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Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems

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DUE PROCESS VERSUS DATA PROCESSING: AN ANALYSIS OF COMPUTERIZED CRIMINAL HISTORY INFORMATION SYSTEMS

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DONALD H. ZEIGLER**

Based on their empirical study of New York's computerized criminal history information system and on their national surveys of similar systems, Professors Doernberg and Zeigler conclude that current regulations governing the dispersion of criminal history information are grossly inadequate. Although information drawn from computerized criminal history files is often inaccurate, incomplete, or inappropriate, that information is routinely used by criminal justice officials and judges to make decisions affecting defendants' liberty. The authors argue that this practice is unconstitutional and suggest ways to regulate criminal history information systems that would protect a defendant's right not to be deprived of liberty without due process of law.

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The authors gratefully acknowledge the assistance of Richard Faust in designing the audit of the New York criminal history information system, see text accompanying notes 242-74 *infra*, and the national surveys, see text accompanying notes 275-96 *infra*, and in analyzing the data derived therefrom. Special thanks go to the many people who helped conduct the audit and to the prosecutors, defense attorneys, and state officials who participated in the national surveys. The audit was undertaken as part of an action for declaratory and injunctive relief challenging the practices of the New York State Division of Criminal Justice Services in collecting, storing, and disseminating criminal history information. The action was litigated by the authors when they were members of the Special Litigation Unit of The Legal Aid Society in New York City. The court's findings of fact and preliminary conclusions of law are contained in an unreported opinion, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979). The authors also gratefully acknowledge the research assistance of Cindy Lou Beale, Thomas W. Calkins, and Deborah Fogel.

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INTRODUCTION

Numerius, the governor of Narbonensis, was on trial before the Emperor. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, "a passionate man," seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, "Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?" to which Julian replied, "If it suffices to accuse, what will become of the innocent?" *Rerum Gestarum*, L. xviii, c. 1.¹

Computers are becoming an integral part of the American criminal justice system. Because criminal history information² plays a vital role in decisionmaking at all stages of the criminal process,³ agencies across the country have given highest priority to the development of automated data processing systems⁴ which can quickly retrieve and display a person's prior criminal record.⁵ During the past decade, such computerized criminal history information systems have proliferated at the federal, state, and local levels with virtually no coordina-

¹ Quoted in *Coffin v. United States*, 156 U.S. 432, 455 (1895).

² For purposes of this Article, criminal history information is information which pertains to individuals charged with crime and includes identification data, the fact and date of arrest, the arrest charges and arresting agency, indictments, informations and other formal criminal charges, the disposition of the charges, and the sentence imposed, if any. It also includes data concerning the place and conditions of incarceration and parole.

³ Criminal history information is used by police in conducting investigations and in deciding whether to arrest a suspect. See text accompanying notes 299-311 *infra*. Prosecutors use criminal history information in deciding upon an appropriate charge. See text accompanying notes 312-27, 338-42 *infra*. Judges refer to criminal history information when setting bail and imposing sentence. See text accompanying notes 328-37, 343-50 *infra*. Criminal history information is used by corrections and parole officials in determining the conditions of imprisonment and length of sentence. See text accompanying notes 351-53 *infra*.

⁴ The numerous computerized criminal justice information systems developed on the local, regional, state, and federal levels are best described in Project SEARCH, Proceedings of the National Symposium on Criminal Justice Information and Statistics Systems (1970) [hereinafter 1970 Symposium]; Project SEARCH, Proceedings of the International Symposium on Criminal Justice Information and Statistics Systems (1972) [hereinafter 1972 Symposium]; Project SEARCH, Proceedings of the Second International Symposium on Criminal Justice Information and Statistics Systems (1974) [hereinafter 1974 Symposium]; SEARCH Group, Inc., Proceedings of the Fourth International SEARCH Symposium on Criminal Justice Information and Statistics Systems (1979) [hereinafter 1979 Symposium].

⁵ See President's National Advisory Commission on Criminal Justice Standards and Goals, Criminal Justice System Task Force Report 96 (1973) [hereinafter Criminal Justice System]; Kolodney, The Development and Implementation of an Offender-Based Transaction Statistics System Under Project SEARCH, in 1972 Symposium, *supra* note 4, at 39, 39; Velde, Law Enforcement Assistance Administration Programs in Criminal Justice Information and Statistics Systems, in 1972 Symposium, *supra* note 4, at 15, 16.

tion⁶ or effective regulation.⁷ As a result, such systems exhibit two primary defects. First, the "rap sheets"⁸ they generate are frequently inaccurate and incomplete.⁹ In many jurisdictions, only about one of four dispositions is reported accurately and completely. Second, rap sheets continue to list arrest charges after a disposition has occurred.¹⁰ Because rap sheets continue to list arrest charges even if the charges resulted in dismissal or acquittal or in conviction of offenses less serious than those originally charged, rap sheets frequently exaggerate defendants' criminal records.

Criminal justice officials who use rap sheets containing these defects infer guilt of charges that did not result in conviction.¹¹ The subjects of defective rap sheets are therefore treated more harshly than their actual criminal records warrant. In many cases arrest is more likely, prosecution is more vigorous, bail is set in higher amounts, the sentence is longer, and release on parole is more distant.¹² In short, subjects of defective rap sheets are more likely to spend more time in jail than they would if their rap sheets had contained only accurate, complete, and appropriate information. This Article contends that the compilation and use of rap sheets in their present form violates the constitutional prohibition against deprivation of liberty without due process of law;¹³ individuals held on criminal charges are impermissibly punished without an adjudication of guilt.¹⁴

After briefly discussing the evolution of manual criminal history files, Section I of this Article traces the uncontrolled development of computerized systems from their inception in the 1960's to the present, and discusses the failure of government at the congressional¹⁵

⁶ Criminal Justice System, *supra* note 5, at 41, 44; SEARCH Group, Inc., Tech. Rep. No. 14, *The American Criminal History Record: Present Status and Future Requirements 1* (Sept. 1976) [hereinafter SEARCH Group, Inc., Tech. Rep. No. 14]. Cingcade, *Introduction to Session IIB Judicial Information Systems*, in 1974 Symposium, *supra* note 4, at 91.

⁷ See I E. Albright, M. Fischel, F. Jordan & L. Otten, *Implementing the Federal Privacy and Security Regulations* at vii-ix, 5 (Mitre Tech. Rep. MTR-7704, 1977) [hereinafter Mitre Report]; SEARCH Group, Inc., Tech. Rep. No. 14, *supra* note 6, at 2; text accompanying notes 139-215 *infra*.

⁸ "Rap sheet" is the term commonly used to refer to a compilation of an individual's criminal history.

⁹ For extensive data documenting this problem, see text accompanying notes 234-69 *infra*.

¹⁰ See note 92 and accompanying text *infra*.

¹¹ This inference is explored in detail in text accompanying notes 354-403 *infra*.

¹² See Section III *infra*.

¹³ U.S. Const. amends. V; XIV, § 1.

¹⁴ *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 (1966) (Stewart, J., concurring) (punishment of acquitted defendant by requiring him to pay prosecution costs violated due process).

¹⁵ Hearings on various legislative proposals were held in 1972, 1973, 1974, and 1975. See *Criminal Justice Information and Protection of Privacy Act of 1975: Hearings on S. 2008, S.*

and administrative¹⁶ levels to regulate effectively the proliferation, quality, and operation of incompatible computer systems.¹⁷

Section II documents the consequences of government's failure to regulate these systems and presents the sobering results of (1) a systematic audit¹⁸ conducted by the authors of New York's computerized criminal history information system and (2) national surveys, conducted by the authors, of prosecutors, defense organizations, and state planning agencies¹⁹ to determine whether the findings of the New York audit are representative of other jurisdictions. In New York, nearly three quarters of the rap sheet entries are either incomplete or inaccurate. Formal charges are often less serious than arrest charges, and when defendants are convicted, they are usually found guilty of charges far less serious than those for which they were arrested. Even when a case results in acquittal or dismissal, the arrest record is frequently maintained and disseminated. The findings of the New York audit were consistent with the national surveys; the problems with rap sheets are nationwide.

Section III describes the use of rap sheets at each stage of the criminal process and demonstrates that whenever 'criminal justice officials make discretionary decisions affecting defendants' liberty, criminal history information plays a key role. Section III also demonstrates that the use of defective rap sheets results in harsher treatment

1427, S. 1428 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter 1975 Senate Hearings]; Criminal Justice Information Control and Protection of Privacy Act: Hearings on H.R. 8227 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter 1975 House Hearings]; Criminal Justice Data Banks—1974: Hearings on S. 2542, S. 2810, S. 2963, S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess. (1974) [hereinafter 1974 Senate Hearings]; Dissemination of Criminal Justice Information: Hearings on H.R. 188, H.R. 9783, H.R. 12574, H.R. 12575 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1973-1974) [hereinafter 1973-74 House Hearings]; Security and Privacy of Criminal Arrest Records: Hearings on H.R. 13315 Before the Subcomm. No. 4 of the House Comm. on the Judiciary, 92d Cong., 2d Sess. (1972) [hereinafter 1972 House Hearings]; text accompanying notes 165-82 *infra*.

¹⁶ See text accompanying notes 183-215 *infra*.

¹⁷ See text accompanying notes 144-215 *infra*.

¹⁸ Hard evidence measuring the extent of defects in rap sheets was virtually unavailable until 1977, when the authors conducted the first systematic audit of a computerized criminal history information system. See Office of Technology Assessment, United States Congress, A Preliminary Assessment of the National Crime Information Center and the Computerized Criminal History System 20, 23 (1978) [hereinafter OTA Report]; text accompanying notes 226-29 *infra*.

¹⁹ For purposes of this Article, the term "state planning agency" refers to the unit of state government having primary responsibility for collection, maintenance, and dissemination of criminal history information. A list of state planning agencies appears in SEARCH Group, Inc., Tech. Mem. No. 15, Security and Privacy Rulemaking: Resources, Terms and References 37-40 (1978).

of criminal defendants than would occur if rap sheets contained only accurate, complete, and appropriate information.²⁰

Section IV argues that the use of rap sheets that contain inaccurate, incomplete, and inappropriate information violates the due process clauses of the Constitution. Because these data give rise to a presumption of guilt, they should not be used by criminal justice officials in their decisionmaking processes.

Finally, Section V demonstrates that despite the failure of earlier attempts at regulation,²¹ simple solutions exist that, if implemented, would remedy the major problems of computerized criminal history systems. The proposed solutions would not unduly hamper criminal justice officials. Rather, the proposed solutions would provide an incentive to remedy current defects and would provide officials with the complete, accurate, and appropriate information necessary for the proper performance of their duties.

I

THE DEVELOPMENT OF COMPUTERIZED CRIMINAL HISTORY INFORMATION SYSTEMS

A. *Manual Systems*

In the 1800's, criminal history records were kept manually and arranged according to the individual's name.²² It was not until the late 1800's that Alphonse M. Bertillon developed the first system designed to insure positive identification of individuals with prior criminal records.²³ The Bertillon system, based on a series of body

²⁰ This Article does not discuss the many problems that improper dissemination of criminal history information outside the criminal justice system causes individuals seeking employment, occupational licenses, financial and credit services, and admission to public housing, educational programs, and the armed forces. For a discussion of these problems, see, e.g., *Menard v. Mitchell*, 430 F.2d 486, 490 (D.C. Cir. 1970) (dissemination of arrest records may impair one's opportunities for education, employment, or occupational licenses); 1975 House Hearings, *supra* note 15, at 86, 94-95 (remarks of Gary D. McAlvey) (employment and military service); 1973-74 House Hearings, *supra* note 15, at 76 (remarks of Rep. Edwards) (employment, credit, and housing opportunities); *id.* at 78, 79-81 (remarks of Aryeh Neier) (employment, credit, and housing opportunities); Davis, *Records of Arrest and Conviction: A Comparative Study of Institutional Abuse*, 13 *Creighton L. Rev.* 863, 869, 873-74 (1980) (employment); Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 *Crime and Delinquency* 494, 495-96, 502-03 (1967) (employment and licensing); Note, *The Arrest Record and New York City Public Hiring: An Evaluation*, 9 *Colum. J.L. & Soc. Prob.* 442, 446-48, 479-84 (1972-1973) (employment).

²¹ See text accompanying notes 139-215 *infra*.

²² Hoover, *Fingerprinting: The Work of the Identification Division of the Federal Bureau of Investigation*, *Student Law.*, Oct. 1961, at 13.

²³ V. Leonard, *The Police Records System* 44 (1970); D. Whitehead, *The FBI Story* 132-33 (1956); Hoover, *supra* note 22, at 13.

measurements supplemented by photographs,²⁴ was in general use for approximately thirty years,²⁵ but was gradually replaced by fingerprint identification systems after the turn of the century.²⁶

With the acceptance of fingerprints as the most reliable method of personal identification, many law enforcement agencies began to maintain fingerprint files.²⁷ In 1924, the Identification Division of the Federal Bureau of Investigation (FBI) became the central national repository for fingerprints.²⁸ Beginning with approximately 810,000 sets of prints,²⁹ the Division's files have grown to approximately 170 million sets³⁰ representing over 63 million people.³¹

²⁴ V. Leonard, *supra* note 23, at 44; D. Marchand, *Criminal Justice Information Systems and Information Policy* 163 (1976) (unpublished doctoral dissertation available at University Microfilms International). Bertillon suggested that certain bony structures of the body, such as the forearm, middle finger, and little finger, were unlikely to change in size and would therefore provide a reliable method of identification. V. Leonard, *supra*, at 44-45. The measurements were put into a "formula," and the identification cards were filed by the formula rather than by name. *Id.* at 45.

²⁵ V. Leonard, *supra* note 23, at 45; Hoover, *supra* note 22, at 13.

²⁶ D. Whitehead, *supra* note 23, at 132-33; D. Marchand, *supra* note 24, at 164-65. Use of fingerprints for identification purposes was suggested by Henry Faulds in a note appearing in the English journal *Nature* in 1880. H. Cummins & C. Mildo, *Finger Prints, Palms and Soles, An Introduction to Dermatoglyphics* 15 (1976). During the same period, Sir Edward Henry developed a system of fingerprint classification forming the basis of most systems in use today. *Id.* at 15-16; Hoover, *supra* note 22, at 14.

²⁷ Hoover, *supra* note 22, at 13; see D. Marchand, *supra* note 24, at 164-65. For example, the New York State Bureau of Criminal Identification began fingerprinting prison inmates in 1903. *Id.* at 165; see J. Silbert, *Criminal Justice Information Systems and the Criminal Justice "System"* 81 (1972) (unpublished doctoral dissertation available at University Microfilms International). The California Bureau of Criminal Identification was established in San Quentin prison in 1905 primarily to fingerprint inmates and to distribute copies of the fingerprints to police agencies for use in identifying inmates arrested after release from custody. J. Kenney, *The California Police* 46-47 (1964). By 1923, the Department of Justice and the International Association of Chiefs of Police had established two central clearinghouses for storage and dissemination of fingerprint records. 1974 Senate Hearings, *supra* note 15, vol. 1 at 659-60 (remarks of Clarence M. Kelley).

²⁸ OTA Report, *supra* note 18, at 18; Hoover, *supra* note 22, at 14.

²⁹ Hoover, *supra* note 22, at 14; Jones, *The Status of the FBI's Automatic Fingerprint Identification Project*, in 1979 Symposium, *supra* note 4, at 213, 213-14.

³⁰ [1978] FBI Ann. Rep. 15-16 (1979).

³¹ Jones, *supra* note 29, at 214. In fiscal 1978, the Identification Division received over 6,000,000 sets of fingerprints, [1978] FBI Ann. Rep. 15 (1979), which were processed by approximately 3600 employees. Jones, *supra*, at 214. The Division receives sets of fingerprints from approximately 9900 contributing or participating state and federal agencies. *Id.*

The fingerprint records are divided into criminal and civil files. *Menard v. Mitchell*, 328 F. Supp. 718, 721 (D.D.C. 1971), *aff'd in part, rev'd in part*, 498 F.2d 1017, 1021 (D.C. Cir. 1974); Hoover, *supra* note 22, at 14; Jones, *supra*, at 214. The criminal file contains the records of persons charged with crimes, and the civil file includes, *inter alia*, fingerprint cards of individuals applying for private and government employment, permits, or licenses. *Menard v. Mitchell*, 328 F. Supp. at 721; [1978] FBI Ann. Rep. 16 (1979) (bar graph); Jones, *supra*, at 214. The criminal file contains records on approximately 22 million people; the civil file contains records on approximately 41 million people. Jones, *supra*, at 214. The criminal file comprises almost half of the approximately 180 million prints in the Division's possession. See [1978] FBI Ann. Rep. 16 (1979) (bar graph).

Since its inception, the Identification Division has served as a source of criminal history information for law enforcement agencies nationwide. Fingerprint cards and arrest information are mailed to the Division³² by federal, state, and local law enforcement agencies.³³ When a card is received, the Division searches its criminal files to determine whether the Division has a prior record on the individual involved.³⁴ The Division adds the new information to an existing record or creates a new record if no prior record exists.³⁵ The information is then placed on a rap sheet³⁶ and sent by mail to the agency that submitted the fingerprints.³⁷

FBI Identification Division rap sheets are designed to contain information on the contributor of the fingerprints (usually an arresting agency or correctional institution), the subject's name, the date the subject was arrested or entered the correctional institution, the arrest charges, and the disposition of the charges.³⁸ However, the

³² On February 9, 1973, contributors were notified that fingerprints obtained from individuals charged with "nonserious offenses, including drunkenness, traffic violations and loitering," should no longer be submitted to the Division. [1973] FBI Ann. Rep. 47 (1974).

³³ *Menard v. Mitchell*, 328 F. Supp. 718, 721 (D.D.C. 1971), *aff'd in part, rev'd in part*, 498 F.2d 1017, 1021 (D.C. Cir. 1974); Comptroller General, General Accounting Office, Development of the Computerized Criminal History Information System, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 8, 10 [hereinafter Comptroller General's Report]; OTA Report, *supra* note 18, at 18.

³⁴ *Menard v. Mitchell*, 328 F. Supp. at 721; OTA Report, *supra* note 18, at 18.

³⁵ OTA Report, *supra* note 18, at 18; see Jones, *supra* note 29, at 214.

³⁶ 1974 Senate Hearings, *supra* note 15, vol. 1 at 665 (remarks of Clarence M. Kelley); Comptroller General's Report, *supra* note 33, at 10; Jones, *supra* note 29, at 214.

³⁷ See *Menard v. Mitchell*, 328 F. Supp. 718, 721 (D.D.C. 1971), *aff'd in part, rev'd in part*, 498 F.2d 1017, 1021 (D.C. Cir. 1974); OTA Report, *supra* note 18, at 18. The contributing agency receives the rap sheet data approximately two weeks after sending its request to the Division. OTA Report, *supra* note 18, at 18; President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 268 (1967) [hereinafter *The Challenge of Crime*]. A response time of approximately two weeks is typical of most manual rap sheet systems. D'Alessandro, Paley & Wheeler, *The Role of Facsimile Transmission in the Project SEARCH Demonstration*, in 1970 Symposium, *supra* note 4, at 51, 53. During the 1970's, the Identification Division of the FBI began automating parts of its operations. Jones, *supra* note 29, at 216-17.

The overall plan included (1) computerized recording of incoming fingerprint cards and their logging and tracking throughout the Division as they are processed; (2) computerized name searching; (3) automated fingerprint reading, classification and searching; (4) computerized posting of wanted notices; (5) computerized name checking and miss[ing] persons operations; and (6) computerized printing of Identification Records ["rap sheets"] and "No Record" responses for contributors.

Id. Substantial parts of the plan have been implemented. See [1977] FBI Ann. Rep. 19 (1978); [1973] FBI Ann. Rep. 45-46 (1974); Jones, *supra* note 29, at 214-20.

³⁸ 1974 Senate Hearings, *supra* note 15, vol. 1 at 659, 665-66 (remarks of Clarence M. Kelley); Comptroller General's Report, *supra* note 33, at 10. Most state rap sheets, whether manual or computerized, are now designed to contain similar data. See National Survey of State Planning Agencies, *app. C infra*, questions 1-13.

Division adds to the rap sheet only such disposition data as it receives from the contributing agency.³⁹ Because many contributing agencies submit information that is incomplete or inaccurate⁴⁰ or fail to provide any disposition information whatsoever,⁴¹ Identification Division rap sheets lack disposition data in a substantial number of cases.⁴²

In addition to the manual files maintained on the federal level, most states maintained their own manual files. By 1969, forty-eight

³⁹ *Menard v. Mitchell*, 328 F. Supp. 718, 721 (D.D.C. 1971), aff'd in part, rev'd in part, 498 F.2d 1017 (D.C. Cir. 1974); see Automation & Research Section, Identification Division of the FBI, Disposition Systems and Procedures Feasibility Study 1-2 (1976) (hereinafter FBI Feasibility Study); OTA Report, supra note 18, at 18.

⁴⁰ See FBI Feasibility Study, supra note 39, at 18-29. The Division is unable to record disposition data when the subject of a disposition report cannot be identified or when disposition information cannot be linked to a specific arrest. Id. at 18-20, 28-29. In many cases, contributing agencies fail to include in their disposition reports the subject's FBI identification number and fingerprint classification, rendering the task of identification impossible unless the subject's name is uncommon. Id. at 18, 28. When contributing agencies submit either illegible fingerprints with the arrest information or disposition reports containing incorrect arrest information, disposition information cannot be linked with a specific arrest. Id. at 18-20, 28. Finally, some disposition information is reported to the FBI in ambiguous language, creating uncertainty as to whether the reported disposition constituted the final disposition of the case. Id. at 29.

⁴¹ Id. at 1, 6-14. Contributing agencies fail to provide disposition data for several reasons. Generally, "[a] police department has no strong incentive for reporting dispositions after the positive identification has been established." *The Challenge of Crime*, supra note 37, at 268; see FBI Feasibility Study, supra note 39, at 29. In some jurisdictions, confusion exists as to which agency within a particular state is responsible for submitting disposition information to the FBI. Id. at 27. In addition, police officials often have difficulty obtaining disposition information from court personnel. Id. at 23-25, 27.

⁴² The proportion of missing dispositions has been estimated to be 35%. *The Challenge of Crime*, supra note 37, at 268. The FBI's internal study estimated that 55% of the disposition reports were unusable. FBI Feasibility Study, supra note 39, at 18-20. See text accompanying notes 225-96 *infra* for available data concerning the completeness and accuracy of rap sheets.

The FBI has maintained steadfastly that responsibility for both the accuracy of the information the Identification Division receives and the misuse of the incomplete or inaccurate information it disseminates rests with the submitting and receiving agencies, not with the FBI. *Tarleton v. Saxbe*, 507 F.2d 1116, 1126-27 (D.C. Cir. 1974); 1974 Senate Hearings, supra note 15, vol. 1 at 666 (remarks of Clarence M. Kelley); 1972 House Hearings, supra note 15, at 76-77 (remarks of Beverly Ponder); see *Menard v. Saxbe*, 498 F.2d 1017, 1022, 1026 (D.C. Cir. 1974). The FBI's position has been rejected by the courts. As the court in *Menard* stated:

The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and harm.

498 F.2d at 1026; accord, *Tarleton v. Saxbe*, 507 F.2d at 1126-27; cf. *United States v. Mackey*, 387 F. Supp. 1121, 1123-24 (D. Nev. 1975) (granting motion to suppress evidence seized subsequent to an arrest based on erroneous FBI computer listing). Many public officials involved in the development of criminal history information systems have expressed the view that agencies which maintain data banks must assume responsibility for the completeness and accuracy of the information they disseminate. See, e.g., 1973-74 House Hearings, supra note 15, at 173 (remarks of Arnold R. Rosenfeld); id. at 149 (remarks of Gov. Sargent); id. at 358, 368 (remarks of Richard W. Velde).

states and the District of Columbia had established central criminal information repositories for criminal fingerprint and offender history information.⁴³

B. Early Use of Computers in the Criminal Process

Local police departments began using computers in the early 1960's primarily to maintain files concerning wanted persons and stolen vehicles.⁴⁴ Not until 1967 did the FBI establish the first nationwide computerized criminal justice information system, the National Crime Information Center (NCIC).⁴⁵ Initially, five files were computerized: stolen vehicles, license plates, guns, identifiable articles, and wanted persons.⁴⁶ Files containing records on stolen securities and boats were added in 1968 and 1969, respectively.⁴⁷ NCIC sup-

⁴³ Bratt, Survey of State Criminal Justice Information Systems, in 1970 Symposium, *supra* note 4, at 73, 74. Local criminal justice agencies, however, maintained the bulk of criminal history information. SEARCH Group estimated that during 1975, more than half of 195 million criminal history records maintained by state and local criminal justice agencies were held on the local level. SEARCH Group, Inc., Tech. Rep. No. 14, *supra* note 6, at 27-28. Local law enforcement officials maintained 105 million records, local prosecutors maintained 21 million, local correction officials maintained 15 million, and local probation or parole officials maintained 3 million. *Id.* at 28 (chart).

⁴⁴ For example, the Police Information System (PINS) instituted by Alameda County, California in 1963, Bratt, *supra* note 43, at 73, provided information on wanted persons to county and local law enforcement agencies, Institute for Defense Analyses, President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Science and Technology 69 (1967) [hereinafter Science and Technology]. The California Highway Patrol started their AUTO-STATIS system in 1965, Bratt, *supra*, at 73, which permitted immediate access to files on stolen automobiles, Science and Technology, *supra*, at 69. By 1967, St. Louis, Chicago, New York, and other cities had computer systems that performed similar functions and assisted in police resource allocation. See *id.* The evolution of police computer use in the 1960's is described in Colton, The Use of Computers by Police: Patterns of Success and Failure, in 1972 Symposium, *supra* note 4, at 139, 139-45.

During this period, some police departments also began to transmit fingerprints via facsimile, a process that facilitates rapid retrieval of criminal history information, D'Alessandro, Paley & Wheeler, *supra* note 37, at 52. Facsimile is "a process for transmitting printed matter or graphic information, e.g., still photographs, via wire or radio for the purpose of obtaining an exact reproduction at a remote location." *Id.* at 51. The Chicago Police Department began transmitting fingerprints by facsimile in 1964. New York acquired this capability on an intra-state basis in 1967. *Id.* at 52.

⁴⁵ Comptroller General, Development of a Nationwide Criminal Data Exchange System—Need to Determine Cost and Improve Reporting 4, 5 (1973) [hereinafter Need to Determine Cost]; The National Crime Information Center, A Special Report, 43 FBI L. Enforcement Bull. 8 (1974) [hereinafter NCIC Special Report].

⁴⁶ NCIC Special Report, *supra* note 45, at 8.

⁴⁷ Young, Current Developments and Plans Concerning the NCIC Stolen Property and Wanted Persons Files, in 1979 Symposium, *supra* note 4, at 249, 249. A computerized criminal history file (CCH) was added in 1971. *Id.* For a detailed discussion of CCH, see text accompanying notes 125-33, 157-64 *infra*. A missing persons file was incorporated in 1975, and a file for the exchange of information between state crime laboratories was added in 1978. Young, *supra*, at 249.

plies information from these files on request to local, state, and federal law enforcement agencies.⁴⁸

The 1967 report of the President's Commission on Law Enforcement and Administration of Justice helped to further such use of computers.⁴⁹ According to the Commission, the American criminal justice system of the late 1960's was overburdened⁵⁰ and fragmented,⁵¹ information concerning crime was often incomplete, inaccurate, or unavailable.⁵² The Commission proposed the use in the criminal justice system of "computer-based information systems."⁵³

⁴⁸ Comptroller General's Report, *supra* note 33, at 10; Need to Determine Cost, *supra* note 45, at 4; Colton, *supra* note 44, at 145; NCIC Special Report, *supra* note 45, at 8. By 1978, over 6000 agencies had direct access to NCIC's seven million records through state or local computer terminals. [1978] FBI Ann. Rep. 14 (1979). In fiscal 1978, the computers processed more than a quarter of a million inquiries per day. *Id.* at 14-15.

As with the Identification Division, see note 42 *supra*, NCIC places responsibility on the contributing agency for the completeness and accuracy of information entered in the system, and for the modification or cancellation of those records. 1974 Senate Hearings, *supra* note 15, vol. 2 at 30 (remarks of L. Patrick Gray); National Crime Information Center (NCIC), FBI, Computerized Criminal History Program: Background, Concept and Policy 1-2 (1973), reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 672, 672 [hereinafter Background, Concept and Policy].

⁴⁹ See 1974 Senate Hearings, *supra* note 15, vol. 1 at 173, 179 (remarks of Elliot Richardson); OTA Report, *supra* note 18, at 9, 45; D. Marchand, *supra* note 24, at 81-83.

⁵⁰ See *The Challenge of Crime*, *supra* note 37, at 7, 10.

⁵¹ See *id.* at 7. The Commission offered an explanation for this fragmentation:

The system of criminal justice America uses to deal with . . . crimes . . . is not a monolithic, or even a consistent, system . . . [L]ayer upon layer of institutions and procedures, some carefully constructed and some improvised, some inspired by principle and some by expediency, have accumulated. Parts of the system—magistrates' courts, trial by jury, bail—are of great antiquity. Other parts—juvenile courts, probation and parole, professional policemen—are relatively new. The entire system represents an adaptation of the English common law to America's peculiar structure of government, which allows each local community to construct institutions that fill its special needs. Every village, town, county, city, and State has its own criminal justice system, and there is a Federal one as well. All of them operate somewhat alike. No two of them operate precisely alike.

Id.

⁵² *Id.* at 266. The Commission identified two principal types of deficiencies in the existing data concerning crime, offenders, and the criminal justice system:

First, much [*sic*] of the published data are incomplete, inconsistent, and inaccurate. For example, different criminal justice agencies report their operations in inconsistent units: The police report "arrests," the courts report "cases," and corrections agencies report "offenders." Information from different jurisdictions often has different underlying interpretations. In some jurisdictions, stealing from parking meters is burglary, while in others it is larceny . . .

The second class of deficiencies in existing data includes the vast number of instances in which no data at all are available. We know much too little about how various actions of the criminal justice system affect the number and types of crimes committed by different classes of offenders.

Id.

⁵³ *Id.*

Computers, in the Commission's view, could improve the criminal justice system in three ways:⁵⁴ (1) by facilitating the implementation of a national criminal justice information system, such as NCIC, which could respond rapidly to police inquiries concerning stolen property or wanted persons, (2) by providing rapid access to criminal history information, and (3) by providing complete and comprehensive statistics to assist criminal justice administrators in decisionmaking.

The Commission's suggestions for the organization and control of computerized criminal history information systems reflected concern for the protection of personal privacy and for maintenance of a proper balance between the state and federal systems. The Commission expressed concern that storage of all criminal history information in one central computer would raise the spectre of "Big Brother."⁵⁵ It also recognized that, because law enforcement is primarily a state and local government responsibility, a computerized system "must be geared to the circumstances and requirements of local and State agencies."⁵⁶ Balancing its privacy and federalism concerns against the needs of the criminal justice system,⁵⁷ the Commission proposed that a national computerized repository contain only summary criminal histories listing information about serious crimes, while detailed information concerning serious and less serious crimes would be available from state and local agencies.⁵⁸ It envisioned that the central repository would contain "basic identification information such as name, identification number, age, and description . . . [and] would specify, for each arrest recorded, the date and jurisdiction, the charge, the court disposition, and the assignments to correctional supervision."⁵⁹

The Commission's proposal suffered from two major defects. First, it would have centralized in a national computerized file all of the most important, and potentially most harmful,⁶⁰ facts concerning

⁵⁴ Id. at 266-69.

⁵⁵ See id. at 268-69; *Science and Technology*, supra note 44, at 74-77. Only the year before, Congress had rejected a proposal by the Bureau of the Budget to establish a National Data Center. The proposal was extremely controversial, and had resulted in hearings in both the House and Senate. *The Computer and Invasion of Privacy: Hearings Before the Special Subcomm. on the Invasion of Privacy of the House Comm. on Government Operations*, 89th Cong., 2d Sess. (1966); *Invasion of Privacy: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 89th Cong., 2d Sess. (1966). For excellent summaries of the controversy, see A. Miller, *The Assault on Privacy 54-67* (1971); A. Westin, *Privacy and Freedom 315-21* (1967).

⁵⁶ *The Challenge of Crime*, supra note 37, at 267.

⁵⁷ See id. at 267-69.

⁵⁸ Id. at 268-69.

⁵⁹ *Science and Technology*, supra note 44, at 76.

⁶⁰ See text accompanying notes 297-353 infra.

a person's involvement with the criminal justice system. Indeed, the Commission admitted that the national repository it envisioned would generate a computerized rap sheet very similar to the manual rap sheets generated by the Identification Division of the FBI.⁶¹ Thus, it is questionable whether the Commission's plan would have adequately protected personal privacy.

The second major defect was the failure to address adequately the problem of incompleteness that characterized the Identification Division rap sheets.⁶² Although the Commission recognized the importance of avoiding such incompleteness,⁶³ its suggestions on this point were vague. A report prepared for the Commission merely suggested that the "organization selected to manage [the computerized criminal history file] work closely with reporting agencies to assure that correct, uniform, and complete information is reported."⁶⁴ The Commission itself proposed only that "[s]ome system of incentives should be developed to assure that court dispositions are recorded."⁶⁵

Shortly after the Commission's report was released, President Johnson proposed legislation to implement many of its recommendations.⁶⁶ Subsequently, Congress enacted the Omnibus Crime Control and Safe Streets Act of 1968.⁶⁷ In Title I of the Act,⁶⁸ Congress declared that "crime is essentially a local problem that must be dealt with by State and local governments if it is to be controlled effectively."⁶⁹ Consequently, major responsibility for the development of new programs to combat crime was placed on state and local governments. The federal role was to encourage and assist state and local

⁶¹ *The Challenge of Crime*, supra note 37, at 268.

⁶² See text accompanying notes 39-42 supra.

⁶³ See *The Challenge of Crime*, supra note 37, at 268-69.

⁶⁴ *Science and Technology*, supra note 44, at 75.

⁶⁵ *The Challenge of Crime*, supra note 37, at 268-69.

⁶⁶ On February 6, 1967, President Johnson issued a Special Message on the Crime Commission report. While recognizing that crime was basically a local problem, the President suggested federal legislation to "help . . . strengthen the system, and to encourage the kind of innovations needed to respond to the problem of crime in America." President's Special Message to the Congress on Crime in America, [1967] Pub. Papers 134, 138, reprinted in [1968] U.S. Code Cong. & Ad. News 2115, 2115.

⁶⁷ Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified in scattered sections of 5, 18, 28, 40-42, 47 U.S.C.). The Act was substantially changed in 1973 and 1979. See notes 165-66, 215, and accompanying text infra.

⁶⁸ Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified in scattered sections of 5, 18, 28, 40-42, 47 U.S.C.).

⁶⁹ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Declarations and Purposes, 82 Stat. 197 (current version at 42 U.S.C. § 3701 (Supp. III 1979)).

governments⁷⁰ and to provide substantial amounts of money⁷¹ with relatively few strings attached.⁷² The Law Enforcement Assistance Administration (LEAA) was created to perform these tasks.⁷³

From its inception, LEAA has given high priority to the development of computerized information and statistics systems.⁷⁴ Project SEARCH,⁷⁵ one program funded in part by LEAA,⁷⁶ strongly influenced the design of computerized systems developed during the 1970's.⁷⁷ Project SEARCH initially had two purposes: (1) to develop and test a prototype computerized system for the interstate exchange of criminal history information, and (2) to design and demonstrate a computerized statistics system that would trace individual offenders through the criminal justice system.⁷⁸

⁷⁰ *Id.* at 198.

⁷¹ For the purpose of carrying out Title I, Congress appropriated \$100 million for each of the 1968 and 1969 fiscal years, \$300 million for the 1970 fiscal year, and for succeeding years, such sums as might later be authorized. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 520, 82 Stat. 197. By the end of the 1978 fiscal year, over \$6 billion had been distributed under Title I. See LEAA Tenth Ann. Rep. 145 (1979) (Table of Distribution of LEAA Funds for Fiscal Years 1969-78).

⁷² Title I established a new block-grant approach to federal funding. Section 306 stipulated that 85 percent of the funds expended under Part C (Grants for Law Enforcement Purposes) were to be allocated among the states according to population, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 306, 82 Stat. 197, (superseded 1979), for each state "to use as it deemed fit for improving its criminal justice system and for reducing crime." LEAA Sixth Ann. Rep. 3 (1974).

⁷³ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 101, 82 Stat. 197 (current version at 42 U.S.C. § 3711 (Supp. III 1979)). For discussions of the legislative history of the Act, see Advisory Commission on Intergovernmental Relations, *Making the Safe Streets Act Work* 8-19 (1970).

⁷⁴ 1973-74 House Hearings, *supra* note 15, at 358, 364 (remarks of Richard W. Velde); LEAA, *State-by-State Surveys of Security & Privacy Considerations in Computerized Criminal Justice Information Systems* (1971), excerpts reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 190, 193; Velde, *supra* note 5, at 15, 16-17.

⁷⁵ SEARCH is an acronym for System for Electronic Analysis and Retrieval of Criminal Histories. 1973-74 House Hearings, *supra* note 15, at 358, 364 (remarks of Richard W. Velde).

⁷⁶ See *Need to Determine Cost*, *supra* note 45, at 3; Project SEARCH, Tech. Rep. No. 3, *Designing Statewide Criminal Justice Statistics Systems—The Demonstration of a Prototype at v* (Nov. 1970) [hereinafter Project SEARCH, Tech. Rep. No. 3]; note 78 *infra*.

⁷⁷ See text accompanying notes 125-43 *infra*.

⁷⁸ 1973-74 House Hearings, *supra* note 15, at 341 (remarks of O.J. Hawkins); *Need to Determine Cost*, *supra* note 45, at 3; Project SEARCH, Tech. Rep. No. 2, *Security and Privacy Considerations in Criminal History Information Systems 4* (July 1970) [hereinafter Project SEARCH, Tech. Rep. No. 2]; Project SEARCH, Tech. Rep. No. 3, *supra* note 76, at v; Hawkins, *Preface to 1970 Symposium*, *supra* note 4, at 5, 5.

In 1969, LEAA received numerous grant applications from states seeking substantial funds to develop state criminal justice information systems. 1973-74 House Hearings, *supra* note 15, at 358, 364 (remarks of Richard W. Velde); Velde, *Keynote Address, in 1970 Symposium*, *supra* note 4, at 9, 10; Velde, *supra* note 5, at 15, 16. However, according to its congressional budgetary allocation, in fiscal 1968, LEAA could disburse only four to four and one-half million dollars in its own discretion. LEAA First Ann. Rep. 3 (1969); Velde, *Keynote Address, supra*, at

*C. Development of a Prototype for Interstate
Exchange of Criminal Histories*

The creators of Project SEARCH envisioned a national computerized criminal history information system that would permit rapid access to rap sheets and thereby assist police making arrest decisions, prosecutors making charge decisions, and judges setting bail.⁷⁹ Because criminal justice agencies do not receive manual rap sheets from the FBI's Identification Division until approximately two weeks after a request is sent,⁸⁰ manual rap sheets are often unavailable when those officials are making decisions.⁸¹ A national computerized system could provide criminal justice officials with timely information on a person's criminal record in other states.⁸²

In designing the prototype, Project SEARCH adopted some of the key recommendations of the President's Commission,⁸³ and built upon the practices of existing manual rap sheet systems. Specifically, Project SEARCH designed a system in which the central repository would contain summary information on each offender's criminal history, while state files would contain more detailed information.⁸⁴ The central repository would provide the summary information to the inquiring agency and direct it to the state where additional informa-

10; Velde, *supra* note 5, at 15, 16. Because funds were limited and because LEAA wished to avoid the development of incompatible state systems, LEAA decided to fund one project in which many interested states could participate. Velde, Keynote Address, *supra*, at 10; Velde, *supra* note 5, at 16. Initially, Arizona, California, Maryland, Michigan, Minnesota, and New York were chosen to participate. Connecticut, Florida, Texas, and Washington were to take part as observers. A \$600,000 discretionary grant was awarded to the participating states to launch Project SEARCH. Velde, Keynote Address, *supra*, at 10. An additional \$832,200 was awarded in fiscal 1970. Another \$230,000 was granted in fiscal 1970 and 1971 to pay for interstate switches and telecommunications lines. Grants to SEARCH for development of what became known as CCH ultimately totalled approximately \$2,250,000. 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 695 (LEAA Responses to Issues Raised by the Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary).

⁷⁹ See Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 2-3; Velde, Keynote Address, in 1970 Symposium, *supra* note 4, at 9, 11-12.

