

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
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SALEM, OREGON 97301

Madeline Neighly | Maurice Emsellem

The National Employment Law Project

July 2013

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## **About the National Employment Law Project**

The National Employment Law Project is a non-partisan, not-for-profit organization that conducts research and advocates on issues affecting low-wage and unemployed workers. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing.

Through its Second Chance Labor Project, NELP promotes the employment rights of people with criminal records. We seek to ensure fairer and more accurate criminal background checks and to reduce unnecessary and unfair barriers to employment.

For more information, please visit [www.nelp.org](http://www.nelp.org).

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# I Executive Summary

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At a time when millions of America's workers continue to struggle to find work in the aftermath of the Great Recession, many face an additional barrier—faulty records released by the FBI for use in employment and licensing decisions.

Although considered the gold standard of criminal background checks, the FBI records routinely fail to report important information on the outcome of arrests, information that is often beneficial to workers subject to these reports. Given the massive proliferation of FBI background checks for employment—roughly 17 million were conducted last year—these inaccuracies have a devastating impact on workers, especially workers of color who are disproportionately impacted by the criminal justice system. There is a solution to this problem that would immediately result in less job-loss and financial hardship: the FBI must ensure that records are accurate and complete prior to being released for employment and licensing decisions.

Emblematic of workers facing this additional burden is Raquel Vanderpool, a mother of two who lost the job she loved as a nurse assistant—a job she'd held for eight years—when the FBI erroneously reported that Ms. Vanderpool was convicted of a crime. In fact, the charge had been dismissed and sealed six years earlier.

Ms. Vanderpool, the other workers highlighted in this report, and the unknown thousands of others like them, do not pose a security or safety threat but nonetheless lose out on employment for one reason only: the background check produced by the FBI is inaccurate or missing critical information. As millions of workers struggle to navigate a still-challenging job market, the FBI must avoid creating wrongful barriers that cause unnecessary job loss and financial harm. Now is the time to ensure that criminal background checks with the imprimatur of the FBI are accurate and complete.

## Key Findings

- The use of FBI background checks for employment is rapidly increasing. Roughly 17 million FBI background checks were conducted for employment and licensing purposes in 2012, which is six times the number conducted a decade ago.
- Despite clear federal mandates that require the background reports to be complete and accurate, 50 percent of the FBI's records fail to include information on the final disposition of the case. The missing information is frequently beneficial to job seekers. For example, one third of felony arrests do not result in conviction and many others are reduced to misdemeanors.
- NELP estimates that 1.8 million workers a year are subject to FBI background checks that include faulty or incomplete information, and 600,000 of those workers may be prejudiced in their job search when the FBI reports do not include up-to-date and accurate information that would benefit them.
- African Americans are especially disadvantaged by the faulty records because people of color are consistently arrested at rates greater than their representation in the general population, and large numbers of those arrests never lead to conviction. For example, African Americans were more than four times as likely as whites to appeal an inaccurate FBI record under the federal port worker security clearance program.
- In conspicuous contrast to background checks for employment, the FBI searches for missing disposition information when a person seeks to purchase a gun, and the extra effort tracks down nearly two thirds of the missing information in just three days.

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In 1924, the first federal database of criminal history record information was created to assist with criminal justice investigations, prosecutions, and sentencing. The initial database contained 810,000 fingerprint records. Since that time, both the database content and its usage have greatly expanded. Today, the FBI maintains criminal history records on more than 75 million individuals, and rap sheets are used for both criminal and noncriminal justice purposes, including employment background checks.

As early as 1971, a federal judge noted that the database, which began modestly enough, had grown “out of effective control,” overwhelmed by the “increasing availability of fingerprints, technological developments, and the enormous increase in population.”<sup>1</sup> Even then, the enormous demands placed on the system and lack of processes to ensure accuracy led to “arrest record material [that was] incomplete and hence often inaccurate.”<sup>2</sup> The problem is pervasive and persists.

As this report makes clear, the system is broken. While law enforcement agencies diligently fingerprint detained and arrested individuals and submit those records to the FBI, the information on the final outcome of the case routinely fails to be reported to the FBI. In fact, a majority of the U.S. population live in states where more than 30 percent of the arrest records in the state criminal records repository do not include information on the final outcome of the case. Because the FBI relies on the states to submit updated records, the result is that the FBI records often lack the final disposition information. Unfortunately, it is workers, those who have the least power to deal with the problem, who are being forced to shoulder this burden.

While there are multiple fault areas in need of reforms, this report focuses on finding the best solution to this problem nationally and, specifically, what the FBI must do to ensure records sent under its seal are accurate and complete.

It is the FBI background report that determines whether these workers can move forward in obtaining the license or employment they seek. The FBI is more

than a mere receptacle of information; the imprimatur of the FBI marks the records as authoritative and trustworthy. The FBI must bear the responsibility to ensure accuracy given that the records are official federal documents. In fact, the bureau already has a system in place to ensure accuracy of records for firearms sales. The same process by which the FBI updates records that lack disposition information to ensure timely and appropriate sales of firearms could easily be replicated to ensure timely and appropriate employment of America’s workers.

## **The crisis of incomplete and inaccurate FBI background checks for employment impacts millions of workers, yet it has evaded public scrutiny**

As detailed in this report, the FBI background check crisis has grown and evaded public scrutiny for too long. Since the September 11th terrorist attacks, the number of FBI background checks for employment and licensing has surged. In Fiscal Year 2012, the FBI issued approximately 17 million rap sheets for employment and licensing screening purposes, over six times more than in 2002.

When FBI background checks were first authorized for employment purposes during the Cold War, the authorization was limited to federal government workers. Today, FBI background checks are authorized for occupations ranging from port workers and truck drivers to health care workers and school employees; even janitors and food service workers employed by federal contractors are now subject to FBI background searches.

FBI criminal background checks for employment and licensing are considered the gold standard because they include criminal history information from all states and, because they are fingerprint-based, they are far less vulnerable to mistaken identification. In reality,



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however, the records themselves do not live up to this reputation. They are fraught with limitations that undermine access to employment for many thousands of workers and arbitrarily restrict the pool of qualified job candidates available to the employer community.

Of special concern, in 2006 the U.S. Attorney General revealed that roughly 50 percent of the records are incomplete and fail to provide information on the final outcome of an arrest. There have been numerous attempts to improve the accuracy of the records. Because data is not made publicly available on the percentage of records missing disposition information in the FBI database, there is no way to evaluate the effectiveness of these efforts. When used as an employment screening tool, flawed records prevent qualified applicants from getting jobs.

## **People of color are especially disadvantaged by the faulty FBI background checks**

People of color are especially disadvantaged by faulty FBI records. African Americans are 14 percent of the U.S. population but account for 28 percent of the nation's arrests. That means that the FBI's failure to report final disposition information after an arrest, often including dismissals and other exculpatory information, limits employment opportunities for a larger share of African Americans than their white counterparts, resulting in a racially discriminatory impact.

In one of the largest background check initiatives post-9/11, the Transportation Security Administration ("TSA") screened two million workers for clearance to work at U.S. ports. Of those who subsequently appealed the denial of a security clearance, African-American port workers challenged the accuracy of their FBI records more than four times as often as white port workers.

Roughly one in four U.S. adults has an arrest or conviction record. We estimate that as many as 600,000

workers annually are disadvantaged in the job market because of the divergence between the FBI's reporting and the actual final conclusion of their cases.

## **Workers, employers, and overburdened governmental agencies bear the burden of correcting background checks produced by the FBI**

The persistence of faulty records released by the FBI imposes costs on workers, employers, and other public entities. A worker denied employment or an occupational license because of an incomplete or inaccurate criminal background check must shoulder the burden of contesting a denial of employment, reviewing the criminal record, and tracking down the missing disposition information or challenging the inclusion of misinformation, no matter how old or inaccessible the record—often without wages or work during this process. Employers are denied prompt access to qualified workers, especially in industries with ongoing labor shortages like trucking and healthcare.

In addition, federal, state, and local agencies responsible for screening workers for licensing and employment positions must devote significant time and taxpayer dollars to tracking down and processing missing information. For example, TSA had to process more than 54,000 appeals challenging inaccurate and incomplete FBI records from workers seeking clearance to work at U.S. ports and more than 43,000 appeals by truck drivers who haul hazardous materials. The U.S. Office of Personnel Management, which processed more than two million FBI background checks for federal government and contractor positions in 2011, has also spent considerable time and resources on completing and correcting FBI records. Yet, the FBI does not recognize or accept the updated information provided by these agencies—thus ensuring the persistence of inaccuracies in its database.

