non-judicial contexts by authorizing rehabilitated offenders to assume that employers' questions about their criminal activities do not refer to spent convictions. The Act also explicitly bans employment discrimination based upon knowledge of spent convictions.[165] These two provisions are unparalleled in the United States. Many public and private employers in America use a job applicant's criminal record as an important criterion in deciding whether to hire the applicant.[166] Public licensing authorities often likewise discriminate against rehabilitated offenders.[167] But there are few American laws banning discrimination by private employers on the basis of criminal record.[168]

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165 *See* text accompanying notes 113-131, *supra*. Offenders may make the same assumptions with regard to questions from insurers.

166 These practices are the product both of a fear that the applicant's criminal history indicates a lack of trustworthiness and of the existence of externally-imposed disincentives to hiring an ex-offender. Examples of externally-imposed disincentives include the practice of some insurance companies of denying fidelity bonding to the employer or to his employee who is a rehabilitated offender. *See generally* Meltsner, Kaplan, & Lane, *An Act to Promote the Rehabilitation of Criminal Offenders in the State of New York*, 24 SYRACUSE L. REV. 885, 892 (1973); EHMER & SULTAN, THE EMPLOYMENT OF PERSONS WITH ARREST RECORDS AND THE EX-OFFENDER (1971); A. MILLER, THE CLOSED DOOR: THE EFFECT OF A CRIMINAL RECORD ON EMPLOYMENT WITH STATE AND LOCAL PUBLIC AGENCIES, app. G (1972) (U.S. Dept. of Labor study conducted by the Georgetown University Law Center Institute of Criminal Law and Procedure).

167 *See* Special Project, *supra* note 158, at 1006-13. Often the ex-offender has the burden of satisfying a licensing body that he is of good character. The wide-ranging list of state-licensed occupations may surprise some readers. *See, e.g.*, Missouri's licensed occupations listed in Note, *Employment of "Criminal-Record Victims" in Missouri*, 41 MO. L. REV. 349, 353 n.35 (1976). For law reform proposals in this area, *see* Meltsner, *supra* note 166, at 887; J. HUNT, GUIDE TO LEGISLATIVE ACTION: A REVIEW OF STRATEGIES TO REMOVE STATUTORY RESTRICTIONS ON OFFENDER JOB OPPORTUNITIES (1975).

168 At the federal level, a program has been instituted to reduce unjust discrimination against criminal-record victims. 121 CONG. REC. S11,021 (daily ed. June 19, 1975) (message from the President). This laudable goal is undermined by the "suitability disqualifications" in the current FEDERAL PERSONNEL MANUAL of the Civil Service Commission. § 731.202(b)(2) (July 3, 1975) provides that "criminal, dishonest, or notoriously disgraceful conduct" may be the basis for denial or termination of employment.

Employment discrimination based on a criminal record may violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e)(1)-(15) (1970), since "the high arrest and

A law comparable to the Act's anti-discrimination rule would fill a serious gap in the protective scheme of American employment laws.[169]

Third, the Act criminalizes disclosures of spent convictions by persons having access to public records and provides a civil defamation remedy against persons who maliciously reveal information concerning spent convictions.[170] In many American jurisdictions employers and curious citizens can tap official records for information about an individual's criminal past,[171] though some states have enacted laws providing for the sealing or destruction of criminal records.[172] Such sealing laws greatly

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conviction rates for minority group members will mean that hiring policies giving undue weight to criminal records will result in rejections for a substantially disproportionate percentage of minorities." Note, *Employment of "Criminal-Record Victims" in Missouri*, 41 Mo. L. Rev. 349, 367 (1976). *See* Gregory v. Litton Indus., 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972) (employer's use of arrest records for job positions not requiring any degree of security illegally discriminates against blacks).

The most publicized state provision on the question was enacted in Hawaii. It prohibits most discrimination in hiring, working conditions, application forms, and union-related matters on the basis of an "arrest or court record." Discrimination is permitted if an "arrest and court record . . . have a substantial relationship to the functions and responsibilities of the . . . employment . . . ." Haw. Rev. Stat. § 378-2 (1975 Supp.).

169 Existing administrative procedures for enforcement of laws prohibiting discrimination on the basis of race, sex, and religion could be utilized to enforce anti-discrimination laws. The Hawaii law, for example, authorizes the Department of Labor and Industrial Relations to handle complaints of unlawful discrimination based on race, sex, age, religion, color, ancestry, physical handicap, marital status, or arrest and court record. Haw. Rev. Stat. §§ 378-3 to 378-10 (1968). A more successful approach, however, might be to entrust enforcement to an agency within, or at least closely related to, the State Department of Corrections. Enforcement of the anti-discrimination legislation would become part of the department's overall strategy to ensure that ex-convicts are able to undertake their chosen lawful employment. This idea was suggested by Professor Pat Hardin of the University of Tennessee College of Law. For a proposal creating an ex-offender employment agency, *see* Byron, *Needed: A Special Employment Clearinghouse for Ex-Offenders*, 34 Fed. Probation 53 (1970).

170 *See* text accompanying notes 132-149 *supra*.

171 Influential employers in major cities including St. Louis, Baltimore, New York, Los Angeles, and San Francisco have access to police records officially closed to the public. Report of the Commission to Investigate the Effect of Police Arrests on Employment Opportunities in the District of Columbia (1967), *cited in* Morrow v. District of Columbia, 417 F.2d 782 (D.C. Cir. 1969). *See also Security and Privacy of Criminal Arrest Records, Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 2d Sess. 110-11 (1972).

172 *E.g.*, Alaska Stat. § 47.10.060(e) (1975); Cal. Penal Code § 1203.4 (West Supp. 1976); Del. Code tit. 11, § 4332(i) (Supp. 1970); Idaho Code § 19-2604 (Supp. 1973); Kan. Stat. § 21-4617 (Supp. 1973); Mich. Comp. Laws Ann. § 780.622 (1968); Minn. Stat. Ann. § 609.166 (Supp. 1976); Nev. Rev. Stat. § 179.245 (1967); N. J. Rev. Stat. § 2A: 164-28 (1971); Ohio Rev. Code Ann. § 2953.32(C) (Page 1976); Tex. Code

limit the accessibility of criminal records and, if enforced in conjunction with civil and criminal sanctions such as those provided in the Act, would ensure preservation of the secrecy of stale convictions.

The Act's defamation section[173] is comparable to the laws of several states which require defendants to establish the truth of the communication in question *and* good motives or justifiable ends for it in order to avoid liability.[174] The Illinois Supreme Court has held that this requirement violates the first amendment guarantee of freedom of the press.[175] However, the New York Court of Appeals has held that a judicial order to seal court records suspends the first amendment privilege to report judicial proceedings without being subject to liability in tort.[176] The Supreme Court, in *Cox v. Cohn Broadcasting Co.*,[177] implied that it may accept the New York rule when an appropriate case is presented to it.[178] A defamation statute similar to the Act's, if

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CRIM. PRO. ANN. art. 42.12 § 7 (Vernon 1966); UTAH CODE ANN. § 77-35-17.5 (Supp. 1973); WASH. REV. CODE ANN. § 9.95.240 (1961).

Sealing usually is available if the crime was minor, the offender was a juvenile, or the conviction is several years old. *See generally* Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L. Q. 147; Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CAL. W. L. REV. 121 (1967).

173 Rehabilitation of Offenders Act § 8.

174 W. PROSSER, LAW OF TORTS 797 (4th ed. 1971) [hereinafter cited as PROSSER]. *See, e.g.*, ME. REV. STAT. ANN. tit. 14 § 152; MASS. GEN. LAWS ch. 231, § 92 (West). For a complete review of libel statutes, *see* C. ANGOFF, THE BOOK OF LIBEL (rev. ed. 1966).

175 Farnsworth v. Tribune Co., 43 Ill. 2d 286, 253 N.E.2d 408 (1969). For a discussion of this privilege *see* PROSSER, *supra* note 174, at 822-23, 830-33.

176 Danziger v. Hearst Corp., 304 N.Y. 244, 107 N.E.2d 62 (1952).

177 420 U.S. 469 (1975).

178 In *Cox*, the father of a murder-rape victim brought a tort action for invasion of privacy against a television station which, in violation of a state statute, broadcast the victim's name. The station defended by claiming a privilege under the first amendment. Although *Cox* was actually concerned with invasion of privacy rather than the related tort of defamation, the Court sought guidance from cases in which news media were sued for defamation. Recognizing that the prevention of reputational harm, the interest protected in a defamation action, often conflicts with freedom of expression, the Court held that the presence of the victim's name in official court records amounted to a legislative decision that the information was for public knowledge and therefore could be published without incurring liability for invasion of privacy. The Court specifically noted the possibility that the states may protect privacy interests in judicial proceedings by avoiding public documentation or other exposure of private information after their political institutions "weigh the interests in privacy with the interest of the public to know and of the press to publish." 320 U.S. at 496.

This holding suggests that the Court would accept a legislative determination that information in sealed court records is not for public knowledge and cannot be published with a first amendment privilege against liability. Paul v. Davis, 96 S. Ct. 1155

coupled with sealing statutes such as those presently in force in many states, should pass constitutional muster.

Finally, the Act is a fledgling effort to give complete societal recognition to the success of a convicted criminal whose years of exemplary living demonstrate that he does not deserve perpetual punishment for his crime. The Act cuts through the myth that life-long opprobrium deters commission of future crimes by the offender or other persons and realistically deals with the barriers to social reintegration which confront the offender whose criminal history remains public knowledge.

(1976), held that the fourteenth amendment does not protect interests in reputation and that only the states, through their defamation laws, can provide legal protection for the reputations of their citizens. 96 S. Ct. at 1166. Since there is no federal source for defamation law, the Supreme Court probably will defer to most state judgments concerning appropriate bases for liability and defenses, unless challenges to the laws raise constitutional issues. *Cox, supra,* 320 U.S. at 496 n.26. For example, sealing laws must bend before the accused's sixth amendment right to confrontation. Davis v. Alaska, 415 U.S. 308 (1974). Those offenders who become "public figures" may not be entitled to keep their criminal records secret, even though the records are sealed. The *Cox* Court stated in dictum that "the defense of truth is constitutionally required in defamation actions where the subject of the publication is a public official or public figure." 420 U.S. at 490. Many offenders fall outside this category because it ". . . is not definitionally applied to those who are simply famous or well-known, but rather to those who have achieved . . . influence over others in the resolution of public questions." Keeton, *Defamation and Freedom of the Press,* 54 TEX. L. REV. 1221, 1227 (1976). *See* Time, Inc. v. Firestone, 96 S. Ct. 958 (1976) (wealthy divorcee was not a public figure). *But cf.* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (constitutional protection against liability in tort extends to "all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous").

