Chapter 12

Other Impact Areas Relevant to a National CCH System: Employment and Licensure, Minority Groups, Federalism, Monitoring or Surveillance Potential, and Constitutional Rights

Contents

Page

Chapter Summary. 137
- Employment and Licensing Decisions 137
- Minority Groups 137
- Federalism 138
- Surveillance Potential. 138
- Constitutional Rights 138

Impact unemployment and Licensing Decisions. 139

Impact on Minority Groups 141

Impact on Federalism 142

Impact on Monitoring or Surveillance Potential. 145

Impact on Constitutional Rights 147

TABLE

Table No. *Page*

30.Noncriminal Justice Requests to State Criminal History Repositories 140

Chapter 12

Other Impact Areas Relevant to a National CCH System: Employment and Licensure, Minority Groups, Federalism, Monitoring or Surveillance Potential, and Constitutional Rights

Chapter Summary

Employment and Licensing Decisions

Criminal records may be used to screen individuals out of positions where they could pose a threat to other citizens or coworkers or present an excessive risk to the protection of valuable assets. However, limiting job opportunities may hinder the rehabilitation of former offenders who may become dependent on public welfare or return to crime if suitable employment is unavailable.

Federal, State, and local governments require 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. A national computerized criminal history (CCH) system might further increase the use of Federal and State criminal history files for noncriminal justice purposes.

There is no doubt that the use of criminal history information affects employment and licensing decisions. Even a record of arrest and acquittal will often work to the disadvantage of the applicant. A problem here is that a noncriminal justice decisionmaker is more likely to misinterpret a record, especially when criminal history records contain inaccurate, incomplete, or ambiguous information. Also, except in particular cases such as repeat violent offenders, the ability of criminal history records to predict future employment behavior is a matter of debate. For some occupations, the law is quite clear about what kinds of criminal conduct are disqualifying. However, in most cases substantial discretion is left to licensing boards and employers. In the OTA 50-State survey, noncriminal justice use of criminal history records accounted for about one-fifth of total use, and several States reported that noncriminal justice use already constituted more than 40 percent of total use. Finally, a national CCH system could involve up to 28 to 30 percent of all persons in the labor force, many with arrest records showing no arrests for serious crime, arrests and convictions for minor crime only, or arrests that were disposed in favor of the arrestee.

Minority Groups

Some minority groups have a higher probability of police contact and account for a disproportionate percentage of arrest statistics. For example, the percentage of blacks with arrest records has been estimated at 30 percent nationwide and over 50 percent in some cities. In States like California, blacks are more likely

than are whites to be arrested, to have the arrest reported to the State repository, but then to be released without formal charging. When used in employment decisions, for example, arrest-only criminal history information can have a discriminatory effect. 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" *(Gregory v. Litton Systems,* 1970). 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.

Federalism

Many of the proposed alternatives for a national CCH system would encounter difficulties resulting from the historic constitutional division of powers and duties in the U.S. Federal system. State governments have basic jurisdiction over law enforcement and criminal justice within their borders. At the same time, the Federal Government has a legitimate role in the enforcement of Federal criminal law and prosecution of Federal offenders, both intrastate and interstate, and in assisting with the apprehension of criminal offenders who cross State and/or national borders. To the extent that crime is perceived as a national problem, the Federal Government has a defined role in providing voluntary support to State and local law enforcement activities.

A national CCH system could be used to circumvent State laws, especially with respect to system access. Given the wide variation among State laws and regulations, any national standards included in a CCH system could easily conflict with the standards of at least some States. In addition, with Federal funding for State CCH development now ended, the States and localities would have to bear most of the cost of any national CCH system.

Surveillance Potential

The "flagging" of criminal records–both hot files and criminal history files—is a common surveillance practice and an accepted law enforcement tool. Placing a flagon a file helps law enforcement personnel keep track of the location and activity of a suspect, apprehend wanted persons, and recover stolen property.

Concern has focused on the possible use of a CCH system by Federal agencies—and particularly the Federal Bureau of Investigation (FBI)–for surveillance of the lawful activities of individual citizens or organizations. The basis for this concern is largely the well-documented tendency of the FBI and other Federal agencies, in the late 1960's and early 1970's, to expand intelligence investigations into the realm of political surveillance. FBI officials have repeatedly stated that they will not permit the National Crime Information Center (NCIC) or the Identification Division (Ident) to be used for such purposes, and that a national CCH system would represent little, if any, danger to law-abiding citizens.