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## **There is a tried and true solution to ensure completeness and accuracy before the FBI records are released**

Fortunately, there is a simple and effective solution to the serious problems with the FBI database: clean up the records *before* they are sent to the agencies that rely on them to make hiring and licensing decisions. Indeed, the FBI already has the capacity to update and correct criminal background checks. In implementing the background check provisions under the Brady Handgun Violence Prevention Act (“Brady Act”), the FBI has cleaned up two-thirds of faulty records within just three days of requests, by contacting the appropriate federal, state, and local agencies to obtain the missing information.

Implementing a similarly effective system for employment- and licensing-related criminal background checks, along with the reforms suggested below, will ensure that job seekers are treated more fairly; that employers have a fuller pool of candidates, increasing the likelihood they can access the best and most qualified workers in a timely fashion; that other public agencies are not required to spend limited resources in tracking down information to update

records; and that the greater accuracy and accountability of the system will boost public confidence in the integrity of the FBI criminal background check process.

As detailed below, we recommend the following policies to reform the system and hold the FBI accountable for the records that bear its seal:

- Enact federal legislation requiring the FBI to obtain missing disposition information before releasing background checks for employment and licensing purposes.
- Require the FBI to check the files created under the Brady Act for missing information and accept updated records from the federal and state agencies that make suitability determinations.
- Ensure that all federal and state employment background checks that require FBI records provide an automatic right to a copy of the rap sheet and a robust appeals process.
- Hold the FBI accountable for enforcing the current law regulating criminal background checks for employment and licensing, and require regular reporting monitoring the impact of the current system.

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## II The Evolution of FBI Criminal Background Checks for Employment

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FBI rap sheets<sup>3</sup> are considered the gold standard of criminal background checks for employment because they include criminal history information from the federal government and all states,<sup>4</sup> and they are far less vulnerable to mistaken identification. In reality, however, the records themselves do not live up to this reputation, as roughly 50 percent of the FBI records are incomplete or inaccurate.<sup>5</sup>

With nearly 17 million FBI background checks processed for employment and licensing purposes in 2012,<sup>6</sup> the potential impact these inaccurate and incomplete records have on America's workers is enormous. As this report documents, the FBI criminal background checks used for employment and licensing decisions<sup>7</sup> are fraught with limitations that seriously undermine access to employment for thousands of workers and arbitrarily restrict the pool of qualified job candidates available to the employer community.

**1954: Background checks for federal employees:** FBI criminal background checks for employment began in 1954 with Executive Order 10450, which authorized access to FBI criminal history information for employment investigations of all civilian officers and employees of the federal government.<sup>8</sup> Neither the substance nor structure of the FBI rap sheets was adapted to meet this purpose, even though FBI rap sheets were not originally intended for employment screening. All contact with the criminal justice system reported by state or federal law enforcement authorities is conspicuously displayed on the FBI rap sheets produced for employment purposes—even charges that were dismissed or for which the individual was found not guilty.

To illustrate the problem, Appendix A provides an example of an FBI background report that includes multiple arrest entries and no disposition information. The rap sheet, released for employment purposes in 2011, shows six separate arrest entries. The individual was convicted only once in his life: for a set of assault and related charges arising from an arrest on May 28, 1982. He was arrested several other times, but the charges were always dismissed or he was found not guilty.

**Incremental expansion of background checks:**

Incrementally, the FBI then began providing criminal history information for certain licensing and employment purposes beyond federal employment, starting with background checks of workers employed by banking and other financial institutions.<sup>9</sup> Federal law never specifically authorized this decision to expand access to FBI background checks for other noncriminal justice purposes. When the practice was challenged in 1971, a federal court found that there was no legal authority for the FBI to disseminate these records for noncriminal justice purposes outside of federal government hiring.<sup>10</sup>

**1971–72: Congress acts to restore some limits:** In response, Congress passed two laws that year to expand access to the FBI records beyond the federal hiring process. First, the Department of Justice



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Appropriation Act of 1972 permitted the exchange of FBI records with officials of federally chartered or insured banking institutions.<sup>11</sup> Second, a law was enacted allowing access to the FBI's rap sheets only for the limited purpose of "employment and licensing if authorized by State statute and approved by the Attorney General."<sup>12</sup> Significantly, Public Law 92-544 does *not* authorize private employers to access the FBI rap sheets, but reserves that right for government agencies that conduct the background investigations. To this day, except in extremely limited situations authorized by specific federal laws, private screening companies and private employers may not directly access the FBI's rap sheets.<sup>13</sup> Public Law 92-544 continues to provide the basic framework for access to FBI criminal background checks for employment.

For decades thereafter, the legal structure regulating federal background checks for employment remained largely unchanged, although the pace of new occupational screening laws enacted by Congress and the states accelerated. Congress and the Executive Branch have imposed federal criminal background checks on a range of industries and occupations, and the states have enacted an ever increasing number of laws permitting or requiring employment background checks. Even before the September 11th terrorist attacks, federal laws permitted access to FBI criminal history records for a number of positions, ranging from child care workers,<sup>14</sup> employees of nursing facilities or home health care agencies,<sup>15</sup> to atomic energy workers.<sup>16</sup>

**1998: Creation of Compact Council:** In 1998, the National Crime Prevention and Privacy Compact Act ("compact") was enacted to facilitate the exchange of criminal history information between states for noncriminal justice purposes.<sup>17</sup> To date, 30 states have signed the compact and 11 states have signed memoranda of understanding.<sup>18</sup> Importantly, while not all states are members of the compact, all states participate in the Interstate Identification Index.<sup>19</sup>

**9/11 terror attacks prompt White House action to expand background checks:** In response to the 9/11 attacks, the Executive Branch expanded FBI background checks for any federal contract worker who has more than "intermittent" access to federally controlled properties.<sup>20</sup> This 2004 Presidential directive (Homeland Security Presidential Directive 12, known as HSPD-12) covers a much larger workforce than Executive Order 10450, which encompassed all employees of the federal government. In contrast, HSPD-12 applies to federal contract workers employed at a federal facility and requires FBI background checks for a broad range of non-safety-sensitive positions, such as the large number of contract workers who perform landscaping, janitorial, and food service functions on federally controlled facilities.

The effect of HSPD-12 was devastating for many workers employed by private companies with federal contracts. Individuals who had worked for years without incident were abruptly subject to a new regime of intensive background checks, often without any basic information about the process or their rights to challenge a negative determination issued by the government.

In 2006, for example, shortly after HSPD-12 was implemented, two women who had each worked for decades in the cafeteria of a federal building in Pittsburgh were deemed "unsuitable" for employment based on their FBI background checks.<sup>21</sup> One woman had a 1997 shoplifting conviction that was supposed to have been expunged. The other woman had never been arrested, but the Department of Homeland Security ("DHS") attributed a criminal record to her because it used an incorrect social security number to run the search. Without any explanation of their rights, the two women were summarily escorted from the building and told they were prohibited from working on the grounds, resulting in immediate pay loss.

The workers attempted unsuccessfully to contact DHS to challenge the results of the background investigation. They then reached out to their

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Congressman, Mike Doyle, for help. Congressman Doyle's office contacted DHS, which refused to provide information on the appeal process that applied to workers seeking to challenge the agency's determination. It was not until the Congressman himself contacted DHS for an explanation that the workers were reinstated in their previous positions.<sup>22</sup> To this day, DHS has never clarified for the public what protections, if any, apply to federal contract workers seeking to challenge a background check determination based on the FBI's rap sheets.

**Congress promotes expansion of background checks:**

Also in response to the 2001 terrorist attacks, Congress enacted a number of new laws requiring FBI background checks for workers employed in occupations considered vulnerable to a terrorism security threat. The PATRIOT Act, the first major piece of federal legislation responding to the 9/11 attacks, included a new regime of federal background checks for truck drivers who haul hazardous materials, covering approximately one million truck drivers around the nation.<sup>23</sup> Then, in 2002, Congress passed the Maritime Transportation Security Act, which imposed FBI background checks on two million port workers to screen for "terrorism security risks."<sup>24</sup> In addition, Congress allowed access to the FBI rap sheets to investigate the background of private security guards.<sup>25</sup>

Over the 60 year period since the FBI records were first authorized for use for employment screening, a large number of federal laws regulating workers across a spectrum of safety- and security-sensitive positions have required FBI background checks. In addition to those discussed above, federal laws regulate workers who have "responsibility for the safety and well-being of children, the elderly, or individuals with disabilities,"<sup>26</sup> people who volunteer with certain youth-focused organizations,<sup>27</sup> people who work in public and private schools,<sup>28</sup> and people working in the financial industry,<sup>29</sup> among others.<sup>30</sup> Most recently, in response to the mortgage crisis, Congress also authorized FBI background checks of most of the nation's workers who process mortgages.<sup>31</sup>

Beyond the federal background checks, state laws mandate FBI background checks for a wide variety of positions, from nursing and caregiver positions to workers licensed to handle hazardous materials.<sup>32</sup> The states have enacted at least 1,600 statutes under the authority of Public Law 92-544.<sup>33</sup> The American Bar Association is now in the process of cataloguing all state laws that impose collateral consequences on people with criminal records, including those that authorize access to FBI records.