⁸⁰ See note 37 *supra*.

⁸¹ See D'Alessandro, Paley & Wheeler, *supra* note 37, at 53; OTA Report, *supra* note 18, at 18.

⁸² Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 3-4; Velde, Keynote Address, in 1970 Symposium, *supra* note 4, at 9, 11.

⁸³ See text accompanying notes 53-65 *supra* for a discussion of the Commission's recommendations.

⁸⁴ Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 3-4; Project SEARCH, Tech. Rep. No. 1, Standardized Data Elements for Criminal History Files 1-2 (1970) [hereinafter Project SEARCH, Tech. Rep. No. 1]; see Marx, Evaluation—Criminal History Exchange System, in 1970 Symposium, *supra* note 4, at 227, 227, 229; Plants, Project SEARCH Central Index—Philosophical, Technical and Operational Aspects, in 1970 Symposium, *supra* note 4, at 47, 47.

tion could be obtained.⁸⁵ As with the President's Commission,⁸⁶ federalism and privacy concerns led Project SEARCH to adopt this design rather than one that would centralize all criminal history information.⁸⁷ The data elements to be included in the central file, however, were basically the same as those contained on manual rap sheets from the federal and state files—identification data, arrest information, and disposition data.⁸⁸ Thus, it was not clear that the design was new or represented, as the Chairman of the SEARCH Committee on Privacy and Security asserted, "a very reasonable solution to the problem of possible compromise of American freedoms because of 'instant dossiers.'"⁸⁹

Project SEARCH adopted other practices of manual rap sheet systems. First, it decided that as soon as criminal fingerprint cards were received and a positive identification was made, the date of the arrest, the arresting agency, and the charge would be entered on computerized rap sheets.⁹⁰ Disposition information was supposed to follow.⁹¹ Second, Project SEARCH decided that arrest information would not be deleted from the computerized rap sheet if the subject were convicted of a lesser charge or acquitted.⁹² Third, Project

⁸⁵ Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 4.

⁸⁶ See text accompanying notes 54-61 *supra*.

⁸⁷ See Gallati, SEARCH—Security and Privacy Considerations, in 1970 Symposium, *supra* note 4, at 27, 29-31. Captain John R. Plants of the Michigan State Police stated that this design was chosen

because it clearly presented fewer technical problems associated with huge data bases and multiple inquiry generation, but most importantly because of the inherent privacy and security dangers present in a large national data base. The Project Group also felt that the states would be better able to control their own records with this type of arrangement since they could determine what went out of their state and in what form.

Plants, *supra* note 84, at 47. For a full discussion of the philosophy underlying the design adopted by Project SEARCH, see SEARCH Group, Inc., Tech. Rep. No. 13, Standards for Security and Privacy of Criminal Justice Information 13-15 (2d rev. ed. 1978) [hereinafter SEARCH Group, Inc., Tech. Rep. No. 13].

⁸⁸ See text accompanying notes 38-42 *supra*. The information to be included in the Project SEARCH central repository is described in detail in Project SEARCH, Tech. Rep. No. 1, *supra* note 84, at 4-10. See also Marx, *supra* note 84, at 227.

⁸⁹ Gallati, *supra* note 87, at 31. See text accompanying notes 55-65 *supra* and Section IV *infra* for a discussion of these problems.

⁹⁰ See Project SEARCH, Tech. Rep. No. 8, Design of a Model State Identification Bureau 15-16 (1973); Project SEARCH, Tech. Mem. No. 4, Model Administrative Regulations for Criminal Offender Record Information 10 (1972) [hereinafter Project SEARCH, Tech. Mem. No. 4]; Project SEARCH, Tech. Mem. No. 3, A Model State Act for Criminal Offender Record Information 15 (1971) [hereinafter Project SEARCH, Tech. Mem. No. 3]; Project SEARCH, Tech. Rep. No. 1, *supra* note 84, at 7-10.

⁹¹ Project SEARCH, Tech. Rep. No. 1, *supra* note 84, at 8-10.

⁹² See Project SEARCH, Tech. Mem. No. 4, *supra* note 90, at 10; Project SEARCH, Tech. Mem. No. 3, *supra* note 90, at 15; Project SEARCH, Tech. Rep. No. 1, *supra* note 84, at 8. The only data that Project SEARCH planned to exclude from the prototype system concerned

SEARCH concluded that, while some disposition data would be mandatory,⁹³ inclusion in state computerized rap sheets of formal charges lodged by the prosecutor should be optional.⁹⁴ Finally, Project SEARCH planned to make criminal history information freely available to all criminal justice agencies.⁹⁵

Project SEARCH encountered problems concerning the completeness and accuracy of the prototype data base which presaged similar problems in the subsequent development of state computerized criminal history information systems.⁹⁶ Use of paper forms in lieu of on-line transmission of data rendered the collection of data difficult.⁹⁷ Converting records from manual to computerized form posed

juvenile offenses, misdemeanor drinking and traffic arrests, and unverified information, "such as that emanating from intelligence sources." Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 16-17. Regarding the last exclusion, SEARCH intended "to avoid the use of data resulting from tips, rumors or second-hand allegations that have not been formally substantiated or derived from official criminal justice proceedings." *Id.* at 17.

Retaining arrest charges on rap sheets after dispositions have occurred is common practice. Of the 22 state planning agencies that responded to the authors' survey, 21 indicated that their rap sheets display both the original arrest charge and the conviction offense when a conviction is of an offense of lesser degree than the original charges. National Survey of State Planning Agencies, *app. C* *infra*, question 13.

⁹³ See Project SEARCH, Tech. Rep. No. 1, *supra* note 84, *app. F*, at 2-3.

⁹⁴ *Id.* Frequently, formal charges lodged by the prosecutor are less serious than the arrest charges entered by the police. See text accompanying notes 270-71 *infra*. Failure to replace arrest charges with formal charges is also a common practice. The authors' survey of state planning agencies examined whether the data listed in the charge column include the charges entered by the arresting officer, those contained in the accusatory instrument filed by the prosecutor, or both. Of the 21 agencies responding to this question, 16 answered that the arresting officer's charges are listed, five answered that both arrest and formal charges are presented, and none indicated that only formal charges are listed. National Survey of State Planning Agencies, *app. C* *infra*, question 2.

⁹⁵ Project SEARCH planned to allow direct access to the computerized system to "public agencies which have as their principal function the reduction or prevention of crime or the enforcement of the criminal law." Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 24. Project SEARCH included in this general category police, prosecutors, courts, correction departments, parole and probation agencies, and agencies having as a "principal function the collection and provision of criminal justice information." *Id.* at 25; see Project SEARCH, Tech. Mem. No. 3, *supra* note 90, at 14-15. It also contemplated that criminal history information would be made available to "such other individuals and agencies as are, or may subsequently be, authorized access to such records by statute." *Id.* at 20.

⁹⁶ See text accompanying notes 225-96 *infra*.

⁹⁷ See Hilton, *The Maryland Approach to Data Collection and Reduction for Project SEARCH*, in 1970 Symposium, *supra* note 4, at 213, 213. Information from paper forms was traditionally transferred to a card by key-punching before it was entered into a computer's data bank. See *id.* In an on-line system, data are entered directly into the computer's data bank by means of a typewriter or video display keyboard terminal, obviating the need for paper forms. SEARCH Group, Inc., Tech. Rep. No. 23, *Microcomputers and Criminal Justice: Introducing a New Technology* 60 (1978) [hereinafter SEARCH Group, Inc., Tech. Rep. No. 23]. On-line systems would appear to minimize the risk of error. See note 412 *infra*.

additional difficulties.⁹⁸ Moreover, despite an expressed concern about the importance of completeness and accuracy,⁹⁹ the prototype system "did not have an update capability" in its original design.¹⁰⁰ Although Project SEARCH concluded that "[s]teps to achieve complete data accuracy [were] not possible during the brief demonstration period,"¹⁰¹ it urged the adoption of an audit program for future systems.¹⁰² However, given the philosophy of state control underlying the Omnibus Crime Control and Safe Streets Act, the statute which created LEAA,¹⁰³ Project SEARCH could not ensure that future systems would conduct audits. At most, it could exhort the states to perform responsibly.¹⁰⁴ Unfortunately, that counsel has largely been ignored.¹⁰⁵

D. Development of a New Criminal Justice Statistics System

Although Project SEARCH gave priority to the computerized criminal history program,¹⁰⁶ it also began to work toward its complementary objective: to "[d]esign and demonstrate a computerized statistics system based on an accounting of individual offenders proceeding through the criminal justice system."¹⁰⁷ Dissatisfaction with

⁹⁸ See Nelson, A Technical Analysis and Review of the SEARCH Prototype, in 1970 Symposium, *supra* note 4, at 233, 234.

⁹⁹ Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 19-20.

¹⁰⁰ Nelson, *supra* note 98, at 234.

¹⁰¹ Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 19.

¹⁰² Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 19. Project SEARCH suggested that an "adequate program of data verification" would require agencies to "conduct systematic audits of their files" and periodic employee training programs, with "[a]ppropriate sanctions" to ensure proper performance. *Id.* at 20. Furthermore, an agency that detects erroneous or incomplete information would be required to notify the central repository and each agency to which the inaccurate or incomplete records had been transmitted. *Id.*; see Project SEARCH, Tech. Mem. No. 3, *supra* note 90, at 19, 32.

¹⁰³ See text accompanying notes 67-73 *supra*.

¹⁰⁴ To this end, SEARCH has produced a steady flow of documents which emphasize the need for complete and accurate data and systematic audits. See, e.g., Project SEARCH, Tech. Mem. No. 3, *supra* note 90, at 19-20, 32-33; Project SEARCH, Tech. Rep. No. 2, *supra* note 78, at 19-20; SEARCH Group, Inc., Tech. Rep. No. 13, *supra* note 87, at 41-43.

¹⁰⁵ See text accompanying notes 205-12, 225-96 *infra*.

¹⁰⁶ Criminal Justice System, *supra* note 5, at 96; Kolodney, *supra* note 5, at 39.

¹⁰⁷ Project SEARCH, Tech. Rep. No. 3, *supra* note 76, at v. The Report of the President's Commission on Law Enforcement and Administration of Justice had earlier stressed the "enormous importance" of developing adequate criminal justice statistics systems. Task Force on Assessment, President's Comm'n on Law Enforcement and Administration of Justice, Task Force Report: Crime and Its Impact 123 (1967) [hereinafter Task Force Report: Crime and Its Impact]. In the Commission's view, improved statistics were necessary to "[m]easure the workload and effectiveness of the police, the courts, and the other agencies of the criminal justice system, both individually and as an integrated system." *Id.* For further discussion of the need for

existing criminal justice statistics was widespread.¹⁰⁸ National statistics concerning many stages of the criminal process simply did not exist,¹⁰⁹ and existing statistics often were incompatible. Police counted reported offenses and arrests; courts counted cases; parole and correctional officials counted offenders.¹¹⁰ It was, therefore, impossible to relate the statistics from one agency to those of a preceding or subsequent agency in the criminal process.¹¹¹ Moreover, because criminal justice statistics traditionally measured agency workload, available statistics merely represented the number of actions taken by a particular agency over a calendar or fiscal year.¹¹² As a result, criminal justice system analysts were generally unable to account for multiple actions taken with respect to the same offender or to measure adequately the length of each stage of the criminal process.¹¹³

To remedy these defects in existing statistics, Project SEARCH recommended the implementation of an offender based transaction statistics (OBTS) system.¹¹⁴ The OBTS system focuses on the individual, tracking his progress from the "point of entry in the criminal justice system to point of exit."¹¹⁵ The statistics from different agen-

criminal justice statistics, see Lejins, *National Crime Data Reporting System: Proposal For a Model*, reprinted in *id.*, app. C, at 190-99.

¹⁰⁸ See, e.g., Task Force Report, *Crime and Its Impact*, *supra* note 107, at 123-25; Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 2-1 to 2-7; Friel, *Offender Based Transactional Statistics: The Concept and Its Utility*, in 1972 Symposium, *supra* note 4, at 43, 43-45.

¹⁰⁹ For example, there are no national judicial criminal statistics or national probation statistics. Lejins, *supra* note 107, app. C, at 193, 195. Statistics concerning prosecutorial decisionmaking are not ordinarily available at any level of government. *Id.* at 191; accord, Kolodney, *supra* note 5, at 39.

¹¹⁰ Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 2-5; Friel, *supra* note 108, at 44; Longley, *The Use of Offender Based Transaction Statistics in Criminal Justice Planning*, in 1972 Symposium, *supra* note 4, at 463, 463.

¹¹¹ Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 2-7; Longley, *supra* note 110, at 463.

¹¹² Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 3-1; Friel, *supra* note 108, at 45; Longley, *supra* note 110, at 463.

¹¹³ See Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 2-6 to 2-7; Friel, *supra* note 108, at 45; Longley, *supra* note 110, at 463. Project SEARCH also found that data collection was "irregular and incomplete," that the "meaning of basic criminal justice terms," such as felony or misdemeanor, varied substantially from state to state and that identification codes were inconsistent. Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76, at 2-6; see Kolodney, *supra* note 5, at 39.

¹¹⁴ Kolodney, *supra* note 5, at 39-40. The Statistical Advisory Committee of Project SEARCH developed a prototype OBTS system. *Id.* at 39-41. This project is described in a three volume series: Project SEARCH, *Tech. Rep. No. 3*, *supra* note 76; Project SEARCH, *Tech. Rep. No. 4*, *Implementing Statewide Criminal Justice Statistics Systems—The Model and Implementation Environment* (1972); Project SEARCH, *Tech. Rep. No. 5*, *Designing Statewide Criminal Justice Statistics Systems—An Examination of the Five State Implementation* (1972) [hereinafter Project SEARCH, *Tech. Rep. No. 5*].

¹¹⁵ Longley, *supra* note 110, at 463; accord, *Criminal Justice System*, *supra* note 5, at 34; Friel, *supra* note 108, at 43; Kolodney, *supra* note 5, at 39.

cies are comparable because the OBTS system requires each criminal justice agency to use the person as the unit of count.¹¹⁶ Every criminal justice "transaction" (and its date) involving a particular defendant is recorded, making it possible to determine the length of each stage of the process for each defendant, and to account for multiple actions concerning him.¹¹⁷

As with Project SEARCH's computerized criminal history prototype, problems arose in testing and implementing the OBTS model. A successful OBTS system requires the cooperation of all criminal justice agencies¹¹⁸—no small task. High turnover rates, understaffing, and poor morale among the relatively unskilled clerical workers who recorded the data led to high error rates.¹¹⁹ Furthermore, because OBTS data could be used to pinpoint inefficiency and identify reasons for delay, some agencies were apparently reluctant to participate in a system that would reveal their shortcomings.¹²⁰

¹¹⁶ Project SEARCH, Tech. Rep. No. 3, *supra* note 76, at 3-1; Kolodney, *supra* note 5, at 39-40; Longley, *supra* note 110, at 463-64. "[T]he individual defendant/offender is the thread that holds the system together." Criminal Justice System, *supra* note 5, at 34.

¹¹⁷ Criminal Justice System, *supra* note 5, at 34-35; Kolodney, *supra* note 5, at 39-40. Without losing any of the advantages of the traditional statistics systems, Longley, *supra* note 110, at 464, the OBTS system also provides statistical information concerning dispositions and detailed information on the effect of decisions at one stage of the process upon subsequent stages. Friel, *supra* note 108, at 45.

¹¹⁸ See Dafoe, *The Success or Failure of an O.B.T.S. May Rest with the Selection of an Advisory Committee*, in 1972 Symposium, *supra* note 4, at 57, 57-58.

¹¹⁹ Project SEARCH, Tech. Rep. No. 5, *supra* note 114, at 54-55; see Dalton, *The Personnel Problem*, in 1972 Symposium, *supra* note 4, at 49, 49-50; Friel, *supra* note 108, at 46. Moreover, in one test, the transcription of data onto paper forms "resulted in an intolerable error rate . . . as well as unacceptable time delays and backlogs." Reed, *Problems Encountered in Developing a State Level CCH-OBTS System and Interfacing it with the NCIC-CCH System*, in 1972 Symposium, *supra* note 4, at 359, 364.

¹²⁰ See Friel, *supra* note 108, at 46.

With the completion of the criminal history and OBTS prototypes, Project SEARCH reached its two original goals. See text accompanying note 78 *supra*. Rather than disbanding Project SEARCH, LEAA proposed that Project SEARCH "be expanded to a national organization containing representatives from all 50 states . . . to develop and test [additional] prototype systems having multistate utility in criminal justice." Wormeli, *Developments in Criminal Justice Technology*, in 1972 Symposium, *supra* note 4, at 9, 9. In 1974, Project SEARCH formed a nonprofit corporation, SEARCH Group, Inc., to provide staff and accept grants of money from LEAA. Wormeli, *Review of Project SEARCH*, in 1974 Symposium, *supra* note 4, at 29, 31. Some of the new prototype systems developed by SEARCH Group, Inc., include the Offender-Based State Corrections Information System (OBSCIS), the State Judicial Information System (SJIS), and the Criminalistics Laboratory Information System (CLIS). For information on OBSCIS, see SEARCH Group, Inc., Tech. Rep. No. 10, *Offender-Based State Corrections Information System, The OBSCIS Approach (1975)*; SEARCH Group, Inc., Tech. Rep. No. 16, *Offender-Based State Corrections Information System, The OBSCIS Experience (1976)*; SEARCH Group, Inc., *The OBSCIS Compendium: Proceedings from the OBSCIS Seminar (1978)*. For information on SJIS, see SEARCH Group, Inc., Tech. Rep. No. 12, *State Judicial Information System Final Report (Phase I) (1975)*; SEARCH Group, Inc., Tech. Rep. No. 17.

OBTS systems increase the risks of using rap sheets to make decisions about particular suspects because such systems can be used not only to generate statistics but also to generate criminal histories. An OBTS system records each contact an individual has with the criminal justice system.¹²¹ When an individual is rearrested in the same jurisdiction, the most important data from the prior offense that normally appear on a rap sheet—identification information, the arresting agency, and arrest charges and their disposition—are contained in the OBTS data base and can be used by criminal justice officials.¹²² In short, as OBTS systems proliferate nationwide, all criminal justice agencies that have them, from police to corrections, acquire the ability to generate their own rap sheets.¹²³ Indeed, many agencies use OBTS systems for this purpose.¹²⁴ Thus, OBTS systems add a new dimension to the problem of regulating the dissemination and use of criminal history information.

E. The Implementation of Computerized Criminal Justice Information Systems

After Project SEARCH had succeeded in developing a prototype criminal history information system, the Department of Justice faced the problem of implementing the prototype.¹²⁵ A political dispute erupted between the FBI and LEAA over control of the program.¹²⁶

State Judicial Information System Final Report (Phase II) (1976); SEARCH Group, Inc., Tech. Rep. No. 21, State Judicial Information System Final Report (Phase III) (1978). For information on CLIS see SEARCH Group, Inc., Tech. Rep. No. 11, Criminalistics Laboratory Information System, A Conceptual Design (1975).

¹²¹ See text accompanying notes 115-17 *supra*.

¹²² See Slade & Manson, *The Development, Use, and Problems of a Common Data Base for Criminal Histories and Statistics*, in 1972 Symposium, *supra* note 4, at 51, 52. The states that participated in the Project SEARCH OBTS prototype demonstration concluded that it was efficient to develop a common data base for both OBTS and criminal history systems. See Project SEARCH, Tech. Rep. No. 5, *supra* note 114, at 42. In addition, the National Advisory Commission on Criminal Justice Standards and Goals recommended the development of common data elements. Criminal Justice System, *supra* note 5, at 98. For a comparison of the data elements that the National Advisory Commission suggested be contained in OBTS with the data elements suggested for computerized criminal history systems, see *id.* at 100-01. See generally Slade & Manson, *supra*, at 51-53.

¹²³ See text accompanying note 137-38 *infra*; note 186 *infra*. For a discussion of the implications of this development, see text accompanying notes 297-353 *infra*.

¹²⁴ See text accompanying notes 137-38 *infra*; note 186 *infra*.

¹²⁵ Comptroller General's Report, *supra* note 33, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 11.

¹²⁶ Wilkins, *The Revolution in Law Enforcement Technology Has Produced . . . An Information Monster That Threatens Our Privacy*, Wash. Post, Feb. 27, 1972, § C, at 6, col. 3. During the summer of 1970, both agencies wrote numerous memoranda to the Attorney General setting forth their respective positions. See, e.g., letters from FBI and LEAA to Attorney General, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 369-86.

The FBI proposed to add a computerized criminal history file (CCH) to NCIC to serve as a central national repository. The FBI stressed its experience with identification techniques, manual rap sheets, and the existing NCIC computerized files.¹²⁷ LEAA was disturbed by the FBI plan to include detailed criminal history information in the central repository and thereby alter the SEARCH design. LEAA feared that inclusion of detailed information would greatly reduce the role of the states and pose the threat of a national data bank.¹²⁸ After a study by the Office of Management and Budget,¹²⁹ Attorney General John Mitchell directed that the FBI be responsible for the CCH file.¹³⁰

It soon became apparent that LEAA's fears were well-founded. In March 1971, the NCIC Advisory Board approved a plan to maintain detailed criminal history records on each offender whose records were entered in CCH instead of maintaining summary information on offenders and directing inquirers to the states for additional information.¹³¹ The NCIC plan was to be an interim arrangement, to be replaced by a system that would maintain detailed records of multi-

¹²⁷ Letter from FBI Director J. Edgar Hoover to Attorney General John Mitchell (July 23, 1970), reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 376, 377-78.

¹²⁸ Letter from LEAA Associate Administrators Clarence M. Coster and Richard W. Velde to Attorney General John Mitchell (Aug. 3, 1970), reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 374, 375. LEAA was particularly concerned with the political implications of an expanded central repository: "If SEARCH were no longer a decentralized, state-controlled system, the national data bank could loom as an issue. The existence or even hint of such a data bank could arouse certain members of Congress and the public." *Id.* See also Wilkins, *supra* note 126. Of course, in light of the characteristics of the SEARCH and LEAA models, this concern suggests a distinction which is in fact illusory. See text accompanying notes 57-61, 84-89 *supra*. Additionally, LEAA feared that the FBI, as a police organization, would not adequately serve the needs of other components of the criminal justice system. Letter from LEAA Associate Administrators Clarence M. Coster and Richard W. Velde to Attorney General John Mitchell (Aug. 3, 1970), *supra*.

¹²⁹ The Office of Management and Budget (OMB) was aware that the states which participated in the development of the prototype wished to play a role in the operation of CCH. Letter from OMB Associate Director Arnold R. Weber to Attorney General John Mitchell (Sept. 3, 1970), reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2, at 364, 368. OMB recommended that the FBI operate a central repository containing only summary records and that the states continue to develop and operate their separate, but compatible, computerized criminal history information systems. *Id.* at 368.

¹³⁰ Comptroller General's Report, *supra* note 33, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 10; Need to Determine Cost, *supra* note 45, at 5; see 1973-74 House Hearings, *supra* note 15, at 334 (remarks of O.J. Hawkins).

¹³¹ Background, Concept and Policy, *supra* note 48, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 672, 674-75; Comptroller General's Report, *supra* note 33, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 11; Need to Determine Cost, *supra* note 45, at 5. According to the NCIC this structure was necessary because many state information systems were insufficiently developed, Background, Concept and Policy, *supra*, reprinted in 1974 Senate Report, *supra*, vol. 1 at 11, and NCIC communication links could not transmit detailed criminal histories from one state to another, Need to Determine Cost, *supra* note 45, at 5.

state and federal offenders and summary records of single-state offenders. The CCH file went into operation as planned in November 1971.¹³² As of December 1978, the "interim" plan was still in effect.¹³³

While the Washington bureaucracy battled for control of CCH and over its structure, LEAA grants were spawning a vast number of criminal justice information systems at state and local levels.¹³⁴ Some systems were used by only one criminal justice agency,¹³⁵ whereas others served many agencies at various stages of the criminal process.¹³⁶ The information systems commonly provided information

¹³² Comptroller General's Report, *supra* note 33, reprinted in 1974 Senate Hearings, *supra* note 15, vol. 1 at 11-12; see *Need to Determine Cost*, *supra* note 45, at 5.

¹³³ See OTA Report, *supra* note 18, at 7. The NCIC plan was also criticized for reasons unrelated to the "interim" arrangements. The Office of Management and Budget, after meetings with LEAA and the FBI, complained to the Attorney General on May 13, 1971, that "[t]he NCIC Board governing CCH had all police representatives instead of representatives from the total criminal justice system," and that "[t]he NCIC computer system's policies limited CCH to police use." Comptroller General's Report, *supra* note 33, vol. 1 at 11. No action was taken by the Attorney General.

¹³⁴ At the 1970 SEARCH National Symposium on Criminal Justice Information and Statistics Systems, Harry Bratt of LEAA called the development of information systems "probably the most dynamic area in law enforcement and criminal justice." Bratt, *supra* note 43, at 73. He noted that "[i]n 1968, only about 10 states had computerized information systems under development." *Id.* By late 1970, "virtually every state and countless cities and counties [were] planning, implementing and operating" computerized information systems funded largely by LEAA. *Id.* By 1972, Richard W. Velde, Associate Administrator of LEAA, reported that 47 states had criminal justice information systems. Velde, *supra* note 5, at 18. See also *Criminal Justice System*, *supra* note 5, at 33 (same statistics).

¹³⁵ For example, the Philadelphia Prisoner Inventory System (PRINS) and the New York City Inmate Information System (IIS) apparently were designed to be used only by corrections officials. See Blake & Chasen, *Philadelphia Prisoner Inventory System*, in 1972 Symposium, *supra* note 4, at 253, 253-56; Chagrin & Eisenberg, *Design and Implementation of a Correction Information System*, in 1972 Symposium, *supra* note 4, at 287. Similarly, the Prosecutor's Management Information System (PROMIS) (in use at the United States Attorney's Office in Washington, D.C.) was intended to be used primarily by prosecutors for self-evaluation, not by other criminal justice agencies. See Merrill, *Using the PROMIS Tracking System for Criminal Justice Evaluation*, in 1972 Symposium, *supra* note 4, at 231, 231-33. But by 1979, courts began to use PROMIS and state attorneys general and public defenders also considered using it. Dogin, *Perspectives on a Decade of Technological Advances*, in 1979 Symposium, *supra* note 4, at 11, 12. The use of PROMIS data is also discussed in note 327 *infra*.

¹³⁶ For example, Ohio's County Law Enforcement Applied Regionally (CLEAR) system began as a want/warrant system for police, see Atkinson, *Project CLEAR—An Integrated Regional Information System Serving Government, Law and Justice*, in 1970 Symposium, *supra* note 4, at 75, 79-80, but by late 1972, police, court, and corrections officials had begun to use CLEAR, Atkinson, *The CLEAR/CJIS System*, in 1972 Symposium, *supra* note 4, at 355, 355 [hereinafter Atkinson, *The CLEAR/CJIS System*]. Kansas City's ALERT system was also designed primarily for police use, but later served other criminal justice agencies. Bockelman, *ALERT II—Progress Toward a Computerized Criminal Justice System*, in 1972 Symposium, *supra* note 4, at 105, 105-26. Ohio's CIRCLE system serves various courts, police, prosecutorial, and corrections agencies. Pesce, Anderson & Tobias, *CIRCLE—A Comprehensive Regional Criminal Justice Information System*, in 1972 Symposium, *supra* note 4, at 315, 315, 319.

concerning wanted persons and warrants for police investigative use, management information, and criminal history information.¹³⁷ Most were OBTS systems that either had the ability to generate rap sheets or were expected to develop it shortly.¹³⁸

In an attempt to monitor and coordinate the rapidly proliferating criminal justice information and statistics systems, LEAA instituted a Comprehensive Data Systems Program (CDS) in 1972.¹³⁹ LEAA sought to encourage each state to develop a comprehensive data system with five components: (1) a statistics analysis center, (2) an OBTS program compatible with computerized criminal histories (OBTS/CCH component), (3) a management and administrative statistics program, (4) a collection and audit program for uniform crime reports, and (5) a capability to provide statistical and technical assistance to state and local agencies.¹⁴⁰

¹³⁷ CLEAR, ALERT II, and CIRCLE provide all of this information. See Atkinson, *supra* note 136, at 355-57; Bockelman, *supra* note 136, at 105, 113; Pesce, Anderson & Tobias, *supra* note 136, at 315-16, 318. The PROMIS system provides only management and criminal history information, Merrill, *supra* note 135, at 231-32.

¹³⁸ See Dogin, *supra* note 135, at 11-14. With the CLEAR system, for example, "[c]riminal history is scanned and a 'rap sheet' is automatically printed by the system for the Clerk of Courts." Atkinson, *The CLEAR/CJIS System*, *supra* note 136, at 356. Los Angeles' Regional Justice Information System (RJIS) has a similar capability. Rosenthal, Cramer & Suzuki, *Los Angeles County Regional Justice Information System Software System Design*, in *1972 Symposium*, *supra* note 4, at 373, 381-83.

¹³⁹ 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 698-712 (LEAA Responses to Issues Raised by the Subcomm. on Constitutional Rights of Sen. Comm. on the Judiciary); 1973-74 House Hearings, *supra* note 15, at 365 (remarks of Richard W. Velde); see Hall, *Status Report and Definition of Comprehensive Data Systems*, in *1974 Symposium*, *supra* note 4, at 277, 277 [hereinafter Hall, *Status Report*]; Hall, *Comprehensive Data Systems Program*, in *1972 Symposium*, *supra* note 4, at 65, 65-66 [hereinafter Hall, *Comprehensive Data Systems Program*].

¹⁴⁰ Hall, *Comprehensive Data Systems Program*, *supra* note 139, at 65-66; Hall, *Status Report*, *supra* note 139, 277; Velde, *supra* note 5, at 17. In order to participate in the CDS program and receive federal funds, states were required to agree to implement eventually all five components and to submit a plan to LEAA describing the proposed means of implementation. Once LEAA granted approval, the state could submit a grant application to implement its plan either in whole or in part. 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 702 (LEAA Responses to Issues Raised by the Subcomm. on Constitutional Rights of Sen. Comm. on the Judiciary); Hall, *Status Report*, *supra* note 139, at 277. The CDS guidelines for evaluation of grant applications are set forth in the LEAA's response. See 1974 Senate Hearings, *supra* note 15, vol. 1, at 702-03. The purpose of the first component, a statistical analysis center, was "to provide overall coordination in the planning, development, and operation of the (state) CDS program." Friel, *The Role of a Criminal Justice Statistical Analysis Center in a Comprehensive Data Systems Program*, in *1974 Symposium*, *supra* note 4, at 129, 129. This center was to be "responsible for the analysis, interpretation, and dissemination of" the statistics generated by the program. *Id.*; see 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 699 (LEAA Responses); Hall, *Status Report*, *supra* note 139, at 277. The management and administrative statistics component was to supply information on law enforcement, court, and correction workforces and on equipment. 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 701 (LEAA Responses). This component was "by far the slowest . . . to develop due to a lack of detailed requirements."

LEAA promoted the development of OBTS programs which were compatible with computerized criminal histories to ensure more complete and accurate criminal history information. Since "[t]he recording of . . . official transactions when coupled with proper identification of the individual is precisely the same information needed to develop a criminal history record,"¹⁴¹ LEAA apparently hoped that OBTS systems would generate complete and accurate rap sheets more quickly and easily than traditional reporting systems.¹⁴² In addition, LEAA planned to use the OBTS/CCH component of CDS to effect its plan for a decentralized national criminal history information system based on the SEARCH model, rather than the more centralized system favored by the FBI.¹⁴³

F. 1972 Proposals to Regulate Criminal Justice Information Systems

As computerized criminal justice information systems multiplied, it became apparent that existing federal statutes failed to ensure their effective regulation.¹⁴⁴ The principal statute governing criminal history information¹⁴⁵ was clearly "not designed to cope with new com-

Hall, Status Report, *supra* note 139, at 278. The Uniform Crime Reports (UCR) component was modeled after the FBI's UCR program in an attempt to increase state involvement in crime reporting. *Id.*; 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 701-02 (LEAA Responses). The purpose of the technical assistance capability component was to prepare the states to take over LEAA's technical assistance function should LEAA be dismantled in the future. Hall, Status Report, *supra* note 139, at 278-79.

¹⁴¹ 1974 Senate Hearings, *supra* note 15, vol. 1 at 300 (remarks of Richard W. Velde); see 1973-74 House Hearings, *supra* note 15, at 365 (remarks of Richard W. Velde).

¹⁴² 1974 Senate Hearings, *supra* note 15, vol. 1 at 299 (remarks of Richard W. Velde); see 1973-74 House Hearings, *supra* note 15, at 365 (remarks of Richard W. Velde).

¹⁴³ This intent can be gleaned from the CDS guidelines for the evaluation of grant applications, "envision[ing] a cooperative system for the exchange of criminal histories essentially under the joint control of state governments and the Federal Government insofar as it represents federal offenders. The guidelines permit the development of intra-state systems which will be compatible with an eventual interstate system which will include extensive telecommunication and switching capability and an index which will provide only directory information to records held at the state level."

1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 702-03 (LEAA Responses to Issues Raised by the Subcomm. on Constitutional Rights of Sen. Comm. on the Judiciary).

¹⁴⁴ See Wilkins, *supra* note 126.

¹⁴⁵ 28 U.S.C. § 534 (1976) (added as an Act of Sept. 6, 1966, Pub. L. No. 89-554, § 4(c), 80 Stat. 378), in a section covering the acquisition, preservation, and exchange of identification records, provides:

- (a) The Attorney General shall: (1) acquire, collect, classify and preserve identification, criminal identification, crime and other records; and (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions. (b) The exchange of records authorized by subsection (a) (2) of this section is subject to cancellation if dissemination is made outside the receiving

puterized information systems, much less a system which spans the entire nation and contains, potentially at least, all the criminal justice information held in files anywhere."¹⁴⁶

Sentiment began to grow in Congress in favor of comprehensive legislation to regulate criminal justice information systems.¹⁴⁷ In March and April 1972, hearings were held before a subcommittee of the House Committee on the Judiciary¹⁴⁸ to consider a bill limiting dissemination of arrest records.¹⁴⁹ The bill not only proposed limiting the dissemination of arrest records to the criminal justice system,¹⁵⁰ but also proposed completely prohibiting any dissemination of an arrest record more than two years old if the case were not still pending and the defendant had never been convicted of a felony.¹⁵¹ Finally, the bill proposed granting an individual the right to inspect his arrest records.¹⁵² The legislation was severely criticized by LEAA and the FBI,¹⁵³ however, and did not pass.

departments or related agencies. (c) The Attorney General may appoint officials to perform the functions authorized by this section.

As originally enacted in 1930, § 534 placed the responsibility for collecting criminal history and other crime records on the Identification and Information Division of the FBI, now known as the Identification Division. Act of June 11, 1930, ch. 455, 46 Stat. 554. In 1950, this responsibility was shifted to the Attorney General. Reorg. Plan No. 2 of 1950, 3 C.F.R. 1002-03 (1949-1953 Compilation), reprinted in 64 Stat. 1261 (1950).

¹⁴⁶ Gitenstein, *The Issue of Security and Privacy*, in 1972 Symposium, *supra* note 4, at 553, 553. See generally 1974 Senate Hearings, *supra* note 15, vol. 2 at 15, 15-16 (questions submitted by Sen. Charles Mathias, Jr., to L. Patrick Gray III on March 1, 1973, before the Sen. Comm. on the Judiciary.).

¹⁴⁷ Section 519 of the Omnibus Crime Control and Safe Streets Act of 1968 was amended at Senator Mathias' suggestion to provide:

Not later than May 1, 1971, [LEAA] shall submit to the President and to the Congress recommendations for legislation to assist in the purposes of this title with respect to promoting the integrity and accuracy of criminal justice data collection, processing and dissemination systems funded in whole or in part by the Federal Government, and protecting the constitutional rights of all persons covered or affected by such systems.

Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, § 7(b), 84 Stat. 1880 (omitted 1979); see 1974 Senate Hearings, *supra* note 15, vol. 1 at 39, 39-45 (remarks of Sen. Mathias).

¹⁴⁸ 1972 House Hearings, *supra* note 15.

¹⁴⁹ The bill was H.R. 13315, 92d Cong., 2d Sess., 1972 House Hearings, *supra* note 15, at iv-vi. Nicholas Katzenbach, former Attorney General of the United States and Vice President and General Counsel of IBM, criticized existing computerized criminal history information systems and suggested that legislation prohibit dissemination of arrest histories without recorded dispositions, stating that "[i]t seems to me only fair that this be done, but secondly because the conditions in many of our States with respect to records are absolutely horrible. There is some incentive needed to get these records in some kind of decent shape." *Id.* at 3, 5.

¹⁵⁰ H.R. 13315, 92d Cong., 2d Sess. § 3101 (1972), 1972 House Hearings, *supra* note 15, at iv.

¹⁵¹ *Id.* § 3102(a)(1), (c).

¹⁵² *Id.* § 3103, 1972 House Hearings, *supra* note 15, at v. However, the bill did not provide a mechanism by which an individual could seek correction of erroneous information discovered in the course of inspection of his arrest records.

¹⁵³ See 1972 House Hearings, *supra* note 15, at 61 (remarks of Donald E. Santarelli). Mr. Santarelli, Associate Deputy Attorney General for Criminal Justice, Department of Justice,

G. *Attempts at Legislative Reform in 1973 and 1974*

In 1973, Congress once again attempted to regulate computerized criminal justice information systems. Expenditures had been enormous,¹⁵⁴ and, in accordance with the philosophy underlying the Omnibus Crime Control and Safe Streets Act of 1968,¹⁵⁵ federal regulation of such systems had been minimal. Consequently, the systems were viewed by the National Advisory Commission on Criminal Justice Standards and Goals as uncoordinated and wasteful:

Lacking a coordinated plan which specifies the exact role of local, State, and Federal agencies, these governments have already spent considerable monies for the hardware and impedimenta of incompatible and duplicative systems that do not meet even [certain] general requirements Not only money has been wasted; the human resources, technical talents, and skills available for development of a criminal justice information system have been diffused and dissipated across many redundant development efforts.

. . . .
The proliferation of computerized criminal justice information systems has occurred at every jurisdictional level without serious attention to the interrelationships between these systems or clear definition of appropriate roles. . . .

The availability of Federal funds has contributed to the diffusion of effort. Most State criminal justice planning agencies have been faced with decisions on a project-by-project basis where all projects appear to be reasonable and no setting of priorities is

testified that H.R. 13315 would impose intolerable and unnecessary burdens on the Identification Division of the FBI by requiring it to review manually all of its 20 million arrest records in order to eliminate those over two years old not containing prior felony convictions. *Id.* at 61, 63. He also asserted that it is impractical to follow up on each arrest to obtain disposition data, *id.* at 64, and criticized the bill's prohibition against any dissemination of arrest records outside the criminal justice system, *id.* at 65, 67. The provision permitting individuals to inspect their arrest records was attacked on the ground that "[i]t would enable a person currently under investigation to determine which agencies had an interest in him, and would give him the opportunity to frustrate legitimate investigative efforts." *Id.* at 69. This last criticism is rather misplaced, since rap sheets do not report ongoing investigations until they culminate in an arrest. See text accompanying notes 32-37 *supra*. By the time of arrest, presumably, the individual is well aware of the authorities' interest in him.

¹⁵⁴ In 1974, Richard W. Velde, then Deputy Administrator of Policy Development of LEAA, stated that in its first five years, LEAA had spent more than \$300 million on development of information and statistics systems. He estimated that this was only 10% to 15% of the amount spent by state and local governments during the same period on the development of information systems. Velde, *Progress in Criminal Justice Information Systems*, in 1974 Symposium, *supra* note 4, at 9, 9. Thus, total expenditures nationwide had been in excess of two billion dollars.

¹⁵⁵ See text accompanying notes 67-73 *supra*.

possible. As funding expands, the demand increases. A plan for development of these systems is long overdue. Every State is in the position of not having considered the plethora of existing information systems as an integrated network.¹⁵⁶

In addition, the FBI's attempt to create a national computerized criminal history program had been unsuccessful. On January 16, 1973, the Comptroller General of the United States submitted to Congress a report highly critical of the FBI's CCH file.¹⁵⁷ The report emphasized that "[n]o one has determined what a fully operational system will cost."¹⁵⁸ The Comptroller General was concerned that the federal government was making an "open-ended commitment [with] no assurance that the participants [would] be able to meet the financial requirements."¹⁵⁹ The report also noted that many arrests and dispositions were not reported to state identification units,¹⁶⁰ and concluded that "[t]o put a system into operation without first insuring that the information it will process is complete will result in a system that maintains and provides incomplete data to system users."¹⁶¹

Few states participated in CCH. Massachusetts refused to participate because "the Federal Government had not formally established any safeguards" concerning access to the CCH file or dissemination of its contents.¹⁶² The Comptroller General reported that by February 1974, only six states and the District of Columbia had supplied records to CCH.¹⁶³ Two of the six states, New York and Pennsylvania,

¹⁵⁶ Criminal Justice System, *supra* note 5, at 41, 44.

