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Open vs. Confidential Records

proceedings of a BJS/SEARCH conference

papers presented by

Patrick J. Leahy
Robert R. Belair
Thomas F. Wilson
Paul E. Leuba
Jeffrey M. Snyder
Jane E. Kirtley
Steven R. Schlesinger
Gary D. McAlvey
Ronald D. Stephens
Alan F. Westin
Janlori Goldman
Stephen Goldsmith
George B. Trubow

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Joseph M. Bessette
Acting Director

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Preface

Open versus confidential criminal history record information is a controversial and crucial issue confronting this nation. In the balance hangs public safety, fairness, and the right to privacy. Dramatic changes are taking place in state legislatures and at the federal level to make criminal history records more available to noncriminal justice agencies and to the public in general. It is clear that governmental as well as public attitudes are changing on questions of access and dissemination of criminal history records.

The debate of the issues associated with public access to criminal history records is vitally important, and therefore the Bureau of Justice Statistics was pleased to cosponsor a national conference with SEARCH Group, Inc. in Washington, D.C. on September 29-30, 1987, as an important first step in the development of policies related to public access.

The *Proceedings of the National Conference on Open Versus Confidential Records* provides background information on the issues involved, the perspectives of the competing interests for both privacy and openness, and examines the implications of expanding public access. Participants of the conference included federal and state policymakers, criminal justice practitioners, social scientists, representatives of the media, and the nation's leading scholars on criminal history records.

We believe these conference proceedings will prove to be of immense value to decision makers and policymakers charged with the responsibility of developing final policies on open versus confidential records.

Steven R. Schlesinger

Steven R. Schlesinger
Director, Bureau of Justice Statistics
February 1983-September1988

Welcome and Opening Remarks

Welcome

GARY D. McALVEY
Chairman, SEARCH Group, Inc. and*
Chief, Bureau of Identification, Division of Forensic Services
Illinois State Police

I would like to welcome you to another in a series of conferences dealing with the important area of criminal history information, particularly the access to, use of, and security and privacy of that information. I would also like to thank the Bureau of Justice Statistics for cosponsoring this conference with us, and our speakers, who have taken time from their busy and important schedules to discuss the timely issue of open versus confidential records.

It is difficult to overstate the importance of the issue before us. Today we are at a crossroads in our national and state policies governing access to criminal history record information, particularly in light of its increasing availability to individuals and agencies outside the criminal justice community. The movement towards open records has been gaining momentum since the historic Supreme Court decision of *Paul v. Davis* in 1976 which asserted that arrest records do not relate to the kind of private conduct that is protected by the Constitution. We are witnessing increasing access through a variety of forces: through individual state legislation; through interest groups claiming a legitimate need to know; through challenges for access to federally-held records under the Freedom of Information Act by the Reporters Committee for Freedom of the Press; through revisions to FBI policy; and through increasing access to criminal history record information by federal noncriminal justice agencies, such as the passage in December 1985 of the Security Clearance Information Act.

A Choice of Directions

We are at a crossroads because the changes have not been so pervasive as to have left us without a choice of direction. The increased demand by the public for criminal history record information and the resulting legislative decisions to grant that access have involved only certain groups that could make a legitimate case for needing that information. Since SEARCH first published its *Technical Report No. 13: Standards for the Security and Privacy of Criminal Justice Information*, and since the enactment of the LEAA (now DOJ) Regulations, we have seen the creation of a comprehensive set of standards governing the collection, maintenance, use and dissemination of criminal history record information. While a number of states have opened conviction records to the public, and some have even opened arrest records without dispositions, the majority of the states' laws and policies governing criminal history record information lean more toward confidentiality than toward openness.

Public Access Accelerates

At SEARCH it is our sense, and I think the feeling is shared by many in the criminal justice community, that the movement toward public access to criminal history record information is accelerating rapidly. As the chief of the state central repository in Illinois, I have firsthand knowledge that this is true. At every session of the General Assembly, it seems as if we find one or two bills that are passed by lawmakers and signed by the governor that opens up our records to groups or individuals who have (in the eyes of the General Assembly or the Governor) a legitimate need to know. As a result, we are not only at a crossroads, but we are also at that point in history where we have a responsibility to ensure that leadership be applied in the development of any new policies relating to the access and dissemination of criminal history record information.

That is our purpose here today at this conference — to apply responsible leadership to this important issue. If we are to make informed decisions about access and dissemination, the first step we should take is to bring together in a forum for public debate all of the parties who have a stake in this issue. We want the competing interests for privacy and openness to have the opportunity to go on record expressing their concerns and points of view. The question before us is: "Should the public have access to all criminal history record information?" If so, what is the rationale? If not, what are the confidentiality protections such information should have?

*SEARCH Chairman at the time of the conference.

We are all here to learn, and we are here because many of us are faced with compelling questions related to the subject of open versus confidential records in our states. We have to return home and make decisions. For SEARCH this is an important meeting. Members of the SEARCH Law and Policy Project Advisory Committee are here to gather information to take to the SEARCH Membership Group's deliberations in its efforts to revise the SEARCH standards on criminal history record information. It will be the task of the SEARCH Membership Group to adopt revised standards at its annual meeting in July 1988.

Although I cannot speak for Dr. Schlesinger, who will follow me on this program, I suspect that the recent changes in the law and policy governing criminal history record information, coupled with the eventual direction taken by the revised SEARCH standards, may well call for a re-examination of the Department of Justice Regulations. There is much riding on this issue.

Opening Remarks

STEVEN R. SCHLESINGER
Director
Bureau of Justice Statistics
U.S. Department of Justice

I am very pleased to welcome you to this conference on open versus confidential criminal history records. It is the third in a series of meetings convened jointly by SEARCH Group and the Bureau of Justice Statistics to address information policies relating to criminal justice records. Our first two meetings, held in Washington, D.C. in 1982 and 1984, focused on requirements and procedures to increase the accuracy of criminal justice data. Accurate and complete data are the keystone for forming an effective criminal history record system, a system capable of meeting the needs of the criminal justice and law enforcement communities. Record accuracy is also critical to protect the rights of individuals and to provide the basis for reliable criminal justice statistics. The proceedings of our earlier two conferences were published and have been widely used as reference materials by record management personnel, legislators and academics.

This conference concentrates on a different but important related issue: the extent to which criminal history records should be routinely made available outside the criminal justice community. This issue is of particular relevance at this time in light of a number of factors: the increasing interest in pre-employment record checks at the federal, state and local levels; recently enacted record review requirements in Immigration and Naturalization Service and Department of Defense legislation; more frequent licensing of private employer activities in areas such as child care and nursing homes; and legal concern over employer liability for criminal acts committed by employees.

This heightened reliance on criminal justice record data has been made possible by technological advances in recordkeeping. A recent survey by SEARCH Group, for example, concludes that as of 1984, almost all states had established central repositories facilitating access to a complete record at a single source. Similarly, the use of minicomputers in local police, court and prosecution offices has simplified regular recordkeeping and made timely access to local records a real-world possibility. Additionally, advances in Automated Fingerprint Identification Systems (AFIS) have vastly improved the potential accuracy of data related to an individual. In all of these areas SEARCH — both independently and in conjunction with the Bureau of Justice Statistics — has been a leader in the development of techniques, procedures and policies.

The discussion about open versus confidential records raises several basic issues. On a broad scale these issues focus on: the extent to which criminal history records should be available to all individuals regardless of the purpose for which the data is to be used; the role of legislatures in determining specific categories of persons eligible or ineligible to obtain criminal history data; the relationship between federal, state and local communities in determining the scope and conditions of data disclosure; and the rights of the individual to review data which have been released and to correct data used in decisions which have an impact on the individual's rights or benefits.

On a more specific level, debate centers on the scope of data which should be routinely released and, in particular, whether limits should be imposed on the use of arrest and nonconviction data. Debate also centers on the restrictions, if any, that should be imposed on the release of data describing events which occurred a given number of years prior to the request, and the procedures which should be required to obtain data which has been sealed or otherwise prohibited from release.

On a more operational level, questions arise concerning the techniques which can be used to ensure that expanded data-release policies are accompanied by more rigorous data accuracy standards. Questions also focus on the procedures that facilitate access to the individual's complete record maintained at the local, state or federal level; on the cost of manpower required to meet the increased workload demands associated with greater noncriminal justice access; and on procedures that ensure criminal justice is given priority in data requests from both criminal

justice and noncriminal justice groups. Finally, questions center on the legal issues raised when different disclosure policies are in effect in different states and the impact of these policies on the exchange of data among the states and the federal government.

It is clear that many significant issues must be addressed before final policies can be developed governing the disclosure of criminal history data. Moreover, many questions of interstate and federal-state policy must be resolved to implement policies in this area. Decisions will require participation by legislators, criminal justice personnel, academics and the public. We believe that this conference can serve as a basis for policy development regarding the release and use of criminal justice records.

Before I conclude, I would like to say a few words about our cosponsor for this conference, SEARCH Group. You hear it said occasionally that federalism in this country is in trouble, or is on its deathbed, or something to that effect. It seems to me that SEARCH Group, and the enormous success that SEARCH Group has had, is living testimony to the vitality of federalism. SEARCH Group was founded by the states, and is maintained by the states, for the primary purpose of expressing state interests and state concerns in the area of information systems, information policy and statistics. Indeed SEARCH's unique structure — its Membership Group of high-level, gubernatorial appointees from all of the states — guarantees that SEARCH has been and will continue to be a vigorous, vital voice in the area of information management for the states. Indeed, in information systems, information policy and statistics, SEARCH has maintained a clear leadership role.

In the statistical area, I can think of many, many services that SEARCH has performed. SEARCH has recently been very helpful to the Bureau of Justice Statistics in expanding the number of states that participate in the Offender-Based Transaction Statistics program, which allows us to follow offenders in the state criminal justice system from arrest through the entire criminal justice system. In addition to SEARCH's leadership role in OBTS, SEARCH has also taken a leadership role in the use of statistics based on criminal history records. Criminal history records clearly are an important source of quality statistics, particularly statistics related to career criminals. If there is anything that we have learned in the last few years, it is that a disproportionate number of crimes is committed by a relatively small number of so-called career criminals. Using criminal history record data for statistical purposes should help us significantly in trying to understand these kinds of careers and in trying to understand ways in which we might intervene in these careers to stop them before it is too late.

SEARCH has maintained an important leadership role in this country, expressing strongly and clearly the views of the states on these matters. I want now to pay particular tribute to Gary Cooper, SEARCH's Executive Director, to Bob Belair, SEARCH's General Counsel, and to Tom Wilson, SEARCH's Director of Law and Policy, not only for the work that went into putting on this conference, but also for the leadership that they have shown in criminal justice information concerns.

Keynote Address

Keynote Address

PATRICK J. LEAHY
U.S. Senator
Chairman, Senate Subcommittee on Technology and the Law
Senate Judiciary Committee

I have wanted this opportunity to discuss automated criminal history records, and I am glad this meeting is being held. I believe it is very important. The growth of SEARCH has demonstrated that law enforcement and information specialists have a critical role to play in the administration of criminal justice, and it is one that you have to play together. That role is going to become even more significant as our technologies move into the 21st century. Nobody here can predict with total accuracy just how far those technologies are going to go in the 21st century, even though it is only 13 years away. Let us look at some of the things we do know today.

We have the National Crime Information Center (NCIC), which is the subject of a lot of debate today. The NCIC figures prominently in the debate over making criminal history records available to the public as well as in major studies to determine whether to design a new system. The NCIC is also on the mind of the new FBI Director, William Sessions, who has seen it operate from the perspective of a federal judge. I used the NCIC during the 8½ years I worked as a prosecutor in Vermont. We used the NCIC every day. I also saw how important it was in a rural state like mine. Our state is so small, our state police patrol most of the rural areas alone. Practically speaking, they do not have a backup. The nearest backup could be 50 or 60 miles away, and that could be on a night that we're having 10-15 inches of snow. It helps if they are stopping a car on a road at night to find out whether there is an arrest warrant or alert out on that driver. Without the NCIC, there is no way they would find out.

I have followed the development of the NCIC over the past 20 years. Now I am looking at its future. And, as Chairman of the Senate Judiciary Subcommittee on Technology and the Law, I am trying to develop a fuller understanding of a variety of automated information systems, including the NCIC — how they are used in our society, what security problems they pose, and any challenges they present for policy makers and users who want to preserve the fundamental constitutional principles of liberty and privacy. You have a balancing act here between the interests of record subjects and record users. The NCIC, the largest computerized criminal justice information system in the country, has 19 million records on fugitives, stolen vehicles and criminal histories, and they are accessible to 64,000 criminal justice users nationwide.

Challenges of the Future

Let us look at some of the challenges the next generation of computerized criminal history record development presents us. The first is the challenge of data accuracy. The real-life impact of a false arrest, an unwarranted night in jail or an inaccurate criminal record, is severe, and every one of us has seen cases where that has happened. There is simply no exaggerating the importance of keeping accuracy the top priority. I do not want to be driving through another state and find that there is a Patrick J. Leahy with an arrest warrant and have to explain to a computer terminal that it isn't me. Second, we have the challenge to keep the NCIC focused on its central law enforcement mission. We have to avoid the temptation to adopt technological tricks that are unnecessary or unacceptable as a matter of policy. Third, we face the challenge of balancing the law enforcement and privacy interests against the sometimes competing needs for accountability and public access. Recent court decisions on the public's right to review criminal records underscore the complexity of striking this balance.

The integrity and value of the NCIC, and every other tool in our arsenal against crime, hinges on accuracy. When I was a prosecutor, there was nothing more frustrating than poor paperwork, inaccurate records or mistakes regarding offenses, dispositions and criminal record files. Inaccurate information can destroy a case; it can double the time required for prosecution. It makes it impossible to do anything from obtaining search warrants to determining what you will say at a bail hearing.

As I learn more about computers — including their ability to lose files and mislead operators — I do not want us to lose sight of the importance of accuracy and completeness in our criminal history record system. The NCIC carries with it inherent risks of inaccuracy because it relies on data input from so many sources. For example, in 1985, a FBI audit of Alabama's computerized criminal record system (containing the data it sends to the NCIC) found that 13 percent of the information on wanted persons was wrong. An additional 17 percent of the information in that system was dropped just before the audit. In Mobile, three-quarters of the wanted persons were listed as weighing 499 pounds and standing 7 feet, 11 inches tall. Why? Those are the maximum entries for weight and height and someone had apparently hit the old "max" button. And in another example, in response to lawsuits charging false arrests, New Orleans and Los Angeles revamped their police computer systems and procedures. This indicates that NCIC is often the recepient of inaccurate data.

Lawsuits cannot be the catalysts for correct databases, however. Inaccurate records unjustly jeopardize the rights of innocent people and undermine the integrity of the entire system. Any grand plan to redesign the system can go no further than the drawing board unless system operators demonstrate zero tolerance for inaccuracies and a total commitment to an error-free system.

Policy Directions

My concern is that the NCIC may have a deep-rooted, but unusual problem: the system seems to grow by virtue of a "what-if" kind of fascination with technological capabilities. Effective and responsive systems have to be based on policy goals; we need not rush to adopt every available technology. Let policy drive what we do, not just technology. Do not simply add a few more buttons and assume we are going to catch more criminals. Every law enforcement officer in the country knows there is no substitute for the genius of good, old-fashioned police work.

The original plan of the NCIC was to be an aid for investigators and agents who needed an automated information system. With complete and accurate information, they could catch even the most clever criminals. It was expected to help manage and compile the records necessary to combat those increasingly complex cases, knowing that there are a lot of sophisticated, habitual criminals. But now the NCIC contains information that was not imagined at its inception, such as the Secret Service records (which are based in many instances on the vaguest of suspicions because of the very unique nature of protecting the President of the United States). The huge system is also used by many outside the scope of the traditional law enforcement community, including employers and credit companies.

This expansion explains the difficult issues facing the courts and policy makers today. The NCIC can not be all things to all people. The information needs of campus security police are not the same as those of the Secret Service. The information needs of employers are not the same as those of law enforcement agencies. And such expensive capabilities as digitized fingerprint records may only be needed by certain users. In fact, the 20 years' experience of the NCIC has demonstrated the precise needs of system users. I encourage the FBI to rely extensively on the insights of system users as it develops its proposal to redesign a system. In fact, the FBI's current study provides an important opportunity to return to the primary and underlying purpose of an automated criminal record system: to provide ready and reliable access to the criminal justice community.

An example of how a computer capability creates its own justification is the proposal to use data in the NCIC to give law enforcement officers the capability of tracking the movement of a suspect in an investigation. Under the proposal, adopted by the NCIC Advisory Policy Board, a law enforcement agency investigating a person would be notified immediately of the suspect's location if any other agency filed an inquiry about the person with the NCIC. For

example, somebody suspected of drug dealing in Florida is stopped for speeding in Illinois. The highway patrolman's routine inquiry to the NCIC computer in Washington, D.C. would notify the Florida state police that their suspect was now being stopped in Illinois. The problem with this is that it would occur without a warrant. One's name would be included on the national network only because he is a suspect. In my opinion, this should be looked at very carefully. Sharing information from open investigative files is a very big step, and is one that cannot be taken without thorough analysis of the responsibilities of the agencies involved and the rights of the citizens whose names and data would be shared. You do not want your name in there because of a vendetta by a local police agency, or because of a tip given by an angry neighbor, or because your name is mistaken for somebody else's.

Technological Dangers

Just remember one thing: technology is only a part of law enforcement. These are the dangers to watch for as we use technology: the danger that computerized procedures will pre-empt human judgment; that computer output will replace human decisions; and that we will find ways to make the system more powerful rather than the practices more effective. Our public policy has to be guided by the open give-and-take of informed participants, not just the technical capabilities of system designers. Just because it can be done does not necessarily mean it is the best thing to do. This undertaking should be directed by a combined appreciation for law enforcement, for the rights of individuals, and for the needs of our society. And there is a proper, appropriate balance to be reached.

When we look at the challenges to the future of the NCIC, remember that the need for accuracy and completeness becomes increasingly important, and as that system expands, we are going to face demands for more and broader access. That is the history of this issue. When I was a prosecutor, it was the case, and it is the same case today: expand the system and more and more people are going to want access. Increased access raises tricky questions about the accountability of those outside the criminal justice community who have access to this data. Law enforcement agents, policy makers and users have to remember that the privacy interests of the people whose names are in the computer system and the effectiveness of criminal investigations are both threatened by the disclosure of criminal files.

During the course of this conference, all of you should explore a couple of critical issues: refocusing the NCIC on its original law enforcement mission; easing the tension over who's going to have access; directing the discussion toward policy goals and not just system capability; and assessing what we have learned from the 20-year NCIC experience. Complicated issues that arise from the national computer network are going to become more urgent as the significance of the NCIC grows. I hope we can explore ways to protect legitimate privacy interests, to ensure accuracy and completeness and to meet law enforcement needs. That is not simply a wish list of desirable features, but fundamental requirements for any large information system that has the impact of the NCIC. And these are the questions that everybody on Capitol Hill, of both parties, is going to ask as they are asked for appropriations to expand the NCIC or to improve its capability. Having spent a third of my life in law enforcement, I feel very strongly that we need the best tools possible. Law enforcement is there to serve all of us and we have to do it balancing all of these individual interests. I think we can do it, and will do it, because people such as you will take the time to think the issues through before we act, and not afterward.

Setting the Scene

Public Availability of Criminal History Records: A Legal Analysis

ROBERT R. BELAIR, ESQ.
SEARCH General Counsel
Kirkpatrick & Lockhart, Washington, D.C.

There has been much discussion about opening criminal history records and making these records, particularly nonconviction records (arrests over a year old, acquittals and *nolle pros*) available to the general public. There are stirrings to that effect: we see it in the routine background checks of child care providers, private security personnel and persons who require national security clearance. And we see it in the creation of true open records laws that make all or most criminal history record information available to the general public. These stirrings notwithstanding, however, we ought not to make any mistake about the kind of system that we have in this country. We actually have a closed criminal history records system: with rare exceptions the general public, and the press as well, do not have access to criminal history record information.