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At least 1,600 state laws  
mandate FBI background  
checks.

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## III Dramatic Increase in Background Checks for Employment and Licensing Purposes

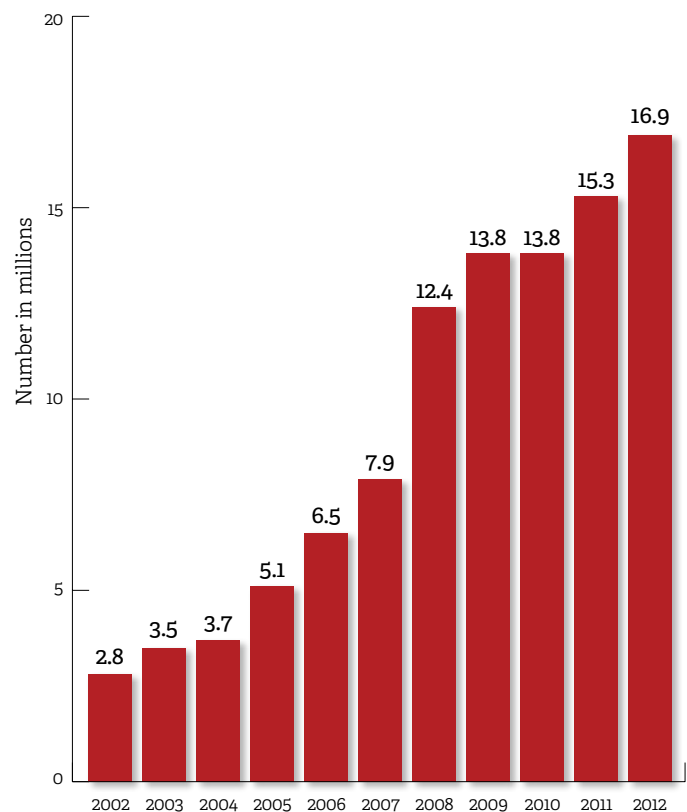
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In Fiscal Year 2012, the FBI released roughly 17 million rap sheets for employment background checks. This is more than six times the number of FBI background checks conducted for employment and licensing purposes in 2002.<sup>34</sup>

The number of FBI criminal background checks performed for employment purposes has increased significantly in less than a decade. See Figure 1. In the past five years, from 2008 through 2012, the FBI has conducted an average of 14.4 million fingerprint-based criminal background checks for employment yearly. This is a dramatic increase from the five preceding years, 2003 to 2007, when an average of 5.3 million fingerprint-based criminal background checks for employment were performed yearly.<sup>35</sup>

Data are not available to isolate the specific sources of the increased volume in FBI rap sheets. We know, however, that the port worker background check program conducted by the Transportation Security Administration reached its peak in 2008 to 2009, and ultimately screened more than 2.2 million workers for clearance to work in secured areas of the nation's ports.<sup>36</sup>

**Figure 1. Rapid Growth of FBI Background Checks for Employment and Licensing Purposes**



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6 times as many FBI background checks were conducted in 2012 as were conducted in 2002.

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## IV One in Two FBI Records is Flawed, Penalizing the Job Search of More Than Half a Million Workers a Year

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Despite their reputation as the most comprehensive background check available, the FBI records are routinely flawed, which seriously undermines the integrity of the criminal background check process. The most troubling deficiency with the FBI records is the fact that the rap sheet often reports the initial arrest but then fails to include any information on the final outcome of the case.

Law enforcement agencies are diligent about fingerprinting and charging individuals who are arrested or even merely detained, and then adding this information to state and federal criminal records systems. Unfortunately, agencies are far less vigilant about submitting the follow-up information on the disposition or final outcome of the arrest.

This is not an isolated deficiency in the FBI's system, affecting only a small number of workers. In fact, the most recently available public data indicates there is a one in two chance that arrest information in the FBI's database will fail to include any indication of the disposition of the case. As reported in 2006 by the U.S. Attorney General, the FBI's Interstate Identification Index system, from which the background reports are created, is "still missing final disposition information

for approximately 50 percent of its records."<sup>37</sup> While the Attorney General identified the lack of disposition information as a serious issue, the situation shows no meaningful signs of improvement.

The failure to update records to reflect the outcome of a case following the report of an arrest is hardly inconsequential. About one-third of felony arrests never lead to a conviction.<sup>38</sup> Furthermore, of those initially charged with a felony offense and later convicted, nearly 30 percent were convicted of a different offense than the one for which they were originally charged, often a lesser misdemeanor conviction.<sup>39</sup> In addition to cases where individuals are initially overcharged and later convicted of lesser offenses, other cases are overturned on appeal, expunged, or otherwise resolved in favor of the worker without ever being reflected on the FBI rap sheet.

Thus, when the outcome of arrests are not indicated on the FBI rap sheets, there is a real chance the missing information is actually helpful to the workers and could significantly improve their employment prospects. Given the large numbers of people arrested each year—including more than 12 million arrests in 2011 alone<sup>40</sup>—there are likely hundreds of thousands of

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50% of FBI records are missing final disposition information.

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## About 1/3 of felony arrests do not result in conviction.

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people whose FBI records report a serious arrest without noting that the charges were ultimately dismissed, overturned on appeal, reduced, or even expunged.

While the limited data provided by the FBI makes it difficult to arrive at hard numbers,<sup>41</sup> we estimate that more than half a million workers a year may be severely prejudiced in their employment search by the flaws in the FBI's criminal records system. This estimate derives from several assumptions. First, we start with the number of FBI checks for employment conducted each year, which averaged 14.4 million per year over the past five years.<sup>42</sup> Next, relying on earlier analyses in which we found that one in four adults in the U.S. has a criminal record,<sup>43</sup> we assume that roughly 3.6 million (25 percent) of the workers subjected to an FBI background check will have a criminal record. If about half of those background checks are inaccurate or incomplete—as the latest publicly available information suggests—then roughly 1.8 million workers are potentially disadvantaged by the gaps in the FBI's records. Finally, if one-third of these workers have an arrest that was ultimately dismissed,

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More than 600,000 workers a year are potentially harmed in their job search when the FBI background check fails to include accurate and complete information of benefit to them.

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overturned on appeal, or reduced to a lesser charged, then more than 600,000 workers a year were potentially prejudiced in a job search as a result of the FBI's failure to report accurate and complete information.

There is no shortage of examples of routine errors within the FBI rap sheets. The experiences of Randy D. and William E. illustrate the impact that faulty FBI records with incomplete criminal history information have on workers and their families.

### Old Arrests Reported Without Dispositions

**Randy D.**<sup>44</sup> of Chicago was denied employment as a security guard when his FBI rap sheet revealed a 15-year-old misdemeanor arrest for disorderly conduct. Not only had the charges been dismissed years earlier, without prosecution or conviction, Mr. D.'s record had also been expunged. Despite his 10 years of experience in security, Mr. D. lost an important job opportunity based on an old and minor arrest, later expunged, that nevertheless appeared as an open disposition on his FBI rap sheet.

**William E.** of Seattle sought his port security clearance from the Transportation Security Administration ("TSA"). Because he had no convictions, Mr. E. believed he would have no difficulty passing the background check. Nonetheless, Mr. E. received an initial denial from TSA because of an arrest dating back more than five years. Mr. E. provided TSA with documentation verifying that he had never been convicted nor had charges ultimately been filed in the case. However, due to the faulty FBI record, Mr. E. was out of work for more than four months while TSA considered his appeal. Although his two-income household had some savings, the long period of forced unemployment depleted the family's safety net.

