
Chapter 1

Summary

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Summary

Introduction

This report addresses four major areas:

- the status of criminal history record systems in the United States;
- the alternatives for a national computerized criminal history (CCH) system;
- the possible impacts of any such system; and
- relevant policy issues that warrant congressional attention to ensure that the beneficial impacts of a national CCH system are maximized and the possible adverse impacts controlled or minimized.

These areas are of concern because:

- criminal history records are a vital part of the criminal justice process;
- advances in computer and communication technologies can help to improve the completeness, accuracy, and timeliness of such records; and
- the use of criminal history records, particularly when exchanged-via a national system, can have important implications for public safety and the administration of justice, employment and licensure, Fed-

eral-State relationships, and civil and constitutional rights.

Until the 1850's, criminal history records in the United States were largely informal notes maintained by local police officers. Since that time, however, such records have become more formalized, centralized, widely used, and technology-based. Originally, criminal history records were known as "rap sheets." They contained information ranging from personal identifiers (e.g., height, weight, eye color, fingerprints, and/or identification numbers) to arrests (date, jurisdiction, and charges). The information contained in criminal history records also may include court disposition of charges, sentencing, incarceration, and the like.

While police were the earliest users of criminal history records, such records are now used to varying degrees at all stages of the criminal justice process by police, prosecutors, public defenders, judges, and probation officials, among others. They are also used for noncriminal justice purposes such as employment and licensing decisions and security checks.

Current Status of Criminal History Record Systems

Criminal History Record Repositories

Criminal history records are stored at the local, State, and Federal levels. Since 1924, the Federal Bureau of Investigation (FBI) has maintained a national repository of fingerprint cards and rap sheets in its Identification Division (known as Ident). Forty-nine of the fifty States now have their own criminal history record repositories.

The use of computers is already widespread. Ident has made progress in automating its own operations through the Automated Identification System (AIDS). As of October 1981, almost 6 million of Ident's criminal records had been automated (representing more than one-fourth of the individuals in the criminal file) and fingerprints for about 70 percent of the individuals in the file had been converted to a machine-readable (automated) format. Since 1971, the FBI has also maintained a

CCH file in its National Crime Information Center (NCIC), although only eight States currently keep records in this file. As of October 1981, it contained about 1.9 million records, including approximately 0.5 million Federal offender records.

At the State level, as of August 1982, 27 States had CCH files, 7 had an automated name index, and 16 had a completely manual system. Ten of the sixteen manual States are in the process of implementing an automated index, and two are implementing a CCH file. Also, the 27 States with CCH files accounted for about 85 percent of all criminal fingerprint card activity, and collectively maintained about 11.5 million CCH records as of September 1981. At the local level, most major metropolitan police departments use computer-based systems (19 have direct lines to NCIC).

For those 12 States in the process of implementing an automated name index and/or CCH file, the estimated time to completion ranged from 1 month, to 1 year, to an indefinite time period, due largely to variations and/or uncertainties in staffing and funding. With full implementation, all but four States would have at least an automated name index, and two of the four remaining manual States do have plans to automate.

Interstate Exchange of Criminal History Records

The exchange of criminal history records among the States and between the States and Federal Government can be accomplished in several ways. The exchange of records with Ident is almost entirely by mail, since Ident does not have direct communication lines to the States. Exchange with NCIC/CCH is almost entirely electronic, since NCIC has direct communication lines to all 50 States (49 of which are authorized to access the NCIC/CCH file) and to several Federal agencies. Use of the CCH file involves about 4.4 million transactions annually, but only about 3.5 percent of total NCIC traffic. Only eight States keep records in the CCH file. Of the 10 files maintained

in NCIC, the bulk of traffic involves the eight so-called "hot files," which furnish an electronic bulletin board capability used by law enforcement agencies to list wanted or missing persons or stolen properties (e.g., vehicles, guns, and securities). NCIC is currently testing the concept of an Interstate Identification Index (III) in which the NCIC/CCH file includes only records for Federal offenders plus a national index of State offenders, and the participating States maintain both single and multi-State offender records.

The exchange of criminal history records can also be accomplished via the National Law Enforcement Telecommunications System (NLETS), a computerized message switching network linking local, State, and Federal agencies. Operated by a nonprofit corporation controlled by the States, NLETS does not hold or manage record files, but provides the capability to switch *Criminal* history records among 49 of the 50 States. Some Federal agencies, notably the Treasury and Justice Departments, can exchange criminal history records over their own nationwide communication networks that interface with NCIC/CCH.

Use of Criminal History Records

Criminal history records are used at all levels of government, by all sectors of the criminal justice community, and increasingly by the noncriminal justice community as well. During fiscal year 1981, about 18 percent of Ident use was by law enforcement agencies, 29 percent by other criminal justice agencies (e.g., prosecutors, courts, and corrections), and 53 percent by noncriminal justice agencies (primarily for employment and licensing and security checks). About 33 percent of Ident use was by Federal agencies and 67 percent by State/local agencies.

Based on 1979 and 1982 OTA surveys, the use of State CCH repositories was roughly 56 percent by law enforcement agencies, 29 percent by other criminal justice, and 15 percent by noncriminal justice. Data from the 1981 III

pilot test suggest that NCIC/CCH is used almost entirely by criminal justice agencies—about 86 percent by law enforcement and 14 percent by other criminal justice (about 12 percent by Federal agencies and 88 percent by State/local agencies).

The widespread use of criminal history information throughout the criminal justice process has been confirmed by other user surveys conducted by OTA, the Department of Justice, the Florida Department of Law Enforcement, and dozens of independent researchers. The use of criminal history records becomes even more important in view of State bail and sentencing reforms that place greater reliance on criminal history information, and the many recommendations of the U.S. Attorney General's Task Force on Violent Crime that involve criminal history records. For example, in April 1982, the U.S. Senate Committee on the Judiciary approved legislation, recommended by the Task Force, requiring handgun purchasers to wait 14 days to pick up their weapons so that police departments will have time to conduct a criminal record check.