Constitutional Rights

The enactment of national legislation that includes statutory protections and mandates specific accountability measures (especially outside audit) was found to be very important in protecting constitutional rights across the board. First and fourth amendment rights could be further protected through tight restrictions (or a prohibition) on noncriminal justice access and strong and independent policy control. Mandatory record quality standards, established by statute and backed up by the necessary funding and technical assistance to ensure implementation (and outside audit to ensure compliance), appear to be the most effective mechanism for protecting fifth, sixth, eighth, and 14th amendment rights.

Impact on Employment and Licensing Decisions

Criminal history information is used in employment and licensing decisions ostensibly to protect the public or the employer from harm. Criminal records may be used to screen individuals out of positions where they might 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* evaluations of good moral character as conditions of employment or licensing. Such requirements may result in employment or a license being denied to individuals with specified criminal offenses. For example, the Federal Government requires a criminal history record check for all new employees, and many States have adopted similar requirements.

No recent systematic research has been done on the number of occupations in the United States that require a criminal history background check. A study conducted in 1974 by the American Bar Association identified 1,948 separate statutory provisions that affected the licensing of persons with an arrest or conviction record, averaging 39 provisions per State.[1] At that time, an estimated 7 million people worked in licensed occupations. This is consistent with OTA'S findings in selected States. For example, in California in 1979,47 different licensing boards were authorized to use State criminal history record information for screening applicants.

As it stands now, dissemination of Federal criminal history records is permitted to officials of any State or local government for purposes of employment and licensing, if authorized by State statute and approved by the Attorney General. Dissemination of State and local criminal history records is governed by a plethora of widely varying State laws, Executive orders, local ordinances, court orders, and judicial rulings.*

Private sector use of criminal history records in employment decisions is even more difficult to document. Research conducted in 1976 found that between 40 and 80 percent of private sector employers seek criminal history information, frequently as part of information requested on employment application forms.[2] With the exception of federally insured or chartered banking institutions and the securities industry, Federal law prohibits the dissemination of Federal criminal history records to private employers.** But in a majority of States, private organizations can lawfully obtain conviction information, and frequently arrest information as well, from State criminal history record files.[3] A 1981 SEARCH Group study found that, in most States, local police may lawfully release to private employers whatever arrest or conviction data they choose from local files.[3]

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[1] James E. Hunt, James E. Bowers, and Neal Miller, *Laws, Licenses and the Offender's Right to Work: A Study of State Laws Restricting the Occupational Licensing of Former Offenders* (Washington, D. C.: American Bar Association, 1974).

*See chs. 6, 7, 8, and 9.

[2] Neal Miller, *Employment Barriers to the Employment of Persons With Records of Arrest or Convictions, A Review and Analysis* (Washington, D. C.: U.S. Department of Labor, 1979), pp. 20-23.

**See chs. 6 and 7.

[3] SEARCH Group, Inc., *Privacy and the Private Employer*, September 1981 draft, p. 33.

[3] Ibid., pp. 34-35; see also ch. 7.

A potential problem is that a national CCH system might further increase the use of Federal and State criminal history files for noncriminal justice purposes in ways that might be detrimental to former offenders seeking legitimate employment, without necessarily improving the protection of the public and employers.

The problem has several dimensions. First, 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 will influence the 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.[5] The problem is that 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 criminal history records contain inaccurate, incomplete, or ambiguous information. For some occupations, the law is quite clear about what kinds of criminal conduct are disqualifying. In most cases, however, substantial discretion is left to licensing boards and public employers (as well as to private employers) in weighing the applicant criminal record along with all other factors.

[5]See Lynne Eickholt Cooper, et al., *An Assessment of the Social Impacts of the National Crime information Center and Computerized Criminal History Program,* Bureau of Governmental Research and Service, University of South Carolina, October 1979, sec. III, pp. 213-268.