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NOTE

STONE v. *POWELL* AND THE NEW FEDERALISM: A CHALLENGE TO CONGRESS

RONALD S. FLAGG*

The Supreme Court's recent decision in Stone v. Powell *raises serious questions about the wisdom of the Court's developing view of the federal system and the Court's competence to define the jurisdiction of the federal courts. Mr. Flagg challenges the policies underlying the Court's "new federalism" and calls upon Congress to reassert the federal interest in a broad habeas corpus review of state convictions by the federal courts.*

Introduction

The Supreme Court in recent decisions has shown an increasing solicitude for state interests in cases where federal constitutional claims have been raised.[1] Last term, the Court extended its conception of a "new federalism"[2] into the area of federal habeas corpus when it decided *Stone v. Powell.*[3] The decision in *Stone,* as well as in many other cases that have come before the Court, reflects the judgments of the Court as to the proper balance between the jurisdiction of the federal and the state courts. In enunciating this "new federalism" the Court has foreclosed the availability of federal relief for unconstitutional or other unlawful acts by state authorities,[4] and it has usurped

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*Member of the Class of 1978 at Harvard Law School.

1 *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 58, 221 (1976).

2 As used herein, the "new federalism" is a shorthand expression for this trend in Supreme Court decisions of increasing solicitude for state interests. The term was used in a similar fashion in Note, *Municipal Bankruptcy, The Tenth Amendment and The New Federalism,* 89 HARV. L. REV. 1871 (1976).

3 96 S. Ct. 3037 (1976).

4 This pattern of Supreme Court decisions limiting the availability of the federal courts to vindicate federal claims extends well beyond the cases discussed in this Note.

> Although the pattern is not uniform, it is clear enough: the Supreme Court is making it harder and harder to get a federal court to vindicate a broad range of federal constitutional and other legal rights. . . .
>
> That there is indeed a pattern, and that it is more than accidental, seems clear from the scope and pervasiveness of the phenomenon. Class actions, standing to sue, federal review of constitutional claims in state criminal and civil proceedings, attorneys' fees, [the power of the federal court to fashion] meaningful remedies — in these and other contexts, the Supreme Court has

the power granted to Congress by the Constitution[5] to define the jurisdiction of the federal courts.[6]

Section I of this Note discusses *Stone* and the policy judgments made by the Court in restricting the availability of federal habeas corpus review. Section II examines other recent cases in which the Court has made similar judgments in restricting access to the federal courts generally in other substantive areas. Section III questions the validity of the judgments underlying the Court's opinion in *Stone* and, by implication, in other recent manifestations of the Court's "new federalism." Finally, Section IV calls upon Congress to assert its authority to define the jurisdiction of the federal courts so as to reverse the questionable judgments of the *Stone* decision.

I. STONE V. POWELL: THE POLICIES UNDERLYING THE "NEW FEDERALISM"

In *Stone,* the petitioner Powell had been convicted of murder in a California state court on the basis of testimony concerning

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sharply restricted the federal courts' power to protect basic rights. Instead, protection of these rights has been relegated to the state courts, few of which have shown themselves responsive.

SOCIETY OF AMERICAN LAW TEACHERS, SUPREME COURT DENIAL OF CITIZEN ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTS: THE RECORD OF THE BURGER COURT 2-3 (October 1976). *See also Causes of Popular Dissatisfaction with the Administration of Justice: Hearings Before the Subcomm. on Const. Rights of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess. 64-68 (1976) (statement of Aryeh Neier and Burt Neuborne on behalf of the American Civil Liberties Union).

5 Congressional power to define the jurisdiction of the federal courts derives from Article III, section 1 of the Constitution which states: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." The Constitutional Convention that met in 1787 wrestled with several plans dealing with the inferior federal courts before it settled on the plan embodied in Article III. During the debates, John Rutledge had urged that the state courts would be sufficient to secure national rights, while James Madison had argued for the mandatory establishment of the inferior federal courts. These two positions were compromised, leaving it to the discretion of Congress to establish inferior federal courts. "And it seems to be a necessary inference from the express decision that the creation of inferior federal courts was to rest in the discretion of Congress, that the scope of their jurisdiction, once created, was also to be discretionary." P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 11, 12 (2d ed. 1973) [hereinafter cited as HART & WECHSLER]. *See generally,* Reddish & Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis,* 124 U. PA. L. REV. 45 (1975).

6 Justice Brennan, dissenting in *Stone,* argued that the "interest balancing approach" used to justify the majority decision is "nothing less than an obvious usurpation of Congress' Article III power to delineate the jurisdiction of federal courts." 96 S. Ct. at 3061 (Brennan, J., dissenting).

a revolver which had been taken from him incident to his arrest for violation of a local vagrancy ordinance. The state courts, both at trial and on direct appeal, rejected Powell's arguments that the vagrancy ordinance was unconstitutional and that the search was invalid. Powell applied for a writ of federal habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds that he was being held in violation of the Constitution. The District Court denied his plea, but the United States Court of Appeals reversed, holding that the vagrancy ordinance was unconstitutionally vague, that the arrest and search were unlawful, and thus that the evidence should have been excluded at trial.[7] The Supreme Court reversed the Court of Appeals' decision, holding that "a federal court need not apply the exclusionary rule on habeas review of a fourth amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review."[8]

Although the Court's decision involved consideration of Powell's fourth amendment claim, the result in *Stone* was not required by the Constitution. The Court did not hold that the federal courts lack jurisdiction pursuant to § 2254 over a fourth amendment claim,[9] nor did it conclude that no violation of the fourth amendment had occurred. Neither did the Court rest its decision on construction of the federal habeas statute.[10] Instead, as in previous abstention cases,[11] the Supreme Court based its decision on its own balancing of the relative state and federal interests involved.[12]

7 507 F.2d 93 (9th Cir. 1974). The court of appeals concluded that, although the exclusion of the evidence would serve no deterrent purpose with regard to police officers who were enforcing statutes in good faith, it would deter legislators from enacting unconstitutional statutes in the future. 507 F.2d at 98.

8 96 S. Ct. at 3052 n.37.

9 *Id.*

10 The Court rejected the argument of the dissent that the decision concerned the scope of the habeas corpus statute and was required as a matter of statutory interpretation. "Our decision today is *not* concerned with the scope of the habeas corpus statute as authority for litigating constitutional claims generally." *Id.*

11 Younger v. Harris, 401 U.S. 37 (1971); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975); Hicks v. Miranda, 422 U.S. 332 (1975). *See* Maraist, *Federal Intervention in State Criminal Proceedings: Dombrowski, Younger, and Beyond*, 50 TEX. L. REV. 1324 (1972); Note, *Federal Jurisdiction — The Abstention Doctrine As Amended by Hicks v. Miranda: A Legal Definition and Ominous Omissions*, 54 N.C. L. REV. 247 (1976). *See also* text accompanying notes 32-37 *infra*.

12 The Court noted that its decision did not mean that the federal courts lack jurisdiction over fourth amendment claims. 96 S. Ct. at 3052 n. 37. Under 28 U.S.C. §

In reaching its decision in *Stone*, the Court purported to balance the advantages and disadvantages of application of the exclusionary rule on federal habeas review. The Court found that the extension of the exclusionary rule to the states in *Mapp v. Ohio*[13] was based "principally on the belief that exclusion would deter future unlawful conduct."[14] However, the Court found that the additional deterrence gained by applying the exclusionary rule on habeas review was small in relation to the costs.[15] The Court cited two specific costs. First, "the focus of the trial, and the attention of the participants therein, is diverted from the ultimate question of guilt or innocence that should be the central concern in a criminal proceeding."[16] Second, "the physical evidence to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant."[17]

These considerations, however, apply with equal force to the application of the exclusionary rule at trial in the state courts or on direct review by the Supreme Court, as well as on collateral review by habeas corpus. Yet the Court did not relieve the states of their obligation to apply the exclusionary rule in their criminal proceedings at trial or on appeal, but only withdrew the operation of the rule when federal district courts review those same proceedings upon a petition for habeas corpus.[18] This distinction can logically be based only upon judgments about

2254(a), federal jurisdiction is only available when the petitioner is held in state custody "in violation of the Constitution or laws or treaties of the United States." The existence of jurisdiction must then mean that where unconstitutionally-seized evidence has been admitted at trial, a violation of the Constitution has occurred. Thus, it is not the Constitution which requires that fourth amendment claims not be cognizable on habeas corpus review.

However, nothing in the habeas corpus statute indicates that the federal courts have the discretion to reject a category of cases over which they have jurisdiction. Thus, one can only conclude that the Court's decision was founded upon the policy considerations it put forward. *See* text accompanying notes 13-20 *infra*.

For further discussion of why the decision cannot be constitutionally based, *see* the dissent of Justice Brennan, 96 S. Ct. at 3057-61.

13 367 U.S. 643 (1961).

14 96 S. Ct. at 3047 (citing Mapp v. Ohio, 367 U.S. 643, 658 (1961)). *See also* Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970).

15 96 S. Ct. at 3051.

16 *Id.* at 3049-50.

17 *Id.* at 3050. For a discussion of the effect of *Stone v. Powell* on the exclusionary rule, *see* Note, *Fourth Amendment in the Balance — The Exclusionary Rule After Stone v. Powell*, 28 BAYLOR L. REV. 611 (1976).

18 96 S. Ct. at 3052 n.37.

the relative roles of the state and federal judiciaries in adjudicating the constitutional claims of state criminal defendants.

The primary judgment of the Court was that the state courts, with only direct review by the Supreme Court, protect fourth amendment rights as competently as the federal district courts. The majority opinion reasoned:

> Despite differences in institutional environment and the unsympathetic attitude to federal constitutional claims of some state judges in years past, we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the several States. State courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law. . . . Moreover, the argument that federal judges are more expert in applying federal constitutional law is especially unpersuasive in the context of search-and-seizure claims, since they are dealt with on a daily basis by trial level judges in both systems.[19]

The Court listed four other policies which led it to limit the application of the exclusionary rule in the context of federal habeas corpus review: "(i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded."[20]

These arguments are unpersuasive in light of the federal interest in ensuring the proper adjudication of federal constitutional claims. The Court in *Stone,* as well as in the cases to be discussed in Section II, has redrawn, on the basis of its own policy judgments, the limits of federal jurisdiction more narrowly than the statutory limits prescribed by Congress. As Section III will suggest, the existing statutory regime has already struck a workable and desirable balance between the federal interest in correct adjudication of constitutional claims and the

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19 *Id.* at 3051-52 n.35 (citations omitted). *See* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441, 509 (1963).

20 96 S. Ct. at 3050 n.31, (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 259 (Powell, J., concurring)). *See also* Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. CHI. L. REV. 142 (1970).

states' interests that the Court promoted in *Stone*. Even if the Court believed that the federal habeas corpus statute did not strike the proper balance, it should have deferred to Congressional definition of the proper jurisdiction of the federal courts.

