Reading Assignments

Class #1 – Sept 1 - Overview of criminal records and of the seminar

1. Overview: What are criminal records? What are the main criminal record data bases? Who collects, maintains, monitors criminal records? What percentage of the population has an arrest record, conviction record? How does the criminal record system “work”? In what way(s) are criminal records “useful” and used? Who has/should have access to the criminal record database? What are the main jurisprudential and policy issues arising from the collection, compilation, dissemination of criminal records? Are there civil rights at stake? What are the sharpest differences between the U.S. and other countries when it comes to constructing, collecting, storing, using and disseminating criminal records?

2. U.K. Tragedy: The Ian Huntley case; the Soham murders; The Bichard Inquiry. 
http://en.wikipedia.org/wiki/Ian_Huntley
http://www.childpolicy.org.uk/dir/index.cfm?ccs=1498&cs=11524

3."Criminal records" might be said to include police files, police blotters, rap sheets, probation files including sentencing recommendations, prosecution files, records of court proceedings, trial transcripts, prison disciplinary and other files, appellate and habeas corpus documents, and parole board files. Are/should all of these records be linked together? Should they all be equally accessible?

4. Fingerprint and DNA databases are not criminal records, but they enable criminal records to be matched to individuals and crime scene evidence.

U.S. criminal record data bases


Bureau of Justice Statistics, Criminal Record Systems Statistics
http://www.ojp.usdoj.gov/bjs/crs.htm
5. Kinds of questions that arise. See Illinois Integrated Criminal Justice Information System meeting, June 2004

http://www.icjia.state.il.us/IIJIS/public/index.cfm?metasection=oversight&metapage=PR_V_notes_06232004

Class # 2 – Sept.8 - Recording police contacts with the citizenry

1. Overview: When should a record be made of a police contact with the citizenry? Can this question be answered independent of who will have access to any record that is made? Do/should police have complete discretion to create and maintain police files (records) or is/should this be a matter of legislation and/or constitutional law? Is this different from asking whether an individual police officer can take and keep notes of her observations, contacts with the citizenry and investigations?

2. Police intelligence files -- What restrictions, if any, are there on police opening, maintaining, using, and sharing “intelligence files”? Should another agency (other than the police) altogether be responsible for intelligence gathering and file construction? Is the civil liberties threat greater if the police do both criminal and intelligence investigating? How can/should intelligence files be handled?

Read:


3. Arrest records – Introduction to the rap sheet. What are the purpose(s) of arrest records? Who should keep them? How long should they be kept? Who should have access to them? If their accuracy is important, how can it be assured?

What is a rap sheet? http://www.psp.state.pa.us/patch/cwp/view.asp?a=3&q=151791
Sample rap sheet (Florida)
http://www.floridacriminalrecords.com/criminal_records_rap_sheet_help/example_rap.html

Should drugs be suppressed if they were seized based upon an erroneous rap sheet entry of an outstanding arrest warrant? See Arizona v. Evans, 514 U.S. 1 (1995).

What can be done about errors on rap sheets?

Legal Action Center, “Correcting Inaccurate Rap Sheets”
http://www.hirenetwork.org/pdfs/setting_the_record_straight.pdf

Should the Justice Department's recent decision to lift the Privacy Act requirement that the FBI ensure the accuracy and completeness of the over 39 million criminal records it maintains in its National Crime Information Center (NCIC) database? See Electronic Privacy Information Center's petition to OMB: http://www.epic.org/privacy/ncic/


4. Is a "police blotter" a criminal record?

Recommended:

Erving Goffman: Stigma: Notes on the Management of Spoiled Identity

Class #3 – Sept. 15 - Identifying and keeping track of “criminals”

1. Overview: For what reason(s) do we require records on arrestees, defendants and on criminal justice events? Will such records necessarily be stigmatizing? Should we be concerned about the possibility that by recording we are labeling and by labeling we are reinforcing individuals' criminal identities?

2. History of criminal identification: names; the Bertillion system; mug shots; fingerprints; DNA. Whose identity should go into what data base? How should identity be defined and recorded? From photographs (mug shots) to fingerprints to DNA.

Alphonse Bertillion http://www.cmsu.edu/cj/alphonse.htm

History of fingerprints http://onin.com/fp/fphistory.html

Recommended:
3. Are fingerprints a type of criminal record? Why do we need fingerprints? Who should be fingerprinted? Should individuals arrested on misdemeanor charges be fingerprinted?

a. Special rules for fingerprinting juveniles?