Second, little concrete evidence exists to support the thesis that criminal history records have predictive value with respect to employment (i.e., can accurately predict future employment behavior), except in particular cases such as repeat violent offenders.[6] Other factors such as education, prior work experience, length of time in the community, and personal references may be more predictive. Thus, there is the added risk that individuals with criminal records will be denied employment solely because they have a record, not because of a determination, based on all of the facts available, that they represent an unacceptable risk to the prospective employer. 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.

Third, despite the limited ability of criminal history records alone to predict future employment behavior, noncriminal justice use has already reached significant levels. In the OTA 50-State survey, noncriminal justice use of criminal history records accounted for about one-fifth of total use, and several States reported that such use already constitutes more than 40 percent of total use, as shown in table 30. Given the politics of State legislatures, in-

[6]Ibid.

Table 30.—Noncriminal Justice Requests to State Criminal History Repositories (as a percent of total requests)

	Percent	Number of States	Year
Overall average	19.9°/0	37	1979
	18.70/o	37	1982
	17.80/o	45	1982

Percent of noncriminal justice requests	Number of States 1979	1982	1982
Distribution of percent noncriminal justice requests			
0- 9.90/0	***15***	***16***	***18***
10-19.90/0	***11***	10	13
20-39.90/o	4	4	7
40+ %	7	7	7
	37		*45*

SOURCE: Office of Technology Assessment 50-State Survey and 1982 followup

terest groups can exert strong leverage to gain access for noncriminal justice purposes. At least 14 States have recently enacted (since 1979) or have pending State legislation or regulations that further broaden noncriminal justice access. Some States are now charging fees (e.g., $6 to $14 per record in New York, about $7 in California, $5 in West Virginia and Nebraska, $3 in Maine, and $2 in Florida) which may serve to restrain noncriminal justice use, although this has not been the case in States like Florida. Between 1979 and 1982, 10 States reported an increase in noncriminal justice use, 5 States reported a decrease, and 22 States indicated that such use remained approximately the same (as a percent of total use).

Fourth, a national CCH system could involve a sizable proportion (perhaps 25 to 30 percent) of all persons in the overall labor force. After a careful review of existing research, OTA estimated that as of 1979 about 36 million living citizens had criminal history records held by Federal, State, and/or local repositories.[7] 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 35 percent had no arrests for serious crime and one arrest for a minor crime, and that 24 percent had more than one minor arrest but no major arrests. The remaining 41 percent (15 million persons) had at least one arrest for a serious crimes

[7]See Cooper, et al., op. cit., sec. I, pp. 51-84 and especially p. 83.
[8]Ibid., p. 83.

Impact on Minority Groups

The implications of a national CCH system for employment and licensing decisions involving minority groups, particularly blacks, is a subject of debate. Certain minority group members do have a higher probability of police contact, and account for a disproportionate percentage of arrest records. Professional recordkeepers (CCH system managers) acknowledge this reality, but point out that criminal history record systems simply reflect data created by local agencies.

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. The 30 percent nationwide estimate used FBI *Uniform Crime Report* data as a baseline, and corrected for double counting arising from multiple arrests. The Philadelphia study found that one-half of all black males in the sample had already been arrested at least once, as an adult, by the time they were 30 years old.[9] As of February 21, 1980, blacks accounted for about 29 percent of all records in the NCIC/CCH file,[10] which is almost triple the percentage of blacks in the total U.S. population.

Some further insight can be obtained by looking at the disposition of adult felony arrests in California where information was available to OTA. In 1981, although blacks accounted for 30.6 percent of arrests and about 7.7 percent of California's total population, they accounted for 37.7 percent of the law enforcement releases. In other words, blacks are disproportionately released after arrest without being formally charged. Likewise, blacks account for a disproportionate number (38.7 percent) of complaints denied. Whites, on the other hand, account for 44.2 percent of the arrests but only 33.1 percent of the law enforcement releases and 36.2 percent of the complaints denied.[11]

[9]Neal Miller, *A Study of the Number of Persons With Records of Arrestor Conviction in the Labor Force* (Washington, D. C.: U.S. Department of Labor, 1979).

[10]"Minutes of the Dec. 10-11, 1980, NCIC Advisory Policy Board meeting, Topic #13, "NCIC Race Categories and Codes Used in the Wanted Persons, Missing Persons, and CCH Files," p. 38.

