

A Study of the Number of Persons with Records of Arrest or Conviction in the Labor Force

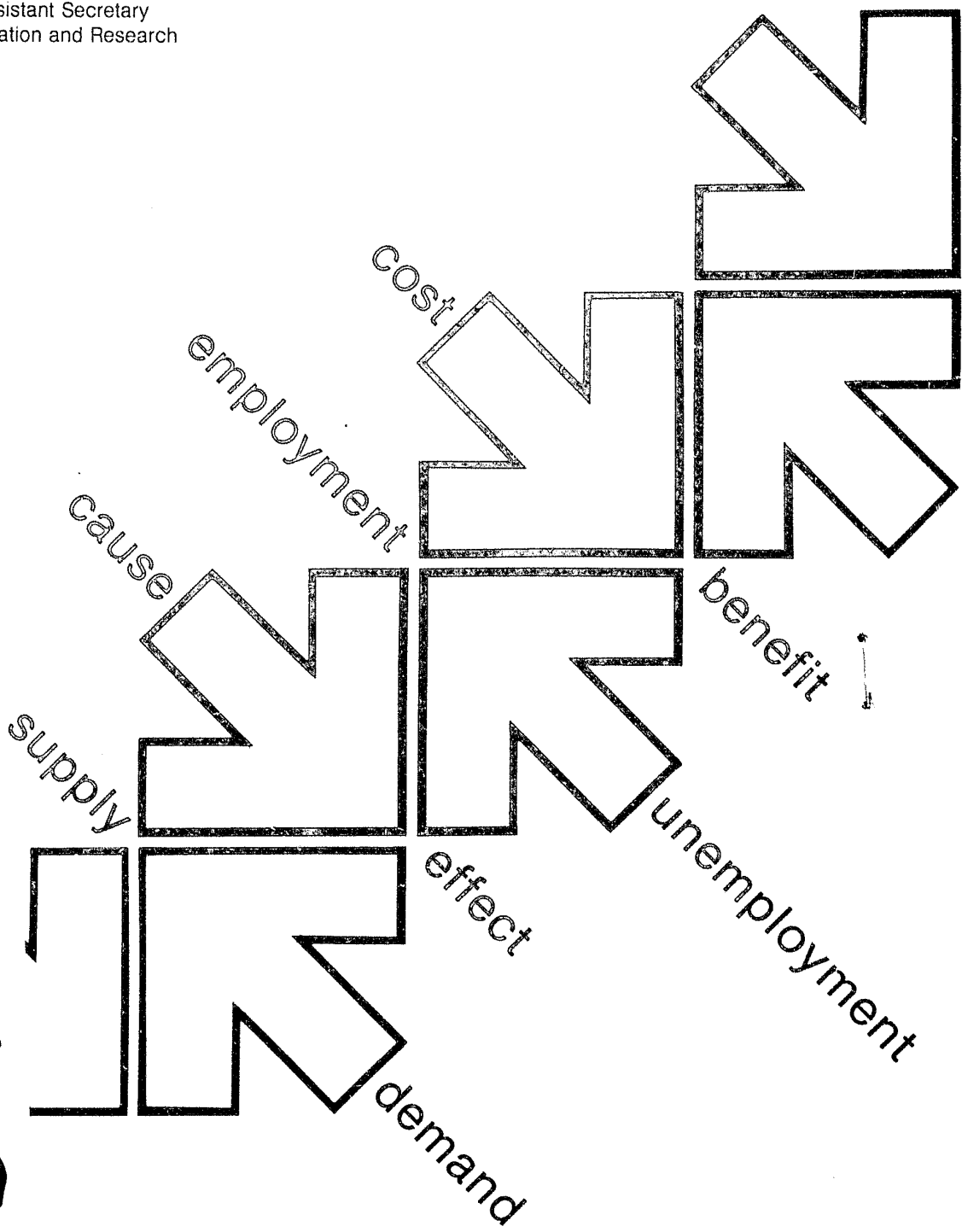


Technical Analysis Paper #63

U.S. Department of Labor
Office of the Assistant Secretary
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Technical Analysis Paper #63

U.S. Department of Labor
Ray Marshall, Secretary

Office of the Assistant Secretary for
Policy, Evaluation and Research
Arnold Packer, Assistant Secretary

January 1979

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ACQUISITIONS

FOREWORD

In the four years since the author began work on a previous policy report to the Department of Labor, Artificial Barriers to the Employment of Offenders (NTIS 99-7-581-42-12), the Department's concern for this problem and related employment difficulties of offenders has waned. With passage of the 1978 Amendments to the Comprehensive Employment and Training Act, there now exist strong statutory mandates for vigorous DOL efforts with both offender programs and removal of artificial barriers to employment. It is hoped that this paper can serve to stimulate new thinking about what should be done to meet the renewed Congressional mandates. However, CETA is not the sole DOL activity for which this paper should have relevance. The Office of Federal Contract Compliance Programs should, if it is to have maximum effect, also consider its implications. Other federal agencies that work in areas such as youth employment should also find this report of relevance to their planning efforts. The Department of Justice, with its concern for both criminal recidivism and individual liberties, is the basis of much activity affecting this population.

While the finding that offenders (persons with records of criminal arrest or conviction) constitute a significant proportion (1/4 to 1/3) of the U.S. adult population and work force is a first approximation only, its policy significance will survive more refined estimates. For, even were the 40 million offenders estimate cut in half, they would still constitute an important subpopulation^{1/} and one much larger than commonly recognized. With either number, it would still be true that millions of labor force participants may be facing unemployment and underemployment because of their records. This cannot be denied by arguing over how many millions of offenders are so affected. While "better" numbers are desirable, what is needed is a better understanding about how these individuals are affected by their record and what can be done to help them.

The author is indebted to Jay Edelson and Bruce Millen of the Department of Labor for their encouragement, and to the many people identified in the report who provided the information on which the report's findings are based, and also to Steve Kolodney of Search Group, Inc. for providing leads to those individuals. Special thanks go to Robert Emrich of the Pacific Institute of Research and Evaluation and Peter Jaszi of the American University Law School for their exhaustive critique of the study's methodology and writing style and to Frank Zimring who recommended that the Foreword state the obvious: we know enough to act upon and that action is needed. Needless to say, any errors herein are solely those of the author. Finally, thanks must go to Ms. Myra Coates who patiently typed the several drafts of this paper. Her patience, good cheer, and abilities helped immeasurably.

^{1/}A figure of 20 million offenders seems improbably low given the report below that the Federal Bureau of Investigation has criminal records for 16.5 million living citizens of the United States, combined with the fact that the FBI retains fingerprint cards of less than 6 percent of all arrests in a year. For the FBI to have a file universe of 16.5 million persons from a total offender universe of 20 million given a 6 percent record retention rate, recidivism among arrestees would have to be nearly 90 percent, with each arrestee having a record of at least one major crime. Yet, the Philadelphia study, also reported below, found that 40 percent of juvenile arrestees did not recidivate.

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A STUDY OF THE NUMBER OF PERSONS WITH RECORDS OF ARREST
OR CONVICTION IN THE LABOR FORCE

Objective: The purpose of this paper is to review past estimates of the number of persons with criminal records who are labor force participants, and to provide new, more reliable estimates of that number.

Methodology: Three separate estimation procedures were used to determine the number of persons with criminal records. First, the number of persons held in the FBI criminal record files was determined and adjusted through use of FBI data to exclude persons (1) whose age indicates from mortality tables that they are deceased or (2) whose record show they have been deported from the U.S. as illegal aliens. This number was then extrapolated to the universe of persons with criminal records, which includes persons with records held by state or local police, but not by the FBI. Second, a similar procedure was used to extrapolate to the universe of persons with criminal records based upon the estimated number of persons held by state and local criminal record centers in California, New Jersey and New York through comparison of the ratio of arrests in those states to all U.S. criminal arrests. Third, probability of arrest rates for males born in 1945, residing in Philadelphia, Pennsylvania from their tenth to eighteenth birthdays, taken from an ongoing research study, were adjusted to consider urban-rural, black-white and male-female arrest differences and then applied against Census population data to provide another offender universe estimate. Labor force participation rates for the U.S. population of black and white males and females were applied to the statistic derived from this triangulation estimation procedure.

Findings: At least 36 million and probably 40 million persons have criminal arrest records. Of these, between 26 and 29 million are in the labor force. An additional 3.5 million persons with records who are not now in the labor force can be expected to reenter the labor force in the future. Population groups with a higher than average number of offenders include the disadvantaged, blacks, veterans and persons with alcohol or drug abuse related handicaps.

Policy Implications: Both criminal justice involvement and employer use of criminal records to screen employment applicants are thought to be problems for offenders. The number of persons potentially suffering from either problem suggests that they may be significant impediments to the Department of Labor (DOL) programs to upgrade the skills of the disadvantaged, provide employment exchange services, reduce unemployment and promote an integrated work force. Specific areas of operational concern for DOL include the Employment and Training Administration offices for administering the Comprehensive Employment and Training Act, the Employment Service, veterans employment and Bureau of Apprenticeship and Training. Other relevant offices are the Office of Federal Contract Compliance Programs, and to a lesser degree, Women's Bureau, and the Employment Standards Administration. Recommendations are made for DOL's implementing the new CETA provision Section 311(g) requiring the Department to assist public and private employers in voluntarily identifying artificial barriers to employment and developing procedures for their removal. Further research is called for on the dynamics of employer decisionmaking and offender job-seeking beliefs and behaviors.

Methodological Overview

The principle methodological procedure used in this paper utilizes extrapolation methods to derive estimates of the number of persons with criminal records. Two different procedures are used. First, extrapolations are made from four different agencies' reports of the number of persons held in their criminal record fingerprint files through adjustments to that figure and application of an extrapolation formula. Second, the findings of a cohort study of male youth contact with criminal justice, as to the probability of arrest of these youth (followed up to age 30), are adjusted to make the cohort more representative of the U.S. population and the new arrest probability rates applied to the separate male, female, white and non-white adult populations (over age 15).

Chart 1, on the following page, shows the step-by-step progression in the first estimation procedure. Column (1) lists the principle record holders studied here: the Federal Bureau of Investigation and the state criminal record agencies in California, New York and New Jersey. Column (2) shows the number of persons held in these files as reported by the agencies.

Column (3) shows the number of persons subtracted from the reported total of Column (2), including those subtracted because they are aliens deported from the United States (FBI only) and those probably deceased due to their age distribution and mortality likelihood. The percent of those estimated to be deceased was taken from a internal FBI sample study of their files; the New Jersey estimate utilizes the FBI finding with a further adjustment to account for the fact that the state files' holdings have never been purged of those over age 80, unlike the FBI's which have been purged.

Columns (4), (5) and (6) are the adding adjustments made to the number of persons reported by the state agency record holders. These adjustments reflect the fact that not all persons arrested have their fingerprints taken, may not have their prints forwarded to the state agency, or may have their records purged by the state agency (but the records are still held by the local police agency from which the prints originated).