II. The New Federalism in Other Contexts

In *Stone v. Powell,* the Supreme Court restricted the application of the exclusionary rule, not by cutting back on the substance of the rule itself, but by forbidding the federal courts to apply it in cases in which those courts previously had jurisdiction under 28 U.S.C. § 2254.[21] The Court based its decision primarily on considerations of federalism and comity.[22]

In his dissent, Justice Brennan expressed the fear that the decision in *Stone* would be used to restrict further the jurisdiction of the federal courts on habeas corpus review in cases involving claims of unconstitutional detention on other than fourth amendment grounds.[23] His concern regarding the potential extension of the rationale of *Stone* is well founded, especially when one examines the wide range of cases in which the Court has relied on similar policies to restrict the access of constitutional claimants to the federal courts.

Francis v. Henderson[24] exemplifies the use of the same federalism rationale to restrict federal habeas corpus in a non-fourth amendment context. In *Francis* the Court held that a state prisoner who failed to make a timely challenge to the racial composition of a grand jury that indicted him could not, after his conviction, bring that challenge in a federal habeas corpus proceeding under 28 U.S.C. § 2254.

The case involved the indictment of Francis, a 17 year old black youth, by a Louisiana grand jury on a charge of felony

21 "[T]he application of the [exclusionary] rule is limited to cases in which there has been both such a showing [that the state prisoner was denied an opportunity for a full and fair litigation of that claim] *and* a Fourth Amendment violation." 96 S. Ct. at 3052 n.37 (emphasis added).

22 As used in this Note, "comity" refers to the discretionary deference of the federal courts to the state courts. Comity often appears in the guise of the minimization of federal interference with state processes.

23 96 S. Ct. at 3062-63 (Brennan, J., dissenting). Justice Brennan's dissent was joined by Justice Marshall. Justice White filed a separate dissent.

24 96 S. Ct. 1708 (1976).

murder. Two months after the indictment the court appointed uncompensated counsel for him; however, this counsel, who was in failing health and who had not practiced criminal law for several years, took no action for Francis's defense until the day before trial. He offered no challenge to the racial composition of the grand jury that had indicted Francis, and he never informed him that such a challenge was possible. At trial, Francis was convicted of felony murder and sentenced to life imprisonment; his two older accomplices, through plea bargaining, each received 8-year prison terms.

In its decision denying Francis habeas corpus relief, the Supreme Court acknowledged that, under the statute and following its decision in *Fay v. Noia,*[25] "there can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this."[26] However, the Court reasoned that "considerations of comity and federalism"[27] require that the federal courts give effect to the state interest in enforcing its criminal procedure when considering whether to overturn state criminal convictions.[28] In addition to comity and federalism, the Court cited the states' interests in finality of criminal judgments and the Court's reluctance to see federal courts "unduly interfere with the legitimate activities of the States"[29] as further reasons for its decision to prevent the federal courts from exercising their power over Francis's constitutional claim.[30]

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25 372 U.S. 391 (1963).

26 96 S. Ct. at 1710.

27 *Id.* at 1711.

28 The Court referred to its decision in Davis v. United States, 411 U.S. 233 (1973), as presenting an analogous concern for the federal interest in the federal rules of criminal procedure. In *Davis,* the Court held that a federal prisoner who failed to make a timely challenge to the racial composition of the grand jury that indicted him could not later seek collateral relief by federal habeas corpus pursuant to 28 U.S.C. § 2255. The Court based its decision on an interpretation of congressional intent under Rule 12(b)(2) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255. Rule 12(b)(2) provides that a challenge to the constitutional validity of a grand jury must be made by motion before trial. The Court held that Congress in enacting § 2255, which provides relief to federal prisoners held in violation of the Constitution, did not mean to undercut the effect of Rule 12(b)(2) by allowing federal prisoners to mount the same challenge prohibited by 12(b)(2) in a post-trial petition under § 2255. 411 U.S. at 242.

29 96 S. Ct. at 1711.

30 The rationale underlying both *Davis* and *Francis* is that the right to raise federal constitutional claims on habeas corpus should be restricted to deter defendants from violating state and federal rules of criminal procedure. However, as the Court recog-

This concern with "comity and federalism" has led the Court to restrict access to the federal district courts in other contexts in which those courts had the power to exercise jurisdiction under previous statutory interpretation.[31] One such area is civil rights actions under 28 U.S.C. § 1983, the Civil Rights Act of 1871.[32] In *Younger v. Harris*[33] the Court held that for reasons of equity, comity, and federalism, federal courts should abstain from enjoining under § 1983 a pending state criminal prosecution absent a finding of bad faith or immediate, irreparable harm.[34] The Court expressed a desire for "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in separate ways."[35]

Recent cases have extended the *Younger* doctrine in many directions. For example, in *Miranda v. Hicks*,[36] the Court held that the principles of *Younger* precluded a federal court from enjoining a state criminal prosecution instituted *subsequent* to the proceeding in the federal court. Also, in *Huffman v. Pursue, Ltd.*,[37] the Court invoked equitable restraint to preclude the enjoining of *civil* proceedings initiated by state prosecution. In

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nized in Fay v. Noia, deterrence is only an effective policy against actions done knowingly or intentionally. Prisoners who because of inexperience, poor counsel, or other reasons are unaware of their rights will not be deterred by the Court's new standard, but instead will be trapped in a needlessly "airtight system of forfeitures." 372 U.S. at 432.

31 *See* Note, *Municipal Bankruptcy, The Tenth Amendment and The New Federalism*, 89 HARV. L. REV. 1871, 1874-1875 (1976).

32 42 U.S.C. § 1983, originally part of the Civil Rights Act of 1871, today reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

For historical background on § 1983, *see* Monroe v. Pape, 365 U.S. 167 (1961). *See generally* McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 U. VA. L. REV. 1 (1974).

33 401 U.S. 37 (1971).

34 *Id.* at 43-57.

35 *Id.* at 44.

36 422 U.S. 332 (1975).

37 420 U.S. 592 (1975).

these cases, the Court denied federal injunctive relief despite the existence of jurisdiction pursuant to 42 U.S.C. § 1983.

This solicitude for the state's interest in exercising its prosecutorial and judicial functions without federal interference, regardless of the impact on a defendant's constitutional claims, also surfaced in *O'Shea v. Littleton.*[38] There plaintiffs brought a civil rights action under § 1983, alleging that a county magistrate and judge had embarked on a continuing intentional practice of racially discriminatory bond-setting, sentencing, and assessing of jury fees. Despite the evidence of past abuses, the Court held that the named plaintiffs could not show that future offenses would be committed against them specifically and therefore lacked standing to bring suit for injunctive relief.[39] In addition the Court found that, even if plaintiffs could satisfy a standing requirement, injunctive relief against defendants' actions would constitute "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings" and would be "in sharp conflict with the principles of equitable restraint."[40]

Similarly, the Court has invoked the principles of comity and federalism to restrict the federal district courts from enjoining allegedly unconstitutional practices of state or local executive officials. In *Rizzo v. Goode*[41] a group of individuals and a coalition of community organizations brought actions against the city of Philadelphia and its mayor, alleging a pervasive pattern of illegal and unconstitutional mistreatment by police officers. Suing under § 1983, the plaintiffs sought equitable relief, including appointment of a receiver to supervise the police department and the establishment of civilian review of police activity. The District Court heard evidence on over forty incidents of alleged police brutality, nineteen of which the Supreme Court later assumed *arguendo* to be violations of constitutional rights.[42] The District Court found that public officials

38 414 U.S. 488 (1974).
39 *Id.* at 493-99.
40 *Id.* at 502.
41 423 U.S. 362 (1976).
42 *Id.* at 367-68. The district judge found five constitutional violations, but the Supreme Court was willing to concede, *arguendo,* that fourteen additional incidents, as to which the district court had made no finding, amounted to constitutional violations. *Id.* at 368.

in Philadelphia consistently had refused to act to stop the violations. It directed the Police Department to draft "a comprehensive program for dealing adequately with civilian complaints," including "appropriate revision of police manuals and rules of procedure spelling out in simple language the 'do's and don'ts' of permissible conduct in dealing with civilians . . . [r]evision of procedures for processing complaints against police . . . and prompt notification to the concerned parties informing them of the outcome" of complaint procedures.[43]

As it had in *O'Shea,* the Supreme Court found that the named plaintiffs lacked the requisite standing, as they could not demonstrate that future incidents arising from inadequate police disciplinary procedures would harm them specifically rather than other members of the class.[44] The Court also held that the District Court had erred in imputing liability to superior officials for the unconstitutional conduct of individual patrolmen. The Court's opinion in *Rizzo* concluded with its reason, by now quite familiar, for limiting federal injunctive relief for the abuses of state or local officials:

> Thus the principles of federalism which play such an important part in governing the relationship between federal courts and state governments, though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments such as respondents here.[45]

Thus the same principles of federalism and comity on which the Court relied in *Stone v. Powell* have been used in other cases to justify restrictions on the district courts' acknowledged power. The application of these principles has prevented the district courts from vindicating the constitutional claims of state prisoners and others who allege state infringement of constitutional rights.

43 COPPAR v. Tate, 357 F. Supp. 1289, 1321-22 (E.D. Pa. 1973).

44 423 U.S. at 372-73.

45 *Id.* at 380. Thus, the Court explicitly brought *Rizzo* into the *Younger* line of abstention cases, also citing Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

III. A Critique of the Supreme Court's "New Federalism"

An examination of the policies upon which the Court has constructed this "new federalism" reveals the impropriety of the balance the Court has struck. In addition, it suggests strong arguments calling for congressional reassertion of its constitutional power to reopen the federal courts to those claims which recent Supreme Court decisions have foreclosed.

A. *Federal Trial Court Jurisdiction Is Necessary for Proper Enforcement of Federal Constitutional Rights*

Since the Court in *Stone* left the exclusionary rule intact for purposes of its application in state trials, on direct review by state appellate courts, and by the Supreme Court, the Court's assumption must be that the state judiciary checked only by the Supreme Court's discretionary review will suffice to protect the fourth amendment rights of state prisoners. The Court has predicated its judgment on the belief that there is "no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the [considerations of fourth amendment claims] than his neighbor in the state courthouse."[46] This assertion ignores the difference in the institutional setting and outlooks of the state and federal judiciaries. It also overlooks the inadequacy or unavailability of state remedies in many cases.

State judges, who are either locally elected or appointed and who serve terms of limited durations,[47] are subject to greater political pressure from the local citizenry than are federal judges. The concerns of these local constituents are likely to focus more on the guilt or innocence of a defendant than on the constitutional rights of that individual, and state judges tend unduly to reflect the substantive goals of the state criminal law in their decisions rather than the "goals of the Federal Constitution in protecting individual rights from unlawful government action."[48] Federal judges, who enjoy life tenure, how-

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46 96 S. Ct. at 3051 n.35 (quoting Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 509 (1963)).

47 *See, e.g.*, Cal. Const. art. 6, § 16.