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## V The FBI and the States Fail to Comply with Clear Federal Mandates

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The serious reporting gaps documented above exist despite clear federal mandates that the records produced by the FBI be accurate and up to date. Specifically, federal regulations state that “[d]ispositions should be submitted [to the FBI] by criminal justice agencies within 120 days after the disposition has occurred.”<sup>45</sup> More generally, the regulation requires that the “information on individuals is kept complete, accurate and current so that all such records shall contain to the maximum extent feasible disposition of all arrests data included therein.”<sup>46</sup>

The state and local criminal justice agencies bear plenty of blame for failing to report on the outcome of arrests in a timely fashion to the FBI. But, in the end, the FBI must be held accountable for ensuring the information it reports is accurate and complete, as the law requires.

In fact, the FBI has been taken to task by a federal appeals court for failing to provide updated and accurate records. Although the case dates back to 1974, the admonition of the federal court still holds true today: “The FBI cannot take the position that it is a mere passive recipient of records received from others, when it in fact energizes those records by maintaining a system of criminal files and disseminating the criminal records widely, acting in effect as a step-up transformer that puts into the system a capacity for both good and

harm.”<sup>47</sup> The court noted also that the “disabilities flowing from a record of arrest have been well documented” and were particularly significant when employment and licensure decisions are at issue.<sup>48</sup>

In addition to the federal requirement to provide updated records to the FBI within 120 days, states are required to maintain complete records at the central state criminal records repository. Federal regulation requires the state repository to include the final outcome of the case within 90 days after the disposition has occurred.<sup>49</sup>

While missing disposition information is a problem that plagues the entire records system, workers with criminal records in some states are disproportionately disadvantaged. A 2010 survey of state criminal history repositories details the percent of arrests in the state systems that have not been updated to reflect the outcome of the case. The survey includes information on the percentage of final dispositions recorded for all arrests, all arrests within the past five years, and all felony arrests.<sup>50</sup>

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The FBI must be accountable for ensuring the information it reports is accurate and complete.

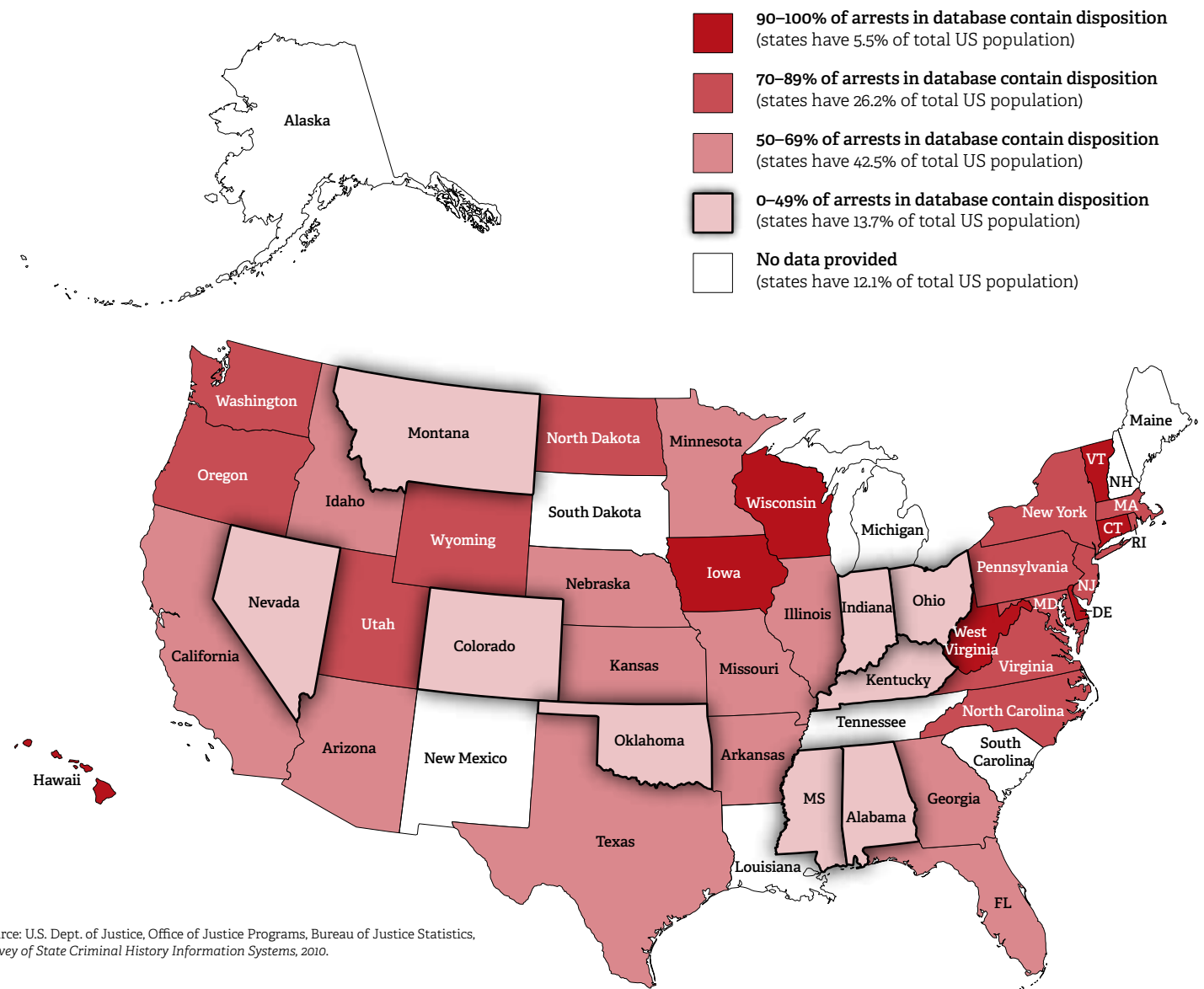


As reflected in Figure 2, more than half the states that provide data report that 30 percent or more of the arrests in their criminal records systems do not include information on the final disposition of the case. Nine states—Alabama, Colorado, Indiana, Kentucky, Mississippi, Montana, Nevada, Ohio, and Oklahoma—report that more than half of the arrests in their systems are incomplete. Only seven states—Connecticut, Delaware, Hawaii, Iowa, Vermont, Wisconsin, and West Virginia, comprising less than six percent of the total U.S. population—have disposition

information for more than 90 percent of all arrests. Notably, only two states—Connecticut and Delaware—have dispositions for more than 90 percent of arrests for each of the three categories surveyed (arrests within the past five years, felony arrests, and all arrests included in the database).<sup>51</sup>

Importantly, the FBI has long recognized the need for increased accuracy in the reporting of disposition information, although the agency continues to insist that the problem can be resolved at the state level.<sup>52</sup> All

**Figure 2. State Criminal Records Repositories Are Missing Disposition Information**



Source: U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2010*.

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states participate in the Interstate Identification Index whereby they submit criminal records information to the FBI, in return for which they have the benefit of accessing a system with criminal history information from all other states.

Despite several rounds of federal funding, which provided hundreds of millions of dollars to the states specifically for the purpose of perfecting the FBI databases,<sup>53</sup> and two separate task forces charged with improving the flow of disposition information,<sup>54</sup> the problem—and negative ramifications—of missing disposition information persists. While the FBI has the ability to perfect records provided for purchases of firearms or certain dangerous chemical agents and toxins,<sup>55</sup> the agency has so far refused to do so for employment and licensing background checks.

The U.S. Attorney General's office has recognized, however, that providing inaccurate and incomplete records harms workers being screened for employment or licensing, and that, "notwithstanding disclaimers to the contrary, [users of such records] erroneously view the fingerprint-based record from a government repository as always current and reliable."<sup>56</sup> It is specifically because of the FBI's imprimatur that these records, inaccurate and incomplete as they often are, can have such a devastating effect on workers, and why it is the responsibility of the FBI to ensure that complete and accurate records are provided before the rap sheets are released to a screening entity.

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"[N]otwithstanding disclaimers to the contrary, [users of FBI background checks] erroneously view the fingerprint-based record from a government repository as always current and reliable."

-U.S. Attorney General's Report on  
Criminal History Background Checks,  
June 2006

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## VI The Prejudicial Impact on Workers, Employers and Overburdened Government Agencies

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For thousands of job seekers struggling to find work in today's economy, as well as employers and the government agencies charged with making suitability determinations based on the FBI's records, navigating these flawed FBI background checks is quite burdensome.