Column (7) shows the numbers applied to the general extrapolation formula $X = YZ$, where:

X = estimated total number of persons with criminal records,

Y = percent of persons with criminal records in the United States held by agency, and

Z = adjusted estimate for the number of persons with criminal records in the record-keeping jurisdiction.

CHART 1 - ESTIMATING THE NUMBER OF PERSONS WITH RECORDS
(FROM AGENCY REPORTS)

Record Holder	Number of Persons in Files	Adjustment				Extrapolation Formula $X = YZ$	Estimate (X) of number of persons with records
		1) Minus: - Aliens - Deceased	2) Plus: - Persons purged but in local police files	3) Plus: Local police files, not sent to record holder	4) Plus: Other		
FBI	22 million	5.5 million (2 million aliens and 3.5 million deceased) ^{1/}	None	Part of extrapolation formula		$X = .4 \times 16.5$ million ^{8/}	41 million
CA	3.5 million	None	.82 million	.35 million ^{3/}	.77 million ^{6/} Subtotal: 5.44 million	$X = .14 \times 5.44$ million ^{9/}	38.8 million
NY	2.725 million	.49 million ^{1/}	.02 million	.645 million ^{4/}	.3 million ^{2/} Subtotal: 3.3 million	$X = .07 \times 3.3$ million ^{9/}	46.5 million
NJ	.903 million	.226 million ^{2/}	N.A.	.677 million ^{5/}	N.A. Subtotal: 1.354 million	$X = .033 \times 1.354$ million ^{9/}	40.6 million

^{1/} Uses estimate of 18% deceased

^{2/} Uses estimate of 25% deceased

^{3/} Uses estimate of 10% local files sent to state

^{4/} Uses estimate of 25% local files not sent to state

^{5/} Uses estimate of 50% local files not sent to state

^{6/} Persons arrested, but not fingerprinted, having no prior record

^{7/} Juvenile arrests only are not forwarded to state

^{8/} Assumes FBI holds files on 40 percent of all persons with records.

^{9/} Assumes proportion of arrests in state to all arrests is same as proportion of arrestees in state files to all arrestees

INTRODUCTION

The U.S. Department of Labor is institutionally concerned with the impact of criminal records^{1/} upon the employability of individuals in several ways. First, under the Comprehensive Employment and Training Act of 1973, as amended, the Department provides financial help to employment and training programs for "offenders", defined as persons who are or have been under the jurisdiction or supervision of the criminal justice system.^{2/} Other provisions of the Act require prime sponsors to eliminate artificial barriers to employment, including those based on criminal records.^{3/} Second, the Department also reviews the compliance of government contractors with equal employment opportunity requirements of Executive Order 11246;^{4/} administrative agency actions and court rulings have held that employer use of criminal records as a job screening device may contravene these requirements.^{5/} Third, the use of criminal records by government grantees or contractors in employment may violate the mandates against discrimination contained in the Vocational

¹The two types of criminal records are those of arrest and those of conviction of a crime. Crimes, as defined here, do not include traffic offenses. From the perspective of one concerned with their use, criminal records may be distinguished as: records which are easily retrievable, in the form of fingerprint or name plus number identifier files; records not easily retrievable as in the form of court or police blotter records; records previously retrievable that have now been expunged and physically destroyed, but whose removal provides no legal authority to deny the fact of arrest or conviction. In a few states, the law affirmatively permits such a denial where the records are expunged; in fact, not all these records are destroyed and remain retrievable. Secondary sources of record information arises from newspaper reporting and the collection of such reports by private investigators and credit bureaus. See Appendix II.

²The definition of offender in CETA, Sec. 125(17) includes all persons, adult or juvenile, who are or have been subject to criminal justice processes from arrest through parole, and who are in need of manpower services, including help to resolve artificial barriers to employment. Section 301(c) of the Act as amended in 1978 requires the DOL to provide financial assistance to offender programs. The Legislative history suggests that Congress was concerned about offenders in two ways: first, the offender in need of employment and training assistance who is presently under custody or supervision, or although not under custody still suffering from the adverse effects of criminal justice contact; and second, those affected by the criminal record barriers to employment.

³Section 121(a)4(A) and (B) and Sec. 103(b)(2)(c), CETA as amended in 1978.

⁴The Office of Federal Contract Compliance Programs.

⁵E.g., Green vs. Missouri Pacific R.R., 549 F.2d 1161 (8th Cir. 1975).

Rehabilitation Act Amendments, as applied to persons with criminal records involving acts that reflects drug or alcohol abuse.^{1/} Fourth, since a significant proportion of offenders are veterans, employment barriers based on criminal records may negatively impact upon government contractors' employment of veterans.^{2/}

Previous estimates of the number of persons with criminal records ranged from 33 to as large as 45 million "offenders". Excluding those who are deceased, not working or not seeking work, nearly a quarter to a third of the labor force, therefore, were thought to be offenders.^{3/}

More precise and confident statistics are needed. In Part A, this paper examines the basic assumptions underlying the earlier estimate of 45 million offenders. Alternative methods for estimating the number of persons with criminal records are developed, new estimates provided, and validation checks described.^{4/} The relationship of this universe to the labor force participation estimates and size of the labor force is analyzed in Part B. Appendix I presents the major policy implications of the new estimate. Background materials relating to the methods by which criminal records are created and used and policymakers' past responses to this problem in non-DOL contexts are included in Appendixes II and III.

¹Section 504, of the Rehabilitation Act of 1973 (Public Law 93-112), 29 U.S.C. 706, prohibiting employment discrimination by federal grantees and contractors against handicapped persons has been interpreted to include alcohol and drug abusers. 45 C.F.R. Part 84, Appendix A, Subpart A3.

²Affirmative action employment by government contractors is governed by 41 C.F.R. 60-250.

³N. Miller, Artificial Barriers to the Employment of Offenders (1975); Employment and Training Programs for Offenders, Technical Assistance Guide for CETA Prime Sponsors ET Handbook No. 341 (1977), p. II-2.

⁴This study was not intended to be an exhaustive analysis of the numbers of persons with criminal records. Rather, considerations of cost and time leave us with some questions still unanswered, even with respect to the specific approach taken here. Other approaches are also available, most of which would be, however, considerably more expensive: i.e., survey of U.S. population.

PART A - NUMBER OF OFFENDERS

I) Review: The initial task was to review previous estimates of the number of persons with records, identify the assumptions used to generate them and develop new estimates where the review found this to be needed. Where new assumptions are required, the work plan specified that their details must be explicit. Secondly, this review of past work may suggest alternative methods for estimating the number of persons with criminal records, regardless of the correctness of the earlier methods used.

a) Federal Bureau of Investigation (FBI) Statistics Based Estimate

Previous work, using FBI statistics, had estimated that there are between 33 and 45 million persons with criminal records in the United States. This estimate was based on:

- FBI published reports that their criminal records file included 21 million persons. The factual basis of this statistic was not verified. The researcher assumed that this statistic reflected only those persons whose files had been assigned identification numbers by the FBI (the system uses a letter prefix with six digits, or 999,999 persons/letter and telephone inquiries in 1974 to the FBI suggested that the FBI had assigned 20 letters as of the earlier study).
- FBI congressional testimony that there existed a second set of criminal records in addition to the set having identification numbers. This set is composed of the fingerprints of persons arrested prior to 1970 and for whom the FBI had only one arrest report. No ID number was assigned to the persons represented by those fingerprint cards. It appeared, from the lettering sequence used for the FBI identification numbers, that this set was not included in the 21 million statistic. Attempts to verify or disprove this assumption were not successful. If this set of individuals with a single arrest were not part of the 21 million statistic, it was estimated (on the basis of FBI reports of recidivism likelihood), that the second set held indexed fingerprint records of an additional 9 million individuals.

- FBI and Law Enforcement Assistance Administration (LEAA) congressional testimony show that not all persons with state and local police records are included in the FBI files. It was conservatively estimated that the FBI identification files contain 67% of all criminal records held by state and local police. This was based on previous calculations of a 12 percent national "virgin" arrest rate, assuming a 67% recidivism rate, and comparing that result to the number of cards received by the FBI each year.

The total number of persons with criminal records was then calculated to be between:

Low estimate: $21 \times 1.5 = 31.5$ million persons

High estimate: $21 + 9$ million $\times 1.5 = 45$ million persons^{1/}

b) Evaluation of Prior Estimates

The key assumptions to be tested were:

- The size of the set of offenders found in FBI identification files, including those with and without FBI identification numbers.
- The proportion of persons found in FBI criminal records to all persons in the United States with records.

The cooperation of the Federal Bureau of Investigation was sought through a request sent by the Department of Labor to the Deputy Attorney General of the U.S. Department of Justice.

c) An Alternative Estimation Strategy

Because it appeared that an estimation approach using FBI information alone would not prove completely satisfactory, additional estimation methods were developed. One such method was to use information from an ongoing study of all youth born in Philadelphia in the year of 1945 which reports on the actual number of arrests made on members of the cohort.^{2/} Arrangements were made with the project director to obtain the most recent findings from this

¹See N. Miller, Artificial Barriers to Employment of Offenders (1975) p. 3. (Report to the U.S. Department of Labor, NTIS #99-7-581-42-12.)

²See Marvin E. Wolfgang, Robert Figleo, and Thorsten Sellen, Delinquency in a Birth Cohort (1972), for a report of early findings of the study.

study. It was anticipated that application of the Philadelphia cohort arrest probability rates to U.S. population statistics could, with certain adjustments, provide estimates of the size of the total offender population.

A third alternative estimation method was to use state criminal record files that can provide accurate estimates of the number of persons with criminal records within their jurisdictions. Proportionalization could then be made of the number of arrests made each year in that jurisdiction to the total number of arrests made in the United States and the finding applied to the number of persons with criminal records in the jurisdiction for extrapolation to the U.S. population of offenders.

* * * *

Juxtaposition of the estimates developed by these several different methods would then permit a "triangulated" estimate of the number of persons with criminal records. While each estimate might require varying assumptions about the nature of the data base before extrapolation, these data limitations would not be expected to overlap. In these circumstances, confidence in each single estimate would be bolstered by the degree of agreement among all the estimates.^{1/}

II) Results of Estimation Procedures: Reported below are the findings from the principal estimation procedures used.

a) Review of FBI Criminal History Data Base^{2/}

It was originally anticipated that the study need only examine the assumptions relative to the size of the FBI criminal records files and their relationship to or correspondence with the universe of state and local files in order to develop new estimates of the number of persons with records. However, investigation suggested that the FBI criminal files are unrepresentative of the universe of criminal history records and absolute confidence in the estimate as to their size is not possible.

¹An alternative procedure would be to use confidence intervals at each point where an estimation is made. This would permit an analysis of the extent to which the final estimate(s) reflect the interactions of several biasing estimates and their direction. The data used did not lend itself to this procedure, since single point reports were generally all that were available.