[11]State of California Department of Justice, Bureau of Criminal Statistics, *Criminal Justice Profile, 1981.*

Thus, blacks in California are more likely to have arrests that result in law enforcement releases and complaints denied. A law enforce ment release occurs when police detain and arrest a person, obtain fingerprints, 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. 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. Despite the dismissal of an arrest by the law enforcement agency or the denial of a complaint by the district attorney, the arrest event is recorded in the State criminal history record system. The evidence in California seems to indicate that blacks are more likely to be arrested, to have that information reported to the State repository, and then be released without any formal charges being presented.

In this instance, the California recordkeeping system is operating precisely as it was designed to operate; it merely records and retains information concerning a police contact when it is submitted by the police, even if the arrest information does not lead to a formal charge or a court disposition. Some States have adopted stringent expungement rules regarding arrest-only information. For example, in New York State, arrest events that do not lead to conviction are sealed and the fingerprints taken with such events are returned to the originating agency. The New York law states that it is the responsibility of the arresting agency, the prosecutor, or the judge to inform the State repository. In California, felony arrests that result in detention only are retained in the State criminal history record for 5 years, and felony arrests that otherwise do not result in a conviction are retained for 7 years.

As discussed earlier, a criminal arrest record, even without convictions, can have an adverse impact on employment and licensing decisions. 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." [12] 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."[13] 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.

[12] American Civil Liberties Union, *Employment Discrimination Against Persons with Criminal Records,* draft report, 1977, p. 11, and *Gregory v. Litton Systems, 316* F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F. 2d 631 (9th Cir. 1972).

[13] *Green v. Missouri Pacific RR, 523* F. 2d 1290 (8th Cir. 1975), at 1298.

Impact on Federalism

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 the FBI fingerprint identification services and the Law Enforcement Assistance Administration 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 the enforcement of Federal criminal law; in the prosecution of Federal offenders, whether intrastate or interstate; and in 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 activities.

Many of the proposed alternatives for a national CCH system encounter difficulties resulting from the historic constitutional division of powers and duties in our Federal system. Since the standards of the States vary so widely, any national standards for a CCH system could easily conflict with those of at least some States.

Massachusetts and Florida illustrate the potential conflict with respect to system access. Both States have developed their own CCH systems, both have given considerable attention to the question of who should have access to these systems, and each has adopted a very different approach. Massachusetts has passed a Criminal Offender Record Information Act which defines the classes of agencies and individuals that are eligible for access. Criminal justice agencies may receive criminal history records after being certified by a Criminal History Systems Board. Noncriminal justice agencies granted access by statute must also be certified to receive criminal history records to carry out statutory duties. Other agencies and individuals may be certified to receive criminal history record information only if "the public interest in disseminating such information to these parties clearly outweighs the interest in privacy and security."[14] Such agencies and individuals must be certified by both the Criminal History Systems Board and the Security and Privacy Council. On the other hand, Florida has passed a Public Records Statute that makes its CCH records generally available for access by noncriminal justice agencies and private citizens.[15] For a $2 fee, a number of private firms located in Florida have CCH record access that would be denied in many other States.

Massachusetts officials have stated in the past that they would not contribute State records to a national CCH file unless they could retain control over access to and dissemination of these records. Massachusetts has been particularly concerned about indirect access to criminal history records by agencies or individuals not authorized to receive such records directly. As a hypothetical example, a private firm with branch offices in both State A and State B could conceivably be denied access to CCH records in State A and permitted access in State B. If State B CCH records were included in a national CCH file, the private firm could circumvent State A law by gaining access to State A records via a request from its State B branch office to the national CCH file processed through the State B CCH system. Information denied to the private firm in State A therefore could be obtained indirectly through access in other States to a national CCH file. While Florida now requires that the access policy of the donor State (State holding the record) be respected, most States do not require that donor State policy be followed.[16]

The problem of secondary dissemination can also occur with Federal agencies. For example, Massachusetts State and local police agencies provide arrest records to the FBI, which is authorized to receive such information for law enforcement purposes. Under Federal regulations, the FBI may disseminate arrest in-

"Massachusetts General Laws, ch. 6, sec. 172.