In preparation for this conference, SEARCH, under the guidance of the Bureau of Justice Statistics, prepared a background paper titled *Public Access to Criminal History Record Information*. This morning I will introduce some of the findings of that report, focusing on the status of statute and case law in this area.

Criminal History Record Systems

Let me talk about the structure of the system: We really have two systems. First, we have an open system of criminal records, one based on original records of entry, such as police blotters, daily log books, incident reports and other kinds of documents found at a police station. Court docket records containing charging and disposition information are also considered original records of entry. These records are *intended* to be public records. They document an event and are intended to be open to prevent the classic evils that can be perpetrated by any kind of justice system: secret arrests, star chamber procedures and other kinds of secret processes.

The second criminal history record system is different. Keep in mind that prior to the mid-19th century, there simply were no criminal history records in this country because there were no police agencies, except in a very few large urban centers. Beginning in the early 20th century, as police forces became more formal and as they developed identification techniques, such as maintaining fingerprint records, police began to attach notes and brief, informal histories to the fingerprint records of active offenders in their communities. The first significant attempt to formalize these records and the criminal history record process occurred in 1924, when Congress authorized what is today the Identification Division of the FBI.

Today, of course, there are central state repositories in operation or authorized in every state in the nation which maintain the formal criminal history records. These are systems created by the police for police purposes. Historically, the police have had wide discretion over what happens to the records in those systems: whether the records are created at all, what they look like, how long they are maintained and, of course, who may see them. In general — and this was true up until the 1960s — the police exercised their discretion to make the records available only within the criminal justice system. Occasionally the police made selective and, in the view of some, arbitrary disclosures outside the system. Traditionally, the courts did not interfere with this practice on the grounds that the records were not protected by common law or constitutional confidentiality strictures.

All of that started to change in the late 1960s. During that period of tumult, skepticism and distrust of government, concerns arose about the computerization of all kinds of personal information and related record-keeping issues. Something else happened in that period that is terribly important with respect to criminal history records. The children of America's middle class were arrested in Vietnam war demonstrations, civil rights demonstrations and other kinds of social protests. As a consequence, policies for protecting the confidentiality of arrest records received new attention.

Reforms and Standards

Out of that period came substantial reforms in the management of criminal history records in general and the dissemination of these records in particular. The 1973 Kennedy Amendment to the Omnibus Crime Control and Safe Streets Act of 1968 supported maintaining the confidentiality of criminal history record information in state and local systems receiving federal funds. Congress tried in 1974 and 1975 to enact detailed confidentiality legislation that would have made criminal history record information unavailable to the public. It came close in both years, 1974 in particular, and lost largely because of an intense effort by the media to defeat the legislation. It is folklore on Capitol Hill that John Tunney, then a senator from California, lost his bid for re-election at least partially because he was a principal supporter of that legislation and thereby incurred a good deal of negative press.

SEARCH supported the 1974 and 1975 legislation and at that time published *Technical Report No. 13: Standards for the Security and Privacy of Criminal Justice Information. Technical Report No. 13* sets forth comprehensive, model standards for the handling of criminal history record information that have been adopted in many states. Currently, SEARCH's standards prohibit public access to criminal history record information unless it is authorized by law, and even then access to nonconviction information is not allowed. SEARCH is, however, rethinking and rewriting those standards now and the discussions that result from this conference will be a help in that regard.

In 1976, the Law Enforcement Assistance Administration (LEAA) adopted comprehensive regulations for criminal history records. Some thought the Regulations were too weak; some thought they were too strong; some thought the emphasis was wrong. With respect to dissemination, the Regulations in fact take a middle ground — they do not restrict the dissemination of conviction record information but permit the public release of nonconviction information only when permitted by state or local law. The LEAA Regulations, without question, have had a dramatic impact on the landscape of criminal history record law. They influenced the content and approach of the law in virtually every state, and to this day I think the LEAA Regulations — and maybe *Technical Report 13* — have been the principal influences on the development of state standards for handling criminal history information.

Case Law Changes

While these standards were being developed in the mid-1970s, the courts were changing the law. In the early 1970s, a number of courts, led by the federal courts of the District of Columbia, flirted with the notion that there was a constitutional theory of privacy that applied to criminal history records, and in particular arrest records. The courts prohibited the release of arrest records to the public where it could be shown that such release would result in some tangible harm or stigma to the record subject.

In 1976, this nascent doctrine was extinguished by a decision that today remains a key case — *Paul v. Davis*. During the 1972 Christmas season police departments in the Louisville, Kentucky area circulated a flyer containing the photographs and names of individuals they characterized as "active shoplifters". The plaintiff, who was listed on the flyer, had been arrested 18 months earlier for shoplifting and the charges were still pending but he had not been *convicted* of shoplifting. He sued, claiming among other things, invasion of privacy. At the time, most of us thought that the circulation of the flyer would be struck down as unconstitutional.

In a related 1971 Supreme Court case, *Wisconsin v. Constantinoe*, the Court struck down a Wisconsin law that permitted authorities, under some circumstances, to post the names of alcoholics in state-controlled liquor stores to prohibit them from purchasing alcohol. The Court's opinion, issued by now-Chief Justice William Rehnquist, said that there is no constitutional privacy interest in an official record such as an arrest record. The Court distinguished arrest records and arrests from matters that, at least in Rehnquist's view, the Court

had traditionally viewed as private: matters of procreation and marriage, for example. The Court implied that an arrest simply was not a private event. In the wake of *Paul v. Davis*, it remains very difficult to assert a constitutional privacy interest in the handling of arrest records.

The year after *Paul v. Davis* was decided, the Supreme Court did suggest in *Walen v. Roe* that there may be circumstances in which the government's release of personal information could implicate constitutional privacy interests, although the Court did not speculate about what those circumstances would be. I think you can argue that those circumstances would not include the release of an official record such as an arrest. A few courts have tried to limit the applicability of *Paul v. Davis* pointing out that it involved a pending arrest record; it did not involve an acquittal; it did not involve an old arrest record; and it did not involve a record of an arrest that was unconstitutional or otherwise illegal. Nevertheless, the established view — the view of the majority of courts today — and I do not see any changes given the current composition of the federal courts and the Supreme Court — is that arrest records are simply outside the protection of the Constitution.

What that "deconstitutionalization" of arrest records did — and it applies, of course, with even move force to conviction records — was to give the states the option of setting whatever policies they wanted. Because, just as there is no constitutional interest in the privacy of these records, I also believe there is no constitutional interest in access to these records, although the media would dispute that.

State Criminal History Record Legislation

After adoption of the LEAA Regulations in 1976, the state legislatures opted to make criminal history records generally unavailable to the public. To the extent that noncriminal justice entities retained a limited right of access, a number of patterns emerged in state legislation:

1) There is a clear hierarchy of noncriminal justice requestors: at the top are national security agencies; in the middle are private employers, especially those involved in providing sensitive services, such as care of children and the elderly; and at the bottom are the press and the general public;

2) There is a clear distinction in state legislation between conviction information and nonconviction information: state agencies demonstrate some willingness to release the former and almost no willingness to release the latter;

3) There is a clear distinction between in-state and out-of-state noncriminal justice requestors, not so much in the law as in the way the state central criminal history repositories have interpreted and applied the law;

4) Some state central repositories retain discretion about record dissemination — more discretion than some of us would have expected; and

5) State legislation places very little emphasis on subject consent. Unlike other kinds of privacy schemes that involve personal information, very few states, only four or five, tie record access to subject consent.

As of 1984, only a handful of states permitted the general public to have access to criminal history records. Eight states provided the public with access to conviction records, but with considerable limitations. Five states granted the general public access to both conviction and nonconviction information. Again, in most states, this access was limited. Florida is the significant exception and is the model for open record states. Wisconsin is the other completely open records state. Since 1984, there have been some signs of a trend toward other states moving to the open records column: Oklahoma became an open record state in 1985 and both North Dakota and Oregon have adopted hybrid open record statutes which permit public access but with some significant limitations.

FOIA Test Case

As many of you may know, the Freedom of Information Act (FOIA) makes all federally held records available to any person for any reason unless one or more of nine exemptions in the FOIA apply. Perhaps the biggest news since 1984 is the decision, in April 1987, by the U.S. Court of Appeals for the District of Columbia in *Reporters Committee for Freedom of the Press v. the United States Department of Justice.*

Robert Schackne, a CBS reporter, and the Reporters Committee for Freedom of the Press filed the lawsuit in 1979. They are seeking the rap sheets of the Medico brothers, a family from Rhode Island that reportedly has a long association with organized crime and an even longer set of rap sheets. In refusing CBS' request, the FBI cited two FOIA exemptions, one of them being the FBI's 1924 recordkeeping statute, 28 U.S.C. 534. That statute makes the FBI's exchange of criminal history record information to noncriminal justice entities (e.g., state and local licensing agencies, federally-chartered or -insured banks and segments of the commodities and securities industry) subject to cancellation if those agencies re-disseminate the information. The FBI argued that this statute effectively prohibits the FBI's release of rap sheet data to the public. The Court of Appeals disagreed.

The FBI's second exemption claim, and the more important one, argued that the release of the rap sheet information would constitute an unwarranted invasion of privacy. The court rejected that claim on the ground that the privacy interest was minimal because the very same information is already in the public domain: rap sheet data is merely a compilation of data from original records of entry and original records of entry are public. The court also found that the public interest in rap sheet data is high.

In May 1987, SEARCH and the states of New York and California filed an *amicus curiae* brief with the Court of Appeals in support of the FBI and the Department of Justice, requesting that the District of Columbia Circuit rehear the case *en banc.* We argued in the *amicus* brief that the Court misunderstood the nature of state law. The Court focused on the law with respect to original records of entry instead of focusing on the law with respect to the very records that are at issue in the case, rap sheets. We cited the body of law regarding criminal history records which — with the exception of Wisconsin and Florida — makes rap sheet information confidential and argued that it is irrelevant whether original records of entry are public. Those records are public because they are intended to deal with the threat of star chamber proceedings and secret arrests. They are not intended to be a criminal history; they have a different purpose, a different tradition.

The distinction between criminal history records and original records of entry is important because the consequences of the *Reporters Committee* decision, if allowed to stand, are devastating. It will transform the FBI into a conduit for obtaining state and local criminal history data; it will circumvent state laws; and it will disrupt information-sharing relationships between the FBI and state and local law enforcement agencies. I also worry that the decision, if allowed to stand, will make it hard for the FBI to protect Interstate Identification Index (III) information, which consists of identification data which indicates that an arrest is either in a federal file or a state file. It is hard to imagine, in the wake of the *Reporters Committee* decision, how this information is going to be protected. Hopefully the decision will be overturned either by the full Court of Appeals or the Supreme Court.

Special Access Rights

Another development since 1984 has been moving criminal history record dissemination policy toward openness: changes in state laws are providing special rights of access to segments of the public. Three segments, in particular, have been specially favored: child care organizations; the private security industry; and the national security industry.

In 1984, Congress passed legislation that tied eligibility for about $25 million in social service block grants to changes in state law that would permit child care organizations to obtain conviction information and open arrest information (up to a year old) for use in employment determinations. A number of states, including Alabama, Connecticut, Georgia, Minnesota and Iowa, changed their laws to be eligible for that money. When they did that, some states adopted related laws that opened their records to organizations providing care for the elderly and to such volunteer organizations as the YMCA and the Boy Scouts.

In addition, Illinois and Georgia and a few other states recently expanded criminal history record access for background check purposes to the private security industry. There is currently legislation in Congress, introduced by Senator Strom Thurmond, and which has a fair amount of support, that would make federal criminal history records available to the railroad police and to public and private security services on college campuses.

It is the Security Clearance Information Act (SCIA) — adopted by Congress in December 1985 — that is perhaps the most important development. The SCIA opens virtually all criminal history record information to the CIA, the Office of Personnel Management, the Department of Defense and the FBI for background checks for security clearances and for placement of people in national security duties. Prior to the adoption of the SCIA, state laws had varied greatly with respect to federal noncriminal justice agency access to criminal history records. In some states, the security agencies received everything; in others, they received partial information; and in a very few states, they received almost nothing. There is a lot at issue here: the federal government conducts about a million national security background checks a year.

There are also some important limitations in the SCIA. Federal agencies cannot obtain sealed data, so that is an area where state discretion over dissemination policy is retained. The federal agency also has to receive written consent from the record subject. Federal agencies may be only able to use the data that they receive for national security purposes. And in some instances, states can insist that federal agencies submit fingerprints — normally it is a name-only check. More specifically, if a state central repository has an Automated Fingerprint Identification System and a state law requiring prints for noncriminal justice access, the repository can require the submission of prints.

Another pro-openness development that should be noted is that on Sept. 10, 1987, the FBI proposed a change in its long-standing regulations at 28 C.F.R., Part 20, sub-part C. The FBI provides criminal history record information to federally-chartered banks, parts of the security and commodities industry and state and local licensing officials, but the FBI only provides conviction information and information about open arrests. Now the FBI is proposing to provide nonconviction information. While it is a very small segment that gains greater access, I think the precedent and the timing is important from an open records standpoint.

There are other developments. The National Conference of Commissioners on Uniform State Laws has recently adopted model state legislation that is difficult to characterize as either pro-openness or anti-openness. It makes all conviction information available to the public, but with some very important limitations on the way that the public can make a request and what they have to supply to the agency. On the other hand, it makes all nonconviction information unavailable.

We are at a crossroads, as Gary McAlvey, SEARCH's Chairman, said earlier today. The issue of open versus confidential records has been deconstitutionalized and is now very much a matter of discretion for state legislatures. There are indications of openness but we still have a closed system. As Tom Wilson, SEARCH's Director of Law and Policy, will describe in his presentation, there are a lot of developments that suggest that we ought to provide the general public with greater access. Yet, there remain important reasons, from a privacy and fairness standpoint, to retain some confidentiality protections. The decisions that we make in the next few years will have much to do with the policies that launch the 21st century.

Public Availability of Criminal History Records: A Policy Analysis

THOMAS F. WILSON
Director, Law and Policy Program
SEARCH Group, Inc.

Should all criminal history record information be available to the public? That is the critical question posed in *Public Access to Criminal History Record Information*, a report prepared by SEARCH for the Bureau of Justice Statistics, U.S. Department of Justice. Bob Belair, SEARCH's General Counsel, has just presented you with the first half of the SEARCH report, which focuses on the extent to which criminal history record information is available to the public and other noncriminal justice requesters. My task is to present the second half of the report — which examines the empirical evidence and conceptual arguments for confidentiality — to determine if there is support and justification for those interests in confidentiality, and to weigh that evidence against the demand for open records.

Before turning to the report, let me say a word about the purpose of the report and this conference. Our purpose is to bring information to the debate, into the public arena of competing interests for confidentiality and openness. To underscore what SEARCH Chairman Gary McAlvey said this morning, there is a movement toward open records, and it is happening in a *de facto* manner: through piecemeal legislation, through forces for change by interest groups going to their legislatures, by the challenges brought forth by groups such as the Reporters Committee for Freedom of the Press, by changes in FBI policy, and by increasing access to criminal history record information by federal noncriminal justice agencies.

Mr. McAlvey also correctly asserts that we are at a crossroads; we are seeing records becoming more available to more people in this society. Nevertheless, the changes that have taken place so far have not been so pervasive that we should call public records a *fait accompli*. The SEARCH report shows that most states have, over the last 20 years, methodically developed a body of standards governing the collection, maintenance, use and dissemination of criminal history record information, and that those standards are heavily weighted toward the privacy interests of the individual. States that have made records more available to the public have done so cautiously, providing access to criminal history records only to selected noncriminal justice agencies for legislatively mandated purposes. The report also states that nonconviction information — arrest only information — has been treated with greater confidentiality than has conviction information.

If we are indeed at a crossroads, then we want to ensure that the policy direction taken is the result of informed decision making. Accordingly, the findings of this report are the result of SEARCH staff research and not the official position of SEARCH Group. In this room today are members of the SEARCH Membership Group's Law and Policy Project Advisory Committee. They are here to gather information to take to the Membership Group in its effort to revise the SEARCH standards on criminal history record information. The revised standards adopted by the Membership Group at its annual meeting in July of 1988 will be the official statement of SEARCH Group on this issue.

My intention, therefore, is simply to share the findings of our research. Any detection of a personal bias is just that. And that disclaimer notwithstanding, my personal hope is that the final outcome of the debate of open versus confidential records will emanate from a long standing principle that has guided SEARCH's Law and Policy program through the years, and my tenure as its director — that is, the principle of seeking a balance between society's right to know in order to protect itself from crime and criminality, and the individual's right to privacy.

There is a presumption that all official government records should be in the public domain. There is a limited constitutional basis for this notion, as well as a statutory basis and tradition. The First Amendment to the Constitution states that the Congress "shall make no law abridging the right of speech or of the free press." This right has sometimes been interpreted to mean the right to hear and the right to obtain information of legitimate interest to the public. The established view is that the First Amendment gives the public a right to obtain and publish public record information, but it does not

give the public a right to insist that all, or even most types of official records, be made public in the first place.

At the federal level and in virtually every state there are Freedom of Information Acts (FOIA) and open records acts that make government records public — subject to a showing that certain records should be exempt because public interest in disclosure is outweighed by interests in confidentiality. Examples include interest in national security, foreign relations, trade secrets and intergovernmental communications. Legislatures and courts have also recognized that some records in government hands should be kept confidential. There are relationships where trust and order must be maintained, and it is in the public interest to maintain such relationships — such as the relationships between doctor and patient, priest and penitent, and husband and wife. There are also cases where the disclosure of a record could cause the subject to be cast in an inaccurate or unfair light. Confidentiality, accordingly, is often preserved on the basis of fairness.

The policy issue facing us here, in light of strong public interest in official records developed and maintained by governments, is whether there is a legitimate basis for exempting all or some kinds of criminal history records from public access. In the SEARCH report we examine the philosophic and conceptual bases upon which our existing laws and policies protecting confidentiality are founded.

Rehabilitation and Employment

Let's look at some of those concepts. One of the conceptual underpinnings of confidentiality is that it promotes rehabilitation and reintegration of the offender into society. Society tangibly benefits if a person can be rehabilitated and reintegrated into society. Reintegration involves the avoidance of the stigma and adverse consequences that result from disclosure of a criminal record. Rotman states that, "Their [offenders'] social handicap is considerably aggravated by the stigma of a criminal record, requiring additional efforts from social agencies to support the arduous process of social reintegration."[1]

Employment is one way to reintegrate the offender into society. There are, however, statutory impediments to employment based on criminal records. One 1982 study found statutes which would bar employment in approximately 350 occupations that employ 10 million people.[2] The policy implications of opening records to the public could be said to be modest, since it is a matter of settled law that access to conviction records is already available to many federal employers, state licensing agencies, and private institutions, such as banks and securities institutions. Conversely, it can be argued that the public's legitimate interest in knowing has been served by federal and state laws making criminal history records available to the employers that have demonstrated a legitimate need to know.

What of access to nonconviction record information in terms of employment? Should it be released to employers? Would it frustrate rehabilitation and reintegration into society? Professor Alan Westin will provide insights on this issue in tomorrow's session, but our research found evidence to be scarce on how employers would use nonconviction record information.

The courts, however, have spoken on the issue. In *State v. Pinkney*,[3] an Ohio court stated that the, "potential economic and personal harm that results if arrests become known to employers, credit agencies and neighbors may be catastrophic." A Federal Court of Appeals panel in *Menard v. Mitchell* stated:

> Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial... Opportunities for schooling, employment or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved.[4]

Our report found that employers have sought both arrest and conviction information in employment decisions. One 1972 study found 79 percent of private employers seeking both arrest and conviction data.[5] A somewhat more recent study by the Congressional Office of Technology Assessment found that "substantial numbers of employers do seek this information . . ."[6] Moreover, the Department of Defense has called criminal history record information "the single most important piece of background information about prospective applicants."[7]

Other studies suggest that employers do not place a premium on criminal history record information. One study in 1976 found that 44 percent of employers made no effort to verify records; 39 percent made no effort to obtain complete rap sheets; and 17 percent made an effort to obtain only local police records.[8] A study in the 1980s by the Education Fund stated that most private employers do not attempt to obtain criminal history records.[9] That study gave two primary reasons: the first was lack of interest, which was attributed to the costs and the poor quality of the records, and the belief that most records would not reflect on the job description; the second was that where there is a sensitive need, they can get criminal history record information informally.