Okla. Stat. tit. 10 sec 7307-1.6 (West 1998)
NY Family Court Act sec. 3601 (McKinney 1999)
New Jersey Stat. 2A:4A-61 (West 1999)

4. Do we need a DNA data base? Does it raise any issues not raised by fingerprints?

a) Combined DNA Index System (CODIS) -- In 1994 Congress authorized the FBI to create a national data base of DNA samples taken from convicted offenders, crime scenes and unidentified human remains. FBI established the Combined DNA Index System (DODIS) which allows state & local forensic labs to exchange & compare DNA profiles. By 2000 all 50 states had enacted statutes requiring convicted offenders to provide DNA samples. Congress passed the DNA Act of 2000 to authorize taking samples from federal prisoners.

Fed probation officials have begun collecting certain offenders’ blood samples for inclusion in FBI DNA database (CODIS). See U.S. v. Carmichael (No. 02-40561 5th Cir. Aug/2003) rejecting federal prisoners constitutional challenge to the 2000 Act. See also IACP Task Force, “DNA Evidence: Enhancing Law Enforcement’s Impact From Crime Scene to Courtroom and Beyond,” 2003 www.iacp.org (arguing that DNA collective needs to be expanded)


Recommended:


Jane Caplan & John Torpey, Documenting Individual Identity (Princeton University Press 2001)

Erving Goffman: Stigma: Notes on the Management of Spoiled Identity


Understanding Juvenile Fingerprinting in New York State: Procedures and Record Use" November, 1996
DCJS, Bureau of Program and Policy Analysis [HTML version, PDF version]

Class #4 – Sept 22 - Rap Sheets; the NCIC system

Overview: What information does a rap sheet contain? What assures its accuracy? Who keeps it and for how long? Who has access to it? See Sample Rap Sheet (State of Florida)
http://www.floridacriminalrecords.com/criminal_records_rap_sheet_help/example_rap.html

1. The Negative Curriculum Vitae – Is there any persuasive reason to keep records of arrests and convictions once the case has been “completed”? Should criminal record be part of every individual’s curriculum vitae so that various individuals, organizations and agencies will always be able to properly assess the individual’s character, reliability, and propensity for dishonesty?

2. NCIC (National Criminal Information Center) -- What is the NCIC and how does it work? What information properly belongs in the NCIC? Are some kinds of administrative charges/adjudications appropriately entered? Do visa and other immigration violations belong in the NCIC?

Read: NCIC website http://www.fas.org/irp/agency/doj/fbi/is/ncic.htm
See Menard v. Saxbe, 498 F.2d 1017 (DC Cir. 1974);
Class #5 – Sept 29 - Juvenile Criminal Records

1. Overview: Are/should juveniles’ criminal justice system contacts (adjudications, dispositions?) be recorded differently from adults”? Do juvenile criminal records necessarily contain different information than adult criminal records? What different information? Should juvenile arrests not be recorded at all? Should juveniles not be fingerprinted? Should juvenile arrests and convictions be sealed or expunged at some point? What point? Should Ian Huntley’s police contacts have been expunged or sealed? If not, should they have been shared with school officials considering his employment application? At the sentencing of an adult defendant, should the fact of that defendant’s juvenile “convictions” be kept from the judge? Should information about a juvenile's family and social history be kept off the rap sheet? out of the databases? completely confidential? If so, is that possible?

Read:


U.S. v. Johnson, 28 F.3d 151 (DC cir. 1994)


Institute for Law & Justice, Prosecutor & Criminal Court Use of Juvenile Court Records: A National Study [http://www.ncjrs.org/txtfiles/juvrecs.txt](http://www.ncjrs.org/txtfiles/juvrecs.txt)

2. Note: A pre-sentence report in a juvenile delinquency case (typically called simply the "probation report" or, in New York State, the "Investigation & Report" or "I&R") contains more information than what is commonly found in an adult presentence report. In addition to what one would find in an adult presentence report (description of the facts of the present offense, the prior record, employment history (which may or may not be appropriate for a juvenile), victim impact statement, and presentence report writer's diagnosis of the appropriate sentence), a juvenile pre-dispositional report typically includes: the respondent's attendance and behavior at school; the respondent's conduct at home as described by the parent; use of alcohol or drugs; the probation officer's assessment of whether the respondent is remorseful about committing the crime; and, in some jurisdictions (like New York), whether the juvenile is "sexually active" and, if so, whether the juvenile uses birth control. In many juvenile cases, the judge orders a
psychological report prepared by the court's department of mental health services (a report which, in New York, is called a "Mental Health Study" or "MHS"). Those reports will, as you recognized, appear in the Probation Department's file on the respondent (called, in some jurisdictions, the "social file") and probably also the court file. In cases in which the defense hires a psychiatrist or psychologist to prepare a report for sentencing (disposition) and defense counsel submits that report to the probation department, a copy will end up in the social file and probably the court file; if counsel submits that report to the judge, it will surely end up in the court file and maybe also the social file.

