Chapter 5

Technology for Record Keeping and Information Sharing

The criminal justice system relies on information at each stage of the process. The information processing system has two primary roles:

1. processing offender-relevant data (i.e., individual criminal records) in support of criminal justice decisions; and
2. processing system-relevant data in support of management and administrative decisions (e.g., manpower allocation and case load projections).

This report, however, deals only with the first of these roles. In this regard, criminal justice officials have sought technologies that will improve:

- the collection, maintenance, processing, and analysis of information;
- the communication or dissemination of data; and
- the quality, accuracy, completeness, and reliability of the data.

Criminal justice decisions at every level are built on such information as the initial offense and arrest reports, which describe the nature of the crime and the characteristics of the victim, and the offender's criminal history record. The seriousness of the offense and the criminal history of the offender are critical to making informed decisions.[1] Contemporary sentencing and parole guidelines have especially brought to light the importance of the data quality, for it largely shapes the disposition an offender may receive at bail, sentencing, and parole release, and also impinges on the rights of those never convicted or even formally accused of crime.

Other things being equal, the more serious the offense, the greater the likelihood that the prosecutor will formally charge and prosecute the suspect, the judge will set a high bail or no bail with the suspect confined until trial, the judge will sentence to confinement, the prisoner will be housed in maximum security, and the parole board will deter release. But in addition, the more serious the offender's prior criminal record, the greater the probability of adverse decisions throughout the system. Given the importance of criminal history records, a central issue is the quality of those records. Recent studies have called into serious question both the completeness and accuracy of criminal history records.

1D. Black and A. Reiss, "Patterns of Behavior in Police and Citizen Transactions, Studies *in Crime and Law Enforcement in Major Metropolitan Areas* (Washington, DC: U.S. Government Printing Office, 1977); R. Friedrich, "The Impact of Organizational, Individual, and Institutional Factors on Police Behavior, " Ph.D. dissertation, University of Michigan, 1977; J. Goldkamp, Two *Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979); D.M. Gottfredson, C.A. Cosgrove, L.T. Wilkins, J. Wallerstein, and C. Rauh, *Classification for Parole Decision Policy* (Washington, DC: U.S. Government Printing Office, 1978); M.R. Gottfredson, "The Classification of Crime and Victims, " Ph.D. dissertation, State University of New York at Albany, 1976; M.R. Gottfredson and D.M. Gottfredson, *Decisionmaking in Criminal Justice: Toward the Rational Exercise of Discretion* (Cambridge, MA: Ballinger, 1988); J. Hogarth, *Sentencing as a Human Process* (Toronto: University of Toronto Press, 1971); L.P, Sutton, *Variations in Federal Criminal Sentences: A Statistical Assessment at the National Level* (Washington, DC: U.S. Govemrnent Printing Office, 1978).

REPORTING AND DATA QUALITY

The completeness, accuracy, and reliability of such information became an important public policy issue in 1967 when the *Report of the President Coremission on Law Enforcement and the Administration of Justice* cited inadequate reporting and inaccurate data as a seri-

ous problem.[2] The commission suggested a national computerized repository to collect summary criminal history information.[3] Five years later, the National Advisory Commission on Criminal Justice Standards and Goals also called attention to the data-quality problem.' And, also in 1973, the General Accounting Office criticized sharply the reporting levels in State criminal history record systems, noting that many arrests and dispositions were not reported to the State central repositories.[5]

Fifteen years later, according to most sources, disposition reporting is still characterized as too little, too late. In addition, there are serious problems with the level of reported arrests and the accuracy of criminal history records. This is in spite of the fact that automation has brought about great improvements in data quality.[6] Automated systems make it more practical and economical to implement tracking, editing, and disposition monitoring systems, as well as transaction logs and other data-quality techniques.

Further, the telecommunications components of automated systems make the reporting of arrests and disposition easy, economical, and reliable. The Office of Technology Assessment, in a 1982 survey, found that automated State repositories achieved a significantly higher average arrest reporting rate (81.6 percent) than did nonautomated systems (71.8 percent). There was a similar difference for disposition reporting. Repositories using automated systems had a 70.6 percent average disposition reporting rate, while repositories using manual systems had a rate of 56.3 percent.[7]

While some jurisdictions have been able to design and operate systems with relatively high disposition reporting levels, others have not. Most States with good quality records police the quality of criminal history record data as it is entered into their systems, including uniform documentation, review and verification, and tracking systems. But many States have not adopted these procedures.