There is also the question of what employers do with the information. Do they use it fairly? A 1970 survey found that of 475 employers, 312 stated they would never hire an offender.[10] In 1967, the President's Commission on Law Enforcement found that individuals with arrest records are more likely to be denied employment than those never arrested, even if there was an indication of an acquittal.[11] A 1970 study for the Department of Labor found that for individuals with records — conviction or arrest — 15 percent of employers said they would not hire at all; 5-10 percent ignored offender status; the remaining 75-80 percent said they take criminal history records into account on a case-by-case basis.[12]

Recent studies suggest that employers may not take such a harsh view. A 1980 study in Illinois found that of 375 businesses surveyed in the state, more than half said they would hire ex-offenders. They indicated, however, that long histories of arrests would bar any kind of employment.[13] This suggests that certain kinds of offenders, and perhaps not all offenders, are the real concern of society and the critical target of record access.

Recidivism

If employment really contributes to rehabilitation and reintegration, then confidentiality could be argued on this basis. For repeat offenders, however, we found that jobs meant precious little. As Dr. Schlesinger has said, repeat offenders are a relatively small group of offenders responsible for a disproportionate amount of crime. For this group at least, confidentiality does not appear to be warranted on the grounds that it will promote jobs and that jobs will promote rehabilitation and reintegration into society.

A great deal of statistical research documents recidivism, notably three recent studies by the Bureau of Justice Statistics: *Returning to Prison* (1984), *Examining Recidivism* (1985), and *Recidivism of Young Parolees* (1987). The 1984 report showed that in 14 states examined, nearly a third of the prisoners released from prison recidivated within three years, and a quarter were back in two years or less.[14] The 1985 study demonstrated that a very high percentage of individuals entering prison had a prior history of incarcerations and convictions — 61 percent of those admitted to prison in 1979 were recidivists. That study found also that recidivists accounted for approximately two-thirds or more of all burglaries, auto thefts, forgery/fraud/embezzlement offenses attributed to all offenders.[15] The 1987 BJS Report found that 69 percent of a group of young parolees were re-arrested for a serious crime within six years from their release form prison; 53 percent were convicted for new offenses; and 49 percent were returned to prison.[16] The BJS studies and other studies quoted in our report show the potential for recidivism relates also to the number of arrests, enough to suggest that if there are two arrests, there is great likelihood that there will be a third.

If the argument for confidentiality for chronic offenders is weak, what of offenders who are not recidivists? Of offenders that do not recidivate in the first two or three years, there is only a slight chance that they will recidivate in the future. A recent Illinois study found that the longer the subject is out of prison, the better the chances he will not return. The Illinois Criminal Justice Information Authority report concluded that "very few of the former inmates who had not been arrested by the end of 29 months would ever be arrested again."[17] Confidentiality protections may not be warranted for recidivists, but there may be evidence to warrant privacy protections for persons with no recidivist activity over a given period of time.

Rehabilitation

To see if rehabilitation by itself can justify confidentiality, our report examines the shift from the rehabilitation model in corrections to the "just deserts" and "selective incapacitation" models. In the 1960s, scholars and criminal justice officials began to question the concept of rehabilitation. In 1974, Robert Martinson asked the crucial question, "What works?" He answered his own question, which was corroborated by much of the research in the '70s — there was no general finding that any of the individual rehabilitation programs worked. Martinson concluded: "With few and isolated exceptions, the rehabilitation efforts that have been reported so far have had no appreciable affect upon rehabilitation."[18]

A Senate Judiciary Committee Report to accompany the comprehensive Sentencing Reform Act of 1984 pronounced the death of the rehabilitation model:

> Recent studies suggest that this approach [rehabilitation] has failed. Most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.[19]

While it might be fair to say that the death of the rehabilitation model had deeper roots in changes in societal norms, it is clear from the studies that have been done that rehabilitation as a model is a weak basis for supporting confidentiality claims.

Fairness

We found that fairness is an appropriate ground for confidentiality, on the basis that there is a legitimate interest in preventing disclosure if the release of such information would reflect inaccurately or inappropriately on the record subject. The issue here is the potential damage to the record subject.

There are four areas related to the concept of fairness where release of criminal history record information could cast the subject in a false or inaccurate light:

(1) the information relates to a different person;

(2) the information is inaccurate or incomplete;

(3) the information is accurate and complete but relates to a conviction or arrest that was unconstitutional or otherwise improper; and

(4) the information is accurate and complete but it relates to an "old" record, no longer reflective of the subject's character.

Let's examine these four in more detail. (1) *The information relates to a different person.* There are two kinds of errors that may result from misidentification — false negatives and false positives. both are the result of records being searched on a name-only basis, without the benefit of positive identification (a technical fingerprint search). In a false negative situation, the name search misses an existing record, perhaps because the offender has used an alias. There will be no damage to the record subject since he will have escaped detection, but the requestor will be now laboring under the false assumption that no record exists. Public interest is not served in this case.

In the case of false positives the name-only search may identify the correct name but not actually the person in question. This could be very harmful to the record subject, especially if the subject does not know the check was made. To avoid both false positives and false negatives, a fingerprint verification should accompany all name searches. Obtaining fingerprints in an open records society may require the subject's consent. Absent consent, an open records policy is rendered ineffective.

(2) *The information is inaccurate or incomplete.* Disposition reporting remains the most serious problem of data quality in criminal history record information. Records are also inaccurate or ambiguous — it is not easy to match arrest and prosecution records, and sometimes it is harder to match the disposition with the arrest and prosecution data. Nevertheless, SEARCH research has found that the quality of criminal history record information is generally getting better, with disposition reporting levels as high as 90 percent in some states and as low as 25 percent in others. The level of disposition reporting in records held by the FBI and the states overall is 60 percent.[20] Still, at present levels, if the public were to have open access it would be faced with inaccurate or ambiguous data 40 percent of the time. The question then becomes, how would the public react to poor quality data? An area that needs to be studied is how non-criminal justice agencies with access have handled the quality and interpretation issues related to criminal history record information. We also need to examine states that have released both conviction and arrest data to non-criminal justice agencies.

(3) *The information is accurate and complete but relates to a conviction or arrest that was unconstitutional or otherwise improper.* What of improper arrests and convictions? Should they be made available, sealed or expunged? There is a basis for this in the courts' power to correct inaccurate, incomplete or otherwise inappropriate information. In many states, sealing policies are the remedy. In those states, sealing for improper arrests and convictions is done automatically or at the request of the record subject. Federal statutes do not afford a definitive right to seal or purge criminal history records, however, the federal Civil Rights Act and the federal Privacy Act have been invoked successfully to obtain relief from improper arrest and conviction records.

(4) *The information is accurate and complete but it relates to an "old" record, no longer reflective of the subject's character.* The aforementioned BJS Special Report, *Examining Recidivism,* states that, "Most of the recidivism, however, was found to occur within the first three years of release."[21]

Statutes in at least seven states recognize that offenders with old records present a slight risk of recidivism and therefore it is appropriate to make their records confidential. The courts, in the absence of statutory justification, have recognized that arrest and conviction information should not be disclosed after a significant passage of time. Several courts have held for record subjects against private parties for disseminating "old" arrest or conviction records. The Supreme Court has observed that after twenty years, a person is no longer a public figure merely by virtue of a conviction.

Again, the concern was the right to know versus the risks involved in confidentiality. Should there be an open records policy, there should be a concomitant recognition of the rights of this special class of record subjects. Our finding is that there is indeed justification for confidentiality for some classes of criminal history record information on the grounds that opening the records would be unfair to the record subjects. Those with an improper arrest or conviction, or clean record period, or with little risk of recidivism might be afforded confidentiality protections without making all records confidential.

Private Conduct

Is there ground for confidentiality on the basis of private conduct? Private conduct includes family, religious and medical matters. It has

been argued that arrest only information carries a presumption of innocence and therefore should be accorded confidentiality. This is especially true if there is an acquittal or factual finding of innocence — which was not the case in *Paul v. Davis*. Prior to *Paul v. Davis*, the courts had much to say on behalf of privacy concerns on the presumption of innocence. In *Davidson v. Dill* , a Colorado court suggested that there is a right of privacy in arrest records once the record subject is acquitted:

> We have now reached the point where our experience with the requirements of a free society demands the existence of the right of privacy in the fingerprints and photographs of an accused who has been acquitted, to be at least placed in the balance against the claim of the state for a need for their retention.[23]

In 1977, a federal district court noted that,

> For the person who has been arrested and exonerated, the presumption of innocence is lost. He stands at a distinct disadvantage to other, also presumably innocent, citizens who do not have "a record". Though he has been found innocent of any wrongdoing, the record will remain as a cloud over his future, put there and maintained by the same system of justice that exonerated him.[24]

Notwithstanding the courts' view, it has been established that an arrest, even an arrest ending in acquittal, it is not a private matter. A 1975 federal district court ruling was explicit about the public nature of arrests and arrestees. The opinion concluded that those arrested

> become persons in whom the public has a legitimate interest, and the basic facts which identify them and describe generally the investigations and their arrests become legitimate public interests. The lives of these individuals are no longer truly private...[T]his right [the right of privacy] becomes limited and qualified for arrested or indicted individuals, who are essentially public personages.[25]

Logic suggests that one who breaks a public law has indulged in a public act and the confidentiality protections afforded to private matters of religion, family and medicine do not apply. Most claims for the private status of arrests do not relate to the private character of the event. The battle for confidentiality must be waged on the grounds of the presumption of innocence that accompanies the arrest and the fear that disclosure of an arrest outside the criminal justice system will result in informal decisions that are inconsistent with the record subject's presumed innocence.

Practical Concerns

The SEARCH report examined the practical considerations for arguing for confidentiality. One such practical problem is that criminal history record workload costs appear to be substantial. The FBI recently cut off service to noncriminal justice agencies for a year to catch up on criminal justice requests and to improve response times. A number of repository directors have documented the increases in requests — and Paul Leuba, Director of Data Services, Maryland Department of Public Safety and Correctional Services, who will be speaking later at this conference, will report on this development. Despite the increase in number of requests, we found reactions mixed as to the actual costs: Some states said automation was able to absorb increases in record checks, and others said such checks strained budgets.

Some argue that charging fees for noncriminal justice checks will make public access feasible on a pay-as-you-go basis. Fees now range as high as $17.50 for a record check but these fees are for background checks for licensing programs and other employment verification. In terms of opening records to the public, should fees be assessed? What if people have a need to know but cannot afford the fee? If records become public, should society pay for the checks in the form of a tax increase or should individuals pay for public access?

Another practical problem is the misinterpretation of rap sheets. Criminal history records were originally developed for the criminal justice community, not the public. As such, the records are in a form and nomenclature specific to the criminal justice community. Certainly, more information is needed on how

noncriminal justice agencies have handled this problem, but it would seem that if records are to be public, then we must improve record clarity, train people to interpret the records and provide the public with readable summaries.

There is also the practical problem of misuse of criminal history record information, especially misuse because of unauthorized re-dissemination. In a public records environment, unauthorized re-dissemination would be a misnomer, in fact, a contradiction in terms. Records would belong to everyone. The real issue, however, is that all of the sealing and purging protections we have talked about regarding improper arrests, clean record periods, and "old" records, may be difficult to execute. Records obtained in an open records environment may be one of the fabled genies that won't go back into the bottle. Computers have rapacious memories that do not age and never forget. Once public, perhaps always public. Sealing and purging records in an open records society may find our state central repositories of criminal history records keeping a secret the public already knows from a variety of sources.

It could be argued that there are remedies in place for the misuse of records. The Fair Credit Reporting Act prohibits consumer reporting agencies from releasing public record information including arrest and conviction data that are more than seven years old. Other federal statutes, such as the Equal Employment Opportunity Act and the Equal Credit Act could be used to prohibit the misuse of certain kinds of criminal history record information for employment and other decisions. The state of New York forbids employers from denying employment or licences on the basis of a prior conviction unless there is a relationship between the offense and the employment sought, or unless the employment would involve an unreasonable risk to property or to personal welfare or safety. Notwithstanding those protections, the real practical risk is that employers may secretly use the criminal history record to dismiss the candidate, while citing another factor as the reason for denying employment.

Conclusions

It is generally hard to find empirical arguments against releasing conviction information, especially in the case of repeat offenders. Clearly, a conviction is a public matter. Exceptions to the release of conviction data seem to be warranted in the case of improper convictions and "old" records following an absence of criminal activity. It is also a fact that a number of states are moving toward a policy of increasing access to conviction records for noncriminal justice agencies.

There is evidence to suggest that non-contemporaneous arrest information and arrest information that results in acquittal or factual finding of innocence should be awarded confidentiality on the basis of fairness to the record subject. One important exception is the child molester, who quite often has a series of arrests with no convictions, attributable in part to the problem of children as witnesses. Child care agencies employ people in positions of special trust, and as such should have access to arrest records that are related to sex and crimes against children.

Sealing, and perhaps purging, are necessary for the protections to be afforded to "old" records and select kinds of arrest where there has been an acquittal or factual finding of innocence. Again, exception may be made, as in the case of child molesters where research shows that no rehabilitation or treatment has proven effective.

Finally, if we are motivated by the principle of balancing society's need to know to protect itself, with the individual's rights of privacy, then I believe the equation prohibits complete openness or complete confidentiality. Rather, we must continue to make distinctions among offenders, among crimes and their severity, and continue to reassess our public policy on the subject of open versus confidential records in light of continuing research.

Endnotes

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[3] *State v. Pinkney*, 290 N.E.2d 923, 924 (Ct. of Common Pleas, Ohio, 1972).

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[10] Downing, see note 2, p. 47.

[11] President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967) p. 75.

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[14] U.S. Department of Justice, Bureau of Justice Statistics, *Returning to Prison*, Special Report (Washington, D.C.: Government Printing Office, November, 1984) p. 2.

[15] U.S. Department of Justice, Bureau of Justice Statistics, *Examining Recidivism*, Special Report (Washington, D.C.: Government Printing Office, February, 1985) p. 1.

[16] U.S. Department of Justice, Bureau of Justice Statistics, *Recidivism of Young Parolees*, Special Report (Washington, D.C.: Government Printing Office, May 1987) p. 1.

[17] J. Markovic, *The Pace of Recidivism in Illinois*, Research Bulletin (Chicago, Illinois: Illinois Criminal Justice Information Authority, April 1986). Also see R. Przybylski, *The Impact of Prior Criminal History on Recidivism in Illinois*, Research Bulletin (Chicago, Illinois: Illinois Criminal Justice Information Authority, July 1986).

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[20] U. S. Department of Justice, Bureau of Justice Statistics, *Data Quality of Criminal History Records*, Criminal Justice Information Policy Series prepared by SEARCH Group, Inc. (Washington, D.C.: Government Printing Office, 1985) pp. 19-23.

[21] *Examining Recidivism*, see note 15, pp. 1-2.

[22] *Davidson v. Dill*, 503 P.2d 157, 161 (Colo. 1972) quoting *Eddy v. Moore*, 5 Wash. app. 334, 487 P.2d 211, 217 (1971).

[23] *United States v. Singleton*, 442 F. Supp. 722, 724 (S.D. Tex. 1977).

[24] *Tennessee Newspaper, Inc. v. Levi*, 403 F. Supp. 1318, 1321 (M.D. Tenn. 1975).

Demand for Criminal History Records by Noncriminal Justice Agencies

PAUL E. LEUBA
Director, Data Services
Maryland Department of Public Safety and Correctional Services

I am going to address the subject of repositories and their role in the collection, storage and dissemination of criminal history records in several different areas. First, I will review a bit of history about the formation of repositories—their role, their placement in state government, the kind of information they collect and how they collect it. Second, I will relate some of our experiences in Maryland, both in the development of a system for collecting criminal records and in the laws and procedures developed for handling noncriminal justice inquiries into these records. Finally, I will discuss how we may need to react to changes in laws and the resulting need to make changes in procedures and standards for the collection of criminal history records. If repositories are to keep pace with these changes, they need to come to grips with some fundamental issues in order to uphold timeliness and accuracy standards.

Let me preface my discussion of a central repository with a story that happened locally. At this time of the year in Maryland and Virginia when it starts to get a little cool and the ground is still warm in the morning, there's a lot of ground fog and it rolls out over the Chesapeake Bay. With a large part of the Atlantic fleet based in Norfolk, Virginia, there is frequently heavy traffic in the deep channels of the Chesapeake Bay. It seems a radio conversation was overheard, apparently between pilots of two ships on the Bay. The first transmission occurred when the captain of the battleship *New Jersey* observed on the radar what appeared to be a very large vessel on a collision course right in front of him. He had the radio operator get on the radio and say, "We realize that the range is about 1500 yards and we're on a collision course; suggest that you modify your heading by about 15 degrees very promptly in order to avoid this collision." Well, a radio message came back that said, "We respectfully request that you modify your heading by 15 degrees in order to avoid this collision." The captain got very upset and got back on the radio and said, "I suggest that you quickly modify your heading by 15 degrees. This is the captain of the battleship *New Jersey*." There was a bit of a pause and then the radio livened up again and a voice said, "Well, Sir, I suggest that you change your heading by 15 degrees and there's not much time left. This is Eddy, the keeper of this lighthouse." I think there is an analogy between where the captain of that battleship finds himself and where we might be going with our stewardship of our criminal record systems in the repositories.

Repository History

Let's begin with some fundamentals. Criminal law is principally the domain of the states. Historically, prior to the late 18th century, criminal records were kept almost as an afterthought by local police and courts. Little effort was made to share those records. It was only in the early part of this century that things changed. While I have not seen it documented, I believe the changes began with the invention of the automobile. The development of a more mobile society was one of the catalysts for keeping criminal history records and people recognized the need to develop more formal and rigorous record systems.

The first central repository, at least in the records I was able to find, was established in 1917. By 1930, there were a total of nine and by 1940, 18 central repositories. World War II slowed down repository growth, and by 1950 there were 20. By 1960, there were 22; by 1970, 28; and by 1980, 43. The decade from 1970 to 1980 showed a growth in central repositories of 15. A number of things accounted for that growth, including the Omnibus Crime Control Act, the development of the Law Enforcement Assistance Administration (LEAA), and the availability of the digital computer. The computer's use in telecommunications technology made it possible for a state central repository to exist and function effectively. SEARCH Group, Inc., as a matter of fact, was founded in 1968 as Project SEARCH as a direct result of a six-state project to share criminal records. So we find that in many ways SEARCH's maturity as an organization, the increasing number of central repositories and the participation of LEAA were catalysts that served to bring us largely to where we are today with 50 state central repositories.

Role of Repositories

Every central repository has as a basic mission the accurate and timely collection, storage and dissemination of criminal history record information. It is important to point out that the majority of central repositories were set up by state law. (Only two central repositories were set up otherwise: one by executive order and another by regulation.)

The repositories were established to collect criminal justice information for criminal justice use. Information systems (used in the broadest terms to include manual and automated procedures for the collection, maintenance and dissemination of information) were developed to meet that specific need.

Collecting information with the intention of using it exclusively in the criminal justice community results in a system that may be far different from an information system designed principally for a broader social purpose — the trend toward non-criminal justice access to and use of criminal history records that seems to be developing today. The principal basis for that difference is the fact that the information we collect for use in the criminal justice system has the built-in doctrine of due process — the right of the individual to inspect that record and challenge it for its use in a proceeding against him in court. I am concerned that this principle of due process is not easily carried out when there is such an explosion in the dissemination of these records to employers and others where their potential post-release use is not controllable. That difference, embodied by the principle of due process, will require us to re-examine some of the basic principles of system design and information handling, particularly in the areas of system audits and information quality control, thereby ensuring that information is complete and accurate before it is used.

Every central repository collects and stores information on felonies, and almost all of them also collect and store information on serious misdemeanors. Beyond that, there is a great variety of laws and practices in effect throughout the country concerning things like local ordinances and motor vehicle offenses, either of a serious or non-serious nature. In Maryland, we have strong environmental laws enforced by the Department of Natural Resources that are handled like criminal laws in some cases. The point I would like to make is that for crimes other than felonies and serious misdemeanors, there certainly is no standard and uniform set of data that is captured by the repositories.

