

Blacking out the blotter

A policy being considered by the American Bar Association would curtail journalists' access to arrest and criminal records.

BY LOREN COCHRAN

Attorney Sharon Dietrich spends her days working with people who have criminal convictions, or even just arrest records, who are attempting to move on with their lives.

The easy availability of criminal records, especially by way of the Internet, makes it hard for them to get housing and employment, said Dietrich, an employment lawyer with Community Legal Services of Philadelphia.

That acts as an impenetrable barrier to reentering society, Dietrich said.

"There are very real consequences for people who have criminal records," Dietrich said.

Nearly a quarter of the United States — more than 70 million people — have a criminal record, according to statistics cited by the American Bar Association's Commission on Effective Criminal Sanctions.

Given that large number, the concerns raised by attorneys like Dietrich have prompted the commission to sponsor a series of resolutions that advocate drastically curtailing the public's access to felony conviction and arrest records.

The commission's recommendation urges federal, state and local governments to immediately "limit access" to records of closed cases without convictions as well as misdemeanor and felony conviction records "after the passage of a specified period of law-abiding conduct."

But media organizations, including The Reporters Committee for Freedom of the Press, have urged the ABA's policy-making body, the House of Delegates, to reject the measure at its annual meeting in mid-August.

First Amendment advocates say the recommendation, if adopted, would impede the press's ability to oversee the criminal justice system, including prosecutorial or police misconduct.

"This would make journalists' jobs infinitely harder without access to criminal records," said attorney Chuck Tobin, a member of the governing board of the ABA's media



AP/RIVERSIDE PRESS-ENTERPRISE PHOTO BY WILLIAM WILSON LEWIS III

A proposal by an American Bar Association committee would close off many arrest records if adopted by the states.

section. "The public has a right to know. The press has a right to know."

'Something that brings darkness'

Minnesota prosecutor Robert Johnson, a man who has spent most of his career locking up criminals, chairs the ABA's criminal justice section, which has endorsed and co-sponsored the controversial recommendation.

Johnson sees the potential for 70 million people out of jail without job prospects or places to live as a perilous predicament for all of society.

"There's the real potential for creating an underclass and that's dangerous to public safety," Johnson said.

The ABA commission that came up with the policy started its work two years ago in response to an earlier call by Supreme Court Justice Anthony Kennedy to the legal profession to address social and economic

problems faced by criminal offenders integrating back into communities after

incarceration.

"As a profession, and as a people, we should know what happens after the prisoner is taken away," Kennedy told an audience in August 2003.

Last year, the commission began a series of hearings where it heard testimony from criminal justice officials and practitioners about how to reduce recidivism and promote societal re-entry after conviction.

Jerry Mitchell, an investigative reporter with *The (Jackson, Miss.) Clarion-Ledger*, has won numerous national reporting awards, including a Polk Award last year, for his stories scrutinizing the justice system. The Pulitzer Prize finalist known for his straight-ahead reporting on civil rights and criminal justice issues, including the operations of the Ku Klux Klan, is not a fan of the move to conceal criminal records.

Mitchell believes the intention of those making the recommendation is probably good but misdirected.

"I'm a big believer in light, and this is something that brings darkness," he said.

Mitchell argues that arrest information can be very revealing, whether it points out a pattern of behavior that an individual is accused of over time or if the records instead point to a pattern of behavior by



AP PHOTO BY GEORGE NIKITIN

Justice Anthony Kennedy

the government.

“How do you really analyze the justice system if you don’t have information like that?” Mitchell asked.

If this ABA recommendation results in widely accepted government policy, Mitchell said, “It would make what I do on a daily basis extremely difficult.”

‘An enormous protection’

George Washington University Law professor Stephen Saltzburg, the co-chairman of the ABA commission, insists the media’s access to active cases will not significantly change under the provisions of the recommendation. While a case is pending, the records remain open, he said. It is when a case closes that the recommendation seeks to seal the records.

