

Uniform Law Commission
Accuracy of Criminal Records Drafting Committee

Chair Robert J Tennesen's Opening comments at the First Meeting of the Accuracy of Criminal Records Drafting Committee held at The Dupont Circle Hotel, Washington DC on March 27, 2015

History of the Creation of This Committee

In 2008 our ABA advisor Steve Saltzburg, as Chair of the Criminal Justice Section, proposed that the ULC draft a "Uniform Law on Criminal Records Policy." He cited the increasing variation and lack of uniformity among the states regarding the many aspects of criminal records. Although his proposal was not accepted Professor Saltzburg was invited to resubmit it at another time. He did along with Todd Belcore and Nicole Julal; and in January 2012 the Scope and Program and Executive Committees approved creation of a committee to study the feasibility of drafting a uniform act on accuracy of and access to criminal records.

The president appointed a study committee in the spring of 2012 and asked me to be the committee chair.

The study committee identified 30 potential stakeholders - organizations that might have an interest in the topic, and solicited their ideas, suggestions and participation. Nineteen individuals, representing themselves or organizations participated as observers. These include representatives from:

- the Office of General Counsel of the FBI,
- National Center for State Courts,
- Consumer Data Industry Association,
- National Conference of State Legislators,
- National Legal Aid and Defenders Association,
- National Association Attorney General's,
- National Federation of Independent Businesses,
- National Association of Criminal Defense Lawyers,
- International Association of Chiefs of Police, and
- Others.

During the course of its deliberations the committee decided to focus on *accuracy of criminal records* maintained by state and local governments and exclude consideration of *access*. This decision was made after considerable debate and thoughtful deliberation. Some committee members and observers had sought to retain *access* in the scope of the committee's work while some observers strenuously opposed appointment of a drafting committee altogether, even if

limited to issues of accuracy. The study committee unanimously recommended appointment of a committee to draft a uniform act on accuracy of criminal records, a decision with which I wholeheartedly agreed. The drafting committee did not conclude that issues of access are not significant or worth addressing.

The decision was made for the following reasons.

First, it concluded that access raises discrete issue quite separate from the accuracy of records created and maintained by states and local governments.

Second, combining accuracy and access is too substantial a task to be undertaken by one committee.

Third, access is partly regulated by the federal Fair Credit Reporting Act over which we have no control and there exists an extensive body of state law that varies greatly from state to state.

In January 2014 the Scope and Program and Executive Committees received and approved the study committee's recommended that **a Drafting Committee on Accuracy of Criminal Records be formed**. President Lansing appointed this committee last fall.

In October of last year the ULC former Executive Director John Sebert was able to persuade Professors Steve Chanenson and Jordan Hyatt to serve as Reporter and Associate Reporter respectively. Since then, they, John Sebert, Lindsay Beaver, more recently our new Executive Director Liza Karsai and I have had monthly conference calls to prepare for this first meeting.

Challenging Mission

Our mission is twofold; to draft an act that improves the accuracy of criminal records and one adoptable by the states. This is a daunting challenge. The issues are complex. Thousands of jurisdictions; police and sheriff departments, prosecutors, courts, corrections departments, central state repositories, probation and parole department and thousands of the employees of these offices participate in the creation and maintenance of criminal history records.

It is further complicated because the data is included in multiple data bases, both paper and electronic, that that may or may not mesh with each other.

Criminal History Background Checks - Uses

Criminal history background checks are a ubiquitous feature in present day America. Some are mandated by state and federal laws.¹ A person's criminal history information, commonly called

¹ According to the National Task Force on the Criminal Backgrounding of America (NTFCBA), state have passed more than a thousand laws authorizing various employer groups to initiate federal criminal background checks of their employees and job applicants.

a RAP sheet, is a chronology of the criminal justice systems actions regarding and that person. The information in a RAP sheet drives decision-making at every stage of the criminal procedure.

- Police use them when deciding to make an arrest,
- Prosecutors use them when charging,
- Judges use them when deciding bail and when sentencing,
- Employers, educational institutions, lenders, licensing authorities, and landlords' use them when deciding whether or not to grant an applicant's request.