The picture is a little less clear with respect to noncriminal justice use. As noted above, the use of Ident is already greater for noncriminal justice than for criminal justice purposes, and as of August 1982, 7 of 45 States reported that noncriminal justice use of criminal history records accounted for more than 40 percent of total use. At least 14 States have recently enacted (since 1979) or have pending State legislation or regulations that further broaden noncriminal justice access. Delays resulting from the noncriminal justice workload reached the point where Ident suspended most State and local applicant services (for licensing and employment checks) for fiscal year 1982. These will be reinstated on October 1, 1982, but on a fee-for-service basis.

Multi-State Offenders

Based on 1979 research, OTA found that about 30.4 percent of individuals in the FBI Ident criminal file had arrests in more than

one State, which closely approximated a 1974 FBI estimate of 30 percent and a 1981 FBI estimate of 33 percent. Based on 1981 data available to OTA for eight States, multi-State offenders ranged from a low of about 3 percent to a high of 36 percent, with Federal offenders excluded. The average was about 12 percent, and only one State was above 16 percent. Nonetheless, the percentage of multi-State offenders appears to be significant. Whether the crimes committed by multi-State offenders tend to be more or less serious than those of single-State offenders could not be positively determined from information available to OTA. This is an area of possible further study.

Fingerprint Identification

Criminal justice practitioners believe that, at present, fingerprints are the only reliable and consistent basis for positive identification. The exchange of records based on names alone results in a high percentage of errors due to the frequent use of aliases and similarities among many common surnames. In a 1982 III pilot test, the FBI found that almost one-third of the matches between individuals and records were in error when based on name-searching techniques alone. Both Ident and State identification bureaus process fingerprint cards received from criminal justice agencies, but manual fingerprint processing is extremely time-consuming and labor-intensive, and therefore costly, especially at the high volumes presently experienced. A 1981 FBI survey estimated that 4.16 million criminal fingerprint cards were received annually by State identification bureaus, and 2.91 million criminal fingerprint cards by Ident.

Ident's experience exemplifies the enormity of the problem. As of October 1981, there were 78 million criminal fingerprint cards representing 21 million individuals in the Ident criminal file. During fiscal year 1981, Ident received an average of 12,684 criminal fingerprint cards daily. Surveys conducted for the FBI in 1979 and 1980 indicated that the average Ident response time for processing fingerprint cards was about 36 workdays. As of July and Octo-

ber 1981, the FBI estimated that Ident internal processing time (excluding mailing time) was averaging 27 and 25 workdays, respectively, for all categories of inquiries (both fingerprint checks and name checks). As of July 1982, processing time had improved, at least temporarily, to about 13 days, due to Ident's 1-year suspension of record checks for federally chartered or insured banking institutions and State and local employment and licensing authorities.

There is general agreement that improvement in fingerprint processing time is necessary, particularly to meet needs that arise early in the criminal justice process where decisions must be made very quickly, for example, in bringing charges and setting bail. OTA did not assess specific alternatives for improvement, but major studies have recently been completed by the Jet Propulsion Laboratory (JPL) and the International Association for Identification. However, it seems clear that fingerprint identification is properly viewed as an integral part of any national CCH system and that automated fingerprint classification and search technology offers substantial promise for improvement.

Record Quality

Since 1970, Congress has expressed its concern about the completeness and accuracy of criminal history records. Section 524(b) of the Crime Control Act of 1973 required the Law Enforcement Assistance Administration (LEAA) to promulgate regulations to provide safeguards for the privacy and security of criminal history records, including their completeness and accuracy. The 1975 regulations (known as title 28, Code of Federal Regulations, pt. 20) apply to the Federal Government and to all States whose criminal history record systems were federally funded in whole or in part. Federal courts have also ruled on record quality issues. For example, in *Tarlton v. Saxbe* (1974) the U.S. Court of Appeals for the District of Columbia ruled that the FBI had a duty to prevent dissemination of inaccurate arrest and conviction records, and had to take reasonable precautions to prevent inaccuracy

and incompleteness. Most States now have statutes or regulations requiring agencies to ensure reasonably complete and accurate criminal history information, including timely reporting of court dispositions. The number of States with statutes or regulations on record quality increased from 14 in 1974 to 45 in 1979, and to 49 in 1981.

Based on the results of record quality research conducted by OTA and others, the quality of criminal history records has improved since 1970; however, significant problems remain. For Ident, OTA record quality research found that, based on a 1979 sample of arrest events, about 30 percent of the Ident records that could be verified lacked a court disposition that had occurred and was confirmed by the district attorney in the local area responsible for prosecution. A 1980 study by JPL found that Ident receives dispositions for about 45 percent of the arrests reported. OTA also found that about one-fifth of the Ident arrest events sampled were inaccurate when compared with charging, disposition, and/or sentencing information in local records.

With respect to NCIC/CCH, OTA record quality research found that, based on a 1979 sample of arrest events, about 27 percent of the CCH records that could be verified lacked a court disposition that had occurred. About one-fifth of the arrest events sampled were inaccurate with respect to charging, disposition, and/or sentencing information. While it is possible that NCIC/CCH and Ident record quality has improved since 1979, OTA is not aware of any comparable research conducted by the FBI or others to document such improvements.