[16] Florida Statute 119. Access is restricted for records sealed pursuant to F.S. 893.14 (first offense possession of drugs) and F.S. 901.33 (first offenders who are acquitted or released).

"SEARCH Group, Inc., *The Interstate Exchange of Criminal History Records*, Sacramento, Calif., May 1981, pp. 5-7.

formation in its files to other Federal agencies authorized by executive order, such as the Office of Personnel Management (OPM) pursuant to Executive Order No. 10450.[17] However, under Massachusetts State law, OPM is authorized access only to Massachusetts offender records pertaining to Federal Riot Act[18] convictions within the last 15 years. Thus, what OPM cannot get from Massachusetts directly, it can get through the FBI indirectly. As a consequence, Massachusetts has declined to provide records to NCIC/CCH and has severely curtailed fingerprint submissions to Ident.

As discussed in chapter 9, in addition to different policies on access to and dissemination of criminal history information, States also vary widely in their statutes and regulations on file content, access, review and challenge procedures, sealing and purging, record accuracy and completeness, court disposition monitoring, and transaction logs and local audits. Even States with similar policies may show considerable variation in the level of resources and management devoted to enforcement. They also differ in their definition of crime; a felony in one State may not be so considered in another.

It was thought by some that the development of Federal regulations in the area of criminal history information systems (title 28, Code of Federal Regulations, pt. 20) would provide the answer to overcoming many of the difficulties of sharing criminal history information among the States and between the States and the Federal Government. Despite a dramatic increase in State statutes and regulations, many States have experienced a number of problems in implementing the Federal regulations, including insufficient resources, confusion in interpreting the regulations, and the lack of a State legislative mandate. In the OTA 50-State survey, 30 out of 46 States indicated that insufficient funds was the principal constraint to fully implementing annual audits, unique record tracking numbers, 90-day disposition reporting, and the like. Fourteen States indicated that a lack of statutory or policy mandate was the principal constraint.[19]

States that are willing to fully implement the Federal regulations face a significant problem in obtaining sufficient funds. Throughout the 1970's, it was Federal Government policy to support the development of State CCH systems and the implementation of the Federal regulations. However, this funding has now ended. In any event, the major portion of the long-term costs of a national CCH system would be the operating costs incurred by participating State and local criminal justice agencies, rather than development costs. Until recently, some of these costs could be recovered through Federal block grants, but 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 only exceptions would be the direct cost of any federally operated facilities (such as Ident and NCIC), and the costs of Federal agencies participating in the system. The difficulty of finding "new money" or reducing other expenses to pay for a national CCH could discourage State participation. Some States in the past have criticized what they believe to be the excessive cost of national CCH alternatives that call for substantial duplication of records at State and Federal levels. In any case, financing could be particularly difficult for States with less well-developed CCH systems, less need for a national CCH system (e.g., relatively low levels of interstate criminal movement), and/or less ability to pay (e.g., smaller, poorer States).

[17] 20 CFR § 20.33(2).
[18] 5 Usc § 7313.
[19] Office of Technology Assessment 50-State Survey conducted in 1979-80.

Impact on Monitoring or Surveillance Potential

Several alternatives for a national CCH system—particularly those involving large central files and/or extensive message switching—have generated concern about their possible use for monitoring or surveillance. The "flagging" of criminal records is a common monitoring or surveillance practice and an accepted law enforcement tool. Placing a flagon a file helps law enforcement personnel keep track of the location and activity of a suspect, apprehend wanted persons, or recover stolen property whenever there is a police contact.

At the State level, both manual and automated files are used for flagging. This practice differs from State to State. The most frequent application seems to be for parole violators and wanted persons. Others include flagging for modus operandi, for individuals with a history of violent acts, and for vehicle files. Several States indicated that flagging is easier with automated systems.[20]

At the Federal level, the flagging of records in Ident is usually through use of a wanted-flash-cancellation notice for persons with an outstanding arrest warrant (wanted notice) or persons placed on probation or parole (flash notice). A cancellation notice is posted when the person is no longer wanted or under supervision.[21] With respect to NCIC, since hot files are flags by definition, all wanted and missing persons and stolen property records included in NCIC represent flags to law enforcement and criminal justice users.