The significance and importance of this committee's work is illustrated by the sheer number of U.S. residents who have a criminal record and the percentage of those records that contain errors. Over 65 million people In the United States have criminal history records. Some errors create a false positive and others a false negative. Either result has great consequences to the individual and to society.

The numbers are staggeringly large. Nationwide, law enforcement made an estimated 12,196,959 arrests in 2012.² As of August 2014 the FBI had 77.7 million individuals on file in its Master Criminal Data Base out of the total U.S. population of 311 million people. The FBI adds between 10,000 and 12,000 individuals per day to the MCDB. Nearly one third of all adults are in the FBI data base.³

The records at FBI's National Crime Information Center (NCIC) are accessed around the clock, every day of the year. Inquiries set a single day record of 12.2 million on July 2, 2012.⁴

² **Crime in the United States**, FBI Criminal Justice Information Service, Uniform Crime Report <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> For more information on arrests in prior years go to http://ojjdp.gov/ojstatbb/ezaucr/asp/ucr_display.asp

³ The WSJ, August 18, 2014, *As Arrest Records Rise, Americans Find Consequences Can Last a Lifetime* Bary Fields and John R. Emshwiller. <http://www.wsj.com/articles/as-arrest-records-rise-americans-find-consequences-can-last-a-lifetime-1408415402>

⁴ <http://www.fbi.gov/about-us/cjis/ncic> NCIC has operated under a shared management concept between the FBI and federal, state, local, and tribal criminal justice users since its inception. There are two facets to the shared management concept—policy and functional. The policy facet provides a means for user input on NCIC policy through the Criminal Justice Information Services (CJIS) Advisory Policy Board. The board enables NCIC users to make recommendations to the FBI Director for policy and operational enhancements to the system. The CJIS Division actively promotes the use of the system and its benefits through daily interaction with users—whether by phone, video teleconference, or e-mail; attendance at meetings and seminars; and via the advisory process. The functional facet provides a means for agencies to access NCIC. The FBI provides a host computer and telecommunication lines to a single point of contact in each of the 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, and Canada, as well as federal criminal justice agencies. Those jurisdictions, in turn, operate their own computer systems, providing access to nearly all local criminal justice agencies and authorized non-criminal justice agencies nationwide. The entry, modification, and removal of records are the responsibility of the agency that entered them. The CJIS Division serves as the custodian of NCIC records.

What percentage of criminal records or rap sheets contains errors?

We do not know for certain and we do not know the percentage of errors that have serious consequences.

In New York, in 2013, the Legal Action Center found that 30 percent of the RAP sheets reviewed contained at least one error. With nearly 7.1 million criminal records that translates to 2.1 million RAP sheets that contain errors. The City University of NY warns that this number could be even higher as a survey done by the Bronx Defenders found a 60% error rate among its clients. Other studies also suggest the number of errors is significant.⁵

What is the Consequence of errors to individuals and to society?

Errors matter to both. On a micro level they affect individuals and on a macro level all society.

To Michael DuCross the consequence of an error cost him five months in jail. "*[He] *was stopped for a routine traffic violation, when a check with the NCIC showed that he was AWOL from the Marine Corps. DuCross was arrested and held for five months before it was found that he had not been AWOL at all, but had been discharged legitimately.*"⁶

The macro effect on society affects all of us. According to an article in the Wall Street Journal⁷, an analysis that it commissioned Prof. Tia Stevens Anderson of the University of South Carolina to perform of a 16 year long US Bureau of Labor Statistics Survey that tracked 7300 randomly selected people into their 20s. She found:

- that 40 percent of male subjects had been arrested at least once by the age of 23, with higher percentages for Black and Hispanics,
- that 47 percent of those arrested weren't convicted and that in more than a quarter of the cases the subjects were not even formally charged,