Sample Juvenile Criminal Record - See attached document

Recommended:


Class #6 – Oct 6 - Privacy & Criminal Records. Who should have access?

1. Overview: Is there an individual right or interest in restricting access to governmental criminal all or some criminal records? Is the fact of an arrest private? If not, how can its recordation infringe a privacy right/interest? Is the fact of a criminal adjudication/disposition private? If not, how could its recordation infringe a privacy right/interest? Under what circumstances, if any, should judges treat 'case files' as private? To what extent should privacy rights/interests limit access to criminal records by police, prosecutors, juries, sentencing judges, prison authorities, specialized employers (e.g. daycare, schools, law enforcement, private security, transportation), all employers, college and university admissions, neighbors, would-be business associates?


3. To what extent is there a public "right to know" about everyman's criminal record that outweighs everyman's privacy interest? See U.S. Department of Justice v. Reporters Committee For Freedom of the Press et al, 489 U.S. 749 (1989)

4. How is access to criminal records handled in other countries?
Canadian policy on criminal records Alberta, Canada:
http://www.johnhoward.ab.ca/PUB/A5.htm#Q1

5. Should criminal record be put on the web and made available to all?


6. Federalism, criminal records, the "III" system, and the National Crime Prevention and Privacy Compact? Must states share criminal records with one another even when their laws/policies on access conflict?


Recommended:


National Center For State Courts, Legal Writings and Industry Whitepapers, (Public Access to Court Records) http://www.courtaccess.org/legal.htm


Illinois' Law on Access to Criminal Records
http://www.isp.state.il.us/services/enrollmentinstructions.pdf


Oct.13 (Class cancelled – Yom Kippur)

Class #7 – Oct. 20 – Expunging, Sealing and Destroying Criminal Records

1. What do "expungement and "sealing" mean? How do sealing and expungement work? With respect to expungement, must the government officials literally destroy or erase all
record of the arrest or just stamp “expunged” on the record or write "expunged" on the computer file? With respect to sealing, must the record be removed from the database so that it will not come up in a search or may it remain in the database while being blocked in some way so that a search will show that there is a record but that it is sealed?

2. Must expunging or sealing only be done pursuant to statute? Or do courts have inherent authority to order it? Is there a constitutional right to an expungement or sealing under certain circumstances? See NYS Criminal Procedure Law 160.50 and 160.55 http://caselaw.lp.findlaw.com/nycodes/c25/a24.html Can a federal court order a state agency to expunge or seal? Can a federal disability for a felony conviction be imposed upon an individual whose state conviction was expunged? See Dickerson v. New Banner Inst., Inc. 460 U.S. 103 (1983) (note that Gun Owners Protection Act of 1986, 18 U.S.C. sec. 921, "over-ruled" the decision.)

3. When, if ever, should arrest records be expunged? Should all or some juvenile arrest/disposition records be expunged? If the arrest of an adult does not lead to a conviction, should the arrest record be expunged after a certain amount (how much) of time? Does that mean if the police are trying to solve a burglary or rape, they should be denied access to previous arrests for similar crimes in the same area?

If the police let a suspect off with a warning, shouldn’t they keep a record of the fact that the suspect was warned once so that s/he will not get the benefit of the doubt the next time? E.g. wouldn’t the police & prosecutor want to know that X had been arrested previously for domestic violence even though charges ultimately were not brought or were dropped? If the police are not allowed to keep a written record, will they be less likely to let the person go without a formal arrest?

Should an arrest record be expunged if the defendant successfully completed a pre-trial diversion program? If so, does that mean that a future prosecutor (perhaps considering diversion) should treat the defendant as a first offender? Should an arrest record be expunged after a successful motion to suppress evidence? Should a conviction record be expunged after an appellate reversal? After a pardon? Should a conviction record be expunged after passage of a certain number (how many) of years?