One concern expressed about a national CCH system focuses on its possible use for indiscriminate Government monitoring or surveillance of individual citizens or groups of citizens. For instance, a national CCH system could be used to run a criminal history record check similar to the relatively common police practice of running a warrant check on motorists stopped for traffic violations. Here, the driver's name and perhaps license number are checked against the local, and sometimes State and Federal, files. Also, the vehicle license plate number and description might be checked against the stolen vehicle files. Even this practice has been challenged in the courts, especially where the police detain individuals and conduct routine checks not based on ''reasonable suspicion.'' The courts have found that "a detention of an individual which is reasonable at its inception may exceed constitutional bounds when extended beyond what is reasonably necessary under the circumstances. ' '[22] If the computer check is conducted during a detention, and the detaining officer has no reason to consult the computer other than curiosity, the resulting conviction may be overturned.[23] Indiscriminate criminal history checks on individuals would appear to be even more likely than hot file checks to conflict with the constitutional protections provided by the fourth, fifth, and 14th amendments.

Concern about a CCH system also has focused on its possible use by Federal agencies—and particularly the FBI—for monitoring or surveillance of the lawful activities of individual citizens or organizations. This concern is based largely on the well-documented tendency of the FBI and other Federal agencies, in the late 1960's and early 1970's, to expand intelligence investigations into the realm of political surveillance.[24]

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[20] "Based on interviews with State criminal records repository personnel.

[21] *'Letter from Conrad S. Banner, Identification Division, FBI, to Marcia MacNaughton, OTA, U.S. Congress, dated July 26, 1979.

[22] *People* v. *Harris,* 1975, 15 Cal. 3D, 384, 390.

[23] *Pennsylvania v. Jones,* U.S. Sup. Ct., No. 77-958 (Mar. 27, 1978).

[24] "U.S. Congress, Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Intelligence Activities and the Rights of Americans,* Book II, 94th Cong., 2d sess., Apr. 26, 1976, p. 4. See also Seth Rosenfeld, "The Berkeley Files: 17 Years of FBI Surveillance in Berkeley," *The Daily Californian,* May 28 and June 4, 1982.

For example, the FBI's COINTELPRO and COMINFIL programs were designed to "disrupt" groups and to "neutralize" individuals who were considered threats to domestic security, such as civil rights and anti-Vietnam War leaders. Among the tactics employed was the use of criminal arrest records to impede the political careers of individuals who the FBI deemed to be "threats."[25] Other intelligence programs resulted in widespread invasions of the privacy of American citizens through the use of surveillance strategies ranging from mail covers and openings to wiretapping and surreptitious entry.[26]

Also during the early 1970's, the FBI made very limited use of NCIC for intelligence purposes which, although law enforcement in nature, had not been authorized by Congress. This was revealed in 1975 during hearings before the Subcommittee on Constitutional Rights of the U.S. Senate Committee on the Judiciary. On July 15, 1975, the Subcommittee Chairman charged that the FBI was using NCIC . . . "to keep track of individuals that might be of interest to the FBI for whatever purposes, including possibly political reasons.

The FBI conceded that a pilot flagging program using NCIC had been operational from April 1971 to February 1974, but did not exceed 4,700 active "flags." The FBI never advised either State and local officials, or apparently congressional officials, about the flagging program because it was "experimental" in nature. According to the FBI, the flagging practices were confined to "national security intelligence investigations" and to the tracking of Selective Service delinquents, top jewel thieves, and bank robbery suspects. The project's objective was "to enable law enforcement agencies to locate, through the NCIC, individuals being sought for law enforcement purposes who did not meet the criteria for inclusion in the NCIC wanted person file."[27] In other words, NCIC was being used to track individuals who had not been formally charged with a crime and did not have an outstanding warrant for a Federal offense or other extraditable felony or serious misdemeanor offense.

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.[28] FBI officials believe that a national CCH system would not have any significant surveillance potential since "surveillance," by definition, means a close watch over someone. FBI officials assert that a system such as NCIC which depends primarily on chance contacts with law enforcement officers does not meet this definition and certainly represents 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 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 the Interstate Identification Index or any other national CCH system. On the other hand, some State officials have noted that there may be legitimate intelligence and surveillance applications of a national CCH system, and that these possibilities should not be abandoned solely because of their sensitivity.