²Information received from Ken Arnold and David Cassens of the Federal Bureau of Investigation are the basis for this report.

(1) The FBI estimates that it has on file 76,000,000 criminal records^{1/} of an estimated 22,000,000 individuals. About 2 million records have been purged because the age of the record holder was over 80. At least two separate record systems, one of which is partially computerized, contain these cards.^{2/}

Discussions and meetings with FBI officials suggest that strong reliability can not be placed upon the 22,000,000 estimate. This figure is seemingly based upon additions and subtractions from a base figure that was derived in an unknown manner, perhaps by applying a ruler to the file cabinets and multiplying the length of the files by a fixed multiplier (estimated or derived from sampling). The difficulty of exactly measuring the number of persons represented in a card file or files suggests that an estimation or approximation was made. It may be that the FBI technical staff can support the 22,000,000 estimate, but such support was not provided. It is not possible, in the absence of further information, to determine whether the FBI is correct or not in its estimate of 22 million individuals. However, it is probable that this estimate is close enough to the "real" figure to be used here.

A second defect of the FBI records is that they do not reflect state and local criminal record files. This can be seen in several ways. An internal 1978 FBI sample survey of the files holding the 22 million single fingerprints showed nearly 10% of the files contain records of aliens arrested for immigration law violations. Immigration law violations, however, constitute only 40,000-50,000 of the annual 9.6 million arrests. The study also showed that by applying mortality tables to the sample population, nearly 20% of the males in the file, and 9% of the females are probably deceased (18% in total). But, youthful offenders under the age 25 comprise about 55-60 percent of all arrests in the U.S. Neither of the FBI findings for their files seem representative of the criminal record universe, which includes all federal, state, and local arrests.

¹This refers, I believe, to the number of fingerprints cards held by the FBI. One individual may have multiple cards in the record jacket created for the I.D. number record system. Since most individuals in the files appear in both record systems, one arrest of a person previously unarrested now generates two cards. A disposition to prison or jail will generate yet a third card. Recidivists in the FBI files have, on the average, three cards showing arrests.

²This refers only to the criminal history fingerprint files. Separate from these are the civil fingerprint files that include cards from armed forces personnel, government employees and aliens.

Another way in which the FBI files are seen to be unrepresentative of state and local criminal files is that the files are purged on request from the police agency or state record center sending in the card, pursuant to their expungement laws or purging policies. Where the state record center requests the purge by the FBI, the record may still be maintained by the local police agency which made the arrest. In any case, under the definition of criminal record used in this paper, persons whose criminal records are expunged are still included in the offender universe. No information is available as to the nature of the files or the demographics of the persons involved among those files purged. A third way in which it can be seen that the FBI files are unrepresentative of state and local records is in noting that the FBI retains about 540,000 fingerprint cards sent to them yearly, compared to a national arrest figure of close to 10 million yearly arrests. This suggests that the FBI receives cards for only a small proportion of all offenders. That the FBI receives cards on less than all offenders is seen by the fact that FBI fingerprint retention policy does not allow it to hold cards for persons arrested as juveniles. About 20 percent of all arrests each year are of juveniles.

Laying aside any caveats as to either the size of the file estimate of 22 million or the possibilities of sampling error in the calculation of deceased persons^{1/} in the FBI files, and disregarding temporarily their unrepresentativeness, the number of living U.S. citizens and resident aliens held in the FBI criminal files is 16,493,000. This results from the subtraction (of aliens (2.2 million) and those probably deceased (3.3 million)) from the total file population estimate of 22 million. The FBI records, therefore, account for 10.6 percent of the adult U.S. population, 18 years and over.

(2) Calculating the likely proportion of persons with criminal records held by the FBI among all persons with criminal records is the second step in the estimation procedure. One method for doing this is to examine the proportion of new fingerprint cards retained by the FBI among all new cards sent to it yearly by state and local police. For, as a result of litigation, the FBI returns fingerprint cards sent to it by local police where no "serious" crime has been committed, of juvenile arrestees as well as smudged cards that are not usable for identification purposes.

¹There seems to be no reason to question the relative accuracy of the alien numbers estimate. If one assumes that the FBI file represent 40 years of arrest fingerprints (calculated by the ratio of the present new card entry of 543,000/year to the 22 million total), the existing federal fingerprinting of over 40,000 aliens/year support the FBI sample estimate of two million aliens in the files.

The FBI reports that 1,235,000 new fingerprint cards were sent to them in FY 1977. These cards are sent to the FBI on a voluntary basis by state criminal record centers and, where no state center exists, by local police agencies. Of this number, an estimated 543,000 cards were retained by the FBI. About 56% or nearly 700,000 cards were returned, with no permanent record of those persons maintained by the FBI. Although it is possible that among the returned cards were two or more of the same person(s), this is not likely to be a common occurrence.^{1/} This means that the FBI holds cards for only 45% of all arrests known to them in one year.

No method is available to precisely estimate from this data the proportion of all local state and federal record files held by the FBI. Two separate factors are at work here: the likelihood of recidivism among those persons whose cards are returned to the local police, and the likelihood in the first instance of a card being sent to the FBI by the local police. To illustrate this, for the FBI to have files on half of all persons with criminal records, this would require (1) that the 45% FBI holding resulted from the practices of local police to send fingerprints to the FBI of all arrestees and (2) that the 700,000 persons whose cards were returned have an 11% likelihood of committing a new crime resulting in the subsequent establishment of a FBI file for them. Neither assumption is correct.

First, in the three states examined below, it was found that local police often fail to send criminal records to the state record center, although required by law to do so. In New York, where only adult records are kept by the state, local police failed to send the state any fingerprint cards, in 25% of all adult arrests. In New Jersey and California, where juvenile records are kept (or were kept until recently in New Jersey), the relevant percentages of failure to forward cards were 50 and 45 percent respectively.

¹It is reported that fingerprint cards taken of non-serious offenders are sent, in many instances, to the FBI only where no local or state police record exists for the person fingerprinted and a check is being made to see if the person is a fugitive from another state. Where the individual is a recidivist in the local jurisdiction, no card is likely to be sent to the FBI. Thus, persons with extensive minor arrest histories, especially those that date back to juvenile arrests (which are no longer accepted by the FBI), may not have any record in the FBI files. This is a change from the procedures in earlier years when the local police routinely forwarded most arrest fingerprint cards to the FBI and cards might be sent to the FBI by both the local and state police. Today, the procedure is for the local police to send fingerprint cards to the state record center (28 exist) and for the state to forward the card to the FBI.

Anecdotal information indicates that local police send even smaller numbers of records to the FBI than they do to the state.

Secondly, criminological research shows that between 40 and 60 percent of all first offenders are never rearrested.^{1/} Many others are rearrested for only minor crimes; these are also unlikely to result in an FBI file being started. Hence, it is estimated here that no more than 40 percent of the 700,000 persons whose cards were returned by the FBI may later have files started on them by the FBI (as a result of future arrests and police forwarding of their files to the FBI). This would result in 280,000 individuals being added to the base 543,000 persons, totaling 823,000 persons, for whom the FBI creates or is expected to create, files for the 1.23 million persons whose cards were sent to them in 1977.

This should be compared to the total number of arrestees each year based on total number of arrests made minus multiple arrests and minus persons already in FBI files. This cannot be done directly, due to lack of the needed statistics. An alternative procedure is to assume that the 1.23 million files received by the FBI reflects local police actions similar to that occurring with respect to their sending records to the state. This appears to be done between 50 and 60 percent of the time.^{2/} This results in a population for comparison to the 823,000 of between 2.06 and 2.46 million person.

Simple division provides us with an estimate of 33% to 40% for the FBI share of the criminal record universe.

The estimate from the FBI statistics of the number of living persons with criminal records, assuming that the FBI holds 40 percent of all criminal records, is 41 million.^{3/}

b) Philadelphia Cohort Study

For the past decade, a study has been ongoing of the criminal activity of all males born in the year 1945 who lived in Philadelphia, Pennsylvania

¹E.g., Philadelphia cohort study, below.

²The California and New Jersey data support this estimate. The New York data, if adjusted for juvenile records, also support this estimate.

³Alternative estimates using the 50% and 33% "holdings" would result in offender populations to 33 and 49.5 million persons, respectively.

at least from their tenth to 18th birthdays. This study is the only one of its kind in studying the cumulative probability of male adults having a criminal record.

Professor Marvin Wolfgang, the principal study investigator, reports that the likelihood of a cohort member having been arrested prior to age 18 is 0.35.^{1/} Black males are twice as likely to have had juvenile arrest records than white males, whites having a 28% arrest rate to 55% for black males.

Approximately 19 percent of a 10% sample drawn from the cohort had adult arrests at age 22. At age 26, this was 23 percent. At age 30, the probability of an adult arrest was .26. The overall probability of cohort members having a juvenile or an adult arrest was .47.

Three adjustments have to be made to this figure before one can extrapolate to the U.S. population for an estimate of the number of persons with arrest records. First, the age of the cohort, 30 years, is higher than that of the average adult male, 28 years,^{2/} resulting in their having greater exposure to the police processes. From the data, it appears as if the probability of arrest rose .09 percent between the ages of 21 and 30 or .01%/yr. Reducing the likelihood of arrest to .45 roughly equalizes this factor.^{3/}

Second, women are also arrested at a present rate of 15 percent of all arrests.^{4/} Although women are being arrested in higher proportion now than they were a decade ago, this is balanced out by the fact that women are 50% less likely to recidivate than men.^{5/} Hence, women constitute probably 15 percent of all arrestees.

¹This and the following statistics are taken from Wolfgang, "From Boy to Man - From Delinquency to Crime" paper given at the National Symposium on the Serious Juvenile Offender (September, 1977).

²U.S. Bureau of the Census, Current Population Reports "Population Estimates and Projections," April, 1978.

³The likelihood of a person being arrested, defined by the arrest rate per population, has increased in the years 1963-1976, which would make the adjusted arrest probability a slight underestimate were it not for the counterbalancing effect of black males constituting a proportion of the cohort twice as great as they are in the general population where their median age is 22.

⁴Federal Bureau of Investigation, Uniform Crime Reports - 1976 (1977).

⁵Women recidivists constitute only one-third of those women arrested or incarcerated compared to a two-third figure for males.

A preliminary estimate of the number of persons with arrest records from applying these figures (.45 arrest probability for males) to the male population 16 years and older of 77,215,000 and taking into account that males account for 85 percent of the total number of arrestees, is 40.9 million. Alternatively, the arrest rate probabilities applied to the same population, but taking into account racial composition (black males comprising less than 12% of the total male population) leads to an estimate of 37.3 million persons with criminal records.