[2]The President's Commission on Law Enforcement and Administration of Justice, ***The Challenge of Crime in a Free Society*** (Washington, DC: U.S. Government Printing Office, 1967), pp. 244-271.

[3]President's Commission on Law Enforcement and Administration of Justice, ***Task Force Report: Science and Technology*** (Washington, DC: Government Printing Office, 1967), p. 75.

[4]U.S. National Advisory Commission on Criminal Justice Standards and Goals, ***Report on the Criminal Justice System,*** p. 114 (1973). See also T.J. Madden and H.S. Lessin, "Privacy: A Case for Accurate and Complete Criminal History Records," ***Villanova Law Review*** 22, pp. 1191, 1198.

[5]U.S. Congress, Office of Technology Assessment, ***An Assessment of Alternatives for a National Computerized Criminal History System*** (Springfield, VA: National Technical Information Service, 1982), p. 93 [Hereinafter cited OTA, ***Alternatives for a National CCH].*** Also, D.L. Doenberg and D.H. Zeigler, "Due Process v. Data Processing: An Analysis of Computerized Criminal History Information Systems," ***New York University Law Review 55,*** (December 1980), p. 1158.

[6]P. Woodard, ***State Criminal History Record Repositories: An Overview*** (Sacramento, CA: SEARCH Group, Inc., forthcoming). [A report prepared for the Federal Bureau of Justice Statistics.]

[7]OTA, ***Alternatives for a National CCH,*** op. cit., see note 176, p. 94.

DISSEMINATION OF FBI CRIMINAL HISTORY RECORDS

The Federal Bureau of Investigation (FBI) is allowed to disseminate criminal history records to State and local officials for employment and licensing purposes; it may also disseminate criminal records to some private sector employers, including federally chartered or insured banks, parts of the securities industry, the futures trading industry, and the nuclear power industry, with some conditions and constraints.[8] Under a "one-year rule" established by the Justice Department in 1974, because of congressional concern about the dis-

[8]"The Dissemination of FBI Criminal History Records for Employment and Licensing Purposes," A Staff Report, reprinted in ***Access to FBI Records for Employment and Licensing Purposes:*** Hearings before the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, 100th Cong., 1st sess., 1988.

semination of inaccurate records, the FBI may not disseminate any criminal record more than a year old unless it shows the disposition of the charge.

In September 1987, the FBI proposed that the one-year rule be eliminated. Opponents of the proposed change point out that the FBI's criminal history record, because it depends on voluntary submissions from States, is seriously lacking in completeness and accuracy. Approximately 50 percent of the arrest entries do not show the disposition of the case, and as much as 20 percent of the arrest-dispositional data that is shown may be erroneous. A report prepared by staff for use of the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary pointed out that fewer than half of arrests result in a conviction, and the subject is entitled to be presumed innocent.[9] Half of all requests for FBI criminal records are for employment and licensing purposes, and if an applicant for a job or a license is refused on the basis of an incomplete or erroneous FBI record, he or she may suffer a substantial penalty even though acquitted or even though the charge was dropped.

The congressional staff report noted that when an incomplete arrest record seems particularly relevant to employment being sought, the FBI can go back to the agency that submitted the record and inquire about its disposition; when it does make this effort, it receives disposition information within 3 days in 42 percent of the cases. The report therefore recommended that the one-year rule not be dropped, but that the FBI take steps to reduce to a minimum those cases where relevant criminal records must be withheld, by improving its procedures for obtaining disposition information.

[9] Ibid.

ELECTRONIC RECORDS AND DUE PROCESS

Virtually every court that has addressed the data-quality issue has found that criminal justice agencies have a duty to implement procedures reasonably designed to safeguard the accuracy and completeness of criminal history records. However, these courts have not unanimously, or clearly, articulated the source of this duty, the standards for establishing a breach of this duty, or the consequences of such breach.

The courts generally do not require criminal justice agencies to maintain or disseminate accurate records. Rather, the courts require them to adopt policies and procedures that are reasonably calculated to result in accurate records. If an agency fails to implement such procedures and if that failure causes some tangible harm to a person when records are used or disseminated, courts are likely to find a violation and provide the subject with a remedy.