⁵ **The Human Cost of Computer Errors**, Michael McFarland S.J. Santa Clara University, Markkula Center for Applied Ethics. "These databases are used to make many critical decisions affecting peoples' lives. Someone can be arrested and detained or denied a mortgage or the use of a credit card based on the data stored in them. Yet the sheer size of these databases, as well as the procedures used to collect process and maintain the data in them, ensure that they will contain many inaccuracies. A study done by Kenneth Laudon for the Office of Technology Assessment (OTA) found that only 25.7 percent of the records sent by the FBI's identification division were "complete, accurate and unambiguous." A higher percentage, about 46 percent, of the criminal history records in the NCIC met these standards. When Laudon checked a sample of open arrest warrants on file with the FBI against records in the local court houses where they originated, he found that over 15 percent of them were invalid, either because there was no record at all of them or they had already been cleared or vacated. Thus 15 percent of the warrants on record put their subjects at risk of being arrested for no justifiable reason."
<http://www.scu.edu/ethics/practicing/focusareas/technology/internet/privacy/computer-errors.html>

⁶ <https://www.coursehero.com/file/p6ch4n/Rogan-was-mistakenly-arrested-and-an-NCIC-file-was-made-about-him-The-file-was/>

⁷ The WSJ, August 18, 2014, *As Arrest Records Rise*

- that persons arrested but not convicted earned lower salaries than those who had not been arrested,
- that 95% of those without an arrest graduated from high school or earned an equivalent diploma verse 84.4% who were arrested but not convicted,
- And, for college degrees the disparity was 37% versus 14%.
- Other disparities also exist for households below the poverty line and for home ownership.

This suggests arrests stigmatize people even when no charges are filed, charges are dismissed or the person is found not guilty. They are disadvantaged in income, education, and housing.

Both individuals and society pay the price for errors.

Individuals are denied opportunities and society is denied the greater educational attainment and earning power these individuals would otherwise achieve for themselves and their families. The societal cost is also paid because of the greater proportional impact on Blacks and Hispanics.

What are the errors? Here are a few examples.

Lack of Disposition Information. Arrests are supposed to be recorded and forwarded by a state central repository to the FBI for inclusion in its *Interstate Identification Index (III or "Triple-I")*. It is an index of federal and state offenders, records of persons arrested for felonies or misdemeanors under either federal or state law.⁸ At the time of the U.S. Attorney General's Report in 2005 only 50% of III arrest records had a final disposition. This means that a state's central repository either did not submit disposition information or that it did not submit biometric information sufficient to associate a disposition with an arrest record.

Records may have improved since the 2005 report but disposition information from both the courts and prosecutors is still frequently missing. According to the February 2015 report to *Congressional Requesters* the GAO stated that in 2012 10 states reported that 50% or less of their arrest records had final dispositions. This results from prosecutors and courts failing to report decisions to not charge, dismissals, acquittals or other dispositions to central repositories.⁹

Some rap sheets contain erroneous information. *Inaccurate data can arise from simple data entry errors, from sloppy data collection at the source, or from the misunderstanding or misinterpretation of information, either at its origin or where it is used.*

⁸ The Attorney General's Report on Criminal History Background Checks, DOJ, June 2006 p.15

⁹ Improving Access to and Integrity of Criminal History Records by Peter M Brien, Bureau of Justice statistics, July 2005. <http://www.bjs.gov/content/pub/pdf/iaichr.pdf>

Data can also be erroneous or misleading because it is incomplete. Sometimes the basic facts that are stored in the database may be accurate, but some critical supporting material is left out, either because it was neglected or unknown or because it did not fit into the database design.

*Another source of error is fraud. "Identity theft," in which malefactors collect enough personal information about victims to be able to masquerade as them^{***10}*

Some RAP sheets contain information that does not pertain to the person.

Correcting an error is easier said than done.

"There is a myth that if you are arrested and cleared that it has no impact," says Paul Butler, professor of law at Georgetown Law. "It's not like the arrest never happened."¹¹

The burden to seek correction of a criminal record is on the individual, not the government. It is costly and time consuming. No one person or office is responsible for making corrections.

