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Re: ABA Resolution 103D

Dear Section Leaders:

The co-chairs of the First Amendment Committee of the Litigation Section, George Freeman, Laura Prather, and Kelli Sager, submit this letter in support of our request to the Section Leadership that it strongly oppose the resolution proposed by the Commission on Effective Criminal Sanctions, ABA Resolution 103D.

Part IV of the Resolution (103D) includes a recommendation that action be taken to "ensure that only law enforcement agencies have access to records of closed criminal cases that do not result in a conviction." We strongly believe that legislation establishing such a presumption is contrary to public policy, and would be subject to serious constitutional challenge.

As explained in more detail below, public scrutiny of government conduct, including all aspects of the criminal justice system, is critical to ensure the protection of individual rights, to guard against government misconduct, and to promote public confidence in the fairness of the system. By advocating a presumptive denial of public access to criminal records, the Resolution disregards the strong public policy rationale that warrants such scrutiny, whether or not a criminal case ultimately results in a conviction. The Resolution also fails to grapple with the inevitable constitutional challenge that would accompany any attempt to deprive the public and press of their First Amendment and common law rights of access. Because adoption of the resolution would put the ABA squarely at odds with established constitutional jurisprudence, well-reasoned state public records laws, and important public policies, we urge the Litigation Section to strongly oppose the Resolution.

I. THIS BROAD RESOLUTION CONTRAVENES THE PUBLIC'S STRONG INTEREST IN SCRUTINIZING GOVERNMENT CONDUCT

On its face, the Resolution purports to suggest that all records of arrests that do not lead to a conviction should be permanently sealed, so that they are accessible only to law enforcement officials. The incredible breadth of such a suggestion may well go beyond what the drafters of the Resolution intended, because to erase all public record of every arrest that did not result in a conviction for that crime would encompass not only police and law enforcement files, but also entire court files where individuals were prosecuted, but ultimately not convicted of a crime. Even taking at face value the altruistic rationale offered by the drafters,[1] the impact of such a change would be staggering.

Under this proposal, highly publicized prosecutions – including that of O.J. Simpson for murder, John DeLorean for drug possession and sale, and William Kennedy Smith for rape – would have to be permanently sealed. Even the prosecution of Aaron Burr for treason presumably would be removed from public files, since he would fall within the category of individuals who were arrested and prosecuted, but not convicted of their crimes. Even apart from the serious constitutional problems with this proposal, the idea that entire court cases would

[1] The report that accompanies the Resolution focuses primarily on the negative impact of prior convictions on individuals who have satisfied their court-ordered obligations. The Resolution does not propose, however, that prior convictions be permanently removed from the public record, nor should it. Thus, a large part of the argument presented by the drafters really has no bearing on Section 103D. Little (or no) support is provided for the suggestion that records of a prior arrest, without conviction, causes the parade of horribles outlined in the report.

be wiped from the public slate inevitably would undermine the public trust in the criminal justice system. As one court explained, "[c]onfidence in the accuracy of its records is essential for a court, and for the authority of its rulings and the respect due its judgments. Such confidence erodes if there is a two tier-system, open and closed. If public records cannot be compared with the sealed ones, all of the former are put in doubt." CBS, Inc. v. United States District Court, 765 F. 2d 823, 826 (9th Cir. 1985).

The Resolution also ignores the critical role played by public access to arrest records even where there is no prosecution. During the civil rights era, for example, hundreds of demonstrators and activists were arrested; most were never convicted of any crime. But the fact of those arrests is historically relevant – indeed, essential – to understanding the harassment and intolerance of law enforcement in many states, and the courage and fortitude shown by those who would risk arrest by promoting desegregation and equal rights. More recently, in the post-9/11 world, thousands of individuals have been detained – and many have been arrested, allegedly for advocating or supporting terrorism; many have never been convicted of any crime, and many have been released after months (or even years) in captivity. The drafters of the Resolution would have all records of these arrests disappear from the public consciousness.[2]