Moreover, the criminal justice system is a complex and involved process. To make matters even worse, it is by design fragmented in nature. It does not have a hierarchical management structure. It is from that fragmented structure that central state repositories derive many of the quality problems that are now plaguing us. It is important to recognize that the central repositories are in the position of being the only unit in the criminal justice system that has, as part of its basic mission, the obligation to deal directly with every other unit in the criminal justice system.

How Repositories Work

To capture and store complete and accurate criminal history records, repositories have to start collecting information at the initiation of criminal charges,which is usually the arrest, and continue building that record to the end of the process, which is perhaps the release from incarceration. The period of time for one cycle through the criminal justice system can span many years and involve perhaps a dozen agencies. While the process usually starts with an arrest and a fingerprint card, there are a number of other ways that process gets started, depending on the various laws in state and local governments. It could be a citation. If an arrest warrant is issued, the repository will want to capture that and tie it together with subsequent arrest information. In many crimes, the process starts with an indictment or criminal information initiated by a prosecutor. If we look at the nature of the criminal activities that noncriminal justice users would be interested in, we might find a fairly high representation of, for example, indictments and criminal informations. So if we are going to solve the

problem of completeness, we have to make sure that our scope of interest is expanded beyond an arrest.

This is important because the entire cycle of one individual's criminal records is connected by our ability to relate the subsequent event (for example, court disposition or incarceration) to that individual's identity. The current system relies on fingerprint identification. But in some states, if, for example, the process starts with an indictment and not with an arrest and fingerprint card, there is no subsequent systematic assurance that the individual will be fingerprinted upon a finding of guilty. Incompleteness is built into the system when criminal events are reported to the repository that are not directly related to fingerprint verification.

Beyond the initial entry into the system through an arrest, an indictment, a warrant or a citation, we generally classify the information into three major areas: pre-trial, trial and post-trial information.

Pre-trial information involves the arrest charges brought against the individual, the pre-trial detention or supervision information, and bond status information. This information is generally of fairly high quality because it comes into the system within a clustered period of time and is generally fingerprint-supported.

Trial information includes any changes to the initial charges, either at the pre-trial or the trial itself; modifications, deletions or new charges; trial dispositions and sentencing data. The quality of this information varies and begins to decline for many reasons, depending on the particular state or local agency that is contributing the data. This decline in quality has a lot to do with something as simple as the lack of a good working relationship between the court and repository officials in a given state. Have the information systems in those two major entities developed in a parallel way? Have they been integrated? Have they been designed with the same numbering system? Have there been efficient procedures developed for the collection and verification of dispositions which may not have been submitted to the repository in a timely way? Considerable variance among the states can be found in disposition reporting and the quality of criminal history records at this point in the system.

The quality of repository records in the areas of incarceration, community supervision and parole are also varied. This has much to do with the degree of resources available to the repositories, including whether a given state has been able to automate corrections, parole and probation information with integrated criminal record reporting capabilities.

My reason for reviewing repository functioning in detail was to convey to you the sense that we are imposing 20th-century information processing systems on a system steeped in tradition, one that is complicated and fragmented. Our success has been spotty across the board. We can point to some strong successes in some areas, while in other areas we have not been successful.

Using Technology

Repositories generally have no direct control over the collection of the information itself. Therefore, the amount of resources available within the repository to communicate with up to hundreds of agencies that collect and report this information can be the single largest factor in determining the quality of repository information. With the jump in the number of repositories in the 1970s, there was more focus on the use of technology to solve the burgeoning explosion of information in the repositories.

Generally, the first emphasis in repository automation was the development of an automated name index. Arrest records account for the overwhelming majority of cases where the criminal record begins, and they are the first point of inquiry in retrieving the criminal record. Virtually every state has an automated master name index based on fingerprint-supported arrest data and other fingerprint data available in the repository. The more recent innovation in that area is the recent successful implementation of Automated Fingerprint Identification Systems (AFIS) in several states, which has helped the repositories improve the

quality of what is characteristically an error-prone process. The manual classification and determination of an identity from a fingerprint card is both time-consuming and error-prone. The overwhelming number of noncriminal justice inquiries require the submission of a fingerprint card by the repository and, therefore, the determination of positive identification by the repository before a response is made to that inquiry. The increasing number of inquiries from noncriminal justice sources will be helped greatly by the availability of an AFIS in the repository. Currently, at least a dozen other states are planning for and implementing AFIS.

Record Access

In a recent report of a survey conducted by SEARCH of the operation of state central repositories, 40 responding states reported a total of 35 million record subjects. Of those, the states of New York and California each reported 4½ million record subjects. On the other end of the spectrum, the state of Wyoming reported 50,000 record subjects. The bulk of the states fall somewhere in between. In Maryland, the number of record subjects is in the vicinity of 800,000, placing us at the mean in terms of number of records in repositories nationally.

If we were to extrapolate record numbers using the SEARCH report, there would be approximately 40 million criminal history records stored in repositories across the nation. That number is actually lower because of duplication among the states (that is, the same individual may have a record in multiple states or two records in one state). In annual figures, there were 5.6 million arrests in the 40 states that answered the survey. It is interesting to note — regarding the relationship between arrests and court disposition data and what it means to us in terms of record completeness — that 32 states reported that 3 million dispositions were reported. We should not draw any direct relationship between the almost 6 million arrests and 3 million dispositions because there is a difference in the number of states answering the question and also a time-lag problem with arrests and dispositions occurring in different years. Nevertheless, it is clear that we still have a disposition reporting problem across the country that is raising serious questions about the utility and use of criminal records, especially nonconviction information for noncriminal justice purposes.

In SEARCH's report, 38 states described the access to this repository information. The states reported that 25 million inquiries were made annually by criminal justice agencies. Of those 25 million inquiries, 87 percent were done by terminal and 13 percent by mail and telephone. These percentages are important to an understanding of the impact on the repositories of the increasing workload caused by noncriminal justice inquiries. Characteristically, these inquiries are not terminal-based. A fingerprint card usually needs to be submitted in response, and that response is generally by mail or in some written form. I should qualify those figures: of the 25 million inquiries, the states of California, Texas and New Jersey have very large and accurate automated systems accounting for 17 million of the 25 million requests. If those three states were taken out and we take a look at the remaining 35 states which reported, we see a different percentage distribution. The remaining 8.8 million inquiries are distributed this way: 88 percent are criminal justice inquiries, including terminal and mail, and almost 12 percent are noncriminal justice inquiries. The criminal justice inquiries are still leading by a great margin, but most of these are reported from remote terminals.

The repositories — generally through a search of the name index and a retrieval of the criminal history record from the criminal history file or independent court and corrections files — have automated their systems to respond to criminal justice inquiries. Those systems, as I mentioned earlier, were designed for the use of criminal justice agencies and appear to be operating very efficiently for that purpose. The much smaller

number of noncriminal justice inquiries — because they are handled manually and generally must be supported by a fingerprint card — are having a disproportionate affect on the manpower uses in the repositories. The process that repositories *generally* use when a noncriminal justice inquiry comes in is as follows. A search is made of the name index to see if the inquiry can be answered based on a name search. If they find an individual who appears to match the request, they pull the fingerprint card from the file and do a visual verification to make sure the fingerprint card under that name index is the same individual. At that point, if they have made a match, they will pull the record and comply with any inquiry requirement. If there is no match at that point, it indicates only that the name inquiry could not lead to an identification; there may be an alias in the name file or an alias on the fingerprint card. Next, a technical search is generally made of the fingerprint file, both in the subject classification file and in the master file. If a match is found at that point, then the same visual inspection takes place and the criminal record is retrieved. If no match is made at this point, only now can you prove, based on a fingerprint identification, that you do not have a criminal record for that individual in the file.

Answering noncriminal justice inquiries is a very time-consuming process for a relatively small fraction of inquiries. Nevertheless, it has a significant impact in this sense: our experience in the repositories indicates that, on the average, about 60 percent of incoming arrest cards involve recidivists who can be found very efficiently in a search of the name file. However, on noncriminal justice inquiries across the nation, matches are made on only five to eight percent of the fingerprint cards. If repositories cannot fulfill the inquiry by a name search, a resource-consuming technical fingerprint search is necessary. The resources are those technicians capable of doing technical classifications of prints and finding that match in the file. These are scarce resources and the answer to this dilemma is AFIS, which happens to be very expensive, takes a great deal of advance planning and careful work, and needs a lot of political support to install and operate.

Maryland's Experience

I will briefly review how noncriminal justice inquiries have grown in Maryland. The statute enabling our state central repository was passed by the Maryland General Assembly in 1976 and the repository went into full operation statewide in 1978. Our enabling statute has a provision that I do not think is too common: it provided the means for both in-state and out-of-state private employers to send a petition to the Secretary of Public Safety and Correctional Services (who is ultimately responsible for the administration of the repository) for access to criminal records. The Secretary reviews the petition for justification for access to criminal records for employment purposes. The Secretary's criteria are as follows: jobs that place people in positions of significant trust in the community, including the care of persons, and jobs involving trust with a particular good, such as money or a very valuable commodity (it could even be information). Over the approximately 10 years that the statute has been in effect, the inquiry level remained low for four or five years and then started to climb slowly. A variety of things are happening to cause awareness of that feature in the statute, resulting in approximately 200 criminal record checks a month being done under that statute. It is conviction data only, but the employer gets the rap sheet back. The Security Clearance Information Act (SCIA) did not have a big impact on Maryland because we were already providing the records to those agencies covered by the Act. While records are provided by the repository through the mail, we are supporting the installation of terminals in several of the SCIA agencies and we are going to provide to the SCIA agencies direct access to our criminal master name index file and criminal records, until an AFIS is installed in Maryland. At that time, we intend to put all agencies, including the SCIA

agencies, on the AFIS, thus requiring the submission of a fingerprint card when answering the inquiry. Our interest is to ensure that we are dealing with the correct subject, that we make a positive identification.

Under the SCIA, our repository receives 5,000-6,000 inquiries a month. That is the largest number of inquiries in Maryland from noncriminal justice sources, resulting from our proximity to Washington, D.C. and a very large number of military bases in Maryland. In 1983, a law was passed requiring volunteer and career fire fighters to undergo criminal history checks. We receive 25 to 30 inquiries a month from that law. In 1986, the Child Care Worker Act was passed, mandating agencies that employ public or private school teachers, social workers, foster parents, day care center workers, school bus drivers, juvenile services employees, school nurses, parks and recreation personnel, Big Brothers, Big Sisters and a number of others to run record checks. It resulted in a big jump in noncriminal justice access to our repositories, about 1,500 inquiries a month. No rap sheets are sent back under that law; the only response is whether or not the person has committed one of a list of serious crimes that are identified in the statute: murder, rape, child pornography, kidnapping, abduction of a child and certain specified sex offenses. An important part of that law is that it requires analysis in the repository of the rap sheet; it is not a matter of merely responding to the agency with an existing document; it requires analysis and development of another document.

In summary, while noncriminal justice inquiries are comparatively small in number, our existing criminal justice systems are not designed to deal with them because of their special nature. Moreover, such inquiries are having a disproportionate impact, and one that I expect to continue. In Maryland, we are expecting a statute to be passed that will require, for example, all nonprofessional employees of hospitals to have criminal record checks done. And there are other statutes being discussed that are going to require more checks. We are planning to install an AFIS as soon as possible to assist with the processing of a significantly increasing workload.

Looking into the future, I think there are problem areas to which we need to be alerted. First — and I think this is unanimous among all of us associated with a record system — is that we have to improve the accuracy and completeness of our records. These records are being used now in the noncriminal justice arena for a purpose that has broader social implications, but without the built-in doctrine of due process. Therefore, we need to adopt a strategy to revise these systems to incorporate improved quality control and to develop the formal, rigorous audits needed to ensure that the record system is going through cycles of continuous improvement. At present, I believe the only audits that have been done of these systems have been done by in-house personnel on a less-than-rigorous basis. We were fortunate enough in Maryland to get funds to conduct a formal, rigorous audit. SEARCH is involved in the audit, which is managed by the Criminal Justice Information Advisory Board. Our intention is to continue this audit on an annual basis.

In conclusion, I believe that criminal history records are at the point where we must treat them with the same care and interest that we characteristically treat our financial records. I also think that it is important for those of us in a position to operate repositories or influence policy to get this message to our political leadership and our management to ensure that we prevent the harm that could happen from incomplete and poor quality records.

Forces for Change

The Private Employer and Criminal History Records

JEFFREY M. SNYDER
Director of Employer Relations for Corporate Human Resources
Vice President, Citibank, N.A.

Since I am from the business sector, I realize that I am in the minority and am talking to people in the legislative/law enforcement areas. So, I thought it might be helpful to give some background on the needs of the business community for arrest records and personal backgrounds and discuss what the business community is experiencing.

Citicorp has 100,000 employees scattered through every state in the union and 93 countries overseas. We have $194 billion in assets, a lot to protect. Our products range from branches of Citibank Savings to a variety of credit cards and business concerns that most people do not know about, such as our computer factories that build our automated teller machines (ATMs) and our airplane parts company that sells parts all over the world. We have a variety of businesses that require a tremendous degree of employee talent. The message we are selling to our clients and customers is: "Trust us if we are going to manage your money." Therefore, we have to hire people with high integrity. We are also caught in an environment where there are many conflicting regulations, laws and policies. Each state has different regulations. It is part of my division's responsibility to monitor this diverse environment so that we can operate effectively and within the law.

Key Laws

The first law that is a key to our business is under the Federal Deposit Insurance Corporation Act. I would like to quote from this regulation because I think it sets the scene for the discussion. The Federal Deposit Insurance Corporation Act, 12 U.S.C. 1829, Conditions Covering Employment of Personnel states: "No person shall serve as a director, officer or employee of an insured bank who has been convicted of or is hereafter convicted of any criminal offense involving dishonesty or breach of trust. For each willful violation of this prohibition, the bank involved shall be subject to a penalty of not more than $100 for each day the prohibition is violated. The corporation may not recover that for its use." That puts us under the gun of having to know who we are hiring.

And how do we do know who we're hiring? We are one of the privileged organizations that have access to the FBI. We are able to submit fingerprint cards for arrest and conviction records and information that would help us in a hiring decision. We have tried to develop a hiring policy that allows us to try to screen applicants at the front door. Our applications require the applicant to sign and verify the accuracy of their statements upon pain of being fired. Firing in the corporate community is, I guess, paramount to capital punishment in the criminal codes; that is how we look at it.

We also now require drug tests. This is something we started in April 1987 across the country. We were not a leader in this, but we felt that it was time. We have not had major internal problems — no more than any other company — but every new employee of the corporation in the United States must take a pre-employment drug test, whether they are an executive vice president or a teller. We also are doing five years of reference checks so that we have some idea of where the applicant has been and what they have done. My personal opinion is that reference checks do not mean anything, that very few corporations or individuals will undertake the liability of giving you accurate information. In many cases, you are asking the individual for references; naturally, they are not going to refer you to anybody who is going to give a negative reference. So reference checks today are really valueless. The FBI check is valid and I think the drug test also does something for us. There may be a network out there, a headhunter for example, to help us get some idea of an individual's background. Nevertheless, we do not hire investigating agencies to do background checks.

I would like to point out some of the problems and contradictions that we run into in trying to do business in various states across the country. New York State has a law, the New York Human Rights Law, that makes it unlawful to deny employment to an applicant on the basis of a previous criminal conviction unless there is a

direct relationship between the criminal offense and the job or employment that would involve an unreasonable risk to property or safety. So, at the outset we have to prove that there is a risk to the corporation. California allows you to inquire into arrests; however, the arrest of employees or prospective employees had to result in conviction. Applicant screening can not involve just a random look at an arrest. Our hands are also tied in California to a great extent.

Employment Screening

I would like to talk about how we have tried to manage employment screening. We ran into some problems a few years ago. Our corporation has expanded at a very fast rate, buying companies across the country and world. Usually when we buy a company, we will not go back and do reference checks on the employees. As a result, we had one experience where we had a company that builds and services ATMs for our branch business. This company, prior to our acquisition, had used a major protection agency to do their background checks. They did not use the FBI. We had a defalcation shortage in our branch system caused by an employee stealing a key to several of the ATMs and taking the reserve cash. When we investigated, we found that the original investigating agency had only done a local check of arrest records and had not done the type of FBI or agency check that would have given us the conviction information we needed. The individual concerned had previously been convicted of grand larceny. Yet his job involved replenishing ATMs. His record indicated he had a certain proclivity that would have prevented us from hiring him in the first place.

Recently we went back to one of our credit card businesses and did an FBI check on everyone because we had been running into problems. It was not an FBI clearance-covered business, but we felt that it involved a relationship with funds and a trust issue. We did the checks and had to release several people who had records that had not been identified during the hiring process.

We are also heavy users of technology, which is causing all sorts of opportunities not only for business but also for people who want to share our assets illegally. We have run into situations of computer fraud; there are situations where people attempt to beat the different safeguards in the credit card systems, once again highlighting our need for integrity. We are almost at the level of the military where top-secret clearance is needed for various jobs.

Those are the kinds of problems we run into. And since we are continually buying businesses, we need to get information that is going to tell us about employee backgrounds. How did we do it? We built a corporate standards manual. We are a decentralized corporation, letting each company run its own business and make its own profits or losses. To address the security problems inherent in this structure, we built a policy framework for businesses to operate under. One of the standards was designed to address pre-employment processing and FBI clearances. Each business had to establish this policy and have it reviewed by our corporate policy unit. We did this to ensure that we were all operating under the right framework. It was their responsibility to operate from there on. We do not look over their shoulders. The local audit teams go in to ensure that they are operating correctly. So that is our checks and balances system.

Another problem we have run into — and it is something that many corporations are doing — is the temporary work force hired through agencies. The temporary work force is not hired through regular screening, so you can end up with several thousand temporary employees working in your processing areas. We found that some of these people may also have a proclivity to share the assets. Upon reference or checking, when we do a drug test or we convert them to full-time hiring, we sometimes find they are not eligible, that they have arrest and conviction records and many other problems. So this has become another area requiring regular scrutiny.

Personnel Records

I would like to discuss Citicorp's personnel records. We went to microfiche about ten years ago. It was a major project. We included the information we needed as an employer and the safeguards to protect the employees' privacy. We screened every record we had — and discarded pictures, wage assignments, incident reports and personnel appraisals more than five years old. Whatever was left was then converted to fiche. The fiche is computer-generated so that all of this information has been put into a computer database that we can withdraw on a fiche record. If I need a current record, I either access it through my computer for information or ask for a fiche card which will give me immediate information on performance appraisals, resumes, applications, confidential agreements and disciplinary documentation — information key to any employment or investigative decision.

At the same time we established this, we also told every employee that they could have access to their records. If they wanted copies of this personnel record, there are machine viewers in every one of our human resource units across the country, and they can make a copy of their record. We are an open environment in terms of giving information to our staff.

Principles of Privacy

At the same time, we are trying to protect our assets, so it is an interesting environment. The privacy issue has become a major factor in the way in which we manage our businesses and the philosophy of the corporation. We do not want to know any more about an employee than we have to. We are not interested in their home life, their social life, who their friends or acquaintances are. We built a system that limits access to the data. You need a password to access the computer system to get information on individuals.

I would like to read you the principles of privacy under which we work. We collect information that is pertinent only to employment. We make every effort to maintain the accuracy of the personnel data. We give the individual the opportunity to correct that data if there is disputed information. We disclose the general uses for that information and require written consent to release information to outside parties. We honor any legal process requiring information and notify the person whose records are sought.

We had to make key decisions about the degree of cooperation with law enforcement agencies, other government agencies, credit agencies, commercial businesses, as well as other agencies. We found we could not work with one general policy; we had to build a framework for each one of those entities. For instance, we provide law enforcement agencies pursuing a specific investigation with supervised access to all information that might have a bearing on the investigation. If it is a litigation situation, then we may require subpoenas. For subpoenas and court orders — and you would be amazed how many people are going through divorces, automobile accidents and sick claims where private information obtained by subpoena is important to the legal process — we will honor them, but we inform the individual immediately of the request. If they wish to inform their personal attorney and fight the subpoena, they certainly have the right to do so.

