



**TO:** Members of Drafting Committee on Accuracy in Criminal Records,  
Advisors, and Observers

**FROM:** Robert J. Tennessen, Committee Chair  
Steven L. Chanenson, Reporter  
Jordan M. Hyatt, Associate Reporter

**DATE:** March 23, 2015

**RE:** *Background and Issues to be Discussed Concerning an Act Improving the  
Accuracy of Criminal Records*

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## I. Introduction

Criminal records are a large and growing part of American life.<sup>1</sup> Our project reflects the importance of these data and revolves around improving the accuracy of criminal records.<sup>2</sup> Given the atomized manner in which criminal records are created, collected and disseminated, this is a daunting task. While many organizations play a role in ensuring accurate criminal records, no one entity or jurisdiction has full responsibility and control. Our task is to devise legislation that can encourage improvement in this area.

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<sup>1</sup> See, e.g., Gary Fields and John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014, available at <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402> (“America has a rap sheet. Over the past 20 years, authorities have made more than a quarter of a billion arrests, the Federal Bureau of Investigation estimates. As a result, the FBI currently has 77.7 million individuals on file in its master criminal database—or nearly one out of every three American adults.”).

<sup>2</sup> Access to and the appropriate use of criminal records, as independent topics, are beyond the scope of this project.

This memorandum will provide a brief overview of some of the myriad of issues that inform – and are impacted by – efforts to increase the accuracy of criminal records. Many of these topics are complex; most (but not all) should be resolved before the legislative drafting process can begin in earnest. In addition to outlining major policy and practical issues, and identifying gaps in knowledge (as well seeking help in filling those gaps), background research and policy materials are presented.

## **II. Background**

Over 65 million American have a criminal record.<sup>3</sup> This estimate includes records relating to a range of conduct – from felonies to misdemeanors – at the state and local levels; the actual number is subject to some debate.<sup>4</sup> In 2012, one survey of all fifty states, American Samoa, Guam, and Puerto Rico reported a total of 100,596,300 persons in their criminal history files, 94,434,600 of which were automated records.<sup>5</sup> What is clear, however, is that a significant component of the American population is, in a meaningful way, impacted by the presence of an accessible administrative record detailing past, illegal transgressions or some contact with the criminal justice system.

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<sup>3</sup> National Employment Law Project, 65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment (2011). Available at: [http://www.nelp.org/page/-/65\\_million\\_need\\_not\\_apply.pdf?nocdn=1](http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1)

<sup>4</sup> See, e.g., Jacobs, James B. *The Eternal Criminal Record* (2015), Harvard University Press, Cambridge, MA. See also Gary Fields and John R. Emshwiller, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime*, WALL ST. J., Aug. 18, 2014, available at <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>

<sup>5</sup> Survey of State Criminal History Information Systems, 2012 (2014), Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice, Washington, DC. Available at: <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>

A criminal record is created at the very first encounter between an individual and law enforcement, most often at arrest. In many cases, records are also created in incidents in which no arrest takes place (*e.g.* intelligence collection, “stop and frisk”). Much like the first loose pebble that leads to an avalanche, these initial records are joined with other data as the individual moves through the criminal justice system. The complete file will include information on charges, bail, pre-trial detention, court processing, motions practice and, eventually, conviction and sentencing data. The precise mix will vary by jurisdiction. Of primary importance to this conversation will be the records relating to criminal justice outcomes: most often convictions and the categorical classifications of the underlying offenses. However, understanding this broader process and context will be important as well; errors and omissions that are created during this process matter too.

Criminal records are being used in an increasing number of contexts: employment and housing screening in the private sector, predicting future criminality by criminal justice agencies, licensing in a variety of professionals and careers, numerous types of financial relationships and, to preclude individuals with a criminal history from accessing certain services to which they are not entitled. Records are maintained – and access provided – by public and private entities. Online, open access to criminal dockets, custody status and priors arrests are being made available by many agencies. The appositeness of these applications are well beyond the scope of this project. These activities are, and have been, taking place.

Instead, our focus is on ensuring that the underlying records, given their meaningful and lifetime consequences, are as accurate as possible.

### **III. Issues Surrounding the Accuracy of Criminal Records**

A 2005 report by SEARCH, the National Consortium for Justice Information and Statistics, and the Bureau of Justice Statistics offers a starting point for a discussion of attendant issues. The report notes that an inaccurate identification can result in false positives (attributing a record to an individual who did not commit a crime) and false negatives (failing to attribute a criminal record to an individual that did, in fact, have a record). Both types of errors are important and have implications for both public safety and individual liberties. These concerns, and others, are highlighted in the Study Committee's December 2013 report.

The Study Committee framed one concern as follows: "All states report arrest data to a central repository and in turn to the FBI databases. However, the results of an arrest are not systematically reported to the central repository and on to the FBI. Examples include (1) release without a charge, (2) dismissal of a charge by a prosecutor, (3) dismissal or acquittal by a court, and (4) reversal of a conviction by an appellate court."<sup>6</sup> As of 2012, 10 states had 50% or less of their arrest records include final dispositions; 20 states (up from 16 in 2006) had more than 75% of their arrest records include final dispositions.<sup>7</sup> These errors of omission or incompleteness could inappropriately harm an individual by implication.