Ultimately, the sealing of records of criminal proceedings that do not result in conviction would purge all evidence of government misconduct or error in the criminal justice system. Indeed, in just one recent example reported this week, a federal district judge in Los Angeles dismissed charges brought by the government against two men who were arrested almost twenty years ago by law enforcement agents who claimed that the men had ties to Palestinian terrorists. As the Times reported, no criminal charges were ever pursued; instead, the government spent two decades trying to deport the men, until the federal judge dismissed the case as a result of prosecutorial conduct that the judge described as "an embarrassment to the rule of law." Los Angeles Times, January 31, 2007, A1. The drafters of the Resolution apparently would have this case – where individuals were arrested, but never convicted – removed from all public files.

Because this Orwellian notion is contrary to public policy, it should be rejected for this reason alone.

[2] Moreover, as with the examples provided above, it is inconceivable that the drafters intend to suggest that the historical record be dramatically altered by sealing information about arrests that did not result in convictions. Lee Harvey Oswald is only one example of someone who was arrested, but never prosecuted; surely the drafters would not suggest that records relating to his arrest should be confined to law enforcement officials.

II. THE RESOLUTION VIOLATES WELL-ESTABLISHED FIRST AMENDMENT RIGHTS.

In addition to the rationale offered above, the suggestion that public files should be sealed whenever an arrest does not lead to a conviction is contrary to the public's and press' rights of access under the First Amendment to the United States Constitution.

A. Court Files Are Presumptively Open To The Public And Press Under The First Amendment.

The evolution of our legal system, stretching as far back as its roots in medieval England, was founded upon the premise that criminal proceedings are presumptively open to public scrutiny. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980); Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501, 506 (1984) ("Press-Enterprise I"). Such openness enhances the basic fairness of the trial by exposing the actions of the jury, the judge, and the prosecutor to scrutiny, and thereby promotes public confidence in the system. See Richmond, 448 U.S. at 570; Press Enterprise I, 464 U.S. at 508; Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1, 9 (1986) ("Press-Enterprise II"). As the United States Supreme Court has noted, "[t]he value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known." Press Enterprise I, 464 U.S. at 509; see also Richmond, 448 U.S. at 571-72.

This presumption of access, and the values served by openness, also extends to documents filed with the court. See Associated Press v. United States District Court, 705 F. 2d 1143, 1145 (9th Cir. 1983) (holding that public and press has a First Amendment right to pretrial documents); Oregonian Publishing Co. v. United States District Court, 920 F.2d 1462 (9th Cir. 1990) (public has protected right of access to plea agreement); CBS, Inc. v. United States District Court, 765 F. 2d 823 (9th Cir. 1985) (ordering the release of sentencing document). Where doubt has been raised regarding whether the First Amendment guarantee attaches to a particular proceeding or document, the Supreme Court applies a two-fold test. First, the Court considers whether historical tradition indicates that the proceedings were presumptively open. Press-Enterprise II, 478 U.S. at 8-9. Second, the Court determines whether public access plays a significant role in the functioning of the particular process in question. Id., 478 U.S. at 9.

Applying these principles, it is apparent that the First Amendment guarantee of public access attaches to precisely the kind of criminal records that Resolution 103D seeks to close. Indeed, in Globe Newspaper Co. v. Pokaski, 868 F. 2d 497 (1st Cir. 1989), the First Circuit Court of Appeals considered the same kind of blanket prohibition proposed here: a Massachusetts statute authorizing the sealing of court records of completed criminal cases. Id., at 499. Applying the Supreme Court's two-prong test, the court found that the historical

tradition of the legal system demonstrates that such records had been presumptively open to public access. Id., at 503. The court then determined that such access plays a significant role by ensuring a fair proceeding and promoting the public's acceptance of the legal process and the result. Id. The court also recognized that public access made investigative reporting possible, which, in turn, exposed significant governmental problems such as bribery, ex parte dealings, and other misconduct in the disposition of criminal cases. Id., at 503-04. The First Circuit thus concluded that "a blanket prohibition on the disclosure of records of closed criminal cases," such as the Resolution proposed here, "implicates the First Amendment." See also Associated Press, 705 F. 2d. at 1147 (holding that blanket order to seal pretrial documents "impermissibly reverse[s] the 'presumption of openness' that characterizes criminal proceedings 'under our system of justice'").