At the State level, a comparison between a 1979 OTA 50-State survey and a 1973 General Accounting Office (GAO) study (based on a 1970 50-State survey conducted by LEAA) shows some improvement in the average level of disposition reporting. The GAO study found the average level to be about 52 percent for the 49 States responding; the OTA study showed an average level of about 65 percent for the 41 States responding. However, the

1979 average for computerized States (with a CCH file and/or automated name index) as opposed to manual States was even higher (about 71 percent compared to 50 percent for manual States). Given that in 1970 only one State (New York) had a CCH system, the results indicated that most of the improvement in disposition reporting over the 1970-79 period was in States with CCH systems. OTA also sampled State records in one major urban jurisdiction in each of three States. For the three urban jurisdictions, disposition reporting was 58, 60, and 85 percent. Several States contacted by OTA have achieved further improvement in disposition reporting since 1979. However, between 1979 and 1982, average disposition reporting levels for all States responding improved only marginally, to about 66 percent. In the OTA 50-State survey, 14 of 41 States responding in 1979 and 13 of 47 States in 1982 indicated that disposition reporting to the State repository was less than 50 percent. In both 1979 and 1982, eight States indicated a reporting level of less than 25 percent.

Significance of Record Quality Problems

On the one hand, Federal and State law emphasizes the importance of complete and accurate criminal history records, but on the other, the law authorizes the dissemination of records, whether or not they are accurate and complete, for a variety of purposes. For example, Federal regulations and FBI operating procedures assign agencies that enter records into Ident or NCIC the responsibility "to assure that information on individuals is kept complete, accurate, and current." The FBI helps to maintain the integrity of the NCIC files through automatic computer edits and purges, quality control checks, and periodic record validations by originating agencies. Similar procedures are possible in Ident through the use of AIDS. Yet, with few exceptions, Federal and State law authorizes the dissemination of criminal history records—with or without dispositions—to the criminal justice community. Law enforcement and

prosecuting agencies, in particular, find that an incomplete and/or inaccurate record can be useful as a "pointer" to the location of complete and accurate information, even though an arrest-only record is not admissible in criminal trial proceedings under the laws of criminal evidence in most jurisdictions.

With respect to noncriminal justice use, Federal regulations permit dissemination of Ident and NCIC/CCH records without dispositions to Federal noncriminal justice agencies if authorized by Federal statute or Executive order. Dissemination is also permitted to State and local noncriminal justice agencies if authorized by Federal or State statutes and approved by the U.S. Attorney General, except for records without dispositions where the arrest charge is more than 1 year old and is not under active prosecution. At the State level, as of mid-1981, 37 States authorized dissemination of arrest-only records to a variety of State and local noncriminal justice agencies (primarily for employment and licensing purposes), and 27 States authorized such dissemination to private sector organizations and individuals. The disclosure of such records to private parties frequently "depends upon factors other than State law, such as local law, local agency policy, or the impact of the State's public record or freedom of information law."

In most court cases where the completeness or accuracy of criminal records has been challenged, the balancing of individual rights of privacy and due process versus the maintenance of public safety and welfare has proven a difficult challenge to the courts. Yet the Federal courts have found violations of civil and constitutional rights, particularly when arrest-only information is used in minority employment decisions (see *Gregory v. Litton Systems*, 1970) and when arrest information is used in criminal justice decisions such as setting bail (see *Tatum v. Rogers*, 1979).

¹ISEARCl Group, Inc., *Trends in State Security and Privacy Legislation*, Sacramento, Calif., November 1981, p. 10.

Privacy and Security Protection

While very important, record quality (accuracy and completeness) is only one aspect of privacy and security protection. In enacting section 524(b) of the 1973 Crime Control Act, Congress also stressed the importance of protecting individual privacy by limiting record dissemination to lawful purposes, by permitting individuals to access, review, and challenge their records, and by ensuring the security of criminal history record systems. Title 28 of the Federal regulations required States accepting Federal funding to develop specific policies and procedures in these and other areas.

Since 1974, when statistics were first compiled, the States have made substantial progress. For example, as of mid-1981, over two-thirds of the States had statutes and/or regulations that:

- establish a State regulatory authority for privacy and security of criminal justice information systems (46 States in 1981 compared with 7 in 1974);
- place some restrictions on the dissemination of criminal history information (all States and the District of Columbia in 1981 compared with 12 in 1974);
- establish the rights of individuals to inspect their criminal history records (43 States compared with 12);

- provide criminal sanctions for violation of privacy and security laws (39 States compared with 12); and
- establish the rights of individuals to challenge the accuracy and completeness of record information pertaining to them (35 States in 1981 compared with 10 in 1974).

Nonetheless, even where States have enacted laws or regulations, wide diversity remains in the specific provisions—for example, in sealing and purging procedures, in statutory limitations on criminal history file content, and in the definition of authorized users.

Also, States vary widely in their implementation of privacy and security measures such as record quality audits, court disposition monitoring, quality control checks, and routine review of transaction logs. Based on a 1982 50-State survey, OTA found that only 13 of 49 States responding had ever conducted a record quality audit. Thirty of 49 had automated or manual procedures for the regular review of court disposition reporting, and 35 of 46 routinely employ quality control checks on the accuracy of input data. Forty-nine of fifty States maintained transaction logs of criminal history records disseminated, although most indicated that the logs were reviewed only when a specific abuse was indicated.

Alternatives for a National CCH System

The United States already has a “national criminal history system.” It is partly manual and partly computerized, and includes criminal record and fingerprint card repositories maintained by Ident and 49 State identification bureaus. The national system also includes the CCH files in NCIC and 27 States. For the interstate exchange of criminal history records, the national system uses the U.S. Mail, the NCIC and NLETS communication networks, and, to a lesser extent, the communication networks of the Justice and Treasury Departments. The many local and metropol-

itan criminal history record systems, either manual or automated, are also a part of this national system.