A final concern involves the intercomection of FBI criminal record systems with other Federal information systems that might collectively constitute a "de facto national data bank" with even greater monitoring and surveillance potential. For example, the already

"Ibid., p. 10.
"Ibid., p. 38.
[27]Letter from Harold R. Tyler, Jr., Deputy Attorney General, U.S. Department of Justice, to Senator John Tunney, Chairman, Subcommittee on Constitutional Rights, Committee on the Judiciary, U.S. Senate, Oct. 29, 1975.

*As of September 1982, the Department of Justice and 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.

[28]See testimony of William Bayse, FBI, before the Oct. 22, 1981, hearing of the Subcommittee on Civil and Constitutional Rights, House Judiciary Committee.

authorized interconnection of NCIC with the Treasury Enforcement Communication System and the Justice Telecommunication System means that the NCIC data base is accessible to dozens of Federal agencies, including the Internal Revenue Service (IRS), Bureau of Customs, and Immigration and Naturalization Service, among others.* Although these agencies are subject to Federal law and regulations and NCIC operating procedures, the actual use of NCIC data by Federal agencies does not appear to be subject to outside audit or oversight. Some agencies surveyed by OTA have developed their own detailed procedures. For example, IRS Criminal Investigative Division procedures require that NCIC be queried when evaluating possible tax fraud. * While such Federal agency use is entirely legal, the interconnection of networks and information systems in effect extends the overall surveillance potential.

*see Ch. 4.

*See ch. 6.

Impact on Constitutional Rights

The enactment of national legislation could provide explicit guidelines for the operation and use of a national CCH system and include statutory protections against the use of CCH information in ways that might violate constitutional rights. Such legislation could mandate specific accountability alternatives such as access, review, and challenge procedures, criminal penalties, and privacy standards. Comprehensive legislation would help ensure a major and continuing role for Congress in the development and oversight of a national CCH system. SEARCH Group, Inc., among others, has concluded that enactment of Federal legislation "may be the single most important factor" in developing a national index or any other national CCH system.[29] SEARCH Group believes that in addition to protecting constitutional rights,[30] legislation is necessary in order to: 1) provide a clear mandate for a national CCH system; 2) establish a strong national commitment in terms of political and financial support; and 3) specify which organizations or entities shall have policy and/or management responsibility .31

In the absence of comprehensive Federal legislation, a national CCH system could be established through user agreements among the 50 States or by an interstate compact. In the former arrangement, each State would have to execute user agreements with all other States. To create an interstate compact, each State legislature would have to ratify the compact which would then be signed by the Governor. Congress would need to enact legislation consenting to the compact, followed by the signature of the President.[32] Whether or not establishing user agreements or an interstate compact would be less cumbersome and more feasible than enactment of comprehensive Federal legislation is an open question. However, it seems likely that the legislative route would provide stronger and more direct protection of constitutional rights.

Outside audit is another accountability measure found to be very important in protecting constitutional rights and was recom-

[29] SEARCH Group, Inc., *Essential Elements and Actions for Implementing a Nationwide Criminal History Program,* Sacramento, Calif., February 1979, p. 4.

[30] SEARCH Group, Inc., *Standards for Security and Privacy of Criminal Justice Information,* Sacramento, Calif., January 1978, pp. 18-19. This report covers many other areas, such as sealing and purging standards, that might be covered in comprehensive legislation.

[31] SEARCH Group, Inc., *Essential Elements and Actions for Implementing a Nationwide Criminal History Program,* Sacramento, Calif., February 1979, p. 4.