The Supreme Court has clearly stated that the First Amendment rights to public access can only be denied where such denial "is essential to preserve higher values and is narrowly tailored to serve that interest." Press-Enterprise I, 464 U.S. at 509-10; Press-Enterprise II, 478 U.S. at 9. "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." Press-Enterprise I, 464 U.S. at 509; Waller, 467 U.S. at 44. The Resolution does not clearly articulate the "higher value" underlying its proposal. But to the extent that the Resolution seeks to prevent the negative effects that arrest records may have on an innocent individual's reputation and privacy, these concerns are too general and vaguely conceived to justify such a broad infringement of First Amendment rights. See Landmark Communications, Inc. v. Virginia, 435 U.S. 839, 841-42 (1978) ("[o]ur prior cases have firmly established ... that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'"); Paul v. Davis, 424 U.S. 693, 713 (1976) (finding that the plaintiff has no constitutionally protected privacy right to prevent public officers from disclosing the fact he had been arrested for shoplifting); Pokaski, 868 F. 2d at 507, n.18 ("[r]ecords cannot be sealed on the basis of general reputation and privacy interests.").

The Supreme Court has stated clearly that each denial of public access to legal proceedings and documents must be specifically justified and made on a case-by-case determination to ensure that closure is made only where necessary. Press-Enterprise I, 464 U.S. at 512 (voir dire may be closed only where a prospective juror makes an affirmative request and the trial judge can ensure that there is a valid basis for a belief that disclosure infringes a significant interest in privacy); Waller, 467 U.S. at 48-49; see also Associated Press, 705 F. 2d. at 1147; Globe Newspaper Co. v. Fenton, 819 F. Supp. 89, 99 (D. Mass. 1993). Consequently, the kind of blanket sealing proposal contained in the Resolution would not survive constitutional scrutiny.

Finally, in any event, a party seeking to overcome the strong constitutional presumption of openness must satisfy certain procedural requirements. First, the public must be given meaningful opportunity to be heard prior to the sealing or closure to express its objections or offer less restrictive alternatives. See Oregonian, 920 F. 2d. at 1466; Phoenix Newspapers, Inc. v. United States District Court, 156 F. 2d 940, 948 (9th Cir. 1998); Globe Newspapers Co. v.

Superior Court, 457 U.S. 596, 610, n. 24 (1982). Second, any order sealing criminal proceedings or documents must set forth specific findings justifying the closure. Oregonian, 920 F. 2d. at 1466; Press-Enterprise II, 478 U.S. at 9-10; Waller, 467 U.S. at 45.

The Resolution violates these fundamental constitutional prerequisites as well. As proposed, for example, the Resolution's blanket prohibition would apply automatically to all "criminal case records" where there was no conviction. There would be no hearing or other opportunity for the public to register its objections or suggest less restrictive means in any particular case. The Resolution also appears to propose a ban on disclosure that would be permanent and absolute. It does not suggest any mechanism by which closure could be prevented or undone. Such summary closure is manifestly in conflict with the guarantees of the First Amendment.

B. The First Amendment Requires Full Disclosure Of The Identities Of The Persons Arrested By The Government.

The First Amendment to the United States Constitution provides an independent ground for public access to arrest records. Courts have long acknowledged the nexus between the First Amendment and public access to government information. For example, in Black Panther Party v. Kehoe, 42 Cal. App. 3d 645, 654 (1974), the California Court of Appeal held that "[t]here is an undoubted connection between First Amendment freedoms and access to government files, especially those which record or illuminate official action." Although the court noted that the judiciary had "postpon[ed] delineation of a constitutional right of access" (id. at 655), and the Legislature was not precluded from protecting personal privacy by "demarcation of islands of nondisclosure" (id.), the court nonetheless found that "[a]ccess to government records is doubtless a fundamental interest of citizenship." Id.