Thus, many but not all of the building blocks for a national *computerized* criminal history record system are already in place. Technically, there are several ways that a national CCH system could be designed. At one end of the spectrum, criminal history records for all offenders could be stored in a central national repository such as Ident. The full development of AIDS or the NCIC/CCH file

could constitute a national CCH repository when hooked up to the NCIC (or other) communication lines to permit nationwide electronic access. The repository would include records on roughly 21 million persons with arrests for serious or significant offenses. At the other end of the spectrum, a central national repository could be limited to records of Federal offenders (approximately 0.5 million), and records of State offenders would be stored only in the respective State repositories. An intermediate alternative (known as the single-State/multi-State approach) would be for a national repository to maintain records of all multi-State as well as Federal offenders, with single-State offender records stored by the States.

Given the constitutional prerogatives of the States with respect to criminal justice, and the fact that 49 of the 50 States now maintain their own State repositories, records on State offenders will continue to be maintained by the States whether or not a national CCH system is implemented. Therefore, any State records maintained in a national repository will incur extra costs (to the Federal Government for storing the records and to the States for updating the records). Cost control has thus been one of the driving forces behind efforts to keep the recordkeeping function decentralized so that duplication between the Federal and State Governments is minimal.

For any alternative where all records are not maintained in a central repository, two other capabilities are necessary—an index to records not stored centrally, and a means to exchange or transfer records stored in 50 or more locations. There are several technical options here. For example, a national index could be maintained centrally at one location, such as Ident or NCIC in Washington, D.C. or NLETS in Phoenix, Ariz. Records could be exchanged via the NLETS or NCIC communication networks or both.

Regional systems have also been proposed. However, OTA found little evidence to support the feasibility of regional systems. On the contrary, NLETS traffic logs indicate that criminal history traffic between the States

does not conform to regional patterns. During the 1981 III pilot test, almost three-quarters of the hits on Florida records (matches between an inquiry and a record) originated from the Midwest and West. In addition, the 1979 OTA record quality research found that a high percentage (about 75 percent for Ident) of multi-State offenders had arrests in at least one noncontiguous State.

A so-called “ask-the-network” system is also a technical possibility. In the ask-the-network approach, there would be no central index. Instead, each State would, in effect, poll any or all of the other 49 States plus the FBI when seeking CCH information. OTA found that a significant percentage of multi-State offenders (about 43 percent for Ident, again based on 1979 data) had arrests in three or more States. Considered together with the high percentage of multi-State arrests in noncontiguous States, it appears that all States and the FBI would have to be polled every time in order to make sure arrests were not missed, but the inquiry-to-hit ratio would then be very low. Under similar circumstances, NLETS found that many States began to ignore the inquiries. Also, the FBI and various State criminal justice officials believe that an ask-the-network approach would not be cost effective, and would be harder to secure against unauthorized access. Nonetheless, ask-the-network systems are used successfully in the defense intelligence community and in the private sector, and their potential use in a national CCH system is an area of possible further research.

Improving Response Time

The operating experience of the Ident AIDS program and several State identification bureaus has documented that a much shorter turnaround time is possible with automated systems than with manual. The JPL study of AIDS concluded that full automation could reduce the overall Ident processing time for fingerprint checks from about 36 workdays to about 3 hours. Further improvements could result from the use of high quality facsimile

electronic transmission. For example, New York State already makes relatively extensive use of this technology. New York responds to fingerprint inquiries submitted via facsimile within an average of 1 hour and 50 minutes, and within 3 hours 90 percent of the time.

The response times for computerized criminal history record checks could be even faster. In theory, the response time for a national CCH repository would be measured in seconds. Indeed, as of April 1982, NCIC/CCH processing time was averaging less than one-half second per inquiry, with very few inquiries taking more than 5 seconds. The III pilot test has demonstrated that even for a national index alternative, response times of less than an hour are possible. During a February-March 1982 test, response time was less than 1 hour 96 percent of the time, less than 5 minutes 76 percent of the time, and less than 1 minute 48 percent of the time. Thus, it appears that the III response time could approach the response time achieved by individual States with online CCH files, which is frequently in the range of 5 to 20 seconds. Response times for States with manual files would be considerably longer.

Improving Record Quality

While computerization can improve the response time of fingerprint and criminal record checks, improvements in record quality are more difficult to achieve. This is because high record quality depends on timely and accurate submissions from a large number of criminal justice agencies. Court disposition reporting appears to be a significant problem in many States.

Available evidence indicates that strengthening State and local criminal history systems and court disposition reporting systems is a prerequisite to further improving CCH record quality, regardless of the national CCH system structure. Particularly important are efforts to upgrade court administration, establish standardized (and perhaps even codified) court reporting procedures, improve the coordination between judicial and other criminal

justice agencies (especially law enforcement) responsible for timely record update actions, strengthen field audits of reporting procedures and record quality, and increase funding and technical assistance to implement computer-based systems where appropriate.

Shifting Preferences on System Structure

An OTA survey of State repository officials found that, as of 1979, officials from 24 States out of 42 responding preferred the national index alternative, known as III. Officials from 11 States preferred the single-State/multi-State alternative. Since that time, many other Federal and State officials have shifted their support to III. The NCIC's Advisory Policy Board, NLETS Board of Directors, and SEARCH Group, Inc., have all endorsed III which, if fully implemented, would mean that all State records would be maintained by the States themselves. Only Federal offender records and an identification index would be maintained at the national level.

In a 1982 OTA followup survey, officials from about two-thirds of the States indicated a clear preference for the III concept, with officials from most of the other States either actively considering III or seeking further information on which to base a decision. However, many States, even some of those strongly supporting III, noted a variety of implementation problems which might preclude their participation, in some cases for years.