What happens if the D is identified by means of a photo array in which his photo was taken from a previous arrest that resulted in a dismissal. In other words, can a photo from a dismissed arrest be later used for purposes of identifying the unknown perpetrator of a crime. See People v. Patterson, 78 N.Y.2d 711 (1991).

If a criminal record is expunged, can the person deny the arrest or conviction on an application to the police department for employment? on an application for admission to the bar? on cross examination (to impeach) at a trial? Must police and prosecutors who are aware of the expunged record, deny its existence when queried by other government agencies? Employers? Judges? Can/must they lie in court? Should there be sanctions against anyone who knowingly discloses an expunged record? or even the criminal justice event that the expungement officially erases?
4. If Smith sues a newspaper for defaming on account of the paper saying that he had previously been convicted (arrested) for embezzlement, is the newspaper precluded from entered the fact of his expunged conviction into evidence? See Bahr v. Statesman Journal Co., 624 P.2d 664 (Ore. Ct. Appeals).

5. Read any two of the following:


Michael Fleming and Michelle Moore, "Expungement, Eligibility, Extent & Effects"


Class #8 – Oct 27 - Consequences of a Criminal Record -- Employment


Legal Action Center, After Prison: Roadblocks to Reentry

Illinois Moves to Shield Certain Criminal Records

Topics: Criminal Record as statutory bar to certain occupations; right/responsibility of employers to discriminate on the basis of criminal record; the impact of criminal record on employability; the impact of criminal record on other rights and social benefits.

Can employers be held liable for not checking an employee’s criminal record, if that employee commits a crime against another employee or a customer? (negligent hiring & retention laws)

http://www.kcba.org/barbulletin/0309/article3.html


http://www.consumercredentials.com/background-checks-why.htm

Recommended:


Legal Action Center, Employment Discrimination & What To Do About It


Class #9 (Make-up class) – Friday, Oct 28 - Consequences of Criminal Record -- Criminal Justice

1. Overview: Why is/should the criminal history record relevant to various decision points in the criminal justice system?

2. To what extent, if at all, is/should criminal record relevant to the pre-trial release decision? John Clark & Alan Henry, "The Pretrial release Decision making Process:
3. To what extent, if at all, is the defendant's criminal record relevant at the trial stage? Consider. Michael Jackson trial [http://crime.about.com/b/a/157185.htm](http://crime.about.com/b/a/157185.htm)

Note: In California, a witness may generally be questioned about criminal convictions only if the convictions are for felonies and the witness has not been pardoned for innocence, been granted a certificate of relief from civil disabilities, or obtained other similar relief. Evid. Code § 788. Under both sets of rules, if the witness denies a criminal conviction, it may only be proved by offering a certified record of the conviction.

The federal rules allow questions about prior bad acts of a witness to impeach credibility where, in the court's discretion, they are probative of truthfulness. Fed. Rules Evid. 608(b). However, if the witness denies the act, it may not be proved by other evidence unless the act to be proved has some relevance to the case that is independent of its bearing on credibility. Under California law, inquiry concerning prior bad acts that have not resulted in a criminal conviction is not permitted to attack the credibility of a witness. Evid. Code § 787.

4. Can/should a state shield a witness's juvenile criminal record from being revealed by the defendant's cross examination? See Davis v. Alaska, 415 U.S. 308

5. Sentencing: Does a current criminal defendant "deserve" more severe punishment because she has a criminal record or because a defendant with a history of criminal convictions (arrests) is more likely to reoffend in the future? If a criminal record is relevant to sentencing, how much should it count? Should only convictions count? Only felonies? All felonies count the same? Misdemeanors count as some percentage of a felony? Should there be some “decay” in the impact of prior criminal record? I.e. a 10 year old conviction should count for less than a 2 year old conviction?

Read:


If a criminal record is increases the sentence, does/should the defendant have a right to a jury determination of that record's existence? See Almendarez-Tores v. U.S. (Supreme Court 1998) [http://www.oyez.org/oyez/resource/case/1042/](http://www.oyez.org/oyez/resource/case/1042/)

Other than the bare fact of the conviction, what can be inferred from a criminal record? Can one infer proof of the facts necessary to establish that conviction? see Shepherd v. U.S. (Supreme Court 2005)
3. To what extent, if at all, is/should a criminal record be relevant to parole or pardon?

4. To what extent, if at all, is/should a criminal record be admissible in a civil suit?

Recommended:

Andrew von Hirsch, Past and Future Crimes (Rutgers U Press '85)

Class #10 – Nov 3 - Other Consequences of a Criminal Record

Welfare -- The federal welfare law permanently bars anyone with a drug-related felony conviction from receiving federal cash assistance and food stamps during his lifetime unless a state opts out (as NYS did). 21 USC sec. 862a. Relies on self reporting.

