

TO: ULC

FROM: Robert J. Tennessen, Committee Chair
Steven L. Chanenson, Reporter
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DATE: May 31, 2016

RE: Preliminary Background and Selected Issues Concerning the Draft
Criminal Records Accuracy Act

I. Introduction

Criminal records are a large and growing part of American life.¹ Our project reflects the importance of these data and revolves around improving the accuracy of criminal records.² Given the wide range of justifications for, and manners in which, criminal history record information can be created, collected and disseminated, this is a daunting task. While many organizations play a role in ensuring accurate criminal history record information, no one entity or jurisdiction has full authority, responsibility or control. Our task is to devise legislation that can encourage improvements in this area.

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

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.

history record information. Many of these topics are complex; several of them remain areas of discussion and debate within the Drafting Committee.

II. Background

Over 65 million American have a criminal record.³ 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.⁴ 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.⁵ 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 created at the very first encounter between an individual and law enforcement, often at the time of arrest. In many cases, information is 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 leads to an avalanche, these initial records are joined with other data as the

³ 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

⁴ 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>

⁵ U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2012 (2014), available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>

individual moves through the criminal justice system. The complete file will likely include information on charges, bail, pretrial detention, court processing, motions practice, and, for some cases, conviction and sentencing. The precise mix will vary by jurisdiction. Of particular importance to this conversation will be the records relating to 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.⁶ 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 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.

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.⁷ 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. Our focus is on ensuring that the

⁶ 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.

⁷ 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.

underlying criminal history record information, given the 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 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."⁸ As of 2012, 50% or less of the arrest records in 10 states included final dispositions; 20 states (up from 16 in 2006) had more than 75% of their arrest records include final dispositions.⁹ These errors of omission or incompleteness could

⁸ Study Committee Report at 4.

⁹ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND CHECKS, 18-19

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 due to 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 2014.¹⁰ 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 based on names, date of birth and other indicators that may rely on truthful self-identification, are also fraught with even more 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.

(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)).

¹⁰ PA Criminal Justice Advisory Boards Data Dashboards, Pennsylvania Commission on Crime and Delinquency, available at: <http://www.pacjbdash.net/Dashboards/tabid/2013/Default.aspx>.

IV. Selected Topics of Note in the Current Draft.

a. *Animating Principles.* This act is premised on at least three

Principles:

1. Society at large has a vital interest in the accuracy of criminal history record information.
2. Subjects of criminal history record information are entitled to have that information be accurate.
3. The government has an obligation to collect, maintain, and disseminate accurate criminal history record information.

Reasonable minds may and do differ on how to implement these principles, but they may be helpful to remember when considering the merits of the draft.

b. Identification of Appropriate Oversight Authority. There are several roles that must be filled within the framework outlined in the draft. Significantly, an agency or individual will be responsible for establishing certain regulations, reviewing challenges brought by individuals, conducting regular audits, etc. As mentioned in the discussion notes, 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 take the lead in overseeing the functioning of the 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 reporters abandoned their initial effort to use the term Attorney General, even in brackets, in the text of the act. Instead, the Drafting Committee has tentatively settled on the concept of a “responsible agency/individual” for non-audit functions and a “senior elected or appointed official responsible for governmental oversight, audit, or integrity,” for audit functions. While these phrases are not elegant, they communicate the different functions envisioned by the Drafting Committee, while providing each state with the necessary flexibility to fill these positions appropriately in light of its own constitutional structure and political landscape.

- c. *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.

d. *The role of the courts.* Including the courts 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 essential disposition data. As such, the draft includes courts in the presumptive definition of a “contributing justice agency,” which must collect and report relevant data. The Drafting Committee is sensitive to separation of powers concerns and provided the highest court in the state the ability to opt out of this provision on constitutional grounds. The discussion notes provide alternative language for an opt-in provision.

e. *Proactively addressing mistaken identity as a source of inaccuracy.* Mistaken identity and identity theft are major concerns, both as substantive threats to victims and as systemic challenges 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 some states and the federal government. The registry proposed in this draft is designed to afford relief to individuals without a criminal record, or at least

without a particular criminal record, from being confused with the person who does have that criminal record. In doing so, it should make it more difficult for inaccuracies based on identity theft or overt fraud (e.g., an arrestee provides the name of an innocent, uninvolved individual at the time of arrest) to find their way into the criminal history record information system. At the same time, this approach should permit the victims of identity theft 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 identifying information, about members of the general public. We tried to structure protections that should limit the potential for abuse and overreach while still accomplishing the harm reduction and accuracy improvement goals.

f. Institutional Sanctions. It is clear that any program to increase the overall accuracy of criminal history record information systems will require additional efforts surrounding the collection and management of data. The Drafting Committee engaged in extensive discussions about the proper role, if any, for institutional-level “carrots and sticks.”

Historically, various actors, including the federal government,¹¹ have provided financial incentives to improve criminal history record information systems around the country. The draft continues to encourage positive support for contributing justice agencies on the front line and directs the central repository provide remedial training for agencies failing to meet minimum standards. The draft also envisions that annual audit information – including deficiencies – will be widely and publicly disseminated in an effort to goad agencies to improve when needed. Most of the sanctions, however, are focused on individuals, although institutional-level injunctions are authorized. The Drafting Committee discussed the appropriateness of providing broader institutional-level sanctions. If a particular contributing justice agency – perhaps a police department or a prosecutor’s office – is simply not collecting fingerprints or submitting disposition information pursuant to the act, should other remedies be available? In other words, should the act provide a suite of “sticks,” perhaps related to official authorization to act, provision of resources, or ongoing fiscal support, in an effort to prompt noncompliant contributing justice agencies to fulfill their responsibilities? While recognizing the problem, the Drafting Committee did not embrace this approach.

¹¹ 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>.

We are far from the first group to undertake efforts in this area,¹² although we believe that ULC is uniquely positioned to make a distinctive and positive contribution through legislation. It would be both substantively meaningful and 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. We look forward to those conversations.

¹² 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).