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<sup>6</sup> Study Committee Report at 4.

<sup>7</sup> U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 18-19 (Washington, D.C. 2015), available at <http://www.gao.gov/assets/670/668505.pdf> (citing U.S.

On the other hand, at least some arrest records are not properly connected to an individual because of the absence of biometric information in the official file. In other words, some states will not report all of an individual's arrests, convictions and sentences because there is no positive fingerprint identification. For example, Pennsylvania (which, we are told is one of the better states in this regard) fingerprinted just 87.9% of all cases in the third quarter of 2014.<sup>8</sup> Of the 7,601 cases not fingerprinted during that quarter, more than 25% were for felonies. It is our understanding that cases without fingerprints are essentially in a form of limbo and do not get reported by the central repository. The alternative to biometric identification, matching on names, date of birth and other indicators that may rely on truthful self-identification, are also fraught with even more problems. These errors of omission or incompleteness could inappropriately harm society by preventing an individual's record from fully reflecting his contact with the criminal justice system.

**IV. Discussion Topics: *How can and should legislation address America's fragmented system of criminal history records?***

- a. *Use legislation to encourage and/or embrace national standards.*
  - i. *This is a difficult issue as we are unaware of an existing comprehensive national standard. A recently released 2015 GAO report describes the work of the Disposition Task Force, which*

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Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems 2012* (Washington, D.C. 2014) and U.S. Department of Justice, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems* (Washington, D.C. 2006).

<sup>8</sup> PA Criminal Justice Advisory Boards Data Dashboards, Pennsylvania Commission on Crime and Delinquency. Available at: <http://www.pacjabdash.net/Dashboards/tabid/2013/Default.aspx>.

*was created by the FBI's Advisory Policy Board. That Task Force has identified "the greatest disposition-reporting challenge – the lack of national disposition-reporting standards."<sup>9</sup> Despite its efforts, the Task Force has not promulgated national standards.*

ii. *Legislatively build upon the work of such groups as NLETS ([www.nlets.org](http://www.nlets.org)) and others to create aspirational standards for the type, nature and format of criminal information captured and released by law enforcement as well as courts.<sup>10</sup>*

b. *Use legislation to institutionalize the use of both "carrots" and "sticks."*

i. *As a "carrot," federal and state governments have spent a great deal of money<sup>11</sup> encouraging relevant agencies to provide complete and accurate criminal records through technical assistance and training.*

ii. *Are there other carrots that should be institutionalized through legislation? Should training be mandatory with competencies assessed before an official is qualified to work in this area?*

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<sup>9</sup> U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 24 (Washington, D.C. 2015), available at <http://www.gao.gov/assets/670/668505.pdf>

<sup>10</sup> See Study Committee Report at 6 (encouraging drafting committee to explore such matters as the security, uniformity of presentation, and treatment of expunged or sealed criminal records).

<sup>11</sup> The National Criminal History Improvement Program has spent almost \$600 million between 1995 and 2014. <http://www.bjs.gov/index.cfm?ty=tp&tid=471#Funding>.

- iii. *There have historically not been many “sticks” employed to penalize agencies who do not provide complete and accurate criminal records.*
  - iv. *Are there “sticks” that should be institutionalized through legislation? Some possible examples include decertifying municipal police departments that fail to follow basic rules, and refusing to allow cases to be closed if an accurate criminal record is not maintained.*
- c. *Create a state-level coordinating body, such as a central state repository, with the express responsibility and authority to ensure accurate criminal records (perhaps through application of “carrots” and “sticks”) at both the state and municipal level.*
- i. *If such a body was created, should it have true audit and remedial powers as well as the responsibility to ensure, perhaps through random sampling, that records are accurate and complete?<sup>12</sup>*
  - ii. *If such a body was created, how would it address the constitutional separation and autonomy of the state court system?*

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<sup>12</sup> Cf. U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 25-26, 30-32 (Washington, D.C. 2015), available at <http://www.gao.gov/assets/670/668505.pdf> (describing FBI audit efforts and that all but one of the 14 recently audited states were out of compliance with federal notification requirements).