Many of these officials also support the concept of a National Fingerprint File (NFF), considered to be an integral part of III. The NFF would be limited to fingerprint cards and related personal descriptors on each criminal offender. The NFF would contain no arrest or disposition data. It would perform the technical fingerprint search to establish positive identification or nonidentification based on fingerprint cards received from State identification bureaus or Federal agencies. It would also assign FBI identification numbers, and could enter identification data into III. The NFF concept is predicated on single-source

submission policies. That *is*, only one agency per State would be authorized to submit fingerprint cards. Submission of only one fingerprint card per subject per State would be permitted.

OTA surveyed the States with respect to single-source fingerprint card submission and found that, as of August 1982, 18 States had implemented single-source submission (com-

pared with 17 in a September 1981 FBI survey) and four more had scheduled a late 1982 implementation, for a total of 22 States. Officials from about one-third of the other States indicated that implementing single-source submission could be difficult due to a potential work overload, staff and funding shortages, local agency resistance, and/or privacy concerns.

Possible Impacts of a National CCH System

Criminal Justice Process

To the extent that a national CCH system provides information that is more complete, timely, and verifiable (based on positive identification) than is presently available, the system would improve the functioning of the criminal justice process. The most significant improvements are likely to be in the areas of criminal investigations, police booking and intake, pretrial release and bail decisions, and presentence investigation reports.

For example, after an arrest, police make or participate in decisions concerning whether to release or how long to hold the suspect, whether to fingerprint, and the level of charges to be placed. Each of these decisions clearly affects the creation of a criminal history record, and conversely, criminal history records (and thus a national CCH system) may potentially influence these decisions. Since postarrest police decisions often must be made quickly, a national CCH system could make criminal history records more readily available, thus increasing their use.

The impact of a national CCH system could be particularly significant in pretrial release and bail decisions, which typically must be made within 36 to 72 hours after arrest. If accurate and complete, CCH records could help prosecutors and judges to better balance the need to protect the public from harm by defendants out on bail, versus the need to protect the constitutional rights of defendants. Many States have laws or rules requiring judges to

consider prior convictions in determining pretrial release conditions. It is important, however, that CCH records be complete and accurate. In *Tatum v. Rogers (1979)*, a U.S. district court found a violation of constitutional (sixth, eighth, and 14th amendment) rights when arrest information without otherwise available disposition information was used in setting bail.

Criminal history information is also used in the preparation of presentence investigation reports. These are used by judges in arriving at a sentence suited to offenders, and are subsequently used by the courts and corrections departments in assigning offenders to appropriate institutions. Problems that arise in the preparation of presentencing reports include incomplete disposition data and insufficient resources (time and money) for verification. It would appear that a national CCH system would be advantageous if based on accurate and complete records that could be obtained quickly and easily.

A national CCH system could also affect other aspects of the criminal justice process. For example, criminal history records are very important to specialized programs (e. g., prior felon, career crime, and violent felon programs) that assign police investigators and special prosecutors to individuals who have prior felony convictions. Also, an arrestee's criminal history record can affect the prosecutor's decisions concerning whether to bring or drop charges, the level and number of charges, and

whether to negotiate at trial for lower charges through plea bargaining. An offender's criminal history is also an important factor in determining initial correctional custody rating (level of supervision needed) and institutional placement (e.g., maximum, medium, or minimum security), and is one of many factors considered in parole decisions.

Employment and Licensure

To the extent that a national CCH system is accessible for noncriminal justice purposes, the system would be very likely to have a significant impact on a large number of employment and licensing decisions.

Criminal history information is used in employment and licensing decisions to protect the public or the employer from harm. Criminal records may be used to screen individuals out of positions where they might easily cause harm to other citizens or coworkers or present an excessive risk to the protection of valuable assets (e.g., money, securities, precious jewelry, and other property).

However, limiting job opportunities on the basis of a criminal record in effect involves an additional punishment for crime, that is, a "civil disability," in addition to the punishment administered by the court. This civil disability may in turn hinder the rehabilitation of offenders and prevent them from becoming useful and productive members of society, even if they want to do so and are otherwise capable. Former offenders who cannot find suitable employment may become dependent on public welfare or return to crime.

Federal and State legislatures must balance these considerations when requiring criminal history checks or character evaluations (which frequently include record checks) for literally millions of public sector jobs or publicly licensed private sector jobs. The private sector also frequently seeks criminal history information in making employment decisions.

The impact of a national CCH system for noncriminal justice use is complicated by several factors. First, States (as well as the Fed-

eral Government) vary widely in their non-criminal justice access and dissemination policies. As noted earlier, a significant portion of State and Federal criminal history record repository use is for noncriminal justice purposes. Thus, without some kind of national standards on access, a national CCH system is likely to be heavily used for noncriminal justice purposes and in ways that heighten the already existing conflicts-of-law among and between various States and the Federal Government.

Second, noncriminal justice use is even more sensitive to record quality than is criminal justice use. There is no doubt that the use of criminal history information affects employment and licensing decisions. The results of research, case studies of employers, surveys of employer attitudes, as well as the experience of Federal and State parole officers, all suggest that any formal contact between an individual and the criminal justice process is likely to influence an employer's decisions on job applicants. A record of arrest and conviction will have the greatest influence, but even a record of arrest and acquittal will frequently work to the disadvantage of the applicant. This problem is aggravated because criminal history records are designed for use by those who are familiar with the criminal justice process and who understand the limitations of a record. At best, a criminal history record provides a snapshot or series of snapshots of a person's contact with the criminal justice process at various points in time. Much of the contextual and background information necessary to properly interpret the record is not included. A record is more likely to be misinterpreted when used by someone outside the criminal justice system, particularly when a significant percentage of criminal history records contain inaccurate, incomplete, or ambiguous information.