48 *Developments in the Law — Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1060 (1970).

ever, operate in an institutional setting more insulated from local pressures and less insulated from review by the federal Courts of Appeal and the Supreme Court than their state counterparts.[49] This distinction in the institutional pressures on state and federal judges was recognized in the debates of the Constitutional Convention,[50] in the debates over ratification of the Constitution,[51] and in the debate in Congress over the Reconstruction legislation which first broadened federal jurisdiction over state actions.[52] These assumptions concerning the bias and inadequacy of the state courts when presented with constitutional claims are a primary rationale for the existence of the inferior federal courts. In fact, state courts may not be as sympathetic to federal constitutional claims as are the federal courts.[53] Numerous instances of woeful disregard for federal

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49 *Id.* at 1061; Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352, 1357 (1970).

50 During the debate over the establishment of the inferior federal courts, James Madison noted that an appeal from the state courts to the Supreme Court may not, in many cases, be a remedy. "What was to be done after improper Verdicts in State tribunals obtained under the biassed directions of a dependent Judge, or the local prejudices of an undirected jury?" HART & WECHSLER, *supra* note 5, at 11.

51 Alexander Hamilton, discussing in *The Federalist* why the adjudication of federal questions should not be left to the states, wrote:

> The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the states would be improper channels of the judicial authority of the union. State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.

THE FEDERALIST No. 81, at 510 (B. Wright ed. 1961) (A. Hamilton).

52 During debate over the Civil Rights Act of 1871, Representative Coburn stated:

> The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror as local judges can; their sympathies are not so nearly identified with those of the vicinage: the jurors are taken from the State, and not the neighborhood: they will be able to rise above prejudices or bad passions or terror more easily.

CONG. GLOBE, 42d Cong., 1st Sess. 460 (1871). *See also id.* at 653 (comments of Senator Osborn); Monroe v. Pape, 365 U.S. 167, 172-85 (1961).

53 "[I]t is difficult to avoid concluding that federal courts are more likely to apply federal law sympathetically and understandingly than are state courts." ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 166 (1969). *See also Developments in the Law — Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1060-63 (1970); Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. PA. L. REV. 793, 800-03 (1965); McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Claims, Part II,* 60 U. VA. L. REV. 250, 263-64 (1974);

law in state court proceedings can be cited; such disregard can be corrected only by federal habeas corpus actions.[54]

State remedies also may be inadequate or unavailable. In California, for example, where Powell originally was tried in the state courts, fourth amendment claims are not cognizable in the state's habeas corpus proceedings.[55] Even where available, state remedies may be inadequate or unresponsive to constitutional claims.[56]

Direct review of state court decisions by the Supreme Court provides insufficient federal scrutiny of state processes. First, the Supreme Court cannot possibly review all the state criminal

Chevigny, *Section 1983 Jurisdiction: A Reply,* 83 HARV. L. REV. 1352, 1357-59 (1970); Mishkin, *The Federal "Question" in the District Courts,* 53 COLUM. L. REV. 157, 158 (1953).

54 An amicus brief submitted to the Supreme Court by the American Civil Liberties Union in *Stone v. Powell* cited numerous cases in which fourth amendment claims were presented to state courts and rejected even though the applicable precedents made clear that the fourth amendment had been violated. Amicus Brief by American Civil Liberties Union at 18-21, Stone v. Powell, 96 S. Ct. 3037 (1976). Among the state cases which were reversed on fourth amendment grounds on federal habeas review in 1975 were Patterson v. Lockhard, 513 F.2d 579 (8th Cir. 1975); Moffet v. Wainwright, 512 F.2d 496 (5th Cir. 1975); United States *ex rel.* Coleman v. Smith, 395 F. Supp. 115 (W.D.N.Y. 1975); O'Berry v. Wainwright, 394 F. Supp. 591 (S.D. Fla. 1975); Frankboner v. Robinson, 391 F. Supp. 542 (W.D. Va. 1975).

55 *In re* Wright, 65 Cal. 2d 652, 422 P.2d 998, 56 Cal. Rptr. 110 (1967). *See also* Reitz, *Federal Habeas Corpus: Post-conviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461, 465 (1960) ("The narrow common-law writ of habeas corpus which the states incorporated into their jurisprudence is totally incapable of encompassing the modern issues of due process and equal protection.").

56 Inadequate state processes are not restricted to the setting of habeas corpus. In Rizzo v. Goode, 423 U.S. 362 (1976), the Supreme Court prevented the district court from providing injunctive relief, saying that the "federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' " *Id.* at 378 (citations omitted).

Yet in its concern for the administration of state law, the Court left unremedied the state's failure to enforce federal constitutional rights. The district judge previously had found that the state remedies (such as Police Department complaint procedures, redress through the Commission on Human Relations or the Police Advisory Board of Philadelphia, criminal prosecution by the Philadelphia District Attorney, and private civil actions against the police) for the unconstitutional police activities at issue were inadequate or no longer in existence. COPPAR v. Tate, 357 F. Supp. 1289, 1292-94, 1319 (E.D. Pa. 1973).

In contrast, no one has ever denied the efficacy of the district court's remedy "or the fact that it effectuated a betterment in the system." 423 U.S. at 381 (Blackmun, J., dissenting). The federal courts have proven adept at meeting the problems posed by the changing nature of litigation from the traditional model of disputes between private parties over private rights to the conception of litigation as a method of carrying out public policy through vindication of constitutional and statutory rights. This facility of the federal courts is attributable partly to the liberal pleading, joinder, and class action provisions of the Federal Rules of Civil Procedure, and the flexibility of response to the problems accompanying such suits, with their concomitant size and complexity, by such means as the appointment of magistrates and masters. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281 (1976).

convictions in which constitutional claims are raised.[57] Second, direct review by the Supreme Court will deny the defendant in a state criminal trial the benefit of a federal trial court's role in constructing a record and making findings of fact.[58] As an earlier Court emphasized, "[h]ow the facts are found will often dictate the decision of federal claims."[59] If one accepts the institutional arguments that the federal courts are more sympathetic to federal constitutional claims than state courts, then state criminal defendants should have some chance to have the facts in their cases determined in a federal forum.[60]

Finally, the federal district courts provide potentially more uniform treatment of constitutional claims than do the more numerous state courts.[61] Even before the Supreme Court speaks on a particular issue, there is likely to be a developing uniformity among the eleven Courts of Appeal. While divergences between circuits may appear on a given issue, these help to focus issues for the Supreme Court's ultimate determination. "In any event, the process is more likely to afford uniformity than any state interaction if only because there are fewer jurisdictions to reconcile."[62] Thus, contrary to the Court's assertions in *Stone,* proper adjudication of constitutional claims requires the availability of a federal forum free from the institutional constraints of the state trial and appellate courts.

B. *Broad Federal Habeas Corpus Jurisdiction Is Not Inconsistent with "Effective Utilization of Judicial Resources"*

The Court in *Stone* expressed its desire for "the most effective utilization of limited judicial resources."[63] However numerous

57 *See* Reitz, *Federal Habeas Corpus: Post-conviction Remedy for State Prisoners,* 108 U. PA. L. REV. 461, 464 (1960).

58 *See* 28 U.S.C. § 2254(d) (1970).

59 England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964). *See also* Townsend v. Sain, 372 U.S. 293, 312 (1963).

60 As Professor Amsterdam described the situation:

> These defendants (in civil rights cases) depend on the federal constitution .... Its guarantees turn on questions of fact. The defendants are tried in state courts and the facts are found against them. It was known that the facts would be found against them, and they are. If this was an end of factfinding, the Constitution would be worthless.

Amsterdam, *supra* note 53, at 840.

61 *See Developments in the Law, supra* note 53, at 1061. This same argument applies to the consideration of the availability of federal court review of constitutional claims arising under § 1983. *See* Chevigny, *supra* note 53, at 1357-58.

62 Chevigny, *supra* note 53, at 1358.

63 96 S. Ct. at 3050 n.31.

habeas corpus petitions are,[64] they represent only a small fraction of total civil filings and consume on the average less than 1% of the federal judge's time.[65] Many petitions are disposed of without the need for a hearing; when a hearing is required, it frequently takes less than one day.[66] Moreover, Congress has responded to any overload caused by habeas corpus petitions by enacting the Federal Magistrates Act.[67] The Act provides for the preliminary screening by federal magistrates of applications for posttrial relief and the submission of a report and recommendation to the district judge to facilitate decision-making.[68] Congress also has limited wasteful duplication of effort between the state court and the federal district court by limiting the scope of collateral review to constitutional questions,[69] requiring exhaustion of state remedies,[70] and limiting the situations in which the federal court may redetermine controverted facts.[71]

Even supposing that habeas corpus petitions unduly burden

64 After an increase in the number of habeas petitions in the 1960's, the number of petitions has dropped markedly in the last few years. The number of habeas corpus petitions from state prisoners increased from 1,020 in fiscal 1961 to 9,063 in fiscal 1970. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 135, table 17 (1971). Between 1971 and 1974 the number of habeas corpus petitions has declined from 8,372 to 7,626. In 1974, habeas corpus petitions from state prisoners represented less than 8% of the total civil filings in the United States district courts. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, 221-22, tables 49-50 (1974).

65 Habeas corpus petitions from state prisoners constitute 8% of civil filings but require less than 1% of the average judge's time. Note, *Proposed Modification of Federal Habeas Corpus for State Prisoners—Reform or Revocation,* 61 GEO. L. J. 1221, 1246 (1973). *See also* Shapiro, *Federal Habeas Corpus: A Study in Massachusetts,* 87 HARV. L. REV. 321, 367-72 (1973).

66 Yet it is all too easy to overstate the strain that an expanded habeas jurisdiction and expanded federal constitutional rights put on the judicial system. Most of the petitions were quickly dismissed: less than 500 reached the hearing state, and most of those hearings lasted less than one day. Nor was the burden on the states staggering: many petitions do not even require a response; less than ten percent of the state convictions attacked had to be defended in a hearing, and so few prisoners were released that the burden of retrial must be small.

Developments in the Law, supra note 53, at 1041 (footnotes omitted).

67 28 U.S.C. § 636 (Supp. IV 1974).

68 28 U.S.C. § 636(b)(3) (Supp. IV 1974). The performance of the magistrate's function was explicitly intended "to afford some degree of relief to district judges and their law clerks, who are presently burdened with burgeoning numbers of habeas corpus petitions and applications under 28 U.S.C. § 2255." S. REP. No. 371, 90th Cong., 1st Sess. 26 (1967).

69 28 U.S.C. § 2254(a) (1970).

70 *Id.* § 2254(b).

71 *Id.* § 2254(d).

the resources of the federal courts, the Supreme Court should not determine which substantive federal rights should be accorded enforcement priority.[72] If a rising caseload threatens to inundate the federal courts, Congress should act to provide additional resources or reexamine enforcement priorities in a systematic fashion.[73] Selective enforcement of constitutional claims by the federal courts is not an appropriate response.