One further adjustment may be required. These probabilities are based upon urban arrest patterns. Thus, an adjustment should be made to reflect the lower arrest probabilities of persons living in suburban and rural areas.^{1/} Using FBI arrest data for 1963 (at which time the cohort was 18 years of age, the period of highest arrest activity), the combined rural and suburban arrest rates/100,000 population was 42 percent of that for urban residents. The former made up only one-third of the nation's population, reporting to the FBI.^{2/}

This information is not sufficient to allow us to make adjustments for urban-rural differences. Moreover, it is not clear what adjustments are needed since part of the differential between the two rates is the result of the heavier concentration of blacks and other non-whites in the urban areas. Since arrests measure police performance much more than they do crime itself, it is at least arguable that the application of race specific arrest rates to the U.S. population, broken down by racial categories (which resulted in an estimate of 37 million persons with records) is sufficient to account for most urban-rural arrest differences.

If it is estimated that racial differences account for and can be a proxy for other factors accounting for nearly 80 percent of the arrest rate differential, this will result in an estimate of 36.1 million persons with a criminal record. Alternatively, if it is estimated that racial differences account for only 20 percent of the differential, the estimate is lowered to 32.6 million persons. No further narrowing of the estimated number of persons with criminal records derived from the cohort data is possible beyond the two figures of 32.6 and 36.1 million persons.

^{1/}Philadelphia is, of course, not necessarily representative of U.S. urban cities, nor is the 1945 cohort necessarily representative of other age cohorts. Another confound for this estimate is that the basis of the arrest statistics is the FBI criminal files, which as discussed above, hold only 40 percent of all persons with records. Thus, an unknown number of cohort members may have criminal records, which the study did not uncover.

^{2/}Uniform Crime Reports - 1963 (1964)

(c) State Criminal Record Files

State criminal record files in several jurisdictions are relatively comprehensive. In these states, the legislators require local police to file all fingerprint cards with a state office. Each state has different laws designating the specific categories of crimes to be fingerprinted. These requirements are rarely complied with in all cases. Information as to the extent and scope of their state criminal history files was gathered from New York, California, and New Jersey, which were identified by the Law Enforcement Assistance Administration as having the most advanced state criminal record systems.

1) California

The state files include both a fingerprint file, similar to the FBI's, and a name index file.^{1/} The criminal fingerprint file now has 3.5 million persons in it. Adjustments must be made for (1) fingerprint files purged by the state but retained by local police, (2) persons deceased, but still in file, (3) records maintained by local police and are not forwarded to state, and (4) for persons arrested but not fingerprinted.

i) In California, cards for persons with an arrest-only record more than five years old or misdemeanor convictions more than seven years old, with no subsequent record activity, are considered to be stale records and removed from the state files. Nearly 100,000 such files are removed each year. The local police files for these individuals are not purged, however, and the record information is retrievable at that level. It is estimated that one million files, purged from the state files, represent individuals with only local arrest or misdemeanor conviction records.^{2/}

ii) The state also purges records of persons over the age of 70. Undoubtedly, there are persons in both file sets of the state and the local police with birth dates less than seventy years ago who are deceased. The numbers of such persons in the state files is extremely small, due to the stale record purging policy. The number of files purged by the state for

¹The information and statistics reported here come from personal communication with Fred Wynbrandt, Assistant Director, Identification and Information Branch, California Division of Law Enforcement.

²Between three and four million files were purged by the state when it initiated its purging policy. Records in these files went back as far as the 19th century. A "best guess" estimate is that one million of those files represent persons whose files were removed because of staleness rather than the age of the recordholder.

reasons of age in the last fiscal year was 1,500--reflecting the effects of the states purging of all non-felony-conviction stale records. Thus, all but 10,500 of the 3.5 million persons in the files are under the age of 63 (calculated by multiplying 7 years times 1,500 persons/year purged). Between 40 and 50 percent of the files reflect criminal activity since 1973. Applying HEW mortality tables, it is roughly estimated that about 1,500 persons in the files can be expected to die each year. This is, for our purposes, minimal.

Applying the FBI estimate of 18 percent deceased persons (p. 6) to the one million persons with purged state records (due to staleness) still retrievable at the local police level reduces that population to 820,000.^{1/}

iii) Not all persons fingerprinted have their prints sent to the state. California survey estimates are that about 10 percent of all fingerprints taken by local police, and required by state law to be sent to the state files, are not sent to the state files. Since the state files contain 90 percent of all persons fingerprinted, this will add another 350,000 to the estimated number of persons with criminal records. Reducing this figure by 40 percent for probable recidivism calls for a final adjustment of 210,000 persons whose prints are not sent to the state by the local police.^{2/}

iv) Not all persons arrested in California are fingerprinted and, thus, recorded in the criminal files. In FY '77, of approximately 1.4 million police arrests of adults and juveniles, only 765,000 fingerprint records were received by the state. This resulted from both local police failures to forward prints (10% of all prints taken are not forwarded) and the practice of issuing a citation in lieu of arrest (similar to a traffic ticket, with no fingerprints taken).^{3/} Overall, about 560,000 arrests or 40 percent of all

¹The FBI statistic is used here although it may be questioned as representing a higher proportion of deceased persons than seems likely. No other figure is available, however, and the resultant error, if any, would be on the side of underestimating the population of offenders.

²Some portion of those persons who have their fingerprints taken by local police, but whose prints are not sent to the state police files, already have their prints on file with the state or will later have their fingerprints sent to the state due to rearrest. The proportion of persons in this category is estimated to be 40 percent.

³California law requires that where a citation has been issued, the "arrestee" is to be fingerprinted at the time of the subsequent court proceedings. This mandate is apparently only rarely complied with and no record is kept in the state files should the state receive a citation disposition record (about 75,000/year are received).

arrests in the state do not result in fingerprints being taken. These records are retrievable at the local level and through the state name registry, which list all arrestees plus identifying numbers such as social security, drivers license, or birth date. While this group of arrestees contain many persons with minor charges such as loitering, it also contains others with possibly significant (to employers) records such as drunk driving or shoplifting. There are no statistics upon which to base estimates of the additional number of persons in California who have only name/identifying number criminal records. If one assumed that 2/3's of the 40% whose prints are not taken have prior fingerprint records,^{1/} this would result in the state's having on file only 83 percent of all persons with criminal records from arrest or citations in lieu of arrest. (One-third of 40% is 17%, which is subtracted from 100%.)

v) Adding up the earlier adjustments to the number of persons with arrest fingerprints and making the correction for the 17 percent of persons who are given citations in lieu of arrest, the calculation is:

- (a) 3.5 million + 820,000 + 210,000 = 4.63 million persons with arrest records.
- (b) 4.63 million = .83X (all persons with arrest or citation records).
- (c) Dividing 4.63 by .83 = 5.58 million.

It is estimated that California has criminal records for 5.58 million persons who have been arrested or given citations in lieu of arrest.

Extrapolation of the number of persons in California to the entire United States population must consider that arrests in California constituted 14 percent^{2/} of all arrests in the country, according to unpublished Uniform Crime

¹The FBI reports that 2/3 of those cards which it receives are for persons already in their files. State reports for "virgin" arrests show higher proportions of first arrests, upwards of 40 percent. The Philadelphia cohort study showed a similar percent (40) of those arrested had only one arrest at age 26.

²This extrapolation assumes that the likelihood of an arrestee in California being rearrested within the same year is the same as the national within-the-year recidivism rate. If this is correct, there will be no double counting of arrestees from comparing arrest rates. If recidivism in California is higher than the national norm, than the extrapolation will result in a low estimate; conversely low California recidivism would result in a high estimate. Given the fact that the California arrest rate/population is higher than the national average, this would suggest either higher arrestee recidivism is occurring or an extraordinary proportion of California's permanent and transient population are offenders.

Report data.^{1/} Assuming little interstate recidivism in one year's time and that present arrest behavior is consistent with past arrest patterns in California and the U.S. as a whole, the estimated 5.58 million persons with California records results in a national estimate of 39.9 million persons with criminal records.

2) New York

The state files contain only a fingerprint based system.^{2/} These are estimated to hold the records of 2.725 million persons. Unlike California and the FBI's files,^{3/} these contain only adult criminal records; juvenile records are not maintained by the state.

To estimate the number of New York residents with arrest records, adjustments need to be made for (1) persons deceased, but still in files, (2) records on persons maintained by local police, but not sent to state, and (3) fingerprint records purged by state, but maintained in a name plus identifying number state registry. Records on persons born before 1900 have been purged by the state. A purge is now underway on files of persons born before 1910. If we use the FBI estimate that 18 percent of their files represent deceased persons, the number of live persons in the New York criminal files is 2.235 million.

The state estimates that it receives cards for 75 percent of all adult arrestees.^{4/} This results in an estimate of 2.98 million living persons in the state with records, excluding those purged by the state.

State fingerprints files are returned on persons who receive favorable disposition in the courts, such as a not guilty verdict. Name plus number

¹This unpublished data was gathered by the researcher during the conduct of the LEAA-funded National Manpower Survey and contains a state by state report of arrests by type of arrest for the years 1969-1973. Arrests in California for years prior to 1969 accounted for a slightly lesser proportion of all arrests (13%) in the U.S.

²The information and statistics reported here come from personal communication with Adam D'Alessandro, Deputy Director, New York Division of Criminal Justice Services.

³FBI accepted juvenile cards up to 1972. They no longer accept juvenile cards.

⁴A comparison of the number of fingerprint criminal cards received in 1973 by the state (313,000) to the number of adults arrested in that year (405,300) according to unpublished Uniform Crime Report data closely conforms to the state estimate, resulting in a finding of 77%.

identifier files are still kept, however. This is a new and yet little used procedure. Assuming that 20,000 persons have had first offender fingerprint records removed, this would raise the estimated total to 3 million persons with criminal adult records.

A final adjustment required before a national extrapolation is made is to correct for the number of persons with juvenile-only criminal records.^{1/} The Philadelphia cohort study indicates that nearly 40 percent of all persons with arrest records have only juvenile records and are without an adult arrest record. However, in Pennsylvania an individual is a juvenile until age 18, compared to age 16 in New York. Moreover, in New York City, "youth contact" cards (an informal record system kept at the police precinct level) are used in lieu of arrest and fingerprinting of juveniles.^{2/} The result is that juveniles constitute only half of the proportion of arrests in New York that they do in Pennsylvania. Adjusting for the fact that half of all "juvenile" arrests are of persons age 16 and 17 (which in New York results in an adult record), it is estimated that 10 percent of all persons in New York with criminal records can be expected to have juvenile-only records.^{3/} This results in an estimated offender population in New York of 3.3 million persons.

According to unpublished Uniform Crime Reports data, arrests in New York state constitute an estimated 7.1 percent of the national arrest figures

¹In New York state, access to juvenile records is limited by the fact that (1) state law forbids access, (2) records are kept by the local courts rather than at a central body and (3) police record keeping is also haphazard. Employers will differ in their policies regarding criminal records as to their interest in juvenile records. When they do ask for this information, the job applicant is expected to answer honestly and is rarely aware of the fact that there is little chance of being caught lying.