In most cases, the federal or state screening agency that receives the incomplete FBI record notifies the job seeker that he or she must provide the missing information or else will be rejected from consideration. While some agencies provide detailed information on the specific evidence the worker must submit for consideration, others give little to no guidance. And in either case, the onus is on the worker to find the missing information, which could be decades old, in order to be deemed eligible for employment or licensing. In many cases, workers are unable to navigate the complex criminal records systems and cannot provide the required evidence at all, or are unable to do so quickly enough to remain under consideration for the position. In today's competitive job market, even a limited delay in the hiring process can exclude an applicant from consideration for an available job opening.

For example, Precious Daniels was denied a temporary position with the Census Bureau based on an arrest for disorderly conduct even though the charges had been dismissed.<sup>57</sup> In 2009, Ms. Daniels had been arrested for blocking a doorway during a peaceful protest against Blue Cross Blue Shield of Michigan to pressure the company not to pay lobbyists to weaken healthcare coverage. When she appeared in court following her arrest, the disorderly conduct charge was dismissed. A

year later, when Ms. Daniels was denied a temporary position with the 2010 Census because of her criminal history, she was certain that the denial was in error and that the Census Bureau had confused her record with another person's. After contacting the Census Bureau, she was informed that she was indeed ineligible for employment unless she could provide official documentation within 30 days about the disorderly conduct case that had been dismissed. In the end, as a result of the delay, Ms. Daniels was not considered fairly for a position with Census and was not hired.

The faulty FBI records also have a detrimental impact on employers who are often denied timely access to qualified workers, unnecessarily compounding the difficulty of filling jobs in industries such as trucking or healthcare, where there are still significant labor shortages and requirements for federal background checks.<sup>58</sup> In addition, as described in more detail below (section IX), the federal, state, and local agencies responsible for screening workers for licensing and employment positions ultimately bear the burden of dealing with inadequate FBI records. For example, the Transportation Security Administration had to process more than 54,000 appeals challenging faulty FBI records from workers seeking clearance to work in the ports<sup>59</sup> and more than 43,000 appeals by truck drivers who haul hazardous materials.<sup>60</sup>

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## VII Workers of Color are Especially Disadvantaged by the Faulty FBI Records System

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While the flawed FBI records affect all demographic groups, the impact is especially harsh for communities of color, where much larger percentages of workers have had interactions with the criminal justice system.

As the U.S. Equal Employment Opportunity Commission (“EEOC”) recently reaffirmed, “criminal record exclusions have a disparate impact based on race and national origin.”<sup>61</sup> As such, use of an individual’s criminal history information by an employer may violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.<sup>62</sup> To comply with the law, employers must ensure that disqualifying criminal records are “job related” and “consistent with business necessity.”<sup>63</sup>

In general, employers must take into account three factors when assessing whether a criminal records exclusion is job related and consistent with business necessity: (1) the nature and gravity of the offense or conduct; (2) the time elapsed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought.<sup>64</sup> Once the employer has developed a targeted screen using the above-listed factors, it must usually then provide an individualized assessment opportunity for people excluded by the targeted screen.

Of special importance to this discussion, the fact of an arrest does not establish that criminal conduct has occurred, and “an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.”<sup>65</sup> Employers are responsible for ensuring that workers are not being denied employment simply because of an arrest record. Given these requirements,

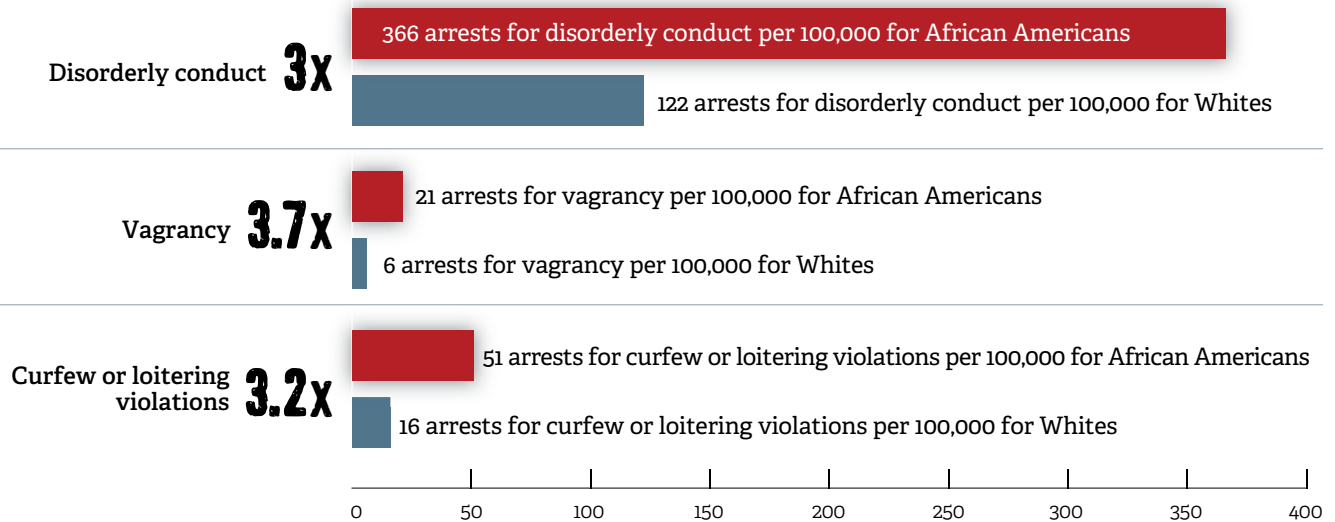
it is vital that employers have access to accurate criminal history information.

As demonstrated in Figure 3, African Americans are consistently arrested at rates greater than their representation in the general population, and whites are consistently underrepresented. African Americans represent more than 28 percent of arrests<sup>66</sup> but only 14 percent of the U.S. population.<sup>67</sup> In contrast, whites account for more than 75 percent of the U.S. population<sup>68</sup> but only 69 percent of those arrested.<sup>69</sup> The disparities are even greater for the most minor offenses, including disorderly conduct (34 percent of arrests in 2011 were of African Americans and 63 percent were of whites), vagrancy (39 percent of arrests in 2011 were of African Americans and 58 percent were of whites), and curfew and loitering violations (36 percent of arrests in 2011 were of African Americans and 61 percent were of whites).<sup>70</sup>

Even arrests for misdemeanors and very minor offenses can have serious repercussions for workers. Although prohibited by federal regulation, the FBI frequently reports such “non-serious” offenses on criminal records produced for employment purposes. The current regulation states: “Criminal history record information maintained in the [databases used to supply criminal history information for employment purposes] shall include serious and/or significant adult and juvenile offenses.”<sup>71</sup> The database “excludes arrests and court actions concerning nonserious offenses.”<sup>72</sup>

**Figure 3. African Americans Are More Likely to Be Arrested for Low-Level Offenses than Whites**

African Americans are **2.3x** more likely to be arrested than Whites 6,400 arrests per 100,000 for African Americans  
2,800 arrests per 100,000 for Whites



In 2006, the FBI proposed eliminating this critical protection—one of the only substantive restrictions on what the FBI rap sheets may report for employment purposes. The FBI offered a very limited rationale for doing so, noting only that states have the discretion to decide what information to send and the FBI merely reports the information provided to it.<sup>73</sup> To date, the proposed rule to eliminate the restriction on reporting non-serious offenses has not been finalized. In reality, however, the FBI has routinely reported non-serious offenses on employment background checks for years and continues to do so today despite letters from Congress and interested groups calling on the FBI to stop this practice.<sup>74</sup>

Given their higher rate of arrest, even for minor offenses, workers of color are disproportionately disadvantaged by the deficient FBI records. Although the FBI does not generate data on the racial breakdown of incomplete rap sheets,<sup>75</sup> NELP compiled such data in representing more than 500 port workers in the Transportation Security Administration’s background check process, and the results are striking. African Americans were more than four times as likely as whites to need to appeal a decision denying them

clearance to work at the nation’s ports solely because of a faulty FBI record.<sup>76</sup>

Specifically, African Americans account for approximately 14 percent of the port workers—equal to the general population—but represented more than 40 percent of the appeals filed by NELP because of incomplete or inaccurate information reported on FBI background checks.<sup>77</sup> In contrast, white workers make up approximately 63 percent of the port worker population but only 24 percent of the appeals filed with TSA.<sup>78</sup> Since large numbers of port workers did not appeal the initial disqualification letter, there may be thousands of additional workers who were eligible for security clearance but had faulty FBI records that cost them this opportunity to work.<sup>79</sup> For the workers who did appeal, the overwhelming majority were successful (as described in section IX.1).