Post-employment Situations

I would like to talk about situations that happen after employment. Let's say a new vice president or hot-shot credit officer with an MBA is aboard. A month later, we get a report that the college they claimed to have graduated from with an MBA has no record of them. And if you look at the bachelor's degree, that college has no record of them either. This has happened; it is not unusual. Our investigation shows that the person is doing pretty well on the job, but they do not have the academic credentials. We allow our line managers the option of whether they want to keep someone with a falsified degree. In the majority of cases, we are going to terminate that person even though they have done a satisfactory job. If we get back an FBI finding that shows the person was convicted of a crime of dishonesty or breach of trust, we confront the

individual and ask for mitigating circumstances or other information. We will give them an opportunity to consult a lawyer and keep them on paid leave of absence. If they cannot disprove the information, we terminate their employment, because it would be a violation of law to keep them employed.

We also have situations where long-service employees are arrested. This is a rather common occurrence when you have 100,000 employees that are a cross-section of society. Some of the situations I have seen involve everything from child abuse to fraud to insider trading violations and attempted murder. Our approach in these situations depends on whether these employees have customer contact or it is a situation involving financial exposure. We decide whether or not we want to keep these persons working, change their jobs, suspend them, or take some other course of action. We had a situation recently where we hired a former IRS official who came with good references. The IRS later prosecuted him for violation of their regulations and it became a major criminal action. The individual had done well for us and had had good references from the IRS, so we moved him to a position where he was not exposed to customers, until he admitted guilt and received a suspended sentence. We terminated him because there was a breach of trust and we were not going to keep that person employed.

This is a continuing issue with us. The only way you may know an individual has been arrested is if they do not come to work the next day. They do not come in and tell us they have been arrested. Many times, the law enforcement agency contacts us for part of the investigation, but if they do not, we have to get the information ourselves. Our protection and corporate security departments try to get information. Nevertheless, there is no automatic termination for these employees. We, like any other prudent investigator or business person, need critical information to make an accurate decision.

When we get information such as this or we have a potential fraud situation, we have an Investigations Committee, which I chair. Usually the senior line officer, myself and a senior officer from the investigation unit are there. We will review the situation and decide whether or not that person's employment should be continued. If the person is terminated, it is for loss of confidence. We are not accusing them of being a thief; we just do not want them working for us. That has been our approach since 1977 and it works very well. We have not had any major legal actions because of it. We give the individual every option to present his side of it, to provide information. And we find it is a good balance between Dodge City justice and a witch hunt or just forgetting about it. So I think we have found the right balance.

In summary, looking at the corporate or business side, we have an obligation to protect our employees, to protect our assets and our obligations to our stockholders, so we have to blend these responsibilities and make it work.

Media Access to Criminal History Records

JANE E. KIRTLEY
Executive Director
Reporters Committee for Freedom of the Press

I think everybody will agree that statistics demonstrate that crime rates are decreasing in the United States. That is good news for us, and the FBI says so, and of course we believe that. There are other studies, though, that have reflected that the public's fear of crime is actually on the increase in the United States. Why? Why is there this difference between perception and reality? One explanation, that we think is a viable one, is that these perceptions are based on incomplete or inaccurate information about how our criminal justice system works. For reporters and for members of the public, probably the most important source of information to rebut that perception of increase in crime are public records reflecting the day-to-day activities of the various component parts of the criminal justice system. These include police blotters; court records that show indictments, dismissals, convictions and sentences; and other records that reflect incarceration, parole and pardons. Each action of law enforcement or judicial officials creates a record, and an analysis of these records can show the effectiveness or the ineffectiveness of these criminal justice efforts.

While these records have been traditionally open to the press and to the public, there has been a trend in the United States since the 1960s to minimize access to them. Increased use of computers to maintain and rapidly retrieve information has fostered concern over misuse of information reflecting involvement of the individual citizen with the criminal justice system and even the Orwellian image of Big Brother. The move to protect criminal history information runs headlong into the constitutional guarantees of public access to government information.

First Amendment Right of Access

The Supreme Court has repeatedly recognized the First Amendment right of access to the operations of the criminal justice system, usually in the context of access to criminal trials. Federal and state appellate courts have interpreted this right to encompass access to other judicial proceedings and to the documents that relate to them. At the same time, the court has found that the personal privacy rights of individuals who have been involved with the criminal justice system is minimal. The only restrictions on access to criminal trials that would be traditionally sanctioned, for instance, are the ones that are narrowly tailored to protect specific privacy interests with minimal intrusion on the rights of access. As we've seen here in Washington recently, in the case involving Michael Deaver, there was an attempt to close the jury *voir dire* because of privacy concerns. That attempt was overturned because the court had not used the appropriate balancing tests. Nevertheless, it is an example of the kind of over-zealousness that often occurs in this area, although I believe the courts generally apply a very stiff standard of openness and presumption of openness, particularly in the criminal context. A similar approach could be used to protect individuals against the misuse of criminal history information without interfering with the traditional right of access, and that is what we advocate at the Reporters Committee.

The trail of documents about an individual that begins with an arrest record and ends with a judicial disposition of the criminal case, whether by conviction or sentencing or *nolle prosequi*, is long and consists of only one kind of material — public records, public documents. The public and press generally have the right to examine arrest laws and the court clerk's docket book. They have a right of access to court proceedings and a right to examine documents in pending and completed criminal cases. Neither the public nor the media can be deprived of their rights of access to public documents merely because the information is being transferred to a state criminal history agency. The U.S. Supreme Court has ruled four times in the past few years that the First Amendment guarantees the public and the press the right to attend criminal trials — that's

Richmond Newspapers, the *Globe* newspaper, the *Press-Enterprise* cases — all of which have dealt with the right of the public to attend criminal proceedings and have access to criminal proceedings.

Judicial Proceedings

About half of the U.S. Courts of Appeal have ruled that this constitutional right of access to a trial extends to pre-trial and preliminary judicial proceedings in criminal cases, and two federal Courts of Appeal have ruled that it guarantees access to exhibits and physical evidence in a judicial criminal case. Recently, two federal appeals courts have ruled that the public and media have a First Amendment right of access to pre-trial proceedings and documents in civil cases. And, the courts in many states have ruled that the First Amendment and provisions of their state constitutions require that the public be admitted to court proceedings in all but the rarest of cases.

Courts have generally applied two lines of reasoning in coming to the conclusion that the right of access to a particular formal judicial proceeding is based on the Constitution. One is that the criminal trial has historically been open, open to the press and general public. Second, the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process as a whole. Public scrutiny of the integrity of proceedings is essential to maintain the quality and safeguards of the fact-finding process and benefits the defendant and society as a whole. I submit that these principles apply with equal force to other aspects of the criminal justice process, from arrest records to parole decisions. It is beyond dispute that reporters have traditionally and historically had access to arrest logs kept by police and docket books kept by court clerks. It seems quite clear that if public scrutiny enhances and safeguards the criminal trial, that same public scrutiny — not just at one moment in time, but over time, because that's the only way the quality of justice can really be assessed — is even more desperately needed to enhance and safeguard the quality of justice administered in police stations and in our prisons.

In the *Richmond Newspapers* case, the Supreme Court recognized at least five structural reasons why the First Amendment must be interpreted as guaranteeing a public right of access: 1) Public access promotes free discussion of governmental affairs; 2) It gives the assurance that the proceedings are conducted fairly to all concerned; 3) A trial is a public event and what transpires there is public property; 4) Public access checks corrupt practices by exposing them to public scrutiny; and 5) public access makes the participants more conscientious in the performance of their roles, and protects rather than hinders the fair trial rights of the accused.

These structural benefits of openness apply as well when considering the public's right of access to arrest records and other documents concerning criminal defendants which are prepared before, during and after judicial proceedings. They promote the discussion of governmental affairs — for example, the effectiveness of police in investigating crimes, arresting suspects and gathering evidence for use at trial. The success of penal institutions, parole and probation systems are of great public importance and are subject to considerable public debate. Whether it is true or not, the public appears to perceive that the crime rate is rising, that convicts often receive sentences which are inadequate and that they are released from prison to commit more crimes long before their sentences are completed. A Gallup poll in 1983 stated that fear of crime continues to pervade in American society, that 45 percent of all Americans are afraid to go out alone at night. Again, access to these records can help assure the public that proceedings are, and are perceived to be, conducted fairly and equitably for all concerned. The people have a right to know what is going on in their courts and criminal justice agencies, and the arrest, trial and conviction or acquittal of a criminal is a public event and never loses that status as a matter of public record. Abuse of the criminal justice system by prosecutors, judges and

others has been demonstrated by newspapers in Philadelphia, Chicago and St. Louis when they examined volumes of criminal history information in the early 1970s for stories documenting abuses. They could not have written those stories without the documentary evidence to support their findings.

Access also promotes conscientious performance of duty. Scrutiny by the press of the criminal justice process will discourage abuse of the system in the future. Public officials and others will be aware that their misdeeds will be exposed publicly. It will be more likely that criminal defendants will be treated fairly by law enforcement, judicial and penal agencies that do not operate in the dark.

Following ex-Chief Justice Burger's tradition and structural benefit analyses to arrest records and post-conviction documents, it would appear to me that the public interest in non-judicial criminal history information about an individual is as significant as the public interest in criminal judicial records. Therefore, the First Amendment should guarantee access to the former as it does to the latter.

There is no doubt that the states have a significant interest in protecting individuals who have been charged with crimes but not convicted, who are rehabilitated convicts, and to protect them from discrimination by prospective employers, financial institutions and others. The criminal history information laws in many states and the most recent version of the model law by the National Conference of Commissioners on Uniform State Laws imposes mandatory sealing and expungement for such information. Yet this interest is no more compelling than the states' interest in protecting, for example, a young sexual assault victim who has been called to testify in a criminal case. These laws ignore the Supreme Court's admonition in the *Globe* newspaper case that the public and media cannot be divested of their First Amendment rights of access, absent a compelling need which must be demonstrated on a case-by-case basis.

Computerized Record Systems

It is well established that networks of computerized recordkeeping systems can jeopardize information that individuals would prefer to keep private. Unchecked, a government agency could gain considerable power with the use of computers to amass vast amounts of information about every individual's life. It is also without question that individual citizens typically do not have the resources to gain direct access to information stored in these computers. They often do not know if the information is accurate, and many of them are not confident that officials will use the computerized records only for lawful purposes. Sad, but there it is. To the extent that the debate about criminal history computer recordkeeping systems is premised on these concerns, these problems have been, can be, and I hope will be addressed by existing and future legislation.

The Law Enforcement Assistance Administration saw to it that every state created protections for some privacy interests, to specify the kinds of information that could be maintained in these computer files and the purposes for which it could be used. It required the states to apprise individuals of all requests for disclosure of criminal history information. That same approach has been successfully adopted on the federal level to deal with other recordkeeping systems. For example, the Fair Credit Reporting Act requires that, upon demand, a credit rating company must allow an individual to see his credit report and to give him or her an opportunity to correct any misinformation. Similar provisions, such as the Buckley Amendment, protect school records, and more broadly, the Privacy Act protects all documents retained by the federal government which are accessible by an individual's identifier. These statutes seem to adequately protect private or inaccurate personal information from unauthorized view.

Still, some people argue that criminal history information is very different. They say that this information itself is private and that exposure

of it stigmatizes the individual in his personal dealings in the community and, among other things, undercuts the rehabilitative purposes of our criminal justice system. However, an individual's involvement with our criminal justice system as reflected in his criminal history information is neither a purely personal nor private matter. The Supreme Court has repeatedly recognized that the commission of a crime, prosecutions resulting from it and judicial proceedings arising from the prosecution are without question events of legitimate concern to the public and thus newsworthy. Moreover, this information is public record information and should not be removed from the public domain. In fact, a compelling argument could be made that sealing or expunging criminal history information could be as detrimental to some individuals as it might be beneficial to others, and would in any event be detrimental to the public support on which the success of the judicial branch of the government depends.

Reporters regularly examine police arrest records and court clerks' dockets in their search for news. They report daily on new criminal charges filed and on convictions, and their stories are filed in the newspaper library computer. However, if charges against a person are dismissed a month later or an appellate court overturns a conviction years later, a record of the event never shows up in the police log and it may not appear on the clerk's docket. It is possible that no story will be done about the dismissal or reversal, and no clip enters the library files. Maybe years later, if the individual comes into the public eye again because of a job promotion or an appointment to public office or a subsequent arrest, a reporter will look in his library for background information and find that a story was written about the earlier arrest or conviction, but there will be no record about the subsequent dismissal on appeal. Under many existing laws, the reporter would have no means of determining whether the library file is complete and accurate.

Neither the central repository nor the local police department could disclose the contents of their files on the individual, nor could they give the reporter access to alphabetical indices which would point the direction toward the complete case file. The openness of police and court chronological indices is meaningless unless the reporter knows that a certain event occurred within a certain period of time. Further, if a state law expunges records after a fixed time period, the search for the documents might be completely futile. Assuming that the information about a prior arrest or conviction is relevant to the reason the individual has come into the limelight, the reporter would be likely to include the background data in the story. While it is accurate as written, it is incomplete and it could be harmful.

Use of Criminal History Information

Not only is it questionable whether secrecy benefits the individual, but it is also questionable whether the passage of time alone can deprive the public of its right of access. Courts in about 15 states have addressed the issue of tort liability for publication of non-contemporaneous public record information and only a very few have allowed a cause of action to stand. This supports the position that the information contained in criminal history records is not entitled to much in the way of privacy protection. Indeed, when people speak of the stigmatizing effect of this information, their comments are not addressed to the question of disclosure at all. Rather, they are really angry about the subsequent use to which this information may be put. They point out that criminal history information has often been used to deprive a person of employment opportunities, or favorable credit ratings, or professional livelihood. Statutes can deal with this problem much more appropriately in terms of usage rather than in terms of secrecy.

For example, statutes such as the Equal Employment Opportunity Act and the Equal Credit Opportunity Act prohibit employers and creditors from denying individuals opportunities based on certain proscribed factors. These statutes provide protections for applicants and impose penalties against violators. It would be very

simple to include other factors in these statutes to cover situations where employment or credit decisions are made based on irrelevant or out-of-date material and where the applicant otherwise shows evidence of rehabilitation. As Mr. Jeffrey Snyder of Citicorp mentioned earlier today, the New York Human Rights Law in fact reflects this approach, forbidding any public or private employer from denying any license or employment to an individual because of a prior conviction unless there is a direct relationship between the conviction and the employment sought. In addition, no person or business may even ask an applicant for employment, credit or insurance about an arrest which did not lead to conviction. This statute imposes civil remedies for violation. It is narrowly focused and directly addresses concerns that have been articulated about the exposure of criminal history information. Its approach is workable, and it does not restrict the right of public access to criminal history information.

Nearly two decades ago, Congress and the criminal justice community correctly determined that there was a need to improve the collection and retrieval of criminal history information. Under the LEAA, all states established regulations and computerized systems for accomplishing this. Acting with little guidance from Congress or the LEAA, many states melded into their collection scheme provisions to shield individuals who had been charged with crimes from the social stigma associated with being a suspect or a convict. Many of these state laws equate secrecy of criminal history information to such protection. However, by sealing and expunging criminal records, the state laws and the laws proposed by the National Conference of Commissioners on Uniform State Laws deprive the public and the media of their First Amendment right of access to criminal justice information. Automatically, documents that were once public records are to be placed in hiding or eradicated.

Need for Safeguards

These laws provide no procedural safeguards. In most cases, secrecy is mandatory and expunction comes as a matter of course with the passage of time. No heed is paid to the right of the public to access to documents created by the government in the normal course of its affairs. No consideration is given to the public interest in fair and efficient operation of the criminal justice system. No consideration is given to the criminal justice system's well documented need for public support or to the public scrutiny and debate, without which that support cannot exist. Nor is there any consideration of whether secrecy is the only or even the best means of protecting individuals from discrimination based on their status as former criminal defendants or convicts. Yet simple amendments to existing federal and state laws could adequately protect the interests which these Draconian secrecy laws are designed to protect.

These amendments would provide procedures by which individuals can correct erroneous information. They would prohibit the improper use of personal information to decide whether to hire a person, and they would provide civil remedies against those who discriminate based on a person's status. Provisions such as these have already proven effective in protecting individuals, and existing laws could be amended to protect against the misuse of criminal history information without infringing on the public's and the press' First Amendment right of access to criminal history information.

Access to Juvenile Justice Records

RONALD D. STEPHENS
Executive Director
National School Safety Center

Quality decisions depend upon quality information. When it comes to sharing juvenile records and to developing effective juvenile justice strategies, quality information — current, accurate and comprehensive — is imperative to the decision-making process. It is particularly timely to convene this conference on confidentiality and information accessibility, stressing the relationship between schools and the juvenile justice system. The safety of our schools and the levels of crime and violence they experience is directly related to our national and state policies on confidentiality as it relates to juvenile offender record sharing. A recent issue of *USA Today* reported a new type of executive officer that is emerging in the corporate structure. In addition to the chief executive officer, the chief financial officer and the chief operating officer, there is now the chief information officer. The way this officer makes information available to organizational decision makers, planners and strategizers is a crucial component of a well-managed organization.

The debate over the relationship between confidentiality of juvenile records, juvenile crime and the right of students to attend safe schools is inseparably and integrally interwoven. The National School Safety Center believes juvenile records should be more accessible to youth-serving professionals who have a "legitimate need to know." Information relative to criminal prosecutions and school-related incidents must be shared for agencies to be effective. Too often, a habitual juvenile offender is treated as a first-time violator by the courts, resulting in lighter sentencing, ineffective sanctions and inappropriate treatment relative to the pattern of misbehavior.

If youth-serving professionals only knew the full circumstances and history of offenders, strategies could more accurately and effectively respond to the juvenile's needs and to the safety needs of the school and community.

School Crime Statistics

The incidence of crime in schools is well documented in the United States. The last comprehensive study of school crime and violence was completed in 1978 by the National Institute of Eduction. The *Violent Schools/Safe Schools* study found that every month in America there were more than 280,000 incidents of on-campus muggings, attacks or assaults on students. The study also reported 5,000 teachers were attacked or assaulted on campus each month across America, 1,000 of whom were injured seriously enough to require medical attention.

There has been some discussion as to whether or not the levels of school crime and violence reported in 1978 are continuing in the 1980s. The California Legislature recently enacted the School Crime Reporting Act, Assembly Bill 2483. The statewide results, released only a few months ago, reported 162,734 acts of crime and violence within the California school system alone. About 70,000 of these were crimes against property, but about 64,000 were crimes against individuals. The other 29,000 were categorized as victimless crimes such as drug abuse and weapons possession. State authorities who supervised crime reporting felt that school crime and violence was substantially underreported.

Another report, released by the Los Angeles County Schools Superintendent, reported a 64 percent increase in assaults from 1984-85 to the 1985-86 school year. Who were these assaults against? About 42 percent of the increase in reported assaults was against staff members, and a 69 percent increase in assaults occurred against students, but most alarmingly, over the past two years, assaults against peace officers have increased by 250 percent.

It is clear that Los Angeles and the state of California are not necessarily reflective models of the entire country, but they may be indicative of national trends. California's crime data, when extrapolated nationally, indicates that we are still experiencing significant crime and violence in and

around our nation's schools. Violence was so bad in Detroit public schools this year, for instance, that school officials actually shut down all 23 high schools for two days and brought parents, administrators, law enforcement and community leaders together to discuss ways to stem the tide of crime and campus violence.

Young people are seriously injuring one another, and in some cases killing each other, over incidents we, as adults, would consider trivial. Last fall at Fairfax High School in Los Angeles two kids were arguing over who was going to use a telephone booth. One student pulled out a gun and ended the argument by killing his classmate. This incident was allegedly gang-related and involved a dispute over turf as to who was allowed to use a public telephone in a particular area of the campus. Los Angeles has experienced more than one gang-related death per day since January.

During the past four years that the National School Safety Center has tracked student violence on campus, we have witnessed an increase in the seriousness of the crimes committed. California spends about $50 million a year on textbooks. In comparison, about $100 million a year is spent on school vandalism and related losses and vandalism prevention. The National PTA reported in 1986 that about $600 million a year is spent nationally on vandalism alone. Why is this allowed to continue?