¹⁵⁷ Need to Determine Cost, *supra* note 45, at 9-11.

¹⁵⁸ *Id.* at 7. As of March 11, 1974, LEAA was unable even to approximate how much money had been spent in developing the CCH program, since the money came from a variety of sources. 1974 Senate Hearings, *supra* note 15, vol. 1 at 695, 695 (LEAA Responses to Issues Raised by the Subcomm. on Constitutional Rights of Sen. Comm. on the Judiciary).

¹⁵⁹ Need to Determine Cost, *supra* note 45, at 7.

¹⁶⁰ *Id.* at 1, 10.

¹⁶¹ *Id.* at 11. The data presented in the Comptroller General's report on completeness of arrest and disposition reporting are discussed more fully in note 238 *infra*. During the 1974 Senate hearings, Assistant FBI Director Thompson admitted that CCH rap sheets, like those of the Identification Division, frequently are not updated. 1974 Senate Hearings, *supra* note 15, vol. 1 at 193, 223-24 (remarks of Fletcher Thompson).

¹⁶² 1974 Senate Hearings, *supra* note 15, vol. 1 at 50, 51 (remarks of Gov. Sargent of Massachusetts); see 1973-74 House Hearings, *supra* note 15, at 146, 149 (statement of Gov. Sargent). Massachusetts' refusal to participate in CCH displeased the federal government and as a consequence, "[t]he Small Business Administration threatened to withhold \$30 million in disaster aid and loans. The Defense Department froze 2,400 jobs. The Justice Department brought suit against [them]." 1974 Senate Hearings, *supra* note 15, vol. 1 at 50, 52 (remarks of Gov. Sargent). Subsequently, the federal suit was withdrawn. *Id.* at 52. The controversy concerning Massachusetts' participation in CCH is discussed in detail in D. Marchand, *supra* note 24, at 207-10.

¹⁶³ Comptroller General's Report, *supra* note 33, at 12. The six states were Arizona, California, Florida, Illinois, New York, and Pennsylvania. *Id.*

subsequently withdrew from the CCH program because "they could not justify the cost of updating the duplicate records held by NCIC."¹⁶⁴

In the Crime Control Act of 1973, Congress attempted to address some of the problems of criminal history information systems in an amendment to Title I of the Omnibus Crime Control and Safe Streets Act of 1968.¹⁶⁵ Although well-intentioned, this legislation was not designed either to serve as a blueprint for reform of criminal history

¹⁶⁴ OTA Report, *supra* note 18, at 7.

¹⁶⁵ This section of the Crime Control Act of 1973, Pub. L. No. 93-83, § 524(b), 87 Stat. 197 (current version at 42 U.S.C. § 3789g(b) (Supp. III 1979)) provided that:

All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is [sic] included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Administration shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

The Crime Control Act of 1973 substantially revised Title 1 of the 1968 Act. Congress was critical of LEAA's performance in overseeing the expenditure of the money LEAA granted. The House Committee on the Judiciary rejected proposals to convert the Omnibus Crime Control and Safe Streets Act of 1968 into a "simple 'no strings attached' special revenue sharing program" H.R. Rep. No. 249, 93d Cong., 1st Sess. 5, reprinted in [1973] U.S. Code Cong. & Ad. News 1729, 1731. LEAA retained federal responsibility to administer the program and to assist the states in comprehensive planning. *Id.* LEAA was to be made more accountable. *Id.* The Committee stated:

No plan is to be approved unless and until LEAA finds a determined effort by the plan to improve law enforcement and criminal justice throughout the State Not until the threat of nonfunding becomes real can the citizenry expect the quality of anti-crime efforts to improve. The committee feels that LEAA has in the past not exercised the leverage provided to it by law to induce the States to improve the quality of law enforcement and criminal justice.

Id. For a review of the legislative history of the Crime Control Act of 1973, see *id.*, reprinted in [1973] U.S. Code Cong. & Ad. News at 1729; H.R. Conf. Rep. No. 401, 93d Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 1741.

In 1979, Congress again substantially modified Title 1. Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified in scattered sections of 5, 18, 41, 42 U.S.C.). The Senate Judiciary Committee noted that LEAA's performance had not measured up to expectations. According to the Committee, LEAA's problems included "excessive redtape and bureaucracy; wasteful uses of grant funds; poorly ordered priorities; lack of clearly defined Federal, State, and local crime-fighting roles; inadequate targeting of funds; and ineffective research and statistical programs." S. Rep. No. 142, 96th Cong., 1st Sess. 7, reprinted in [1979] U.S. Code Cong. & Ad. News 2471, 2478. To remedy these problems, Congress eliminated the old Act's burdensome paperwork and created two new organizations to help manage the statistics, research, and assistance programs authorized by the legislation. In addition, the Act established a new umbrella agency—the Office of Justice Assistance, Research, and Statistics (OJARS)—to oversee the work of the other new bureaus and of LEAA. *Id.* at 13, 15, reprinted in [1979] U.S. Code Cong. & Ad. News at 2484, 2486.

information systems or to require effective changes in existing practices. Criminal justice officials were not directed to make rap sheets complete and accurate. Rather, the amendment required only that criminal history files contain disposition information "to the maximum extent feasible" under procedures "reasonably designed to insure that all such information is kept current therein."¹⁶⁶ These are inexact standards at best.¹⁶⁷

Not surprisingly, passage of the Crime Control Act of 1973 did not quell sentiment for comprehensive federal regulatory legislation. In late 1973 and early 1974, hearings were held in both the House and the Senate.¹⁶⁸ In his opening statement in the Senate hearings, Senator Ervin stressed the need for such regulatory legislation,¹⁶⁹ noting that "[t]he rap sheet distribution system by the Identification Division of the FBI operates without formal rules. Custom and several letters from the Director of the FBI to local police departments seem to be the only limitation on access to the information."¹⁷⁰ The Senator observed that although the NCIC Advisory Policy Board drafts informal security and privacy guidelines, "the regulations are largely hortatory. They place most of the security responsibilities on the local data banks which plug into NCIC and do not provide effective enforcement mechanisms."¹⁷¹ Numerous witnesses before the Senate

¹⁶⁶ Crime Control Act of 1973, Pub. L. No. 93-83, § 524(b), 87 Stat. 197 (current version at 42 U.S.C. § 3789g(b) (Supp. III 1979)).

¹⁶⁷ Senator Kennedy, speaking in support of the amendment, made clear that it was intended only to encourage agencies to include information:

This amendment does not adopt a rigid, inflexible standard requiring purges or inputs into any criminal information system, and it recognizes the difficulties where disposition information does not reach law enforcement authorities because of judicial control over such information This is the strongest [statutory] language I could think of at this time, without being totally inflexible

1974 Senate Hearings, *supra* note 15, vol. 1 at 719-20 (remarks of Sen. Kennedy). Subsequently, the Department of Justice promulgated regulations in an attempt to implement this amendment. See text accompanying notes 183-95 *infra* for a discussion of the regulations.

¹⁶⁸ 1974 Senate Hearings, *supra* note 15; 1973-74 House Hearing, *supra* note 15.

¹⁶⁹ 1974 Senate Hearings, *supra* note 15, vol. 1 at 1-8 (remarks of Sen. Ervin). Witnesses testifying at the 1973-74 House Hearings also stressed the need for comprehensive federal legislation. 1973-74 House Hearings, *supra* note 15, at 214, 216, 220 (remarks of Att'y Gen. Saxbe); *id.* at 76, 78 (statement of Rep. Harrington).

¹⁷⁰ 1974 Senate Hearings, *supra* note 15, vol. 1 at 19 (remarks of Sen. Ervin); accord, 1973-74 House Hearings, *supra* note 15, at 78, 105 (remarks of Aryeh Neier) (criticizing the FBI's laxness in policing the dissemination of criminal history information); 1972 House Hearings, *supra* note 15, at 153, 172 (remarks of Aryeh Neier) (same).

¹⁷¹ 1974 Senate Hearings, *supra* note 15, vol. 1 at 20 (remarks of Sen. Ervin). Senator Mathias echoed this theme, noting that Congress had not set statutory guidelines for the development and operation of NCIC. 1974 Senate Hearings, *supra* note 15, vol. 2 at 15, 16 (Questions Submitted by Sen. Charles Mathias, Jr., to L. Patrick Gray III on March 1, 1973, Before the Sen. Comm. on the Judiciary.).

Committee expressed concern about the quality of data in manual and computerized systems and stressed the importance of maintaining complete and accurate files.¹⁷²

The hearings in both houses of Congress focused on two bills¹⁷³ which proposed regulation of virtually all data banks containing criminal history information.¹⁷⁴ Each bill strictly limited dissemination outside the criminal justice system,¹⁷⁵ encouraged regular updating

¹⁷² For example, Governor Sargent noted that 20% of the arrest entries lacked recorded dispositions in Massachusetts' manual system. He also reported that "[o]ne Governor wrote me his state's files ran about 70% without dispositions." 1974 Senate Hearings, *supra* note 15, vol. 1 at 50, 54 (remarks of Gov. Sargent). Attorney General Meyer of Nebraska testified that

[c]riminal records were not updated in the past for a variety of reasons, the main one being that such records were created and designed by law enforcement agencies for their own use in investigating crime, and for that purpose all that is needed is the fact of an arrest on a certain charge [For other purposes, however,] an updated arrest record is imperative. When such a record goes to a court for the purpose of fixing bail, determining probation conditions, or for use in a presentence investigation, we all agree that it should be accurate and complete.

Id. at 131; see *id.* at 223-24 (remarks of Ass't FBI Director Thompson). Richard W. Velde, Deputy Administrator for Policy Development of LEAA, stated:

It is necessary that all criminal justice agencies, including courts and corrections, assume responsibility for completeness and accuracy of criminal offender record information. . . .

. . . .

Existing court systems are often inadequate. . . . This is a critical problem in getting dispositional entries. . . .

. . . .

[Complete and accurate records are] essential, not only to protect individual rights, but also as a tool of criminal justice planning, management, and evaluation. Complete record keeping, such as the offender-based transaction statistics system contemplates, makes possible the description of system dynamics in a timely and comprehensive fashion.

Id. at 293, 296-97.

¹⁷³ Criminal Justice Information Control and Protection of Privacy Act of 1974, S. 2963, 93d Cong., 2d Sess., 1974 Senate Hearings, *supra* note 15, vol. 1 at 24, 24-34 (Senate version) [hereinafter S. 2963]; H.R. 12575, 93d Cong., 2d Sess., 1973-74 House Hearings, *supra* note 15, at 39, 39-75 (House version). The other bill was Criminal Justice Information Systems Act of 1974, S. 2964, 93d Cong., 2d Sess., 1974 Senate Hearings, *supra* note 15, vol. 1 at 632, 632-52 (Senate version) [hereinafter S. 2964]; H.R. 12574, 93d Cong., 2d Sess., 1973-74 House Hearings, *supra* note 15, at 18, 18-38 (House version).

The House considered two other bills that term: H.R. 188, 93d Cong., 1st Sess., 1973-74 House Hearings, *supra* note 15, at 2, 2-10 (first introduced in 1972 as H.R. 13315) (discussed in text accompanying notes 149-53 *supra*) and H.R. 9783, 93d Cong., 1st Sess., 1973-74 House Hearings, *supra* note 15, at 11, 11-17.

¹⁷⁴ S. 2963, *supra* note 173, applied to any governmental agency "which performs as its principal function . . . the administration of criminal justice." *Id.* § 102(16). In his introductory statement Senator Ervin explained that this provision was necessary because "no one State can effectively regulate" the use and dissemination of criminal history information "which finds its way into a data bank in another State." 1974 Senate Hearings, *supra* note 15, vol. 1 at 581, 588. S. 2964, *supra* note 173, applied to all criminal justice information systems except those that did not engage in the interstate exchange of information and were operated by state and local governments without federal funding. *Id.* § 4(a).

¹⁷⁵ S. 2963, *supra* note 173, provided that criminal justice information (defined to include virtually all criminal justice records identifying an individual, *id.* § 102(7)), could only be

and disposition reporting,¹⁷⁶ gave the subjects of criminal history records the right to inspect their rap sheets and to challenge erroneous information,¹⁷⁷ and required audits.¹⁷⁸ Nevertheless, both bills were inadequate to insure completeness and accuracy. Neither required that accuracy and completeness be achieved,¹⁷⁹ and neither contained realistic or effective sanctions for failure to comply with the statutory requirements.¹⁸⁰ Despite their shortcomings,¹⁸¹ enactment of either

collected by and disseminated to criminal justice agencies unless a state or federal statute specifically authorized dissemination to other agencies. Id. § 201(b). S. 2964, supra note 173, contained similar limitations on dissemination of criminal justice information, id. § 5, although certain exceptions were created for criminal intelligence information, id. § 5(c). Criminal intelligence information was defined as "information compiled by a criminal justice agency for the purpose of criminal investigation, including reports of informants and investigators." Id. § 3(d).

S. 2963, supra note 173, also prohibited exchange within the criminal justice system of nonconviction data unless the subject of a record had applied for employment with the requesting criminal justice agency, or the requesting agency had arrested, detained, or commenced a prosecution against him and the charge was still pending. Id. § 202(a), (b), (c).

¹⁷⁶ S. 2963, supra note 173, required each criminal justice information system to "adopt procedures reasonably designed . . . to insure that the criminal justice information in the system is currently and accurately revised to include subsequently received information." Id. § 206(a). The bill also required operators to devise procedures for informing agencies to whom information was sent previously of any additions or corrections and, "if technically feasible," to check before disseminating arrest information to see whether disposition had occurred. Id. § 206(c). S. 2964, supra note 173, required any agency that contributed criminal history information to insure that the information would be accurate, complete, and regularly revised to reflect subsequent developments, including dispositions. All federal, state, or local criminal justice agencies were to take the steps necessary to comply. Id. § 7(a), (b). S. 2964, supra note 173, also provided that arrest information could not be disseminated without a recorded disposition, if a disposition had been reported. Id. § 8(b).

¹⁷⁷ S. 2963, supra note 173, § 207; S. 2964, supra note 173, § 6.

¹⁷⁸ S. 2963, supra note 173, proposed that the Board responsible for enforcement of the Act conduct an annual audit of all federal agencies and of at least ten state agencies that collect and disseminate criminal justice information. In addition, each system was to conduct its own annual audit. Id. § 306(a), (b). S. 2964, supra note 173, proposed that all criminal justice information systems "include a program of verification and audit to insure that criminal offender record information is regularly and accurately updated." Id. § 12(a) (1).

¹⁷⁹ S. 2963, supra note 173, required only that criminal justice information systems "adopt procedures reasonably designed . . . to insure" completeness and accuracy. Id. § 206(a). Agencies disseminating arrest information without disposition data were required only to determine whether a disposition had occurred "if technically feasible." Id. § 206(c). S. 2964, supra note 173, required only that criminal justice agencies "assure that the information [they] contribute is accurate and complete" and "take the steps necessary to achieve compliance." Id. § 7(a), (b). Thus, both bills were vague and, instead of mandating immediate action, contemplated compliance at some future and undetermined time.

¹⁸⁰ Since an agency was required only to "adopt procedures" or "take steps" to achieve compliance, see note 179 supra, an agency would not likely be found in violation of the requirements unless it affirmatively refused to comply. If sanctions were necessary, S. 2963, supra note 173, provided that the Board charged with the bill's enforcement, id. § 301(a), could deny the agency interstate exchange of criminal justice information or interrupt the agency's receipt of federal funds, id. § 307(d)(1), (2). The only penalty for failure to provide disposition

bill would at least have provided a starting point for regulation of criminal justice information systems. Neither these bills nor a similar bill in 1975 passed.¹⁸²

information as required by § 7(a) of S. 2964, *supra* note 173, was denial of access to criminal justice systems subject to the Act. *Id.* § 13(a). These sanctions were so extreme that it was highly unlikely they would ever have been applied. Because criminal justice agencies would likely have known this, the proposed sanctions would not have assured compliance. Effective and realistic procedures, however, can be devised to assure the completeness and accuracy of criminal history information. See text accompanying notes 407-22 *infra*.

¹⁸¹ See notes 179-80 and accompanying text *supra*. Several witnesses expressed additional reservations about the bills during the hearings. One witness noted that many states had already passed legislation regulating criminal justice information systems, and that potential inconsistencies between state and federal legislation could become sources of confusion and conflict. 1974 Senate Hearings, *supra* note 15, vol. 1 at 338-40 (remarks of David Weinstein). See also *id.* at 137 (remarks of Att'y Gen. Meyer of Nebraska); *id.* at 490-93 (remarks of Col. John R. Plants).

¹⁸² Legislation to regulate criminal history information systems also was introduced in 1975, and hearings were held in both the House and Senate. One witness stressed the continuing need for comprehensive legislation:

Progress in the development of effective and accurate criminal history information systems has been seriously impaired because of the lack of federal action in the development of statutory standards for the control over these systems. Many state and local governments have been unwilling to move forward to provide this [*sic*] necessary data to criminal justice agencies because of the lack of agreement at the federal level as to what standards will be imposed. Without an end to this confusion, governmental agencies throughout the country will not commit themselves to providing the tools required by law enforcement. I believe that most people in the criminal justice community are now at the point where they would be relieved by any action by the Congress, regardless of the nature of that action. . . .

In view of the potential expansion of computerized systems, a statutory basis for controlling these systems is required now.

1975 Senate Hearings, *supra* note 15, at 195, 203 (remarks of Paul Wormeli); accord, *id.* at 229 (remarks of Aryeh Neier); *id.* at 87 (remarks of Gary D. McAlvey); *id.* at 122 (remarks of Richard N. Harris).

The hearings focused on a compromise bill: H.R. 8227, 94th Cong., 1st Sess., 1975 House Hearings, *supra* note 15, at 3, 3-41, and its Senate counterpart, S. 2008, 94th Cong., 1st Sess., 1975 Senate Hearings, *supra* note 15, at 3, 3-41. The bill applied to virtually all criminal history information systems, *id.* § 103(a), and allowed all criminal justice officials free access to those systems, *id.* § 201(a), (b). Dissemination outside the criminal justice system was prohibited unless authorized by federal or state statute, *id.* § 203(a), except that correction officials could, with the consent of the individual, divulge the substance of the individual's record to a prospective employer to aid that individual in obtaining employment, *id.* § 205.

With respect to completeness and accuracy, the bill required that criminal justice agencies "adopt procedures reasonably designed" to insure that criminal history information "is currently and accurately revised to include subsequently received information" *Id.* § 207(a)(1). The bill also required that criminal justice officials responsible for "making or recording decisions relating to dispositions" report such dispositions "as soon as feasible" to the appropriate agency for inclusion with arrest record information. *Id.* § 207(a)(2). In addition, the bill provided that in certain cases, records could be sealed, expunged, reviewed, and challenged. *Id.* §§ 208, 209.

The bill would have created a Commission on Criminal Justice Information comprised of government officials and private citizens charged with the administration of the bill. *Id.* § 301(a). The Commission would have been empowered: (1) to exempt information maintained prior to the effective date of the Act from its completeness and accuracy requirements if the Commission found that "full implementation of this section [was] infeasible because of cost or

H. The Federal Regulations

While Congress was considering comprehensive legislation governing criminal information systems, the Department of Justice issued draft regulations¹⁸³ designed to implement Section 524(b) of the Crime Control Act of 1973.¹⁸⁴ LEAA expected these rules would be

other factors," id. § 207(b), (2) to "conduct such audits and investigations as it may deem necessary to insure enforcement of the Act," id. § 304(a)(6), and (3) to "delay the effective date of any provision of [the] Act for up to one year, provided that such delay is necessary to prevent serious adverse effects on the administration of justice," id. § 304(a)(7).

The bill created a private right of action for damages for any individual injured due to a violation of the Act, id. § 308(a), and empowered the Commission to sue for declaratory and injunctive relief to enforce the bill's provisions, id. § 308(b). Criminal penalties were provided as well. Id. § 309. Finally, any state law or regulation placing greater restrictions on the maintenance, use, or dissemination of criminal history information than those provided by the Act was to take precedence over the Act. Id. § 311.

The bill exhibits many of the same weaknesses present in the bills considered during 1973 and 1974, see notes 179-80 *supra*. The bill failed to require that criminal history records be complete and accurate, and failed to prohibit the dissemination of incomplete and inaccurate records. The bill required only that at some future time, criminal justice agencies "adopt procedures reasonably designed" to insure completeness and accuracy, id. § 207(a)(1), and that criminal justice officials report and record dispositions "as soon as feasible," id. § 207(a)(2), rather than immediately upon their occurrence. In addition, the bill contained no restrictions on the dissemination of arrest charges once a disposition was recorded. Moreover, the Commission's power to delay implementation of the Act would have likely made it ineffective.

The bill was criticized during the hearings on the grounds that it would interfere with state prerogatives, violate the principle of separation of powers, and hinder law enforcement. Deputy Attorney General Harold Tyler argued it would be inappropriate for the federal government to interfere in the institutional structures of state criminal justice agencies. 1975 House Hearings, *supra* note 15, at 42, 43, 70, 78 (remarks of Deputy Att'y Gen. Tyler); 1975 Senate Hearings, *supra* note 15, at 207, 209 (same); accord, 1975 Senate Hearings, *supra* note 15, at 150-53 (remarks of Rocky Pomerance); 1975 House Hearings, *supra* note 15, at 91-92 (remarks of Gary D. McAlvey). Deputy Attorney General Tyler also contended that it would not be proper for the proposed Commission, an executive agency, "to intrude into the management of information systems maintained by the courts on either the Federal or state level." Id. at 42, 50 (remarks of Deputy Att'y Gen. Tyler); accord, 1975 Senate Hearings, *supra* note 15, at 207, 209 (same). Rocky Pomerance, President of the International Association of Chiefs of Police, testified that the bill's restrictions on access to criminal history information would severely hamper law enforcement. Id. at 153 (remarks of Rocky Pomerance). As with the proposals of 1972, 1973, and 1974, the bill did not pass.

¹⁸³ The proposed rules were published in the Federal Register on February 14, 1974. 39 Fed. Reg. 5636 (1974) (codified as revised in 28 C.F.R. pt. 20).

¹⁸⁴ Criminal Justice Information Systems, 28 C.F.R. § 20.2 (1980). Section 524 (b) is set forth in its 1973 version in the text accompanying note 165 *supra*. Although the Justice System Improvement Act of 1979, Pub. L. No. 96-157, 93 Stat. 1167 (codified in scattered sections of 5, 18, 41, 42 U.S.C.) reorganized the Crime Control Act of 1973, § 1301 expressly provided that "[a]ll . . . regulations . . . of [LEAA] which are in effect on the date of the enactment of the Justice System Improvement Act of 1979 [December 27, 1979] shall continue in effect according to their terms until modified, terminated [or] superseded . . ." by the appropriate authorities. Id. § 1301 (codified at 42 U.S.C. § 3797 (Supp. III 1979)). On June 13, 1980, the regulations were amended to substitute the Office of Justice Assistance, Research, and Statistics (OJARS) for LEAA. 45 Fed. Reg. 40,114 (1980).

temporary and would be replaced by comprehensive legislation.¹⁸⁵ When the legislation failed to pass, LEAA was left to rely on these rules to regulate the growing number of criminal justice information systems.¹⁸⁶

The regulations went into effect on June 19, 1975,¹⁸⁷ and apply to manual and computerized criminal history information systems at all

¹⁸⁵ See Velde, *supra* note 154, at 9, 10.

¹⁸⁶ New systems abounded. For example, the Computer Assisted Bay Area Law Enforcement (CABLE) system provided the San Francisco Police Department with information on field support, criminal history, resource allocation, personnel records, and incident reporting. CABLE included digital computer terminals in patrol cars. Officials planned to expand CABLE into an OBTS system serving all criminal justice agencies. Feder, *Cable Car City's CABLE System*, in 1974 Symposium, *supra* note 4, at 463, 463, 467-68.

The Columbia Region Information Sharing System (CRISS) was serving 35 law enforcement agencies, 38 courts, and approximately 35 corrections agencies in five counties in Oregon and Washington. The CRISS Crime Analysis System consisted of "three major subsystems": a crime file, a uniform crime reporting file, and a patrol deployment file. Orazetti, *CRISS Crime Analysis System*, in 1974 Symposium, *supra* note 4, at 43, 43.

The Regional Justice Information System (REJIS) was designed to "operate a regional computer system for the more than 200 criminal justice agencies" in St. Louis, Missouri, and the surrounding area. When fully implemented, REJIS was to have "interacting subsystems" serving police, prosecutors, court, and correction officials. Kolodney & Hamilton, *The Design of the Corrections Subsystem of REJIS*, in 1974 Symposium, *supra* note 4, at 133, 133.

The system in Rochester, New York, contained on-line warrant and criminal history files and a system for collecting report data on calls for service. Coudit, *Rochester Police Department Infosystem I*, in 1974 Symposium, *supra* note 4, at 71, 72. The criminal history file maintained rap sheets. See *id.* at 72, 78.

For other examples of police information systems, see Miller, *Charlotte's Law Enforcement Operational Information System*, in 1974 Symposium, *supra* note 4, at 81; Rodriguez, *Current Operational Information System of the Dallas Police Department*, in 1974 Symposium, *supra* note 4, at 67. A prosecution information system is described in Rogers, *PROCES: An On-line Case Management System for Prosecuting Attorneys*, in 1974 Symposium, *supra* note 4, at 401.

The Integrated Court Automation/Information System (ICAIS) was developed to provide a computerized information system for California trial courts. In addition to assisting performance of administrative and clerical tasks, such as case scheduling and notification of jurors, ICAIS was specifically designed to provide judges with rap sheets. See Kleps & McKay, *Conceptual Design for Court Information Systems*, *The Integrated Court/Automation Information System*, in 1974 Symposium, *supra* note 4, at 117, 117-20; Kreindel & Moreschi, *A Statewide Superior Court Criminal Case Management System for Massachusetts*, in 1974 Symposium, *supra* note 4, at 107.

The Michigan Department of Corrections planned to use the Corrections Management Information System (CMIS) in order to manage the Department. The system's data base was to include criminal history information. Boehm, *Michigan Corrections Management Information Systems*, in 1974 Symposium, *supra* note 4, at 149, 149, 159.

Participants in the 1974 SEARCH Symposium observed that the quality of criminal history information was often poor and that developing systems were incompatible. See, e.g., Orr, *Privacy, Confidentiality and Security and the Management of Local Criminal Justice Information Systems*, in 1974 Symposium, *supra* note 4, at 507, 511 (problem of incompleteness and inaccuracy of data is "monumental"); Cingcade, *supra* note 6, at 91 (noting lack of uniformity in judicial information systems).

¹⁸⁷ 40 Fed. Reg. 22,114 (1975). Revisions had been made in the draft rules. 39 Fed. Reg. 5636 (1974), to accommodate suggestions offered during hearings on the regulations held in 1974. *Id.* The rules are currently codified in amended form in 28 C.F.R. pt. 20 (1980).

levels of government.¹⁸⁸ State and local agencies that received LEAA funds for their systems after July 1, 1973 are required to submit a plan to LEAA.¹⁸⁹ Each plan must include proposals designed to insure that: (1) criminal history information be complete and accurate,¹⁹⁰ (2) dissemination of such information be limited to authorized recipients,¹⁹¹ (3) audits be conducted,¹⁹² (4) confidentiality and security be maintained,¹⁹³ and (5) the subjects of criminal history records be provided with an opportunity to inspect and challenge rap sheet entries.¹⁹⁴ All elements of the plans were to be implemented by

¹⁸⁸ Subpart B applies "to all state and local agencies . . . collecting, storing, or disseminating criminal history record information processed by manual or automated operations . . . [through funding] in whole or in part by [LEAA]." 28 C.F.R. § 20.20(a) (1980). Subpart C applies to "any Department of Justice criminal history record information system that serves criminal justice agencies in two or more states, and to Federal, state and local criminal justice agencies [which] utilize [those systems]." *Id.* § 20.30.

¹⁸⁹ *Id.* §§ 20.20, 20.21. The regulations further require each state to submit with its plan a "certification that to the maximum extent feasible action has been taken to comply with the procedures set forth in the plan." *Id.* § 20.22.

¹⁹⁰ *Id.* § 20.21(a). The regulations suggest that each state maintain a central repository, *id.* § 20.21(a)(1), because of the economic and administrative impracticality of maintaining complete criminal history records locally. *Id.* pt. 20 app. § 20.21(a)(1).

Under the regulations, arrest records available for dissemination must contain disposition information within 90 days of the disposition in order to be considered complete. *Id.* § 20.21(a)(1). Criminal history records need be complete and accurate only for arrests occurring after the effective date of the regulations, June 19, 1975. *Id.* States are required to establish procedures for criminal justice agencies to check with the central repository prior to dissemination of any data to insure that the most current information is being disseminated, "except in those cases where time is of the essence and the repository is technically incapable of responding within the necessary time period." *Id.* § 20.21(a)(1). The regulations also require establishment of audit procedures to insure that erroneous information is not included on rap sheets. *Id.* § 20.21(a)(2).

¹⁹¹ *Id.* §§ 20.21(b), (c). The regulations authorize the exchange of criminal history information, including "non-conviction data," *id.* § 20.3(k), within the criminal justice system, *id.* § 20.21(b)(1), but impose strict limitations on dissemination outside the criminal justice system, *id.* §§ 20.21(b), (c), "to fulfill the mandate of section 524(b) of the [1973] Act which requires [LEAA] to assure that the 'privacy of all information is adequately provided for and that information shall only be used for law enforcement and other lawful purposes.'" *Id.* pt. 20 app. § 20.21(b).

¹⁹² The regulations require the plans to "[i]nsure that annual audits of a representative sample of State and local criminal justice agencies chosen on a random basis shall be conducted by the State to verify adherence to these regulations." *Id.* § 20.21(e). Audits of each agency maintaining criminal history information are not required "[s]ince it would be too costly." *Id.* pt. 20 app. § 20.21(e).

¹⁹³ *Id.* § 20.21(f).

¹⁹⁴ *Id.* § 20.21(g). Under Subpart C, systems within the Department of Justice are required to provide for individual review of rap sheets. *Id.* § 20.34. Under the original regulations, § 20.34(b), if an individual wished to correct an inaccurate or incomplete record, he was required to apply to the agency which contributed the information. 40 Fed. Reg. 22,114, 22,117 (1975). The FBI was obliged to change its records only if the contributing agency furnished it with corrected information. *Id.* In 1978, this provision was modified to allow an individual to direct a

December 31, 1977.¹⁹⁵

It soon became apparent that very few states and localities would comply with the regulations.¹⁹⁶ An LEAA report¹⁹⁷ reviewing state plans stated that "in the overwhelming number of cases these procedures had not yet been implemented; and in many cases the procedures were still in the 'proposal' stage."¹⁹⁸ Regarding the completeness and accuracy requirement, the report noted that "[i]n most

challenge to the FBI's Identification Division. 43 Fed. Reg. 50,173, 50,173-74 (1978) (codified at 28 C.F.R. § 20.34(b) (1980)). The FBI then forwards the challenge to the contributing agency and requests verification or correction. 28 C.F.R. § 20.34(b) (1980). The regulations still do not require the FBI to investigate a challenged entry if the contributing agency fails to respond. Id.

The regulations also failed to require Department of Justice criminal history systems to conduct audits. In addition, responsibility for insuring the completeness and accuracy of FBI rap sheets is placed on contributing criminal justice agencies, and not on the FBI. Id. § 20.37. Finally, § 20.37 requires only that any agency contributing to any Department of Justice criminal history record information system provide dispositions for arrest entries "to the maximum extent feasible." Id. § 20.37.

Attorney General Bellotti of Massachusetts severely criticized Subpart C during the 1975 Senate Hearings, stating that the provisions concerning individual review of records make it "virtually impossible for the individual to correct incorrect data already accessed from the NCIC and Identification Division." 1975 Senate Hearings, *supra* note 15, at 193. He also noted that the regulations do not require an arrest record to be complete before dissemination. Id. at 190. Speaking of Subpart C generally, he concluded: "I believe that what [it does] is computerize and institutionalize and formalize a great many of the constitutional deficiencies that had been built in a very loose way into the operations of the Department of Justice." Id. at 159.

¹⁹⁵ 40 Fed. Reg. 22,114, 22,116 (1975) (§ 20.23). Penalties for failure to comply with the regulations include a fine not to exceed \$10,000 and initiation of procedures to cut off federal funds. 28 C.F.R. § 20.25 (1980).

¹⁹⁶ See text accompanying notes 197-215 *infra*. In 1976, a SEARCH Group, Inc. report described the status of criminal history information systems as follows:

The existing criminal history system is incapable of satisfying the data demands and timeliness requirements being placed on it.

. . . Growth trends and usage patterns indicate that this condition will worsen in the future, and that the present criminal history system configuration may become unmanageable.

. . . .

Today, the collection of data, its storage, and the dissemination of criminal history information is uncoordinated at all governmental levels. . . . Operational criminal justice agencies are relying on secondary sources for CCH records and are storing these records in their own files.

New users of criminal history records are continually emerging, and unanticipated usage is being made of CCH systems. Yet, accuracy, completeness and timeliness of data are not acceptable.

. . . .

DUPLICATION, REDUNDANCY, and OBSOLESCENCE are obvious characteristics of the present state of practice.

SEARCH Group, Inc., Tech. Rep. No. 14, *supra* note 6, at 1 (emphasis in original).

¹⁹⁷ Privacy and Security Staff, Nat'l Criminal Justice Information and Statistics Service, LEAA, Privacy and Security of Criminal History Information Summary of State Plans [hereinafter LEAA, Summary of State Plans]. The document has no publication date, but apparently was published in late 1976 or early 1977.

¹⁹⁸ Id. at iii.

cases . . . the plans stress that [the] foundation [for obtaining arrest and disposition reports] is insufficient for the purpose of achieving total compliance with the Regulations."¹⁹⁹ Moreover, "audit procedures are not described in specific detail."²⁰⁰

The general failure of states to comply with the regulations was confirmed by a survey of eighteen states conducted for LEAA by the Mitre Corporation²⁰¹ between August and December 1977.²⁰² Mitre reported that of the states visited, only two were in "substantial" compliance with the regulations. Nine others were found to be in "medium" compliance, and the remaining seven were found to be in "minimal" compliance.²⁰³ Mitre concluded that "none of the states in this survey will achieve total compliance by the 31 December 1977

¹⁹⁹ Id. at 6. Problems included "the inability to ensure total reporting of arrests, the lack of established procedures for obtaining court dispositions, the inability to tie dispositions to arrests, and of greater significance the general inability to enforce compliance." Id. The report concluded that "states will have a difficult time achieving 100% completeness and accuracy in the near future." Id. at 7.

In addition, most states were using, or planning to use, paper forms that would follow the individual through each stage of the criminal process. Id. Because paper reporting systems are error-prone, see notes 96, 117 *supra* and note 412 *infra*, "[s]tates that are presently relying upon some variation of this method noted in their plans completeness rates ranging from 30% to 80%." LEAA, Summary of State Plans, *supra* note 197, at 8. The report also noted substantial problems in complying with the requirement that criminal justice agencies inquire of the central repository before disseminating information to ensure that it is current. Id. at 9-10.

The plans' failure to provide effective procedures for ensuring completeness and accuracy may be due in part to an LEAA-approved instruction which relieved state and local agencies of the responsibility for including disposition information on rap sheets for arrests occurring prior to December 31, 1977, despite the regulations' requirement that dispositions be included for all arrests after June 19, 1975. National Criminal Justice Information and Statistics Service, LEAA, Privacy and Security Planning Instructions Criminal Justice Information Systems 24-25 (rev. ed. Apr. 1976). LEAA noted that "there is language in the Act and the regulations to indicate that disposition reporting should be implemented 'to the maximum extent feasible.'" Id. Thus,

[t]here is no intent to require that agencies go back into old records and obtain dispositions for all arrests occurring before a disposition reporting system is in effect. Although agencies must pursue the development of disposition reporting in good faith, these procedures can be implemented as late as December 31, 1977. Where no implementation is possible now, agencies would not be expected to attempt to reconstruct records, even if the arrest occurred after June 19, 1975.

Id. at 25.

²⁰⁰ LEAA, Summary of State Plans, *supra* note 197, at 15. Some states had not yet decided who should conduct the audit, whether legislative or executive authorization was required, or whether funds were available to pay for it. Id.

Problems also arose in the course of implementing the regulations which required individual access and review, limits on dissemination, and system security. Id. at 17-33.

²⁰¹ Mitre Report, *supra* note 7. This survey was conducted to assess the level of state compliance with the regulations and to estimate the level of compliance that could be expected by December 31, 1977. Id. at vii. In selecting the states to visit, the investigators sought to choose a group that would be "adequately representative of the nation" as a whole. Id. at 2.

²⁰² Id. at 3.

²⁰³ Id. at 5.

deadline.”²⁰⁴ Specifically, Mitre reported that “most states have not made significant progress towards compliance with the completeness and accuracy requirement of the Regulations.”²⁰⁵ Indeed, only seven of the eighteen states had formal disposition reporting systems.²⁰⁶ As of December 1977, apparently none of the eighteen states had conducted an annual audit.²⁰⁷ Only two states appeared to be able to conduct an audit in the foreseeable future.²⁰⁸ Mitre also reported that states generally failed to comply with the regulations concerning individual access and review,²⁰⁹ limitations on dissemination,²¹⁰ and security.²¹¹ Reasons cited for the general lack of compliance with the regulations included insufficient resources, confusion about the meaning of the regulations, lack of incentives to change existing practices, and a tendency to delay compliance pending the installation of new automated systems.²¹²

When faced with this general failure to comply with the regulations, the Department of Justice chose neither to impose fines nor to

²⁰⁴ *Id.* at ix.

²⁰⁵ *Id.* at 31.

²⁰⁶ *Id.* “In states without formal systems for the reporting of dispositions, . . . reporting is . . . fragmented, typically uncoordinated, and reflects primarily isolated local initiatives. In several states with informal reporting systems, the [central state repository] merely provides disposition reporting forms for use by local agencies. Often these forms are only sporadically used.” *Id.*; see SEARCH Group, Inc., Tech. Rep. No. 14, *supra* note 6, at 2.

²⁰⁷ See Mitre Report, *supra* note 7, at 73-78.

²⁰⁸ See *id.* at 73, 77-78. These states passed legislation authorizing a specific agency to conduct an audit, drew up audit plans, and made resources available to conduct such an audit. Of five other states which had organizations “officially mandated by statute to perform audits for manual as well as automated records systems,” resources to conduct audits were not available in two, and complete audit plans had not been developed in four. In the remaining eleven states, compliance with the audit requirement was described as “marginal,” *id.* at 77.

²⁰⁹ *Id.* at 53, 78-79. Most of the 18 states had developed some procedures designed to permit individual access and review. *Id.* at 53. The report concluded, however, that “[w]ith but few exceptions, these procedures have been largely informal in nature.” *Id.* Despite the high level of inaccurate and incomplete information in most criminal history data banks, see text accompanying notes 225-96 *infra*, existing challenge and review procedures are rarely used. See Mitre Report, *supra* note 7, at 45, table VI.

²¹⁰ See Mitre Report, *supra* note 7, at 79. Mitre stated that the primary obstacle to effective limitations on dissemination is “the lack of standardized, comprehensive policies, applicable to all impacted agencies in a state, which are supported by formalized procedures and the force of state law.” *Id.* at ix.

²¹¹ See *id.* at 72, 79. Mitre noted that other than at the central repositories, the regulations pertaining to security had received little attention in most states, concluding that the “difficulty of establishing standards, of estimating the costs of implementation and of obtaining the necessary funds has hindered compliance in the security area. . . . Until such time as standards are developed and promulgated and appropriations are allocated, little progress in this area can be anticipated.” *Id.* at 72.

²¹² *Id.* at 21-24.

cut off federal funds.²¹³ Instead, the Department extended the deadlines for compliance.²¹⁴ With respect to the requirement that state and local systems maintain complete and accurate records, the Department simply gave up: "No specific time deadline is being imposed upon complete and accurate records. To the maximum extent feasible, it is expected that all States will continuously work toward the goals set out in § 20.21(a) without undue delay."²¹⁵

I. Development of Microcomputer Technology

As computerized criminal justice information systems continued to proliferate in the 1970's²¹⁶ with virtually no effective governmental regulation,²¹⁷ the already dim prospects for correcting the systems'

²¹³ Penalties for failure to comply include the imposition of fines up to \$10,000 and termination of federal law enforcement funds. 28 C.F.R. § 20.25 (1980).