A Federal court found in 1974 that a criminal justice agency has a positive duty to maintain Criminal history records in an accurate and reliable manner.[10] Later that same year, the District of Columbia Court of Appeals strongly implied that any statutory authorization to collect and disseminate criminal history records inherently required the agency to collect and

[10] 498 F 2d 1017, 1026 (D.C. Cir. 1974) (Menard II). This case chronicled Menard's 9-year struggle to remove his arrest record from FBI files, since he was released (by Los Angeles police) without being charged. Menard argued that because he had only been detained and not arrested the FBI was without authority to maintain a record of his encounter with the Los Angeles police. The Federal Court of Appeals for the District of Columbia stated that the FBI has a duty to be more than a "mere passive recipient" of records received from the State and local enforcement agencies, and also has a duty to carry out its record keeping operations in a reliable and responsible manner. Although the *Menard* court declined to speculate on the extent to which the U.S. Constitution requires the FBI to maintain accurate and complete records, the court did find that the Department of Justice's statutory authority to "acquire, collect, classify and preserve" criminal justice records under 28 U.S.C. 534 carries with it the responsibility to discharge this record keeping function reliably and responsibly and without unnecessary harm to record subjects. See also, Louis F. Solirnine, "Safeguarding the Accuracy of FBI Records: A Review of ***Menard v. Saxbe*** and ***Tarlton v. Saxbe***, " ***University of Cincinnati*** *Law* ***Review 44, (1975),*** pp. 325, 327.

disseminate those records in an accurate manner.[11]

But the notion that the U.S. Constitution requires criminal justice agencies to maintain accurate and complete criminal records suffered a setback 2 years later. The Supreme Court, in *Paul v. Davis,*[12] *1976,* held that a police chief could circulate a flyer to local merchants containing the names and photos of "active shoplifters" without running afoul of the subjects' constitutional rights. The Court said that the U.S. Constitution does not require criminal justice agencies to keep official files, such as arrest records, confidential. Moreover, even if dissemination of an official record under some circumstances could be of constitutional interest, tangible harm to the subject must be demonstrated before the dissemination could violate any constitutionally protected interest.

This decision did not address the question of whether the criminal justice agencies must maintain *accurate* criminal history records. But at least one Federal court has cited the 1976 decision as authority for arguing that subjects do not have constitutional interest in the handling of their criminal records. A Federal district court held that a person against whom charges were dropped shortly after his arrest had no constitutional interest that required the purging of the arrest entry from the FBI's files.[13]

Courts have continued to find that criminal justice agencies have a duty to make reasonable efforts to ensure the accuracy and completeness of criminal history records. It is unclear whether the legal basis for such a duty is constitutional. The same year the Supreme Court decided *Paul v. Davis,* for example, a Federal district court held that the FBI's failure to reflect an acquittal entered 27 months prior to the lawsuit constituted a breach of the FBI's duty to maintain accurate records."

Again, the district court did not commit itself about whether this duty derived from the Constitution or from the FBI's record keeping statute. The court said that it felt no need to identify the source or extent of the FBI's duty because the record keeping activity at issue violated "even a minimal definition of FBI responsibility. "[15]

A Federal district court looked to statutory law, the Federal regulations, the U.S. Constitution, and common law doctrines to support its determination that the administrator of the Rhode Island National Crime Information Center (NCIC) has a duty to establish reasonable administrative mechanisms designed to minimize the risk of inaccurate records.[16]

The courts have also pondered over the extent of the burden which the victim of such mistakes should carry in order to establish a breach of this duty. A California court said that a criminal justice agency does not have a duty to correct a record on the basis of an "unsubstantiated" claim that the record contains inaccurate or incomplete information.[17] The

[11] *Tarlton* v. *Saxbe* 507 F. 2d 1116, 1122, 1123 (D.C. Cir. 1974); this expanded the decision in *Menard.* The court implied that even in the absence of a statutory obligation, agencies have constitutional and common law obligations to ensure accuracy in the collection and dissemination of criminal justice information.

[12] 424 U.S. 693, 713 (1976); see also, M. Elizabeth Smith, "The Public Dissemination of Arrest Records and the Right to Reputation: The Effect of *Paul* v. Davison Individual Rights," ***American Journal** of Criminal Law 5* (January 1977), p. 72.