"SEARCH Group, Inc., *The Feasibility of an Interstate Compact for Exchanging Criminal History Information,* Sacramento, Calif., April 1980, pp. 3-4.

mended by SEARCH Group.[33] Outside audit would be necessary to ensure that a national CCH system was being operated and used for authorized purposes and in accordance with any guidelines established by Congress. The General Accounting Office and/or an independent national board could conduct audits of Federal and State agencies, and State CCH repositories (or possibly independent State boards) could conduct audits of user agencies within the State. *

The first amendment provides that "Congress shall make no laws . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances. " First amendment rights could be violated to the extent a national CCH system was used to monitor the lawful and peaceful activities or associations of citizens or to discourage such activities or associations through the dissemination of criminal history information. The dissemination of arrest-only information for noncriminal justice purposes could violate an individual's freedom of speech and association.[34] Strong and independent policy control over a national CCH system and tight restrictions (or a prohibition) on noncriminal justice access, coupled with outside audit and compre hensive legislation, would help minimize the possibility that a national CCH system could be used at some point in the future in violation of first amendment rights.

The "right to privacy" is embodied principally in the fourth amendment, which guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. " The courts have generally taken a middle ground here in recognizing that the individual's "fundamental right to privacy . . . and the potential economic and personal harm that results if his arrest becomes known to employers, credit agencies, or even neighbors''[35] must be balanced against the importance of arrest records to law enforcement officials.[36] Tight restrictions on noncriminal justice access and mandatory quality standards (especially with respect to disposition reporting) for those records that are disseminated outside the criminal justice community would help minimize the possibility that information from a national CCH system could be used in violation of individual privacy.

The fifth amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law. " The 14th amendment extends this due process protection to the States. The presumption of innocence has been construed as falling within the concept of liberty. Furthermore, the courts have held, under certain circumstances, that the dissemination and/or use of incomplete and/or inaccurate arrest and conviction records violates due process.[37] This is especially the case when the complete and accurate criminal history information was otherwise available but was not used as a basis for criminal justice decisions. The fifth amendment guarantees "the right to a speedy and public trial, by an impartial jury ... , and to have the assistance of counsel for his defense, " among other criminal process rights. The eighth amendment provides that no person shall be subjected to "excessive bail . . . or fines, nor cruel and unusual punishments. " In the leading case of *Tatum v. Rogers (1979),* the court found that the use of "rap sheets containing erroneous, ambiguous, or incomplete data with respect to prior arrests and dispositions" in setting bail constituted violation of the 14th (due process), sixth (right to effective assistance of counsel), and eighth (right to reasonable bail) amendments. * Mandatory record

"Ibid., p. 49.
*See ch. 14 for further discussion.

[34] See *Schware* v. *Board of Bar Examiners of New Mexico, 353* U.S. *252, 1957,* where the court held that a State cannot refuse to permit a law graduate to take a bar exam where such refusal was based on arrests for offenses for which the applicant was not tried or convicted.

[35] See *State v. Pinkney, 290* NE2d 923,924 (C.D. Ohio, 1972).
[36] See Ibid.; *Houston Chronicle Publishing Company v. City of Houston, 531* SW2d 177, 187 (Court of Civil Appeals of Texas, 14 Dist. 1975); William Rehnquist, "Is an Expanded Right of Privacy Consistent With Effective Law Enforcement," *Kansas Law Review,* vol. *23,* fall 1974, pp. 1-22; and *Menard v. Mitchell 430* F.2d 486 (D.C. Cir. 1970).
[37] See ch. 6 for discussion of *Tarlton v. Saxbe (1974)* and *Tatum v. Rogers (1979).*
*See further discussion in chs. 6 and 11.

quality standards established by statute and backed up by the necessary funding and technical assistance to ensure implementation (and outside audit to ensure compliance) appear to be the most effective ways to minimize the possibility that national CCH information could lead to fifth, sixth, eighth, and 14th amendment violations.

The 14th amendment also guarantees "the equal protection of the laws" to any person within the jurisdiction of a given State. It is also arguable that "any act by the Federal Government which would in effect be a denial of equal protection of law would constitute a 'deprivation of liberty' prohibited by the fifth amendment due process clause."[38] Thus, for example, it can be argued that the use of incomplete criminal history records (especially when lacking information on dispositions that have already occurred) violates equal protection of the law by "merging the distinction between innocence and guilt.'"[39]

[38] William A. Ratter, *Consitutional Law,* Gilbert Law Summaries, Gardena, Calif., 1970, p. 87. See *Bolling* v. *Sharp,* 347 U.S. *497, 1954.*

[39] SEARCH, *Standards for Security and Privacy,* op. cit., p. *5.*