In October 2012 **Jose Gabriel Hernandez** was arrested at his home for sexually assaulting two teenage girls. It was a case of mistaken identity and the prosecutor dropped the charges. Hernandez assumed that the authorities would correct the record. But he learned it was necessary to hire a lawyer and seek expungement. He did not have the money to do so. He and his wife were paying the non-refundable \$22,500 paid to a bail bondsman to secure a \$150,000 bond enabling him to be released from jail.¹²

Precious Daniels of Detroit was rejected for a temporary job with the Census Bureau in 2010 and told that a criminal background check turned up a red flag. She and others had been arrested at a protest and released on posting \$50.00 bail. She was never charged. The Census Bureau gave her 30 days to obtain the records to prove that her case was resolved without conviction. She went to the court and was told that no record of her arrest existed. She did not get the job.¹³

In 2013 Barbara Ann Finn, a 74-year-old great-grandmother and a resident of the area since 1985, applied for a part-time job as a cafeteria worker in a Maryland school system. The school system notified her that the FBI check matched her prints to a 1963 arrest of someone with a name she did not recognize. She thought the incident may have occurred when she and another girl were arrested in Philadelphia. She said the police took both of them in custody and that she

¹⁰ () Missing the source reference

¹¹ The WSJ, August 18, 2014, *As Arrest Records Rise*,

¹² The WSJ, August 18, 2014, *As Arrest Records Rise*,

¹³ The WSJ, August 18, 2014, *As Arrest Records Rise*,

was released without any action. The record of her arrest does not exist.¹⁴ She can neither show that no charges were brought nor seek expungement of a record that does not exist.

A "hanging arrest" problem bedeviled Kevin Cleare, who spent five years in prison for attempted robbery and discovered, as he tried to re-enter society, that three arrests that were erroneously listed on his rap sheet as open and pending — even though he was in custody when the arrests supposedly took place.

According to an article in the NY Daily News of March 10, 2015 it took *Cleare seven years to get the matter cleared up, with help from a paralegal and a senior attorney from the nonprofit Legal Action Center. The odyssey included a trip to the Manhattan precinct where he'd been arrested (the cops threw him out); a visit to One Police Plaza (same treatment); an unanswered letter to the NYPD's Deputy Commissioner for Legal Affairs; and a meeting with the Manhattan District Attorney's Office, which finally sent a letter to the state Dept. of Criminal Justice Services confirming that the open arrests didn't belong on Cleare's rap sheet.*¹⁵

Other efforts to reform the criminal justice system are underway.

Efforts to improve reentry and reduce recidivism are underway across the country. These efforts take many forms. State criminal codes are being revised in states to correct the excesses of the 'war on crime' of a prior era.

Improving the accuracy of criminal records is one part of a broader effort to improve criminal justice.

Since 1995 the National Criminal History Improvement Program has granted almost \$600 million to the states to improve the quality, timeliness and accessibility the States' criminal history records. This has resulted in some improvement in states reporting through their central repository.^{16 17}

Need for State Action

Historically, law enforcement has been primarily a state responsibility in our system of federalism. The work of ULC supports the states' federalism responsibilities by drafting uniform acts that recognize a state's uniqueness while simultaneously supporting uniformity where it is necessary or beneficial. States have a responsibility and a critical role in improving the accuracy of criminal records. This committee's responsibility is to draft an act that enables states to fulfill their responsibility in our federal system.

¹⁴ The WSJ, August 18, 2014, *As Arrest Records Rise*,

¹⁵ <http://www.nydailynews.com/opinion/errol-louis-rap-sheets-riddled-errors-article-1.2143329>

¹⁶ <http://www.bjs.gov/index.cfm?ty=tp&tid=4>

¹⁷ <http://www.bjs.gov/index.cfm?ty=tp&tid=471#Funding>

Obligations

Citizens have an obligation to obey the law. Governments have a moral and political imperative to provide justice by correcting errors.

It is evident that these mutual obligations are not always satisfied. Some citizens commit crimes and pay the price - acquiring a criminal record. Some acquire an arrest record but have not committed a crime. When criminal records are in error it is the duty of the government to correct the record and remediate the consequences of the inaccuracy.

As one of the observers to the study committee wrote "We applaud the Study Committee for discussing accuracy issues because accurate records are in everyone's best interest."

Expectations of this meeting

Identify resources, issues, and sense of direction the committee members wish to pursue.

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