Indeed, when the United States Supreme Court announced in Richmond Newspapers v. Virginia, 448 U.S. 555, 588 (1980), that the First Amendment prohibits states from unnecessarily holding criminal trials in secret, its ruling was based on a broader concept: the First Amendment forbids the government from unnecessarily withholding information that is traditionally public. As Justice Stevens explained, Richmond Newspapers "unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment." Id. at 583 (Stevens, J., concurring). This prohibition guarantees "the indispensable conditions for meaningful communication" regarding important governmental affairs. Id. at 588 (Brennan, J., concurring).

The Richmond Newspapers test has been applied by federal courts of appeals to prohibit the unwarranted withholding of governmental information in a variety of contexts. See Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 181 (3d Cir. 1999) (meeting of town planning commission); Cal-Almond, Inc. v. United States Dept. of Justice, 960 F.2d 105, 109 (9th Cir. 1992) (Department of Agriculture's voters list); In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569, 572-73 (8th Cir. 1988) (affidavit in

support of search warrant). Information relating to arrests of individuals is subject to the two-part Richmond Newspapers test, as the United States Department of Justice has acknowledged. See Brief for United States at 27 n.15, Los Angeles Police Dept. v. United Reporting Publishing Corp., 528 U.S. 32 (1999), at 1999 WL 280450. Both parts of this test weigh in favor of access to booking photos.

First, in evaluating the "tradition of openness" prong, decades of experience makes clear that the government traditionally has disclosed the identities of people who have been arrested. More than a century ago, many local police departments began keeping records that became known as "police blotters," which generally recorded the names of all persons taken into custody, and often included the place and time of arrests, a brief physical description of detainees, the name of the arresting officers, and any allegations against detainees. Walter A. Steigleman, The Legal Problem of the Police Blotter, 20 Journalism Q. 30, 30 (1943). Studies in the 1950's and 1960's confirmed that the overwhelming majority of jurisdictions allowed public access to police blotters, even though most of these jurisdictions were not required to do so by statute at that time. In 1966, a random sample by the American Bar Association found that 93% of local police chiefs permitted access to their blotters. ABA, Standards Relating to Fair Trial and Free Press, at 230-31 (1966). Today, it appears that every state makes its police departments' arrest and detention logs open for public inspection, regardless of whether the detainees have been charged with any crime. See Bureau of Justice Statistics, Report on the National Task Force on Privacy, NCJ 187669 (2001) at 13 (not noting any exceptions).

Arrest records, including booking photographs, also traditionally have been made available to the public and press by law enforcement. Included in The Library of Congress collection are numerous law enforcement booking photographs of criminal suspects, including the 1889 prison booking photograph of imprisoned anarchists from the Haymarket Affair, a 1909 booking photograph of accused bomb thrower Thomas D. Courtney, the 1931 Miami Police Department photograph of Al Capone, the 1948 booking photographs of American Communist Party leaders, and the 1963 Dallas booking photograph of Jack Ruby. See http://www.catologue.loc.gov. In 1997, the San Francisco Museum of Modern Art displayed historical booking photographs in "Police Pictures: The Photograph of Evidence." See http://www.raintaxi.com/online/1998spring/police.shtml.[3]

[3] This kind of information continues to be available to the public and media today. For example, The Los Angeles Police Department website, http://www.lapd.com, posts LAPD booking photographs of criminal suspects (as well as unofficial snapshots) as part of its effort to seek public help in capturing criminal suspects as part of the department's "Wanted by the LAPD" section. The Salt Lake City Police Department released booking photographs of Wanda Barzee and Brian David Mitchell after their arrest in the Elizabeth Smart kidnapping case; those photographs now are available on the Internet. See http://www.news.findlaw.com/new/s/20030314/crimesmartdcgigpix.html. Other websites show historical booking photographs, such as a 1990 FBI photograph of Mafia figure John Gotti, a

These sources demonstrate that law enforcement agencies long have disclosed arrest records to the public. The first prong of the Richmond Newspapers test thus supports public access.