- d. *Legislatively limit what is reported and prohibit reporting arrest data without disposition data.*<sup>13</sup>
- e. *Legislatively leverage the work of the Department of Justice and the National Center for State Courts which is designed to “[i]mprov[e] the reporting of arrest warrants and criminal dispositions from the courts and other local agencies to state and federal criminal databases.”*<sup>14</sup>
- f. *Respect the funding challenges inherent in improving this system and make the case for its importance.*

## **V. Further Investigation**

Although we have explored this area over the past few months, much more needs to be learned about exactly how criminal records are created, evaluated, stored and disseminated. We have become convinced that each jurisdiction – all the way down to the municipal level – handles these issues slightly differently.<sup>15</sup> Those differences – combined with the lack of any central organization at the state level (let alone at the federal level) with both the authority and responsibility to ensure the accuracy of criminal history records – present a significant challenge. Thus, we have created a questionnaire that we have piloted in our local areas. It is attached to this memo. We would appreciate feedback on the questionnaire as well as

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<sup>13</sup> Cf. Study Committee Report at 4 (noting problem); *id.*, at 6 (urging drafting committee to determine “[w]hat information should be included in a criminal history record[.]”).

<sup>14</sup> Warrant and Disposition Toolkit, Bureau of Justice Assistance. Available at: <http://wdmtoolkit.org/>.

<sup>15</sup> Cf. U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 22 (Washington, D.C. 2015), available at <http://www.gao.gov/assets/670/668505.pdf> (noting that “state challenges in submitting complete records to the FBI are generally inherent to local jurisdictions”).

assistance in obtaining answers from other jurisdictions, assuming that this group is in agreement.

More broadly, identifying and understanding how, where and why these errors creep into the system is an important part of our collective task. We hope that committee members, advisors and observers will assist us in identifying how and why these errors occur at all the contact points at which data is collected, entered or maintained. To create a meaningful legislative response we need to have a thorough understanding of how errors occur:

1. by arresting officers and departments at the time of an arrest,
2. at the time of booking,
3. at the time information is conveyed to the prosecutor's office,
4. at the time prosecutors enter the information and prepare charges or determined not to bring charges,
5. at the time warrants are issued,
6. at the time the court receives a case, when it enters information about a case, and when it disposes of the case,
7. when information is conveyed by police or sheriff's departments and the courts to the central state repository,
8. when information is obtained by the state central repository from police and Sheriff departments and the courts, and
9. other points where information is collected or maintained.

Lastly, we are far from the first group to undertake efforts in this area,<sup>16</sup> although we believe that ULC is uniquely positioned to make a distinctive and positive contribution through legislation. It would be both substantively

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<sup>16</sup> See, e.g., U.S. Government Accountability Office, *Criminal History Records: Additional Actions Could Enhance the Completeness of Records Used for Employment-Related Background Checks* 23 (Washington, D.C. 2015), available at <http://www.gao.gov/assets/670/668505.pdf> (“SEARCH is implementing the State Repository Records and Reporting Quality Assurance Program, which includes a voluntary self-assessment checklist for states as a way to disseminate best practices.”); *id.*, at 24 (discussing the FBI Advisory Policy Board’s Disposition Task Force).

meaningful as well as efficient to tap the collective knowledge of our group to ensure that we capitalize on all the work of those who have come before us.

## **VI. References**

There are many sources of information that may be helpful either as a more fulsome background or as a reference. The following references are attached to this memo.

**Survey of State Criminal History Information Systems, 2012** (2014), Bureau of Justice Statistics. Relying on survey data, this report summarizes and analyzes the presence and nature of automated criminal records in all fifty states and several other jurisdictions.

**Report of the National Task Force on the Criminal Backgrounding of America** (2005), SEARCH, The National Consortium for Justice Information and Statistics. This report provides a significant amount of foundational information regarding the use of criminal background checks for noncriminal justice purposes. Many of these issues have analogs within the criminal justice process.

***Accuracy in Criminal Background Checks***, New York Times Opinion Section, Aug. 9, 2014.

**Improving Access to and Integrity of Criminal Records** (2005), Brien, P. M., Bureau of Justice Statistics. This report summarizes the National Criminal History Improvement Program (NCHIP), a federal initiative deployed to facilitate the development of automated and accurate criminal history systems at the state level. In addition to disposition records, which are discussed in detail, the report also discusses sex offender registries and domestic abuse “stay away” orders, two other, non-dispositional records.

**Continuing Criminal History Records Improvement Evaluation** (2000), Bureau of Justice Statistics. Though a bit dated, this report provides important context and background regarding federal-level efforts to increase the availability and accuracy of criminal histories across several jurisdictions and data systems.

**Mass Incarceration and the Proliferation of Criminal Records** (2005), Jacobs, J. This law review article provides an overview of the processes through which a criminal record can be created and analyzes several legal and policy

efforts to minimize the broader implications that such records can carry. Importantly, Jacobs concludes that, given these issues, assurances of accuracy are paramount.

**Interstate Identification Index (III) National Fingerprint File (NFF) Program** (n.d.), Federal Bureau of Investigation. Prepared by the FBI, this brief document provides an overview of two key components of the current, federal administrative record keeping system.

**National Instant Criminal Background Check System (NICS)** (2015), Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division. This presentation, developed for internal use at the FBI and provided with permission here, provides information on the use of The National Instant Criminal Background Check System (NICS) in support of the requirements of The Brady Handgun Violence Prevention Act of 1993.

**Selected Criminal Records Accuracy Statutes** (2015), ULC Staff.