Third, there is considerable disagreement over the extent to which criminal history records can predict future employment behavior, except in particular cases such as repeat violent offenders. Other factors such as education, prior work experience, length of time in

the community, and personal references may be more predictive. On the other hand, the high recidivism rates suggest that once a person is arrested or convicted, he or she is much more likely to be convicted of a subsequent crime within a few years than those without a prior criminal record. Whether or not this is relevant to or predictive of employment behavior is a matter of debate. States such as New York have required by statute that any agency seeking criminal history information establish a strong relationship between the nature of the job and specific kinds of criminal offenses. Florida, with its open records policy, is at the other extreme.

Fourth, criminal history records involve a sizable proportion of all persons in the labor force. After a careful review of existing research, OTA estimated that as of 1979 about 36 million living U.S. citizens had criminal history records held by Federal, State, and/or local repositories. Of these, OTA estimated that about 26 million persons were in the labor force (representing, conservatively, 28 to 30 percent of the total labor force), and thus were potentially exposed to employment disqualifications because of an arrest record. Of the 36 million, OTA estimated that about 35 percent had no arrests for serious crime and one arrest for a minor crime, and about 24 percent had more than one minor arrest but no major arrests. The remaining 41 percent (roughly 15 million persons) had at least one arrest for a serious crime.

These aspects of noncriminal justice use warrant congressional consideration in formulating policy on any national CCH system.

Minority Groups

Some minority groups account for a disproportionate percentage of arrest records. For example, various studies have estimated the percentage of blacks with arrest records as ranging from 30 percent nationwide to over 50 percent in certain cities such as Philadelphia. As of February 21, 1980, blacks accounted for about 29 percent of all records in the NCIC/CCH file, which is almost triple the percentage of blacks in the total U.S. popula-

tion. Statistics of 1981 on felony arrests in California indicated that, at least in that State, blacks also accounted for a disproportionately high percentage of law enforcement releases and complaints denied (37.7 and 38.7 percent, respectively, compared with 30.6 percent of felony arrests).^{*} Releases and complaints denied may occur for a variety of reasons, such as insufficient evidence, refusal of the victim to prosecute, lack of probable cause, unavailable witness, or illegal search.

As discussed earlier, a criminal arrest record, even without convictions, can have an adverse effect on employment and licensing applicants. Indeed, the courts have found that a policy of refusing employment to blacks with an arrest record without convictions "had a racially discriminatory impact because blacks are arrested substantially more frequently than whites in proportion to their numbers" (see *Gregory v. Litton Systems*, 1970). Similar judicial reasoning has been extended to black applicants refused employment due to criminal convictions where the offense "does not significantly bear upon the particular job requirements" (see *Green v. Missouri Pacific RR*, 1975).

In this context, any discriminatory impacts from the use of national CCH information would depend on whether and under what conditions noncriminal justice access is permitted. The potential for discriminatory impacts could be minimized if records or index entries based on arrest-only information, as well as information on arrests not leading to conviction, were actively sealed or otherwise effectively removed from the file, at least for noncriminal justice purposes. Some States, such as New York, do this for their own files, but many States do not. California has struck a middle ground. Felony arrests that result in detention only are retained in the California State criminal history record repository for 5 years, and

^{*}A law enforcement release occurs when police detain and arrest a person, obtain fingerprints, and report the arrest to the State record system, but subsequently release the person and do not present the case to the district attorney. A complaint is denied when the police arrest and present a person to the district attorney, but the district attorney decides not to prosecute the case.

felony arrests that otherwise do not result in a conviction are retained for 7 years.

Federalism

The balance of authority and power between Federal, State, and local governments has been a central issue in the debate over a national CCH system. Because of the decentralized nature of the U.S. criminal justice process and because the generation and use of criminal history information occurs mostly at the State and local levels of government, most States seek a primary role in any national CCH system. State governments have basic jurisdiction over law enforcement and criminal justice within their borders under their constitutionally reserved powers, and many have been reluctant to share this jurisdiction with the Federal Government, except with respect to Federal offenders. Most States have appreciated other kinds of support from the Federal Government, such as FBI fingerprint identification services and LEAA funding for State CCH system development, as long as this support was provided on a voluntary basis and the States retained control over the operation and use of their own criminal history record systems.

The Federal Government has a legitimate interest in: 1) the enforcement of Federal criminal law, 2) the prosecution of Federal offenders, whether intrastate or interstate, and 3) assisting with the apprehension of interstate and international criminal offenders who cross State and/or national borders. To the extent that crime is perceived as a national problem deserving national attention, the Federal Government also has a defined role in the provision of voluntary support to State and local law enforcement and criminal justice activities.

Many of the proposed alternatives for a national CCH system encounter difficulties resulting from the historic constitutional division of powers and duties in the U.S. Federal system. Since the standards of the States vary so widely (e.g., with respect to dissemination, record quality, and sealing and purging of criminal history records), any national stand-

ards for a CCH system could easily conflict with those of at least some States.

From the perspective of many States, a national CCH system like III would have a minimal impact on Federal-State relationships assuming that it retained State policy control over the CCH records, avoided any significant conflict with State laws and practices on the collection and use of criminal history information, and kept State costs at an affordable level. Nevertheless, III (or any other national CCH system) would have interstate and national as well as intrastate impacts. A strong argument can be made that, regardless of the specific system structure, the Federal Government has the responsibility and authority to establish some kind of system standards.