[13] *Rowlett* v. *Fairfax,* 446 F. Supp. 186, 188 (W.D. Mo. 1978). Moreover, the opinion criticized ***Tarlton v. Saxbe*** saying that *Tarlton* incorrectly implied that constitutional privacy and due process rights may give subjects an interest in the quality of data in their criminal history records.

[14] *Shadd* v. *United **States,*** 389 F. Supp. 721 (W.D. Pa. 1975), aff'd, 535 F. 2d 1247 (3rd Cir. 1976), cert. denied, 431 U.S. 919 (1977).

1[5]1 bid., p. 721.

[16] *Test* v. *Winquist,* 451 F. Supp. 388, 394 (D. R.I. 1978). 'he plaintiffs brought a civil darnage action against the East Providence police officers for deprivation of constitutional rights (false imprisonment) and for various State tort claims, including false imprisonment, libel and slander. The police officers, who had acted on out of date information, in turn, sued the regional administrator of the NCIC. The court decided that the arresting officers may, indeed, if found liable to the plaintiff, have a cause of action against the regional administrator of the NCIC for breach of a duty to provide accurate information. Whether this duty was established by statute, regulation, the U.S. Constitution or common law, the court did not specify.

[17] ***White v.** State* 95 Cal, Rptr. 175, 181 (Ct. App. 1971). The court denied a damage suit against the State repository for negligent record keeping and dissemination.

In some cases the courts have evidently blessed data quality settlements worked out by litigants. In those suits, the plaintiffs charged that they had been falsely arrested, based on inaccurate warrant information, thereby violating their constitu-

plaintiff must be able to demonstrate this, the court said, on some objective basis.

The courts have also considered the question of who is responsible for requesting that the FBI correct or amend State or local records held by the FBI. Consistently, courts have placed this burden on the subject of erroneous or inaccurate records, rather than on the agencies that collect, keep, use, and disseminate them. 'a In the absence of a specific statutory command to maintain accurate and complete records, a person must demonstrate some harmful use or dissemination of his or her records to have much chance of obtaining judicial relief.

If one can demonstrate the dissemination or use of inaccurate or incomplete criminal history records, an injunction can be obtained requiring the inaccurate or incomplete information to be corrected or expunged.[19] An agency may also be subject to an action under the Civil Rights Act (often called "Section 1983 Actions").[20] Section 1983 gives individuals the right to bring an action for deprivation of their Federal constitutional rights caused by persons acting under State authority. However, those bringing an action must surmount several legal hurdles. One must be able to demonstrate that the agency violated one's constitutional rights and that some tangible harm occurred as a result. One may still be unable to recover damages if the government can demonstrate that the State or local official acted reasonably and in good faith. The courts have generally held that the outcome depends on whether the agency made reasonable efforts to establish a record keeping system designed to safeguard against errors.

The most frequent result of a breach of an agency's duty to maintain accurate and complete criminal history information is a finding by a court that an arrest or search based on erroneous information is illegal. Virtually all such decisions find that a constitutional violation occurs as part of an improper arrestor search; that is, it does not rest directly on use of inaccurate or incomplete records, but an agency's breach of its duty to disseminate accurate and complete records may result in improper arrests or searches. An arrest made solely on the basis of an inaccurate NCIC entry, uncorrected for 5 months, was found to be a deprivation of liberty without due process of law. Therefore, any evidence seized as a result of such an arrest had to be suppressed."

Numerous other decisions have ordered the suppression of evidence obtained during the course of arrests based on mistaken information in an outstanding warrant file or in other types of criminal justice files. The courts have not set definitive rules on how much time lag

tional and civil rights. The settlement agreements reportedly set forth specific data quality procedures and criteria which the criminal justice agency must follow to ensure the accuracy of warrant files. D. Olmos, "Civil Rights Issues Fuel L.A.'s Warrant System Changes," *Computerworld*, Oct. 29, 1984, p. 10; D. Raimondi, "False Arrests Require Police To Monitor Systems Closely," *Computerworld*, Feb. 25, 1985, p. 23.