²¹⁴ On December 6, 1977, LEAA extended the deadline for implementation of the regulations from December 31, 1977 to March 1, 1978. 42 Fed. Reg. 61,595 (1977). The announcement made clear that the extension was "to provide an opportunity for submission of State requests for further extensions," *id.*, which would be granted so long as the state showed "a good faith effort" to implement the regulations "to the maximum extent feasible." *Id.* at 61,596 (codified at 28 C.F.R. § 20.23 (1980)).

²¹⁵ 42 Fed. Reg. 61,595 (1977); see 28 C.F.R. § 20.21(a) (1980).

²¹⁶ By May 1979, 24 jurisdictions were using Prosecutors Management Information Systems (PROMIS) and 90 other jurisdictions were installing them. The Offender Based State Corrections Information System (OBSCIS) was in operation in 35 states. Dogin, *supra* note 135, at 12. Twenty-three states were involved in SEARCH Group's State Judicial Information Systems (SJIS) program. Of the 20 states that had received LEAA funds to develop statewide judicial information systems, 14 had OBTS systems in operation or in the development stage, and 18 had a criminal history information component for generation of rap sheets. Winberry, SJIS—Its Past, Present and Future, in 1979 Symposium, *supra* note 4, at 135, 136.

²¹⁷ Although many states have enacted laws governing criminal history information systems, few such laws contain provisions sufficient to ensure completeness and accuracy of criminal history records or to prohibit inappropriate dissemination and use of arrest data. Some states require disposition data to be reported to a central repository. See, e.g., Ala. Code § 41-9-648 (1975) (requires officials charged with the compilation of criminal disposition data to report such information to the Alabama criminal justice information center); Cal. Penal Code §§ 13151, 13151.1 (West Supp. 1980) (instructs courts to report dispositions); Del. Code Ann. tit. 11, § 8504 (1979) (same); Ga. Code Ann. §§ 92A-3003, 92A-3004 (1978) (requires central repository to collect dispositions and directs court officials to supply them); Hawaii Rev. Stat. § 846-5 (Supp. 1980) (mandates that every criminal justice agency report dispositions); Iowa Code Ann. § 692.15 (West 1979) (requires that disposition reports be filed within 30 days after disposition); Kan. Stat. Ann. § 22-4705(c) (Supp. 1979) (requires criminal justice agencies to report criminal history records to central repository); Neb. Rev. Stat. § 29-3516 (1979) (criminal justice agencies must report dispositions within 15 days); Or. Rev. Stat. §§ 181.511, 181.521 (1979) (directs law enforcement agencies and courts to report dispositions). Some states that have reporting requirements also have sanctions for noncompliance. See, e.g., Del. Code Ann. tit. 11, §§ 8520, 8521 (1979) (negligent failure to report dispositions may subject court officials to fine of \$50 or imprisonment up to 60 days, or both; willful misconduct in reporting may subject court officials to a fine of \$100 or imprisonment up to six months, or both); Ga. Code Ann. § 92A-3007 (1978) (negligent or willful failure to report dispositions may subject court officials to loss of job).

many defects²¹⁸ became even dimmer. With the development of small, inexpensive computers that have the capacity of the larger, more expensive models of a few years ago,²¹⁹ the ability to collect,

Although several states require audits of criminal history information systems, certain state statutes do not provide explicit directions concerning what those audits should entail or the frequency with which audits should be conducted. See, e.g., Ark. Stat. Ann. § 5-1112 (1976) (Administrator of State Criminal Justice and Highway Safety Information Center directed to appoint agents to monitor and audit records); Fla. Stat. Ann. § 943.055 (West Supp. 1981) (Division of Criminal Justice Information Systems to order audits when deemed necessary); Kan. Stat. Ann. § 22-4706(f) (Supp. 1979) (Directors of State Bureau of Investigation shall develop agreements concerning audit requirements); Md. Ann. Code art. 27, § 748(a)(6) (Supp. 1980) (Secretary of Public Safety and Correctional Services and the Chief Judge of the Court of Appeals are to promulgate regulations concerning audit requirements); Neb. Rev. Stat. § 29-3517 (1979) (criminal justice agencies shall verify all record entries); Utah Code Ann. § 77-59-6.5(3) (1978) (State Bureau of Criminal Identification required to audit when the information it receives does not meet its standards and must audit on a random basis when the Bureau deems it necessary). Other states have more specific audit requirements. See, e.g., Conn. Gen. Stat. Ann. § 54-142h(b) (West Supp. 1980) (state justice commission to audit random sample of criminal justice agencies annually); Hawaii Rev. Stat. §§ 846-6, 846-13 (Supp. 1980) (State Attorney General to conduct annual audits of representative sample of criminal justice agencies to verify accuracy and completeness of records); Iowa Code Ann. §§ 692.13, 692.16 (West 1979) (Department of Public Safety to initiate periodic review to determine accuracy and an annual review to remove old arrests without disposition data). Although many states provide sanctions for failure to comply with statutes governing criminal history information, sanctions often are not directed specifically to failure to conduct audits. See, e.g., Hawaii Rev. Stat. § 846-16 (Supp. 1980); Iowa Code Ann. § 692.7 (West 1979); Neb. Rev. Stat. § 29-3527 (1979).

The extent to which state officials comply with requirements such as those listed above is unclear. Available evidence, however, suggests that compliance with audit requirements is rare, see notes 200, 207-08 *supra* and text accompanying notes 225-96 *infra*, and that mandatory reporting requirements are not effective in achieving completeness and accuracy of criminal history records. See text accompanying notes 276-96 *infra* for a discussion of the National Surveys of Prosecutors, Defense Agencies and State Planning Agencies.

²¹⁸ Dr. Alan F. Westin, Professor of Public Law and Government at Columbia University, outlined some of the problems facing those seeking reform of criminal history information systems in his Keynote Address at a forum sponsored by SEARCH Group in June 1977. He noted that

[c]ost-effectiveness will be the watchword, with a commitment to not rocking the boat much on these kinds of issues. . . .

As far as legal rules, I think that we are caught in a very serious set of problems today. We seem to have run out of gas on legislative change in this area. Congress is inactive at the moment in the criminal justice standards area. There does not seem to be much momentum there for action: the leadership in the House and Senate is not there; the Carter Administration does not seem to be actively interested; and there are no dramatic issues that seem to be gathering interest-group forces behind congressional legislation. The fuel also seems gone at the state level. After passage of the first SEARCH Model State Codes, with a few states passing this in whole and a few others taking parts of it, the state legislative scene seems to be relatively dormant. . . .

At the same time, I don't see the courts being a great deal of help in the near future in setting new legal norms. The U.S. Supreme Court is remarkably uninterested in the problems of record keeping and information privacy. . . .

SEARCH Group, Inc., Tech. Mem. No. 14, Access to Criminal Justice Information Summary Proceedings of the Forum on Criminal Justice Information Policy and Law 7-8 (Oct. 1977).

²¹⁹ As Steve E. Kolodney, Executive Director of SEARCH Group, Inc., observed: "Already, we see small computers being introduced into agencies which short years before could not afford

store, and disseminate criminal history information is no longer limited to centralized systems operated on a state, regional, or metropolitan basis. Instead, thousands of such systems may exist nationwide, each with the capability of generating rap sheets.²²⁰

As SEARCH Group, Inc. noted, with classic understatement: "The use of microcomputers has the potential for decentralizing data processing. . . . Privacy and security regulations must be expanded to accommodate microcomputer applications."²²¹ In addition, SEARCH Group, Inc. noted that it will be difficult to audit microcomputer systems: "Many microcomputer systems will be purchased out of local revenue funds rather than federal grants. An auditor may not even know of the existence of some systems unless the agency provides a complete list or the auditor studies expenditure records."²²² Finally, there is no reason to expect that the information stored in microcomputer systems will be any more accurate or complete than the information stored in existing systems.²²³

to consider automation. Each new installation spawns successors, innovation becomes commonplace." Kolodney, *Small Computers*, in 1979 Symposium, *supra* note 4, at 101, 101. Paul K. Wormeli explained:

[T]he stand-alone microcomputer can do anything that the large computer can do in the area of information storage and retrieval. . . . You can store records; you can create a full management information system; you can do record retrievals; store arrest records and court records; create on-line data bases to handle the storage of your information; produce monthly records; do all the things you got off the big computers.

Wormeli, *Small Computers and Criminal Justice*, 1979 Symposium, *supra* note 4, at 103, 104. Microcomputer technology is discussed in SEARCH Group, Inc., *Tech. Rep. No. 23*, *supra* note 97, at 1-21, which also contains a bibliography of microcomputer literature, *id.* at 53-54.

²²⁰ The Police Operational Support System—Elementary (POSSE) is an example of microcomputer use in criminal justice. POSSE is designed to satisfy all the record retrieval and management information needs of a police department. It is a relatively simple system, using computers that cost between \$12,000 and \$25,000. Wormeli, *supra* note 219, at 103, 104. The impact of microcomputers on criminal justice information and law enforcement is also discussed in SEARCH Group, Inc., *Tech. Rep. No. 20*, *JAMS Jail Accounting Microcomputer System* (1978); Boehm, *Applying Small Computer Technology in the Correctional Environment*, in 1979 Symposium, *supra* note 4, at 123; Heller, *Using Low-Cost (\$300-\$1,000) Microcomputers and Programmable Calculators for Police Resource Allocation*, in 1979 Symposium, *supra* note 4, at 109, 109-18.

²²¹ SEARCH Group, Inc., *Tech. Rep. No. 23*, *supra* note 97, at 39.

²²² *Id.* at 43.

²²³ SEARCH Group, Inc., was candid in its assessment of the probable levels of completeness and accuracy of microcomputer systems:

Data entry, editing and auditing procedures will apply to microprocessors in the same manner as for mini and megacomputers. Creating and maintaining accurate and complete data files are procedural problems that are largely independent of hardware and software.

Ease and cost of desired editing and/or auditing programs will vary from system to system; it cannot be said that micros will be better or worse.

Id. at 50.

In sum, in the late 1960's and early 1970's, the development of computerized criminal history information systems was spurred by advances in computer technology and by large grants of federal money with few restrictions on how it was to be spent. The result was a vast proliferation of incompatible systems that were not required to maintain even minimal data quality. Attempts to enact comprehensive federal legislation failed, and federal regulations governing such systems have been ineffective. Recent technological advances are likely to increase further the number of criminal justice information systems, making control of the dissemination and use of criminal history information even more difficult to achieve. The failure of government at all levels to regulate systems effectively has resulted in criminal history files which are substantially incomplete and inaccurate, and which frequently contain inappropriate information.²²⁴ The extent of this problem is examined in the following section.

II

DATA QUALITY OF CRIMINAL HISTORY INFORMATION SYSTEMS

Complaints of poor data quality accompanied the development of criminal history information systems,²²⁵ but there was little hard evidence available to reveal the extent of the problem.²²⁶ The evidence that was available indicated that criminal history information was substantially incomplete and inaccurate.²²⁷ The data were fragmentary, however, and often were based on the guesses of criminal justice officials rather than on rigorous, systematic studies.²²⁸ In 1978, the Office of Technology Assessment (OTA) reported to Congress that "[t]he present climate is clouded by the absence of well-established information on the completeness, ambiguities, and accuracy

²²⁴ See Section II *infra*.

²²⁵ See, e.g., notes 172, 182, 196 *supra*.

²²⁶ Hard evidence was unavailable because states failed to conduct audits. See notes 200, 207-08 and accompanying text *supra*. Although states receiving federal funds are now required to conduct audits annually, see note 192 and accompanying text *supra*, it appears that this requirement is honored in the breach far more than in the observance. In the survey of state planning agencies conducted for this Article, ten states reported conducting no annual audits. National Survey of State Planning Agencies, app. C *infra*, question 27. Of the remaining 12 states that responded to the question, six audit merely by checking their own records, not by comparing rap sheet data with court records. *Id.* question 28. Five states report that they audit using both methods, and one state only compares its records with court files. *Id.*

²²⁷ See text accompanying notes 234-41 *infra*.

²²⁸ See, e.g., text accompanying note 241 *infra*; notes 236-37, 239 *infra*.

of criminal history data"²²⁹ OTA stated further: "We need to know the real extent of quality deficiencies in both the existing manual and computerized criminal history systems."²³⁰

This section satisfies in part the need expressed by OTA. After briefly reviewing the scattered studies that have been conducted since the late 1960's,²³¹ this section presents the results of a systematic audit of New York State's computerized criminal history information system (*Tatum* audit): New York rap sheets are largely incomplete, inaccurate, and untimely and that these defects result in substantial exaggeration of defendants' criminal records.²³² Finally, this section discusses the results of the authors' national surveys of prosecutors, defense organizations, and state planning agencies.²³³ The surveys were conducted to determine whether the results of the *Tatum* audit were unique to New York or were representative of conditions elsewhere. The results suggest that the New York experience is not unlike the experience of other jurisdictions.

A. Studies Conducted Before the Tatum Audit

In 1967, the President's Commission on Law Enforcement and Administration of Justice reported that FBI Identification Division rap sheets lacked disposition data in 35% of the cases.²³⁴ Later studies found disposition data to be missing more frequently. A 1973 survey of the CCH file revealed that only 40.3% of arrest entries had accompanying dispositions;²³⁵ a 1976 study by the FBI Identification Division²³⁶ showed that only between 44.4% and 48.1% of arrest entries

²²⁹ OTA Report, *supra* note 18, at 20.

²³⁰ *Id.* at 23.

²³¹ See text accompanying notes 234-41 *infra*.

²³² See text accompanying notes 259-74 *infra*. To the authors' knowledge, this is the first such audit of a criminal history information system ever conducted.

²³³ See text accompanying notes 276-96 *infra*.

²³⁴ *The Challenge of Crime*, *supra* note 37, at 268.

²³⁵ 1974 Senate Hearings, *supra* note 15, vol. 1 at 691-92 (response of Clarence M. Kelley to letter of inquiry sent to the FBI). The survey was conducted on November 18, 1973. It did not determine what percentage of the cases studied had actually been disposed of at that time. See *id.*

²³⁶ FBI, Feasibility Study, *supra* note 39.

To identify the scope of the problem, investigators drew a sample of 3000 arrests posted on January 30, 1974, and 1000 arrests posted on December 15, 1974, and counted the number with final dispositions reported as of June 1976. *Id.* at 5-6. The FBI is not always so rigorous in compiling its statistics. For example, the study describes how the methodology of previous studies led the FBI to overestimate disposition reporting by 19%.

had dispositions reported.²³⁷

Surveys of state systems have revealed similar deficiencies. An LEAA survey conducted in 1969 and 1970 showed that large numbers of arrests and dispositions were not reported to state planning agencies.²³⁸ At the 1974 Senate Hearings, Senator Ervin noted that, in several states, as many as 70% of the records lacked dispositions.²³⁹ In 1976, SEARCH Group, Inc. conducted a national survey of criminal justice agencies.²⁴⁰ These agencies estimated that 31% of the criminal histories they receive are missing data, and that 10% contain erroneous data.²⁴¹ Although these studies indicate that disposition data are often inadequate, in most instances, they do not provide hard or detailed evidence with which to assess the quality of criminal history information systems.

Dispositions have been for a long time estimated at so many per inch. The estimate is influenced by how much compression is put on the stack of paper before it is measured and the current thickness of a disposition sheet. It is assumed that the compression factor and paper thickness were about the same in 1974 and 1975 as they are today and that accordingly, the estimates of disposition receipts for these years were in error by 19% also.

Id. at 8.

²³⁷ Id. at 7. The Identification Division estimated that about 4% of the 1974 arrest dispositions would be received subsequent to the study. Id. at 14. It is unclear how the Division arrived at this estimate. In another study, the FBI reported that it had not received disposition data on over 372,000 out of the 835,000 charges (45%) made and recorded in CCH between 1970 and 1974. FBI, *Crime in the United States 1974*, at 47 (1975).

²³⁸ The survey results are set forth in *Need to Determine Cost*, supra note 45, at 10, and are as follows:

Number of States by percent of completeness of arrest and disposition reporting
to State identification units

<u>Transaction</u>	<u>More than 90 percent</u>	<u>65 to 90 percent</u>	<u>Less than 65 percent</u>
Arrests	11	20	18
Dispositions	7	11	31

(One State did not provide information on arrests; another State did not provide information on dispositions.)

²³⁹ 1974 Senate Hearings, supra note 15, vol. 1 at 19 (remarks of Sen. Ervin). Governor Sargent of Massachusetts estimated that, in 1971, 20% of his state's manually maintained criminal history files included arrests not followed by disposition data. Id. at 50. In 1974, manual rap sheets in Montana included disposition in only 20% of the cases. Montana had no mandatory reporting system and the state Identification Bureau did not gather disposition information systematically. Uda, *Privacy, Law Enforcement, and Public Interest: Computerized Criminal Records*, 36 *Mont. L. Rev.* 60, 60 n.4, 61 (1975).

²⁴⁰ The results of this study are reported in SEARCH Group, Inc., *Tech. Rep. No. 14*, supra note 6.

²⁴¹ Id. at 27.

B. *The Tatum Audit*

1. *Background*

In New York City, attorneys for the Legal Aid Society²⁴² are acutely aware of the shortcomings of their clients' rap sheets. Legal Aid clients are indigent,²⁴³ and ordinarily can post only nominal bail.²⁴⁴ Whenever a rap sheet contributes to a decision to set bail at an amount an indigent defendant cannot afford, the connection between rap sheet quality and that defendant's incarceration is evident.²⁴⁵ Moreover, since many cases are disposed of at arraignment,²⁴⁶ rap sheets unfairly affect the sentences of defendants who enter guilty pleas and are sentenced immediately.²⁴⁷

The harmful impact of New York rap sheets on indigent clients led the Legal Aid Society to commence a federal class action challenging the record-keeping practices of New York's central repository, the New York State Division of Criminal Justice Services (DCJS).²⁴⁸ Because DCJS had done no audits of its own,²⁴⁹ the authors conducted one.

2. *Methodology*

The methodology of the audit was not complex. A sample of 793 rap sheets was drawn from the Manhattan Criminal Court night arraignment calendar over the course of fifteen evenings in February and March 1977.²⁵⁰ The progress of each case for which a rap sheet

²⁴² The Legal Aid Society represents approximately 85% of the defendants in the New York City Criminal Court. Interview with Harold S. Jacobson, Special Assistant to the Attorney-in-Charge for Planning and Management, Criminal Defense Division, The Legal Aid Society (June 10, 1980).

²⁴³ *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM), slip. op. at 18 (S.D.N.Y. Feb. 16, 1979).

²⁴⁴ See Ares, Rankin & Sturz, *The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Parole*, 38 N.Y.U.L. Rev. 67, 79 (1963); Note, *A Study of The Administration of Bail in New York City*, 106 U. Pa. L. Rev. 693, 707-11 (1958).

²⁴⁵ See text accompanying notes 328-37 *infra*.

²⁴⁶ The *Tatum* audit showed that only 32% of the cases continued beyond arraignment stage. Richard Lowe, Chief of the Trial Division of the New York County District Attorney's Office, confirmed that figure. He estimated that 60% to 65% of all cases are disposed of at arraignment. Trial transcript at 274, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979).

²⁴⁷ See text accompanying notes 338-50 *infra*.

²⁴⁸ *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979). The investigations discussed below as a part of that litigation were conducted by the authors or under their direct supervision.

²⁴⁹ Stipulation at ¶ 72, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., filed Nov. 18, 1977).

²⁵⁰ Fifteen different arraignment sessions were chosen in order to observe a variety of presiding judges. In all, ten judges presided over the arraignments observed by the audit team.

had been drawn was observed through the completion of arraignment and was coded.²⁵¹ The rap sheet's report of each defendant's prior New York arrests²⁵² occurring on or after January 1, 1973²⁵³ was then coded and compared directly with court files. Of the 2,741 prior arrests examined, reference to court files yielded conclusive disposition information on 2,210.²⁵⁴ This sample was of sufficient size to insure that the results would be a reliable reflection of all rap sheets.²⁵⁵ In

Night arraignments were observed because during the day as many as three separate parts operate, dividing cases according to the age of the defendants and the types of charges filed. To secure a representative sample of cases during the day would have required an audit team for each part. At night, by contrast, all incoming cases are handled by a single arraignment part and a representative sample could be obtained by one team.

Except for the first night and the night of March 15, 1977, most of the cases handled by the Legal Aid in night arraignments were included in the sample. On the first night, photocopying the rap sheets began only a few minutes before the session. Since it was not possible to copy most of the rap sheets without delaying the court, numerous cases heard by this judge were missed. Only ten rap sheets were copied. (Since the judge presiding that night was also presiding the next night, the deficiency was eliminated, and an adequate number of his cases was included in the sample.)

To avoid the timing problem encountered on the first night, photocopying on subsequent evenings began at least an hour before the session. This allowed sufficient time to copy the rap sheets in all cases likely to be reached by the court. This procedure worked well on all evenings after the first with the exception of March 15. On that night, the presiding judge disposed of cases so quickly that he handled all the cases in which rap sheets had been photocopied plus a great many others. Although the sample contains 67 cases handled by this judge, it is estimated that he disposed of twice that many.

Ten to fifteen cases handled each evening by the Legal Aid Society were not included because the files were brought to the courtroom late in the evening and the cases were called too quickly to permit copies of the rap sheets to be obtained without interfering with the court.

²⁵¹ A copy of the coding sheets used throughout the audit appears as app. D *infra*.

²⁵² Because of the practical impossibility of checking the reported dispositions of out-of-state arrests against court records, such arrests were not included in the analysis.

²⁵³ January 1, 1973, was used as the cutoff date because the court records for pre-1973 cases had been sent to archives where they could not be seen without an individual requisition for each case, thus making it impossible to locate and examine large numbers of records. By contrast, records for post-1973 arrests were readily accessible in the clerk's office. DCJS' capacity to obtain and list accurate disposition information should not have diminished since 1973 and may even have improved. Restricting the sample to post-1973 arrests, therefore, involves either no bias or a bias in the direction of showing greater accuracy and completeness than actually exists for the records of prior arrests in the system.

²⁵⁴ Information on the 531 arrests for which disposition data could not be located is set forth in Table 1 *infra*.

²⁵⁵ The purpose of taking a sample is to infer the characteristics of a population from the characteristics of a sample. T. Wonnacott & R. Wonnacott, *Introductory Statistics* 3 (3d ed. 1977). In the present case, for example, the accuracy of the disposition information on all of the rap sheets maintained by DCJS is to be inferred from the accuracy of the disposition information on the rap sheets in the sample. Sampling theory allows one to construct an interval around the sample characteristic within which one can have a specified level of confidence that the population characteristic lies. *Id.* at 4, 143-49, 223-26. This interval is known as a confidence interval.

The reliability of a percentage of a sample is customarily reported by calculating a confidence interval using the sampling error of the percentage. On the basis of statistical theory, one

addition to comparing the rap sheets' reports of dispositions with court records, the audit analyzed delay and bias in reporting disposi-

can be sure with a designated level of assurance that the percentage of the total population with a certain characteristic is within the confidence interval, determined by the percentage in the sample plus or minus the sampling error. The level of assurance desired can be chosen before the study is executed. Four commonly used levels are 90%, 95%, 99%, and 99.9%. Sampling error figures are then computed according to standard formulae, which are in basic textbooks for ready reference. See J. Freund & F. Williams, *Elementary Business Statistics: The Modern Approach* 312-16 (3d ed. 1977); T. Wonnacott & R. Wonnacott, *Introductory Statistics* 223-27 (3d ed. 1977).

Sample size is one of the principal determinants of sample reliability. Three principles from statistical theory and practice apply to determining the reliability of the present samples of 793 rap sheets and 2210 prior arrests:

(1) Contrary to expectation, the reliability of a statistic depends upon the size of the sample but not upon the size of the population from which the sample is drawn. See J. Freund & F. Williams, *supra*, at 312-16. Thus, the reliability of a statistic computed from the present sample of rap sheets is the same whether the total number of rap sheets maintained by DCJS is 10,000 or 1,000,000 or 2,600,000. Similarly, the reliability of a statistic computed for the prior arrest sample of 2210 is determined by that number, not by the total number of prior arrests reported to DCJS since 1973. An important corollary must be noted. When a percentage is reported for a subgroup in a sample, the reliability of that percentage is determined by the number of cases in the subgroup rather than in the total sample. The sampling error is therefore greater.

(2) The reliability of a statistic is determined separately for each statistic calculated from the sample, not for the sample as a whole. See J. Freund & F. Williams, *supra*, at 312-16. For example, the reliability of each percentage computed from the sample is calculated separately. For this reason, one may not speak in terms of the reliability of an entire study, but only of the reliability of specific statistics calculated from the sample.

(3) The reliability of the statistic also depends on characteristics of the statistic itself. See *id.* at 317. For example, for a percentage the reliability is less when the percentage is close to 50% and greater when it is close to 10% or 90%. For a sample size of 2000, the sampling error for a figure of 50% is nearly a full point greater than a sampling error for a figure of 10% or 90%. See J. Freund & F. Williams, *supra*, at 521.

Reliability of all percents from the *Tatum* audit may readily be determined. Percentages calculated from the rap sheet sample of 793 will in no case have a sampling error in excess of 3.5%. Percentages calculated from the 2210 prior arrests will in no case have a sampling error in excess of 2.2%. Sampling errors for subgroups, even if the subgroup is as small as 100, never exceed 10%.

A word of caution is necessary concerning the reliability of the *Tatum* data. Strictly speaking, one can only construct a confidence interval where the sample is drawn at random from the population. T. Wonnacott & R. Wonnacott, *supra*, at 8-9. A random sample is one in which each member of the population has an equal chance of being chosen. *Id.* Since the rap-sheet sample was drawn from cases scheduled to be arraigned at night and the audit reviewed only those arrests made on or after January 1, 1973, all of the arrests on the rap sheets maintained by DCJS did not have an equal chance of being chosen. For example, arrests made before January 1, 1973, had no chance of being chosen. The sample was, therefore, not a random sample of all arrest records maintained by DCJS. But if excluding pre-1973 arrests in the sample introduced any bias at all, it biased the result toward an appearance of greater accuracy than actually exists in the system. See note 253 *supra*. Further, there is no reason to believe that nighttime arraignment on a current arrest has any effect on the accuracy of DCJS disposition information relating only to prior arrests. Therefore, the authors believe that similar results, or results indicating less accuracy, would have been obtained had the sample been truly random.

tions and discrepancies among arrest,²⁵⁶ formal,²⁵⁷ and disposition charges.²⁵⁸

3. Results

The results of the audit are disturbing. As Table 1 shows, only 27% of all 2,210 arrest entries on DCJS rap sheets are accompanied by complete and correct disposition information. For the remaining 73% of the arrest entries, the rap sheets were either inaccurate or incomplete. Rap sheets were completely blank—containing no disposition information at all—for nearly half the entries, and were incomplete, inaccurate, or ambiguous in the remaining 27%.²⁵⁹

As shown in Table 1, 9% of the cases were still pending when the rap sheets were generated, so there were no dispositions to report. In 3% of the arrests, the court records were sealed or otherwise unavailable.²⁶⁰ Finally, in 7% of the cases, no docket number could be found for the case, making it impossible to identify the relevant court records or even to confirm that court records exist.²⁶¹

²⁵⁶ Arrest charges are those designated by the arresting police officer. The arresting officer forwards the arrest charges and the defendant's fingerprints to DCJS. These charges appear in the charge column of New York rap sheets. The formal charges do not replace these arrest charges when the formal charges are ultimately lodged against the defendant in an accusatory instrument. Deposition of William T. Bonacum, Deputy Commissioner of DCJS, at 8-14, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Jan. 14, 1977); see Stipulation at ¶¶ 14, 26, 34, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., filed Nov. 18, 1977).

²⁵⁷ Formal charges are those which are lodged in an accusatory instrument such as an information, complaint, or indictment.

²⁵⁸ See text accompanying notes 269-73 *infra*.

²⁵⁹ DCJS refuses to see its own system in this light. Its own estimates of data quality—not based upon audits—vary. For the Mitre Corporation's survey, just after the *Tatum* audit, see text accompanying notes 201-12 *supra*, DCJS estimated that it reported 75% of case dispositions. Mitre Report, *supra* note 7, at 29. DCJS made that same estimate in the plan it submitted to LEAA pursuant to its regulations. New York State Division of Criminal Justice Services, State of New York Criminal History Record Information Plan 13 (1975); see 28 C.F.R. § 20.21 (1980), text accompanying notes 189-94 *supra*. But, in another proposal filed with LEAA only four months earlier, DCJS estimated its failure rate at 33.3% to 50%. New York State Division of Criminal Justice Services, New York State Offender Based Transaction Statistics Program 22 (1975). Frank J. Rogers, Commissioner of the New York State DCJS, testified that officials at DCJS told him that inaccurate disposition reporting occurred in less than 2% of the cases. Deposition of Frank J. Rogers, at 21, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given June 9, 1977). Moreover, DCJS had no procedure to identify cases old enough for dispositions to have occurred but in which none had been reported. Mitre Report, *supra* note 7, at 29.

²⁶⁰ Where the court file for a case could not be found, information was obtained, if possible, from other court records, such as the sentencing book or adjournment book. In some cases, not even these records could be located.

²⁶¹ It was not entirely clear why these docket numbers could not be found. In some cases, the district attorney may have refused to press formal charges, so no docket numbers were ever assigned. In others, the docket number may be listed in the court records under a name different from the one on the defendant's rap sheet.

TABLE 1²⁶²

ACCURACY AND COMPLETENESS OF DISPOSITION INFORMATION
(for 2,741 Prior Arrests since January 1, 1973)

Disposition Checked in Court Records,	81%	
Rap Sheet is:		
Complete and Correct		27%
Blank		45
Incomplete ²⁶³		8
Inaccurate ²⁶⁴		9
Ambiguous, showing "Combined Charges" ²⁶⁵		10
Case Pending: No Disposition to Report	9	
Court Records Sealed or Otherwise		
Unavailable	3	
No Docket Number Locatable	7	
Total Percent	100%	100%
Total Number of Prior Arrests	(2,741)	(2,210)

The audit also analyzed delay in reporting dispositions. Delay was measured by analyzing the completeness and accuracy of the rap sheet entries for dispositions occurring in each of the five sample years. If reporting delays exist, one would expect dispositions occur-

²⁶² The large number of prior arrests examined (2210) insures that these percentages reliably represent the DCJS files. See note 255 supra. The sampling error for any percentage in a sample of more than 2,000 is at its highest about 2%. It can, therefore, be said that there is a 95% probability that the percentage of all arrest records since 1973 for which DCJS rap sheets are complete and accurate is between 25% and 29%, while the percentage for which the disposition column is completely blank, though a disposition occurred, is between 43% and 47%. Similar intervals can be calculated for the remaining data in Table 1 by adding and subtracting the approximated sample error.

²⁶³ Incomplete entries lack full information on convictions. For example, the rap sheet may indicate conviction of an attempt, without stating the crime attempted. It may state: "110.00PL CLASS E FEL. CONVICTED OF ATTEMPT AT CLASS D FEL." The user is not told what Class D Felony was attempted. The rap sheet may also indicate a sentence without listing the conviction charge.

²⁶⁴ The study included four types of inaccurate entries: (1) the basic disposition is incorrect (conviction listed for dismissal or vice versa), (2) multiple listings indicate a plea to more than one count when there was a plea only to a single count, (3) sentences are recorded incorrectly, and (4) the original conviction is correctly listed but a reversal on appeal is not shown. Since DCJS has no system for reporting appellate dispositions, the fourth type of error occurs whenever a conviction is reversed on appeal. See *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM), slip op. at 7 (S.D.N.Y. Feb. 16, 1979); New York State Division of Criminal Justice Services, State of New York Criminal History Record Information Plan 12-13 (1975). Because of limited resources, only trial court data could be collected in the *Tatum* audit, and inaccuracies of the fourth type are, therefore, not included in the statistics. Thus, DCJS reports a somewhat higher percentage of inaccurate dispositions than the audit figures indicate.

²⁶⁵ Ambiguous entries show several charges in the disposition column as well as an indication of a plea to "combined charges" when the plea was only to a single charge. A typical entry reads: 230.00PL Class B Misd. Prostitution-Combined- 240.35PL Viol. Loit. Susp. Crim. Intent/No Ident Convicted Upon Plea of Guilty Comb. Chgs.

ring in earlier years to be reported more often and more completely than recent dispositions. Table 2 indicates that this is indeed the case.

TABLE 2²⁶⁶

ACCURACY AND COMPLETENESS OF DCJS DISPOSITION
DATA BY YEAR OF DISPOSITION FOR CASES THAT
COULD BE CHECKED IN THE COURT RECORDS

DCJS DATA ARE	YEAR OF DISPOSITION				
	1973	1974	1975	1976	1977
Complete and Correct	44%	43%	36%	22%	1%
Blank	16	22	26	55	93
Incomplete	11	10	10	7	4
Ambiguous; showing "Combined Charges"	13	9	17	8	0
Inaccurate	15	15	10	8	1
Total % of Arrests	100	100	100	100	100
Total No. of Arrests	(202)	(347)	(484)	(866)	(288)

Even for cases disposed of in 1973 and 1974, however, only 44% of the dispositions were reported completely and correctly. The similarity of these figures suggests that disposition information continues to trickle in for a few years, but then reaches a plateau after which it remains essentially the same.

The data were also analyzed to determine whether disposition entries were more complete and accurate in cases in which the disposition was favorable to the defendant or in cases in which it was unfavorable. Favorable dispositions (those resulting in dismissal or acquittal of all charges or transfer to a civil court) compose 32% and unfavorable dispositions (those resulting in at least one conviction or a youthful offender adjudication) compose 68% of the cases for which information was obtained from court records.²⁶⁷ Table 3 shows the level of quality of the 2,210 arrest records.

²⁶⁶ In 23 cases, the court records failed to reflect the year the disposition occurred. These cases are not included in Table 2. The 1977 arrests in the table are for those cases disposed of before the arraignment at which the sample was chosen. The reliability of the statistics in this Table are discussed in note 255 *supra*.

²⁶⁷ The distinction drawn here between favorable and unfavorable dispositions is somewhat arbitrary since a disposition classified as unfavorable might, if reported, actually benefit a defendant. For example, a defendant previously charged with attempted robbery but convicted only of disorderly conduct might be helped by the reporting of that disposition, since the conviction charge is far less serious than the arrest charge. The frequency of such disparities between arrest charges and conviction charges was examined during the *Tatum* audit and is discussed in the text accompanying note 273 *infra*.

TABLE 3²⁶⁸

COMPLETENESS AND ACCURACY OF DCJS INFORMATION
ON PRIOR ARRESTS IN RELATION TO WHETHER DISPOSITION
WAS FAVORABLE OR UNFAVORABLE TO DEFENDANT

<u>DCJS Record</u>	<u>Unfavorable Disposition</u>	<u>Favorable Disposition</u>
Complete and Correct	17%	50%
Blank	48	41
Incomplete or Inaccurate	36	9
Total Percent	100%	100%
Total Number of Cases	(1515)	(695)

DCJS is much more likely to have disposition information, and to report it correctly, if an arrest resulted in a disposition favorable to the defendant. Fifty percent of favorable dispositions were correctly reported by DCJS, compared to only 17% of unfavorable ones. DCJS completely failed to report 48% of unfavorable dispositions and 41% of favorable dispositions. Unfavorable dispositions are much more likely than favorable ones to be recorded incompletely or inaccurately (36% to 9%). These results may be due to the greater complexity of unfavorable dispositions. More information must be recorded where the disposition is unfavorable (one or more specific conviction charges and data on sentencing) than when it is favorable, so there is greater opportunity for error.

Rap sheets misrepresent a person's record when they include serious arrest charges, but not lesser formal or conviction charges. New York rap sheets always show arrest charges, but have no system for showing formal charges and only sporadically show conviction charges.²⁶⁹ On examination, the data reveal significant discrepancies between arrest and formal charges when the arrest is for a felony (Table 4), and enormous disparities between arrest and conviction charges for all arrest charges (Table 5).

The relationship between the levels of the most serious arrest and formal charges²⁷⁰ is shown in Table 4 for all prior arrests since 1973

²⁶⁸ These data are based on the 81% of prior arrests (2210 observations) in which the disposition had occurred and was checked in court records.

²⁶⁹ See Table 1 accompanying note 262 *supra*.

²⁷⁰ The New York Penal Law establishes five classes of felony (A to E, of which A is the most serious), three classes of misdemeanor (A and B, of which A is the more serious, and unclassified misdemeanors, generally similar to Class A Misdemeanors in permissible sentence), and one class of violations. N.Y. Penal Law §§ 55.05, .10, 70.00, 70.15 (McKinney 1975 & Supp. 1980-1981). These nine categories are considered in the analysis which follows. Since most defendants face multiple charges varying in degree, the analysis considers only the most serious of each defendant's arrest, formal, and conviction charges.

that could be checked in the court records. The data show that the judgment of the police is often superceded by the District Attorney with the result that arrest charges are reduced prior to arraignment. For example, in 83% of arrests where the highest arrest charge was an A Felony, the highest formal charge was an A Felony, but 17% of the A Felony arrest charges were reduced during the charging process: 13% to a lower felony and 4% to a misdemeanor.

TABLE 4²⁷¹

PATTERNS OF CHANGE IN DEGREE OF HIGHEST
CHARGE FROM ARREST CHARGE TO FORMAL CHARGE

Formal Charge Is Higher/ Same/Lower Than Arrest Charge	Highest Arrest Charge Is								
	-----FELONY-----					MISDEMEANOR			VIOLA- TION
	A	B	C	D	E	A	B	Unc.	
HIGHER	—	0%	3%	5%	5%	3%	2%	10%	4%
Felony	—	0	3	5	5	3	0	10	0
Misdemeanor	—	—	—	—	—	—	2	0	4
SAME	83	82	72	74	78	93	98	90	96
LOWER	17	17	25	22	17	4	0	0	—
Felony	13	14	13	5	—	—	—	—	—
Misdemeanor	4	3	11	16	16	3	0	—	—
Violation	0	0	1	0	1	1	0	0	—
Total Percent	100	100	100	100	100	100	100	100	100
Total No. of Arrests	(46)	(121)	(188)	(457)	(257)	(824)	(442)	(20)	(129)

Overall, Table 4 shows that the highest formal charge was as serious as the highest arrest charge in a substantial majority of cases: between 72% and 83% for felony arrests, between 90% and 98% for misdemeanor arrests, and 96% for violations. However, changes in the level of charges did occur in a substantial percentage of felony arrests. When there was a change, the charge was almost always reduced. Thus, between 17% and 25% of felony arrest charges were reduced by the time formal charges were filed. The data suggest that the higher felonies (A, B, C) were most often reduced to lower felo-

²⁷¹ Patterns of change which are impossible, such as a Class A Felony charge becoming a higher formal charge or a violation arrest charge becoming a lower formal charge, are indicated by a hyphen.

nies, while lower felonies (D, E) were typically reduced to misdemeanors. Class A Misdemeanors tend to be reduced to B Misdemeanors rather than to violations. The failure to indicate formal charges on a rap sheet²⁷² would, therefore, frequently misrepresent a defendant's criminal history.

The relationship between arrest charges and case dispositions is shown in Table 5. Here, the reduction in the level of charges is

TABLE 5²⁷³
 PATTERNS OF DISPOSITION BY DEGREE
 OF HIGHEST ARREST CHARGE

Disposition Is Higher/Same Lower Than Arrest Charge	Highest Arrest Charge Is								
	----FELONY----					MISDEMEANOR			VIOLA- TION
	A	B	C	D	E	A	B	Unc.	
CONVICTION OF HIGHER CHARGE	—	0%	0%	0%	0%	0%	0%	0%	3%
Felony	—	0	0	0	0	0	0	0	0
Misdemeanor	—	—	—	—	—	—	0	0	3
CONVICTION OF SAME DEGREE CHARGE ²⁷⁴	0	0	1	2	1	14	75	69	76
CONVICTION OF LOWER DEGREE CHARGE	36	41	52	61	62	49	16	6	—
Felony	3	16	5	3	—	—	—	—	—
Misdemeanor	27	21	38	44	54	23	—	0	—
Violation	6	4	10	13	9	26	16	6	—
FAVORABLE DISPOSITION	64	59	47	38	36	36	9	25	21
Total Percent	100	100	100	100	100	100	100	100	100
Total No. of Arrests	(33)	(90)	(168)	(402)	(234)	(730)	(423)	(16)	(127)

²⁷² See note 256 supra.