²Further complicating the problem of comparability is that the large volume of arrests in NYC create pressures on police not to make arrests of juveniles, since they cannot be handled by the courts. Acts that would result in an arrest in most other cities if seen by the police, do not always result in an arrest in NYC.

³This estimate considers the fact that research has shown that early age of first arrest is strongly correlated with recidivism and the fact that individuals at age 16 are entering the period of highest probability of rearrest. Hence, the Philadelphia study is a poor indicator of the probability of a person having only juvenile arrest record in states such as New York where the definition of a juvenile does not include older youth, 16 to 18. For, persons arrested for the first time at the age 16 or 17, they are unlikely, statistically, to be rearrested.

(500,000 vs. 9,000,000 in 1973).^{1/} This projects, using the 3.3 million estimate, to 46.5 million persons with criminal arrest records in the United States.

3) New Jersey

The New Jersey state police fingerprint files contain 902,785 persons.^{2/} A substantial proportion of these will be deceased persons since purging of persons age 80 or older has just recently been started by the state. Because New Jersey has not completed purging its files of persons over age 80, using the FBI estimate of 18% deceased in the files (in addition to the FBI files purged of persons over age 80) for New Jersey would probably result in a low estimate for the number of deceased persons. It is more likely that 25 percent of those persons whose records are in the state files are deceased.^{3/}

This results in an estimated 677,000 persons with criminal records in the New Jersey files.

State Uniform Crime Report data indicates that the state receives fingerprints for about 50 percent of all adult arrests in the state.^{4/} This results in an estimated adult offender population in New Jersey of 1,354,000 persons.

Arrests in New Jersey constitutes 3.3 percent of all arrests in the United States. Using the state offender estimate of 1.35 million persons, this results in an estimate of 40.6 million persons with criminal records in the U.S.

¹As was discussed (note 2 page 14 with respect to the California extrapolation), this arrest rate statistic indicates that recidivism in New York is lower than the national norm, resulting in an overestimate from the extrapolation. Zimring found in a study of the New York pretrial intervention program that crime-arrest probabilities in New York City have been diminishing over the past decade--a finding which supports the lower recidivism inference (personal communication from Frank Zimring).

²Information reported by Major William Zainelli, New Jersey State Police, Records and Identification Section.

³Adding in those persons purged by the FBI because they were age 80 or over to the number of persons estimated to be deceased, but in the files, gives a total of 6 million deceased, compared to 22 million files plus two million purged or 23 million persons totally held now or previously held by the FBI. Six million is 25% of 24 million.

⁴Until 1976, the state kept juvenile fingerprint records. Hence, no adjustment is needed (as was necessary for New York) to account for juvenile arrests unreported to the state. State policy now provides for removal of the files of juvenile arrest only cards, but manpower shortages have prevented the policy's implementation. The estimate above, for the number of offenders in the state, could omit perhaps 200,000 juveniles arrested in the past three years.

III) Summary: The separate estimates of the number of persons with arrest records range from 32.6 million (Philadelphia extrapolation, low) to 46.5 million (New York). Other estimates were 36.1 million (Philadelphia, high), 41 million (FBI), 39.9 million (California), and 40.6 million (New Jersey). Among these, the low estimates from the Philadelphia cohort study are rife with assumptions, and deliberate underestimates. The highest estimate, from the New York analysis, also is based on substantial estimated adjustments. The New Jersey and California estimates showing 40.6 and 39.9 million persons use the "hardest" data and use the fewest adjustments among the several procedures used.^{1/}

Recognizing that several of these estimates were predicated upon knowing or assumed underestimates of significant data factors, it is felt that the number of persons with arrest records is likely to be no less than 36 million, with a strong likelihood that they number 40 million.^{2/}

¹Analyzing the combined data for the three states, a total offender population of 10.09 million persons have been arrested in jurisdictions having 24.4 percent of all U.S. arrests. This results in an estimate of 41.35 million, reflecting the effect of the higher, but less certain New York proportion and the likelihood of some duplication of persons in the three file sets. If duplication exists in 5% of the cases, the combined estimated offender population is 39.1 million.

²A final validation check on the statistic comes from a survey done for the Law Enforcement Assistance Administration on the number of criminal record files maintained by state and local police. This study, The American Criminal History Record: Present Status and Future Requirements (Search Group, Inc., Technical Report, No. 14, September 1976), found that in 1975 "the United States maintained over 195 million criminal history records at state and local levels." Of this number, 28.5 million criminal histories were maintained at the state level and 105 million by local police. Thus, for a population of 36 million individuals, an average of three separate local police agencies keep criminal history records for every offender. This seems relatively high since other data indicate that 40 percent of persons arrested are never rearrested. The FBI reports that the "average" file in its computerized files records four arrests without reference to the number of agencies holding this information. The criteria for entry into the file, however, considers likelihood of reoccurrence as favoring entry. In sum, this data does not, in any way, contradict the 36 million estimate and even tends to support an inference of underinclusion favoring the higher 40 million figure.

PART B. THE NUMBER OF OFFENDERS IN THE LABOR FORCE

The Department of Labor is concerned with offenders only as they are present or potential members of the labor force. But, not all offenders are in the labor force. Hence, the estimates above for the number of persons with arrest records must be adjusted for DOL purposes to exclude those offenders not working nor seeking work.

I) Review: As with the work task to estimate the number of persons with criminal records, this task began by reviewing past work.

a) Earlier estimates of 33 million labor force participants were derived from:

- Subtraction of deceased persons from the 45 million offender estimate through applying HEW mortality tables to those persons under age 80 (using as a reference the number of persons over 80 purged from the files by FBI, then reported to be approximately 1 million).
- Subtraction of all persons over 65 who are still living but assumed not in workforce due to retirement (through similar procedure).
- Application of an estimated 90% labor force participation rate for an offender population of 90% male and 10% female (based upon examination of 1970 Census studies of incarcerated populations, DOL labor force participation tables, and limited studies of offender labor force participation).

b) Evaluation

i) The estimates in Part A of the number of persons with criminal records exclude deceased persons through application of mortality tables by the FBI in its self-examination of their criminal files and applied here to the state files or in the instance of the Philadelphia cohort study, the use of population statistics. Hence, no further modification is needed here.

ii) The use of a single labor force participation rate for the estimated population seems unwise. Moreover, the assumption leading to the use of a 90% rate-- that older offenders are not a significant segment of the total offender population--may be incorrect in light of the FBI information showing the number of deceased persons in their files to be 18 percent.

II) Results of new estimation procedures: Few studies exist of the labor force participation rates of offenders. Those few generally report rates at about the 95 percent level for a population of parolees or institutionalized offenders (intent to work sometimes being reported).^{1/} These figures are generally in accordance with labor force participation rates for the labor force as a whole, since the median age of inmates and parolees ranges from 25 to 39 in the fifty states.^{2/} No studies exist that report direct observations on labor force participation of persons with criminal records such as arrest or past the point of correctional supervision (ex-parolees).

It seems not unreasonable to use the general population participation rates for the offender population. Offenders constitute a significant proportion of the labor force and are over 20 percent of the total U.S. adult population. Arguments against the use of these rates would stress that the offender population is likely to be younger than the total adult U.S. population since the arrest rate per 100,000 population has increased over 20 percent since 1963, leading to a proportional growth among those age groups with the highest labor force participation rates. If true, the use of general population participation rates might result in an underestimate. Conversely, the FBI information showing that 18% of the persons in their files are likely to be deceased would suggest that the offender population is older than the population at large. This might result, if true, in an overestimate of the number of offenders in the work force. The data presented in the Appendix, that about half of the offender population have records that show 10 years have passed since their last criminal justice contact, might support an inference of offenders being older than the male population as a whole; the median age of males being 37 years of age for white males over age 15, and 34 years for black males over age 15 (labor force median ages being slightly lower for both white males, 35 years, and black males, 33 years). No data is available, however, to test either inference, nor are there figures available other than general labor force participation rates to perform the needed calculation.

¹These studies are important only in not contradicting the procedure used here, but not as positive support. Parolees are often required to seek work as a condition of parole, and prison inmates are a skewed sampled of the offender population as a whole.

²Employment and Training Report of the President (1978) Table A-4.

Such a calculation should, however, take into account the differential representation among offenders for such significant characteristics as sex and race. Thus, white males had a labor force participation rate in 1977 of 78.5%, black males, 71.0%, and females, 48.4%.^{1/} Applying these rates to a population of 36 million offenders that is 85% male and 30% black,^{2/} it is calculated that no less than 25.9 million offenders are presently in the labor force. Alternatively, the higher estimate of persons with criminal records of 40 million results in an offender labor force of 28.8 million persons.^{3/}

^{1/}Ibid. No adjustment is made for age groupings (see text above), nor for regional differences. The number of persons with criminal records who are non-labor force participants because of prison sentences is about 300,000, including those in jail awaiting transfer to prison. This is less than one percent of all offenders, not having any significant effect upon the labor force participation rate of this population as a whole.

^{2/}While blacks represent 45% of all arrests, black arrestees also have substantially higher number of arrests per individual than white arrestees. Were this not so, an estimate of 36 million arrestees, 85 percent male and 45% black would include 13.8 million adult black males or about 146 percent of the number of all black males over age 15, (9.5 million) according to the Census estimate for 1977. This seems unlikely even considering the fact that Census statistics undercount blacks, especially for a population whose median age (all ages) is 22.9 years. If blacks constituted 30 percent of the male arrestee population of 30.6 million, then an estimated 9.2 million male blacks have criminal records. If Census undercounting of black males is set at 10 percent, then 87 percent of all black males have criminal records. This finding is consistent with the estimates made by the President's Commission on Law Enforcement and the Administration of Justice in 1967, Task Force Report: Science and Technology (96% of urban black males will be arrested in their lifetime), and with the Philadelphia cohort study. Other studies showing a "black shift" in the proportion of black-white offenders from arrest through imprisonment also support the view that the proportion of blacks among offenders must be significantly lower than the 45% figure for arrests or prison inmates.

^{3/}Approximately one-third of the adult U.S. population not in the work force (excluding those with home responsibility reasons) are so because they are in school or do not expect to be able to find a job. Employment and Training Report of the President (1978) Table A-12. Their addition to the estimate above would seem reasonable, since even if presently not in the work force, they would like to be members, either now or in the future. This would increase the number of persons in, or potentially in, the labor force to 32.46 million.

APPENDIX I

Who is the Offender? - Policy Implications

The size of the offender population (one-quarter of the work force) may or may not have policy significance to the Department of Labor. It is the consequences of offender status in combination with the number of persons affected by that status that together suggests the policy significance of the finding. For, it is commonly assumed that criminal records in themselves have a negative effect upon employment success.^{1/} Not all offenders will be actually affected by offender status; many will, however. The question that follows is which DOL offices or programs serve significant numbers of offenders, or, whose missions should take into account the fact that significant numbers of labor force participants are offenders? In order to answer this we need first to disaggregate the offender population into its several constituent parts; second, to examine the specifics of the barrier problem, including employers' concerns with the offender's record and the impact of record labelling upon the offender's job seeking behavior; and third, to "match" DOL activities that have potential concerns with the problem(s) uncovered.