Our nation's confidentiality laws contribute to the perpetuation of these problems by allowing a juvenile repeat offender to be treated as a first-time offender by the court system. The courts, judges and prosecutors often have difficulty tracking individuals who get involved in serious offenses. Lenient treatment afforded to habitual offenders only encourages them to continue their pattern of intimidation and crime.

Students have a right to attend schools that are safe, secure and peaceful. We need to make sure that our laws — even confidentiality laws — support safe schools. When one stops to think about it, there are only three categories of people required, by law, to be somewhere against their will. The first is criminals. They are protected against cruel and unusual punishment. The second is the mentally insane, who enjoy the same protection. The third is schoolchildren. Students, at the very least, deserve equal protection under the law. If children are required to be in school, then they need the same safe and secure environment.

The National School Safety Center receives newsclips daily from all over the country. A recent newsclip from Detroit, Michigan, describes an April 1986 incident where a 14-year old student, who had been transferred to Murray Wright High School because of disciplinary reasons, shot and killed a star football player on campus. The fight broke out in the school cafeteria. During the fracas he shot another kid in the face and a third student was hit by a ricocheting bullet. An anonymous comment by one of the teachers to *The Detroit Free Press* revealed: "We were ignorant of the fact that he [the suspect] had problems. We didn't know what to look for. It's like putting a time bomb in the classroom that could go off at any minute. Isn't it only right that somebody lets teachers know what we're up against? We can't do what's in the best interest of the student if we don't know where to begin. We feel like we're caught in the middle of a combat zone."

Another recent incident in Milwaukee, Wisconsin, involved the multiple stabbing of a 27-year-old teacher, three months pregnant with her first child. The 14-year-old transfer student who committed the crime had a past record of violence and disruption at her prior school. However, school officials, including the principal and teacher, were unaware of her pattern of aggressive behavior.

Schools get involved with confidentiality where crime and violence meet. When teacher training is inadequate, student supervision is incomplete, or where there is a justifiable reason to provide specialized supervision and attention, yet no one is warned — school officials may be held liable for damages that result from violence and disruption caused by students who misbehave.

Related Confidentiality Issues

Other areas where confidentiality is an issue in the school setting include health clinics, child abuse, counseling and supervision. Pending legislation in California would allow students to get contraceptives or have abortions without parental knowledge or consent. Nationwide, there are at least 100 health clinics located in schools and another 300 planned within the next 12 to 18 months. We will continue to see this issue put confidentiality against the parents' right to know. Child abuse has been cited as another critical confidentiality issue. School officials are mandated reporters. Their failure to promptly report confidential matters of child abuse or neglect may result in serious liability. A California school administrator who knew about, but failed to promptly report, an instance of child abuse and molestation was sanctioned and removed from his position. The teacher/pedophile continued to victimize students. There is now a $110 million dollar lawsuit against the school district for their failure to act on a timely basis.

What about the counseling issue? While coming out of the principal's office during a recent visit to an elementary school in downtown Los Angeles, I saw a number of sixth-graders lining up for graduation practice. The principal pointed to a young child and said, "See the kid in the blue shirt? I took an 11½ inch knife away from that boy just the other day. And when the police came to fill out the report, they asked, 'Well, did you check him for anything else?'" When the officer conducted the search, a baggie of marijuana fell out of his pants. The principal pointed to another kid and said, "The kid in the yellow windbreaker is the gang leader on campus."

What are the responsibilities of counselors and school administrators when they know there are gang members on campus and when they know there are plans to harm or hurt someone, or when a school counselor becomes aware of a student's special problem or need? I asked the principal about another child in a blue shirt and suggested the student looked like a fine young boy. The principal said, "He tries to do what's good and what's right but his mother encourages him to be very streetwise and use a lot of bad language. The other day, the counselor was visiting his home — by the way he lives in a garage with his parents — and a beeper went off. That's not because his parents are doctors or lawyers, but most likely, because they are involved in drug trafficking." Another boy, throwing a ball into his mitt, caught the principal's eye. "That boy's parents just bought him a car," he said. I remarked, "You're kidding! He couldn't be over 13 years old." The principal replied, "I know, we suspect his parents are into drugs as well." Finally, he pointed to a boy in a brown windbreaker. The principal said, "I have a subpoena to appear in court tomorrow with that boy's records. I don't know what for, but I have to be there in the morning."

These are not unusual circumstances for urban school administrators. They are all too often routine scenarios. As we address confidentiality issues, we must address what needs to be disclosed, and what needs to be kept confidential, to best protect the child. Appropriate treatment, counseling and education to respond to the individuals' needs also hinge on this information.

Serious Habitual Offender Program

The crimes juveniles are committing have become much more serious, and the age at which juveniles are committing these crimes is becoming younger. It is not uncommon to see 9, 10 and 11-year-olds being arrested for murder. Dr. Marvin Wolfgang, a professor at the University of Pennsylvania, tracked 9,945 males born in 1945 until their 18th birthday. He found that about 7 percent of those juveniles committed 70 percent of the crime. He repeated the study again in 1958 and found the same percentages. However, his new findings reveal crimes are becoming more serious at earlier ages.

With respect to juvenile justice issues, the Office of Juvenile Justice and Delinquency Prevention's Serious Habitual Offender Comprehensive Action Program (SHOCAP) deserves mention. There were five initial pilot sites around the country, including Jacksonville, Florida, and Oxnard, California. Although the definition of a serious habitual offender (SHO) may vary, it generally includes a juvenile who has committed three or more felonies within the past 12 months. Tim Crowe, director of the National Crime Prevention Institute in Louisville, Kentucky, coordinates this effort with OJJDP, a division of the U.S. Department of Justice. His manual discusses cases that relate to the confidentiality issue.

The first incident involved members of a Lexington, Kentucky, jury who were shocked and outraged to find that a young offender for whom they had recently recommended a somewhat lenient sentence had a previous record of serious conduct. State law prohibited the jury from knowing the boy's past record prior to their setting the sentence. The young man had been convicted as an accomplice in the abduction, sodomy and murder of two high school boys. He is eligible for parole in seven years.

Another Kentucky youth was recently re-tried on the charge of murdering a 7-year-old girl. He had been convicted previously and received the death sentence. His new trial, which came as a result of an appeal, resulted in a 20-year sentence. He is not eligible for parole immediately. The public and state lawmakers were so enraged that a year and half ago, the Kentucky Legislature passed a bill that allows a jury access to juvenile criminal history information. The bill further requires that violent offenders serve a longer prison sentence prior to being eligible for parole. Florida and other states are considering the passage of similar laws.

A third incident in California involved a teenager with a long record who had been arrested for assault and robbery with a firearm. During intake processing, the juvenile lied about his age and was put in the adult jail. When it was discovered that the offender was a minor, the prosecutor ordered him released. Within 72 hours after his release, the juvenile had killed someone. Had his past record been made available to appropriate authorities, this needless homicide very well might not have occurred.

The Illinois General Assembly commissioned a report from the Criminal Justice Information Authority. The report said: "Restricting the exchange of juvenile justice data is often counterproductive because police, the courts, social service agencies and others cannot always obtain the information they need to distinguish chronic juvenile offenders from the less serious delinquents. Without broad access to juvenile records, it is difficult for these agencies to refer young offenders to appropriate treatment programs early on."

It is not necessary that we open the juvenile records to everyone, but rather we must provide youth-serving agencies with appropriate access. Successful managing and sharing of relevant juvenile record data requires responsible and thoughtful cooperation. A profile of a serious habitual offender case developed by Chief Gary Higgins of the Jacksonville, Florida, Sheriff's Office exemplifies how school officials, law enforcement, social services and crime analysis officers worked collaboratively to respond to a child's needs.

The offender, whose name has been suppressed in this example, is a white male, 15 years old, 6-foot-1, 210 pounds, described as large and clumsy and with a very violent nature. His parents were divorced and he lived with his 51-year-old alcoholic father who had custody. His father had a lengthy arrest record dating back to 1951, mostly for alcohol-related offenses. The juvenile's last arrest involved a physical confrontation where blows were exchanged with a subject. Official reports revealed that the subject and his father fought frequently.

In the Jacksonville SHOCAP program, the schools, law enforcement and juvenile justice officials have worked together collaboratively to share information and to develop customized strategies for dealing with each serious habitual offender. When they started getting better at sharing the records, they found that they were able to develop a more comprehensive and effective treatment program for each individual. In the process, they discovered that the school had quite a record on this individual. They found from the sheriff's office that not only had the juvenile been suspended from school on two occasions, but also that he had attacked a teacher with a belt in February, assaulted a student with a stick in June, and later threatened a counselor and a school bus driver. When the Human and Rehabilitation Services came into the picture, they reported the young man had been involved in aggravated assault and assault and battery. And then finally, one other group, the Crime Analysis Unit, had additional data. When they combined all their data, the picture became complete. They were then able to develop an effective response strategy to the benefit of the youth. That is positive record sharing!

Within the next few months, the National School Safety Center will release a publication on juvenile records and confidentiality. The book will review confidentiality laws in all 50 states and will suggest positive record-sharing strategies. NSSC promotes amending the Family Educational Rights and Privacy Act of 1974 (FERPA) and related state laws to allow juvenile record sharing on a "need-to-know" basis so that youth-serving professionals can more effectively counsel, treat and work with disruptive offenders, their families and the community at large. We tend to do such a good job hiding problems, that we often do not know what the problems are, and we make it impossible or unlikely for others to help.

A student's right to privacy must be balanced with the responsibility schools have to protect all students and staff from harm. In a democratic society, the rights of all students and staff to attend safe school campuses and to live in safe, crime-free communities must take precedent over a youthful offender's desire to keep his school and criminal records closed to juvenile justice agencies.

State and local officials with a legitimate interest in the student's education records for the purpose of an official investigation or disposition of a case should have access to juvenile records. This would specifically include investigations that may result in the student coming under the jurisdiction of the juvenile court.

Until this type of record sharing and cooperation occurs, our juvenile justice system passively condones crime and violence by shielding critical information which could assist youth-serving professionals to better manage, counsel and rehabilitate disruptive youth.

The Implications of Change

A Social Science Perspective on Open Records

ALAN F. WESTIN
Professor of Public Law and Government
Columbia University

When I was asked to speak at this particular SEARCH conference, I was told the audience would be the keepers of the state criminal justice data systems and that my role was to share some perspectives about one particular facet of the open record debate: the questions of how, why and with what effect private employers seek access to criminal history information.

Let me try to put this into a historical setting. From about the 1880s until the mid-1960s, we had what most historians and lawyers would call, "The era of employer prerogative in the United States." Employment was at-will: the private employer was free to hire, supervise and fire without significant legal intervention. With a few exceptions, such as the National Labor Relations Act (setting the terms for labor-management relations and protecting employee rights to join a union), employers were free to do what they wanted in terms of managing the employment relationship.

In terms of criminal history information, this was the era of manual recordkeeping for the most part, with a little machine assistance in the 1950s and the beginning of automation in the early 1960s. Employers had pretty much at-will access to criminal history information. Employers either got the information because the record systems were completely open to them under state law or administrative practice, or because the employers were part of the information buddy system; they were able to call up their friends in law enforcement or in state administrative agencies and get information. Criminal history information circulated widely to employers, credit reporting agencies, investigative services, university police departments, landlords and to other organizations and institutions which felt that knowing about a criminal history record would be useful for their purposes.

From the 1960s to the present, we have entered a period best described as "The era of socially-mediated decision making by the employer." That is, the public decided there are important issues such as equality, privacy and due process that justify a variety of constraints being placed on employers. Some of these are legal and involve, for example, limiting access to criminal history information because of equal employment opportunity, privacy or wrongful discharge statutes. These were created partly as a result of changing social values and employee expectations. If employers wants to get good people to apply for a job, stay on the job, and be good performers, management must take into account expectations of equal employment opportunity, fair treatment and respect for privacy and due process when it does pre-employment screening or on-the-job surveillance. Another important factor is that employers know that their practices in screening and monitoring employees is now of interest to the mass media. Employers know they will get adverse publicity if they do things that the media believe are shocking and newsworthy. Ventilation of that is part of the new environment of the socially-mediated decision making.

Major Shift

This major shift from employer prerogative to socially-mediated decision making is a major one in terms of American law and employer practice. Nevertheless, one has to be careful to understand its limits. Some characteristics of employer decision making in hiring and retaining employees still rest on employer prerogative. First, we retain the major distinction in American law between constitutional limitations controlling the government employer and the absence of said constitutional law for the private employer; only when specific employee-protection statutes are enacted governing private employment is the private employer limited by law. Second, employers maintain a very large private police force to manage, investigate and take security measures on their private property. This growing private security apparatus services the private employer wholly apart from public law enforcement. Third, private employers decide their own internal due process or justice system for

employees who are dismissed or who have disciplinary action taken against them, and the great majority of such actions still cannot appealed by employees outside the firm.

In practice, there is a wide variation among companies between those that provide no meaningful complaint and appeal systems and others that have elaborate, well-administered and quite effective systems. Federal Express, for example, has one of the best programs in the country, the Guaranteed Fair Treatment Procedure; employees who feel unfairly treated by administrative decisions can go before a board of review with an employee peer group majority on it. This board then decides questions such as whether there has been a breach of company rules, whether the degree of discipline is appropriate, or whether termination is justified. However, there is wide variation among private employers in whether appeal systems are provided for their employees when disciplinary action is taken. And appeal systems rarely, if ever, apply to job applicants, where most employer use of criminal history information takes place.

Finally — and this is a very important factor for my discussion — information about workplace crime and misconduct is very scarce. Employers regard workplace crime as a shameful thing. Employers often do not prosecute crimes; they simply push the malefactor out of the organization. They will not tell even other employers that they have dismissed somebody for crime, often very serious crime. If the employee gives the money back, or if publicity over the situation is seen as hurting the company, then employers like to bury the fact of crime. And, they do not track it very well inside their own organizations: very few employers keep systematic data on the eight or ten major types of crime and wrongful conduct that occur at the workplace. It is a rare security department that can tell top management how much crime there really is. Unlike some areas of social research, this is not one in which there is good recordkeeping, nor are there large bodies of information about what employers do about it. That has to be understood as we think about what we know and do not know in this area.

Empirical Studies

For three years, my colleagues and I gathered empirical information on how private employers feel about criminal history information, how they are using it, and how this relates to the open records debate. We drew on two primary sources. First, we conducted a three-year field study and a national survey under a grant from the Bureau of Justice Statistics, U.S. Department of Justice. In the field study, we visited 32 employer organizations in states including Florida, New York, New Jersey, Illinois, California and South Carolina. In those organizations, we interviewed over 200 line managers and professionals from human resources, security and legal departments. We did additional interviews with about 200 officials in related government agencies around the country — equal employment opportunity agencies, motor vehicle departments, law enforcement agencies, and so forth. We conducted about 50 interviews with civil liberties, public interest, media, public defender and ex-offender organizations. I call these sources our qualitative database. In addition, we were involved in putting on national conferences, at which typically 250 or 350 human resources executives from major- and medium-sized companies discussed individual employee rights issues, including questions about pre-employment screening and criminal history records.

The second source of my comments is a national private-employer survey that we conducted in 1985 on private employer attitudes toward workplace crime and misconduct and their crime control strategies for dealing with it. This report, *Employer Perceptions of Workplace Crime*, has just been issued by BJS. I will use both our qualitative sources and our quantitative sources to present a picture of what is happening, and to interpret it for you.

Our survey produced slightly over 200 responses: 52 percent were from the manufacturing sector; 20

percent from banking; 17 percent from insurance; and 11 percent from retail, resort, health care and other assorted industries. Because of employer sensitivities about workplace crime, their lack of good information, and perhaps the length of our questionnaire, and because asking employers what they could have done better is a fairly threatening inquiry to some employers, we achieved only a 12 percent response rate. From a statistical standpoint, this makes one cautious about drawing many firm conclusions. However, since we did extensive qualitative work, and the survey paralleled our field interviews, we feel more comfortable in using the survey results, although with appropriate cautions.

Major Conclusions

Several major conclusions of our studies about private employer behavior are relevant and useful for criminal justice state administrators. First, there is tremendous diversity among private employer establishments. We are dealing with 80 million to 85 million private workers and several hundred thousand employer establishments. There is enormous diversity by industry, type of workforce, type of crime, employee problem and by management and organizational culture. There is simply no one dominant or majority model as to private employer beliefs and behavior in this area.

Second, private employers have mixed motives in seeking criminal history records. Potentially, they could have three objectives: first, they want to choose good performers, people who are going to do the job and, hopefully, help get it done better than the competition. Second, employers would like to minimize workplace crime by getting criminal history records, predicting who the criminals are going to be, and excluding them from the workforce. Third, employers want to obey the law and limit their legal liabilities. This means not getting into legal trouble in the way in which they select the employees.

The third aspect of private employer behavior to note is that the dominant approach to this issue among the overwhelming majority of private employers is basically pragmatic, rather than doctrinaire or ideological. This is based on a set of management attitudes that have emerged in the past 20 or 30 years, as a result of sweeping social change and resulting changes in management human resources approaches. Most employers recognize that crime and misconduct in the workplace cannot be eliminated. It is endemic because of our society's materialistic values and pressures, because of the opportunities available to tempted employees, and because the draconian measures that might control workplace crime are not legally or socially acceptable in our society. The typical employer starts by thinking in terms of selecting good employees and thus averting crime. Therefore, words like "containment" and "minimization" really describe most employer attitudes toward the problem of crime and misconduct in the workplace, as opposed to final solutions or grand system approaches. Also, there is a tug of war inside the private employer world between the security and auditing professionals, who are charged with trying to protect the assets and control crime, and the human resources and legal people, who are concerned about employee attitudes, human resources and legal liability. Top management often gets conflicting signals from different sub-units inside the organization, each one pressing its particular responsibility and sometimes competing with each other about the direction of policy.

What does our study suggest as some of the specific applications of these employer views to criminal history records? First, employers feel themselves caught in a crossfire today. There are pressures to control crime and to reduce money losses in a time of high competition. A lot of toleration of crime has begun to shrink in the mid- and late-1980s as a result of that kind of bottom-line, fight-the-competition type of pressure the private employer feels. Second, employers are competing with labor force realities. We are entering a period of labor force shortage. In the next several decades — as all of the demographic data clearly show — it is going to be hard to hire lower-level employees in clerical, para-professional, and blue-collar and service

industries, the lower third of the occupational structure. That means the employer faces the task of screening and making decisions about people who come from weaker educational backgrounds and who are more likely to have family problems and records of youth misbehavior. Employers are aware that trying to evaluate people's background and references in this new labor-shortage environment will not be easy. Third, employers feel legal cross-pressures. On the one hand, employers are concerned about laws and pressures over privacy, equal employment opportunity and similar employee rights concerns, if they should decide to use criminal history information. But there is also possible legal liability for negligent hiring if a criminal history is available and is not used. Courts have said that the failure to ascertain a criminal history record can give rise to liability if, for example, workplace crime involves a rape or assault, and an employee hired to serve the public has a criminal history record of violent assaults or even rapes.

One of the clearest findings of our studies, and something that may surprise you, is that most employers today do not see criminal history records as very useful for *most* of their hiring decisions. For a small number of posts involving special occupations, employers consider a criminal history record important, and they get records in such situations either legally in open records states or, very often, illegally. We went to many corporations in which we were told, off-the-record, that the company retains an ex-police chief or ex-FBI officer whose job it is to get unavailable criminal history information on a small number of cases a year.

The larger issue is the volume of searches of criminal history records that cannot be done through the personal information buddy system. We found that private employers just do not know what weight to give to a criminal history record, compared to other pre-employment screening opportunities and techniques they have, such as tests for honesty, polygraph exams or drug tests, or the use of background and reference checks. Employers are just not convinced that criminal history records are accurate or complete enough to rely on, or that they are really the most important thing in pre-employment screening. The other assessment techniques — which obviously raise many other legal and policy questions — are seen in many cases as being more useful to the private employer than the criminal history check.