Second, courts would consider whether access to the information at issue would "play[] a significant positive role in the functioning of the particular process in question." Press-Enterprise, 478 U.S. at 8; accord Washington Post, 935 F.2d at 288. As discussed above, disclosure of arrest information – whether or not a conviction results – deters the government from making illegal arrests. In Richmond Newspapers, the Supreme Court observed that public access not only served as a check on government abuse but also fostered "the proper functioning" of the process at issue. 448 U.S. at 569 (plurality opinion). Publicity here likewise serves valuable preventative purposes. See Caledonian Record Publ'g v. Walton, 573 A.2d 296, 303 (Vt. 1990) (exposing arrests to public view promotes "responsible and nondiscriminatory" use of that power). As one commentator has argued, "the public has a legitimate interest in learning the identity and condition of those held in government custody," and that interest is furthered by public access to arrest records. Nicholas E. Poser, Perp Walk Decision Leaves Troubling Questions, 19-SUM Comm. Law 3, *7. For example, when Dallas police released a booking photograph of Oswald shortly after his arrest in 1964, the photograph revealed cuts and a dark bruise over his eye, raising questions about police treatment of Oswald in custody. Id.

The availability of information about criminal cases where no conviction has resulted also promotes accurate fact-finding in the government's investigations, where the press has come to "play an essential role in overseeing the investigative process and in conducting independent investigations into criminal matters." Sarah Henderson Hutt, In Praise of Public Access, 41 Duke L.J. 368, 381 (1991). Courts thus commonly emphasize the truth-seeking value of disclosing basic information regarding investigations. See Detroit Free Press, 73 F.3d at 98 (FOIA requires government to release mug shots of detainees in part because these photographs can "reveal the government's glaring error in detaining the wrong person for an offense").

Finally, the availability of criminal case information promotes public confidence in the fairness of our justice system. As the Supreme Court noted in Richmond Newspapers, "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." 448 U.S. at 572 (plurality opinion).

Milwaukee County Sheriff's Department photograph of murderer Jeffrey Dahmer, a 1964 Dallas Police Department photograph of Lee Harvey Oswald, and a U.S. Marshal Service photograph of deposed Panamanian dictator Manuel Noriega. See http://www.mugshots.org. The booking photographs of civil rights leader Martin Luther King, Jr., O.J. Simpson and William Kennedy Smith are among dozens of such photographs featured in the book, Famous Mugs (Cader Books 1996).

C. Privacy Interests Do Not Warrant Restrictions On Public Access.

With respect to arrest records, the drafters focus on the rights of the individuals arrested to keep the information about them private. But purported privacy interests do not outweigh the public's right of access to arrest information. Because an arrest is a matter of public record, courts repeatedly have held that suspects have no cognizable privacy interest in the fact of their arrest. See, e.g., U.S. Dept of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 753 (1989). Nor do suspects have a privacy interest in their arrest records. Indeed, more than 25 years ago, the United States Supreme Court held that law enforcement agencies cannot be held liable for invasion of privacy or defamation for distributing "mug shot" photos of arrestees. Paul v. Davis, 424 U.S. 693, 713 (1976). In that case, the law enforcement defendants distributed an "Active Shoplifters" flyer to merchants with booking photos of individuals who had been arrested for shoplifting. Id. at 695-96. The plaintiff, who previously had been arrested for shoplifting, claimed that publication of the booking photo invaded his privacy and defamed him. The Supreme Court rejected this claim:

> [The plaintiff] claims constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based ... on a claim that the State may not publicize a record of an official act such as an arrest. None of our substantive privacy decisions hold this or anything like this, and we decline to enlarge them in this manner.

Id. at 713. As Justice Rehnquist remarked when asked to comment on the privacy implications of releasing arrestees' names:

> An arrest is not a "private" event. An encounter between law enforcement authorities and a citizen is ordinarily a matter of public record, and by the very definition of the term it involves an intrusion into a person's bodily integrity. To speak of an arrest as a private occurrence seems to me to stretch even the broadest definitions of the idea of privacy beyond the breaking point.