²⁷³ The total number of arrests reported here is 13 greater than the total number reported in Table 1. For those 13 cases, the court file could not be obtained. Other court records, however, did show the level of conviction entered, but not the specific charge within each level. Therefore, the disposition information in these cases was not complete enough for inclusion in Table 1, but was sufficient for inclusion in Table 5.

²⁷⁴ Limiting the sample to arrests since 1973 produces a bias which applies primarily to persons convicted of Class A and B Felonies. Persons convicted of such crimes since 1973 are unlikely to have been released from prison in time to be rearrested to appear in the arraignment sample. Therefore, the estimated percentage of persons convicted of these crimes is biased downward. The bias, however, is probably not large since very few lower felony charges (Class C, D, and E) result in conviction of felonies at the same level (1%, 2%, and 1%, respectively).

dramatic. The data show that nearly all felony arrests resulted either in favorable dispositions or in conviction of a lower charge, frequently a misdemeanor. For example, 47% of all C Felony arrests resulted in dismissal or acquittal; 48% in a misdemeanor or violation conviction; 5% in conviction of a lower felony; and only 1% in conviction of a C Felony.

Although misdemeanor arrest charges were not lowered as frequently as were felony arrest charges, the pattern is similar. Convictions, when they occur, were frequently for charges lower in degree than the arrest charges. An arrest charge of an A Misdemeanor resulted in a conviction on that level only 14% of the time. In 26% of the cases, A Misdemeanor arrest charges were disposed of as violations, and in 36% there was no conviction at all.

In sum, the failure of rap sheets to show formal charges obscures the fact that the charges defendants actually face in court are sometimes less serious than those for which they are arrested. In addition, defendants, if convicted at all, are typically found guilty of charges far less serious than those for which they were arrested. Thus, the frequent failure of rap sheets to show dispositions results in a substantial exaggeration of defendants' criminal records, since rap sheet users in the New York criminal justice system most often see only arrest charges, not ultimate dispositions.

The *Tatum* audit demonstrates the deficiencies in the DCJS data base. Disposition data are often incomplete and inaccurate. Delays in disposition reporting are extreme. Distortion of defendants' criminal records is common. The poor performance of a system required to be complete and accurate only "to the maximum extent feasible" is clear.

C. *The National Surveys*

The *Tatum* audit did not, of course, reveal whether the New York system is representative of other criminal history information systems in the United States. To determine whether the deficiencies in the DCJS data base are peculiar to the New York System, three national surveys were conducted.

1. *Methodology*

Questionnaires focusing on the structure, quality, and use of rap sheets were sent to a nationwide sample of prosecutors, defense agencies, and state planning agencies. Two hundred eighty-nine prosecu-

tors' offices and 291 defense agencies were polled.²⁷⁵ In addition, all state planning agencies except New York's Division of Criminal Justice Services were surveyed.²⁷⁶ The response rate was high: over half of the prosecutors (148) and of the defense attorneys (154) and almost half of the state planning agencies (22) returned completed questionnaires.²⁷⁷

TABLE 6²⁷⁸

Question:

"APPROXIMATELY WHAT PERCENTAGE OF RAP SHEET ARREST ENTRIES CONTAIN NO CORRESPONDING DISPOSITION INFORMATION?"
(Table shows % of respondents in each category who designated that the given proportion of rap sheets lacked disposition)

	<u>District Attorneys</u>	<u>Agencies</u>	<u>State Planning Agencies</u>
0 %	2.7%	1.4%	0%
10 %	3.4	7.0	19.1
20 %	13.0	7.0	14.3
30 %	17.1	16.1	19.1
40 %	11.0	17.5	9.5
50 %	29.5	33.6	9.5
60 %	13.0	7.7	14.3
70 %	4.8	7.0	9.5
80 %	4.1	1.4	4.8
90 %	1.4	1.4	0
100 %	0	0	0
Mean estimate	42.9%	42.6%	38.1%
Number of responses	(146)	(143)	(21)

²⁷⁵ Six prosecutors' offices and six defense agencies in each jurisdiction (if the jurisdiction had six or more) were selected, including one office in each of the two largest cities and four others chosen at random.

²⁷⁶ The authors did not include DCJS because information concerning New York rap sheets had already been obtained through other sources.

²⁷⁷ Prosecutors' responses were received from all jurisdictions except the District of Columbia, Puerto Rico, Rhode Island, and the Virgin Islands. Defense attorneys' responses were received from all jurisdictions except Maine, South Dakota, and the Virgin Islands. State planning agency responses were received from Alabama, Alaska, California, Connecticut, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Oregon, Pennsylvania, South Carolina, Utah, Virginia, and Washington.

Copies of the questionnaires containing tabulations of all responses to each question can be found in apps. A, B, and C *infra*.

²⁷⁸ These figures exclude responses of "Unknown" and questionnaires in which this question was left blank. The data in Table 6 are drawn from National Survey of Prosecutors, app. A *infra*, question 8; National Survey of Defense Agencies, app. B *infra*, question 10; National Survey of State Planning Agencies, app. C *infra*, question 14.

While these surveys are not as comprehensive as the audit of New York's system presented above, they nonetheless provide a basis for determining whether the New York audit reflects the situation in other jurisdictions.

2. Results

As in the *Tatum* audit, the surveys first attempted to determine the number of arrests for which state criminal history information systems fail to report any disposition whatsoever. Table 6 shows the percentage of arrest entries the respondents estimated to lack all disposition information. The results substantially echo the findings of the *Tatum* audit. The *Tatum* audit evidenced a failure of New York rap sheets to report disposition information of 45% of the arrest entries.²⁷⁹ The national survey shows that district attorneys, on the average, estimate that rap sheet entries fail to contain disposition information 42.9% of the time. Defense attorneys estimate that 42.6% of all rap sheet entries contain no disposition information. Even the state planning agencies, whose product is being reviewed, perceive the complete failure rate to stand at 38%.²⁸⁰

Respondents also were asked whether rap sheets ever show some, but not all, elements of case dispositions. Specifically, respondents were asked whether the disposition column is sometimes missing conviction charges, the sentence imposed, or corrections information. The results are shown in Table 7.

²⁷⁹ See Table 1 accompanying note 260 supra.

²⁸⁰ Rap sheets in the 18 states surveyed in 1977 by the Mitre Corporation, see text accompanying notes 201-12 supra, were also found to be lacking substantial numbers of dispositions. Estimates of the "level of disposition reporting" ranged from less than 10% to more than 90% with most states falling in the 30% to 70% range. Mitre Report, supra note 7, at 29. These estimates led the authors of the Mitre Report to conclude:

Thus, most states have not achieved a level of arrest and/or disposition reporting needed to support the completeness and accuracy requirement of the [federal] Regulations. States (N = 7) with formal reporting systems and relatively high levels of arrest and disposition reporting have typically also taken numerous steps to implement the other provisions (i.e., unique tracking numbers, delinquent disposition monitoring, quality control procedures, and formal query before dissemination procedures) of the Regulations. States (N = 11) with a low level of both arrest and disposition reporting have taken only minimal steps to implement these other provisions. Thus, most states have not made significant progress towards compliance with the completeness and accuracy requirement of the Regulations.

Id. at 31.

Although the Mitre Report did not identify the individual states by name, New York, one of the states studied, id. at 2, was identified by the authors as state "H" by similarities between characteristics of state H and New York. These indications include the capacity of the state for auditing its own system, the status of its local repository, and the status of the central repository, listed in Tables I, III, V and X of the Report. Id. at 7, 17, 39, 75. Officials in New York (state

TABLE 7²⁸¹

Questions:
 "ARE [Conviction charges] [Sentences imposed]
 [Corrections data] SOMETIMES MISSING
 FROM THE DISPOSITION SECTION WHEN
 OTHER DISPOSITION DATA ARE SHOWN?"

	<u>YES</u>	<u>NO</u>	<u>Number of Responses</u>
<u>District Attorney Sample</u>			
Conviction charges	80.4%	19.6%	(138)
Sentences imposed	77.5	22.5	(142)
Corrections data	85.8	14.2	(134)
<u>Defense Agency Sample</u>			
Conviction charges	70.7	29.3	(133)
Sentences imposed	79.6	20.4	(142)
Corrections data	86.9	13.1	(130)
<u>State Planning Agency Sample</u>			
Conviction charges	63.6	36.4	(22)
Sentences imposed	50.0	50.0	(22)
Corrections data	76.2	23.8	(21)

Table 7 shows that a substantial majority of prosecutors, defense lawyers, and state planning agencies reported that disposition entries in their jurisdictions sometimes lack the conviction charges, the sentences imposed, or the corrections data. Although the percentage of state planning agencies reporting that these data were sometimes missing was smaller than the corresponding percentages for district attorneys and defense agencies, at least half of each group found that each type of disposition data was sometimes missing. This result is consistent with the *Tatum* audit.²⁸²

"H" in the Report) estimated the level of disposition reporting at 75%. *Id.* at 29. Although the Mitre Report's figures are not strictly comparable to those in the *Tatum* audit since the Report does not clearly define "level of disposition," *id.* at 31 n.4, the audit does seem to indicate that the officials surveyed for the Report overestimated the level of disposition reporting. The *Tatum* audit showed that the disposition column of New York rap sheets contains data only 55% of the time, and in only half of those cases are the data complete and accurate. See Table 1 accompanying note 260 *supra*. The *Tatum* audit results were submitted to one of the authors of the Mitre Report on October 7, 1977. Despite the availability of these data, and despite the audit results' inconsistency with the estimates of state officials, no mention is made of the *Tatum* audit results in the Report.

²⁸¹ These figures exclude responses of "Unknown" and questionnaires in which this question was left blank. The data in Table 9 are drawn from National Survey of Prosecutors, app. A *infra*, questions 13-15; National Survey of Defense Agencies, app. B *infra*, questions 15-17; National Survey of State Planning Agencies, app. C *infra*, questions 16-18.

²⁸² See Table 1 accompanying note 260 *supra*. The surveys' attempt to quantify more precisely the percentage of rap sheets which lacked these data was not successful. On the average, district attorneys who felt that data were "sometimes missing" perceived that 44.4% of all case entries lack at least one of these data elements; the defense agencies' average was 47.8% and the state

Respondents in the surveys were also asked whether rap sheet entries are ever ambiguous.²⁸³ As in New York, it appears that data are frequently presented in forms that rap sheets users are unable to decipher. The results are shown in Table 8.

TABLE 8²⁸⁴

Question:

“APPROXIMATELY WHAT PERCENTAGE OF RAP SHEET ENTRIES ARE AMBIGUOUSLY LISTED?”

(Table shows % of respondents in each category designating a given level of ambiguity)

	District Attorneys	Agencies	State Planning Agencies
0%	0.9%	0.8%	11.1%
10%	20.2	13.4	55.6
20%	23.7	15.1	0.0
30%	26.3	27.7	11.1
40%	11.4	11.8	11.1
50%	8.8	20.2	11.1
60%	5.3	2.5	0.0
70%	0.9	5.0	0.0
80%	0.9	3.4	0.0
90%	1.8	0.0	0.0
100%	0.0	0.0	0.0
Mean estimate	29.6%	35.2%	18.9
Number of responses	(114)	(119)	(9)

Table 8 shows that, on the average, prosecutors estimate 29.6% of all rap sheet entries to be ambiguous, defense attorneys admit that 35.2%

planning agencies' was 36.4%. This average does not include the responses from parties who answered "no" to whether data were sometimes missing. See National Survey of Prosecutors, app. A *infra*, question 16. National Survey of Defense Agencies, app. B *infra*, question 18; National Survey of State Planning Agencies, app. C *infra*, question 19. The difficulty with accepting these data at face value is that, when combined with the data reflecting no disposition reporting at all (Table 6 accompanying note 278 *supra*), and those reflecting ambiguous disposition reporting (Table 8 accompanying note 284 *infra*), the totals substantially exceed 100%. Thus, the responses to the questions dealing with incompleteness on each questionnaire overlap those concerning complete failure to report dispositions and ambiguous reporting. Nonetheless, the incompleteness problems discovered in New York by the *Tatum* audit are perceived to be present in other jurisdictions.

²⁸³ The term "ambiguous" was intentionally left undefined in the survey since ambiguity is, by nature, a subjective concept. No matter how a particular user may define the term, an affirmative response means that he is unable to make effective use of the data in the form in which they are presented.

²⁸⁴ These figures exclude responses of "Unknown" and questionnaires in which this question was left blank. The data in Table 8 are drawn from National Survey of Prosecutors, app. A *infra*, question 18; National Survey of Defense Agencies, app. B *infra*, question 20; National Survey of State Planning Agencies, app. C *infra*, question 21.

as ambiguous, and state planning agencies admit that 18.9% are ambiguous. These figures may be combined with those in Table 6, since ambiguous entries and no entries should be mutually exclusive,²⁸⁵ thus presumably preventing overlap in responses. This combination reveals that district attorneys estimate that 72.5% of all rap sheets either completely lack information or present it ambiguously. Defense attorneys place the figure at 77.8% and even the state planning agencies admit to 57.0%. By subtraction, therefore, only 27.5% of all rap sheets are perceived by prosecutors as complete, accurate, and comprehensible; 22.2% by defense attorneys; and 43.0% by state planning agencies.²⁸⁶ These figures are sufficiently close to those presented in Table 1 to support the conclusion that the defects of New York rap sheets are fairly representative not only of the types of problems encountered nationwide, but also of their general magnitude.²⁸⁷

The surveys also polled opinion on the estimated average delay in disposition reporting. Delay in disposition reporting, found in the *Tatum* audit,²⁸⁸ is also experienced elsewhere in the country, as Table 9 shows:

TABLE 9²⁸⁹

Question:

“WHAT IS THE AVERAGE TIME BETWEEN THE DISPOSITION OF A CASE AND THE APPEARANCE OF THAT DISPOSITION ON THE DEFENDANT’S RAP SHEET?”

(Table shows % in each category designating a given time delay)

	District Attorneys	Defense Agencies	State Planning Agencies
No appreciable delay	29.4%	25.8%	35.0%
3 Months	30.4	32.3	55.0
6 Months	30.4	24.7	5.0
1 Year	4.9	8.6	5.0
More	4.9	8.6	0
Number of responses	(102)	(93)	(20)

²⁸⁵ But see note 283 supra.

²⁸⁶ This calculation assumes that the respondents included all of the common defects in disposition reporting as either being ambiguous or as having no disposition at all. If they did not do so, then the percentage of complete and correct dispositions is even lower than this calculation indicates.

²⁸⁷ In the *Tatum* audit, 72% of the arrest entries were found to lack disposition data or to provide disposition data that were ambiguous, inaccurate or incomplete. See Table 1 accompanying note 260 supra. Although the national survey figures may be compared to those from the *Tatum* audit, it should be noted that ambiguity was precisely defined in the audit, but left undefined in the survey. Compare note 283 supra with note 263 supra.

²⁸⁸ See text accompanying notes 266-68 supra.

²⁸⁹ These figures exclude responses of “Unknown” and questionnaires in which this question was left blank. The data in Table 9 are drawn from National Survey of Prosecutors, app. A

Again, it is noteworthy that officials in the state planning agencies who are evaluating their own product believe the problem is much less severe than do rap sheet users. Ninety percent of the state planning agencies responding estimate the average delay between disposition and appearance on a rap sheet at three months or less. Only 59.8% of the prosecutors and 58.1% of the defense attorneys believe that reporting is done this promptly. As in New York, disposition reporting delays are regularly encountered by rap sheet users, despite the sophisticated technology available.²⁹⁰

The surveys also sought to determine whether missing dispositions are more likely to be favorable or unfavorable to the defendant. The results are presented in Table 10.

TABLE 10²⁹¹

Question:
 "ARE MISSING DISPOSITIONS MORE OFTEN FOUND
 TO BE DISMISSALS OR ACQUITTALS, OR ARE THEY
 MORE OFTEN FOUND TO BE CONVICTIONS
 (WHETHER BY PLEA OR AFTER TRIAL) WHEN THE
 COURT RECORDS OF SUCH CASES ARE CONSULTED?"

	<u>District Attorneys</u>	<u>Defense Agencies</u>	<u>State Planning Agencies</u>
Dismissal or Acquittal	32.1 %	64.1 %	33.3 %
Conviction	5.8	0	22.2
No Difference	62.0	35.9	44.4
Number of responses	(137)	(131)	(18)

infra, question 10; National Survey of Defense Agencies, app. B infra, question 12; National Survey of State Planning Agencies, app. C infra, question 23.

²⁹⁰ See text accompanying notes 79-124, 216-23, 266-68 supra.

²⁹¹ These figures exclude responses of "Unknown" and questionnaires in which this question was left blank. The data in Table 10 are drawn from National Survey of Prosecutors, app. A infra, question 11; National Survey of Defense Agencies, app. B infra, question 13; National Survey of State Planning Agencies, app. C infra, question 25.

As Table 10 shows, a substantial majority of all the respondents estimates that missing dispositions tend to be favorable to the accused. For example, 32.1% of the prosecutors responding estimate that missing dispositions are *more often* dismissals or acquittals than convictions. Sixty-two percent of the prosecutors estimate missing dispositions are dismissals or acquittals *as often* as they are convictions. Thus, 94.1% of the prosecutors perceive that missing dispositions are favorable to the accused at least half the time. Using the same calculation, nearly all of the defense attorneys and more than three-quarters of the state planning agencies concur. Few of the prosecutors and defense attorneys found missing disposition data to be unfavorable to the accused more often than favorable. Even among the state planning agencies, less than one quarter opined that convictions made up the majority of blank dispositions. These results contrast with those of the New York audit, which indicate that missing dispositions are more likely to be unfavorable to the defendant.²⁹²

Finally, the surveys' data were examined to see whether convictions, when entered, are typically for offenses less serious than those charged. This is the case in New York.²⁹³ The surveys' results are shown in Table 11.

²⁹² The *Tatum* audit data can be found in Table 3 accompanying note 268 supra. It is important to note that Table 10 is not directly comparable to Table 3. Limited resources precluded a direct comparison of rap sheet data with court files in the national surveys. The data in Table 10 thus reflect the perceptions of rap sheet users instead of first-hand data like those available in the *Tatum* audit.

However, it is possible to extract comparable data from Table 3. Table 3 separated the cases in the *Tatum* audit for which dispositions could be found in court records into those with favorable and those with unfavorable dispositions. By multiplying the total number of cases with favorable dispositions by the percentage of those cases in which no disposition was reported, one may calculate the total number of cases in which the disposition was favorable but was not reported. The total number of cases with unfavorable dispositions which were not reported may be calculated in a similar fashion. By comparing these two numbers, it is possible to determine the percentage of cases without dispositions in which the disposition was favorable to the defendant and the percentage of cases in which it was unfavorable.

Two hundred eighty-five cases with favorable dispositions had no dispositions reported (695 cases with favorable dispositions times 41% with no disposition reported equals 285 cases). Seven hundred twenty-seven cases with unfavorable dispositions had no dispositions reported (1515 cases with unfavorable dispositions times 48% with no disposition reported equals 727 cases). Thus, of the 1012 (285 plus 727) cases with no disposition reported, 28% (285) had a favorable disposition, and 72% (727) had an unfavorable disposition.

By contrast, Table 10 shows that nationally, missing dispositions are more likely to be dismissals or acquittals than convictions at least half the time.

²⁹³ See Table 4 and text accompanying notes 273-74 supra.

TABLE 11²⁹⁴

Question:
 "IN APPROXIMATELY WHAT PERCENTAGE OF CASES
 IS THE LEVEL OF THE MOST SERIOUS CONVICTION
 OFFENSE THE SAME AS THE LEVEL OF THE MOST
 SERIOUS CHARGE?"

(Table shows % of respondents in each category who designated a given degree of equality between offense and conviction charge)

	District Attorneys	Defense Agencies	State Planning Agencies
0%	0.9%	0.0%	0.0%
10%	4.3	13.6	0.0
20%	7.0	14.6	7.1
30%	13.9	15.5	7.1
40%	6.1	10.0	21.4
50%	32.2	22.7	14.3
60%	6.1	9.1	7.1
70%	7.0	8.2	7.1
80%	12.2	3.6	14.3
90%	8.7	2.7	21.4
100%	1.7	0.0	0.0
Mean % estimate	52.3	40.8	59.3
Number of responses	(115)	(110)	(14)

As Table 11 reflects, the prosecutors estimate that the level of the most serious conviction offense is the same as that of the most serious charge about half (52.3%) of the time. State planning agencies place the figure slightly higher (59.3%). Defense attorneys estimate that the most serious conviction offense is at the same level as the most serious charge only about 40% of the time. The *Tatum* audit found that the level of the most serious charge remained constant from arrest to conviction only about 24.2% of the time.²⁹⁵ Although these figures may not be strictly comparable to the surveys',²⁹⁶ both studies reveal

²⁹⁴ These figures exclude responses of "Unknown" and questionnaires in which this question was left blank. The data are drawn from National Survey of Prosecutors, app. A *infra*, question 27; National Survey of Defense Agencies, app. B *infra*, question 21; National Survey of State Planning Agencies, app. C *infra*, question 24.

²⁹⁵ This figure may be derived from the information contained in Table 4 by dividing the number of arrests in which the level of the charge remained the same by the total number of arrests. If A and B Felonies are removed from the calculation, see note 273 *supra*, the percentage where the most serious charge remained constant increases to 25.7%.

²⁹⁶ The *Tatum* audit indicates the percentage of cases in which the charge level remained the same from arrest to conviction. The question in the survey, however, did not specify whether the

that rap sheets that lack disposition data often overstate a person's record.

Tables 10 and 11 together support the inference that when a disposition is missing, it is a conviction of an offense as serious as the highest charge only about one-quarter of the time. Table 10 shows that at least one-half of missing dispositions are dismissals or acquittals. Table 11 shows that of the remaining one-half of missing dispositions which are not dismissals or acquittals, approximately 50% are convictions of offenses less serious than those charged. Thus, only one-quarter of missing dispositions are estimated to be convictions of offenses as serious as those charged.

The results of the national surveys largely reflect the findings of the *Tatum* audit. The only major difference between the findings of the two studies was that the *Tatum* audit indicated that unreported dispositions were more likely to be unfavorable to the defendant, while the national surveys indicated that these dispositions were more likely to be favorable to the defendant. Finally, it is significant that the three groups polled in the national surveys gave largely consistent responses. Prosecutors and defense agencies are in accord about the degree of inaccuracy and incompleteness of rap sheets. State planning agencies, while holding a noticeably higher opinion of their product than do users of rap sheets, nonetheless are candid in admitting that substantial problems exist.

This section has presented a detailed picture of the defects contained in rap sheets generated by criminal history information systems. These deficiencies take on increased importance once one appreciates the degree to which the criminal justice system relies on rap sheets at each stage of the criminal process. Section III examines how rap sheets are used at each stage of the criminal process and how rap sheet defects prejudice defendants.

III

USE OF RAP SHEETS IN THE CRIMINAL PROCESS

Rap sheets have been called "the most widely used records within the criminal justice process."²⁹⁷ Police use rap sheets in the course of

respondent was to indicate the percentage of cases in which the level of the charge remained constant from arrest to conviction or from formal charge to conviction. If some or all of the respondents interpreted the question in the latter way, then the figures given in the text understate the disparity between the surveys and the audit.

²⁹⁷ D. Marchand, *supra* note 24, at 129; accord, 1975 Senate Hearings, *supra* note 15, at 202 (remarks of Paul Wormeli) ("Criminal offender record information and the statistics derived therefrom are the critical thread that links the various parts of the criminal justice system.")

investigations and in deciding whether to arrest a suspect; prosecutors use rap sheets to make charge decisions; court officials rely on criminal history information to make recommendations and decisions concerning bail, plea-bargaining, and sentencing; and correction and parole officials use criminal history information to determine the conditions and length of incarceration. In short, whenever criminal justice officials make discretionary decisions directly affecting defendants' liberty, criminal history information plays a key role.²⁹⁸ Moreover, officials do not only consider convictions. Prior arrests, including those that resulted in dismissal or acquittal, are used to justify treating defendants more harshly.²⁹⁹

A. Police Use of Rap Sheets

Police make extensive use of rap sheets. As a result, persons who have been arrested in the past are more likely to be subjects of police scrutiny than those who have not.³⁰⁰ As the court in *Davidson v. Dill*³⁰¹ observed, "it is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect in an investigation."³⁰²

Police use information concerning previous arrests in several ways. When time permits, officers on patrol obtain criminal history information about suspicious persons or vehicles to help them decide whether further inquiry is warranted and whether the suspects are likely to be dangerous.³⁰³ In investigating a particular crime, photo-

²⁹⁸ As SEARCH Group, Inc. has noted, "[t]he criminal history record is a primary source of information vital to exercising discretion and making decisions concerning individuals throughout the criminal justice process. There is no substitute." SEARCH Group, Inc., Tech. Rep. No. 14, supra note 6, at 1; accord, 1974 Senate Hearings, supra note 15, vol. 1 at 69 (remarks of O.J. Hawkins); OTA Report, supra note 18, at 21-22.

²⁹⁹ See notes 308, 318, 333, and 345 infra.

³⁰⁰ 1974 Senate Hearings, supra note 15, vol. 1, at 352 (remarks of Richard R. Andersen); Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 *Yale L.J.* 543, 591 (1960); Note, *The Right of the Innocent Arrestee: Sealing of Records Under Calif. Penal Code section 851.8*, 28 *Hastings L.J.* 1463, 1464 (1977). In January 1980, the New York City Police Department announced a special program to keep persons with extensive records of arrest under intermittent surveillance in an effort to intercept them in the act of committing a crime. Buder, *Police Plan a New Drive on Chronic Felons*, *N.Y. Times*, Jan. 5, 1980, at 25, col. 1.

³⁰¹ 180 *Colo.* 123, 503 P.2d 157 (1972).

³⁰² *Id.* at 127, 503 P.2d at 159.

³⁰³ 1974 Senate Hearings, supra note 15, vol. 1 at 69 (remarks of O.J. Hawkins); Bockelman, supra note 136, at 105. In Hamilton County, Ohio, for example, a police officer in a patrol car can radio to his dispatcher the license number of a vehicle he is following. The license number is entered in a data terminal which immediately displays all information on file at the Regional Computer Center and at the state and federal levels pertaining to the owner's criminal record.

graphs of persons previously arrested for similar crimes may be shown to the victim.³⁰⁴ In addition, "police may examine criminal history records of potential suspects under the belief that a prior history of arrests for crimes similar to the one in question . . . is suggestive of the subject's likely involvement"³⁰⁵ in the present crime. Prior arrests also are analyzed to isolate a *modus operandi* which may link a suspect to one or more crimes.³⁰⁶

The dispatcher relays the information to the officer. Atkinson, *supra* note 136, at 80. See generally Colton, *supra* note 44, at 139-40, 145. Response time is reduced considerably when the officer can communicate directly with central computers either by a digital terminal mounted in his car or by a hand-held digital terminal. See Sohn, Fielding, Foulkes & Granit, Analysis and Traffic Projections for a National Law Enforcement Communications System, in 1974 Symposium, *supra* note 4, at 329, 338. A description of a digital system is set forth in Feder, *supra* note 186, at 467-68. Both mounted and hand-held digital systems have been proliferating rapidly. J. Murphy, Arrest by Police Computer xi-xii, 1-12 (1975).

³⁰⁴ Courts generally have approved this practice, even if the person photographed was acquitted of the prior charges or the charges were dismissed. See, e.g., Loder v. Municipal Court, 17 Cal. 3d 859, 865, 553 P.2d 624, 628, 132 Cal. Rptr. 464, 468 (1976), cert. denied, 429 U.S. 1109 (1977); Kolb v. O'Connor, 14 Ill. App. 2d 81, 88-91, 142 N.E.2d 818, 822-24 (1957). Moreover, some courts have held that a photograph taken after an illegal arrest may be included among those shown to a witness. E.g., State v. Price, 27 Ariz. App. 673, 676-77, 558 P.2d 701, 704-05 (1976); People v. McInnis, 6 Cal. 3d 821, 825-26, 494 P.2d 690, 693, 100 Cal. Rptr. 618, 620-21, cert. denied, 409 U.S. 1061 (1972).

³⁰⁵ OTA Report, *supra* note 18, at 21. The California Supreme Court in Loder v. Municipal Court, 17 Cal. 3d 859, 865-66, 553 P.2d 624, 628-29, 132 Cal. Rptr. 464, 468-69 (1976), cert. denied, 429 U.S. 1109 (1977), explains how arrest records are used in establishing a pattern of misconduct:

Often the prior arrest is not an isolated event but one of a series of arrests of the same individual on the same or related charges. This is especially true when the crime in question is typically subject to recidivism, such as the use of addictive drugs, child molesting, indecent exposure, gambling, bookmaking, passing bad checks . . . and even some forms of burglary and robbery. In these circumstances, a pattern may emerge . . . which has independent significance as a basis for suspecting the arrestee if the crime is committed again.

³⁰⁶ Martensen, Crime Analysis: A Way to Turn Data Into Information, in 1974 Symposium, *supra* note 4, at 527, 527; see 1974 Senate Hearings, *supra* note 15, vol. 1 at 209 (remarks of Fletcher D. Thompson). This method of analysis can also be used to identify "all those crimes that are similar to the one for which a suspect is already in custody. This effort can maximize the number of cases properly cleared by a single arrest." Martensen, *supra*, at 527.

Computers have been particularly helpful in crime analysis. In Los Angeles, for example, it was "virtually impossible for an investigator to survey crime reports outside his particular division of assignment for similar elements of *modus operandi* (MO), suspects, or vehicle description." Kenney & Boyer, Results and Evaluation of the PATRIC Operational Test-Bed, in 1972 Symposium, *supra* note 4, at 85, 85. The computerized Pattern Recognition and Information Correlation (PATRIC) System was developed to enable investigators to use the enormous volume of crime reports received each day by the Los Angeles Police Department. *Id.* Criminal history records are a key ingredient in the PATRIC data base. *Id.* at 85, 86. For a list of specific improvements in law enforcement efficiency due to automated information systems, see Bockelman, The ALERT System from Conceptual Design—Present Day Operations—to Future Plans, in 1970 Symposium, *supra* note 4, at 118, 125.

The crime analysis system utilized in Long Beach, California, has gone one step beyond mere "crime analysis." In addition to moving vehicle citations and pawnshop loan reports, Long

Information obtained by police through examination of arrest records may be used to support the issuance of search warrants³⁰⁷ and to help establish probable cause for arrest.³⁰⁸ The ultimate decision to arrest often depends in part on whether a person has an arrest record,³⁰⁹ as does the determination of the force appropriate to effect the arrest.³¹⁰ Finally, police use arrest records when deciding whether to press charges against a person once he is arrested.³¹¹

B. Prosecutors' Use of Rap Sheets

Prosecutors use criminal history information in deciding whether to charge a defendant and in fixing the level of formal charges.³¹² In

Beach has computerized field interview reports "to document suspicious occurrences for which no criminal violations can be identified" for use in subsequent investigations. Lance & Cook, *Investigation Support—A Subsystem of the Long Beach Public Safety Information System*, in 1974 Symposium, *supra* note 4, at 309, 309. This computerized criminal rumor information system commenced operation in December 1972. *Id.*

The development of microcomputers will enable both small and large police departments to computerize crime analysis. SEARCH Group, Inc., Tech. Rep. No. 23, *supra* note 97, at 32.

³⁰⁷ Rosenfeld, *supra* note 299, at 520.

³⁰⁸ In *Loder v. Municipal Court*, 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976), cert. denied, 429 U.S. 1109 (1977), the court described how prior arrests on drug charges might support a finding of probable cause:

"Although previous arrests of a suspect in connection with illicit drug transactions will certainly not suffice to constitute probable cause for search or arrest, and while, indeed, arrests without convictions may be of little probative value, still a suspect's reputation as being involved in illicit drug traffic based on prior arrests may be considered." (*People v. Buchanan*, 26 Cal. App. 3d 274, 292, 103 Cal. Rptr. 66, 79 (Ct. App. 1972)). When the investigating officer knows of such a pattern, "that knowledge can be used, in connection with other information, to support a finding of probable cause for arrest." (*People v. Martin*, 9 Cal. 3d 687, 692 n.5, [511 P.2d 1161, 1164 n.5, 108 Cal. Rptr. 809, 812 n.5, cert. denied, 404 U.S. 1113 (1973)]).

17 Cal. 3d at 866, 553 P.2d at 629, 132 Cal. Rptr. at 469; see Rosenfeld, *supra* note 299, at 520. See generally *W. LaFave, Arrest: The Decision to Take a Suspect Into Custody* 287-88 (1965).

³⁰⁹ *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970); *Kowall v. United States*, 53 F.R.D. 211, 215 (W.D. Mich. 1971); *W. LaFave, supra* note 308, at 149-50. An individual's past record or reputation as a previous troublemaker is an important element in police decisionmaking. See Siegel, Sullivan & Greene, *Decision Games Applied to Police Decision Making—An Exploratory Study of Information Usage*, 2 J. Crim. Just. 131, 134-37, 140 (1974); Smith, Wehmeyer, Keating & Berberich, *Background Information: Does It Affect the Misdemeanor Arrest?*, 4 J. Police Sci. & Ad. 111 (1976).

³¹⁰ 1974 Senate Hearings, *supra* note 15, vol. 1 at 350-51 (remarks of Richard R. Andersen).

³¹¹ *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970); *Kowall v. United States*, 53 F.R.D. 211, 215 (W.D. Mich. 1971); *Police Comm'r v. Municipal Court*, 374 Mass. 640, 655-56 and n.10, 659, 374 N.E.2d 272, 281 and n.10, 283 (1978).

³¹² *Loder v. Municipal Court*, 17 Cal. 3d 859, 866, 553 P.2d 624, 629, 132 Cal. Rptr. 464, 469 (1976), cert. denied, 429 U.S. 1109 (1977); *Davidson v. Dill*, 180 Colo. 123, 127, 503 P.2d 157, 159 (1972); LEAA State-by-State Surveys, *Security and Privacy Considerations in Computerized Criminal History Information Systems* (1971), excerpts reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 190, 192; 1974 Senate Hearings, *supra* note 15, vol. 1 at 352 (remarks of

New York City, for example, the Manhattan District Attorney's Early Case Assessment Bureau (ECAB) evaluates new felony arrests and places them on one of seven prosecution tracks for action ranging from immediate presentation before a grand jury to dismissal.³¹³ Prior criminal record plays an important role in assigning cases to four of the seven tracks.³¹⁴ In assessing prior record, ECAB relies on New

Richard R. Andersen). The National Survey of Prosecutors and Defense Agencies, see text accompanying notes 276-96 *supra*, examined the use of criminal history information at various stages of the criminal process. More than 97% of both prosecutors and defense attorneys indicated that prosecutors use rap sheet data to make prosecution decisions. National Survey of Prosecutors, app. A *infra*, question 1; National Survey of Defense Agencies, app. B *infra*, question 1. Almost 61% of prosecutors and 84% of defense attorneys responded that rap sheet data are used in making charge level decisions. National Survey of Prosecutors, app. A *infra*, question 3; National Survey of Defense Agencies, app. B *infra*, question 3. Most prosecutors who use rap sheets for charge level decisions use both the arrest and disposition data. National Survey of Prosecutors, app. A *infra*, question 6. Defense attorneys were asked, "Do the prosecution's charge level decisions seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted?" Seventy-four percent of those responding answered "yes" and 26% answered "no." National Survey of Defense Agencies, app. B *infra*, question 6.

³¹³ Trial transcript at 228-29, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978). The seven tracks are as follows:

A-track comprehends felony cases that the district attorney's office is able to present directly to the grand jury without further preparation; they are presented as quickly as possible. In effect, the defendant is indicted before his initial arraignment in the criminal court. Deposition of Richard Lowe at 15, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1977). A B-track case is one that the district attorney has decided to prosecute as a felony but that is not sufficiently prepared at the time the tracking decision is made to be presented to the grand jury. *Id.* Although ECAB believes a B-1 case is sufficiently serious to be prosecuted as a felony, the district attorney may accept a misdemeanor plea. Grand larceny of an automobile, for example, is usually a B-1 case. Trial transcript at 231, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978). ECAB's policy is to prosecute such a case as a misdemeanor if the defendant does not have a substantial criminal history. If he does, ECAB will prosecute the case as a felony unless the defendant accepts a misdemeanor plea at arraignment or following a preliminary hearing. *Id.* at 230. A C-track case is one that the district attorney is unsure can be successfully prosecuted as a felony because of either evidentiary problems or the unavailability of witnesses. If the case is more fully developed later, it will be prosecuted as a felony; otherwise it is prosecuted as a misdemeanor. See Deposition of Richard Lowe at 16-17, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1977). A C-1-track case essentially has the same characteristics as a C-track case. However, if the defendant's criminal history is insubstantial, the district attorney will accept a misdemeanor plea regardless of witness availability or evidentiary sufficiency for felony prosecution. See *id.* at 17. A D-track case is technically a felony which the district attorney decides not to prosecute as a felony. The case is charged as a felony, however, with the expectation of later reduction to a misdemeanor. In determining whether to classify a case in the D-track, the district attorney considers the defendant's age, the severity of the charges, and the defendant's criminal background. See *id.* An E-track case is dismissed without filing formal charges, generally because the evidence is legally insufficient for prosecution. See *id.* at 17-18.

³¹⁴ Deposition of Richard Lowe at 27-28, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1977); Trial transcript at 229-30, 232-35, 237, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978). Those four tracks are B-1, C, C-1, and D. See *id.* at 237. Statistics compiled by the Manhattan district attorney's

York rap sheets as generated by the central state repository.³¹⁵ Despite the fact that the *Tatum* audit showed New York rap sheet entries to be accurate and complete only 27% of the time,³¹⁶ ECAB does not seek independently to verify or update the entries.³¹⁷ Although ECAB places greater emphasis on rap sheet entries indicating convictions, weight is given to arrest charges as well, whether or not they resulted in conviction.³¹⁸

The Manhattan District Attorney's office also uses rap sheets in deciding whether to channel cases into its Career Criminal or Major Felony Programs. These programs are designed to insure that those defendants having substantial criminal records or charged with very serious crimes are prosecuted with particular vigor.³¹⁹ Applying a point system, the office decides to prosecute a defendant as a career criminal based exclusively upon his criminal record as presented by his rap sheet.³²⁰ Defendants are awarded points not only for prior con-

office show that from January 5, 1976 to January 2, 1977, ECAB evaluated 23,282 cases. Two hundred forty-five cases were assigned to the A-track, 2276 to the B-track, 760 to the B-1-track, 2218 to the C-track, 389 to the C-1-track, 16,033 to the D-track, and 575 to the E-track. Additionally, 786 cases were reduced to misdemeanors in the charging process. *Id.* at 236-37; Deposition of Richard Lowe, *supra*, at 28. Using the district attorney's figures, 83.3% of the cases reported by arresting officers as felonies fall into the four tracks in which heavy reliance is placed upon a defendant's prior criminal record.

³¹⁵ See Trial transcript at 229-30, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978).

³¹⁶ See Table 1 accompanying note 260 *supra*.

³¹⁷ Trial transcript at 229-30, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978); Deposition of Richard Lowe at 32, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1977).

³¹⁸ As Richard Lowe candidly testified during the *Tatum* trial:

If there are open cases and no convictions or there is no indication of a disposition, we proceed on the assumption either that for the most part there were some convictions, or, in any event, we look for a pattern of behavior.

If it is a drug case, you know, we look for prior drug arrests. If it is a robbery case, we look for prior robbery arrests to indicate the pattern of behavior of this individual, the type of behavior.

Frankly, in evaluating the charging process, we may be guilty of an assessment of where there is smoke, there is fire type thing.

Trial transcript at 233, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1978). Concerning the weight given prior arrests which resulted in dismissal or acquittal, he testified:

[O]bviously, you know, that defendant would not be looked up (sic) as severely, but I must say that very rarely does a rap sheet indicate an acquittal as opposed to a dismissal, and, frankly, the myriad of reasons of why cases are dismissed do not go to the heart of the matter, that is, most dismissals are not on the merits, so therefore we don't place too much emphasis on dismissals.

Id. at 233-34.

³¹⁹ See Trial transcript at 238-39, 242-43, 245, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978).