Of course, there are certain kinds of jobs in which a criminal history record check is perceived by employers, society and scholars as probably very relevant. A sex offender record or a record of assault and violence are reasonably good predictors for those kinds of behavior on the job, if the employee is doing work that involves contacts related to the previous offense. Therefore, as we all know, there has been a major trend in the 1980s to open up criminal history records in areas like this to both public and private employer access.

Our study also found that employers, in terms of emphasis, are shifting away from pre-employment screening to on-the-job controls as the main way to deal with crime and drugs. That is, they are assuming that it is opportunity and motivation that often drives people to commit first-offense crimes. They assume that if someone has no criminal history record or scored well on an honesty test, that somehow that person may, if given the opportunity and put under pressure, still engage in workplace crime. So, there has been a jump in supervision and access controls on the job and in undercover operations. A survey in the mid-1980s found that only 10 percent of the responding companies said in 1980 that they were using undercover agents on the job to deal with crime. By 1984, that figure had risen to 53 percent. Therefore, as employers lower their expectations for pre-employment screening to get the right workforce, they begin to believe that their private police force and undercover agents may be the

better mechanism by which to deal with crime problems.

The bottom line of our research is that criminal history repositories do not have the "crown jewels" being sought after by most employers. Most employers honestly do not lust after information in these state central repositories. If you create an open records state, as Florida did, and if you make it easy, reasonably cheap and fairly rapid for the employer to get access to criminal history records, then many employers — but not most — will avail themselves of the opportunity. However, given the dominant environment in the United States today — where it is not easy, fast or inexpensive to obtain criminal history information — most employers are not very concerned about fighting for access to criminal history records.

Policy Implications

What kind of public policy implications does this suggest for the debate and exploration of the open versus closed records issue? First, it suggests that we are going to be balancing the interests of those who are served by closed records and those who are served by open records. Second, it suggests that employer attitudes and experience are not decisive. And third, based on the limited empirical work in the private sector world, there is no clearly preferable strategy. That means we should look carefully in making federal policy to see what is going on in the open records states, such as Florida, and in effectively closed states, such as Massachusetts and Tennessee, to see what differences record access makes, and what kind of experiences employers have. If SEARCH does a study of Florida, for example, it really has to approach things in terms of getting behind laws and regulations, and looking at actual employer practices, especially practices taking place at the margins and out of public sight. Otherwise, you are not touching reality. That kind of hard-nosed, get-at-the-facts kind of research is the only way to reach the right kind of social judgment on these issues.

One trend is going to continue: the legislatures will continue to open up private employer access to selected occupational checks, as in the sex offender and violent behavior area. This means that due process safeguards and proper controls should become part of that legislative effort and a lot of attention should be paid to these issues.

The open versus closed record debate is one of those issues where we cannot all be right, and there are strong and competing arguments on both sides. I wish I could say that social science or policy research could be a major aid in this value conflict. However, I am very skeptical about that: I do not think the right kind of research is being funded today by public or private sources, or even being proposed; therefore, society is going to have to decide these issues based on imperfect information, and balancing competing values as best we can. That is why I think that SEARCH is such a useful organization. It has the kind of experience, contacts, and access to decision makers in the state legislatures and Congress that gives it an opportunity to speak strongly on these issues and champion model codes and regulations with a lot of authority to recommend them. So, I heartily endorse what you are doing here and wish you good luck in it.

Open Records and Civil Liberties

JANLORI GOLDMAN
Staff Attorney, Privacy and Technology Project
American Civil Liberties Union

I appreciate the opportunity to be here today to talk about the civil liberties implications of open versus confidential records.

There are two recent and disturbing developments which may affect the way that criminal history records are used in this country. First, the FBI's Advisory Policy Board (APB) in June 1987 recommended that the FBI/National Crime Information Center (NCIC) system be expanded to include a tracking and surveillance system for individuals under investigation for suspected criminal activities. Additionally, the APB recommended that the NCIC system be linked to data bases at the Internal Revenue Service, the Immigration and Naturalization Service, the Social Security Administration, the Securities and Exchange Commission, and the Bureau of Alcohol, Tobacco and Firearms. These proposals will be coming before the APB again in December 1987, at which point the FBI will review the final recommendations. The ominous nature of such an expanded and unprecedented system is made even more threatening by the notion of opening up the system to the non-law enforcement community. While the criminal history records system is currently open only to law enforcement and other legislatively-authorized users, it is my belief that there is a definite push at the state and federal legislative levels to open the system to non-law enforcement users.

Second, the FBI recently published proposed regulations to abolish the one-year rule, which prohibits the FBI from disseminating naked arrest records (those without a disposition) over one year old to noncriminal justice users. It was only a few years ago, though, that the FBI told the Senate Judiciary Committee in a hearing,

> In establishing our policy, we felt that after a year there was a certain balance that had to be struck, and we would just arbitrarily not disseminate it without disposition data. We most certainly welcome any legislation in this area to clarify, at least for us, what is a legitimate time to not disseminate information.

This statement came from David Nemecek, Chief of the FBI's NCIC Section to now-retired Senator Charles Mathias.

Eroding Rights

In every session of Congress, legislation is introduced which threatens to erode the privacy and due process rights of record subjects. This session, both the House and the Senate introduced a bill which would allow the National Association of State Racing Commissioners (NASRC) to have access to NCIC files to perform criminal history background checks on license applicants. The bill, in effect, would require the FBI to disseminate records to a private, unincorporated trade association. This legislation is particularly disturbing in that racing commissions in each state already receive this information through the state governmental entities. Supporters of this bill claim that the centralization of this process will be more convenient and less expensive. Under the bill, the criminal history records are sent to the NASRC, which does the background check for a particular applicant and disseminates it to the state where the individual is applying for a license. Currently, each applicant has to go to each state to apply for a license in that state. The bill centralizes license applications, making the process easier and cheaper. The ACLU has fought for years against federal legislation which would grant private access to the NCIC. So far we have been able to win those battles. We have to battle that issue every single session. It would be disastrous if either of these proposals were adopted.

The way is being paved to produce changes. Each inroad to broader access to more information may seem small, but the cumulative effect looks terrifying. As a staff attorney on the ACLU's Privacy and Technology Project, I have come to understand that the issue of whether criminal history records should be made available to the non-law enforcement community is not a simple one. In fact, a law professor might find this a good issue for a law

school exam. Students could first argue that criminal history records should be made public to all requestors because:
1) the public has a right to know the information generated by the law enforcement process;

2) an individual's criminal history may be of interest to prospective employers, insurance companies, landlords, the media and even next-door neighbors; and

3) access to criminal history records is vital to the public's ability to guard against police abuse.

The students could then cite relevant statutes and case law and note that a public policy trend in this direction has been charted.

On the other hand, a good student would argue, criminal history records should remain confidential and closed to the non-law enforcement community because:
1) individuals maintain a protectable privacy interest in personal information collected and held by the government;

2) criminal history records are collected with an eye toward criminal justice use and use of these records by those unsophisticated in their handling runs the risk of misapplication and misunderstanding;

3) use of criminal history records by prospective employers will perpetuate discrimination against minorities and the poor who are arrested and convicted more frequently than middle-class whites who engage in the same conduct;

4) nearly 30 percent of the criminal history records held in the FBI's centralized repository are inaccurate, incomplete or outdated, while at the state level, incomplete disposition reporting is about 48 percent;

5) there is a question as to whether non-law enforcement access to records actually prevents or inhibits crime; and

6) individuals have no effective remedy against a private entity in the event that disseminated information is incorrect, incomplete or mishandled.

In assessing the effectiveness of non-law enforcement access, we know that there are those who have committed numerous crimes and have no record, while others have been convicted of a crime and are now rehabilitated. Dr. Schlesinger of BJS stated yesterday that a small number of people are responsible for committing the large number of crimes. In terms of potential discrimination, please note that black people are arrested four times more frequently than whites. Also, I was pleased when Professor Alan Westin said it is possible that employers may not even want criminal history information, and that when they do, they are not exactly sure how to use it. That only underscores my point as to the unsophisticated level at which most of these people use the information.

As for data quality, a 1985 SEARCH report on the data quality of criminal history records found that the quality of these records was so deficient as to compromise the decision making process. Dirty data not only leads to false arrests, but endangers police officers who may not be warned that someone they have stopped is dangerous. As for remedies for people harmed by inaccurate or incomplete information, there is no effective legal remedy in this area.

This past summer, however, Terry Dean Rogan won his case against the Los Angeles Police Department, in part because he sued a governmental entity charged with upholding the constitutional rights of citizens. He brought a Section 1983 action, which in some situations is not a powerful, potent or successful remedy. But the court in his case held that the LAPD was liable for violating his constitutional rights because the Department kept inaccurate information in their record system after they knew it was inaccurate. Rogan was wrongfully arrested five times after somebody had stolen his identification and used it after being arrested for robberies, murders and assaults. The LAPD was also held liable by the court because there were identifying characteristics that distinguished Rogan from the suspect which should have been put into the record when the suspect was first arrested. I

wonder whether or not that decision will have repercussions at the state and local law enforcement levels.

Precedents and Legislation

A law school student might also cite judicial precedent or legislation which supports closed records environment. However, the Supreme Court has refused to recognize a constitutional right to privacy in criminal history records or, for that matter, any records held by a third party. And no piece of comprehensive legislation exists which sets standards for and restricts the dissemination of criminal history records. The body of case law and statutes is stacked against the record subject. As an ACLU representative, though, I have the luxury — some may even say the privilege — to revisit the first principles on which this country was founded. The constitutional right to privacy involves more than just the right to be let alone; in certain instances, it also involves the right to control areas of one's life. The privacy right is intimately tied then to our right to due process and equal protection under the law. I believe that *Paul v. Davis* was wrongly decided, I also believe that 28 U.S.C. 534 restricts the FBI from disseminating to anyone outside the criminal justice community. Some protective case law does exist in this area. In a well-known case, the Ninth Circuit prohibited the automatic rejection of a prospective employee based solely on his arrest record. The court in that case held that arrest records are not relevant to an applicant's suitability or qualification for employment. The D.C. Circuit Court of Appeals, ironically, in light of the *Reporters Committee* case, recognized the undoubted social stigma involved in an arrest record, noting that arrest records could cause an applicant to be denied employment.

However, this is not a law school exam where these kind of issues can be theoretically played out and confined to an eight-page blue-book. The *Reporters Committee for Freedom of the Press v. the U. S. Department of Justice* case, if the Committee prevails, will settle the issue of open versus confidential records. The court in that case — while some may argue has fairly interpreted FOIA — took no pains to distinguish between rap sheet information and complete, accurate disposition data. Further, the court misunderstood the availability of rap sheet information at the local and state levels.

SEARCH's 1981 report *Privacy and the Private Employer* noted that, "Both statutory and case law appear to be moving in the direction of permitting, if not requiring, broader access to criminal history records." The report also stated that,

> There was also some evidence, although it is by no means definitive, that private employers seldom distinguish between arrest and conviction records. Employers do not want to absorb the expense of investigating circumstances surrounding an arrest and thus they treat arrests as they would treat convictions.

Mr. Jeffery Snyder from Citicorp, however, said that he would prefer not to receive naked arrest records during pre-employment screening because they would taint his mind. Nevertheless, it is my guess that if he had access to that information, he would take it. The question is not whether we are curious; it is whether this is a legitimate way of fulfilling the needs of the business community.

Nearly one-third of the total workforce has a criminal history record. One-half of those people have not been arrested in the past decade, and over half of all arrests do not end in conviction. There is no doubt that employers want to know a prospective employee's criminal history and that those records will certainly be a factor in whether or not to hire the job applicant. Regardless of the nature or condition of the data, any criminal history operates as a stigma against the record subject. Sometimes, it is a stigma rightly deserved; there are certain situations in which specific kinds of information are very relevant to an employer, such as child care providers receiving conviction records of child molesters.

Predicting Behavior

We cannot say that employers make good use of criminal history records and that the information may be used in predicting an employee's on-the-job behavior. Certainly the information is interesting to us and may satisfy our curiosity, but in the balance, these are not legitimate ways of assessing people's character for job performance. In the worst-case scenario, all an employer may know, for example, is that a job applicant had a run-in with a police officer seven years ago for which there is no disposition data. How can that information be useful to the employer without substantially harming the individual?

Currently, the FBI reports that requests for access to criminal history record information from noncriminal justice agencies exceeds requests from the law enforcement community. How has this happened, and why? Is the need for the information by employers and licensing boards perceived or real? And what, if anything, can be done to shape public policy and close the door on the indiscriminate dissemination of criminal records? At this time, the only non-law enforcement entities that receive access to criminal history records are those authorized to do so by state and federal statute. In those instances, the requestor has had to demonstrate a legitimate need for access to the records. Imagine what would happen to the FBI system if we moved into an open record society in which anyone could get any record — the world as envisioned in the *Reporters Committee* decision. The requests to the FBI would overwhelm its already-overworked system and would most likely inhibit the effective functioning of its primary purpose — to provide law enforcement quick access to good law enforcement records.

I came here yesterday expecting to hear from SEARCH that the trend is toward an open record society. I expected to hear that any attempt to restrict access and dissemination of records to the non-law enforcement community would be a futile battle. Instead, I have heard Gary McAlvey and Tom Wilson of SEARCH and Paul Leuba of the State of Maryland talk about their concerns about providing criminal history records to all requestors. And I listened yesterday to Jane Kirtley from the Reporters Committee come under heavy fire for her view that all criminal history records should always be made available to the public. I am encouraged by what I have heard here in the last couple of days. I understand that SEARCH has a tremendous responsibility to guide policy in this area, to set model policy. The issues are complex and competing. I urge all of you to step away for just a moment from responding to the public's recent lust for information created partly by technological advances and the growing attitude that "The more information I have on you, the better."

A concerted effort must be made on the state and federal levels to craft comprehensive criminal history record legislation. Legislation is crucial to limit the scope of NCIC, to retain the one-year rule to prevent dissemination of naked arrests to the non-law enforcement community, and to allocate money to improve the quality and condition of criminal history records. Such legislation is pending now. Standards must be developed as to who gets what information, for how long and for what purpose.

I talked to Paul Leuba about the situation in Maryland in which the state Legislature decided that if a non-law enforcement or private entity wants to receive criminal history record information, they must demonstrate a particular need for that information on a case-by-case basis. They must then petition the Secretary of State for that information, and the Secretary of State must then make a determination as to whether or not the release of these records will serve the purpose of the private entity. It is a very interesting and fairly unusual solution. It is one which shows that the Legislature has thought about these issues, is going to be careful about these issues, and is willing to put in the time and energy to achieve fairly thoughtful results. Many of these questions have yet to fully play themselves out in the states and at the federal level, but I think that this conference does mark a beginning in the dialogue. We must restate, as we have for years, that the public's interest in maintaining fairness, trust and individual privacy far outweighs any interests which may be served by an open records society. I appreciate the opportunity to be able to share in that dialogue.

Open Records: a Public Policy Perspective

STEPHEN GOLDSMITH
Prosecuting Attorney, Marion County, Indiana

What we are here to talk about today in terms of public policy and open versus confidential records is the idea that all of us in this room are quite satisfied that we are capable of understanding and appropriately, rationally and constitutionally using criminal histories — but that everyone else is dangerous if they have access to this information. It is the same kind of discussion we have about juvenile records in the school setting: The welfare agencies have their child abuse records, the prosecutors and police have their delinquency records, and the schools have their discipline records. Everyone is sure that if he shares his records with someone else, the record subject will be harmed. However, if he has all of the information, he can make more informed decisions. Therefore, what we are talking about today basically is whether the presence of information — the widespread use of knowledge — is detrimental to the way we do our jobs. And as such, we will define these records in terms of whether we think more information will help us make good decisions or if more information will cause us to make bad decisions. I am on the side of knowledge, and of open records.

An Open Record System

I would submit to you that we have an open record system now. There is no private, closed, confidential criminal history record. It is closed only to those people who do not know how to work the system. Let's examine the issue: First, any good investigative or police reporter can get any criminal history he wants. I doubt if there's anyone in the audience today that works in the criminal justice system who doubts that the police reporter can get a criminal history of someone he is investigating or who has been arrested. We know that the press can get the criminal history of anyone of public stature. We know that any police officer and any prosecutor can get the criminal history. We also know that all former police officers can get the criminal history, and half of them work for corporations. They simply call their friends. We know that any good defense lawyer can get the criminal history by calling the police officer that he works with because they have developed a relationship. We know that the civil lawyers and corporations who know defense lawyers can get the criminal history of a person involved in a tort suit. Therefore, we really have an open records system. The only people who cannot get the records are the lower-level clerks, prosecutors and police officers that have not been given security clearances. They have to obey the rules because they work for one of us.

If you go through the privacy issues, then the situation becomes even more confusing. First, who is damaged by open criminal history information? It is the public official or person who is prominent in the community; a public indecency arrest of two years ago will damage his ability to do his job. As a public official, everyone knows about that arrest anyway. Second, who is really protected by privacy? Certainly not Judge Bork and other people of interest to the press. Every community that has an investigative reporter, or the public for that matter, can have a look at the police blotter. We are left, then, with a situation where people who are not prominent, about whom no one is investigating, who have not been convicted, and who are not applying for a job have their records secured. Now, is this a privacy issue worth all the trouble that the rest of us have to go through to use the data? I submit to you that is is not.

A Premium on Accuracy

Let's now look at the reasons why criminal history records should be public. First, let me suggest to you that the records should to be open *because* they are inaccurate. Let's turn the accuracy issue on its head for a moment. We all know the records are inaccurate, but we have this idea that only police officers, prosecutors

and FBI agents can use them intelligently. Therefore, there is no compelling reason to clean up inaccurate records. As such, I am not particularly disturbed by the Terry Dean Rogan example, simply because there can be no premium on accuracy in those records until they have a wider, more public use. If we have widespread use of those records, there is going to be a premium on making them accurate. Let me illustrate the point: Tomorrow in Indianapolis, I will have to be involved in a fight about a million dollar ordinance to computerize our criminal histories into an integrated data base that we are building. Of the million dollars, $300,000 is needed for temporary help to enter the records into the computer. The rest of the money is needed because the records are inaccurate — before we put them into the computer we want to make them accurate. That is an interesting issue: it is all right if they're inaccurate on paper because nobody can see them except those of us who carry them around; but we want to make sure they are accurate if they go into the computer system.

The more we use these records, the more available they are, the more necessary it is that they be accurate. More people will be relying on the data. As criminal history records become public, the responsibility of law enforcement to make those records accurate will increase. Moreover, the money that local, state and national government will invest in accurate information will increase as the use of the information increases. I think making records public places a premium on them.

Many people are worried that the person who reads his criminal history is unsophisticated and cannot understand it. What we are really saying is that we have valuable information, but we do not trust you to use it correctly, so we are going to keep it confidential. I suggest that there are many more decisions that are harmfully made from lack of information than from having information. Moreover, it should not be up to us to decide what information is out there in the workplace, or in criminal justice, or for free press decisions. I believe it is up to the public to decide, assuming we come up with some rudimentary level of clarity and have accuracy.

Law Enforcement Use of Records

The second reason for making criminal history records public is that the privacy of the records reduces the ability of law enforcement to use these records. For example, in Phoenix last week at the National Institute of Justice's State-of-the-Art for the Judiciary, I stated my position that juvenile records should be used in adult proceedings as part of the sentencing process. A judge in attendance said, "Well sure that makes sense, but by law we judges are not allowed to see the juvenile histories, even for adults." One of the prices that we pay, then, for having closed records is that the people who pay most attention to confidentiality are the public officials in the system who most need the information. If we opened up the records, we would also open up the use of the records. We would be able to transfer juvenile records for adults; we would be able to transfer records to other people in the system; and officials would make more intelligent decisions. Again, closed systems means that we are going to protect other people from knowledge, and somehow assume that they will make better decisions if they know less about individuals.

Private Employers' Use of Records

A third reason, to open records is to put more responsibility on the part of a private employer to look at those records. More corporations may be exposed to negligent employment decisions. The question of employment enters us into yet another problematic discussion. If you work in a day care center, child molestation is so important that the employer must have a right to criminal histories. You just cannot debate that. However, if you work in a school, hiring drunk drivers as bus drivers may not be important enough to warrant looking at a criminal history record.

As a consequence, we will allow some number of bus crashes we could have prevented if the employer had access to the drivers' records.