Importantly, however, merely needing to rely on the appeal process disadvantaged workers and caused financial hardship for many. In large part because of the need to file appeals, African-American port workers were also out of work for longer than their white counterparts.<sup>80</sup>

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"I couldn't believe I got fired for this. It was humiliating. I was really nervous applying for other jobs because I thought the same thing would happen. I couldn't believe that one mistake would jeopardize my career and my financial security nine years later."

—Sophia Hoffmann

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### **Sophia Hoffmann's Minor Infraction Unfairly Reported by the FBI Despite Federal Regulation to the Contrary**

Sophia Hoffmann<sup>81</sup> was fired from her position working with developmentally disabled adults in 2010 because of a nine-year-old infraction that was improperly reported on her FBI background check.

Having a college degree and a history of working with people with disabilities, Ms. Hoffmann was an excellent candidate for the job. In fact, she was hired while living in a different state. After moving and beginning work in her new position, Ms. Hoffmann was required to undergo an FBI background check—something she thought would be no problem.

Unfortunately, in 2001, Ms. Hoffmann had been stopped for jaywalking as she rushed to her college campus for an exam. Stressed out and frustrated by the delay, Ms. Hoffmann became irritated and engaged in a verbal argument with the police officer. She was eventually charged and pled no contest to an infraction and was fined \$100. Ms. Hoffmann has no other arrest on her record and has never been convicted of a felony or misdemeanor offense. Despite clear regulations to the contrary, Ms. Hoffmann's FBI record included the non-serious offense with the notation "Convicted—Fine" (Appendix B).

After losing her job because of the improper reporting of a non-serious offense by the FBI, Ms. Hoffmann was without work for roughly eight months. It was both financially and emotionally challenging as she was afraid of further rejection. Eventually Ms. Hoffmann had to return to her home state. She has since worked with a local nonprofit to remove the non-serious offense from her record, and is completing an advanced degree in her field.

Despite the humiliation she felt when she was fired because of a nine-year-old infraction, Ms. Hoffmann is dedicated to providing social services throughout her career.



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## VIII The Serious Limitations of the Process of Correcting FBI Records

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Federal regulations require officials who make employment or licensing decisions based on FBI rap sheets to provide job seekers an opportunity to complete or challenge the accuracy of the information contained in the record.<sup>82</sup> In addition, individuals may request a copy of their FBI record at any time to review the accuracy of the criminal history information.<sup>83</sup> Unfortunately, there is considerable divergence between policy and reality for workers harmed by inaccurate and incomplete FBI records.

Despite the clear language of the regulation, workers frequently lose out on job opportunities because of an incomplete or inaccurate FBI background check. Some workers report not being informed by the hiring agency that the reason for their ineligibility was the information reported by the FBI, or not being given information on their right to request a copy of the report or contest the information it contains. Other workers are unable to understand or comply with the notice they do receive. While such a provision is important given the large number of missing dispositions in the FBI database, the regulation alone is not enough to protect workers with inaccurate and incomplete records.

Correcting incomplete and inaccurate FBI records is even more challenging because workers rarely receive a copy of the FBI or state rap sheet used to make suitability determinations, even though they have often paid for the record as part of the employment or licensing screening process. Thus, workers may receive notice that they have been deemed unsuitable for a position or employment license based on their criminal history, but have no further information as to the offense on their record resulting in the disqualification, unless and until they are able to independently access the FBI record. In other situations, the worker is told

that there is record of an arrest without a corresponding conviction on the FBI criminal record that will prevent the agency from processing the employment or licensing application until the individual provides final disposition information from the arresting agency, sentencing court, or FBI. These two situations can be particularly challenging for workers whose offenses are old or minor, or who have never been convicted and thus are completely unprepared for the rejection.

When a faulty FBI record stands between the worker and the government agency that is responsible for certifying suitability for employment, job seekers are frequently unable to navigate the complex maze to correct the record and therefore lose out on job opportunities through no fault of their own. Because many criminal justice records are not readily available, individuals often have to travel directly to the sentencing court or arresting agency to obtain proof of the final disposition—which may mean traveling to a courthouse or law enforcement agency in a different county or even state. If an arrest did not result in actual charges, there is likely no court record available. In that instance, the individual must “prove a negative” and obtain paperwork verifying that no official action was taken after the initial arrest.

Even more challenging, for individuals with very old arrests and convictions, the necessary information may not be readily available as law enforcement agencies and courts have switched from paper to computerized records. If a record is available by paper document only, individuals may have to wait for a search of the archives. In some instances, documents relating to non-conviction activities are destroyed after a specified time period. When that happens, the most an individual may be able to obtain is a letter certifying that no information exists.

Given these barriers and the lack of resources to assist the many workers dealing with faulty records, only a small number of people ever petition the FBI to clean up their records, despite the process set forth in the regulations. In contrast, when a procedure to appeal faulty records is structured within the employment or licensing process—as in the port worker security program—many more individuals will take advantage of the process. Unfortunately, most employment and licensing screens do not include such a transparent procedure for challenging inaccurate and incomplete FBI records.

In 2010, the last year for which we have all of the following data, FBI rap sheets were issued for more than 13.8 million individuals seeking employment or licensing,<sup>84</sup> and approximately 23.7 million rap sheets were produced for all noncriminal justice purposes,<sup>85</sup> including immigration clearances, adoptions, and other background check mandates. That same year, however, a mere 1,306 individuals petitioned the FBI to modify or correct their records (Figure 5).<sup>86</sup> Of those requests, 784 records, or 60 percent, were actually modified or corrected by the FBI.<sup>87</sup> Unfortunately, the information provided by the FBI does not specify what “modifications” were made—correcting inaccurate information, updating missing disposition information, or other changes to the record.<sup>88</sup> Again, it is important to note that these figures are individuals who contacted the FBI specifically to challenge the information included on their record; the data does not capture workers who challenged the information contained on their FBI criminal record through another government agency’s process.

Figure 5. Requests to Modify Inaccurate & Incomplete FBI Records



Faulty records for employment and licensing screens impose huge costs on job seekers and workers. Even those who eventually correct their record nonetheless suffer economically from lost opportunities. Ms. Vanderpool’s experience, described below, provides an example of a young woman whose FBI record inappropriately reported a dismissed and sealed youthful record as a conviction, which cost her a job.

Clearly, the current process, which puts the entire burden on the worker to both petition the FBI for a copy of the record and then seek a correction of that record, is wholly inadequate for workers seeking employment and licensing eligibility. Indeed, it provides another compelling justification for why the FBI must ensure the accuracy and completeness of the records prior to release, before the damage is done.

While federal policy includes a process to correct the FBI records, and the FBI records themselves include a disclaimer that the license or employment should not be denied “until the applicant has been afforded a reasonable time to correct or complete the information,” in reality many workers are not provided such an opportunity. Furthermore, workers are not automatically provided a copy of their rap sheet when they are notified that an offense on their FBI criminal history is considered disqualifying. As explained in detail in section IX.3, at least one state—California—has recognized how these faulty records disadvantage workers and taken steps to improve the process. California requires a copy of the record be provided to the worker and that the FBI records are accurate and complete prior to releasing the background report for employment. Most states, however, have not taken similar steps to ensure accuracy and protect the rights of workers.

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"I lost four years. I lost everything—including my confidence. I'm just now able to contribute again and support my family but I could have been so much farther in my career. I was studying and getting my licenses and that all stopped. I have to work my way up from the beginning again." —Raquel Vanderpool

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### **Raquel Vanderpool's Dismissed and Sealed Record Reported by the FBI as a Conviction**

Raquel Vanderpool is a 31-year-old, Latina mother of two who provides caregiving and nurse aid services to the elderly.<sup>89</sup> Ms. Vanderpool began training in high school to be a nurse aid. Unfortunately, in 2002, when she was 20 years old, Ms. Vanderpool made a foolish decision that would eventually cost her the job she loved. To impress her friends, she changed the amount on a prescription for painkillers she had received for a toothache. The impact of this single, youthful mistake would have severe consequences on the rest of her life.

At the time of her arrest, Ms. Vanderpool was already working as a nurse aid. Because of her honesty, remorsefulness, and hard work, she was able to retain her position, regain the trust of her employer, and excel in her field. Unfortunately, when a change in the law required Ms. Vanderpool to get an FBI background check, the report inaccurately reported her prior offense as a conviction. Although Ms. Vanderpool had been processed under a diversionary program for youthful offenders—her charges dismissed and the record sealed—the FBI background check inaccurately showed the offense as a conviction. Her employer very much wanted to keep her, but the state law prohibited it from doing so, even though the record was inaccurate. By the time Ms. Vanderpool was able to clear her record and challenge the over-restrictive state law, her certification had lapsed and she was unable to return to the job she loved and the employer she had successfully served for nine years.