³²⁰ *Id.* at 245-46.

victions, but also for certain charges that are not accompanied by dispositions.³²¹ No points are awarded if the charges on the rap sheet ended in dismissal or acquittal.³²² Entry into the Major Felony Program is determined by a point system that is based in part on the defendant's rap sheet.³²³ Ironically, a prior felony arrest which is not accompanied by a disposition costs the defendant more points than a prior misdemeanor conviction. As with the Career Criminal Program, arrests that the rap sheet indicates ended in dismissal or acquittal are not held against the defendant.³²⁴

The Manhattan District Attorney's office does not seek to verify or update rap sheet entries in either program before relying upon

³²¹ Under the Career Criminal Program's point system, a defendant is awarded 8 points if he has one prior felony conviction and 15 points if he has more than one prior felony conviction. A defendant is awarded 3 points if he has one prior misdemeanor conviction and 5 points if he has more than one prior misdemeanor conviction. Arrest entries not accompanied by dispositions earn a defendant 5 points if the arrest charge was homicide, 5 points if the rap sheet shows three or more felony arrests, and 3 points if the arrest charge concerned a weapon. Thirty-five points are necessary for entry into the Career Criminal Program. *Id.* at 248; Career Criminal Program Defendant Evaluation sheet, app. E *infra*.

³²² See trial transcript at 247, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978).

³²³ See Trial transcript at 239, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978); Deposition of Richard Lowe at 61-62, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 10, 1977). Because the Major Felony Program focuses primarily on the nature of the current charges, the defendant's criminal history is only one factor in the decision to prosecute the case as a major felony. *Id.* at 43 (test. given Feb. 1, 1977). A defendant is awarded 8 points for a prior felony conviction, and 3 points for a prior misdemeanor conviction. A prior arrest entry unaccompanied by a disposition earns a defendant 5 points if the prior charge is the same as or related to the current charge, 5 points if the prior charge was for a violent crime, and 3 points if the prior charge involved a weapon. *Id.* at 62-64 (test. given Feb. 10, 1977); Trial transcript at 240-44, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978). Fifty points are necessary for entry into the Major Felony Program. *Id.* at 248; Major Felony Program Defendant Evaluation sheet, app. F *infra*.

³²⁴ Trial transcript at 242, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978). The National Survey of Prosecutors, app. A *infra*, showed that special prosecution programs in many jurisdictions use rap sheets in a manner similar to their use in Manhattan. Forty percent of the prosecutors responding indicated that their offices have special prosecution programs both for individuals with particular criminal records and for individuals charged with particular types of offenses. National Survey of Prosecutors, app. A *infra*, question 21. Of the prosecutors who responded, 86% indicated that cases are prosecuted more vigorously when the defendant's rap sheet shows a history of prior convictions than if the rap sheet shows no prior convictions. Fourteen percent indicated this was not the case. *Id.* question 22. Fifty-seven percent of those responding reported that a defendant whose rap sheet shows arrest entries without dispositions is prosecuted more vigorously than one whose rap sheet shows no prior arrests, and 43% responded to the contrary. *Id.* question 23. Finally, 41% answered that cases are more vigorously prosecuted when the defendant's rap sheet shows a history of prior arrests resulting in dismissal or acquittal than if the defendant's rap sheet shows no prior arrests, but 59% denied that such entries cause more vigorous prosecution. *Id.* question 24. The percentages cited in this footnote are approximate. For the exact percentages, see National Survey of Prosecutors, app. A *infra*.

those rap sheets to award points.³²⁵ However, the *Tatum* audit demonstrated that a substantial proportion of the dispositions which New York rap sheets fail to list are dismissals or acquittals.³²⁶ If New York rap sheets reported dispositions completely, points would not be awarded for many of the arrest entries which currently lead to more vigorous prosecution of defendants.³²⁷ Thus, the failure of New York rap sheets to contain complete information harms defendants in Manhattan in a specific and quantifiable way.

C. Use of Rap Sheets in the Bail Process

Criminal history information also plays a vital role in pretrial release decisions.³²⁸ In nearly all jurisdictions, prosecutors rely on rap

³²⁵ Deposition of Richard Lowe at 44-45, 63-65, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 10, 1977); Trial transcript at 239-41, 244, 246, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Richard Lowe given Feb. 1, 1978).

³²⁶ See Table 3 accompanying note 268 *supra*.

³²⁷ The evaluation process in the Career Criminal and Major Felony programs is manual. The Prosecutor's Management Information System (PROMIS) has computerized this process, and provides "automated designation of priorities for pending criminal cases." Hamilton & Work, *The Prosecutor's Role in the Urban Court System: The Case for Management Consciousness*, 64 *J. Crim. L. & C.* 183, 185 (1973); see Cannavale, *Using Information Systems for Social Science Research: PROMIS—An Example*, in 1974 Symposium, *supra* note 4, at 423, 423 & n.3. Priorities for pending criminal cases are assigned based upon evaluation of the gravity of the charges and the defendant's criminal history. Hamilton & Work, *supra*, at 185; Lane, *Using PROMIS*, in 1979 Symposium, *supra* note 4, at 237, 237. Since PROMIS is an OBTS system, criminal history information is contained in its data base. See *id.* at 237-39. In assessing criminal history, PROMIS weighs "factors such as the number and density of prior arrests, the number of previous arrests for crimes against persons, the use of aliases, and the use of hard narcotics." Hamilton & Work, *supra*, at 185. In the United States Attorney's office in Washington, D.C., high priority cases flagged by the computer are assigned to a special unit for prosecution. The conviction rate for high priority cases is approximately 25% higher than for routinely processed cases. Hamilton & Work, *supra*, at 187.

Researchers are also using the PROMIS data base to predict recidivism. See K. Williams, *Predicting Recidivism with PROMIS Data—Preliminary Results from an Analysis of Defendants in 1973* at 1 (1975). The Williams study analyzed which factors, including criminal history, could be used to predict recidivism. The results showed that whether the defendant was arrested in the past five years, the length of time since the most recent arrest, and the number of prior arrests all could be used to predict arrest in the future. *Id.* at 3-4, 24. One purpose of identifying likely recidivists presumably is to enable judges to impose longer sentences upon conviction and thereby reduce defendants' opportunities to commit future crimes. Punishing people for crimes they have not yet committed on the basis of computerized forecasts using data which are largely incomplete and inaccurate poses obvious constitutional problems. By 1979, PROMIS systems were in full operation in 24 jurisdictions, and were being installed in 90 others. Dogin, *supra* note 135, at 11, 12.

³²⁸ The laws of several jurisdictions specifically require or permit judges to consider criminal history information in setting bail. In New York, for example, no local criminal court may set bail for a defendant charged with a felony until the court has been furnished with a copy of his rap sheet or with a police report of his prior arrest record unless the prosecutor consents to dispensing with them when not readily available. N.Y. Crim. Proc. Law § 530.20(2)(b)(ii)

sheets in making bail recommendations,³²⁹ and judges use rap sheets in setting bail.³³⁰ In this process, prosecutors and judges consider arrests as well as convictions.³³¹ They give weight to arrest charges that are not accompanied by disposition information,³³² and even to arrest charges that have resulted in dismissal or acquittal.³³³

(McKinney Supp. 1979). Colorado, Oregon, and the District of Columbia require a judge to consider a defendant's prior criminal record in making pretrial release decisions. Colo. Rev. Stat. § 16-4-105 (1978); D.C. Code Ann. § 23-1303 (1973); Or. Rev. Stat. § 135.230 (1979). Alaska and Delaware require a court to consider a defendant's prior record of convictions before admitting him to bail. Alaska Stat. § 12.30.020 (1972); Del. Code Ann. tit. 11, § 2105 (1979). Some states, such as Alabama and Arizona, do not require that specific criteria be used in setting bail. Instead, consideration of criminal history information is at the discretion of the courts. See, e.g., Ala. Code § 15-13-4 (1975); Ariz. Rev. Stat. Ann. R. Crim. P. 7.2 (West 1973).

³²⁹ In the National Survey of Prosecutors, app. A *infra*, 90.4% of the respondents indicated that they use rap sheets in making bail recommendations; only 9.6% indicated that they do not. *Id.* question 2. Approximately 94% of defense attorneys responding to the survey reported that prosecutors use rap sheet data in making bail recommendations. National Survey of Defense Agencies, app. B *infra*, question 2.

³³⁰ *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970); *Loder v. Municipal Court*, 17 Cal. 3d 859, 867, 553 P.2d 624, 630, 132 Cal. Rptr. 464, 470 (1976), cert. denied, 429 U.S. 1109 (1977); Deposition of Judge Benjamin Altman at 6-7, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given June 29, 1977); see Deposition of Judge Harold Rothwax at 5-7, 10, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given April 20, 1977); OTA Report, *supra* note 18, at 21; U.S. Comptroller General, *How Criminal Justice Agencies Use Criminal History Information* 13, 17 (1974) (report no. B-171019); see Kleps & McKay, *Conceptual Design for Court Information Systems The Integrated Court/Automation Information System (ICAIS)*, in 1974 Symposium, *supra* note 4, at 117, 120; Rosenfeld, *supra* note 299, at 520. Courts also consider prior arrests in deciding whether to permit bail pending appeal. *Russell v. United States*, 402 F.2d 185, 186 (D.C. Cir. 1968); *Rhodes v. United States*, 275 F.2d 78, 81-82 (4th Cir. 1960); *Johnson v. United States*, 291 A.2d 697, 698 (D.C. 1972).

³³¹ *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970); *Loder v. Municipal Court*, 17 Cal. 3d 859, 867, 553 P.2d 624, 630, 132 Cal. Rptr. 464, 470 (1976), cert. denied, 429 U.S. 1109 (1977). In the National Survey of Prosecutors, app. A *infra*, 69% of those prosecutors responding indicated that they refer to both arrest and disposition data in making bail recommendations. *Id.* question 5.

At the trial of the *Tatum* case, numerous witnesses testified that prosecutors and judges in New York City refer specifically to prior arrests during the bail-setting process. Trial transcript at 420-21, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Stephen Kelban given Feb. 8, 1978); *id.* at 392 (test. of Jo Ann Ferdinand given Feb. 8, 1978); *id.* at 452-53 (test. of John Sweeney given Feb. 8, 1978); *id.* at 465 (test. of Ellen Schall given Feb. 8, 1978). One court has commented that "[a]rrrests are properly considered as relevant to character" in setting bail. *Villines v. United States*, 312 A.2d 304, 307 (D.C. 1973).

³³² Deposition of Judge Harold Rothwax at 11-12, 15-16, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given April 20, 1977).

³³³ In the National Survey of Defense Agencies, app. B *infra*, 81% of the respondents indicated that prosecutors' bail recommendations seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted. *Id.* question 5. Almost 70% responded that courts' bail decisions seem to be affected by such entries. *Id.* question 8. During the trial of the *Tatum* case, defense attorney Ellen Schall testified that both prosecutors and judges give weight to arrests which resulted in dismissal or acquittal in the bail setting process. Trial transcript at 463, 465, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test.

In America's major cities, bail usually is set at a defendant's initial arraignment.³³⁴ Because of the high volume of cases at arraignment sessions,³³⁵ defense counsel and prosecutors frequently are unable to investigate rap sheet entries in order to supply missing information or correct errors.³³⁶ As the court found in *Tatum v.*

given Feb. 8, 1978). Judge Rothwax explained why he gives weight to arrests which resulted in dismissal when he sets bail:

A case can be dismissed for a variety of reasons: It can be dismissed because the evidence was illegally obtained, and it may well be that the defendant was clearly guilty of possessing the contraband or weapons or what have you. It may be dismissed because the complainant failed to appear. There may have been a variety of reasons why a case is dismissed and not knowing why it is dismissed, makes it difficult to evaluate whether it was dismissed because the defendant was, in fact, innocent or whether it was dismissed because there was an illegality in obtaining the evidence.

Deposition of Judge Harold Rothwax at 15, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given April 20, 1977). Numerous witnesses testified during the *Tatum* trial that in New York City, if the the defendant's rap sheet shows prior arrests which resulted in dismissal, prosecutors recommend and judges set higher bail than if it indicates no prior arrests. Trial transcript at 394-95, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Jo Ann Ferdinand given Feb. 8, 1978); id. at 424-25 (test. of Stephen Kelban given Feb. 8, 1978); id. at 456 (test. of John Sweeney given Feb. 8, 1978); id. at 465-66 (test. of Ellen Schall given Feb. 8, 1978).

³³⁴ L. Katz, L. Litwin & R. Bamberger, *Justice is the Crime* 155 (1972); P. Wice, *Freedom for Sale* 23-24 (1974); La Fave, *Alternatives to the Present Bail System*, 1965 U. Ill. L.F. 8, 9; see *The Challenge of Crime*, supra note 37, at 131.

³³⁵ See *The Challenge of Crime*, supra note 37, at 127-28; L. Katz, L. Litwin & R. Bamberger, supra note 334, at 155-56.

³³⁶ The National Survey of Defense Agencies, app. B infra, asked: "If rap sheets are available to you prior to bail being considered at a defendant's initial arraignment, are you able to investigate his prior criminal history to supply missing or incompletely listed data on the rap sheet prior to making your bail application?" Almost 63% of the respondents answered in the negative. Id. question 23. The following colloquy between counsel for plaintiffs and Legal Aid attorney Jo Ann Ferdinand during the *Tatum* trial describes the practical problems defense counsel encounter in New York City:

Q For the most part, are you able before making a [b]ail application at arraignments, to check out cases where there is no disposition indicated?

A For the most part, no.

Q Would you explain to the Court why it is that you cannot do that?

A Well, there are several reasons. First, there are a number of cases that will be out of Manhattan, that will be for other counties, and it would require calling the clerk's office in those counties.

It can be done, but then it takes a fairly long amount of time. You have to find someone in the clerk's office to answer the phone, someone who will then look up in their books, and they will usually not handle more than one request at a time over the telephone. So if you call and ask for a series of cases, they will not answer at all.

Q With respect to cases which—prior cases that were in Manhattan, are you able to check those out?

A You could go to the clerk's office in the Criminal Court building and stand on line and wait for your turn and ask for the disposition on a prior case.

Again, for the most part, you can only ask for one case at a time. They won't give you—you can't give them a list of cases. Also, we are not really permitted by the Court or our supervisors to be out of arraignments for the amount of time that it would take. You

Rogers, "[i]t is obvious that the result [of incomplete or inaccurate rap sheets] is frequently the imposition of bails in amounts exceeding those which would be set if complete and accurate information were available to the courts."³³⁷

D. Use of Rap Sheets in Plea Bargaining

Rap sheets also affect the plea bargaining process.³³⁸ Prosecutors use rap sheets to decide whether to reduce formal charges in exchange for a plea of guilty, and if so, to what level.³³⁹ Since many cases are disposed of by plea at arraignment³⁴⁰ before counsel can investigate rap sheet entries,³⁴¹ defendants may receive less favorable dispositions than they would if their rap sheets were complete and accurate.³⁴²

would have to be out of the courtroom for 15 to 20 minutes to get the disposition for one prior case, and in that period of time, you are expected to be in court. That would be during the day.

At night you used to be able to go into the clerk's office yourself and check up prior dispositions, but now they have converted to a computer system and you are not permitted—I am not permitted to use the computer. In any event, I don't know how to use the computer, so I wouldn't be able to check any prior dispositions at night. There is no way at night to find out at all. There is nobody on duty to help you.

Trial Transcript at 386-87, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Jo Ann Ferdinand given Feb. 8, 1978). This testimony was echoed by other Legal Aid attorneys. *Id.* at 421-22 (test. of Stephen Kelban given Feb. 8, 1978); *id.* at 463-64 (test. of Ellen Schall given Feb. 8, 1978). Prosecutors are unable to investigate rap sheet entries before arraignment for similar reasons. *Id.* at 266-69 (test. of Richard Lowe given Feb. 1, 1978).

³³⁷ *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM), slip op. at 26 (S.D.N.Y. Feb. 16, 1979).

³³⁸ "The plea of guilty is probably the most frequent method of conviction in all jurisdictions; in some localities as many as 95 per cent of the criminal cases are disposed of in this way." ABA Project on Standards for Criminal Justice, *Standards Relating to Pleas of Guilty 1-2* (Approved Draft 1968); accord, *The Challenge of Crime*, supra note 37, at 134 (90th); D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial 8* (1966) (80th).

³³⁹ *Loder v. Municipal Court*, 17 Cal. 3d 859, 866, 553 P.2d 624, 629, 132 Cal. Rptr. 464, 469 (1976), cert. denied, 429 U.S. 1109 (1977); Comptroller General, *How Criminal Justice Agencies Use Criminal History Information 13* (1974) (report no. B-171019); Rosenfeld, supra note 299, at 520; see White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. Pa. L. Rev. 439, 447 (1971). Social scientists report that a defendant's prior criminal record is a very important factor in plea-bargaining decisions of prosecutors. Lagoy, Senna & Siegel, *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 Am. Crim. L. Rev. 435, 445-47 (1976). In Manhattan, the willingness of prosecutors to plea-bargain depends upon the tracking decision by the Early Case Assessment Bureau. This tracking decision, in turn, relies heavily on rap sheets. See text accompanying notes 312-18 supra.

³⁴⁰ D. Newman, supra note 338, at 79. For example, of the 543 cases arraigned in Manhattan during the sessions attended by the *Tatum* audit team, 41% resulted in pleas of guilty, 27% had all charges dismissed, and only 32% were adjourned for subsequent action. See note 246 supra.

³⁴¹ See note 336 and accompanying text supra.

³⁴² Cf. *The Challenge of Crime*, supra note 37, at 133 ("A prosecutor who bases his estimate of the provability of a case on a one-page police report can easily dismiss strong cases and press cases that ultimately prove to have little foundation.").

E. Use of Rap Sheets at Sentencing

Criminal history information also plays an important part in the sentencing process.³⁴³ Prosecutors and probation officials consider arrest and conviction data in making sentence recommendations.³⁴⁴ These officials give weight to charges that resulted in dismissal or acquittal, as well as to those that led to conviction.³⁴⁵ Sentencing

³⁴³ The laws of some states explicitly require or permit judges to consider criminal history information in passing sentences. OTA Report, *supra* note 18, at 21-22. In New York, for example, a court may not ordinarily pronounce sentence until it has received a copy of the defendant's rap sheet or a police report of his prior arrest record. N.Y. Crim. Proc. Law § 390.10 (McKinney Supp. 1980). Alaska and Indiana require a court to consider the defendant's prior criminal record in imposing sentence. Alaska Stat. § 12.55.005(2) (Supp. 1979); Ind. Code Ann. § 35-50-1A-7 (Burns 1979). In Arkansas, a court may order a presentence report, and the report must include an account of the defendant's "history of delinquency or criminality." Ark. Stat. Ann. § 41-804(2) (1975).

³⁴⁴ More than 95% of the prosecutors and defense attorneys responding to the national surveys indicated that prosecutors use rap sheet data in making sentence recommendation decisions. National Survey of Defense Agencies, app. B *infra*, question 4; National Survey of Prosecutors, app. A *infra*, question 4. Almost 54% of the prosecutors indicated that they refer only to disposition information in making sentence recommendations; however, 45% reported that they refer to both arrest and disposition data for this purpose. *Id.* question 7.

Bernard D. Young, an Administrative Assistant in the Department of Probation of Manhattan Supreme Court and a former Senior Probation Officer, testified that the practice of his office is to include in presentence reports information concerning each past arrest of the individual reflected on the rap sheet. Trial transcript at 293, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Feb. 1, 1978). In the Northern District of California, prior record was found to be the most important factor influencing a probation officer's sentence recommendation. The number of prior arrests was found to be the third most important factor. Carter & Wilkins, *Some Factors in Sentencing Policy*, 58 J. Crim. L. & C. 503, 509 (1967). In the California Superior Courts for the years 1959 to 1965 and in all of the federal circuits in 1964 except the Seventh Circuit, judges followed probation officers' recommendations to place defendants on probation in over 90% of all cases. *Id.* at 505; see *Loder v. Municipal Court*, 17 Cal. 3d 859, 867, 553 P.2d 624, 630, 132 Cal. Rptr. 464, 470 (1976), cert. denied, 429 U.S. 1109 (1977) (on conviction in California, any prior arrest record is routinely obtained by probation officers and included in their report of findings and recommendations to the court); S. Rubin, *The Law of Criminal Correction* 83-84, 87-88 (1963); Administrative Office of the U.S. Courts, *The Presentence Investigation Report* 11 (1965).

³⁴⁵ The National Survey of Prosecutors, app. A *infra*, asked: "Do sentencing recommendations made by your office tend to be affected by the *number* of prior arrests not resulting in conviction or by the *severity* of prior charges not resulting in conviction?" Three and one-half percent indicated they are affected by the number of prior arrests not resulting in conviction; 15.4% indicated they are affected by the severity of prior charges not resulting in conviction; 32.9% indicated they are influenced by both factors, and 48.3% indicated they are influenced by neither. *Id.* question 26. Approximately 76% of the defense attorneys responding to the survey find that the prosecution's sentence recommendations seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet when no conviction resulted. National Survey of Defense Agencies, app. B *infra*, question 7. Probation officials' reliance upon prior arrests resulting in dismissal or acquittal is revealed in the following colloquy between counsel for plaintiff and Bernard D. Young in the *Tatum* trial:

Q When a presentence report is submitted to the Court and it includes notations of arrest events that resulted in dismissal or acquittal, is it the practice of your office to make

judges also consider prior records of arrest that terminated in favor of

a recommendation to the Court as to sentence with respect to whether you believe incarceration is justified?

A Yes.

Q Is that one of the duties of your office?

A Yes.

Q Are there instances where an individual's prior criminal record will persuade you to recommend incarceration, even though it shows multiple dismissals?

A Along with the other information we have. The recommendation is not based solely on the criminal history.

Q I understand.

Am I correct that a rap sheet showing a series of arrests and dismissals for a crime of violence might incline you to recommend incarceration?

A Yes.

[Counsel for plaintiff then showed Mr. Young a New York rap sheet showing a series of assault charges, all of which resulted in dismissal.]

Q I show you a copy of Plaintiff's Exhibit 6, which has been received by the Court. I will ask you to look that rap sheet over and tell us whether this is the type of sheet that you are talking about that would incline you to recommend incarceration, were there a conviction to the most recent arrest event listed on the sheet?

A Yes.

Q Would you advise the Court of the factors which you see on the sheet that would incline you to do that?

A The primary number of—or the types of arrests of this defendant are for assault, in fact practically all his arrests are assault, and his instant arrest appearing in the Court is for assault.

I think we would be inclined to feel that the Court—we would call it to the attention of the Court that we feel this man would be—this person would be an assaultive individual.

Q So you would be inclined to recommend on the basis of this rap sheet that the individual receive some term of incarceration upon an assault conviction?

A Yes.

. . . .

Q Other than a rap sheet like Exhibit 6 which shows a series of assault charges and dismissals, are there other types of crimes that would have a similar effect on your recommendations to the Court?

A Our recommendation would be on the basis of the types of offenses for which he is arrested and the instant offense involved and the violence involved.

Q Am I correct, then, that a similar series of arrests for burglary would incline you to recommend incarceration, even if they showed dismissal?

A Yes.

Q Is that also true for robbery arrests?

A Yes.

Q For sex crime arrests?

A Yes.

Q Is it true with respect to drug offenses?

A Yes. Yes.

Q Is there any offense or category of offenses where . . . a series of charges resulting in dismissal, would not incline you to recommend incarceration?

A The only thing I could think of would be something like public drunk, or that type. Primarily our cases that come into the Supreme Court have a degree of violence, for the most part.

Trial transcript at 295-98, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Bernard Young given Feb. 1, 1978).

the accused,³⁴⁶ on the supposition that arrest charges are evidence of a flawed character³⁴⁷ or part of a pattern of misconduct.³⁴⁸ Generally, a defendant with prior arrests resulting in dismissal or acquittal will be sentenced more harshly than a similarly situated defendant with no prior arrests.³⁴⁹

Normally, defense counsel, the prosecutor, and probation officials are able to investigate rap sheet entries before sentencing to obtain complete and accurate information for presentation to the court. However, when a sentence is imposed at arraignment as part of a plea-bargained disposition, inaccurate and incomplete rap sheet entries may result in longer sentences than would be imposed if rap sheets were complete and accurate.³⁵⁰

³⁴⁶ Use of such records by sentencing courts has been widely approved. See, e.g., *Scopolites v. State*, 50 Ala. App. 115, 277 So. 2d 389, 394 (Ala. Crim. App.), cert. denied, 291 Ala. 797, 277 So. 2d 395, cert. denied, 414 U.S. 977 (1973); *Misenheimer v. State*, 268 Ind. 274, 289-90, 374 N.E.2d 523, 532 (1978); *State v. Rose*, 183 Neb. 809, 811-12, 164 N.W.2d 646, 648-49 (1969); *State v. Ferbert*, 113 N.H. 235, 238, 306 A.2d 202, 204 (1973). For discussions of sentencing judges' considerations of prior arrests that terminated in favor of the accused, see *Menard v. Mitchell*, 430 F.2d 486, 490-91 (D.C. Cir. 1970); *Kowall v. United States*, 53 F.R.D. 211, 215 (W.D. Mich. 1971); *Davidson v. Dill*, 180 Colo. 123, 126-27, 503 P.2d 157, 159 (1972) (en banc). One study demonstrated that in fiscal year 1964 prior record and the number of previous arrests were the third and fourth most important factors, respectively, in the sentencing decisions of federal judges in the Northern District of California. Carter & Wilkins, *supra* note 344, at 509.

³⁴⁷ See, e.g., *Jones v. United States*, 307 F.2d 190, 192 (D.C. Cir. 1962), cert. denied, 372 U.S. 919 (1963); *Villines v. United States*, 312 A.2d 304, 307 (D.C. 1973); *State v. Green*, 62 N.J. 547, 566, 303 A.2d 312, 325 (1973).

³⁴⁸ See, e.g., *Williams v. New York*, 337 U.S. 241, 247 (1949); *Russell v. United States*, 402 F.2d 185, 186 (D.C. Cir. 1968); *State v. Montoya*, 91 N.M. 425, 428, 575 P.2d 609, 612 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978).

³⁴⁹ *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM), slip op. at 12 (S.D.N.Y. Feb. 16, 1979); cf. *People v. Griffin*, 60 Cal. 2d 182, 190-91, 383 P.2d 432, 436-37, 32 Cal. Rptr. 24, 28-29 (1963) (for sentencing purposes, a jury may consider circumstances surrounding a previous, similar charge from which defendant was acquitted), rev'd on other grounds, 380 U.S. 609 (1965). In the National Survey of Defense Agencies, app. B *infra*, 70.9% of the defense attorneys responding indicated that sentencing decisions seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet, despite the fact that those arrests never resulted in conviction. *Id.* question 9.

³⁵⁰ As Legal Aid attorney Ellen Schall testified at the *Tatum* trial, it is not always practical for defense counsel to defer sentence until an investigation is completed:

Q When you take a plea on behalf of a client at the arraignment court, is it customary for you to ask the Court to defer sentencing so that a presentence report can be prepared?

A It depends. Often a judge would say that if you take the sentence today, it would be a certain amount of time. If you insist on an investigation and sentence, it would be more time.

Q In the case where the sentence will be passed at the arraignment, I take it you have no more opportunity to check out the rap sheet than you do for a bail application?

A That is correct.

F. Use of Rap Sheets After Sentencing

Correction and parole officials also use criminal history information. Correction officials rely on rap sheet data to determine the appropriate level of institutional security for defendants³⁵¹ and to establish treatment programs.³⁵² Parole officials evaluate prisoners' criminal histories to decide whether and when to release them on parole.³⁵³

In sum, rap sheet data contribute to virtually every discretionary decision concerning criminal defendants. Criminal justice officials routinely rely upon arrest as well as conviction data, even when the arrest resulted in dismissal or acquittal. In addition, incomplete and inaccurate rap sheets cause defendants to be treated more harshly than they would be if the rap sheets were complete and accurate. The unfairness of these practices should be apparent; their constitutionality is assessed in the following section.

IV

THE CONSTITUTIONAL IMPLICATIONS OF PRESENT PRACTICES

The right of an individual to be free from arbitrary government action impairing his liberty is perhaps the most fundamental principle of our constitutional law.³⁵⁴ The defects in rap sheets identified in

Trial transcript at 469-70, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. of Ellen Schall given Feb. 8, 1978).

³⁵¹ See LEAA, *State-by-State Surveys, Security and Privacy Considerations in Computerized Criminal History Information Systems* (1971), excerpts reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 190, 192; *The Challenge of Crime*, *supra* note 37, at 266; OTA Report, *supra* note 18, at 22.

³⁵² Comptroller General, *How Criminal Justice Agencies Use Criminal History Information* 13 (1974). The Offender Based State Correction Information System (OBSCIS) has computerized reporting of disciplinary infractions within correctional institutions and the work or rehabilitative activities in which inmates participate. See SEARCH Group, Inc., Tech. Rep. No. 10, *Offender-Based State Corrections Information System: The OBSCIS Approach* 16 (1975). As SEARCH Group, Inc., has noted: "These data are particularly critical because of their potential impact on parole or time-to-serve considerations." *Id.* Therefore, incomplete or inaccurate OBSCIS data may harm inmates in essentially the same way that incomplete or inaccurate rap sheets harm defendants prior to conviction.

³⁵³ *Loder v. Municipal Court*, 17 Cal. 3d 859, 868, 553 P.2d 624, 630, 132 Cal. Rptr. 464, 470 (1976), cert. denied, 429 U.S. 1109 (1977); 1975 Senate Hearings, *supra* note 15, 157, 190 (statement of Francis X. Bellotti); LEAA, *State-by-State Surveys, Security and Privacy Considerations in Computerized Criminal History Information Systems*, (1971), excerpts reprinted in 1974 Senate Hearings, *supra* note 15, vol. 2 at 190, 192; OTA Report, *supra* note 18, at 22.

³⁵⁴ See *Richardson v. McFadden*, 540 F.2d 744, 750 (4th Cir. 1976) ("There is no more fundamental proposition in our law than that a state may not act arbitrarily and capriciously to

Sections I and II cause arbitrary denials of liberty because officials using the defective or inappropriate information invariably make the same constitutionally impermissible assumption of guilt. Whether rap sheets show convictions when none occurred, or list arrest charges with no dispositions or with partial or ambiguous disposition information, or continue to list more serious charges when a conviction was on less serious charges, or list charges disposed of by dismissal or acquittal, the result is the same: police, prosecutors and judges, and probation, correction and parole officials assume the subjects of rap sheets are guilty of crimes of which they have never been convicted and act against them on that basis.³⁵⁵ Such action is unconstitutional because the inferential process relied on to create the assumption of guilt is defective, thereby rendering that assumption unreliable and its use by criminal justice decisionmakers a violation of due process of law.³⁵⁶

deprive a citizen of 'liberty' or 'property' interests."). This principle is a theme present in several of the specific constitutional guarantees. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) ("The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order to 'safeguard the privacy and security of individuals against arbitrary invasions.' "); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("the touchstone of due process [under the fourteenth amendment] is protection of the individual against arbitrary action of government."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (sixth amendment right to a trial by jury extended to the states because institution of a jury trial reflects the deep commitment of the nation against arbitrary law enforcement).

Deprivations resulting from incarceration entail the loss of fundamental "personal freedom in the most immediate and literal sense of those words." *United States v. Thompson*, 452 F.2d 1333, 1340 (D.C. Cir.), cert. denied, 405 U.S. 998 (1971). It is easy to lose sight of the fact that incarceration involves "the most basic [right] of all, since what is at stake is no less than the freedom to be free." *Id.* Subsumed under that basic right are the freedom to walk about, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *Inmates of Suffolk County Jail v. Eisenstadt*, 360 F. Supp. 676, 688 (D. Mass. 1973), aff'd, 494 F.2d 1196 (1st Cir. 1974), to travel, *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), and the right to associate with persons of one's own choice, *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). A particularly keen deprivation forced upon the imprisoned is the loss of the "right to be let alone," which Justice Brandeis characterized as the "most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (dissenting opinion). Privacy, the Supreme Court has recognized, is one of the fundamental values that the Bill of Rights was designed to protect. See generally *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972).

³⁵⁵ As one court noted:

We cannot ignore the truth that many guilty men go free and are not even charged in some cases. Many things may contribute to this result, including lack of sufficient proof, illegality of certain seized evidence, crowded court dockets, and other things that cause or justify a failure to prosecute or to convict. It is not unheard of to find some fire where there is much smoke.

Houston Chronicle Publishing Co. v. City of Houston, 531 S.W.2d 177, 187 (Tex. Civ. App. 1975) (dictum), aff'd, 536 S.W.2d 559 (Tex. 1976).

³⁵⁶ See text accompanying notes 381-85 *infra*.

Of course, use of informal, less concretely verified information has traditionally been accepted as part of the criminal justice process at stages other than the trial.³⁵⁷ Decisionmakers seeking all information available have routinely cast their nets wide, especially when unhampered by formal application of rules of evidence that would otherwise forbid consideration of certain information.³⁵⁸ As a consequence, partial criminal history information and even information advising of acquittals and dismissals are a fixture at many nontrial stages of the process. Incomplete data, one is told, are certainly better than none, and decisions ought to be as informed as possible.

Incomplete data and lists of arrest charges not resulting in conviction *are* worse than no information at all, however, when used by officials as a predicate for erroneous conclusions. Officials cannot know whether a person was in fact guilty of a charge that did not result in conviction. Certainly in many instances the person was either innocent or guilty only of a lesser charge. In such cases, when an official making a decision affecting a person's liberty presumes him guilty of an arrest charge, the consequent loss of liberty is based upon a "crime" of which the person was never convicted. This plainly violates due process of law.

A. *Use of Erroneous Information*

Use of erroneous information, *i.e.*, rap sheet entries showing convictions that did not occur,³⁵⁹ presents the most egregious constitutional violation. As early as 1948, in the seminal case of *Townsend v. Burke*,³⁶⁰ the Supreme Court ruled that the use of erroneous information at sentencing is a violation of due process. Townsend was a state prisoner convicted of burglary and robbery on a plea of guilty. At sentencing, the trial judge made explicit reference to what he perceived to be the defendant's prior criminal record, incorrectly asserting that the defendant had been guilty of a prior charge that had been

³⁵⁷ See notes 389-91 and accompanying text *infra*.

³⁵⁸ See notes 299-353 and accompanying text *supra*.

³⁵⁹ The *Tatum* audit showed that convictions occasionally are erroneously reported as dismissals or acquittals. When this happens, the rap sheet, though not prejudicial to the subject, fails to protect the community from an individual who, upon rearrest and conviction, ought to be identified and treated as a recidivist.

³⁶⁰ 334 U.S. 736 (1948).

dismissed and of two other offenses of which he had been acquitted.³⁶¹ The Supreme Court reversed,³⁶² stating:

We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

We would make clear that . . . [i]t is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no

³⁶¹ By the Court (addressing Townsend):

Q Townsend, how old are you?

A 29.

Q You have been here before, haven't you?

A Yes, sir.

Q 1933, *larceny of automobile*. 1934, *larceny of produce*. 1930, *larceny of bicycle*. 1931, *entering to steal and larceny*. 1938, *entering to steal and larceny in Doylestown*. Were you tried up there? No, no. Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.

A No. That was my brother.

Q You were tried for it, weren't you?

A Yes, but I was not guilty.

Q And 1945, this. 1936, *entering to steal and larceny*, 1350 Ridge Avenue. Is that your brother, too?

A No.

Q 1937, *receiving stolen goods, a saxophone*. What did you want with a saxophone? Didn't hope to play in the prison band then, did you?

The Court: Ten to twenty in the Penitentiary.

Id. at 739-40.

³⁶² Id. at 741. The Court noted its displeasure with the sentencing procedures in rather strong terms:

The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of *larceny of an automobile*, and the 1938 charge of *entry to steal and larceny*, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.

Id. at 740.

opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process. . . .

In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair play which absence of counsel withheld from this prisoner.³⁶³

Thus, the Court left no doubt that sentencing predicated on misinformation violates due process.³⁶⁴

Townsend has broad application to the problems presented by modern rap sheet data. The due process violation articulated in *Townsend* occurs at all stages of the criminal process in which erroneous rap sheet data are used as a premise for harsher treatment of criminal suspects and defendants. Criminal history information is used by the police to decide whether there is probable cause to search or to arrest.³⁶⁵ When erroneous information is used to establish probable cause, and probable cause would not exist absent the erroneous information, the defendant suffers a violation of fourth amendment guarantees.³⁶⁶ Reliance on erroneous information by prosecutors makes it more likely that charges will be filed against a defendant, that prosecution will be vigorous, and that the defendant will be offered less favorable terms for a guilty plea.³⁶⁷ Although such decisions are discretionary,³⁶⁸ it is clearly unfair to treat one defendant

³⁶³ *Id.* at 741.

³⁶⁴ The principles enunciated in *Townsend* have been reaffirmed in numerous cases by both federal and state courts. See, e.g., *United States v. Tucker*, 404 U.S. 443 (1972); *Farrow v. United States*, 580 F.2d 1339, 1358-59 (9th Cir. 1978); *United States v. Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973); *Elliott v. United States*, 434 F. Supp. 774, 777 (N.D. Cal. 1977), *aff'd per curiam*, 591 F.2d 99 (9th Cir. 1979); *Beck v. State*, 365 So. 2d 985, 1002 (Ala. Crim. App.), *aff'd*, 365 So. 2d 1006 (Ala. 1978), *rev'd on other grounds*, 447 U.S. 625 (1980); *State v. Bosworth*, 360 So. 2d 173, 175 (La. 1978), *rev'd and remanded*, 373 So. 2d 152 (La. 1979); *People v. Lauzon*, 84 Mich. App. 201, 208-09, 269 N.W.2d 524, 528 (1978); *Wraggs v. State*, 549 S.W.2d 881, 883 (Mo. 1977) (*en banc*); *Stacey v. State*, 30 Or. App. 1075, 1080, 569 P.2d 640, 643-44 (1977).

³⁶⁵ See text accompanying notes 302-11 *supra*.

³⁶⁶ See *United States v. Mackey*, 387 F. Supp. 1121, 1125 (D. Nev. 1975). In *Mackey* the defendant was hitchhiking when approached by police officers who requested identification. The NCIC computer reported an outstanding warrant on the defendant for a parole violation and he was arrested. The court found that the computer report of an outstanding warrant was erroneous because the warrant had been cancelled five months earlier, *id.* at 1121-22, and concluded that "a computer inaccuracy of this nature and duration, even if unintended, amounted to a capricious disregard for the rights of the defendant," *id.* at 1125. The court held that the government's action was the equivalent of an arbitrary arrest which deprived the defendant of his liberty without due process of law. *Id.*

³⁶⁷ See text accompanying notes 312-27 *supra*.

³⁶⁸ Prosecutors' decisions, though discretionary, are subject to due process review. See *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974).

more harshly than another simply because the government has included erroneous information in his file. The constitutional violation inherent in such practices is the same as in *Townsend*: a person is deprived of liberty on the basis of false information and thus is denied due process of law.

Once a person is arrested and formal charges are lodged, counsel normally is assigned.³⁶⁹ Counsel's role in dealing with erroneous information received attention in *Townsend*.³⁷⁰ The Court noted counsel's duty to insure the accuracy of the record upon which the sentencing court proceeds.³⁷¹ Indeed, one of counsel's most important functions at any stage of the criminal process is to insure that the defendant is proceeded against only on the basis of information which is not erroneous, misleading, or unduly prejudicial. As a practical matter, however, defense attorneys often are unable to perform the duties outlined in *Townsend* before defective rap sheets have harmed their clients. The court in *Tatum v. Rogers* explained the practical difficulties encountered by lawyers at arraignment and the constitutional violations that result:

The evidence shows that time considerations make it impossible for defense attorneys to correct rap sheet errors or to supply missing information at arraignment sessions. At most, the attorneys are able to interrogate their clients about such errors and omissions, but courts were shown to be unwilling to accept corrective data not independently verified by counsel

The result reached in the State of New York when judges base bail decisions on incorrect and/or incomplete rap sheet information at arraignments, is for all practical purposes the same as that found unconstitutional by the Supreme Court in *Townsend v. Burke*. Although the plaintiffs here were represented by Legal Aid attorneys at their respective arraignments, counsel's ability to remedy rap sheet defects in the arraignment context was, as found above, *de minimus*. In this connection it appears that counsel's presence is merely physical—it is not effective to protect the accused. The result is the rendering of bail decisions on the basis of erroneous information, without the effective assistance of counsel in violation of the Fourteenth Amendment's Due Process Clause, of the Sixth Amendment's guarantee of the right to the effective assistance of

³⁶⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Massiah v. United States*, 377 U.S. 201 (1964), and *Argersinger v. Hamlin*, 407 U.S. 25 (1972), together extended the right to assignment of counsel to all indigent defendants facing imprisonment on criminal charges. But, as explained below, counsel's presence is not always sufficient to protect the defendant from his rap sheet.

³⁷⁰ 334 U.S. at 740-41.

