

TO: Uniform Law Commission

FROM: Robert J. Tennesen, Committee Chair
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RE: Uniform Criminal Records Accuracy Act

I. Introduction

Criminal records are a large and growing part of American life.¹ This project reflects the importance of these data – for both law enforcement and civilian purposes – and focuses on improving the accuracy of criminal records.² While many organizations play a role in promoting accurate criminal-history-record information, no one entity or jurisdiction has the authority, responsibility or control necessary to fully regulate this system. Our task is to devise legislation that can broadly encourage improvements in this area using the structures and authorities already in place in many jurisdictions. As noted in our previous, similar memos and in the act itself, we are far from the first group to undertake efforts in this area.³ Yet we believe that the Uniform Law Commission is uniquely positioned to make a distinctive and positive contribution through legislation.

In light of feedback from Commissioners during the 2017 annual meeting in San Diego, the Drafting Committee made various changes to the draft act. For example, the Drafting Committee removed denial of access to criminal-history-record information as a sanction under the act, narrowed the definition of biometric information by tethering it to other law requiring or permitting the use of such information for the purpose of identification, and deployed “procedures” instead of “rules” in an effort to allow for a more efficient administration of the act. The goal of

¹ 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.”); Jo Craven McGinty, *How Many Americans Have a Police Record? Probably More Than You Think*, WALL ST. J., Aug. 7, 2015, available at <http://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>.

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

³ 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); Draft Uniform Criminal Records Accuracy Act, Section 101, cmt.

the act, however, remains unchanged and squarely focused on the accuracy of criminal-history-record information.

II. Background

Over 65 million American have a criminal record.⁴ This estimate includes records relating to a wide range of conduct – from felonies to misdemeanors – at the state and local levels. While the scope is broad, the actual number is subject to some debate.⁵ In 2016, for example, one survey of all fifty states, American Samoa, Guam, and Puerto Rico reported a total of 110,235,200 persons in their criminal history files.⁶ In 1993, 79% of all criminal records were automated; by 2016 the rate had risen to over 96%.⁷

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.

Criminal-history-record information may be generated at the very first encounter between an individual and law enforcement, often at the time of arrest. In many cases, data are also gathered relating to incidents in which no arrest takes place (*e.g.*, intelligence collection; “stop and frisk”). Much like the first loose pebble that eventually leads to an avalanche, these initial records are joined with other data as the individual moves through the criminal justice system. The complete file for the incident will likely include information on charges, bail, pretrial detention, court processing, motions practice, and, for some cases, conviction and sentencing. The precise mix of information – as well as the names, formats, and structure – will vary by jurisdiction. Of particular importance to this conversation will be the records relating to final criminal justice outcomes, such as dismissals and convictions.

Most fundamentally, accurate criminal-history-record information is essential for a properly functioning criminal justice system. Errors can result in a wide array of problems for law enforcement officials and the citizens they serve.⁸ At the same time, criminal-history-record information is 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

⁴ 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

⁵ See, *e.g.*, JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015). 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>.

⁶ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SURV. OF ST. CRIM. HIST. INFO. SYS, 2016 (Jan. 2018), <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf> [hereinafter BJS State Survey].

⁷ See Bureau of Justice Statistics, U.S. Dep’t of Justice, Surv. of St. Crim. Hist. Info. Sys., 1993 (1995), <https://www.bjs.gov/content/pub/pdf/Schis93.pdf>; see also BJS State Survey.

⁸ See, *e.g.*, Alan Feurer, *Cleared of a Crime but Hounded by a Warrant*, N.Y. Times (March 28, 2016) (“If Kafka had lived in today’s New York, he might have recognized the nasty little tale of Nicholas Bowen and the wrongful warrant that would not go away.”), available at <http://www.nytimes.com/2016/03/29/nyregion/cleared-of-a-crime-but-hounded-by-a-warrant.html? r=0>.

variety of professions and careers, numerous types of financial relationships, and to preclude individuals with a criminal history from accessing public services to which they are not entitled.