C. *The Interest in Finality in Criminal Trials Does Not Require Further Restriction of Federal Habeas Jurisdiction*

The Court in *Stone*[74] as well as in *Francis v. Henderson*[75] cited the need for finality in criminal trials as a reason for restricting the habeas jurisdiction of the federal courts. While one may

72 Evaluating the relationship between Congress and the Supreme Court on habeas corpus, Justice Frankfurter wrote:

> Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution. . . . It is not for us to determine whether this power should have been vested in the federal courts. . . . [*T*]*he wisdom of such a modification in the law is for Congress to consider,* particularly in view of the effect of the expanding concept of due process upon enforcement by the States of their criminal laws. *It is for this Court to give fair effect to the habeas corpus jurisdiction as enacted by Congress. By giving the federal courts that jurisdiction, Congress has imbedded into federal legislation the historic function of habeas corpus adapted to reaching an enlarged area of claims.* . . .
>
> Congress has the power to distribute among the courts of the States and of the United States jurisdiction to determine federal claims. It has seen fit to give this Court power to review errors of federal law in State determinations, and in addition to give to the lower federal courts power to inquire into federal claims, by way of habeas corpus. . . . But it would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts.

Brown v. Allen, 344 U.S. 443, 499-500, 508-10 (1953) (concurring opinion) (emphasis added).

73 Senator Nelson (D. Wis.) commented during the last congressional term:

> In my view, the assertion of constitutional rights—and the existence of a federal forum to review those claims — is vitally important for the society, as well as for the petitioner. Our willingness to use scarce judicial resources in this way reflects again the high priority this society places on constitutional liberties and individual freedom. If this society no longer values the constitutional rights to the same degree, that judgment should be reflected by the representatives of the people — Congress — through a decision to restrict the habeas jurisdiction of the federal courts. Congress is also the only body which can address the rising caseload in the federal courts in a systematic way and make some basic judgments about how scarce judicial resources should be allocated.

121 CONG. REC. S17,848 (daily ed. Oct. 1, 1976).

74 96 S. Ct. at 3050 n.31.

75 96 S. Ct. at 1711.

concede the need to establish a point beyond which state convictions will be immune from attack, where that point should be is not self-evident. In a federal system premised on the supremacy of federal law, some federal supervision of the state courts in their determination of federal constitutional claims is necessary. As final arbiter of federal constitutional claims, however, the Supreme Court is incapable of reviewing all state criminal convictions in which such claims have been raised. In order to effect some federal review of these claims, a workable division of labor between the Supreme Court and the lower federal courts is necessary. The habeas corpus statute established a regime which recognized the need for some federal supervision of constitutional claims and the Supreme Court's inability to examine all such claims on direct review.[76]

While finality of state court convictions is important, effective enforcement of constitutional guarantees must take precedence. The habeas corpus statute as previously interpreted adequately accommodated the state's interest in finality by establishing a presumption that the state hearings had been adequate and casting the burden of proving deficiencies upon the petitioner,[77] and by restricting federal collateral review to constitutional claims and violations of federal laws.[78] Thus, prior to *Stone v. Powell,* the habeas procedures, while recognizing the state interest in finality of criminal convictions, carried out "the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[79]

D. *Minimizing Friction Between the Federal and State Judicial Systems Does Not Require the Elimination of Federal Habeas Corpus Review of Federal Constitutional Claims*

The Court in *Stone* relied on the need to minimize friction between federal and state systems of justice.[80] The federal

76 *See* Freund, *Symposium: Habeas Corpus — Proposal for Reform,* 9 UTAH L. REV. 18, 30 (1964).

77 *See* 28 U.S.C. § 2254(d) (1970).

78 *See id.* § 2254(a).

79 Fay v. Noia, 372 U.S. 391, 424 (1963).

80 96 S. Ct. at 3050 n.31.

habeas procedures which the Court curtailed in *Stone,* however, were responsive to the need to accommodate both the state and federal interests at issue. Tension was reduced by requiring the prisoner to exhaust his state remedies prior to application for a writ, thus giving the state courts a chance to address the constitutional claim.[81] As noted above, if a federal court did entertain a habeas petition, it limited its review to federal and constitutional questions;[82] and even then the State's fact-finding process was presumed to be correct.[83]

Since the Supreme Court has appellate jurisdiction over all cases arising under the constitution and laws of the United States,[84] it is impossible to eliminate all federal scrutiny of state criminal proceedings. Neither is it wise. In a system where federal law is supreme, some friction between the state and federal courts is inevitable.[85]

Moreover, the procedure which the Court created in *Stone v. Powell* holds the potential for increased intrusion by federal courts into the state judicial process. The Court's decision bars consideration of a fourth amendment claim unless the prisoner was not afforded an "opportunity for full and fair litigation" of the claim.[86] Thus the federal judge, rather than focusing in the first instance on the prisoner's fourth amendment claim, appears to be required to determine the adequacy of the state process, and then to deal with the constitutional questions should inadequacies be found. Though the content of the requirement of an "opportunity for full and fair litigation" is yet unclear, it raises the possibility that federal judges, otherwise precluded from granting redress to prisoners convicted on the basis of illegally obtained evidence, will engage in more search-

81 *See* 28 U.S.C. § 2254(b) (1970). *See also* Wright & Sofaer, *Federal Habeas Corpus for State Prisoners: The Allocation of Fact-Finding Responsibility,* 75 YALE L. J. 895, 903 (1966).

82 *See* 28 U.S.C. § 2254(a) (1970).

83 *See id.* § 2254(d).

84 U.S. CONST. art. III.

85 Professor Freund has commented that friction between the federal and state courts "is largely a matter of psychology which is self-determining and self-correcting. It seems to me if this is seen as really a problem of internal federal judicial administration, there is no reason why state judges should feel offended that review is had by a district judge rather than by Supreme Court justices. If it would help any, one might think of the federal district judges sitting as delegates or masters for the Supreme Court." Freund, *Symposium: Habeas Corpus — Proposal for Reform,* 9 UTAH L. REV. 18, 30 (1964). *See also* Brown v. Allen, 344 U.S. 443, 510 (1953) (Frankfurter, J., concurring).

86 96 S. Ct. at 3039, 3052.

ing scrutiny of the state judicial process than is common at present — a result likely to heighten, rather than diminish, state-federal friction.[87]

IV. The New Federalism — A Challenge for Congress

Federalism concerns the proper relationship between the federal and state governments and thus must take into account the interests of both. The Court, in its recent enunciation of a "new federalism," has been careful to safeguard the interests of the states, showing great deference to the states' judicial,[88] executive,[89] and legislative functions.[90] However, the Court has failed to safeguard the interests of the federal government, especially the major federal interest, whether in habeas corpus petitions or civil rights actions — the enforcement of federal constitutional and statutory rights.

This federal interest theoretically can be protected by the states as well as by the federal government. The Court contends that, in fact, the state courts are equally as capable of enforcing federal rights as the federal courts.[91] The purpose of this Note has been to demonstrate, however, that the argument is far less persuasive than the Court asserts.[92] In its reasoning, the Court ignores the differences in institutional setting and outlook of the state and federal courts. It ignores the inadequacy and unavailability of state remedies, as well as the lack of responsiveness of state institutions. Finally, it ignores the basic assumptions that have led to the provision for inferior federal courts in the first instance and subsequently to the various congressional enactments defining the jurisdiction of the federal courts. The questionable assumptions of the Court's recent decisions manifest a fundamental hostility to the rights asserted themselves.[93]

87 *See* Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N.C. L. Rev. 633, 642 (1974).

88 *See* text accompanying notes 32-37 *supra*, regarding *Younger*, *Huffman*, *Hicks*, *O'Shea*, and *Francis*.

89 *See* text accompanying notes 41-45 *supra*, regarding *Rizzo v. Goode*.

90 *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 508 n.18 (1975).

91 96 S. Ct. at 3051 n.35.

92 *See* Section III *supra*.

93 *See* Stone v. Powell, 96 S. Ct. 3037, 3071 (1976) (Brennan, J., dissenting); Rizzo v. Goode, 423 U.S. 362, 383-84, 387 (1976) (Blackmun, J., dissenting); Warth v. Seldin, 422 U.S. 490, 520 (1976) (Brennan, J., dissenting).

By redrawing the limits of federal jurisdiction more narrowly than the statutory limits provided by Congress, the Court has defined the extent to which it believes the federal courts should be available to vindicate constitutional and federal claims. Congress need not accept this judgment of the Court; it has the constitutional power to define the jurisdictions of the federal courts.[94] Until it can be shown with greater certainty that state forums will give sufficient protection to federal rights, Congress should act to maintain the availability of the federal courts for vindication of those rights.

Congress should act to reverse *Stone v. Powell* by providing that any constitutional claim which can be raised on direct review also is cognizable by federal habeas corpus. Congress also should reverse *Francis* and *Davis*[95] by amending 42 U.S.C. §§ 2254 and 2255 to ensure that a habeas petition brought by a state or federal prisoner can be entertained despite procedural default in the trial court unless the prisoner has deliberately bypassed the appropriate procedures. Only the threat of habeas serves as a "necessary . . . incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[96]

94 *See* note 5 *supra.*

Congress demonstrated its concern with the continued availability of federal post-conviction remedies late in 1976. In April the Supreme Court had promulgated rules of practice and procedure for post-conviction relief under 28 U.S.C. §§ 2254, 2255. Following objections to the proposed rule by several Congressmen, eight amendments were passed which made it easier for habeas petitioners to get a federal hearing than would have been the case under the Court's proposed rules. Act of Sept. 28, 1976, Pub. L. No. 94-426, 90 Stat. 1334 (1976).

95 *See* notes 24-30 *supra*, and accompanying text.

96 Desist v. United States, 394 U.S. 244, 262-63 (1969) (Harlan, J., dissenting).

BOOK REVIEW

THE FOREST SERVICE: A STUDY IN PUBLIC LAND MANAGEMENT. By *Glen O. Robinson,* Baltimore: The Johns Hopkins University Press, 1975. Pp. xv, 327, index. $16.95 cloth; $4.95 paper.

*Reviewed by Robert G. Lee**

Jeremy Bentham once said that his principle of utility could be traced to a vision of the perfect king which came to him at the age of seven when he read Fenelon's *Télémaque.*[1] Fenelon's hero, Telemachus, captivated Bentham with his perfect virtue, but disappointed Bentham with his successful answers to the questions posed by the goddess of Wisdom regarding the best form of government.[2] Bentham was so enthralled by the myth and so troubled by the answers of Telemachus that he dedicated his life to providing a more perfect and more rational solution to the question of what constitutes good government. Two hundred years later we are still searching for the definitive answer — in the arena of public land management as in others.