³⁷¹ *Id.* at 740.

counsel, and of the Eighth Amendment's guarantee of the right to be admitted to reasonable bail.³⁷²

Although the *Tatum* court focused on the effect of rap sheets on bail, rap sheets may also affect a defendant's plea or sentence. In most metropolitan areas, many defendants plead guilty and are sentenced at arraignment.³⁷³ Since counsel is no more able to correct rap sheet entries for plea bargaining or sentencing than for bail-setting, the constitutional violation in using defective rap sheets for these purposes is precisely the same as in *Townsend*: defendants are denied due process of law because they are sentenced more harshly on the basis of unreliable beliefs about their past criminal conduct.³⁷⁴

B. Use of Incomplete or Inappropriate Information

Townsend and *Tatum* together support the conclusions that due process is denied when inaccurate information is used to a defendant's detriment at any stage of the process, and that the constitutional violation occurs not only when counsel is absent, but also when counsel, though present, is unable to protect the defendant.³⁷⁵ *Tatum*

³⁷² *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y. Feb. 16, 1979).

³⁷³ See notes 338-40 and accompanying text *supra*.

³⁷⁴ The Court in *Townsend v. Burke* was uninterested in whether *Townsend* was "overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record," 334 U.S. at 740, twice noting that the due process defect inheres in "the careless or designed pronouncement of sentence on a foundation so extensively or materially false." *Id.* at 741. Thus, the Court focused attention at the heart of the problem: the quality of the information contributing to the decision, not the state of mind of the person supplying or using it. In light of the history of the development of criminal history information systems and the widespread recognition of their deficiencies, see Section I *supra*, it cannot be fairly asserted that rap sheet users are unaware that rap sheets contain much erroneous information. They may nevertheless be unaware of the untruth in particular entries. As *Townsend* makes clear, however, knowing use of false information is not a prerequisite to finding a constitutional violation. In sum, basing decisions on rap sheets containing erroneous information denies due process, even though neither the agency supplying the rap sheet nor those using it intend to inject or to rely upon false information in the decisionmaking process, and even though they may be unaware of its existence.

³⁷⁵ *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970), presents a similar instance in which a defendant's due process rights were violated because counsel was unable to represent his client effectively. In *Malcolm*, the sentencing court resisted both prosecution and defense attempts to correct its confusion about the defendant's prior record, concluding in error that the defendant had five prior armed robbery convictions. In fact, though having admitted the events, the defendant had pleaded guilty only to one count of robbery and one count of petit larceny, and the remaining charges had been consolidated or dismissed. *Id.* at 815-16. The appellate court, though noting that the sentencing judge's confusion was "more a matter of semantics than substance," nonetheless gave such heavy weight to the *Townsend* principle that it declined to permit the sentence to stand, citing counsel's inability to correct the record as the primary reason for its action. *Id.* at 816. *Malcolm* thus establishes that due process is denied if the court proceeds on the basis of a defective record that counsel is unable to correct because his role is improperly

extends the principle of *Townsend*, however, because it also holds that due process is denied when judges base bail decisions on *incomplete* information.³⁷⁶ Use of incomplete rap sheet entries denies defendants due process in the same manner as use of inaccurate information: defendants are treated more harshly on the basis of assumptions that often are materially untrue. Incompleteness of rap sheets appears in three common forms: arrest entries which reflect no disposition though one has occurred, arrest entries which show some but not all of the disposition data, and arrest entries which report disposition data in ambiguous and unusable form.³⁷⁷ Such entries do not affirmatively mislead. They do, however, invite criminal justice officials to rely on arrest charges in making their decisions since the arrest charges are the only fully comprehensible information on the rap sheet. Whatever the form of incompleteness, the inference drawn by users of those data is the same: that the defendant is, in all likelihood, guilty of the prior arrest charges listed on his rap sheet.³⁷⁸ In cases in which this is not true, the defendant is denied due process just as he would be if the disposition column erroneously listed a conviction of the arrest charge.

Even some rap sheet entries that accurately report both arrest and disposition data may unfairly prejudice defendants for essentially the same reasons. Here the rap sheet entry is not defective, but the inference made from it still is. Such entries come in two forms: charges resulting in dismissal or acquittal³⁷⁹ and charges disposed of by conviction of less serious charges, whether by guilty pleas or after trial.³⁸⁰ In both cases, the inference made by the rap sheet user is that the defendant was guilty of some or all of the arrest charges. The result is an unconstitutional deprivation of liberty because the defendant is acted against on the basis of unreliable inferences. The problem is that bare rap sheet data are inadequate as a matter of law to support an inference of guilt.³⁸¹

circumscribed by the court. *Malcolm* would seem to apply as well when counsel's role is improperly circumscribed by the criminal justice system's demand that cases be processed too quickly for counsel to be able to act effectively. See notes 336, 350 and accompanying text *supra*.

³⁷⁶ *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM), slip op. at 20 (S.D.N.Y. Feb. 16, 1979).

³⁷⁷ See notes 261, 263, 278-82 and accompanying text *supra*.

³⁷⁸ See notes 308, 318, 333, 345 and accompanying text *supra*.

³⁷⁹ See note 268 and accompanying text *supra*.

³⁸⁰ A third form of complete and accurate entry shows that the defendant was convicted of all arrest charges. As Table 5 from the *Tatum* audit shows, however, this rarely happens to New York defendants in felony cases. Nationally, this happens somewhat more often. See notes 273-74, 294-96 and accompanying text *supra*.

³⁸¹ Some states explicitly direct that no adverse inferences be drawn from an arrest followed by acquittal or dismissal. For example, in New York, after a dismissal or acquittal, "the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and

Criminal law inferences must, however, be made in accordance with due process of law. *Leary v. United States*,³⁸² discussing evidentiary presumptions in criminal cases, noted that such presumptions "must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact upon which it is made to depend."³⁸³ While the inference of guilt made from a prior charge may in some cases be factually correct even though the prior arrest did not result in conviction, in others it is wrong. Because it is normally impossible in an individual case for a criminal justice official to know whether the inference is correct, circumscribing a person's liberty through the use of unproven charges has two consequences. First, persons who in fact were guilty of a prior arrest charge but avoided conviction receive their due. Second, those who were completely innocent in the prior case, or who were guilty only of some lesser offense, are treated as though they were guilty of crimes they did not commit. Although the first result may be desirable, the second is intolerable. It cannot be said with substantial assurance that a person with a prior arrest is more likely than not to have been guilty of the charge.³⁸⁴ Therefore, to avoid the arbitrariness and irrationality identified in *Leary*, due process demands that

prosecution," N.Y. Crim. Proc. Law § 160.60 (McKinney Supp. 1980), and the arrest records are to be sealed, id. § 160.50. As shown by rap sheet users' candid admissions, see notes 308, 318, 333, 345 *supra*, this type of statute often is honored in the breach rather than in the observance. See, e.g., Hawaii Rev. Stat. § 831-3.2 (1976 & Supp. 1980) (allowing entry of order providing that unconvicted defendant be treated as though not arrested); La. Rev. Stat. Ann. § 44:9 (West Supp. 1981) (same, for misdemeanors only); Md. Ann. Code art. 27, § 292 (1976 & Supp. 1981) (same, for first offenders only); Utah Code Ann. § 77-35-17.5 (1978 & Supp. 1979) (same, but expungement in court's discretion).

³⁸² 395 U.S. 6 (1969). *Leary* involved a statute mandating a presumption of knowledge of illegal importation from the fact of possession of marijuana.

³⁸³ Id. at 36. In *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979), the Supreme Court extended the *Leary* test to permissive inferences, holding that before a jury is allowed to draw a voluntary inference there must be a rational connection between the basic facts proved and the presumed fact, with the latter "more likely than not to flow from the former." Id. at 165 (citation omitted).

The Court has also condemned inferences of guilt made without legal foundation. For example, it has made clear that convictions obtained in violation of a defendant's right to counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), may not be used against him "either to support guilt or to enhance punishment for another offense." *Burgett v. Texas*, 399 U.S. 109, 115 (1967). See also *United States v. Tucker*, 404 U.S. 443 (1972).

³⁸⁴ See *Menard v. Mitchell*, 430 F.2d 486, 493 (D.C. Cir. 1970) ("It is certain that, every year, a multitude of persons guilty of no criminal activity are arrested and charged with crime. . . . Since 'probable cause' necessarily implies substantially less than absolute certainty, it follows that a significant number of those arrested will not in fact have committed the offense for which they have been detained.").

prior accusations of crime not be used against defendants, whether they were guilty of the charges or not, unless their guilt was adjudicated.³⁸⁵

Inferring guilt from the fact of arrest is also inconsistent with the presumption of innocence. Logically, the concept that an individual is presumed innocent until proven guilty beyond a reasonable doubt cannot be reconciled with an inference of guilt from prior unproven accusations of crime. Indeed, the presumption exists precisely to insure that the inference is not made, thus protecting the innocent.³⁸⁶ It is, quite simply, hypocritical to suggest that a defendant is presumed innocent until charges against him are proved beyond a reasonable doubt while imposing penalties in the form of higher bail, more vigorous prosecution, or enhanced sentences merely because the charges themselves were made. Thus, the unsupportable inference offends the presumption of innocence just as it offends due process.³⁸⁷

³⁸⁵ One permissible exception to this rule occurs when a court setting bail believes that a defendant may flee because of other pending charges which may increase the total punishment he faces.

³⁸⁶ *Coffin v. United States*, 156 U.S. 432 (1895), underscores the force of the presumption in American law, tracing it from Deuteronomy through Roman law, canon law, and into the common law tradition. The Court's review of the history of the presumption makes clear its historical purpose: to avoid the possibility of harm to the innocent. *Id.* at 454, 456. The Court stated further: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Id.* at 453. The Court has frequently reaffirmed the importance of this presumption. See, e.g., *Estelle v. Williams*, 425 U.S. 501, 503 (1976); *Cool v. United States*, 409 U.S. 100, 104 (1972); *In re Winship*, 397 U.S. 358, 363 (1970); *Deuch v. United States*, 367 U.S. 456, 471 (1961).

³⁸⁷ However, in *Bell v. Wolfish*, 441 U.S. 520 (1979), a case challenging the confinement conditions of pretrial detainees, the Court raised the question of how broadly the presumption of innocence applies outside of trial:

The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it may also serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial. . . . It is "an inaccurate, shorthand description of the right of the accused to 'remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . . ' [, an] 'assumption' that is indulged in the absence of contrary evidence. . . ." Without question, the presumption of innocence plays an important role in our criminal justice system. . . . But it has no application to a determination of the rights of a pretrial detainee during confinement before his trial has even begun.

441 U.S. at 533 (citations omitted).

By declaring that the presumption does not apply to pretrial detainees challenging conditions of confinement, *Bell* implies that the presumption does not apply at nontrial stages of the criminal process generally. The short answer to such an inference is that use of arrest charges not resulting in conviction for any purpose which results in deprivation of liberty is logically irreconcilable with the presumption. In addition, it is submitted that *Bell* is inconsistent with the presumption's constitutional history, and with its recent history in the Supreme Court. The

C. Arguments Supporting the Use of Arrest Information

Although few would urge that use of erroneous or incomplete information is desirable in making decisions affecting a person's liberty, the proposition that it is constitutionally impermissible to use accurately listed arrest charges finds only limited support in case law.³⁸⁸ Indeed, case law offers wide support for the use of prior

Supreme Court and federal and state courts have repeatedly referred to and applied the presumption in contexts other than trial. In *Stack v. Boyle*, 342 U.S. 1 (1951), the Court applied the presumption to the setting of bail prior to trial. Petitioners were charged with violating the Smith Act, and the district court fixed high bail on the ground that others indicted under the Smith Act had forfeited bail by absconding after conviction. 342 U.S. at 3. The Supreme Court directed the district court to entertain applications for bail reduction, stressing that "[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." *Id.* at 4. Similarly, in *McGinnis v. Royster*, 410 U.S. 263 (1973), the Court applied the presumption to defendants unable to post bail who sought "good-time" credit for incarceration prior to trial and conviction. In holding that absence of rehabilitative programs for pretrial detainees furnished a rational basis justifying the state's refusal of good-time credit, *id.* at 277, the Court noted that "[i]t would hardly be appropriate for the State to undertake to rehabilitate a man still clothed with the presumption of innocence," *id.* at 273. Thus, although the presumption was used for the unusual purpose of circumscribing individuals' liberty interests, its continuing application to phases of the process other than trial was reaffirmed.

The presumption has also been applied outside the trial context to the bail process, *Glynn v. Donnelly*, 470 F.2d 95, 98 (1st Cir. 1972); *Day v. Caudill*, 300 S.W.2d 45, 48 (Ky. 1957); *In re Haigler*, 15 Ariz. 150, 137 P. 423, 424-25 (1913), and, before *Bell*, to the conditions of pretrial confinement, *Campbell v. McGruder*, 580 F.2d 521, 531 (D.C. Cir. 1978); *Duran v. Elrod*, 542 F.2d 998, 1000 (7th Cir. 1976). But see *United States v. Doyle*, 348 F.2d 715, 721 (2d Cir.), cert. denied, 382 U.S. 843 (1965).

It may be possible to harmonize *Bell* with *Stack v. Boyle* and *McGinnis v. Royster* by limiting *Bell* to its facts. *Bell* involved only a challenge to the conditions of pretrial confinement whereas *McGinnis* involved a challenge to the computation of sentence length and *Stack* concerned the role of the presumption in the bail process. Moreover, *Bell* on its facts rested on the assertion that any deprivation of liberty was justified as a necessary requirement for the orderly governance of the holding institution. 441 U.S. at 540, 552-55. Thus, the presumption may still apply to all formal stages of the criminal process itself, although not to ancillary matters such as conditions of confinement.

³⁸⁸ A few state courts have ruled that unsubstantiated arrest records may not be used in the sentencing process. For example, California has taken the view that

[a]rrest records, as well as police contacts which do not lead to arrest, should not be included in a probation report and should not be considered by the trial court in sentencing a defendant unless supporting factual information is included. Otherwise, the trial court is without basis for making intelligent judgment either as to the reliability of the information . . . or as to its relevance. . . . This view is in accord with current Judicial Standards, section 12.5 ("Records of an arrest or charge not leading to a conviction or adjudication of guilt should not be included unless supporting factual information concerning the arrest or charge is included in the report.").

People v. Tobia, 98 Cal. App. 3d 157, 165, 159 Cal. Rptr. 376, 380-81 (1979) (footnote omitted). In *People v. Hampton*, 5 Ill. App. 3d 220, 282 N.E.2d 469 (1972), an Illinois court recognized that to enhance a sentence because the sentencing judge believes that the defendant is guilty of prior crimes with which he was neither charged nor convicted amounts to imposition of punish-

arrest charges not resulting in conviction.³⁸⁹ Courts advance various reasons to support this practice. For example, some courts have

ment without proof beyond a reasonable doubt, without prosecution by grand jury indictment, and without according the defendant trial by jury. *Id.* at 229, 282 N.E.2d at 475. In the court's words, "Such procedure cannot, of course, be condoned." *Id.*; cf. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 241 (1957) (arrest without more may represent only the complainant's suspicion). Other courts have condemned the use of arrest records at sentencing while nonetheless upholding the specific sentence imposed as within the discretion of the sentencing judge. See, e.g., *Waters v. State*, 483 P.2d 199, 202-03 (Alaska 1971) (dictum); *People v. Bowlin*, 133 Ill. App. 2d 837, 842, 272 N.E.2d 282, 286 (1971); *State v. Green*, 116 N.J. Super. 515, 525, 283 A.2d 114, 119 (App. Div. 1971) (dictum), modified, 62 N.J. 547, 303 A.2d 312 (1973). *Commonwealth v. Shoemaker*, 226 Pa. Super. 203, 212-15, 313 A.2d 342, 347-48 (1973), condemned as error the sentencing judge's use of the rap sheet list of the defendant's arrests as showing criminal conduct, stating that such use "ignored the presumption of innocence and amounted to basing a sentence not simply on no evidence before the court, but on no evidence at all." The court affirmed the sentence, however, holding that there was insufficient ground to intrude upon the sentencing judge's discretion. *Id.*

³⁸⁹ See, e.g., *United States v. Atkins*, 480 F.2d 1223, 1224 (9th Cir. 1973) (sentencing court may consider evidence of other crimes); *United States v. Sweig*, 454 F.2d 181, 184 (2d Cir. 1972) (sentencing court may consider evidence of crimes of which defendant was acquitted, since acquittal does not establish conclusively the "untruth" of all the evidence); *Russel v. United States*, 402 F.2d 185 (D.C. Cir. 1968) (criminal record can be considered in setting bail).

Although this Article focuses on cases concerning use of prior arrest records, mention must be made of a parallel line of cases concerning the use of evidence of prior misconduct. Reliance upon such information generally has been upheld, but the cases make clear that *Townsend* places limits on the use which can be made of unsubstantiated information. See text accompanying notes 360-64 *supra*.

The law has always allowed judges passing sentence to consider information from a wide variety of sources and of varying degrees of completeness. The seminal case is *Williams v. New York*, 337 U.S. 241 (1949). There the trial court, deliberating whether to impose a sentence of life imprisonment or death, received information in the probation report referring to other, similar crimes of which Williams had not been convicted, though he had confessed to some of them. Williams asserted that receipt of such data denied due process because he was not allowed to confront or cross-examine those offering evidence against him. Rejecting his argument, the Court explained why sentencing is different from other parts of the criminal process:

A sentencing judge, however, is not confined to the narrow issue of guilt. His task within fixed statutory or constitutional limits is to determine the type and extent of punishment after the issue of guilt has been determined. Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics. And modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

337 U.S. at 247 (footnote omitted); cf. 18 U.S.C. § 3577 (1976) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.").

Even *Williams* has its limitations, however. In the years since *Townsend* and *Williams*, the courts have shown continuing sensitivity to the need to preserve the standards imposed by the former without unduly restricting the inquiry allowed by the latter. In *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972), this tension was explored. The trial court had received FBI reports of statements by an anonymous informer which, in effect, accused the defendant of far more serious crimes than those of which she had been convicted.

stressed that prior arrests can be used as indications of character, or of whether a person is law abiding.³⁹⁰ Others have noted that often charges do not result in conviction for reasons unrelated to the defendant's guilt or innocence.³⁹¹ The arguments supporting the use of

Prior to receiving this information, the judge had indicated that he would impose a minimum sentence. Citing the informer's statements, he imposed the maximum, but invited the defendant to submit mitigating information in a motion for reduction of sentence. *Id.* at 629.

The Ninth Circuit, though affirming that evidence of criminal conduct may be considered even though the defendant was never charged or convicted of it, *id.* at 633, reversed and remanded for resentencing:

We believe that other criminal conduct may properly be considered, even though the defendant was never charged with it or convicted of it. . . .

[But in this case,] what we have is a conviction at a trial providing all of the safeguards required by the Constitution, of an offense warranting, in the opinion of the trial judge, the minimum sentence of five years. This is followed by a determination, based on unsworn evidence detailing otherwise unverified statements of a faceless informer that would not even support a search warrant or an arrest, and without any of the constitutional safeguards, that Weston is probably guilty of additional and far more serious crimes, for which she is then given an additional sentence of fifteen years. . . . To us, there is something radically wrong with a system of justice that can produce such a result. . . .

[W]here a trial judge, in exercising his sentencing discretion, relies on evidence of prior convictions that is false, or mistakenly believes that the presentence report shows prior convictions when it does not, the defendant has been deprived of due process and the sentence must be vacated. *Townsend v. Burke*, 1948, 334 U.S. 736, 740-41, 68 S.Ct. 1252, 92 L.Ed. 1690; *United States v. Malcolm*, 2 Cir., 1970, 432 F.2d 809. . . .

Id. at 630-31. The Court was careful to distinguish the wide-ranging inquiry authorized by *Williams* from the indiscriminate use of unsubstantiated charges attacked by Weston. *Id.* at 633. Thus, the *Weston* court, pinpointing a *Townsend* violation in a situation that might appear to come under *Williams*, also focused by implication on one of the key problems presented by rap sheets containing inaccurate, incomplete, and inappropriate data. Courts using rap sheets for bail and sentence purposes frequently receive what amount only to lists of charges. Rap sheets do not contain indications of the underlying facts and circumstances of each arrest or whether the arrest was supported by probable cause. The unnamed complainants in each case occupy the position of the faceless informer referred to by *Weston*. Basing decisions on bare arrest charges contained in such rap sheets is similarly unconstitutional.

³⁹⁰ The court's statement during the *Tatum* trial is illustrative:

However, getting back to the bail situation, the Court can take into account that he has been arrested a number of times, to see whether we are dealing with a person who is generally law-abiding or who is forever getting involved with the law. Isn't that so?

He is therefore an irresponsible person who may take lightly his obligation to his peers.

Trial transcript at 767. Similarly, the court in *State v. Montoya*, 91 N.M. 425, 428, 575 P.2d 609, 612 (1978), noted that arrests not leading to convictions are "properly considered by the sentencing judge because they are part of defendant's pattern of conduct." In *Fernicola v. Keenan*, 136 N.J. Eq. 9, 10, 39 A.2d 851, 851 (1944), the court stated:

In every large community are men who have never been convicted of an indictable offense but whose associations and manner of life are such that the police feel reasonably assured that such a one, unless he turn over a new leaf, will eventually be guilty of a serious crime. If he be lawfully arrested and fingerprinted, the police are justified in keeping the prints for possible use in the future, even though no indictment is found.

³⁹¹ *United States v. Linn*, 513 F.2d 925, 928 (10th Cir.), cert. denied, 423 U.S. 836 (1975). In *Fernicola v. Keenan*, 136 N.J. Eq. 9, 39 A.2d 851 (1944), the court stated:

prior charges resulting in dismissal or acquittal all rest on the belief that the fact of arrest indicates the individual was guilty of some or all of the offenses with which he was charged. No matter how carefully or tactfully stated, criminal justice officials are inferring that the individual is guilty of a crime of which he was never convicted.³⁹²

If the inference is made, a number of anomalies arise which make the offense to due process clear. For example, suppose an individual is arrested and charged with robbery, assault, and possession of a weapon. While these charges are pending, they may not be used as evidence against him.³⁹³ They are evidence of nothing of legal significance.³⁹⁴ As one court stated: "It is not uncommon for entirely innocent persons to be indicted. It would be a gross injustice to permit the fact of such making of a charge to be used to the prejudice of the

[T]he police are justified in retaining such records, in certain cases, after an acquittal or a failure of the Grand Jury to indict. Sometimes a grand jury dismisses a charge because it seems trivial; sometimes the trial jury must acquit a guilty person because the evidence does not establish guilt beyond a reasonable doubt.

Id. at 10, 39 A.2d at 851. See also note 333 supra.

³⁹² Thus, for example, courts link the claim that arrest records are needed to permit identification to the observation that dismissals and acquittals merely prove that the prosecution could not prove guilt beyond a reasonable doubt, *United States v. Linn*, 513 F.2d 925, 928 (10th Cir.), cert. denied, 423 U.S. 836 (1975), without establishing the innocence of the accused, *United States v. Schnitzer*, 567 F.2d 536, 540 (2d Cir. 1977), cert. denied, 435 U.S. 907 (1978); see *Kowall v. United States*, 53 F.R.D. 211, 215 n.23 (W.D. Mich. 1971). Were it not for this inference of guilt, there would be no particular interest in retaining such records at all.

³⁹³ See *United States v. Pennix*, 313 F.2d 524, 528-31 (4th Cir. 1963); *Pearson v. United States*, 192 F.2d 681, 699 (6th Cir. 1951); *Coyne v. United States*, 246 F. 120, 121 (5th Cir. 1917).

³⁹⁴ The Fifth Circuit has explained the underlying policy reason for declining to permit a charge to be used as evidence in most forceful terms:

The fact that an unproven charge has been made against one has no logical tendency to prove that he has been guilty of any offense, or to impair the credibility of his testimony. An indictment is a mere accusation, and raises no presumption of guilt. On the contrary, the indicted person is presumed to be innocent until his guilt is established, by legal evidence beyond a reasonable doubt, in a court of competent jurisdiction. It does not seem to be fairly open to question that he is deprived of the benefit of this presumption by the admission against him of evidence of the fact that a charge, based upon *ex parte* evidence which, when combated on a trial, may turn out to be utterly untrustworthy, has been made against him.

Coyne v. United States, 246 F. 120, 121 (5th Cir. 1917) (cited with approval in *United States v. Pennix*, 313 F.2d 524, 529-30 (4th Cir. 1963)).

In *Michelson v. United States*, 335 U.S. 469 (1948), the Court approved one limited use of prior arrest information at trial. A character witness may be asked whether he is aware of a defendant's prior arrests. 335 U.S. at 479, 482. The *Michelson* majority was careful to point out, however, that the question is allowed not because it reveals anything about the defendant, his character or his actions, but only because it casts light upon the witness' ability accurately to testify about the defendant's reputation in the community:

Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty. Only

person against whom the unproven charge was made."³⁹⁵ Suppose also that all three charges are dismissed or that the defendant is acquitted of them. Suppose further that he is subsequently rearrested and charged, for example, with assault, and that the court gives weight to the prior charges in setting bail. It is difficult to see how the probative weight of such charges, fixed at zero while they are pending, is increased by the fact of dismissal or acquittal.³⁹⁶ Nonetheless,

a conviction, therefore, may be inquired about to undermine the trustworthiness of a witness.

....

The inquiry as to an arrest is permissible . . . because the prosecution has a right to test the qualifications of the witness to bespeak the community opinion. If one never heard the speculations and rumors in which even one's friends indulge upon his arrest, the jury may doubt whether he is capable of giving any very reliable conclusions as to his reputation.

335 U.S. at 482-83. *Michelson* also makes clear that such testimony may not be used by the jury to make inferences about the defendant's behavior or characteristics. *Id.* at 475-82; accord, *United States v. Evans*, 569 F.2d 209, 210 (4th Cir. 1978); *United States v. Watson*, 557 F.2d 365, 369 (7th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); *United States v. Edwards*, 549 F.2d 362, 366-69 (5th Cir.), cert. denied, 434 U.S. 828 (1977); *United States v. Evans*, 542 F.2d 805, 817 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States v. Wells*, 525 F.2d 974, 976-77 (5th Cir. 1976).

³⁹⁵ *Coyne v. United States*, 246 F. 120, 121 (5th Cir. 1917); see text accompanying notes 328-37 *supra* and note 397 *infra*.

³⁹⁶ It is, perhaps, even more difficult to see how prior dismissals or acquittals contribute anything properly cognizable in deciding the sole question presented upon a bail application: whether the individual may be expected to return when required by the court.

[T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.

Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.

Stack v. Boyle, 342 U.S. 1, 5 (1951) (citation omitted); see *People ex rel. Lobell v. McDonnell*, 296 N.Y. 109, 111, 71 N.E.2d 423, 425 (1947); American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Pre-Trial Release §§ 1.1, 1.2, 5.1(a) (1968). As was observed in *United States v. Allison*, 414 F.2d 407, 414 (9th Cir.), cert. denied, 396 U.S. 968 (1969), "a defendant's criminal record, of itself, is of little relevance in assessing the likelihood of flight where, as here, the prior offenses do not reflect a propensity to abscond."

Courts have, however, suggested that factors other than reappearance, such as the anticipated dangerousness of the defendant to the public, ought to be considered in setting bail. See, e.g., *United States v. Leathers*, 412 F.2d 169, 170-71 (D.C. Cir. 1969) (per curiam) (only in capital cases) (citing the Bail Reform Act, 18 U.S.C. § 3146(a) (1976)); *Nail v. Slayton*, 353 F. Supp. 1013, 1019-20 (W.D. Va. 1972); *State ex rel. Ghiz v. Johnson*, 155 W. Va. 186, 190-91, 183 S.E.2d 703, 705-06 (1971). Justice Jackson, sharply criticized this practice while sitting as Circuit Justice on an application for bail pending appeal of Smith Act convictions:

Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.

Williamson v. United States, 184 F.2d 280, 282-83 (2d Cir. 1950) (Jackson, Circuit J.).

it is clear that prior charges do, in fact, give rise to the "bad man" inference in the bail and sentencing stages.³⁹⁷ Given this inference, it is clear that dismissal and acquittal are of limited value to the accused if he is ever arrested again.³⁹⁸

In the sentencing context, the inference and its impact are, if anything, even clearer.³⁹⁹ Suppose a second and unrelated assault charge against a defendant results in a conviction, and he stands before the court for sentencing. Suppose also that the defendant has an accomplice, identical to him in every way except that the accomplice has no arrest record. The accomplice is given a one year prison term. The defendant, because of his prior arrest on similar charges, is given eighteen months. It is apparent, on these facts, that the true effect of the dismissal of the first arrest was to serve as the factual predicate for an inference drawn by the trial judge that the defendant was guilty of the prior charge, for which he is, in effect, now being given a six-month sentence. Needless to say, such a result could not be arrived at overtly. Nonetheless, it is achieved covertly when prior charges not resulting in conviction are given weight in sentencing.

It seems legitimate to inquire what the true value of a dismissal or acquittal is if the arrest and charge, standing alone, are given weight after a subsequent arrest. That the inference of guilt is rarely stated explicitly makes it no more acceptable, only more insidious. It is axiomatic that "the Due Process Clause of the Fourteenth Amendment does not permit a state to impose a penalty . . . upon a defendant whom the jury has not found guilty."⁴⁰⁰ The imposition of any form of punishment upon a person found not guilty "violates the most rudimentary concept of due process of law."⁴⁰¹ Yet that is the result

³⁹⁷ The "bad man" inference has been condemned by some courts. See *United States v. Fox*, 473 F.2d 131, 134-36 (D.C. Cir. 1972); *Hurst v. United States*, 337 F.2d 678, 680-81 (5th Cir. 1964), *aff'd* 370 F.2d 161 (5th Cir. 1967); text accompanying notes 328-37 *supra*.

³⁹⁸ The unreliability of inferences drawn from prior arrests resulting in acquittal or dismissal may also cause harm to a defendant if they are used at a probable cause hearing to establish a "reputation" for criminal conduct. See *Spinelli v. United States*, 393 U.S. 410, 414 (1969) (a generalized assertion of criminal reputation may not be considered at all on the issue of probable cause); *United States v. Smaldone*, 485 F.2d 1333, 1350 (10th Cir. 1973) (same). But see *United States v. Harris*, 403 U.S. 573, 582-83 (1971) (plurality opinion); *United States v. Canestri*, 518 F.2d 269, 272 (2d Cir. 1975).

³⁹⁹ Although judges have been granted wide discretion to impose a specific sentence within the statutory authorization, *Gore v. United States*, 357 U.S. 386, 393 (1958); *Williams v. New York*, 337 U.S. 241, 246 (1949), such discretion is not immune from review. The most stringent limit on the sentencing process is provided by the due process clause. *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion); *Williams v. New York*, 337 U.S. at 252 n.18.

⁴⁰⁰ *Giaccio v. Pennsylvania*, 382 U.S. 399, 405 (1966) (Fortas, J., concurring) (disallowing imposition of costs on an acquitted defendant imposed in the discretion of the jury on a finding of some evidence of wrongful conduct).

⁴⁰¹ *Id.* (Stewart, J., concurring).

achieved whenever an individual's liberty is curtailed, whether at the charging, bail, trial, sentencing, or parole stages of the criminal justice process, by reason of reference to prior arrests not resulting in conviction.

It is the unreliability of the inference of past guilt drawn from prior arrest charges which makes their use unconstitutional.⁴⁰² For example, when a defendant's sentence is extended because of this unreliable inference, he is deprived of liberty without due process of law. In view of the general lack of accuracy and completeness of criminal history information systems and the weight accorded their data throughout the criminal process, the continuing offense to due process from use of information that is of no better quality than that condemned in *Townsend v. Burke* is clear. As one court put it: "[C]ollection[s] of dismissed, abandoned or withdrawn arrest records are no more than gutter rumors when measured against any standards of constitutional fairness to an individual and, along with records resulting in an acquittal, are not entitled to any legitimate law enforcement credibility whatsoever."⁴⁰³

What remains, of course, is to devise solutions to the constitutional problems presented by criminal history information systems while giving due deference to legitimate criminal justice needs. Such solutions are set forth in the following section.

V

PROPOSED SOLUTIONS

Criminal history information systems are mired in substantial and worsening problems. Despite the dangers posed by rap sheets containing inaccurate, incomplete, ambiguous, and inappropriate information, attempts to regulate criminal history information systems have failed. Federal legislative proposals have lacked both concrete standards and effective enforcement mechanisms and thus would not have succeeded even if they had been enacted.⁴⁰⁴ Federal regulations have been promulgated,⁴⁰⁵ but they require only that systems be complete and accurate to "the maximum extent feasible,"⁴⁰⁶ an essen-

⁴⁰² See text accompanying notes 381-85 *supra*.

⁴⁰³ *United States v. Dooley*, 364 F. Supp. 75, 77 (E.D. Pa. 1973).

⁴⁰⁴ See text accompanying notes 139-82 *supra*.

⁴⁰⁵ 28 C.F.R. pt. 20 (1980); see text accompanying notes 183-95 *supra*.

⁴⁰⁶ 28 C.F.R. § 20.22(a) (1980). "Maximum extent feasible . . . means actions which can be taken to comply with the procedures set forth in the plan that do not require additional legislative authority or involve unreasonable cost or do not exceed existing technical ability." *Id.*

tially meaningless and unenforceable standard which, when combined with the persistent flouting of the regulations' deadlines, results in virtually no effective regulation.⁴⁰⁷ A hodgepodge of criminal history information systems is, therefore, allowed to flourish because of indifference to the impairments of liberty such systems cause.

The time has come to call a halt to the drift. Despite the failures of the past, reasonable and relatively inexpensive procedures can be designed to insure the collection, maintenance, and dissemination of complete, accurate, and appropriate records, thereby preventing unconstitutional deprivations of liberty. To this end, the authors suggest the enactment of federal legislation incorporating the following requirements: (A) No data concerning a newly arrested defendant may be entered in a rap sheet system until after he has been arraigned. If a defendant pleads guilty at arraignment, only the charges to which he pleaded and the sentence imposed may be entered in the system. If the charges are dismissed or withdrawn, no entry may be made. For cases that survive arraignment, only formal charge data should be entered. Arrest charge data should never be entered. (B) Computerized systems must be programmed to inquire periodically whether a case for which no disposition has been reported is still pending. If the case is still pending, the system may continue to list it. If a conviction has occurred, the conviction data must replace the charge data. If the case has been dismissed or the defendant acquitted, the entire case entry must be deleted. If no response to the inquiry is received, the system may not disseminate information concerning that case until its status is ascertained. (C) All information systems other than the central state repository must be programmed to delete from their records all information identifying an individual whose case has been disposed of unless, as with correction and parole agencies, he is still within the agency's jurisdiction. (D) Periodic audits comparing rap sheet data bases with court records must be conducted by independent auditors so that discrepancies can be identified and corrected. Each of these proposals is considered in detail below.

A. Postarraignment Data Entry

Problems of incompleteness and inaccuracy often result from the practice of entering arrest charges in criminal history information systems immediately following arrest. In New York, for example, the arresting officer transmits the defendant's fingerprints and the arrest charges to the Division of Criminal Justice Services. The new charges

⁴⁰⁷ See text accompanying notes 183-215 *supra*.

are added to the defendant's rap sheet, which is then sent back to the officer, the prosecutor and the court.⁴⁰⁸ This practice simultaneously insures that at least one further data entry (disposition) will be necessary and introduces information which in most cases should not be disseminated.⁴⁰⁹ Entering new arrest charges on rap sheets before arraignment is unnecessary, since all that is required is that the individual be identified and his *prior* record ascertained. Officials at arraignment are fully aware of the current arrest charges, and therefore need not obtain them from the defendant's rap sheet.

Waiting until after arraignment to enter new information in criminal history information systems would reduce the number of required data entries and help insure that only complete, accurate, and appropriate information is included in rap sheet systems. One data entry at most would be necessary for the many cases that are disposed of at arraignment.⁴¹⁰ If a case is dismissed at arraignment, no entry should be made. Implementation of this suggestion would eliminate a major source of inappropriately included data and would render many actions for expungement or sealing of records unnecessary.⁴¹¹ If a defendant pleads guilty to one or more charges, only the

⁴⁰⁸ See Deposition of William T. Bonacum at 4-9, *Tatum v. Rogers*, No. 75 Civ. 2782 (CBM) (S.D.N.Y., test. given Jan. 14, 1977).

⁴⁰⁹ In present systems, the charges designated by the arresting officer usually are not replaced on the rap sheet by the formal charges. In the National Survey of State Planning Agencies, app. C *infra*, none of the respondents reported that formal charges replace arrest charges. Five of 22 respondents stated that both arrest and formal charges are displayed. *Id.* question 2.

⁴¹⁰ See notes 246, 275-77 and accompanying text *supra*.

⁴¹¹ Many states have statutes requiring that certain records be either expunged (entirely removed from the record system) or sealed (retained in the system but with access restricted). The statutes differ in the classes of cases to which they apply and in whether relief is accorded automatically or must be sought by the defendant. Alabama and Iowa provide automatic expungement of all records of an arrest which does not result in a conviction. Ala. Code § 41-9-625 (1975); Iowa Code Ann. § 692.17 (West 1979). In Illinois, such relief must be requested. Ill. Ann. Stat. ch. 38, § 206-5 (Smith-Hurd Supp. 1950). In Florida, sealing or expungement of an arrest record not resulting in conviction may be obtained by motion, provided that there are no other charges related to the offense and that the defendant has no prior convictions. Fla. Stat. Ann. § 943.058 (West Supp. 1981). In Missouri and New York, termination of a prosecution with no conviction entitles the defendant to sealing of all records of the arrest and prosecution. Mo. Ann. Stat. § 610.105 (Vernon 1979); N.Y. Crim. Proc. Law § 160.50 (McKinney 1979 & Supp. 1980). In California, the same relief may be obtained by motion, but only if the judge believes the defendant to be innocent. Cal. Penal Code § 851.8 (West Supp. 1980). In Virginia, the defendant must file a petition requesting expungement. After a hearing, the court will order expungement if it finds that continued maintenance and possible dissemination of the arrest information could result in injustice. Va. Code § 19.2-392.2 (Supp. 1980). Utah permits sealing of prior *conviction* records, if good behavior is shown, while Nevada permits sealing if the defendant has not been subject to further arrest within a specified period of time. Utah Code Ann. § 77-18-2 (Supp. 1981); Nev. Rev. Stat. § 179.245 (1979). Several jurisdictions, including Arizona, the District of Columbia, Georgia, Louisiana, Maine, Mississippi, Nebraska, New Hampshire, New Mexico, North Dakota, Oklahoma, Vermont, the Virgin Islands, Wisconsin, and Wyoming do not provide for either sealing or expungement.

conviction charges should be entered,⁴¹² thus precluding inferences of guilt from arrest or formal charges that do not result in conviction. Pending charges need be entered only for those cases that continue beyond arraignment. Such entries should be the charges filed in an accusatory instrument, insuring that the listed charges are those with formal legal standing, rather than the charges designated by the arresting officer.⁴¹³

B. Automatic Inquiries on Pending Cases

In order to prevent the dissemination of and reliance on incomplete rap sheets, computerized systems should be programmed to inquire periodically whether cases in their files without dispositions remain pending or have been closed.⁴¹⁴ The interval between entry

To the extent that use of criminal history information violates federal constitutional rights, most states' laws fail to protect those rights. Moreover, since provisions permitting individual access to records for challenge and review are rarely used, Mitre Report, *supra* note 7, at 45, sealing or expungement provisions which place the burden upon the individual to seek relief are unlikely to be effective. Finally, the widespread assessment that many arrests reported on rap sheets without dispositions result in acquittals or dismissals, see text accompanying note 291 *supra*, suggests that neither sealing nor expungement statutes effectively remedy the problem of rap sheets that contain inappropriate data.

⁴¹² Appropriate, accurate, and complete disposition information ideally should be directly entered in a criminal history information system by court personnel using computer-linked keyboards as arraignments occur. The greater the number of steps of transmission and recordation that data must go through, the more likely it is that errors or omissions will occur. On-line reporting of court data thus should substantially improve not only the speed with which data become available, but also their accuracy.

⁴¹³ Information must continue to be entered prior to arraignment in two classes of cases: those in which the defendant is indicted prior to arrest and those in which the defendant is given a summons in lieu of arrest. In both instances, if the defendant is arrested prior to his arraignment on the pending charge, criminal justice officials should be made aware of *all* pending charges. Such entries, of course, must be either updated or deleted following arraignment.