To meet these demands, criminal-history-record information is maintained – and access is provided – by both public and private entities. Online, open access to criminal dockets, custody status, and priors arrests are being made available by many agencies.⁹ The wisdom of these applications is well beyond the scope of this project. We simply note that these activities are, and have been, taking place. In every instance, however, accurate criminal history data are essential to the efficient and fair operation of the systems that rely upon this information. Our focus, therefore, is on ensuring that the underlying criminal-history-record information, given its potentially meaningful and lifelong consequences, is 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 and other concerns 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.”¹⁰ As of 2016, 21 states (up from 16 in 2006) had more than 80% of all their arrest records include final dispositions; the national average is 68%.¹¹ These errors of omission or incompleteness could inappropriately harm an individual, either by implication or in practice, by failing to provide a complete picture of the criminal proceedings – and their outcomes – filed against an individual.

On the other hand, at least some arrest records are incomplete because they are not properly connected to the subject individual. In many cases, this is because of the absence of biometric information in the official file. Commonly, fingerprint data are used to ensure that all of the

⁹ For example, the entirety of the public portion Pennsylvania’s criminal docket may be found at <https://ujportal.pacourts.us/docketsheets.aspx>. Dockets are searchable by defendant, county, docket number, and others. Many other jurisdictions offer similar levels of access.

¹⁰ Study Committee Report at 4.

¹¹ See, e.g., BJS State Survey; Bureau of Justice Statistics, U.S. Dep’t of Justice, *Surv. of St. Crim. Hist. Info. Sys.*, 2006 (Oct. 2008), <https://www.ncjrs.gov/pdffiles1/bjs/grants/224889.pdf>; U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS*, 18-19 (2015), available at <http://www.gao.gov/assets/670/668505.pdf> (citing U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2012* (2014) and U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS* (2006)).

records for an individual – but only that individual – are connected within the many criminal justice databases. In other words, some states will be unable to report all of a subject individual’s arrests, convictions and sentences because there is no positive fingerprint identification. For example, Pennsylvania (which appears to be a high-performing state in this regard) fingerprinted just 87.5% of all cases in the fourth quarter of 2017.¹² Of the 7,107 cases not fingerprinted during that quarter, 22% were for felonies. It is our understanding that cases without fingerprints often remain in a form of limbo and cannot be reported by the central repository. The alternative to biometric identification, matching based on names, date of birth and other indicators that may rely on truthful self-identification, is also fraught with problems. Matches can be made using the exact data provided or close matches; these two approaches to linking data have costs and benefits. In all cases, 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.

It was in response to these concerns, raised by the American Bar Association as well as other experts, that the Uniform Law Commission approved this project. With the help of many outside stakeholders, the Drafting Committee has submitted the proposed Uniform Criminal Records Accuracy Act.

IV. Selected Highlights of the Draft Uniform Criminal Records Accuracy Act.

a. *Principles.* The act is premised on three principles:

- i. Society at large has a vital interest in the accuracy of criminal-history-record information.
- ii. Subjects are entitled to have the information kept about them under this act be accurate criminal-history-record information.
- iii. The government has an obligation to ensure that the criminal-history-record information that it collects, stores, maintains, submits, and disseminates is accurate.

Reasonable minds may and do differ on how to implement these principles, but they are at the core of what the Drafting Committee attempted to accomplish.

b. *Multiple points of data collection and reporting.* The draft widely distributes responsibilities for capturing and reporting relevant information, including biometric (typically fingerprints) and disposition information. We believe that this “belt-and-suspenders approach” is warranted given the wide variation of fingerprint-collection compliance rates between and within states, as well as the large number of missing pieces of disposition information present in almost every jurisdiction examined during the course of this project. In many ways, this requirement is the lynchpin of the entire act. If successfully implemented, this should increase the accuracy of criminal records going forward.