From a legal standpoint, Federal action could be based on: 1) the criminal record information needs of Federal agencies as established by various Federal statutes and Executive orders (e.g., Executive Order Nos. 10450, 12065, and 10865); 2) the implementation of Federal regulations for State and local criminal justice information systems that have used Federal funding (title 28, Code of Federal Regulations, pt. 20); 3) the interstate commerce clause of the U.S. Constitution; and/or 4) the constitutional provisions (including the first, fourth, fifth, sixth, ninth, and 14th amendments) guaranteeing individual rights of privacy and due process.

cost

Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of the Federal regulations. From 1970 to 1981, LEAA provided a cumulative total of about \$207 million in categorical grants to the States for comprehensive data systems and statistical programs. About \$39 million was for 145 CCH-related grants awarded to 35 different States. These grants peaked in 1976 and ended in 1981. In addition, some portion of LEAA block grants to the States was used for criminal justice information systems. This avenue of Federal support has also been phased out.

Thus, at present the States and localities would have to bear most of the cost of any national CCH system. The difficulty of finding "new money" or cutting back other expenses could discourage State participation. Financing could be particularly difficult for States whose criminal history record systems are not yet well developed, whose need for a national CCH system is not perceived to be great, and whose ability to pay is limited.

OTA did not independently estimate the cost of a national CCH system. The Federal share would presumably include some portion of the cost of Ident (which totaled about \$58.7 million in fiscal year 1980 and whose full automation has been estimated at \$50 million by JPL) and NCIC (\$6.1 million in fiscal year 1981), plus the costs of Federal agencies participating in the system. The actual Federal share would depend on the specific alternative implemented, and whether or not further Federal support were provided to the States.

LEAA grants made a significant contribution to the relatively rapid development of State CCH systems during the last 12 years. OTA research has identified the following three areas as possible priorities for further funding: 1) improving court disposition reporting systems on a nationwide basis; 2) upgrading criminal history record systems in the States that are operating manually or assisting those in the process of automating their name index and/or file; and 3) improving procedures in all States where necessary to assure the accuracy and completeness of criminal history information, to conduct audits of local users, to maintain and periodically review transaction logs, and to train employees and users.

Surveillance Potential

The "flagging" of criminal records is a common monitoring or surveillance practice and an accepted law enforcement tool. Placing a flag on a file helps law enforcement personnel to keep track of the location and activity of a suspect whenever there is a police contact.

At the State level, both manual and automated files are used for flagging. Although

this practice differs from State to State, the most frequent application seems to be for parole violators and wanted persons. At the Federal level, Ident records are usually flagged by using a wanted notice for persons with an outstanding arrest warrant or a flash notice for persons placed on probation or parole. With respect to NCIC, since hot files are flags by definition, all wanted or missing persons and stolen property records included in NCIC represent flags to law enforcement and criminal justice users.

Concern has been expressed about the possible use of a national CCH system by Federal agencies—and particularly the FBI—for monitoring or surveillance of the lawful activities of individuals or organizations. To understand this concern, one must remember that the debate over a national CCH system began in the late 1960's and early 1970's, a time when the FBI was engaged in domestic political intelligence and surveillance activities with respect to, for example, civil rights and anti-Vietnam War leaders and groups. Also during the early 1970's, the FBI made very limited use of NCIC for intelligence purposes which, although strictly law enforcement in nature, had not been authorized by Congress.

Since that time, the FBI has rejected all requests or proposals for intelligence use of NCIC.* During the course of the OTA study, FBI officials have repeatedly stated to Congress and to OTA that they will not permit Ident or NCIC to be used for unauthorized purposes of any kind. FBI officials believe that a national CCH would not have any significant surveillance potential and would represent little, if any, danger to law-abiding citizens. Strong and independent policy control over a national CCH system and tight restrictions on noncriminal justice access, coupled with outside audit and explicit statutory guidelines for operations, would help protect against the possibility—however remote—that

*As of September 1982, the Department of Justice and the FBI had approved but not yet implemented a U.S. Secret Service proposal to establish an NCIC file on persons judged to represent a potential threat to protectees, including the President. This could involve the use of NCIC to gather intelligence data on or track individuals not formally charged with a criminal offense.

a national CCH system could be used at some point in the future in violation of first amendment or other constitutional rights. In comments to OTA, various criminal justice officials have suggested a statutory prohibition on intelligence use of III or any other national CCH system. On the other hand, some State officials have noted that there may be legitimate intelligence and surveillance applications, and that these possibilities should not be abandoned solely because of their sensitivity.

Message Switching

As noted earlier, unless all criminal history records were stored in one place (e.g., a national CCH repository) a national CCH system would require some electronic means to transfer records (and inquiries for such records) among and between the various State and Federal repositories and participating agencies. The transfer or switching of messages from one State to another through the NCIC computer has been a point of controversy over the last 12 years. Some message switching alternatives have raised questions about the impact on Federal-State relations and the potential for monitoring and surveillance. For example, in 1973, the FBI proposed to have NCIC assume all law enforcement message switching (not just NCIC/CCH traffic), including messages sent over NLETS. As a result, Congress has denied the FBI authority to perform message switching, defined as "the technique of receiving a message, storing it in a computer until the proper line is available, and then retransmitting, with no direct connection between the incoming and outgoing lines."²

²Department of Justice Appropriation Authorization Act of 1980.

More specifically, the Department of Justice (DOJ) was prohibited, without explicit approval of the House and Senate Judiciary Committees of Congress, from "utilizing equipment to create a message switching system linking State and local law enforcement data banks through equipment under the control of DOJ or the FBI."³ In addition, congressional approvals in 1979 and 1980 of the FBI's requests to upgrade NCIC computer technology were conditioned on the FBI's commitment not to use such technology for message switching.

There are several message switching alternatives for III. First, inquiries could be switched via NCIC, with records returned via the NLETS message switching system. This approach was used in the III pilot and Phase 1 tests. The routing of inquiries through NCIC has been termed "automatic inquiry referral" and is a form of partial message switching. Second, both inquiries and records could be switched via NCIC. Third, both inquiries and records could be switched via NLETS. Fourth, records could be switched via NLETS and inquiries via NCIC or NLETS. Fifth, the use of NCIC or NLETS could be optional for switching of both inquiries and records. OTA has not evaluated these alternatives in detail, although all appear to be technically feasible. In making a complete evaluation, message formats and purpose codes, costs to the States and the Federal Government, response time, and message privacy and security all need to be considered. In any event, any DOJ or FBI message switching role in a fully operational III (or other national CCH system) would probably require congressional approval.