⁴¹⁴ Variations on this approach which have been suggested by others impose overbroad limitations on criminal history information systems. For example, one commentator has urged: [L]egislation should provide that six months after the arrest notation is received, if there has been no further clarification, the data system will transmit an inquiry to the submitting agency. If no final disposition is received within two years of entry, the arrest record will be sealed to all users, subject to reopening if the arrest later results in conviction. DeWeese, Reforming Our "Record Prisons": A Proposal for the Federal Regulation of Crime Data Banks, 6 Rut.-Cam. L.J. 26, 76 (1974).

A number of problems are apparent with this suggestion. First, the six-month initial deadline for clarification may be unrealistic in many jurisdictions because of the speed with which cases are closed. Second, assuming the propriety of distributing data on pending cases, there is no logical reason to stop reporting that a case is pending merely because it has been pending for two years.

Another commentator has suggested that no nonconviction data be available for use in the criminal justice system at all. Uda, Privacy, Law Enforcement, and Public Interest: Computerized Criminal Records, 36 Mont. L. Rev. 60, 74 (1975). While in most cases, we would agree that "there is no general need for raw arrest information to be entered," *id.*, in some instances

of a formal charge in the data bank and the inquiry should be the normal time between charge and disposition in each jurisdiction. For example, in New York City, at least three-fifths of criminal cases are closed at arraignment, and nearly three-quarters are closed within ninety days of arraignment.⁴¹⁵ If the inquiry interval were set at ninety days after arraignment for all New York City cases, it would insure that by the time of the first inquiry in a particular case, the chances that a disposition had occurred would be nearly three in four. A ninety-day inquiry interval would help to ensure that approximately three-quarters of the cases in New York City would have dispositions reported not later than ninety days from the date of arrest.

If inquiry finds that a case is still pending, legitimate uses for the charge data require that the case continue to be listed. However, systems must be programmed to follow up the initial inquiry with periodic inquiries until a disposition occurs and is recorded. If a conviction occurs, conviction charges should replace the formal charges. If the case ends in dismissal or acquittal, the entire case entry should be deleted from the system. If no response to an inquiry is received, the case should not be listed again until its status can be ascertained.

This approach would insure more timely disposition reporting and, at the same time, place the burden of collecting data upon central repositories, where it belongs.⁴¹⁶ Finally, the system's refusal to report cases when responses to inquiries are not received would provide a strong incentive to officials who use criminal history information to cooperate in providing dispositions.

C. Purging Systems Other than the Central Repository of Identifying Data

The number of systems now capable of generating rap sheets exacerbate the problems caused by the use of defective and inappropriate data. Police departments,⁴¹⁷ district attorneys' offices,⁴¹⁸ court

pending case data are appropriately included on rap sheets, see note 413 *supra*. Moreover, the choice is not necessarily between raw arrest data and conviction data. Formal charges, a step beyond the arrest, may be entered.

⁴¹⁵ See note 340 *supra*; Interview with Ivar Goldart, Assistant Attorney-in-Charge for Training and Management of the Criminal Defense Division of the Legal Aid Society (Aug. 14, 1981).

⁴¹⁶ See note 42 *supra*.

⁴¹⁷ See, e.g., Aldrich & Mahan, *East Valley Information System (EVIS)*, in 1974 Symposium, *supra* note 4, at 53, 60; Rodriguez, *Current Operational Information System of the Dallas Police Department*, in 1974 Symposium, *supra* note 4, at 67, 67; Coundit, *supra* note 186, at 72; Feder, *supra* note 186, at 465; Miller, *supra* note 186, at 81-82, 85.

⁴¹⁸ See, e.g., Merrill, *supra* note 135, at 232; Rogers, *supra* note 186, at 402-03.

systems,⁴¹⁹ probation departments, and correction departments⁴²⁰ all have systems which enable them to produce their own rap sheets. This proliferation of systems makes it difficult to limit the dissemination and use of criminal history information.

A central repository that merely collects, stores, and disseminates criminal history information does not itself make decisions affecting an individual's liberty. Thus, improper use of defective or inappropriate data can be controlled by prohibiting the repository from disseminating them. That prohibition on dissemination would be ineffective, however, if those who do make decisions affecting the liberty of arrestees continue to rely upon defective data stored in their own files. Therefore, decisionmaking agencies must be prohibited from maintaining independent computerized criminal history information.

It is, of course, appropriate for criminal justice agencies other than the central repository to monitor an individual's progress through that stage of the process with which they are concerned. There is also a legitimate need for such agencies to use the sophisticated technology available to provide statistics and management information. Once an individual has passed through the system, however, these agencies no longer need to retain criminal history information linked to that individual because his rap sheet can be obtained easily from the central repository. Arrest counts, charge decisions, disposition rates, and offender statistics may be gathered without data identifying specific individuals who have completed their journey through the system. Therefore, upon termination of a case, criminal justice agencies should delete from their computerized files information which identifies individuals. Such a requirement would insure effective regulation of dissemination and use of criminal history information and protection of individuals' rights without disturbing the statistical and management uses of OBTS systems or interfering with the ability of criminal justice agencies to use rap sheets to make decisions.

D. Audits

Agencies should hire independent auditors to conduct regular audits of criminal history information systems. These audits should include verification of rap sheet entries by comparing them with court

⁴¹⁹ See, e.g., Kleps & McKay, *supra* note 186, at 120; Kreindel & Moreschi, *supra* note 186, at 107.

⁴²⁰ See, e.g., Chagin, *Design and Implementation of a Correction Information System*, in 1972 Symposium, *supra* note 4, at 287, 290; Kolodney & Hamilton, *supra* note 186, at 134-35.

records; internal consistency checks are insufficient. Conducting audits is the only way to monitor the performance of criminal history information systems and the people who maintain these systems. The oft-repeated excuse of state planning agencies that they do not have the resources to conduct proper audits⁴²¹ rings hollow in light of the huge amounts of money pouring into the development of computerized systems.⁴²²

CONCLUSION

If the proposals outlined above are incorporated into federal legislation applicable to criminal justice information systems nationwide, many problems which currently exist would be remedied. Although some changes in current practice will be necessary, they are not major and do not involve substantial expenditures of funds. Given the harm and injustice caused by present practices, the proposed changes are clearly warranted.

The problems of computerized criminal history information systems have been presented and solutions have been proposed. Daily, thousands of individuals are condemned to spend more time in jail than they should because rap sheets fail to contain only complete, accurate, and appropriate information. Violations of constitutional rights of this degree cannot be countenanced. The criminal justice system must do better. It is hoped that the foregoing assessment of the magnitude and impact of the problems will help persuade criminal justice officials, legislators, and the public at large to take corrective action.

⁴²¹ See Mitre Report, *supra* note 7, at 73-77.

⁴²² See note 154 and accompanying text *supra*. Audits are not terribly expensive. For example, the *Tatum* audit cost approximately \$12,000, excluding the authors' time.

APPENDIX A

National Survey of Prosecutors

Questionnaire and Tabulated Responses

Please check (____) the answer after each question which best describes the practice of your office or the circumstances relating to the criminal history information system in your jurisdiction.

1. Are rap sheet data used in making prosecution decisions? YES 1(144) 97.3% NO 2(4) 2.7%

2. If the answer to question #1 was yes, are such data used in making bail recommendations? YES 1(132) 90.4% NO 2(14) 9.6%

3. If the answer to question #1 was yes, are such data used in making charge level decisions? YES 1(88) 60.7% NO 2(57) 39.3%

4. If the answer to question #1 was yes, are such data used in making sentence recommendation decisions? YES 1(139) 96.5% NO 2(5) 3.5%

5. When rap sheet data are referred to in making bail recommendation decisions, do you use arrest data, disposition data or both? ARREST 1(2) 1.5% DISPOSITION 2(40) 29.4% BOTH 3(94) 69.1%

6. When rap sheet data are referred to in making charge level decisions, do you use arrest data, disposition data or both? ARREST 1(1) 1.0% DISPOSITION 2(34) 33.3% BOTH 3(67) 65.7%

7. When rap sheet data are referred to in making sentence recommendation decisions, do you use arrest data, disposition data or both? ARREST 1(2) 1.4% DISPOSITION 2(76) 53.5% BOTH 3(64) 45.1%

8. Approximately what percentage of rap sheet arrest entries contain no corresponding disposition information?

0%	0(4)	2.7%	60%	6(19)	13.0%
10%	1(5)	3.4%	70%	7(7)	4.8%
20%	2(19)	13.0%	80%	8(6)	4.1%
30%	3(25)	17.1%	90%	9(2)	1.4%
40%	4(16)	11.0%	100%	10(0)	0%
50%	5(43)	29.5%			

9. Are entries of disposition data missing more often with older or newer cases? OLDER 1(80) 54.8% NEWER 2(19) 13.0% NO DIFFERENCE 3(47) 32.2%

10. What is the average time between the disposition of a case and the appearance of that disposition on the defendant's rap sheet? NO APPRECIABLE DELAY 1(30) 29.4% 3 MONTHS 2(31) 30.4% 6 MONTHS 3(31) 30.4% 1 YEAR 4(5) 4.9% MORE THAN ONE YEAR 5(5) 4.9%

11. Are missing dispositions more often found to be dismissals or acquittals, or are they more often found to be convictions (whether by plea or after trial) when the court records of such cases are consulted? DISMISSAL OR ACQUITTAL 1(44) 32.1% CONVICTION 2(8) 5.8% NO DIFFERENCE 3(85) 62.0%

12. Approximately what percentage of entries not showing disposition data have resulted in a conviction?

0%	0(4)	4.0%	60%	6(4)	4.0%
10%	1(15)	14.9%	70%	7(5)	5.0%
20%	2(10)	9.9%	80%	8(2)	2.0%
30%	3(17)	16.8%	90%	9(0)	0%
40%	4(10)	9.9%	100%	10(0)	0%
50%	5(34)	33.7%			

13. Are conviction charges sometimes missing from the disposition section when other disposition data are shown? YES 1(111) 80.4% NO 2(27) 19.6%

14. Are sentences imposed sometimes missing from the disposition section when other disposition data are shown? YES 1(110) 77.5% NO 2(32) 22.5%

15. Are corrections data sometimes missing from the disposition section when other disposition data are shown? YES 1(115) 85.8% NO 2(19) 14.2%

16. If the answer to questions #13, 14 or 15 was yes, approximately what total percentage of case entries are missing at least one of those data elements?

0%	0(1)	.9%	60%	6(11)	9.7%
10%	1(7)	6.2%	70%	7(7)	6.2%
20%	2(11)	9.7%	80%	8(5)	4.4%
30%	3(28)	24.8%	90%	9(4)	3.5%
40%	4(7)	6.2%	100%	10(2)	1.8%
50%	5(30)	26.5%			

17. Are entries on rap sheets ever ambiguously listed? YES 1(127)
90.7% NO 2(13) 9.3%

18. If the answer to question #17 was yes, approximately what percentage of dispositions are so listed?

0%	0(1)	4.9%	60%	6(6)	5.3%
10%	1(23)	20.2%	70%	7(1)	.9%
20%	2(27)	23.7%	80%	8(1)	.9%
30%	3(30)	26.3%	90%	9(2)	1.8%
40%	4(13)	11.4%	100%	10(0)	0%
50%	5(10)	8.8%			

19. When a prosecution decision is to be based in part upon an individual's prior criminal history, are disposition data not appearing on the rap sheet sought out before the decision is made? YES 1(115)
83.3% NO 2(23) 16.7%

20. If the answer to question #19 was no, are arrest data used in place of such missing disposition data, or is the arrest event disregarded? ARREST DATA USED 1(22) 46.8% EVENT DISREGARDED 2(25) 53.2%

21. Does your office have special prosecution programs either for individuals with particular criminal *records* or for individuals charged with particular types of *offenses*? RECORDS 1(10) 6.8% OFFENSES 2(6) 4.1% BOTH 3(59) 40.4% NEITHER 4(71) 48.6%

22. Are cases more vigorously prosecuted when the defendant's rap sheet shows a history of prior convictions than they are if the rap sheet shows no prior convictions? YES 1(124) 85.5% NO 2(21) 14.5%

23. Are cases more vigorously prosecuted when the defendant's rap sheet shows a history of prior arrests but does not show the dispositions than they are if the rap sheet shows no prior arrests? YES 1(82) 57.3% NO 2(61) 42.7%

24. Are cases more vigorously prosecuted when the defendant's rap sheet shows a history of prior arrests resulting in dismissal or acquittal than they are if the rap sheet shows no prior arrests? YES 1(57) 41.3% NO 2(81) 58.7%

25. Do sentencing recommendations made by your office tend to be affected by the *number* of prior arrests resulting in conviction or by

the *severity* of prior convictions? NUMBER 1(3) 2.1% SE-
 VERITY 2(35) 24.3% BOTH 3(103) 71.5% NEITHER
 4(3) 2.1%

26. Do sentencing recommendations made by your office tend to be affected by the *number* of prior arrests not resulting in conviction or by the *severity* of prior charges not resulting in conviction? NUM-
 BER 1(5) 3.5% SEVERITY 2(22) 15.4% BOTH 3(47)
 32.9% NEITHER 4(69) 48.3%

27. In approximately what percentage of cases is the level of the most serious conviction offense the same as the level of the most serious charge?

0%	0(1)	.9%	60%	6(7)	6.1%
10%	1(5)	4.3%	70%	7(8)	7.0%
20%	2(8)	7.0%	80%	8(14)	12.2%
30%	3(16)	13.9%	90%	9(10)	8.7%
40%	4(7)	6.1%	100%	10(2)	1.7%
50%	5(37)	32.2%			

28. At what point in the criminal justice process do rap sheets from your jurisdiction normally become available to your office?
 PRIOR TO ARRAIGNMENT 1(72) 50.0% AFTER AR-
 RAIGNMENT BUT PRIOR TO TRIAL 2(68) 47.2% AFTER
 TRIAL 3(4) 2.8%

29. If your state has a statute requiring sealing or purging of criminal history information from a defendant's rap sheet upon the occurrence of a specified disposition, in your experience how well are the statutory requirements complied with? SUBSTANTIALLY TO-
 TAL COMPLIANCE 1(67) 71.3% MEDIUM COMPLIANCE
 2(18) 19.1% MINIMAL COMPLIANCE 3(9) 9.6%

Please feel free to use the space below to comment upon the criminal history information system in your jurisdiction or upon the use of rap sheet data in your office.

APPENDIX B

National Survey of Defense Agencies

Questionnaire and Tabulated Responses

Please check (____) the answer after each question which best describes the practice of your office or the circumstances relating to the criminal history information system in your jurisdiction.

1. Are rap sheet data used in making prosecution decisions? YES 1(150) 98.0% NO 2(3) 2.0%

2. If the answer to question #1 was yes, are such data used in making bail recommendations? YES 1(143) 94.1% NO 2(9) 5.9%

3. If the answer to question #1 was yes, are such data used in making charge level decisions? YES 1(118) 84.3% NO 2(22) 15.7%

4. If the answer to question #1 was yes, are such data used in making sentence recommendation decisions? YES 1(145) 95.4% NO 2(7) 4.6%

5. Do the prosecution's bail recommendations seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted? YES 1(120) 81.1% NO 2(28) 18.9%

6. Do the prosecution's charge level decisions seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted? YES 1(107) 73.8% NO 2(38) 26.2%

7. Do the prosecution's sentence recommendations seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted? YES 1(115) 76.2% NO 2(36) 23.8%

8. Do the court's bail decisions seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted? YES 1(103) 69.6% NO 2(45) 30.4%

9. Do the court's sentence decisions seem to be affected by the presence of one or more arrest entries on a defendant's rap sheet where no conviction resulted? YES 1(107) 70.9% NO 2(44) 29.1%

10. Approximately what percentage of rap sheet arrest entries contain no corresponding disposition information?

0%	0(2)	1.4%	60%	6(11)	7.7%
10%	1(10)	7.0%	70%	7(10)	7.0%
20%	2(10)	7.0%	80%	8(2)	1.4%
30%	3(23)	16.1%	90%	9(2)	1.4%
40%	4(25)	17.5%	100%	10(0)	0%
50%	5(48)	33.6%			

11. Are entries of disposition data missing more often with older or newer cases? OLDER 1(53) 35.8% NEWER 2(17) 11.5% NO DIFFERENCE 3(78) 52.7%

12. What is the average time between the disposition of a case and the appearance of that disposition on the defendant's rap sheet? NO APPRECIABLE DELAY 1(24) 25.8% 3 MONTHS 2(30) 32.3% 6 MONTHS 3(23) 24.7% 1 YEAR 4(8) 8.6% MORE THAN ONE YEAR 5(8) 8.6%

13. Are missing dispositions more often found to be dismissals or acquittals, or are they more often found to be convictions (whether by plea or after trial) when the court records of such cases are consulted? DISMISSAL OR ACQUITTAL 1(84) 64.1% CONVICTION 2(0) 0% NO DIFFERENCE 3(47) 35.9%

14. Approximately what percentage of entries not showing disposition data have resulted in a conviction?

0%	0(11)	11.1%	60%	6(2)	2.0%
10%	1(22)	22.2%	70%	7(2)	2.0%
20%	2(22)	22.2%	80%	8(1)	1.0%
30%	3(13)	13.1%	90%	9(1)	1.0%
40%	4(11)	11.1%	100%	10(0)	0%
50%	5(14)	14.1%			

15. Are conviction charges sometimes missing from the disposition section when other disposition data are shown? YES 1(94) 70.7% NO 2(39) 29.3%

16. Are sentences imposed sometimes missing from the disposition section when other disposition data are shown? YES 1(113) 79.6% NO 2(29) 20.4%

17. Are corrections data sometimes missing from the disposition section when other disposition data are shown? YES 1(113) 86.9% NO 2(17) 13.1%

18. If the answer to questions #15, 16 or 17 was yes, approximately what total percentage of case entries are missing at least one of those data elements?

0%	0(0)	0%	60%	6(9)	8.6%
10%	1(9)	8.6%	70%	7(8)	7.6%
20%	2(10)	9.5%	80%	8(9)	8.6%
30%	3(20)	19.0%	90%	9(5)	4.8%
40%	4(9)	8.6%	100%	10(4)	3.8%
50%	5(22)	21.0%			

19. Are entries on rap sheets ever ambiguously listed? YES 1(125) 89.3% NO 2(15) 10.7%

20. If the answer to question #19 was yes, approximately what percentage of dispositions are so listed?

0%	0(1)	.8%	60%	6(3)	2.5%
10%	1(16)	13.4%	70%	7(6)	5.0%
20%	2(18)	15.1%	80%	8(4)	3.4%
30%	3(33)	27.7%	90%	9(0)	0%
40%	4(14)	11.8%	100%	10(0)	0%
50%	5(24)	20.2%			

21. In approximately what percentage of cases is the level of the most serious conviction offense the same as the level of the most serious charge?

0%	0(0)	0%	60%	6(10)	9.1%
10%	1(15)	13.6%	70%	7(9)	8.2%
20%	2(16)	14.5%	80%	8(4)	3.6%
30%	3(17)	15.5%	90%	9(3)	2.7%
40%	4(11)	10.0%	100%	10(0)	0%
50%	5(25)	22.7%			

22. At what point in the criminal justice process do rap sheets from your jurisdiction normally become available to your office?
 PRIOR TO ARRAIGNMENT 1(41) 27.9% AFTER ARRAIGNMENT BUT PRIOR TO TRIAL 2(100) 68.0% AFTER TRIAL 3(6) 4.1%

23. If rap sheets are available to you prior to bail being considered at a defendant's initial arraignment, are you able to investigate his prior criminal history to supply missing or incompletely listed data on the rap sheet prior to making your bail application? YES 1(47) 37.3% NO 2(79) 62.7%

24. If the answer to question #23 is no, are you able subsequently to investigate to supply such missing data for purposes of a bail reduction application? YES 1(65) 73.9% NO 2(23) 26.1%

25. Approximately how many days will normally pass between the original setting of bail and a bail reduction hearing?

1	(11)	9.2%	6	(1)	.8%
2	(16)	13.3%	7	(28)	23.3%
3	(15)	12.5%	8	(3)	2.5%
4	(8)	6.7%	9	(1)	.8%
5	(19)	15.8%	10	(15)	12.5%
			More 11	(3)	2.5%

If "More," approximately how many? _____

26. If your state has a statute requiring sealing or purging of criminal history information from a defendant's rap sheet upon the occurrence of a specified disposition, in your experience how well are the statutory requirements complied with? SUBSTANTIALLY TOTAL COMPLIANCE 1(18) 17.3% MEDIUM COMPLIANCE 2(45) 43.3% MINIMAL COMPLIANCE 3(41) 39.4%

Please feel free to use the space below to comment upon the criminal history information system in your jurisdiction or upon the use of rap sheet data in your office.

APPENDIX C

National Survey of State Planning Agencies

Questionnaire and Tabulated Responses

Please check (____) the answer after each question which best describes the criminal history information system in your jurisdiction.

1. Do rap sheets in your jurisdiction have a section listing the charges lodged against the defendant for each arrest event? YES 1(21) 95.5% NO 2(1) 4.5%

2. If the answer to question #1 was yes, are the charges listed those designated by the arresting officer, those contained in the accusatory instrument filed by the prosecutor or both? ARRESTING OFFICER 1(16) 76.2% ACCUSATORY INSTRUMENT 2(0) 0% BOTH 3(5) 23.8%

3. If the answer to question #1 was yes, is the penal code section number one of the data elements included in the charge section? YES 1(13) 61.9% NO 2(8) 38.1%

4. If the answer to question #1 was yes, is a description of each charge one of the data elements included in that section? (E.g. "Robbery in the first degree") YES 1(18) 85.7% NO 2(3) 14.3%

5. Do rap sheets in your jurisdiction have a section listing the disposition of charges lodged against the defendant for each arrest event? YES 1(20) 95.2% NO 2(1) 4.8%

6. If the answer to question #5 is yes, is the disposition of each charge separately noted in the disposition section? YES 1(21) 100% NO 2(0) 0%

7. If the answer to question #5 was yes, is the penal code section number one of the data elements included in the disposition section? YES 1(9) 45.0% NO 2(11) 55.0%

8. If the answer to question #5 was yes, is a description of each conviction offense one of the data elements included in the disposition section? (E.g. "Robbery in the first degree") YES 1(15) 75.0% NO 2(5) 25.0%

9. If the answer to question #5 was yes, is the sentence imposed one of the data elements included in the disposition section? YES 1(20) 95.2% NO 2(1) 4.8%

10. If the answer to question #5 was yes, are correction data among the data elements included in the disposition section? YES 1(17) 81.0% NO 2(4) 19.0%

11. If the answer to question #5 was yes, is dismissal or acquittal one of the data elements included in the disposition section? YES 1(19) 90.5% NO 2(2) 9.5%

12. If the answer to question #5 was yes, is the result of an appeal, when one is taken, one of the data elements included in the disposition section? YES 1(14) 66.7% NO 2(7) 33.3%

13. Where a conviction is entered of an offense of lesser degree than the original charges, is it your practice to replace the original charges with the conviction offense, or are both displayed? REPLACED 1(1) 4.5% BOTH DISPLAYED 2(21) 95.5%

14. Approximately what percentage of rap sheet arrest entries contain no corresponding disposition information?

0%	0(0)	0%	60%	6(3)	14.3%
10%	1(4)	19.0%	70%	7(2)	9.5%
20%	2(3)	14.3%	80%	8(1)	4.8%
30%	3(4)	19.0%	90%	9(0)	0%
40%	4(2)	9.5%	100%	10(0)	0%
50%	5(2)	9.5%			

15. Do rap sheet case entries ever contain some, but not all, of the disposition information called for? YES 1(20) 90.9% NO 2(2) 9.1%

16. Are conviction charges sometimes missing from the disposition section when other disposition data are shown? YES 1(14) 63.6% NO 2(8) 36.4%

17. Are sentences imposed sometimes missing from the disposition section when other disposition data are shown? YES 1(11) 50.0% NO 2(11) 50.0%

18. Are corrections data sometimes missing from the disposition section when other disposition data are shown? YES 1(16) 76.2% NO 2(5) 23.8%

19. If the answer to questions #16, 17 or 18 was yes, approximately what total percentage of case entries are missing at least one of those data elements?

0 %	0(1)	7.1 %	60 %	6(1)	7.1 %
10 %	1(4)	28.6 %	70 %	7(0)	0 %
20 %	2(1)	7.1 %	80 %	8(1)	7.1 %
30 %	3(3)	21.4 %	90 %	9(2)	14.3 %
40 %	4(1)	7.1 %	100 %	10(0)	0 %
50 %	5(0)	0 %			

20. Are entries on rap sheets ever ambiguously listed? YES 1(8)
38.1% NO 2(13) 61.9%

21. If the answer to question #20 was yes, approximately what percentage of dispositions are so listed?

0 %	0(1)	11.1 %	60 %	6(0)	0 %
10 %	1(5)	55.6 %	70 %	7(0)	0 %
20 %	2(0)	0 %	80 %	8(0)	0 %
30 %	3(1)	11.1 %	90 %	9(0)	0 %
40 %	4(1)	11.1 %	100 %	10(0)	0 %
50 %	5(1)	11.1 %			

22. Are entries of disposition data missing more often with older or newer cases? OLDER 1(18) 81.8% NEWER 2(1)
4.5% NO DIFFERENCE 3(3) 13.6%

23. What is the average time between the disposition of a case and the appearance of that disposition on the defendant's rap sheet? NO APPRECIABLE DELAY 1(7) 35.0% 3 MONTHS 2(11) 55.0% 6 MONTHS 3(1) 5.0% 1 YEAR 4(1) 5.0% MORE THAN ONE YEAR 5(0) 0%

24. In approximately what percentage of cases is the level of the most serious conviction offense the same as the level of the most serious offense charged?

0 %	0(0)	0 %	60 %	6(1)	7.1 %
10 %	1(0)	0 %	70 %	7(1)	7.1 %
20 %	2(1)	7.1 %	80 %	8(2)	14.3 %
30 %	3(1)	7.1 %	90 %	9(3)	21.4 %
40 %	4(3)	21.4 %	100 %	10(0)	0 %
50 %	5(2)	14.3 %			

25. Are missing dispositions more often found to be dismissals or acquittals, or are they more often found to be convictions (whether by plea or after trial) when the court records of such cases are consulted?

DISMISSAL OR ACQUITTAL 1(6) 33.3% CONVICTION
 2(4) 22.2% NO DIFFERENCE 3(8) 44.4%

26. Approximately what percentage of entries not showing disposition data have resulted in a conviction?

0%	0(2)	18.2%	60%	6(1)	9.1%
10%	1(0)	0%	70%	7(1)	9.1%
20%	2(2)	18.2%	80%	8(1)	9.1%
30%	3(3)	27.3%	90%	9(0)	0%
40%	4(1)	9.1%	100%	10(0)	0%
50%	5(0)	0%			

27. Does your agency conduct annual audits to determine the level of completeness and accuracy of data in the criminal history information system? YES 1(12) 54.5% NO 2(10) 45.5%

28. If the answer to question #27 is yes, do such audits include internal data entry consistency checks, comparison of rap sheet entries with court records or both? INTERNAL CONSISTENCY CHECKS 1(6) 50.0% COMPARISON WITH COURT RECORDS 2(1) 8.3% BOTH 3(5) 41.7%

29. Does your agency collect disposition data directly or does it depend upon outside agencies in your state to submit disposition data for inclusion on an individual's rap sheet? COLLECTED BY THIS AGENCY 1(2) 9.1% SUBMITTED BY OUTSIDE AGENCIES 2(13) 59.1% BOTH 3(7) 31.8%

30. If the answer to question #29 was "Submitted by Outside Agencies" or "Both," does your agency have available a statutory or regulatory procedure to compel submission of such data by the outside agencies? YES 1(17) 85.0% NO 2(3) 15.0%

31. If the answer to question #30 was yes, does your agency use such procedure to compel submission of disposition information? NEVER 1(6) 40.0% OCCASIONALLY 2(8) 53.3% FREQUENTLY 3(1) 6.7%

32. On approximately how many individuals are criminal history records now maintained by your agency?

0- 100,000	1(3)	13.6%
100,000- 500,000	2(11)	50.0
500,000-1,000,000	3(2)	9.1
1,000,000-2,000,000	4(4)	18.2
2,000,000-3,000,000	5(2)	9.1%
More than 3,000,000	6(0)	0%

If the answer to this question is "More than 3,000,000," please indicate approximately how many such records are maintained by your agency. _____

33. If your state has a statute requiring sealing or purging of criminal history information from a defendant's rap sheet upon the occurrence of a specified disposition, in your experience how well are the statutory requirements complied with? SUBSTANTIALLY TOTAL COMPLIANCE 1(14) 93.3% MEDIUM COMPLIANCE 2(1) 6.7% MINIMAL COMPLIANCE 3(0) 0%

APPENDIX D

Arraignment Study Data Sheet

NYSID # (Omit letter)
1-7 _____

Attempts
9 = Old PL 6 = Social Services Law

8-11/1000

ITEMS IN FOLDER

12-17 Date of Birth
Mo. _____ Da. _____ Yr. _____
18 Race _____ 1 = white 2 = black (Not H.) 4 = other 5 = W/Hisp. 6 = B/Hisp.
19 Sex _____ 1 = male 2 = female

12 _____ Affidavit of non-PO complainant 1 = signed 2 = unsigned 3 = absent
13 _____ Affidavit of PO complainant 1 = signed 2 = unsigned 3 = absent
14 _____ Defendant's narcotics use 1 = CR1 form by PO present 2 = slip saying "no use" present 3 + neither present
15 _____ ROR 1 = not recommended 2 = recommended, unverified info. 3 = recommended, verified info.

Bench warrants for defendant
20 _____ 1 = warrant outstanding
21 _____ 1 = ever was warrant
22-23 _____ # NYS arrest dates
24-25 _____ # NYS dates w/o disp.
26-27 _____ # Non-NYS arrest dates
28-29 _____ # Different names
30-31 _____ # Different addresses

FORMAL CHARGES, CURRENT CASE
(List highest level codes first)

Law Penal Law § Level

ARREST CHARGES, CURRENT CASE
(List highest level codes first)
Law Penal Law § Level
High chg.
32-38 _____
2nd chg.
39-45 _____
3rd chg.
46-52 _____
4th chg.
53-59 _____
5th chg.
60-66 _____
6th chg.
67-73 _____
7th chg.
74-80 _____

High chg.
16-22 _____
2nd chg.
23-29 _____
3rd chg.
30-36 _____
4th chg.
37-43 _____
5th chg.
44-50 _____
6th chg.
51-57 _____
7th chg.
58-64 _____

65-66 _____ Atty. name _____ (print)
67-68 _____ Judge name _____ (print)

Law Code Level Code
1 = PL 1 = A Fel. 6 = A Misd.
2 = VTL 2 = B Fel. 7 = B Misd.
3 = PHL 3 = C Fel. 8 = Uncl.
4 = AC 4 = D Fel. Misd.
5 = PL 5 = E Fel. 9 = Viol.

CODE IF PRESENT IN COURTROOM

69 _____ 1 = Civilian complainant present
70 _____ 1 = PO complainant present

71 _____ 1 = Defendant's family present
 72 _____ 1 = Pre-arraignment

DATE OF ARREST 73-78
 Mo _____ Da _____ Yr _____

79-80/Blank

ATTORNEY'S EVALUATION OF IMPACT OF
 7 FACTORS ON JUDGE'S DECISION

7 factors from CPL § 510.30	Cannot gauge	Very helpful	Helpful	No effect	Harmful	Very harmful	
Character, reputation, habits, mental condition							12
Employment and financial resources							13
Family ties; length of residence in community							14
Criminal record-reference to convictions							15
Criminal record-reference to sheet							16
Record in responding to court appearances							17
Weight of evidence and probability of conviction							18
Sentence which may be imposed; level of charge							19
	0	1	2	3	4	5	

DISPOSITION TODAY IN ARRAIGNMENT PART

- 20-21 _____ 01 = Adjourned
 02 = ACD
 03 = Mental examination (CPL Art. 730)
 04 = Narcotics examination (CPL Art. 81)
 05 = Partial dismissal; other charges adjourned
 06 = All charges dismissed
 07 = Plea guilty to all charges
 08 = Plea guilty to charge(s) below to cover all charges
 09 = Case not reached for arraignment

PLEA GUILTY TO:

	Law	Penal Law §	Level
22-28	_____	_____	_____
29-35	_____	_____	_____
36-41	_____	BAIL recommended by DA in §	
42-47	_____	BAIL (BOND) set by Judge in §	

48-53 _____ BAIL (CASH) set by Judge in \$

54-59 _____ FINE IN \$ 60 _____ 1 = REMAND (No bail)
SENTENCE PROBATION
Mo. Da.

61-64 _____ 65 _____ 1 = 1 year
3 = 3 years

66 _____ 1 = Conditional discharge 67 _____ 1 = Unconditional discharge
72-80/BLANK

68 _____ 1 = DAT
69 _____ 1 = Alternative Sentence
70 _____ 1 = Time Served
71 _____ 1 = Probation Registrant

This page for arrest # _____
(02, 03, etc.)

1-7 NYSID# (omit letter) _____

8/4 9-10 _____ Arrest # 11/1

12-13 _____ County of arrest

14-19 Date of arrest Mo. _____ Da. _____ Yr. _____

ARREST CHARGES, THIS ARREST
(List highest level codes first)

	Law	Penal Law §	Level	3rd chg. 26-32	_____	_____	_____
High chg. 20-26	_____	_____	_____	4th chg. 33-39	_____	_____	_____
2nd chg. 27-33	_____	_____	_____	5th chg. 40-46	_____	_____	_____
3rd chg. 34-40	_____	_____	_____	6th chg. 47-53	_____	_____	_____
4th chg. 41-47	_____	_____	_____	7th chg. 54-60	_____	_____	_____
5th chg. 48-54	_____	_____	_____	Docket #			
6th chg. 55-61	_____	_____	_____	County + court:			
7th chg. 62-68	_____	_____	_____	SOURCE OF DISPOSITION INFORMATION			
8th chg. 69-75	_____	_____	_____	61 _____			

DISPOSITION CODE (See back)

FORMAL CHARGES, THIS ARREST
(List highest level codes first)

	Law	Penal Law §	Level	62-63 _____
High chg. 12-18	_____	_____	_____	Date of Disposition 64-69 Mo. _____ Da. _____ Yr. _____
2nd chg. 19-25	_____	_____	_____	SENTENCE (if convicted) 70-75 Fine in \$ _____

IMPRISONMENT

Minimum Yr. _____ Mo. _____ Da. _____
 12-17

Maximum Yr. _____ Mo. _____ Da. _____
 18-23

- 24/1 _____ Time served
- 25/1 _____ Probation
- 26/1 _____ Diversion program
- 27/1 _____ Conditional discharge
- 28/1 _____ Unconditional discharge
- 29/1 _____ YO treatment granted
- 30/1 _____ Predicate felony offender
- 31/1 _____ Other (? _____)

CONVICTION CHARGES, THIS ARREST

(List highest level codes first)

	Law	Penal Law §	Level
High chg. 32-38	_____	_____	_____
2nd chg. 39-45	_____	_____	_____
3rd chg. 46-52	_____	_____	_____
4th chg. 53-59	_____	_____	_____
5th chg. 60-66	_____	_____	_____
6th chg. 67-73	_____	_____	_____
7th chg. 74-80	_____	_____	_____

APPENDIX E

*Career Criminal Program Defendant
Evaluation Sheet*

Defendant _____
Age _____ Docket Number _____

Type of Crime (Including Attempts)

- 1. Robbery
- 2. Burglary
- 3. Felonious Assault

Prior Criminal Record

- 1. Felony Convictions
 - (a) One 8
 - (b) More than one 15
- 2. Misdemeanor Convictions
 - (a) One 3
 - (b) More than one 5
- 3. Prior Arrests
 - (a) Homicide 5
 - (b) Three or more felony arrests 5
 - (c) Weapon (top charge) 3
- 4. Status of Defendant When Arrested
 - (a) Pending case(s) 5
 - (b) State parole 5
 - (c) Wanted or bench warrant outstanding 2

Point Total Prior Criminal Record _____

Refer case to Career Criminal ADA _____

Do not refer case to Career Criminal Program _____

(Check One)

Prior criminal record reviewed by: _____

Date: _____

Career Criminal Assistant District Attorney Evaluation

Accepted

Rejected

Reasons: _____

By Career Criminal ADA _____

Date _____

APPENDIX F

Major Felony Program Defendant Evaluation Sheet

<i>Defendant(s)</i>	<i>Age</i>	<i>Docket No.</i>	<i>Charge</i>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Officer _____ *Shield No.* _____

Command _____ *Phone No.* _____

Please circle those points which apply to your case. Where there are multiple defendants, compute on basis of major defendant. (Categories are cumulative.)

I. NATURE OF CASE

A. VICTIM

- 1. Injured 10
 - 2. Hospitalized (not including treated and released) 10
 - 3. Permanent Injury 15
 - 4. Police Officer 2
 - 5. Att. Murder-Police Officer 10
 - 6. Victim-youth, elderly, disabled 5
- TOTAL "A" _____

B. WEAPONS

- 1. Explosives 15
 - 2. Loaded Sawed-off Shotgun 15
 - 3. Loaded Gun (includes not recovered) 10
 - 4. Unloaded or imitation 5
 - 5. Knife 5
 - 6. Other (billy, club, etc.) 3
 - 7. Weapon discharged 10
 - 8. Multiple weapons 5
- TOTAL "B" _____

C. SEX CRIMES

- 1. Force (physical, non-weapon) 10
 - 2. Semen present 10
 - 3. Immediate outcry 10
 - 4. Prior relationship -10
- TOTAL "C" _____

D. BURGLARY (MUST BE DWELLING)

- 1. Night-time 10
 - 2. Evidence of forcible entry 5
 - 3. Person present 10
- TOTAL "D" _____

E. ARSON

- 1. Dwelling 10
 - 2. Person present 10
 - 3. Extensive property damage 5
- TOTAL "E" _____

F. VALUE OF STOLEN PROPERTY

- 1. Under \$250 1
 - 2. Up to \$1,500 3
 - 3. Over \$1,500 5
 - 4. Over \$25,000 10
- TOTAL "F" _____

G. KIDNAPPING

- 1. Time of abduction (in excess of 12 hours) 5
 - 2. Ransom demanded 15
 - 3. Sexually abused 5
 - 4. Victim under 12 years 10
- TOTAL "G" _____

H. BRIBERY

- 1. Tapes 5
 - 2. In excess of \$250 5
 - 3. Underlying crime
 - (a) Felony 10
 - (b) Misdemeanor 5
 - (c) Violation 3
 - 4. Money Vouchered 10
- TOTAL "H" _____

SUB-TOTAL _____

II. DEFENDANT EVALUATION

A. PRIOR CRIMINAL RECORD

- 1. Felony Conviction 8
 - 2. Misdemeanor Conviction 3
 - 3. Prior Arrests
 - (a) Same or related 5
 - (b) Violent crime 5
 - (c) Weapon (top charge) 3
- TOTAL "A" _____

B. DEFENDANT'S STATUS WHEN ARRESTED

- 1. Pending cases 5
 - 2. State Parole 5
 - 3. Wanted 2
- TOTAL "B" _____

SUB-TOTAL _____

III. STRENGTH OF CASE

A. WEAPON RECOVERED

- 1. At scene 2
 - 2. From defendant 3
 - 3. Elsewhere but connected to defendant 3
- TOTAL "A" _____

B. PROPERTY RECOVERED

- 1. At scene 3
 - *2. From defendant's person 5
 - *3. Elsewhere but connected to defendant 3
- TOTAL "B" _____

C. PRIOR RELATIONSHIP BETWEEN DEFENDANT AND

COMPLAINANT

Not to be deducted if relationship is only relevant on issue of identity and points have already been deducted under the sex crimes section -5

TOTAL "C" _____

D. ARREST

- 1. At scene 5
- 2. Shortly after occurrence (within 24 hours) 2

TOTAL "D" _____

E. SUPPORTING EVIDENCE

- 1. Admission or statement 3
- *2. Additional witnesses 3
- 3. Fingerprints recovered 5

TOTAL "E" _____

SUB-TOTAL III _____

IV. D.A.'s EVALUATION

Consider in addition to the terms marked with asterisk, the evaluation of the People's witnesses. For example, prior record, credibility generally, identification, search and seizure and Wade and Miranda problems.

Please enter the number of points you feel the case is worth. You may add a maximum of 20 points or deduct up to 15 points.

SUB-TOTAL IV _____

SUB-TOTAL I — _____

SUB-TOTAL II — _____

SUB-TOTAL III — _____

SUB-TOTAL IV — _____

TOTAL POINTS _____

A.D.A. _____