c. *The role of the courts.* To fully implement the multiple points of data collection strategy, we believe that the process – and the act – must involve the courts. Including the courts

¹² PA Criminal Justice Advisory Boards Data Dashboards, Pennsylvania Commission on Crime and Delinquency, available at: <https://pacjabdash.net/Dashboards/tabid/2013/Default.aspx>.

in the data collection and reporting process is crucial to an effective criminal-history-record information system. Courts are, after all, responsible for the creation – and recording – of many of the most vital types of disposition data. As such, the draft includes courts in the definition of a “contributing justice agency,” which must collect and report relevant data. The Drafting Committee was sensitive to separation of powers concerns. As such, the Drafting Committee has included guidance in a comment for those jurisdictions interested in exempting their courts or giving their courts the option to opt out.

d. *Proactively addressing mistaken identity as a source of inaccuracy.* Mistaken identity is a major concern, both as substantive a threat to victims and as a systemic challenge to the accuracy of criminal-history-record information. The draft proposes the creation of a voluntary mistaken identity prevention registry that is modeled on identity theft-specific registries managed by several states and the federal government. The registry proposed in this draft is designed to prevent mistaken arrests, confusion of one individual with another with another during criminal-history-record information searches, and the creation or perpetuation of inaccurate criminal-history-record information. When properly implemented, the registry should prevent individuals who are victims of mistaken identity from being unduly burdened (*e.g.*, being confused with an individual who has an active criminal warrant during an unrelated traffic stop). We are, however, very sensitive to the fact that for this proposed system to work, the government will gain access – admittedly on a voluntary basis – to yet more data, including biometric information, about members of the general public. The Drafting Committee tried to structure protections that should limit the potential for abuse and overreach while still accomplishing the harm reduction and accuracy improvement goals.

e. *Oversight through checks and balances.* There are several oversight functions, such as establishing procedures and conducting regular audits, embedded in the draft. We believe strongly in the value of a checks-and-balances approach and want an agency or individual somewhat removed from the day-to-day operation of the criminal-history-record information system to have a significant role in overseeing the functioning of that system. The agency or individual best equipped to take on these tasks can vary significantly. In Pennsylvania, for example, the Attorney General would have the authority and resources to fulfill these requirements. In other states (*e.g.*, Minnesota), the same office may lack those abilities, and may not be an appropriate authority for these purposes. After extensive discussion – and at the urging of the representative of the National Association of Attorneys General – the Drafting Committee settled on the concept of a “responsible agency or individual” for non-audit functions and a “senior elected or appointed official responsible for governmental oversight, audit, or integrity,” for audit functions. Although these phrases are not elegant, they communicate the different functions envisioned by the Drafting Committee, while still providing each state with the necessary flexibility to fill these positions appropriately in light of its own constitutional structure and political landscape. Appropriate legislative notes are provided.

f. *Costs.* The Drafting Committee was consistently sensitive to the cost of implementing the draft act. The Drafting Committee rejected or narrowed a variety of suggested provisions because of the potential cost. As noted above, a recent change moved from “rules” to “procedures” because the Drafting Committee believed that, in at least some jurisdictions, using “procedures” instead of “rules” will allow for a more streamlined and less expensive process. The

resulting draft is focused on increasing accuracy in as economical a fashion as possible. The Drafting Committee, however, recognizes that improving this accuracy of criminal records will not be free and that the errors in the current system extract a real cost, although that expense is difficult to quantify and, at times, even see. The costs of failing to address inaccurate criminal records – to law enforcement, to individual liberties and through the unnecessary expenditure of scarce public resources – are significant.¹³ Ultimately, we tried to remain true to the principles articulated above, including that, “[t]he government has an obligation to ensure that the criminal-history-record information that it collects, stores, maintains, submits, and disseminates is accurate.” We believe that the expense of meeting that obligation, while not cost-free, is money well-spent.

¹³ Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOWARD LJ 1 (2016).