Economic rationality, posits Glen Robinson, is the answer to the riddle of proper public land management. While attempting neither to speak for the goddess of Wisdom nor to offer an alternative solution to the riddle, I will take issue with Robinson's premise and analysis from a sociological perspective. I begin by describing the climate of socio-political conflict in which this book has appeared.

This is a time of crisis for public land management. Land management practices of various federal agencies, most notably the Forest Service, the Bureau of Land Management, and the Park Service, have come under increasing scrutiny by a variety of special interest groups, user publics, politicians, and administrators from other federal agencies. Only during the conservation movement of the late nineteenth century, when the first forest reserves and national parks were withdrawn from the

*Assistant Professor of Forestry, University of California, Berkeley; B.S., 1964, Ph.D., 1973, University of California, Berkeley; M.F.S., 1969, Yale University. The reviewer specializes in natural resource sociology.

1 M. MACK, JEREMEY BENTHAM: AN ODYSSEY OF IDEAS 31 (1963).

2 M. MACK, *supra* note 1, at 31-32.

public domain, has concern with the treatment of public land been as widespread and intense.

The legislative battle to enact the National Environmental Policy Act of 1969[3] (NEPA), and subsequent litigation under the Act concerning the compliance of federal agencies with it,[4] reflect the intensity of the controversy over land management. The controversy continues despite the efforts of the federal land management agencies, professional societies, and commodity-interest groups to stabilize the institutional environment. These groups had hoped that the statutory guarantees for wilderness preservation in the Wilderness Act of 1964[5] and the congressional mandate requiring a balance among the many uses of national forest lands in the Multiple-Use and Sustained Yield Act of 1960[6] would delineate definitively the objectives and administrative procedures of the Forest Service. This was not to be the case, however, as the environmental movement of the nineteen-sixties and early -seventies generated a new wave of legal and political challenges to the very foundations of traditional agency authority and responsibilities. As a result, the Forest Service and other federal land management agencies are presently struggling to adapt to an institutional environment which is constantly changing.

Robinson originally intended to study the Forest Service's organization and administrative processes, a task for which he is eminently qualified.[7] He became dissatisfied with this limited project and turned his sights to the larger framework of federal land management within which the Forest Service operates. Thus, the object of his research became "not merely the Forest Service as an administrative institution, but the institution as a focal point for looking at the general processes, problems, and controversies of public land management" (p. xii).

The study employs a number of professional perspectives on the problems of the Forest Service, but two stances predominate. Robinson assumes a lawyer's viewpoint for purposes of

3 42 U.S.C. §§ 4321-4347 (1970).

4 *See generally* F. ANDERSON, NEPA IN THE COURTS: A LEGAL ANALYSIS OF THE NATIONAL ENVIRONMENTAL POLICY ACT (1973).

5 16 U.S.C. §§ 1131-1136 (Supp. IV 1974).

6 16 U.S.C. §§ 528-531 (Supp. IV 1974).

7 Robinson has been on the law faculty at the University of Minnesota and is currently serving as a commissioner on the Federal Communications Commission.

describing agency structure and procedures: rulemaking, adjudicatory procedures, judicial review, and public involvement. However, the implications of agency structure and procedures for internal agency behavior are limited to a discussion of bureaucratic control, and the implications for the agency's external behavior remain wholly undeveloped. These latter issues are approached instead from an economist's viewpoint, in which the relationship of the agency to its environment is treated as a problem of resource allocation. Robinson articulates this disciplinary perspective by stating that "economic evaluation is the study of choice and allocation under conditions of scarcity. It is with reference to that broad definition that I choose to characterize the dominant perspective of this study as an economic one" (p. xiii).

Robinson's book begins with a short history of the Forest Service, followed by a summary of the organizational structure and functions of the agency as a bureaucracy. Then, after a discussion of multiple-use philosophy, six chapters are devoted to the resources derived from Forest Service lands — timber, outdoor recreation, wilderness, range, wildlife, and water. A chapter summarizing the problems and controversies surrounding the agency concludes the book.

My reaction to *The Forest Service* is one of extreme ambivalence. Robinson's descriptions of the history, organization, and administrative procedures of the agency provide a useful summary of public forest land administration from 1876 to the present. A review of legislative history presents the context within which the agency's policies were developed and applied. In short, the book presents a clear picture of the agency itself, though some features of the picture do not accurately portray the external social and political territory in which the Forest Service operates. The major shortcoming of Robinson's book is the deification of individual rationality, particularly economic rationality. Robinson assumes that a scientifically informed moral calculus, premised on the rationality of the individual decision-maker, can be developed to provide a framework for solving current problems and controversies. In the same way, public land managers tend to assume, on the basis of their "rational" expertise, that they know or can readily determine

what is in the public interest. But, in attempting to maintain independence from social and political influences and controls, land managers ignore the limitations of their own rationality and knowledge, and overlook their dependence on social and political environments.

Robinson has, unfortunately, approached the Forest Service from the viewpoint of its professional bureaucrats. His preference for a moral calculus is economic analysis and pricing mechanisms for allocating scarce resources. There is nothing inherently inappropriate about economic analysis and pricing schemes; they provide valuable tools for public land management. However, *exclusive* reliance on individual rationality, especially rationality based on the questionable assumption of the "economic man," is reason for concern. Organizational behavior is far too complex to be represented by a single model.[8] Robinson overlooks significant features of Forest Service behavior, such as trial and error learning and political bargaining. Prescriptions that ignore this complexity are likely to generate at least as much conflict as they resolve.

When studying public land management from a broad perspective, one must ask three questions: (1) what is the *meaning of public land* to a society, (2) how is land *conceptualized* for purposes of study, and (3) what *decision-making* processes are employed in managing public land? Robinson does not concern himself with the first question, takes for granted conventional Forest Service thinking as an answer to the second, and relies heavily on professional economic rationality as an answer to the third.

I. The Meaning of Public Land

Public lands are owned by the public and are, according to law, to be used in the public interest. Yet this conventional definition of public land is subject to many interpretations. Robinson's position, shared by many, is at one end of the spectrum: public ownership implies that an identifiable entity, usually a government agency, has the right to regulate access and use in a manner similar to that of the owner of a private

8 *See* G. Allison, Essence of Decision: Explaining the Cuban Missile Crisis (1971).

property resource. Access to resources is bought and sold at market value just as it would be in the private sector. At the other extreme we find people who think that public ownership implies that land is owned and open to unrestricted use by all members of a society — what economists often refer to as a "common property" or "open access" resource.[9] For an open access resource, social position and willingness, or ability, to pay are not determinants of use. Even a preserved natural environment may be considered an open access resource for all who benefit from its existence, even if there is no on-site use.[10]

Robinson's discussion fails to grasp the significance of the interplay between the common-property aspects and the market aspects of the use of land under Forest Service management. Wilderness use and access for purposes of hunting game have common-property attributes; the game itself is "owned" by the state and the right to take is granted by permit. Use of rivers and lakes for recreational purposes such as canoeing is often regulated by a fee system essentially based on open-access philosophy. Access for outdoor recreation such as snowmobiling and motorbiking is restricted by administrative rulings designed to preserve the "commons." Without adequately assessing the successes or failures of the non-market aspects of these traditional land uses, and without even acknowledging that they provide an alternative to a system based on private property rights, Robinson would have us believe that resource scarcity must of necessity lead to an extension of market mechanisms for purposes of allocation.

Yet there is a long tradition in resource economics which recognizes that resources may be allocated by a variety of social institutions, only one of which is a system of private property rights imbedded in a market system.[11] As Wantrup so clearly stated it:

> Common property of natural resources in itself is no more a tragedy in terms of environmental depletion than private

9 *See* Fisher & Krutilla, *Managing the Public Lands: Assignment of Property Rights and Valuation of Resources,* in THE GOVERNANCE OF COMMON PROPERTY RESOURCES 35 (E. Haefele ed. 1974).

10 *Id.*

11 *See, e.g.,* Clawson, *Comment,* in *id.* 60-63; J. COMMONS, LEGAL FOUNDATIONS OF CAPITALISM (1968).

> property. It all depends on what social institutions — that is, decision systems on the second level — are guiding resource use in either case. Effective institutions to conserve common-property resources have been developed for the administration of public forests in many countries. The same is true for the conservation of game and fish, whether by primitive tribes in pre-Columbian America or modern game management departments. Agricultural land held in common by villages in medieval Europe was conserved by institutions based on custom and law before private property and the profit motive broke up the decision systems.[12]

Even private property itself is open to public access for prescribed purposes; many northern European countries recognize the public right to use private lands for limited recreation such as hiking. Resource economists seem to agree that discussion of resource allocation of public land might be conducted more productively by turning from a common sense distinction between "private" and "common" resources to an empirical examination of decision-making systems.

II. The Conceptualization of Public Land

Before evaluating Robinson's approach to decision-making systems it is necessary to examine the resources which are objects of concern to decision makers. Like almost all policy analysts who preceded him, Robinson does not question the Forest Service's definition of natural resources as the five product outputs: timber, recreation, forage, wildlife, and water. These five uses of national forest lands were prescribed as the primary outputs from national forests by the Multiple-Use and Sustained Yield Act of 1960,[13] and have been used to define the programs of the National Forest System. After a short foray into the ambiguity of the Multiple-Use and Sustained Yield Act regarding the much debated distinction between dominant and multiple use,[14] Robinson resorts to the five traditional catego-

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12 Ciriacy-Wantrup, *Soil Conservation in European Farm Management*, 20 J. Farm Econ. 86 (1938), *quoted in* Clawson, *Comment*, *supra* note 9, at 61.

13 16 U.S.C. §§ 528-531 (Supp. IV 1974).

14 Due to ambiguity in the statutory definition of multiple-use, the Multiple-Use and Sustained Yield Act has been both lauded, for providing the discretion necessary to properly allocate land uses, and criticized, for providing too much agency discretion. *See* Martin, *Conflict Resolution Through the Multiple-Use Concept in Forest Service Decision-*

ries of land use functions to organize his discussion of the Forest Service.

The choice to segment the Forest Service and federal land management functions in this way is one of the most important decisions affecting public land management. As the psycholinguists and anthropologists have so often reminded us,[15] the way we use language to cut up nature determines to a very large extent how we will organize our activities toward the environment. In contrast to the Forest Service's use of the traditional outputs, recent environmental legislation recognizes the importance of a large number of present and potential resource values not considered in previous acts. The National Environmental Policy Act of 1969[16] and the Forest and Rangeland Renewable Resources Planning Act of 1974[17] are careful *not* to specify a limited set of resources. For example, Section 2 of the Forest and Rangeland Renewable Resources Planning Act requires the Forest Service to conduct a nationwide "Renewable Resource Assessment" of all public and private forest, range, and associated lands, and to include therein "an inventory, based on information developed by the Forest Service and other federal agencies, of present and potential renewable resources."[18] Section 4 of this act requires the Assessment to include a "detailed inventory of all National Forest System lands and renewable resources. This inventory shall be kept current so as to reflect changes in conditions and identify new and emerging resources and values."[19]

Given Congress's clear mandate to consider new and changing definitions of natural resources, as well as new resource values, one is puzzled by Robinson's decision to adopt traditional Forest Service use functions to analyze the agency's problems. Few of us would put much faith in the interpretations of a psychotherapist who used the neurotic's common sense logic as the theory for diagnosing an emotional problem. Yet many of

Making, 9 NAT. RESOURCES J. 228 (1969); C. REICH, BUREAUCRACY AND THE FORESTS (1962); Note, *Managing Federal Lands: Replacing the Multiple Use System*, 82 YALE L. J. 787 (1973).