“The focus isn’t to take highly publicized cases away from the news,” Saltzburg said.

In cases that do not result in a formal conviction, the case file becomes off-limits to everyone except law enforcement at the moment it closes, Saltzburg explained.

In cases where the defendant is convicted, the records would be sealed automatically, without any justification required, after some predetermined amount of time. “Forgiveness over time makes sense,” Saltzburg said.

Tobin said the recommendation’s proposed restriction severely conflicts with the First Amendment.

The proposal recommends providing a way for members of the public to petition courts to unseal a file. But instead of a criminal defendant having to prove a file should be sealed, the responsibility would shift to the public to prove that it should be unsealed.

“It completely reverses the presumption that has been built in four decades of media law,” Tobin said. “The Supreme Court has developed a very strong presumption of public access to all proceedings and records in the courts.”

Tobin is equally concerned about a provision in the commission’s recommendation that would allow law enforcement agencies, including prosecutors and police officers, sole access to all records, including those cases that never resulted in convictions.

“We learn a lot about government through the failures and the discretionary decisions of not prosecuting cases,” Tobin said.

Tobin questions the ability of the public to otherwise find out about improper and unlawful tactics of law enforcers without the records of cases that were eventually dismissed.



PHOTO BY J.D. SCHWALM

Jerry Mitchell, an investigative reporter with *The (Jackson, Miss.) Clarion-Ledger* known for his reporting on civil rights-era crimes, said a proposal to seal arrest records “would make what I do on a daily basis extremely difficult.”

Saltzburg said that while the mechanics of automatic sealing “may be somewhat impractical,” the ability of the news media to access the records is still available.

“There is a trade-off,” Saltzburg said. “Anytime you close access, at least without a showing of cause, to records, you make it obviously somewhat more burdensome to do research.

“But anybody who believes the police have been engaged in certain kinds of patterns is going, if they can make a showing... to get the same access to records they would have had otherwise.”

The commission’s recommendations, however, do not address other questions, such as who pays for the cost of unsealing a closed case or how a previously closed case that later becomes newsworthy (perhaps for a political candidate) can be identified if the name has been wiped out of the records.

Mitchell says the prospect of eliminating all identifiers from criminal justice system records means no meaningful oversight.

“You have to have names,” Mitchell said, in order to follow the story behind the arrest or any charges that are eventually filed.

Johnson said he understands the news media’s objections as governmental watchdogs to being denied access to criminal records.

“I view the press as an enormous pro-

A controversial proposal

The American Bar Association’s policy-making body, the House of Delegates, will vote on seven resolutions concerning public access to criminal justice information at the association’s annual meeting, Aug. 13-14. If a resolution passes, it becomes official ABA policy. The resolutions urge federal, state and local governments to:

- Limit access to all closed criminal cases in which charges were dropped, reversed or vacated and seal misdemeanor and felony convictions after a specific period of time.
 - Allow the use of a sealed conviction for subsequent prosecution or sentencing, allow any individual to have access to a sealed record upon a showing of good cause, revoke a previously sealed case upon a subsequent conviction, and allow a remedy when an unauthorized disclosure occurs.
 - Require applications for employment or licensing to

affirmatively state that the applicant is not required or expected to report a sealed arrest or conviction, and prohibit employers from requiring job applicants to disclose a sealed arrest or conviction or deny employment based on a sealed arrest or conviction.

- Clearly indicate to the subject of a sealed arrest or conviction that she may state in response to any inquiry, other than by law enforcement, that the arrest or conviction in question did not take place.

- Prohibit credit reporting agencies and background-screening services from disseminating sealed information about arrests and convictions and provide penalties for unlawful information dissemination.

- Limit access to government-retained criminal information, including information in state records repositories.

- Make evidence of sealed conviction information inadmissible in any negligence or wrongful conduct lawsuit against an employer.

Out of sight, out of mind?