I: The Offender

A population of 40 million persons makes the offender universe a varied group, not the homogeneous population that fictional stereotypes suggest. Rather, offenders will differ demographically (race, sex, age, etc.) and by seriousness of offender status.

a) Who is the offender?

i) The calculations above, by which the number of persons with criminal records were estimated, used Uniform Crime Report (UCR) information about arrestee characteristics. Adjustments were made to eliminate double counting of individuals, due to rearrests within one year of the same persons. This resulted in the following:

- males to females (85% to 15%)

¹Concern with the effects of the record upon employment does not necessarily imply concern with providing program services to persons presently in contact with criminal justice through arrest or serving sentences from conviction of a crime. It is possible to separate the DOL's commitments to provide program services such as those provided by the ETA, from efforts to deal with the problems of offender status in other contexts. Such a bifurcation of efforts is not desirable and hence, this analysis will also deal with the immediate meaning of offender status problems for the development of offenders' program services.

- blacks to whites (70% to 30%)
- juveniles (under 18) to adults (6% to 94%)

No other demographic information is available from the UCR or any other national data source describing arrestees. The Philadelphia cohort study has presented some interesting data showing that while white offenders have nearly 50 percent juvenile-only records, the proportion of black offenders with juvenile-only records is 22 percent. One-half of all the black adult males in the study had been arrested as adults by the age of 30. Foremost, an adult criminal record (75%) occurred between the ages of 18 and 22.

Other data sources are available to describe persons incarcerated in jail or prison. This information is useable only in the specific context in which it was gained, due to the differential selections process by which offenders move from one part of the criminal justice system to another. For example, of 10,000,000 arrests each year, about 100,000 new prison commitments results. Information about prison inmates is not generalizable beyond that specific context to arrestees as a whole.

ii) For prison inmates, the following demographic information is reported in the LEAA, Census of Prison Inmates (1976) (Advance Report) as of 1974:

Sex:	males - 97%
Race:	blacks - 47%, other non-white - 2%
Age:	27 years median; 3/4 between 18 and 34
Education:	61% no high school degree, 8% some college
Marital Status:	married - 24%, divorced/separated - 24%; widowed - 3%
With Dependents:	61% (one or more)
Veterans Status:	27%

Employment related information included:

Working at time of arrest	67%
Looking for work at time of arrest	13%
Willing to work, but not looking	6%
Not in work force or not willing	13%
Median length of time at most recent job	8 months
Work as:	
Nonfarm laborers, operatives or craftsmen	69%
Service workers	11%
Farm workers, supervisors	2%
Professional and technical workers	3%
Managers and Administrators	6%

b) How serious a criminal history does the offender have?

In addition to demographic information, offenders may be distinguished on the basis of the seriousness of their offenses, case disposition, and extent of criminal history.

i) Of all arrests, about 22 percent are for crimes listed by the FBI as a major crime (i.e., Crime Index). These include homicide, forcible rape, robbery, aggravated assault, burglary, larceny-theft and motor vehicle theft. Excluding motor vehicle theft, these crimes constitute nearly 20 percent of all arrests.

Exclusion from the Crime Index listing does not necessarily imply the nonserious nature of a crime: Included in the nonindex crime arrests in 1976 were: other assaults (428,000), arson (17,700), forgery and counterfeiting (68,000), fraud (199,300), embezzlement (10,000), stolen property (111,600), drug law violations (609,700), and sex offenses (except rape or prostitution) (62,600).

This totals 1,470,000 arrests, which added to those for index crimes makes for 3.5 million arrests in 1976 for serious crimes. Overall, about 40 percent of all arrests are for serious crimes. This parallels our estimate that the FBI holds 40 percent of the records of all persons with records. In addition, about one million persons are arrested each year for drunk driving, the seriousness of which as a crime--from the point of view of employment--will vary according to the circumstances of the arrest and the employer's perspective.

ii) Seriousness of criminal records may also be measured by type of disposition: convicted as charged, convicted of a less serious offense, or not convicted. Arrests should not be equated with convictions, although this error does occur not infrequently.^{1/} As a rule, the more serious the crime charge at arrest, the more likely for a disposition favorable to the accused to have occurred. For example, in 1976 police arrests for homicide

¹The reason being that until recently, few police agencies made any effort to match dispositions to arrests records. The FBI reports that 45% of its files do not have disposition information. Local police files are generally in worse shape. Almost a third of the criminal records in present use lack significant data elements. Employers, however, especially private and local government, gain criminal record information from the local police so that arrest information is generally the only information available.

resulted (according to the UCR) in only 71 percent prosecution and 48 percent found guilty as charged, 14 percent of a lesser charge. This compares to 83 percent of persons arrested for all crime index crimes being charged, 66% found guilty as charged and 7% of a lesser charge.

It is estimated that perhaps as high as 40 percent of all arrests do not result in a conviction.^{1/}

iii) Offenders may be distinguished by criminal history into three groups: active-chronics, active or recently active (last 10 years) non-chronics; nonactive. Extent of criminal history record is useful mainly in identifying persons who are active or "career criminals." One estimate, by Project Search, of this subpopulation of career criminals is 5.24 million individuals. It was also estimated that this population will gain between 200,000 and 400,000 persons each year.

Employers may be concerned about persons with multiple arrest histories regardless of the relevance of their crimes, insofar as the history indicates a low likelihood of staying on the job. Perhaps 20 percent of all offenders have multiple (two or more) arrest histories, half of which show arrests within the past ten years. But, criminal record data is not needed to show unstable job history, so that its unavailability would not effect employment decisions.

These individuals are included among a larger subset of offenders as being under supervision (3 million) or having records that show an arrest within the past ten years (14.8 million). Approximately half of the estimated 36-40 million persons with criminal records have not been arrested in the past ten years. The attached Chart I presents one way in which the offender universe might be described in terms of the seriousness of criminal history and recency of last contact.

II: Criminal Record Employment Barriers

What employment-related uses are made of criminal record information? Several types of information exist to answer this question. These are:

¹This is a higher figure than those cited by the UCR which does not consider in its calculations arrests that result in police withdrawal of charges. The UCR does include prosecutor's refusal to charge, a later nolle prosequi and not guilty findings.

Chart I

Illustrative

Estimated Offender Universe by Seriousness of Arrest
Record, and Measures of Record Staleness (n = 40 million)

Total offender estimate (in millions)	40
Offenders with:	
At least one serious crime arrest ^{1/}	16.5
Multiple minor arrests only	9.5
Active in past ten years	13
With one or more serious crime arrests	8.3
With multiple minor arrests only	4.7
In present contact (within year)	2
With one or more serious crime arrests	1.3
With multiple minor arrests only	0.7
Not under supervision	7
With one or more serious crime arrests	4
With multiple minor arrests only	4
Not active in past ten years	13
With one or more serious crime arrests	8.3
With multiple minor arrests only	4.7
No serious crime or multiple minor arrests	14
Active in past ten years	7
In present contact (within year)	1
Not under supervision	6
Not active in past ten years	7

^{1/}Assumes that FBI file holdings are for serious crimes only and these hold all serious crime arrestees.

- Surveys of employers and employment agencies, asking about employment policies or reviewing employment application forms.^{1/}
- Social science studies comparing the reactions of employers to identical job applications, differing only in criminal record data.^{2/}
- Reviews of state and local legislative hearing on requiring of permitting licensing or civil service employment denials on the basis of criminal records.^{3/}
- Case reports of litigation where employers or public licensing agencies have been successfully sued for their arbitrary use of criminal records in decisionmaking.^{4/}
- A 1975 survey of the number of requests to state criminal record centers for employment related purposes.^{5/}
- Field studies of public employment practices.^{6/}

¹Smith, Wood & Milan, "A Survey of American Correctional Agencies," Criminal Justice & Behavior, Vol. 1 (1974) pp. 234-246; New York Urban Coalition, Survey of National Employers in New York City (1972) (unpublished); Jensen and Siegold, "Finding Jobs for Ex-Offenders: A Study of Employers' Attitudes," American Business Law J., Vol. 14, p. 195-225 (1976); Basker and Strauss, Reconciliation After Vietnam: A Program of Relief for Vietnam Era Draft and Military Offenders (1977), p. 129 (recapitulating published and unpublished studies for the Clemency Board); Martin, Offenders as Employees (1962); Hamilton and Roessner, "How Employers Screen Job Applicants," Monthly Labor Review (September, 1972). See also references cited in Miller, Artificial Barriers to Employment of Criminal Offenders (1975) (Report to ASPER, DOL), especially at note 8 (public employment).

²Hess and LePoole, "Abuse of the Record of Arrest Not Leading to Conviction," Crime and Delinquency, Vol. 13 (1967), p. 494; Schwartz and Skolnick, "Two Studies of Legal Stigma," Social Problems, Vol. 10 (1962), pp. 133-142; Buikhuisen and Dijksterhuis, "Delinquency and Stigmatization," British Journal of Criminology, Vol. 11, (1971), p. 185-187.

³See, Report of the Committee to Investigate the Effects of Police Arrest Record on Unemployment in the District of Columbia (1967), reprinted as appendix to decision in Morrow v. District of Columbia, 417 F.2d 728 (DC Cir. 1969). See H.S. Miller, The Closed Door: The Effect of a Criminal Record on Employment with State and Local Public Agencies (1972).

⁴Numerous cases are cited in N. Miller, note 2, above.

⁵The American Criminal History Record: Present Status and Future Requirements (Search Group, Inc., Technical Report No. 14, 1976).

⁶Note, "The Arrest Record and New York City Public Hiring: An Evaluation," Columbia Journal of Law and Social Problems, Vol. 9, pp. 442-494 (1973).

- Studies of actual offender job seeking practices showing avoidance of public employers and licensed positions, due to the reputation of these agencies for having offender exclusion policies.^{1/}

a) All of these sources point to the conclusion that a significant number of licensing bodies and employers utilize criminal records in decision-making. For example, the 1975 survey reported that a minimum of 525,000 requests were made to state criminal history information centers for employment or licensing related purposes by non-criminal-justice agencies. It is unknown what the number of similar requests were from local criminal justice agencies who were passing through requests to the state from public and private employers. Nor do we know how many such requests from employers were handled by local police without referring them on to the state.