³Ibid.

Congressional Policy Considerations

As noted earlier, the emerging consensus among Federal and State law enforcement and criminal history record repository officials supports the national index concept known as III. However, full implementation of III (or any other national CCH system) raises a number of issues that warrant congressional attention

to ensure that beneficial impacts are maximized and adverse impacts are controlled or minimized.

Policy Control

Considerable debate has focused on which agency or organization should have direct

policy control over a national CCH system. Suggestions include a consortium of States, a broadened and strengthened NCIC'S Advisory Policy Board, an independent board, and/or the FBI. For example, a broadened and strengthened Advisory Policy Board could include greater representation from the prosecutorial, judicial, correctional, and public defender sectors of the criminal justice community than at present, and could include an "advise and consent" role, at least with respect to State and local participation in a national system. There are many other possibilities, but the key issue is how to devise a mechanism that will effectively represent the interests of the diverse users of a national system, and afford them a strong and possibly controlling policy role.

File Size and Content

Under the 111 concept, the national index would include only names and identifying information (e.g., height, weight, social security number, and State and Federal criminal identification numbers). Proposals have been made to limit the index to entries on violent or very serious offenders, that is, for crimes included in the FBI Crime Index. However, this would exclude entries for drug, weapons, drunk driving, and other offenses generally considered to be serious but not included in the FBI Crime Index. At the other extreme, a totally unrestricted index could include entries on as many as 36 million persons. Other national index issues include the need for policies on limited retention periods for some entries and on the handling of juvenile offender records.

Record Quality

With a national index, the FBI would no longer maintain non-Federal records, and the problems of record quality in Ident and NCIC/CCH would be reduced. However, the quality of records maintained by the States, as well as the quality of any index based on those records, would still be a matter of concern. Record quality could be strengthened by tightening the disposition reporting requirements and/or requiring confirmation of records

lacking disposition data with the originating agency prior to any dissemination. In the opinion of some, the latter requirement would be costly and impractical. The progress made by many States in recent years indicates that improved disposition reporting is possible, but continued improvement would require a significant further commitment measured in manpower, dollars, and system improvements at the State and local levels.

Noncriminal Justice Access

Significant noncriminal justice use of Federal and State criminal history record systems, coupled with widely varying State statutes defining authorized users and State policies on sealing and purging, has generated concern about control of access to criminal history records. Noncriminal justice access to a national index could be prohibited, although this would conflict with many Federal and State laws. Noncriminal justice access could be permitted, but only under stronger Federal guidelines than presently exist. A dual index could be established, one for criminal justice use and a second for noncriminal justice use, perhaps with the latter based on disposition or conviction information only. Even under the status quo, access to a national index would require complicated safeguards (which are technically feasible with a computer-based system) to be consistent with the wide variety of existing State laws and regulations, and would require some means to resolve conflicts between State laws, and between Federal statutes and Executive orders and State laws.

Oversight and Audit

The purposes of new oversight mechanisms would be to help assure Congress, the public, and others that a national index (or any other national CCH system) is operating within the boundaries of law and regulation, and to help identify any problems that may emerge. Oversight is closely linked to system audit. Several possibilities have been suggested. First, Congress could require an annual management report on the operation of a national CCH system. Second, Congress could require periodic

audits of Federal and State CCH files to help ensure compliance with whatever system standards may be established. To keep costs down, the audits would presumably be conducted by sampling Federal and State files on a rotating and perhaps unannounced schedule. Any Federal audit authority, whether by GAO or some other body, would appear to require new Federal legislation and/or regulations.

Public Participation

NCIC'S APB is the only direct avenue of public participation in the governance of the existing NCIC/CCH system. However, at present APB does not include representation from the general public or from public defenders. Public defenders feel strongly that they should be represented on any policy board established for a national CCH system and that defense interests should have access to that system. The experience of Alameda County, Calif., where public defenders are considered to be part of the criminal justice community, has been that public participation in oversight can help ensure accountability of criminal justice record systems and can be beneficial in terms of system performance.

Comprehensive Legislation

Legislation represents one of the strongest measures to provide Federal direction and ensure accountability and control. It could provide explicit authority for a national index or other national CCH system, and include statutory guidelines for its operation and use. In addition to the areas listed above, legislation could establish access, review, and challenge procedures; criminal penalties; privacy stand-

ards; funding for computer-based user audits and disposition monitoring procedures; and uniform crime codes and criminal history record formats. Legislation could also cover areas discussed earlier such as intelligence use, message switching, and funding for development of court disposition reporting and State criminal history record systems.

III Development Plan

In order to develop important additional data from the III test now under way, Congress may wish to consider whether the plan should be revised so that: 1) some or all of the participating States can be tested with no NCIC message switching as well as with partial message switching (known as automatic inquiry referral); and 2) record quality research can be conducted.

AIDS/CCH Consolidation

At present, the Ident/AIDS and NCIC/CCH files duplicate each other to a significant and growing extent. Any AIDS/CCH consolidation is likely to have a significant impact on the cost of FBI criminal history and identification services and could be an integral part of a national CCH system. Congress may wish to request the preparation of several alternative consolidation plans, including the possible creation of a new National Criminal Information and Identification Division of the FBI which would combine Ident, NCIC, and related activities. Congress may also wish to examine the pros and cons of shifting management of a national CCH system to a new bureau within DOJ or elsewhere.