15 *See generally* B. WHORF, LANGUAGE, THOUGHT AND REALITY (1956); E. SAPIR, CULTURE, LANGUAGE AND PERSONALITY (1966).

16 42 U.S.C. §§ 4321-4347 (1970).

17 16 U.S.C. §§ 1601-1610 (Supp. IV 1974).

18 *Id.* § 1601(2).

19 *Id.* § 1603.

us seem satisfied with the Forest Service's long-held *idée fixe* of the five uses — its trained incapacity — as a framework for analyzing land management problems. To understand the Forest Service's decision-making systems, an explanation of this trained incapacity is required.

The organization of Forest Service programs along the lines of the five products or uses was a successful adaptation to the relatively simple and stable environment which existed prior to the environmental consciousness of the last decade. The Forest Service was successful with the five-product approach because: (1) it was engaged in extensive management of a large land base, so that resource conflicts could be resolved by separating uses; (2) social values assigned to forest lands were usually associated with particular products, providing clear linkage between client groups and resource management functions; (3) the legal structure was far simpler than it is today (i.e., NEPA and other recent environmental legislation did not exist); and (4) the influence of social and political constituencies was usually dealt with on only one level of the administrative hierarchy (i.e., local, regional, or national). At present, however, the Forest Service finds traditional spatial separation of uses increasingly less successful because resource management is increasing in intensity, as more values are derived from the same land area; public concern with new environmental values focuses attention on new resources as well as on the interaction between five traditional resources; the increasingly complex legal structure has granted private citizens standing to sue federal agencies for environmentally induced injuries and has required governmental agencies to account for the social and environmental consequences of all of their actions; and the attempts of interest groups to influence policy at all levels of the administrative hierarchy have made it more difficult to maintain agency independence from interests representing new values and resources.

III. Decision-Making Processes in Public Land Management

The Forest Service is faced with an increasingly complex and unstable socio-political environment. This is reflected in the

conflict over access to public land and the pluralistic definition of natural resources. The way the Forest Service responds to this situation will determine its success as a land management agency. What is required is a decision-making system that can deal with the allocation of rights and responsibilities pertaining to resource access and use when there is rapid differentiation and change in the definition of natural resources. Robinson's prescription for an economically rational decision-making system must be evaluated in the light of these requirements.

The current controversy over clear-cutting in national forests is an excellent case with which to evaluate Robinson's argument. He provides a detailed description and interpretation of the issues involved. Moreover, the controversy resulted in legal action that has challenged the fundamental authorities and responsibilities of the Forest Service, indicating how social and political conflict influences land management policy.

Within the last decade a number of environmental protection groups have become increasingly concerned with the environmental and social consequences of clear-cutting timber on national forests. After growing weary of pressing Congress for a moratorium on all clear-cutting on national forest lands, environmentalists commenced legal action to enjoin clear-cutting as a violation of the Organic Administrative Act of 1897.[20] As Robinson documents, the environmentalists succeeded in late 1973 when a U.S. District Court ruled that the Organic Act of 1897 had indeed been violated by the practice of clear-cutting in the Monongahela National Forest.[21] Fortunately for the Forest Service, the suit involved only the Monongahela, and the decision does not apply elsewhere. The Forest Service has elected to seek new legislation to resolve the issues raised by the court interpretation rather than risk an appeal to the Supreme Court that could result in a ban on clear-cutting in all national forests.

A number of Senate bills have been introduced to redress the national forest management problems arising from court rul-

20 16 U.S.C. §§ 473-482, 551 (1970) (enabling legislation for the Forest Service).

21 Izaak Walton League v. Butz, 367 F. Supp. 422 (N.D.W. Va. 1973). The Organic Act only permits the harvest of "dead, matured and large-growth trees" and requires individual tree marking, 16 U.S.C. § 475; clear-cutting involves the harvest of all trees in a given area, regardless of their size or condition, without individual tree marking.

ings on the Organic Act. There has been an unprecedented level of interest shown by preservationist, professional, and industrial organizations in bills introduced by Senator Jennings Randolph (D.-W. Va.)[22] and Senator Hubert Humphrey (D.-Minn.).[23] The Randolph bill, which enjoys the strong support of the preservation groups which initially sought relief from Congress and the court, would legally prescribe many forest management practices in conformity with the court's decision. The Humphrey bill, which has wide backing from professional, industrial and citizen groups, amends the Organic Act of 1897 and the Forest and Rangeland Renewable Resources Planning Act of 1974[24] to provide broad guidelines for modern forest management practices subject to numerous environmental safeguards.

Robinson describes how the Forest Service has already altered administrative procedures in response to public concern with clear-cutting by curtailing its use and strengthening the multiple-use planning system. He then states:

> As indicated by the recent Monongahela case, the reforms have neither satisfied the more vocal critics nor resolved the controversies over timber-management policies. In fact, it is doubtful clear-cutting was ever the major bone of contention. The clear-cutting controversy is but a small part of a larger problem of timber supply with which both the Forest Service and its critics must contend (p. 85).

With this statement Robinson exhibits a defense mechanism common to many policy analysts attempting to deal with uncertainty: he reduces social and political issues to problems of administrative procedure and economic allocation. Robinson's decision to define clear-cutting as a problem requiring facts and computational solutions regarding timber supplies ignores entirely the social and political issues involved — the fact that some citizens want public forests treated very differently. Yet this strategy for decision-making is consistent with familiar forms of bureaucratic and economic rationality.

The Forest Service, as one of the more successful federal

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22 S. 2926, 94th Cong., 2d Sess. (1976).
23 S. 3091, 94th Cong., 2d Sess. (1976).
24 16 U.S.C. §§ 1601-1610 (Supp. IV 1974).

bureaucracies, makes an ideal out of computational decision-making — the determination of decisions through a set of rules specifying the operations that will produce a solution. No choice between competing values is deemed necessary, because all that is required is a computational solution by a knowledgeable individual or electronic computer.[25] Robinson provides a detailed description of how the administrative structure, policy, and daily operations of the Forest Service are governed by rules. He notes that the Forest Service Manual, with its more than twenty volumes, "incorporates and interprets virtually all of the relevant legal documents, statutes, executive orders, departmental regulations, results of judicial decisions and, within the scope of these, prescribes the management policy for the agency," while the Forest Service Handbooks "provide detailed direction on how to perform a variety of functions — road construction, timber surveys and valuation, fire reporting, range analysis, improvement of wildlife habitat and many other functions" (p. 38). Even such subjective issues as landscape aesthetics related to clear-cutting are handled through the application of rules by a professional landscape architect. Considerable delegation of authority to lower levels of the organization is possible because events requiring organizational decisions are assumed to be so repetitive that experts familiar with rules and procedures can be assigned to distinct classes of problems. Uncertainty stemming from pluralistic resource definitions and contests over access to public land is reduced by assuming that a limited set of discrete problems can be identified and solved through rule-governed decisions. Robinson's acceptance of these assumptions is reflected in the organization of his book along Forest Service program lines and his decision to characterize the problems of land management as fundamentally economic.

Economic rationality provides a specific computational logic for simplifying complex problems and prescribing resource allocation decisions. Like bureaucratic rationality, it assumes

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25 The following discussion of decision-making strategies is adapted from Thompsen & Tuden, *Strategies, Structures and Processes of Organizational Decision*, in COMPARATIVE STUDIES IN ADMINISTRATION 195 (1959). *See also* Landau, *Decision Theory and Comparative Public Administration*, 1 COMP. POLITICAL STUD. 175 (1968).

distinct and stable resource definitions, but it is more restrictive than bureaucratic rationality in its use of utility criteria as a framework for interpreting behavior and for formulating rules with which to make better choices. A primary assumption is that social welfare can be maximized by aggregating the preferences of concerned individuals and making choices that serve majority preferences. Prescriptions for maximizing or optimizing particular outputs, such as timber or range, are assumed to maximize social welfare.

Unfortunately, human behavior in the real world does not conform to the theoretical actions of the omniscient, rational economic man. The way individuals *actually* make choices departs substantially from perfect rationality.[26] Prescriptions premised on the behavior of the economic man are likely to be off the mark.

In addition, the assumption that social welfare can be maximized by aggregating diverse claims to land has been refuted on theoretical grounds.[27] There is no objective welfare function for rationally determining what is in the public interest. This moral calculus is not possible because minorities may value their preferences more strongly than majorities and majority preferences are unstable when there are more than two alternatives and more than two parties involved in the choice.

A more descriptive approach to decision-making would free Robinson from the limiting assumptions of economic rationality and other forms of computational decision-making. To a careful observer of organizational behavior, there is a need to account for social and political realities in the Forest Service's environment when prescribing decision-making processes.

One of the first conclusions resulting from a descriptive ap-

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26 H. SIMON, MODELS OF MAN: SOCIAL AND RATIONAL 198 (1957). Simon termed the alternative "bounded rationality" because "[t]he capacity of the human mind for formulating and solving complex problems is very small compared to the size of the problems whose solutions are required for objectively rational behavior in the real world — or even for a reasonable approximation to such objective rationality."

27 *See generally* K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963). For an application of Arrow's argument to natural resource decision-making, *see* Freeman, *The Natural Resources Decision-Maker as Political and Economic Man: Towards a Synthesis*, 3 ENVT'L MANAGEMENT 167 (1975).

proach to the Forest Service is that there is insufficient factual knowledge for computational strategies to work in all situations. For instance, the agency lacks knowledge regarding the long-term biological, physical, and social consequences of clear-cutting. All that is known is that it is generally more efficient in the short run to harvest timber by clear-cutting than by other silvicultural methods, and that particular forest types regenerate better when clearcut. Administrators, lacking factual information, tend to rely on the collective judgment of specialists. However, in many respects a bureaucracy, with its rule-governed procedures, is not organized to make informed judgmental decisions, so it must rely on other social institutions for this purpose. When faced with situations that cannot be handled through computation, the Forest Service increasingly depends on the collective "wisdom" of professional societies for guidance and political support. It relies, for instance, on the Society of American Foresters for factual judgments on clear-cutting.[28] This reliance, however, goes completely unrecognized by Robinson. He overlooks the possibility that diversification of professional expertise in the agency may not only strengthen technical competence, as he points out, but might also augment its capabilities for factual judgmental decision-making.