Can/should colleges and universities exclude students with criminal records?

University of Edinburgh http://www.mvm.ed.ac.uk/studying/admissions/nonacademic.htm

Northern Ireland http://www.stran.ac.uk/studying/policy/criminalrecord.htm

Canada http://www.rrc.mb.ca/register/pdf/CriminalRecordCheck.pdf

http://webapps.cc.umanitoba.ca/calendar06/faculties/education/after_degree/index.asp

Immigration and Travel to the U.S. http://www.legalline.ca/criminal/797.html

http://www.legalline.ca/criminal/796.html

Recommended:


Eligibility for Military Service http://usmilitary.about.com/od/armyjoin/a/criminal.htm
ABA Criminal Justice Standard 19-1: Collateral Sanctions & Discretionary Disqualifications of Convicted Persons;  
http://www.abanet.org/crimjust/standards/collateral_blk.html#1.1

Class #11 – Nov 10 - Criminal Records and the Gun Control

1. Overview: The federal felon-in-possession law (and many state analogs) make it a felony for a person with a criminal record to possess firearm. Is that a justifiable collateral consequence of a criminal record? Even if it displaces the right of self defense?

The 1993 Brady Law seeks to prevent persons with certain criminal records from purchasing a firearm. Thus, the Brady Law was predicated on the existence of comprehensive, accurate, easily accessible criminal and other records. To what extent has the need to comply with the Brady law driven criminal records policy? To what extent does the Brady law work?

Read:
Improving Information for Brady Background Checks  
http://www.ojp.usdoj.gov/bjs/abstract/ichrbc.htm

BJS, “Improving Criminal History Records…”  

BATF’s Criminal Background Check System  
www.usdoj.gov.oig

Recommended:

James B. Jacobs, Can Gun Control Work? (Oxford University press 2002)

Bureau of Justice Assistance, Early Experience with Criminal History Records Improvement," (1997)

Class # 12 – Nov 17 - Meagan’s Law (1)

1. What is Meagan’s Law?


2. What is the Jacob Wetterling Sex registration Law?

Read:  Read: David Heger, “Federal Sex Registration Laws”  
http://www.nvaw.org/policy/fedoffender.shtml

Congress makes money available to help states

http://www.ojp.usdoj.gov/bjs/pub/ascii/nchip99.txt
National Sex Offender Registry Put on Fast Track
http://usgovinfo.about.com/od/defenseandsecurity/a/sexoffendsite.htm

3. Do/Should Sex registration laws apply to juveniles?


4) Are these laws unconstitutional -- ex post facto, double jeopardy, cruel and unusual, irrational, otherwise?

Read:
U.S. Supreme Court 2002

(U.S. Supreme Court 2002)

(Court of Appeals, 5th Circuit)

Class #13 – Dec 1 - Meagan’s Law (2)

1. Practical problems

Read:
Burdens on police

Problems of enforcement/implementation

2. Evaluation
Read:  
http://talkleft.com/new_archives/004499.html

Class # 14 – Dec 8 - Making all criminal records available on the WWW

Overview: Which, if any, criminal records should be made available over the internet? What constitutional rights or policy concerns would be jeopardized by making all criminal records available over the internet?

Read: “Judicial Conference Recommendation on Internet Access to Criminal Files”


2. Indictments: Should criminal indictments be available over the internet. How else can Prof. Jacobs document the war on organized crime?

3. Should rap sheets be available over the Internet?

4. What, if anything, is to be done about private companies that compile criminal record data bases and sell access to consumers? See for example:  Net Detective

http://www.public-record-searches.com/courtreports.html

Also see http://theboost.net/criminal_records/

People Check http://www.instantpeoplecheck.com/

Free public access http://www.searchsystems.net/list.php?nid=348

4. Should the identities of state prisoners be available be available over the internet? Should you be able to type in "Attica" and get back a list of names (photos?) of that prison's current inmates? See Fla. Department of Corrections http://www.dc.state.fl.us/AppCommon

Recommended Books


Mele, Christopher and Teresa Miller, Civil Penalties: Social Consequences (Routledge 2005).


Travis, Jeremy. But They All Come Back: Facing the Challenges of Prisoner Re-entry (2005)


Recommended Movies:

“The Woodsman “(Kevin Bacon”)