[18] The Sixth Circuit held in *Pruett v. Levi*, 622 F.2d 256, 258 (6th Cir. 1980), that a subject did not have a basis to sue the FBI merely because the FBI had refused to act on his generalized claim that the FBI was holding an inaccurate, locally generated criminal history record. He must first direct his claim to the appropriate State or local law enforcement agency, and if still aggrieved he may then direct a specific claim to the FBI. The Sixth Circuit also observed in *Pruett* that a simple claim that an agency is maintaining an inaccurate record, without alleging a specific, adverse effect from the use or dissemination of the record, does not, in light of the Supreme Court's decision in *Paul v. Davis,* create a cause of action. In *McKnight v. Webster,* 499 F. Supp. 420, 422 (E.D. Pa. 1980), a Federal district court set forth a slightly more detailed procedure for plaintiffs to follow in attempting to compel the FBI to correct allegedly inaccurate or incomplete criminal history records. A Federal prisoner, sought expungement of allegedly incomplete records maintained by the FBI and the local police. The court found that the FBI is not required to correct inaccuracies in State or locally created records unless the corrected information is supplied to it by the law enforcement agency, but does have an obligation to forward a request for correction of records to the appropriate State or local law enforcement agency. See also, *Hollingsworth v. City of Pueblo,* 494 F. Supp. 1039, 1040 (D. Colo. 1980), for the same result.

[19] L.N. Mullman, "*Maney* v. *Ratcliff*; Constitutional Law; Fourth Amendment; Computerized Law Enforcement Records," *Hofstra Law Review* 4 (1976), p. 881, p. 884.

[20] 42 U.S.C. 1983. This section of the Civil Rights Act reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action in law, suite in equity, or other proceeding for redress."

[21] *United States v. Mackey* 387 F. Supp. 1121, 1125 (D.Nev. 1975).

is permissible for the police, relying on out-of-date and therefore inaccurate information, to establish probable cause for an arrestor search. The growing use of computers to operate information systems seems to be encouraging courts to minimize allowable periods of delay.[22]

In judging the validity of an arrest or a search, the courts have used a standard that takes into account the good faith of the criminal justice agency as well as the officers in the field. Under Whiteley v. Warden,[23] the legality of an arrest must be evaluated not only on the basis of information used by the arresting officer, but also on information that was supplied to the officer. The accuracy and sufficiency of the data system must be considered. But when a warrant has been issued, an officer can rely on it unless it is objectively unreasonable to do so. Thus, arrests made under magistrate-issued warrants would be harder to challenge than arrests made without warrants.

On the other hand, in *People v. Ramirez,*[24] for example, a California court held that an arrest based solely on a recalled warrant was invalid and the fruits of a search incident to that arrest had to be suppressed. The court said that it is not enough for an officer in the field to rely on information communicated to him through "official channels." The test is the good faith of the law enforcement agency of which the officer is a part.

It is a well established principle of law that a defendant cannot be sentenced on the basis of materially false information. This principle applies to criminal history records that contain information relative to sentencing. Several courts have held that sentences based on false information from a defendant's criminal history record will result in the sentence being overturned and the defendant resentenced.[25]

The end result of all of these confusing precedents appears to be that neither law nor constitutional precedents have yet definitively adjusted to the information age. A criminal justice agency's duty to maintain or disseminate accurate and complete information has also been litigated in tort actions.[26] Thus, a fair reading of the case law suggests that as of the mid-1980's criminal justice agencies need not guarantee or ensure record accuracy, but have a duty to put in place a system that is reasonably designed to produce accurate and complete information. The courts, while more or less convinced of the existence of this duty, have not yet been clear as to whether its source is to be found in the U.S. Constitution. The many challenges to constitutional principles have not yet been resolved. The issue will no doubt reappear in court often in the years ahead.

---

[22] 470 N.E.2d 1303 (Ill. 1984). In *PetterSon v. United States*, 301 A.2d 67 (D.C. 1973), the court found that probable cause for an arrest existed when an officer relied on a list of stolen cars provided by a police radio dispatcher, which was, in turn, based on information from the National Crime Information Center's computer. The car at issue was reported stolen but had been recovered some 15 hours earlier, and the NCIC entry had not yet been updated to reflect the recovery.

[23] 401 U.S. 560 (1971).

[24] 194 Cal. Rptr. 454, 461 (1983).

[25] *United States v. Tucker*, 404 U.S. 442, 447 (1972).

[26] *Doe v. United States*, 520 F. Supp. 1200, 1202 (S.D.N.Y. 1981).