Another, even more significant, conclusion drawn from the descriptive approach to Forest Service decision-making is that both computational and factual judgmental approaches fail when the issue involves a basic disagreement in values. Computation and factual judgment assume that management objectives are both clear and non-controversial. However, people often disagree about objectives, since some interests gain and others lose from almost every land management decision. With his preference for computational strategies, Robinson does not fully grasp this situation and the ways in which it can subject the agency to a paralyzing impasse. For example, an impasse may be inevitable if losing parties have sufficient influence to con-

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28 Almost every issue of Volumes 73 and 74 of the JOURNAL OF FORESTRY carried an update on the status of the clear-cutting issue. The Society issued position statements on the *Izaak Walton* decision and subsequent remedial legislation. *See* 73 J. FORESTRY 758 (1975); 74 J. FORESTRY 264-67 (1975).

structively veto the proposed action. In the past, when the legal structure was simpler, interest group veto was not as great a problem for the Forest Service. However, subsequent to NEPA and related court rules granting citizens standing to sue, groups lacking in political power but strong in legal expertise can often delay or block actions with which they disagree. The success of the Izaak Walton League in interrupting timber harvesting in the Monongahela National Forest and, in the process, forcing a legislative redefinition of the basic authorities and responsibilities of the Forest Service, was possible only because of the post-NEPA legal structure. Under these circumstances, the agency is obliged to find ways for making decisions which avoid paralyzing conflicts; it must discover or create common ground with the relevant political actors so that compromise can be achieved.[29]

Political bargaining is the process through which such compromises are usually reached. The social structure appropriate for bargaining is a group which contains representatives from all major political actors and is united by a primary rule: maintenance of the integrity of the group by ultimately reaching some form of agreement on substantive issues (even if the agreement is to disagree and postpone action). This bargaining structure is inconsistent with normal bureaucratic decision-making. Except at the Washington level, bargaining is not a routine part of the Forest Service's repertoire. Conflict may indeed appear irreconcilable when competing claims to the same land base result from the assignment of different values. Thus, the Forest Service is especially frustrated by the clear-cutting controversy because it is simply not structured to respond to a bargaining situation. The tremendous disagreement over timber harvesting methods, while often discussed in terms of facts such as soil erosion and economic efficiency, seems to be rooted in the social fact that some people strongly like clear-cutting and some don't. Therefore, it seems inevitable, and highly appropriate, that the issue of timber harvesting on na-

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29 *See* Freeman, *Politics of Planning and the Problem of Public Confidence: A Sociology of Conflict Approach,* in PROCEEDINGS OF THE SOCIETY OF AMERICAN FORESTERS: 1972 NATIONAL CONVENTION 184-99 (1973).

tional forests will be resolved in Congress by bargaining processes.

While Robinson is correct in his observation that the critics were not satisfied by bureaucratic reforms of clear-cutting practices, he would discover from current congressional debate that clear-cutting *is* the major "bone of contention." The protection of environmental values is at least as much a part of public discourse on timber management as timber supply. Regardless of wishful thinking by professionals and policy analysts, public land management will continue to be troubled by conflicts in management objectives. Bargaining strategies will, at least in the near future, be as important as they were in the era when Gifford Pinchot applied his political skill to establish the Forest Service.

Conclusion

Robinson is to be complimented for providing a useful reference on agency organization and procedures, and a summary of the arguments for the use of economic techniques in allocating land-based resources. What concerns me most about this book is not its technical shortcomings, which are few, but rather its attempt to prescribe economic rationality as a simple solution to the problems and controversies of public land management. Though the myth of Telemachus holds no inspiration of moral purpose for Robinson, as it did for Bentham, it is hard not to conclude that Bentham's Telemachian legacy — the attempt at derivation of the principles of government from none but rationalistic, utilitarian premises — persists in Robinson's analytic framework.

As an observer of agency behavior, I would recommend instead decision-making systems designed for real people, not angels or kings, nor even heroes. Government bureaucracies are run by people very much like the rest of us, people with similar strengths and weaknesses. We are all condemned to stumble toward unclear goals and to find it difficult to measure our progress. Those concerned with land management confront uncertainty at least as great as that faced by most other professionals. For this reason there is a need to strengthen and expand decision-making systems which encompass a broad

range of values and which attempt to compensate for the limited rationality of individuals. Adequate political processes are at least as necessary for modern public land management as the competent but solitary technician equipped only with rule-book and computer.

RECENT PUBLICATIONS

SETTING NATIONAL PRIORITIES: THE NEXT TEN YEARS. Edited by *Henry Owen and Charles Schultze,* Washington, D.C.: The Brookings Institution, 1976. Pp. 618. $14.95 cloth, $6.95 paper.

This year's volume differs from its six predecessors in the *Setting National Priorities* series in that it is not limited to an examination of the current federal budget. Instead, the focus has shifted to a set of major national problems, only some of which entail budgetary considerations; moreover, the perspective is long- rather than short-range.

The first part of the book deals with national defense and foreign policy, and examines such issues as nuclear proliferation and the growing economic interdependence of industrial countries. The second part of the book addresses domestic policy topics, including income-maintenance programs and the growth of the public sector.

The capstone to the book is a chapter which examines congressional-executive relations. It could well be the most important part of the book, since the inability of the executive branch and Congress to work together is likely to preclude implementation of many of the substantive policies proposed in the first two parts of the book. The theme of the chapter is that Congress and the executive branch must play separate roles, partly adversarial but principally complementary. It is suggested that the chances for such collaboration are maximized when the President and congressional majority are of the same party. A book which looks to the future as this one does is always appropriate reading with the coming of a new presidential administration; *Setting National Priorities* is especially so, given the thesis of its final chapter and the appointment of Mr. Schultze as chairman of the Council of Economic Advisers.

THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY. By *Walter Berns,* New York: Basic Books, 1976. Pp. 226, index. $12.50.

This book sharply criticizes the Supreme Court's intepretation and construction of the first amendment in the diverse

areas of pornography and public aid to parochial schools. Berns' thesis is that the Founding Fathers understood that there could be no democracy without a strong moral foundation, which they attempted to lay in the Bill of Rights, and that the Supreme Court is undermining this foundation by extending the first amendment to protect pornography and bar public aid to parochial schools.

Berns draws on the writings and speeches of the Founders in an effort to show that they did not intend the first amendment to mean what the Supreme Court has said it means. Specifically, he argues that the concept of free speech was never meant to extend to pornography and obscenity, and that the notion of separation of church and state was never intended to prohibit using public funds to help finance parochial schools.

Berns' examination of the legislative history is excellent, his review of the case law exhaustive, and his argument provocative, if not wholly persuasive. For constitutional lawyers, the work should be required reading; for others, it will provide a thorough introduction to and discussion of the first amendment.

THE LAW OF OBSCENITY. By *Frederick F. Schauer,* Washington, D.C.: BNA Books, 1976. Pp. 459, appendices, index. $19.50.

This work is a comprehensive treatise on the law of obscenity. Designed primarily for lawyers, it takes due note of the sociopolitical and psychological elements that circumscribe the legal issues.

After tracing the historical origins of American obscenity law, Schauer examines the principal substantive concepts of modern obscenity law. A description of the existing regulatory frameworks (both federal and state) provides the context within which these substantive principles must be applied. The book concludes with an examination of the procedural considerations that loom large in obscenity litigation, including jury selection and the use of expert testimony.

The appendices contain suggested questions for voir dire examination, suggested jury instructions, a compilation of federal obscenity statutes, and the full text of eleven major Supreme Court decisions dealing with obscenity, and the text is

thoroughly referenced to relevant cases, periodical literature, and statutes. Schauer is to be commended for producing an exhaustive treatise which is not exhausting to read and use.

REGULATION: A CASE APPROACH. By *Leonard W. Weiss and Allyn D. Strickland,* New York: McGraw-Hill Book Co., 1976. Pp. 242. $9.95 paper.

This work is designed to serve as a case book for an undergraduate course in the economics of regulation. It is primarily organized along agency lines (ICC, CAB, FPC, and FCC), but there are two chapters on regulation as it relates to the environment and to antitrust, and two more on rate structure and rate-making.

All of the "big cases" are here; Weiss and Strickland argue against calling them "landmarks" on the theory that there are too many conflicting twists and turns from one case to the next to be sure that any will stand the test of time. Each group of cases is preceded by a large number of questions designed to highlight the evolving principles (and the evolving ambiguities) of regulatory law, and the book successfully illustrates most of the important regulatory policies and techniques which guide the various federal agencies.

THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS. By *Kenneth G. Elzinga and William Breit,* New Haven: Yale University Press, 1976. Pp. 153, index. $10.00.

This book does *not* attempt to answer the question of whether a particular business practice or arrangement lessens competition. Breit and Elzinga focus instead on the efficient deterrence of antitrust violations, whatever the substantive definitions of these violations may be.

The analysis of the deterrence issue begins with an examination of the historical context of the various antitrust penalties. Breit and Elzinga look at private treble damage actions, and convincingly demonstrate that from an efficiency standpoint this remedy suffers from three major defects: perverse incentives (moral hazard), misinformation in the form of nuisance suits, and use of scarce resources in the determination of reparations.

The book turns next to the public action penalties of incarceration, structural relief, and fines. After ruling out incarceration as a viable option because of the inherent inability to identify individual violators, the authors examine the dissolution remedy. They conclude that "there is some finite probability that structural relief . . . [is] a weapon that could be competently wielded in the public interest. But free market proponents should recognize that this probability is decidedly less than 1" (p. 111).

The book completes its discussion of the various remedies by concluding that fines are "the efficient solution." According to Breit and Elzinga:

> Under the ideal solution, the monopolistic sellers would be fined enough to cause them to cease and desist from all monopolistic behavior, but they would be exempt from paying compensation to anyone who purchased from them. . . . With no potential compensation, perverse incentives and misinformation effects would be eliminated and the perplexities and costs of the reparations process would vanish (p. 113).

In short, *The Antitrust Penalties* argues for An Antitrust Penalty: optimal fines without compensation.

COPYRIGHT REVISION ACT OF 1976. Chicago: Commerce Clearing House, Inc., 1976. Pp. 279, index. $12.50 paper.

On October 19, 1976, President Ford signed into law S.22 (Pub. L. No. 94-553), which enacted a complete revision of the U.S. copyright law. This book contains the full text of the new law, selected Committee Reports on the bill, and a coherent explanation of the changes made by the revision.

Perhaps the most important change is an increase in the term of copyright protection — works will now be protected for the author's life plus 50 years. Other changes include Federal preemption and four separate types of compulsory licenses, for cable systems, public broadcasters, jukeboxes, and phonorecords. CCH succeeds admirably in highlighting major changes such as these and in unraveling the complexities of the new law. The book should prove a handy and indispensable reference tool for anyone who must work with the revised statute.