Even the 1975 survey results may be a drastic undercounting. New York state reports that it had over 150,000 employment-related fingerprint checks requested in 1977 from state licensing agencies, banks, etc., authorized under state law. This accounted for about 30 percent of all fingerprints received by the state. About a third of these prints were retained so as to be able to alert authorities, should that individual whose print was checked subsequently be arrested.^{2/}

b) This evidence also indicates that the criminal record information is often misused by employers. There are serious legal questions involving any use of arrest records since the failure of conviction may imply the lack of any probative value to the arrest record. In public employment and licensing, the use of arrest records may therefore deprive the affected individual of due process constitutional guarantees. This is especially the case where no investigation is made of the disposition and facts surrounding the arrest. It is notable that in 1973 the U.S. Postal Service signed a consent order in federal court promising not to use arrest record information as the basis for employment decisions. Because of the disparate effect upon

¹Terry Aronson, Unpublished paper given to Governor's (Wisconsin) Conference on Employment and the Prevention of Crime (1976) (reporting on survey by H.I.R.E.D. of offender clients).

²California is not able to accurately estimate the number of employment related fingerprint checks it makes each year. The New York statistic was thought to be low, however, if applied to California.

minority group members, Title VII EEO requirements have been interpreted to forbid asking for arrest record information on application forms.^{1/}

Conviction records may be relevant to employment decisionmaking. The courts have generally used a "direct relationship" test to distinguish between relevant and irrelevant records. In public licensing cases, a second legal test relates to the "present fitness" purpose of licensing laws, so that state convictions (e.g., those more than seven years old) where the offender can show community success as evidence of rehabilitation may be declared irrelevant to license decisions. The same principle of "staleness equals irrelevancy" would seem to be applicable to all employment decisions using criminal records, with the exception perhaps of crimes that resulted from serious mental problems. However, the Vocational Rehabilitation Act Amendments of 1973, prohibiting employment discrimination on the basis of a handicap, may be relevant to this class of offenders.

c) The data also show that criminal record information is not utilized in situations where it should be. Employers have a duty not to be negligent in their hiring where their employees may have opportunity to injure members of the public. "Victims rights" litigation is still relatively uncommon, but it seems little more than an expansion of the concept of "duty to" in general negligence litigation. One implication of this line of cases is that agencies referring offenders to employers may also be negligent where they have information suggesting an individual's unsuitability for a job and affirmatively act to keep that information from the employer. The situation is legally complicated by limitations on information disclosure in the Privacy Act. As a result, pressures may exist to examine the reasonableness of the job referral itself. Employment Service staff are not aware of the possibilities of litigation resulting from an inappropriate referral and subsequent criminal activity by the referee.

d) Virtually unstudied in the literature is the problem created by employer's past use of criminal records in their decisionmaking upon offenders' expectations for being able to find work. Assumptions of employment search failure may lead many offenders to not seek work or to accept underemployment. The EEOC policy ruling that employers may not ask job applicants about arrest

¹EEOC, Guide for Pre-Employment Inquiries (Fair Employment Practices Manual) 443.67 (5/77).

records is predicated upon the question's psychological impact upon black offenders.^{1/} Anecdotal evidence from such sources as expungement litigation supports the view that criminal records are an inhibiting factor in upward job mobility.

It also appears that much unadaptive or inappropriate job seeking behavior among current offenders reflects uncertainties about their labor market acceptance. Rather than risk failure, bizarre behavior or dress at an interview avoids rejection (or acceptance) that might reflect upon one's merit and the consequent ego loss from the unsuccessful competitive seeking of jobs.

It is probable that much underemployment of offenders exist for all skill and educational groupings of offenders, but that the effect of the record in creating underemployment is greatest among the higher educated and skilled. At the same time, the existence of the record may prevent offenders from beginning self-improvement efforts which they might otherwise undertake. Lowered expectations among less educated offenders may well be a consequence of offender status analogous to underemployment in its waste of human resources.

III: The DOL Context

The significance of large numbers of persons with criminal records lies primarily in the difficulties that the record creates in labor market "acceptance."^{2/} Several DOL offices share responsibilities for easing labor market acceptance. The most prominent of these is the Employment and Training Administration (ETA), under which are programs funded by CETA, the Employment Service and the Bureau of Apprenticeship and Training. A second DOL office which has been programmatically concerned with offenders is the Women's Bureau, dealing only with female offenders. A third DOL office, which

¹Ibid. The impact of arrest records upon employer selection and potential employee self-selection decisions are similar in having a disparate racial impact but result from different causes: the question being asked and use of the answer.

²Other employment problems of offenders as persons presently enmeshed in the criminal justice process may also be significant, but are only partially a record problem. For example, an unpublished study in Washington, D.C. of arrestees' experiences subsequent to their arrest would, if extrapolated to the U.S. criminal arrest population, suggest that 500,000 persons each year lose their jobs following their arrest, due in part to their employer's reaction to the arrest and the subsequent strain put on the arrestee in trying to maintain his/her job while awaiting the prosecutor's decision, awaiting trial, coping with co-workers, or dealing with the multiple court appearances needed in the pretrial period. This study also found that most of the persons losing or leaving their jobs because of an arrest remain unemployed six months later. This later finding cannot be ascribed to itinerant work patterns, although the leaving of the job is likely to reflect some normal job leaving behavior. Further research is needed here.

has potential interest in offenders, is that of the Office of Federal Contract Compliance Programs which reviews federal contractors' compliance with affirmative action hiring requirements relative to race, sex, veterans status and the handicapped. All of these groups, with the exception of women, have high proportions of offenders.^{1/} The several other DOL offices concerned with employment of veterans, also have potential interest in offenders, since one-quarter of offenders presently in contact with criminal justice are veterans.

Other labor market problems, besides acceptance, also exist for offenders, especially if one looks at that subgroup presently under criminal justice control or supervision. For example, anecdotal reports exist that some employers will hire offenders as a form of cheap labor, in violation of federal laws regulating minimum wages, hours and conditions of work. Employer "victimization" of offenders occurs since employers operate on the premise that offenders will not complain and if they do, their status makes it likely that they will be ignored. They are often correct.

IV: The Future

The major implication of the finding that offenders constitute one-quarter of the work force^{2/} is that the Department of Labor cannot expect to effectively accomplish its missions unless it takes account of the problems raised by criminal records in employer decisionmaking. It seems not unlikely that problems resulting from criminal justice contact and criminal record employment barriers make up five to ten percent of all unemployment. Efforts to reduce

¹Not all types of handicapped are likely to include large numbers of offenders. Persons with alcohol or drug abuse problems are often likely to have criminal records. The federal courts have accepted the view that these groups are included in the protections afforded by the Vocational Rehabilitation Act Amendments of 1973, Section 503 of which calls for federal contractor affirmative action. See, e.g., Davis v. Boucher, - F. Supp. - (No. 77-932), (E.D. Penna. May 1978) (holding City of Philadelphia policy against hiring former drug users in violation of constitutional protections and federal regulations under Section 504 of the Act).

²Of course, this statistic is probably a gross underestimate of the ratio of offenders to all persons who are potential clients of DOL programs. The proportion of offenders is surely higher among the disadvantaged, urban and minority groups. Research is needed, therefore, to determine the proportion of unemployed and underemployed who are offenders and to distinguish among these by race, sex, veterans and handicapped status.

unemployment must therefore take this into account, whether one is looking at a Humphrey-Hawkins bill or veterans employment. Similarly, efforts to alter the composition of the work force of government contractors through affirmative action requirements must also take into account the hidden barriers to that goal which result from employer screening of job applicants for criminal records.

Present DOL activities to deal with the problem are nonexistent. Capabilities to deal with the problem exist in several offices, but primarily in ETA and the Office of Federal Contract Compliance Programs (OFCCP):

(1) The existing ETA capability potential is largely one that could operate through its grantees and contractors. However, since it is highly likely that these channels (especially local governments) themselves often use criminal records in employment decisions, the ETA should first focus on the set of problems found among its grantees and contractors before trying to impact upon employers in general. Thus, an examination of hiring practices among CETA prime sponsors, employment services and other contractors and grantees would seem to be a first priority for ETA.^{1/}

(2) The OFCCP has until now disregarded the relevance of criminal records to employment discrimination. This is in contrast to the EEOC and the courts. At a minimum, guidelines should be prepared for federal contractors which would, of course, be coordinated with the EEOC under Executive Order 12067. The new guidelines should not rest upon previous policy statements of the EEOC but should consider the recommendations put forth by the Department of Justice (DOJ) in the context of federal civil service laws.^{2/} The DOJ proposal adds to the "direct relationship" test of EEOC the requirement that where such a relationship exists, employer decisionmaking then looks to evidence of rehabilitation to show "present fitness" for the job in question. The guidelines should

¹See CETA Section 204 (c) (18) and (21) which in effect requires the prime sponsors to remove their artificial barriers to employment. DOL has not acted to enforce these provisions in the Act, as passed in 1973. The 1978 amendments (Section 122 (f) of the Act, as amended) require the Secretary to issue regulations detailing the responsibilities of the primes, reflecting its finding that DOL had not enforced the 1973 provisions.

²Incorporated as an amendment to the proposed Federal Criminal Code Act. See Congressional Record S. 669 (January 27, 1978).

specifically address the problem of possible conflict with DOD security regulations governing the employment of offenders by DOD contractors.^{1/}

(3) Long term, the primary need is for DOL to develop an educational and technical assistance capability to help employers identify and remove artificial employment barriers. This recommendation proceeds from the observation that most employers have never considered the costs and benefits of an employment policy that excludes offenders--especially in the light of the cost of violating federal and state law. They are rarely irrevocably bound to a policy of excluding offenders. They do need to be told that the problem exists, and they often need help in developing a new policy that can be successfully implemented among lower level staff responsible for personnel and supervisory decisionmaking.

Although the new CETA legislation provides for such a program,^{2/} it is unclear at present how this effort can be best coordinated with the OFCCP activities, which it will complement. It is recommended that this new program focus first on implementing the CETA provisions requiring efforts to remove artificial barriers among prime sponsors, the political subunits comprising the primes and their contractors and grantees.

(4) Efforts to eliminate barriers should be coordinated with programs providing traditional employment and training assistance to offenders. One consequence of this recommendation's acceptance would be for increased emphasis on job readiness and job finding training as a complement to skills training.^{3/} At the same time, providers of traditional services to the disadvantaged should be given information relative to the likelihood that they

¹Department of Defense Directive, Industrial Personnel Security Clearance Program No. 5220.6 (first issued December 7, 1966).

²See Section 311(g) of CETA as amended in 1978.

³The rationale for this recommendation is the observation of the author that offenders believe that they are faced by artificial barriers from their record in job seeking. Their reaction to this belief (whether it is true or not, being irrelevant) is to avoid job seeking or to exhibit unusual, often counter-productive behavior in job seeking or interview situations. Help is needed by them to identify the existence of barriers and learn how to overcome them. See N. Miller and S. Hillenbrand, Breaking Out: Overcoming Criminal Record Barriers To Employment, American Bar Association (in print).

are probably now serving offenders; the failure to identify offenders may mean that their investment in services will not have maximum return due to the unaddressed problem of artificial barriers to employment.