One of the most controversial recommendations of an American Bar Association commission is the proposal to automatically close all criminal cases that did not result in convictions. “It is completely unpalatable that O.J. Simpson’s or Michael Jackson’s criminal records would be out of reach,” media lawyer Chuck Tobin said.

The commission recommendation says the public should be able to ask to get a file unsealed. But the burden — and the costs — would shift to the media and public, instead of being shouldered by a person who wants the file sealed.

Here are some other (in)famous cases that would be off-limits if governments enacted laws based on the commission’s recommendations:



Claus von Bülow: In 1982, the New England society figure and financier was found guilty of trying to murder his wife with insulin injections. The Rhode Island Supreme Court set aside the convictions and ordered a new trial in 1984, and a new jury acquitted von Bülow of all charges the next year.



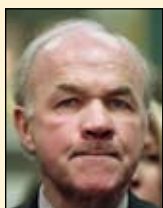
Stacey C. Koon, Laurence M. Powell, Timothy E. Wind and Theodore J. Briseno: The four Los Angeles police officers (shown clockwise, starting at upper left) were found not guilty on multiple counts, including assault with a deadly weapon and assault under color of authority, in the March 1991 beating of motorist Rodney King. The jury deadlocked on another count of assault against Powell, which was then dismissed. Koon and Powell were later convicted of violating King’s civil rights in federal court; Wind and Briseno were again acquitted.



Robert Blake: The actor was acquitted in 2005 of murder and solicitation of murder in the shooting death of his wife, Bonny Lee Bakely. The jury could not agree on a second solicitation count, which the court later dismissed.



Arthur Andersen LLP: The company was found guilty in 2002 for one count of obstruction of justice for its role as Enron’s accounting firm. A federal appeals court in New Orleans (5th Cir.) upheld the conviction in 2004, but the U.S. Supreme Court overturned the criminal conviction in 2005 due to flawed jury instructions.



Kenneth Lay: Lay, who served as Enron’s chief executive, was found guilty in May 2006 of 10 counts of conspiracy and fraud for his part in the collapse of Enron. However, in July 2006, Lay died of a heart attack while vacationing with his wife. In October, a federal trial judge set aside the guilty verdict because Lay’s death pending appeal meant he could not fully challenge his conviction. —LC

tection against the abuses of government,” Johnson said. “I would like to think we are not giving up that scrutiny.”

And Johnson has reservations about police and prosecutors having sole access to arrest records that were dismissed because he is concerned about possible misuse.

Johnson believes the press would likely be a better group to access arrest records than law enforcement, but in his opinion, “They should not be available, period.”

Johnson cited a Minnesota study that he said showed a high level of arrests in a given period that never resulted in charges being prosecuted by district attorneys.

“It’s just wrong for people to be labeled... just because they’ve been taken into custody by a law enforcement officer,” he said.

Alternative means?

The commission also recommends governments prohibit employers from requiring an applicant to disclose arrest or conviction information that has been sealed, and penalize credit report agencies and background-screening services for improper disclosure of closed records.

Tobin said that while the goal to curb recidivism may be noble, the means by which the commission seeks to attain this end is constitutionally improper, as well as unnecessary.

“There are ample alternative remedies to closing off access to criminal records,” Tobin said, noting that there are laws on the books that should already protect people from unlawful employment discrimination based solely on the existence of an arrest or an expunged criminal record.

But Saltzburg said “we couldn’t find a single jurisdiction in the United States where those laws work.”

“If those laws worked, it would be my preference to use those laws rather than adopt a procedure that reduces transparency,” Saltzburg said.

He believes that desire to be true of every person on the commission. “In the best of all worlds, that’s what you would want,” he said.

Dietrich, who would like all criminal records to be restricted, has “no sympathy for the position” taken by journalists and First Amendment advocates.

“If there is a balance to be made, the balance should be in favor of my clients who face the very real effects of discrimination,” Dietrich said.

Mitchell believes the cost of the proposal to the public’s oversight abilities is simply too great.

“You can’t analyze how the judicial system is working,” Mitchell said. ♦