Due to the inaccurate record, Ms. Vanderpool was unemployed for roughly four years and her family suffered economically. Ms. Vanderpool was forced to apply for unemployment benefits and rely on food assistance to feed her children. The family lost a vehicle and even their house after entering foreclosure. Ms. Vanderpool has been unable to afford classes to be recertified as a certified nursing assistant (CNA). As a highly qualified and dedicated nurse aid, Ms. Vanderpool was eventually able to find work in her field.

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# IX Leading Case Studies of the Damage Caused by Faulty FBI Records

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Incomplete and inaccurate FBI records are not a theoretical problem. It is a very real problem that impacts both workers and employers and creates government inefficiency and waste. The following discussion provides prominent examples of the negative consequences that are direct results of the severe limitations of the FBI criminal records system.

## **1. Port Workers Received No Assistance from TSA in Correcting FBI Records**

The port worker background check program implemented by the Transportation Security Administration (“TSA”) vividly illustrates the challenges workers face when confronted by faulty FBI records. Workers burdened with locating missing disposition information are often unable to correct the record quickly enough to avoid losing out on opportunities and suffering economic hardship.

Shortly after the September 11th terrorist attacks, Congress imposed significant new federal background checks on the more than two million workers with access to the nation’s ports. After many delays, the Transportation Worker Identity Credential (“TWIC”) program began in earnest in 2008. By April 2009, all workers (including longshoremen, truckers, and many others) were required to have undergone an FBI background check conducted by TSA in order to access the ports and keep their jobs. It is important to note that the vast majority of workers applying for a TWIC card had been safely and effectively working at the ports prior to implementation of this program—some for years, if not decades.

While the TWIC program includes several helpful worker protections, it also highlights the problem of

inaccurate and incomplete FBI records for employment and licensing purposes, and the very real economic detriment to workers who receive no assistance in correcting those records. The TWIC program is also an example of governmental waste and inefficiencies, as tens of thousands of inaccurate and incomplete FBI records were challenged but the corrected information was not subsequently updated in the FBI database.

The worker protections incorporated into the TWIC program are models in many respects. First, the program specifies the convictions warranting denial of a TWIC. Importantly, applicants may be denied a TWIC for felony convictions only; misdemeanors are not disqualifying.<sup>90</sup> Second, the program includes a waiver process allowing workers to detail their post-conviction rehabilitation to prove they do not pose a threat to the security of the port, thereby waiving the disqualification.<sup>91</sup>

Finally, and most important to this discussion, the TWIC process includes a clear multistep avenue to challenge an inaccurate or incomplete FBI record. The individual is notified of the specific disqualifying offense on the FBI record and the information required to challenge the record and appeal the disqualification. (Refer to Appendix C for an example of an initial disqualification letter sent by TSA to an applicant with a four-year-old arrest on his FBI rap sheet that failed to include a disposition.)

After receiving notice of the initial determination, the individual has 60 days to present official documentation to TSA before the disqualification becomes final, and additional time may be easily requested. Although TSA does not track down the missing information on its own, applicants are clearly told what specific offense is at issue and what documentation must be provided to appeal a denial of security clearance. Importantly, TWIC applicants are not automatically disqualified by TSA upon receipt of the FBI record but instead provided adequate time to correct the record. The TWIC program allows applicants to appeal initial disqualifications if they can verify that the information included on the FBI background check on which the decision was based is inaccurate.<sup>92</sup> Unfortunately, however, obtaining correct information and submitting it to TSA for review remains the responsibility of the workers. Many of them, like Russ F., faced severe challenges in complying with the process.

In the routine case of an FBI record that is limited to arrest information and missing the corresponding disposition, felony offense arrests are still considered disqualifying by TSA unless the individual can provide updated court records showing the offense was dismissed, reduced to a misdemeanor, or otherwise resolved in the worker's favor.<sup>93</sup> Thus, although the federal law only authorizes TSA to disqualify workers due to a felony conviction or being under want, warrant, or indictment for a disqualifying felony,<sup>94</sup> because of the flawed FBI records, the entire burden effectively shifts to the worker to demonstrate that the arrest did not result in a felony conviction. In other words, TSA effectively presumes the arrest led to a conviction or is still outstanding unless the worker can prove otherwise.

In the end, despite its serious limitations, the TWIC program contained some of the most valuable worker protections of any employment or licensing background check requirement, which helped tens of thousands of workers obtain or retain good quality jobs at the nation's ports. According to TSA, more than 100,000 port workers have received initial disqualification letters from the agency because they were determined to be potentially ineligible to obtain a TWIC card based on their FBI criminal background check. More than half of those workers who received an initial disqualification subsequently applied for either a waiver or an appeal.<sup>96</sup>

The severity of the faulty records problem is clear from the fact that a whopping 96 percent of all port workers who challenged the accuracy of their FBI records with TSA were successful, and the numbers were substantial. Specifically, from October 2007 through May 2013, 54,271 workers requested appeals. Of those, 52,299 were successful in verifying that they are eligible to obtain a TWIC, and were thus able to continue or begin working on the ports.<sup>97</sup> Unfortunately, many more workers may be eligible for an appeal but were unable to navigate the TWIC system, either because they did not understand the process or because they were unable to locate the documentation necessary to submit an appeal.<sup>98</sup>

As a result of the TWIC appeal process, TSA has received missing disposition data from more than 50,000 workers, some of whom may have had multiple arrests that lacked dispositions. The agency spent substantial time, money, and effort processing these appeals, necessitated almost exclusively by faulty FBI records. Unfortunately, there is no indication that the

### **Russ F. Struggled to Prove Arrest Did Not Lead to Charge or Conviction**

As is often the case, one of NELP's clients was faced with proving the nonexistence of a record. **Russ F.**<sup>95</sup> had worked at the Philadelphia port for 33 years and wanted to keep working to help support his daughter, grandchild, and son-in-law after the latter's diagnosis with a fatal brain disease. Mr. F. applied to TSA for a TWIC, security clearance he needed to continue working at the port. Unfortunately, Mr. F. was denied a TWIC based on an arrest dating back to 1971 that still had an open disposition in his FBI record. Mr. F. had to take time off from work on several occasions to visit various police departments and courts to obtain sufficient proof that charges were never filed against him and that he was never prosecuted or convicted for this offense. It took more than five months for Mr. F. to win his appeal of the unjust denial and receive the TWIC card he needed to keep his job.



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96% of port workers who challenged the accuracy of their FBI records and were successful.

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updated records in TSA's possession were added to the FBI's database system. Indeed, according to the FBI, the bureau "does not receive updated disposition information from the Transportation Security Administration."<sup>99</sup> As such, all of those tens of thousands of FBI records continue to be incomplete or inaccurate. A similar problem exists with updated records from the U.S. Office of Personnel Management, as discussed below.

## **2. The Office of Personnel Management Is Tracking Down Missing FBI Records that Never Make Their Way Back Into the FBI System**

While each federal agency has significant discretion over its hiring and firing decisions, the U.S. Office of Personnel Management ("OPM") sets broad policy regulating the federal workforce, including hiring procedures, and conducts background investigations for prospective employees and security clearances across the federal government. Federal hiring is regulated by the "suitability" standards issued by OPM.<sup>100</sup>

Although individual federal agencies may conduct their own background investigations for some positions,<sup>101</sup> OPM conducts more than 90 percent of background investigations required for federal employment,<sup>102</sup> including criminal background checks based on the FBI's rap sheets.<sup>103</sup> In Fiscal Year 2011, OPM submitted more than two million fingerprint-based background checks to the FBI.<sup>104</sup> Approximately 10 percent of the individuals subject to an FBI background check had a criminal history.<sup>105</sup>

During the course of its background investigation, OPM collects criminal history information from the

FBI, state, local, tribal, and other federal law enforcement agencies.<sup>106</sup> If the criminal history record is missing pertinent information, such as disposition of a relevant arrest, OPM investigators attempt to find the missing disposition information. OPM does not maintain statistics documenting the volume of information it collects because of incomplete FBI records,<sup>107</sup> but based on the TSA experience, it is reasonable to assume that filling the gaps in FBI records is a significant drain on OPM resources.

After OPM completes its investigation, it provides the results to the federal agency that requested the background check, and gives the applicant an opportunity to contest erroneous criminal history information.