How about auto thieves in garages? The point is, where do we say that the amount of crime that we are going to tolerate is a price we are willing to pay for the incremental benefit of privacy. When we say, it is important to open records for child molestation, but it is not for this or this or this, we tolerate more rapes by people who move furniture, more auto crashes for bus drivers, for example. All fleet employers and commercial carriers should not have just the driving record of their prospective drivers, but their drug and alcohol convictions as well, before placing people on the road.

We should make the records open, make sure that the private employer knows he has a responsibility to check, and charge him for the service. The need of the private employer for criminal history information is a way to produce income, furnish information, and improve data quality, information systems, and the decision making of many people.

Fourth, public records will encourage sharing of the information. The more open the records are, the more we will share the information, the more intelligent the decisions will be for the public policy people as well as the private employers. It is not unimportant, frankly, that I am asked to keep secret that I prosecute people because somehow that knowledge would taint them. It does taint them! Yet they are guilty of the crime for which I prosecuted them. If we open the records, we demonstrate to the world the importance of the criminal justice system, and tell the world that when somebody is convicted, that it is an event worth considering. Opening records gives added importance of the criminal justice system generally, rather than suggesting that we are involved in this dirty little business where we keep records secure so we will not hurt the people we prosecute and convict.

Juvenile Records

In addressing the issue of open versus confidential records, discussions in this country have done a disservice in talking about juvenile records and adult records. What we should be talking about are records of people who are now adults and records of people who are now kids. There is no substantial gain from talking about juvenile records and precluding the access to the juvenile records of people arrested as adults. We make more intelligent decisions from better understanding criminal histories when we focus on the juveniles when they begin committing their crime, and know how many crimes, and the interim between crimes. Privacy puts a barrier between adults and juveniles — not for people who are now juveniles, but for those who are now adults. The cost is that we cleanse out the information that is most important to people trying to make prediction decisions.

If you add together all of the reasons to open records, I would submit that you will conclude that if you have proper funding to do these services, then an open records system is the best thing to do. There remain two issues to confront. We would not want to have an open criminal history records system imposed upon the FBI that would force states, such as California or New York, out of the Interstate Identification Index (III) or the NCIC system. The whole issue of open records becomes much more important as III and other electronic data bases begin to take hold. The second issue is what to do with arrest information that has not led to a conviction. Even I would acknowledge that that is a more difficult situation, one that should have a different standard than for a conviction.

In conclusion, I think there are very powerful reasons why we should take advantage of the *Reporters Committee for Freedom of the Press v. U. S. Department of Justice*. We can turn it on its head and use it as a vehicle to improve the quality of the criminal history records that we are in the business of using and furnishing.

Implication of Open Criminal History Records

GEORGE B. TRUBOW
Director, Center for Information Law
The John Marshall Law School

The conference sponsors have asked me to speak about the implications of dropping the presumption of confidentiality regarding criminal history record information (CHRI). The announcement for this national meeting says that "strong pressures to open criminal history records have been created by . . . the expanding use of criminal history information for noncriminal justice purposes." At the outset, I take issue with that premise of expanding use because I believe it begs the question. Bob Belair, SEARCH General Counsel, made it clear in his presentation — the CHRI system is closed, though there are incursions. No doubt there is an increased public *desire* to have CHRI for noncriminal justice purposes, but the propriety of such access is the subject of this meeting. Just because there are criminals, we don't repeal the criminal laws. We have not come here for a requiem; the policy stands and a decision to change has yet to be made. So, let me state what I think would be the implications of a change to an open CHRI policy. Though I have been asked to focus on the significance a change would have on record subjects, my predictions range more broadly. I venture only three general concerns; though they are few, they are extremely worrisome, and here they are:

1. If SEARCH retreats from its current policy, the Group will have surrendered, or have been stampeded from, its role as the leading expositor of a rational, national criminal history records management policy.

2. If the criminal justice community were to abandon its presumption regarding the confidentiality of CHRI, I believe it would signal an irreversible trend toward an open market in all personal information held by any recordkeeper, public or private.

3. A policy of openness in personal information, coupled with the technology of the 21st century, will propel society down a slippery slope toward the destruction of human dignity. George Orwell's visions of 1984 will not have been wrong — just a bit premature.

Now, some in the audience may regard my alarming predictions as extreme, or at least exaggerated. Before I am dismissed as incredible, however, let me state my case. First, as to the abdication by SEARCH of its leadership position in framing national CHRI management policy.

SEARCH's Historical Role

Regarding SEARCH Group history, I consider myself somewhat of an authority, having been part of the creation. Almost 20 years ago, as the director of the Maryland Governor's Commission on Criminal Justice, I attended a special meeting at LEAA in Pete Velde's office. There were four or five others there, and we were pursuing some cockamamie idea of developing an interstate criminal history data base. That feisty little band of visionaries established Project SEARCH, and, incidentally, they also launched an experiment in federal-state cooperation that stands as a magnificent model of success in intergovernmental relations. Steve Schlesinger, Director of BJS, paid honest and appropriate tribute to SEARCH in his remarks yesterday.

The purpose of the project was to provide information for the criminal justice system. Early program development efforts during the LEAA era had demonstrated that there was grossly insufficient information, either in quantity or quality, upon which to fashion strategies for the control of the crime. Further, the increasing mobility of criminals made it advisable for the states to maintain and share adequate offender information.

As CHRI systems grew in sophistication and availability, the security and privacy of the information became a key concern for LEAA and the states. In 1975, after several years of work, the SEARCH consortium promulgated *Technical Report No. 13: Standards for the Security and Privacy of Criminal Justice Information*, which I consider to be the most comprehensive and detailed guidelines for CHRI security and privacy that have ever been drafted in this country. Congress was sensitive to the privacy problem as well, and in the Crime Control Act of 1973, ordered LEAA to develop privacy and security regulations for automated CHRI systems. From the outset, CHRI was recognized as being compiled by law enforcement, for law enforcement, and not for the curiosity of the general public. The confidentiality of CHRI was presumed and defined in *Technical Report No. 13*. This was one of the earliest national efforts regarding the general issue of informational privacy. SEARCH's leadership regarding CHRI, therefore, came at a time when informational privacy was a developing concept, and the consortium took a bold and firm position.

Privacy interests grew, driven in large part by the Watergate scandal, and in 1974 we witnessed the establishment of a White House Committee on the Right to Privacy, passage of the Federal Privacy Act and the Educational Right to Privacy Act, as well as the appointment of the Federal Privacy Protection Study Commission. In 1976, LEAA promulgated privacy regulations. Though I do not agree with Bob Belair that the regulations were regarded with scorn, they were less restrictive than those of SEARCH's *Technical Report No. 13*! And, as a series of national surveys have shown, the LEAA guidelines set a standard for the nation.

So, in areas of criminal justice information, SEARCH was the unchallenged expert and respected leader. Gary McAlvey, in his opening remarks, emphasized that responsible leadership is a SEARCH imperative. Now, therefore, it would seem especially surprising for SEARCH to retreat from the front and fall in behind what it perceives others may want. But, I am not ready to give up the ghost of that proud, powerful and responsible criminal justice consortium of the recent past, and I do not believe that SEARCH members are ready to do that, either. Their uneasiness in this matter is clear to me.

For instance, I note with pleasure that though it probes the question of open records, SEARCH instantly took up the gauntlet and joined an attack on that dreadful *Reporters Committee* decision. I also observe that SEARCH refused to endorse the Uniform Criminal History Records Act drafted by the Uniform State Laws Commission, in significant part because the draft was criticized for not providing adequate privacy protection in some respects. Further, I have heard SEARCH members raise serious doubts at this meeting as to the wisdom of a policy change. No, I do not believe that SEARCH is ready to surrender the ramparts, so, I exhort my ambivalent colleagues, stick to your guns!

Criminal history records were created by the criminal justice system for that system, and just because the records are there does not mean they must be publicly available. Though Jane Kirtley of the Reporters Committee for Freedom of the Press implied some constitutional requirements for openness, when questioned she had to admit that there are no specific mandates. Her argument that once records are available as original entries there is no sense in closing them later because they are available in newspaper morgues is irrelevant. If so, why does she want the policy changed? And even if the records can be found, the SEARCH position makes social policy clear. Don't give candy to the baby merely because he cries for it. And don't give in just because someone demands that you do. If SEARCH were to do so, it will have passed the leadership wand to the press, or to some nameless public.

Before I leave the matter of SEARCH's role, I want to comment on data quality and its relevance to the general question of open records. It has been asserted that during the last 15 years or so the quality of CHRI has improved both as to the accuracy of the data and its completeness in terms of disposition reporting by criminal justice agencies. SEARCH members appreciate the abysmal quality of CHRI that has plagued us in the past. It is true that one of the reasons initially for protecting the confidentiality of that information was because it was so bad that immeasurable harm could befall a data subject through the release of inaccurate data. But, how much have our data systems in fact improved?

A 1982 report by the Office of Technology Assessment, U.S. Congress, reviewed recent studies of NCIC data quality that indicated inaccuracies in significant quantities of the information. Paul Leuba and the SEARCH background paper admit to continued frailties in data quality. One researcher in 1986 asserted there are serious inaccuracies in 54 percent of NCIC data. Probably SEARCH members themselves have the best insights regarding the quality of data in their systems, and I ask you all to search your conscience before you allow public searches of criminal records. To the extent that bad data quality is a reason for confidentiality, in spite of recent improvements in CHRI, I suggest that poor data quality is just as good as a reason for insisting on confidentiality today as it has been in the past.

But there is another more important point I want to make, however, and that is this: Data quality is irrelevant to the question of informational privacy. If it could be demonstrated that CHRI was absolutely accurate, I would be all the more insistent on its confidentiality. If wrong information about someone is released, then data quality regulations or the law of defamation may play a part and a remedy could be available to the data subject. But if truthful information is released, the only right a data subject will have is one of privacy arising from the confidentiality of the data.

It is frequently said that the truth can cause far more indignation and embarrassment than falsity, and that precisely is the point of privacy. This right protects the confidentiality of truthful, personal information in order to respect the dignity of the individual. So, regarding privacy, data quality is a red herring, though in terms of dissemination, poor data quality is a good reason to restrict access to such information. We have heard nothing at this conference or during the previous 15 years to justify SEARCH in surrendering its policy. If it's not broke, don't fix it. I suggest that the effectiveness of past policy speaks for itself.

Presumption of Confidentiality

Next, I predicted that if the criminal justice system reverses its policy that it will be the bellwether of a march to open all personal records held by government, and by the private sector. Why?

In the first place, to give way on CHRI privacy will invite attacks on the confidentiality of other kinds of criminal justice information, and specifically I refer to investigative and intelligence information. We have learned that feeding red meat to hungry dogs creates an appetite — they always want more and more. Though it is said that the "public" wants CHRI access, I suspect that it is the press and prospective employers who are most insistent upon invading privacy by rummaging around in criminal history records. A demonstrated "need to nose" can be satisfied by releasing less than all CHRI anyway. There now are recognized ways to gain specifically justified access to CHRI without abandoning the entire presumption of confidentiality. It was said on behalf of Citicorp, for example, that specific legislation allowed it limited access for special purposes, and Citicorp does not think that access to more is really necessary. We have heard of "NCIC 2000" wherein the criminal justice system would store even more

kinds of personal information, and if it is there, others will demand the "need to nose." The assault on law enforcement information will not be stemmed by sacrificing CHRI confidentiality. That gambit could lose the whole game.

I also think that keepers of other kinds of records will be influenced by a move to open CHRI. Criminal history information has generally been respected as especially sensitive and complex. The Freedom of Information Act, for instance, designated criminal justice information as one of the few specific exemptions from mandatory disclosure under the Act, though either the Supreme Court or Congress will have to correct the outrage of the *Reporters Committee* case respecting FOIA interpretation. Similarly, the Privacy Act of 1974 has a special provision for CHRI because, as was stated in the House Committee report, "criminal justice records are so different in use from other kinds of records that their disclosure should be governed by separate legislation." Paul Leuba said that criminal justice information should be given the same respect as financial information. But criminal justice information has had more protection, and earlier, than financial information, which became partially protected by the Federal Financial Privacy Act of 1978.

If law enforcement forfeits the special status and protections that have been accorded CHRI — and that's certainly the easiest path to follow — then I believe that other agencies with less sensitive information will take the cue and save themselves time and trouble. Of course, recordkeepers would like to be free of liability or constraints regarding the disclosure of personal information, though certainly that is not in the interest of society or the individual record subject. It seems bitterly ironic that in this year of celebrating the bicentennial of the Constitution anyone should consider sabotaging the presumption of innocence by changing the rules of access to CHRI. Foreign data protection laws are far more concerned with personal privacy than we are, though notions of privacy originally were distinctly American.

Are we so mean-spirited as to lack the compassion and charity necessary to endorse the lofty notions of forgiveness or rehabilitation? Will we provide further evidence of "man's inhumanity to man" by abandoning the constraints we now recognize with respect even to certain conviction information? I would be ashamed of the criminal justice community were it to be the model for such disregard of human worth.

I don't believe there is a general trend to open all records as yet — though there is an increasing demand. But I do think that the criminal justice community could establish such a trend. Therefore, I urge SEARCH members to consider their roles not only as responsible government administrators, but as exemplars of good information practices generally. Don't spook the pack into a charge in the wrong direction.

The Affect of Technology

Finally, I made the frightful prediction that if a trend begins toward open records, the result will be a 21st century notion of the "incredible shrinking man." Personal integrity and human dignity will have been quantified, coded and removed from the control of the individual, who will be less than a shadow of his former self. Is the slope that slippery and the slide that long? Let's consider it.

There is no need for me to lecture this group about the nearly unbelievable advances being made in information and communication technology. Most of you are very conversant in the subject, and many are "info techies" who delight in dabbling with digital development. As for me, I know that contemporary computers can process data at rates of more than

two hundred million functions a second and can transmit information worldwide at the speed of light — I am awed by that reality and can hardly cope with those concepts. But, what is government doing with this capability?

We all are quite aware of computer file-matching programs being implemented in increasing numbers by federal and state governments. Verifications, matches, dossiers, profiles, person locators, are springing up anew on virtually a daily basis. Notwithstanding the Privacy Act, federal bureaucrats, though not evil, are effective "priers of fact." Bureaucratic counterparts in state government, most of whom have little constraints from privacy regulation, learn well from their federal brethren. They also copy and create invasive information programs, and one is hard pressed to keep a current catalog of governmental affronts to personal privacy. And please note, as more personal information is collected, the more access restrictions must be imposed to protect privacy. If no personal information were collected, there would be no need for any access restrictions from the standpoint of privacy protection. If government's collection of information is not restricted, then certainly the distribution of that information must be sharply curtailed.

And while we're at it, let's not forget the private sector. For more than a decade we have heard the growing list of misadventure by the business community involving disrespect for personal information concerning consumers and other members of the public. All these stories will pale by comparison, however, to the wholesale degradation of privacy that is possible through unleashed electronic funds transfer systems. The specter of the checkless and cashless society is one wherein the individual becomes merely a collection of electronic data elements residing in a computer. Those bits and bytes will devour human dignity by stripping control over the private information that, by describing us, defines our very being. With that will die even the opportunity to choose with whom to share our personhood. And that, my friends, is the condition that I believe awaits at the bottom of the slippery slope.

Wait! You may yet rush to judge me an extremist because I have predicted, from the possibility of a change in SEARCH policy, the degradation of the entire American population, if not the whole human race. But, wait! We all remember the tale of the kingdom lost for want of a horseshoe nail. The inexorable progression of loss from nail, to shoe, to horse, to rider, to battle, to kingdom should not be lost on us. That precisely is the way in which privacy and personality will be diminished — not by one massive stroke that tears out the soul, but by a thousand tiny cuts that drain dry the reservoir of human dignity. A thousand little slices, one by one, will cause even a giant sausage to disappear.

I believe this a most important moment in human history. As we in the criminal justice community withdraw, even a little, from the responsible management of information we vacate the stage for the next scene. Because others clamor is no reason for us to be silent or submissive. Privacy is an interest that all of us share — all of mankind — and as the poet said, no man is an island. A loss of even a little privacy for any man diminishes me. We must remember that the integrity of personal information and the preservation of human dignity are inextricably intertwined. As information technology advances, there must be more information protection, not less. And I suggest that improved technology makes information protection easier and cheaper. The growth of the information society can be accompanied by the growth of personal dignity. The expansion of information utility need not cause the shrinkage of mankind. Remember the common motto of the criminal justice system — our job is to serve and to protect. An in terms of informational privacy what must we do?

We must make a stand right here! And right now!

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Drugs & Crime Data

Data Center & Clearinghouse for Drugs & Crime

Illicit drugs—Cultivation to consequences

The worldwide drug business

- Cultivation & production
  - Foreign
  - Domestic
- Distribution
  - Export
  - Transshipment
  - Import into U.S.
- Finance
  - Money laundering
  - Profits

The fight against drugs

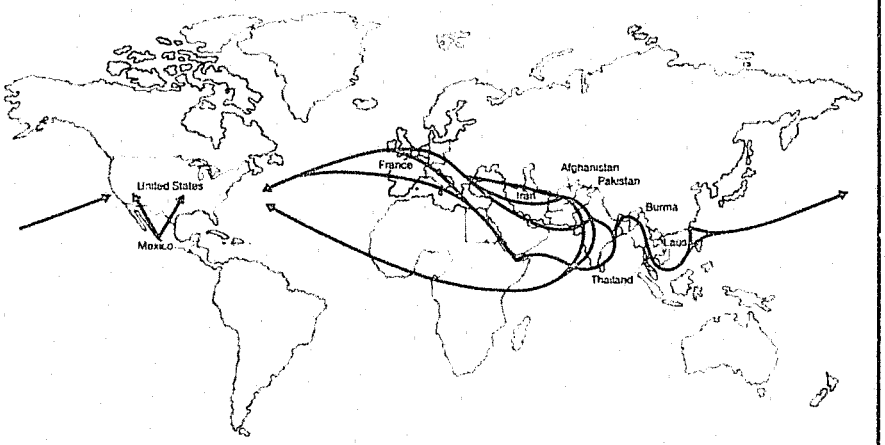
- Enforcement
  - Border interdiction
  - Investigation
  - Seizure & forfeiture
  - Prosecution
- Consumption reduction
  - Prevention
  - Education
  - Treatment

Consequences of drug use

- Abuse
  - Addiction
  - Overdose
  - Death
- Crime
  - While on drugs
  - For drug money
  - Trafficking
- Impact on justice system
- Social disruption

The Data Center & Clearinghouse for Drugs & Crime is funded by the Bureau of Justice Assistance and directed by the Bureau of Justice Statistics of the U.S. Department of Justice.

Major heroin smuggling routes into the United States



DEA Quarterly Intelligence Trends

One free phone call can give you access to a growing data base on drugs & crime

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- **Let you know** about new drugs and crime data reports.
- **Send** you reports on drugs and crime.
- **Conduct** special bibliographic searches for you on specific drugs and crime topics.
- **Refer** you to data on epidemiology, prevention, and treatment of substance abuse at the National Clearinghouse for Alcohol and Drug Information of the Alcohol, Drug Abuse, and Mental Health Administration.
- **Publish** special reports on subjects such as assets forfeiture and seizure, economic costs of drug-related crime, drugs and violence, drug laws of the 50 States, drug abuse and corrections, and innovative law enforcement reactions to drugs and crime.
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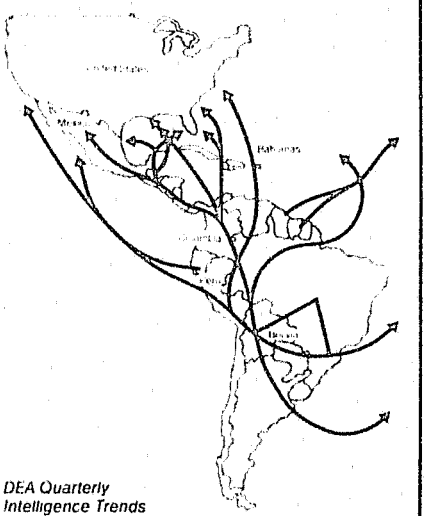

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