These preliminary recommendations present a few action alternatives for DOL's immediate use. They are not a substitute for a detailed plan of action, of which they would be part. Other program and research actions are also needed. Some of these are spelled out in the new CETA Amendments (e.g., research study of offender unemployment incidence; survey of CETA prime sponsor offender programs in Section 301 (b) (2)). Such a plan should stress research needs on such topics as employer decisionmaking, job seeking behavior among offenders and other problems relating to the operations of the labor exchange. Part of this data and information collection could emulate the "knowledge development plan" of the DOL Youth Employment office. The action plan should also recognize that CETA prime sponsors are not aware of the multitude of options available to them in working with criminal justice clients nor how criminal justice agencies can assist them in eliminating artificial barriers to employment. Efforts to bridge this gap should not be limited to preparation of printed materials but should consider greater use of regional office staff through training by the national office of DOL in conjunction with other federal agencies, particularly the National Institute of Corrections in the U.S. Bureau of Prisons.

APPENDIX II

Criminal Records Systems: A Primer

This appendix will briefly describe (a) what types of criminal records are kept and by whom, and (b) the ease with which employers can gain access to these records.

A. Every contact with a criminal justice agency creates a series of paper records of that contact. Most of these records are maintained by agencies in filing systems. The most important of these systems are those maintained by the police.^{1/} Generally, the police have two central criminal record systems. These are the criminal fingerprint file and the name plus number identifier (e.g., social security number) file. In addition, the local police precinct, where an arrest was made, will keep records of the arrest in its daily log or "blotter". Intermediate actions, such as transfers from one police station to another, will be similarly logged.

Until recently, most other criminal justice agencies, besides the police, did not keep central records (i.e., criminal histories). Records in the court system, for example, were kept by case or docket number. With the advent of court management techniques to facilitate speedy trials, computerization of records has occurred, facilitating central record keeping among prosecutors, public defenders, courts and even local correctional agencies (to minimize pretrial detention).

At the same time, the availability of federal dollars has prompted the states to establish state level record centers; which receive criminal record information from all components of the criminal justice system. Patterned on the police model, these centers are primarily fingerprint files, and in some instances, name plus number identifier systems.

The fingerprint file is the basic system, however. For each individual, the fingerprint file creates a record "jacket" which holds record information showing every contact that a person has had with criminal justice and the steps for each contact: arrest, pretrial detention, court disposition, sentencing information, and record of incarceration and parole.

¹Courts, prosecution, public defenders, local jails and state correctional agencies together hold less than 33 percent of all criminal record files.

Only a few record systems have reached a significant level of completeness either for scope (i.e., number of persons arrested) or for breadth (i.e., follow-up data for each arrestee). State level files are incomplete because local agencies fail sometimes to provide the fingerprints of arrestees, as required by state laws establishing state record centers, or subsequent dispositional information to the state. Police use of a citation in lieu of arrest (similar to a traffic ticket) may result in the person never being fingerprinted, although this may be legally required to be done at the court proceeding. Without the original arrest fingerprints, any dispositional information received later must be thrown away since it cannot be matched to an arrest.^{1/}

Local police files are often incomplete with respect to dispositional information due to breakdowns in communication with the prosecutor or the courts. The police have traditionally shown little interest in records showing the disposition of their arrests; federal law now requires such information where the prints are sent to the FBI. There are no significant penalties for failure to comply, since there is no requirement that prints be sent in the first instance.

The result is that criminal record histories are synonymous with the arrest record. Since information about convictions is often not easily obtainable (except for persons serving a sentence at the time of inquiry), arrest records are as a practical matter used to infer conviction by persons seeking criminal record information. The FBI has contributed to this attitude by referring in its Uniform Crime Reports to arrestees as "offenders" despite criticism from the President's Commission on Federal Statistics (1970) and others of the term's disregard of the law's presumption of innocence for arrestees.^{2/}

Accuracy of records is also at question. One national survey reports that 10 percent of all criminal records are estimated to contain major errors.^{3/} This is in addition to the one-third of records with incomplete information.^{4/}

¹California receives 75,000 records of disposition each year for which no arrest information is available.

²Hans Zeisel, "The Future of Law Enforcement Statistics: A Summary View" in Report of The President's Commission on Federal Statistics, (1971), p. 527.

³The American Criminal History Record: Present Status and Future Requirements (Search Group, Inc., Technical Report No. 14, 1976), p. 27.

⁴Ibid.

Finally, it should be noted that secondary, non-official sources of information exist as to criminal records. The most obvious of these are newspaper reports of criminal justice system actions. Until two years ago, for example, the Washington Post listed police arrest reports. While this information may not be itself easily accessible, others keep records of the newspaper reports. Companies who perform credit or employment screening keep their own unofficial criminal record files, which are based in part on news accounts.^{1/}

In sum, a single criminal justice contact may result in the creation of record files in at least four different places: local police, state police, Federal Bureau of Investigation, and the unofficial records of news reports, private investigators or credit bureaus. Gaps in coverage and errors in inclusions make many of these files suspect as a basis for decisionmaking.

B. Criminal records are intended to be used by criminal justice agencies. These records must be accessible, therefore, by a wide range of criminal justice agencies and personnel. Since speed of access may be important, few controls existed until recently to limit the use of the records. As a result, employers seeking criminal record information had only to request such data from local police agencies (or even, only officers) to gain access to information held by any agency with which the intermediary agency could itself gain access.

The only significant impediment to access resulted from the lack of significance to law enforcement purposes of the original record keeping. Serious offenders, measured either by crime seriousness or number of arrests, will have records easily accessible. Nonserious offenders will have records that may be retrievable only with great difficulty (i.e., through the police blotter). Exceptions exist, as in California where the state name-plus-identifier file lists all persons arrested by the local and state police, including those receiving citations in lieu of arrest.

Ease of access to criminal records may also be affected by laws allowing expungement (removal from files) or sealing of criminal records. In theory, the expungement or sealing should prevent access to records. In practice,

¹The accuracy of these unofficial files seems very much at question, being twice removed from the official files--which are themselves erroneous 10% of the time.

this is rarely the case. In Connecticut, for example, expunged files are not physically destroyed, but merely stamped expunged and maintained in the file. In New York, the fingerprint file is destroyed, but a name-plus-identifier file then established. In California, state purging of its files does not affect local police files. Conversely, local police may expunge their file, but fail to request the state or the FBI to return their criminal records for the individual.

A legal complication arises when the state law authorizing expungement or the cancellation of a conviction,^{1/} fails to affirmatively authorize the individual to deny that an arrest or conviction has occurred. A court may thus rule that such a denial is lying and not to be countenanced. An employee may possibly be fired for lying on a job application form, in denying an expunged arrest, or conviction, should a background check be made and this information be discovered.

In sum, criminal records, as a barrier to employment, may be classified according to whether they are (1) retrievable, (2) retrievable only with difficulty, (3) nonretrievable, but where there is a legal or moral obligation not to deny its existence when questioned, and (4) nonretrievable and deniable under law.

¹In many states, a youth charged with a first offense may be placed on probation either without a formal finding of guilty being made or where the guilty finding is only conditional. At the successful completion of the probation term, the court verdict is changed to not guilty or to a dismissal. The record of conviction is legally "as if it never were." In two or three states, the law may also authorize denial of the arrest as well as the conviction.

APPENDIX III

Non-DOL Policy Responses To Employer
Use of Criminal Justice Records

There is general acceptance among policymakers that the use of criminal records by employers without relevancy criteria has adverse and improper effect on offenders' success in the labor market. This has resulted in a number of policy responses, most of which, however, reflect specific concerns, such as EEO; only the courts have made even minimal efforts to balance employers' legitimate needs for criminal record information versus the offenders' "right" to employment opportunities where he/she is qualified and no threat to public safety exists.^{1/} At the federal level, this acceptance has resulted in:

- Presidential directives to the U.S. Civil Service Commission to revise its suitability criteria (1966 and 1975).
- Inclusion in the Civil Service Reform Act of 1978 of a provision limiting suitability checks to conviction records and only to those crimes which are reasonably related to job performance of applicant or other employees.
- Equal Employment Opportunity Commission rulings barring employers from asking about or using arrest records and using conviction record information where that information is not directly related to the job in question.
- Numerous court decisions to the same effect. Other court decisions requiring expungement of arrest records due to their presumed harm to employability.
- Promulgation of regulations by the U.S. Department of Justice requiring state and local criminal justice agencies to limit noncriminal justice use of their records, where federal funds or facilities have supported the state or local record system.

^{1/}Hence, the appropriateness of these responses for the Department of Labor needs examination. It is likely that general direction of these actions will not be changed, but that modifications or even expansions will be found advisable. In any case, these past policy actions encompass only a small proportion of employment situations--even if fully acted upon, which has not been the case to date.

- Passage of federal legislation permitting use of records held by the FBI for noncriminal justice purposes only when authorized by state law.
- Passage of the federal Youth Corrections Act authorizing the voiding of a conviction upon the successful completion of probation by a youthful offender.

At the state and local level, this has resulted in:

- Three states (New York, Wisconsin and Hawaii) explicitly barring employer discrimination against offenders.
- Over 20 states passing legislation removing most state barriers in civil service and licensed employment.
- Governor's executive orders, in three states, to the same effect.
- State and local Human Relations Offices' rulings barring employer asking of arrest information and use of conviction information, except where directly related.
- Passage in the majority of states of expungement and sealing laws, youthful offender acts and privacy and security laws for criminal records.

More far reaching actions can be seen in other English speaking countries and in Western Europe:

- In the United Kingdom, Parliament passed in 1974, the Rehabilitation of Offenders Act which prohibits employment discrimination against rehabilitated offenders, prohibiting dissemination of their records and authorizing denial of conviction.
- In Western Europe, arrest records are not available since only convictions are included in the criminal record. Limits on dissemination of conviction records to employers are common.

In addition to these actions, the report of the Privacy Study Commission in 1977 to the President and the Congress recommended that the use of criminal records by employers be restricted. State task forces dealing with offender rehabilitation, such as in California (1975), have made similar recommendations. The Reports of the Canadian Committee on Corrections (1969) recommended annulment of convictions and issuance of a certificate of good behavior.

Two different approaches may be seen above: (1) preventing access by employers to criminal records through their destruction, sealing or forbidden dissemination, and (2) guiding the discretionary use of such records with penalties for improper use. Little thought has been given as yet by government in helping employers with voluntary compliance through programs designed to eliminate artificial barriers to employment from criminal records. Nor has there been much thought given to the "labelling" effect of criminal records upon offenders' work expectations, labor force participation and job seeking behavior.

It may be concluded, therefore, that since so little is known of the dynamics and dimensions of the problems caused by criminal records in employment, past policy responses may well have been (1) inappropriate in toto (i.e., wrong solution); (2) insufficient in amount; (3) addressed to the wrong decisionmakers or actors; or (4) otherwise need reevaluation and modification. It is also possible that these responses were and are still appropriate and that increased efforts should be placed on their implementation. Answers to the question of which alternative is correct, are not available although a small research effort could well provide them.

END