William H. Rehnquist, Is an Expanded Right to Privacy Consistent with Fair and Effective Law Enforcement?, 23 Kan. L. Rev. 1, 8 (1974).

The California Supreme Court concurred in Kapellas v. Kofman, 1 Cal. 3d 20, 38 (1969), when it rejected a privacy claim based on the disclosure of arrest information from a police blotter. The Court declared that "such [information] would already have been [a] matter of public record," and that its disclosure thus was not actionable. Id. The Court also recognized that the First Amendment protects the disclosure of "newsworthy" information, such as arrests by law enforcement agencies. Id. As the Court noted, "courts have universally concluded that [arrests] are newsworthy matters of which the public has the right to be informed." Id.

Subsequently, the California Supreme Court reaffirmed that a "suspect's right to privacy is not violated by prompt and accurate public reporting of the facts and circumstances of his arrest." Loder v. Municipal Court, 17 Cal. 3d 859, 866 (1976). "[A]t the time of the arrest, the suspect's right to privacy is obviously outweighed by the necessity of identifying him correctly[.]" Id. The Court cited with approval several Court of Appeal decisions that upheld the government's right to disseminate arrest records, including booking photos. In one such case, the Court of Appeal had held that "a photograph taken pursuant to even an illegal arrest may be included in those shown to a witness who is asked to identify the perpetrator of a subsequent crime," id. at 865; in another, it "rejected an arrestee's demand for return or destruction of booking photographs and fingerprints after a misdemeanor charge against her had been dismissed without conviction." Id. at 875-876. See also Alarcon v. Murphy, 201 Cal. App. 3d 1, 5 (1988) ("in most cases, information about arrestee must be made public"; police statements identifying arrestee as murder suspect did not violate his privacy rights, even though suspect was exonerated); American G.I. Forum v. Miller, 218 Cal. App. 3d 859, 864 (1990) (arrestee's right to privacy is outweighed by "compelling interest" in "correctly identifying arrestee" and "publicly reporting the arrest"); People v. Loyd, 27 Cal. 4th 997, 1007 (2002) (discussing general lack of privacy for individuals in police custody; "[t]he concept of one purporting to enjoy privacy while he is under legally authorized supervision would appear to be a monumental anomaly"). Cf. Shulman v. Group W. Prod., Inc., 18 Cal. 4th 200, 227 (1998) ("the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged and does not create liability under the private facts tort"). Given the inherently public nature of an arrest, the availability of arrest records, whether or not there was a conviction, does not violate an arrestee's privacy rights.

The concerns expressed by the drafters also can be addressed in other ways. For example, if in a particular case, there is specific justification for expunging an arrest record, mechanisms to accomplish that task exist. In such instances, however, a court may evaluate the specific circumstances, rather than having a blanket rule imposed upon it. Similarly, to the extent a serious problem can be demonstrated in the employment context, states can adopt laws prohibiting employers from discriminating against individuals who have arrest records but have not be convicted of any crime. These and many other alternatives exist to address any real problems that may exist, without the public policy and constitutional problems created by the Resolution.

D. Conclusion

Resolution 103D advocates a radical departure from historical legal tradition by proposing the closure of government records. In so doing, the Resolution violates important First Amendment and common law rights of access. Furthermore, by presumptively sealing criminal records from public access, the public would lose its ability to monitor the justice system and may thereby also lose confidence in its credibility. Given its serious constitutional and public policy defects, Resolution 103D is inappropriate for the support of the Litigation Section and the ABA.

We would be happy to answer any questions, or provide any additional information that the Section Leadership requests, and appreciate your consideration of our letter.

Sincerely,

Kelli L. Sager

Kelli L. Sager
Davis Wright Tremaine LLP

KLS:ks
Attachments

Cc: George Freeman, Esq. (Co-Chair, First Amendment Committee)
Laura Prather, Esq. (Co-Chair, First Amendment Committee)