Despite OPM's efforts to share the corrected information with the FBI,<sup>108</sup> which would promote efficiency and conserve federal resources, the FBI appears to have rebuffed the overture. In 2010, OPM revised its policies to clarify that the agency could release dispositions collected by OPM investigators to the FBI's criminal records system, thus allowing the FBI to update and correct its database.<sup>109</sup> OPM began sending records to the FBI on January 31, 2011. However, in response to Congressional inquiries, the FBI subsequently stated that it does "not receive updated disposition information from the Office of Personnel Management."<sup>110</sup> Thus, while OPM is submitting information to the FBI to perfect rap sheets, the FBI is either simply not receiving that information or not incorporating any information it does receive into its database. Either way, hundreds of thousands of records are potentially left uncorrected.

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In FY 2011, OPM submitted more than 2 million fingerprint-based background checks to the FBI.



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As a result of the FBI's position, the missing disposition information does not appear to be reflected in the FBI database, meaning that any future report sent from the FBI will continue to be incomplete or inaccurate. In turn, if the worker who was the subject of the initial report applies for another position that requires an FBI background check, the agency performing the second background check may also then spend its limited time and taxpayer dollars on obtaining the missing information. Because the FBI does not incorporate OPM updates into its database, this governmental inefficiency may be replicated multiple times for applicants applying for numerous federal positions or other employment or licensing opportunities that require FBI background checks.

### **3. California Tracks Down Problem FBI Records to Ensure Fair Access to Jobs and Occupational Licenses**

In Fiscal Year 2011/12, California exceeded one million FBI criminal background checks for employment and licensing purposes, thus representing a considerable share of the nearly 17 million rap sheets generated by the FBI for employment screening.<sup>111</sup> California laws mandating FBI background checks cover a range of occupations, with the highest volume of FBI background checks produced for school employees, social services workers, private security guards, healthcare workers, and law enforcement personnel.<sup>112</sup>

California lawmakers and state officials have taken their responsibility seriously to ensure that the large numbers of FBI checks conducted for employment and licensing purposes are up to date and that workers have the information they need to verify accuracy. While the California state repository only has dispositions for 57 percent of all arrests (Figure 2), the California Department of Justice ("DOJ") timely ensures the completeness and accuracy of records that are requested for employment and licensing decisions.

First, with a new law that took effect in January 2013, California is now the only state in the nation that requires every entity that conducts a criminal

background check under the mandate of a state or local occupational or licensing law to automatically provide the subject of the background check with a copy of his or her state and federal rap sheet whenever the agency makes a negative decision based on the record.<sup>113</sup> Like the federal and state consumer protection laws that regulate private criminal background checks, the new California law was intended to allow workers to verify the accuracy of the criminal history information and promptly challenge a negative determination without having to first request a copy of the record.

Second, and most importantly, California's law requires the state DOJ to "make a genuine effort to determine the disposition of the arrest" prior to releasing state and federal criminal history information in many employment situations.<sup>114</sup> The DOJ policy also mandates that the department make a "genuine effort" to determine dispositions of arrests when releasing criminal background check information for all employment or licensing purposes.<sup>115</sup> Thus, when there is a missing record from another state reflected in the FBI rap sheet, the California DOJ contacts the arresting agency from out of state, as well as the district attorney, and/or the court as necessary to determine the outcome of the arrest.<sup>116</sup> We are not aware of any other state that has a similar policy.

As a result, like OPM, California spends considerable resources on contacting other states to update the arrest information listed on the FBI rap sheet. The information obtained by the California DOJ is updated in the state's criminal records system if it corresponds to a California criminal record, and all of the updated disposition information is sent to the FBI weekly. Also, like OPM, California's state officials have tried to ensure that the missing FBI rap sheet information that the state tracks down actually makes its way into the FBI's system. But according to a California DOJ official, "[t]here is no one-to-one process to validate that the FBI update[s] what the [California] DOJ sent."<sup>117</sup> Thus, while the state DOJ reports any updates and corrections it finds to the FBI, the state officials are unaware of whether the FBI subsequently corrects its record.

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## X Where There's a Will, There's a Way: FBI Records Are Cleaned Up Under the Brady Program of Federal Gun Checks

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The preceding discussion has focused on the vast and growing reliance on FBI criminal background checks for employment and licensing purposes, the serious flaws in the system, and the substantial negative effects that faulty records have on employment prospects for thousands of individuals, as well as employers and public agencies. The good news is there are workable solutions to fix this broken system.

Fortunately, a successful and well-established federal program is already in place to clean up the FBI records—the federal program for firearm background checks established by the Brady Handgun Violence Prevention Act of 1993 (“Brady Act”). Currently, the FBI only screens records and searches for missing disposition information in two situations: (1) background checks performed on prospective firearms purchasers; and (2) background checks performed on persons seeking to purchase certain dangerous chemical agents and toxins.<sup>118</sup> The FBI’s large-scale program regulating prospective firearms purchases is described in depth below. It provides a proven, workable template for creating a similar program for background checks of prospective workers.

The Brady Act, which faced intense scrutiny during recent Congressional gun control debates, mandates criminal history background checks for any person seeking to purchase a firearm from a dealer (“licensee”). To comply with the Brady Act, the FBI established the National Instant Criminal Background Check System (“NICS”) to process criminal background checks instantly.<sup>119</sup> Among other restrictions, the Brady Act

prohibits the transfer of firearms to persons under indictment for, or who have been convicted of, a crime punishable by imprisonment for a term exceeding one year, who are fugitives from justice, or who have been convicted of a misdemeanor crime of domestic violence.<sup>120</sup>

As required by the Brady Act, an individual who applies to purchase a firearm from a licensee is subject to a NICS check. Nearly instantaneously, the licensee receives a response from NICS. The licensee is told that the sale may proceed, may not proceed, or is delayed pending further review of the gun purchaser’s record.<sup>121</sup> If a firearm applicant’s FBI record contains arrest information but no disposition for a potentially disqualifying misdemeanor domestic violence or felony offense, the licensee is informed that the purchase is “delayed” and the FBI has three business days in which to track down the missing disposition(s).<sup>122</sup> If the FBI does not locate the information within three business days to verify the purchaser’s disqualification, the licensee is permitted to sell the gun. If the NICS check provides information that an applicant is ineligible to purchase a firearm, the applicant may request the

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reasons for the determination, and the reasons must be provided in writing within five business days after the date of the request.<sup>123</sup>

According to the FBI, the NICS section conducted more than 6.8 million Brady Act background checks in 2011.<sup>124</sup> Of those, approximately eight percent (or more than 500,000 records) required the FBI to search for additional information.<sup>125</sup> In 2010, the FBI sent out an average of 4.27 requests for information to other law enforcement agencies, courts, and other entities for each delayed firearm application transaction.<sup>126</sup> The requests for information included requests for disposition information on misdemeanor domestic violence and felony arrests, as well as updates regarding protection orders, mental health evaluations, and other information.<sup>127</sup>

The FBI estimates the cost of tracking down the incomplete records totaled \$6.9 million in 2010, utilizing nearly 400 NICS section employees.<sup>128</sup> Assuming eight percent of the six million background checks conducted by the NICS section in 2010<sup>129</sup> required a search for additional information (480,000 searches), the cost per record is only \$14.38. In addition, given that the FBI's total budget for Fiscal Year 2010 was approximately \$8 billion,<sup>130</sup> the \$6.9 million spent by the NICS section to correct the records was less than one percent of the bureau's total budget for the year.

Thus, there is a clear and established procedure to clean up the FBI's criminal records, which has proven extremely effective. Indeed, according to the Attorney General's 2006 report, the FBI is "able to find missing arrest dispositions within three business days in approximately 65 percent of all transactions that are delayed because of a missing disposition. This leaves approximately two percent of all NICS transactions processed by the FBI missing a disposition at the end [of] three business days."<sup>131</sup>

The FBI has adopted a special system to keep track of the information that it locates as a result of the Brady checks, so that it can access the disposition information when needed for future firearms purchases. Notably, 782,000 dispositions have been obtained by NICS section employees and posted to criminal history records since the program began.<sup>132</sup> However, if the FBI determines that the information obtained by the NICS section employees is for any reason not eligible for inclusion in the FBI criminal history record, the information is nonetheless entered into a special database (the "disposition document file" or "DDF") that can then be accessed for future NICS investigations.<sup>133</sup> As of 2011, the DDF contained more than one million documents obtained primarily through previous NICS searches.<sup>134</sup>

The FBI's ability to obtain a significant amount of missing disposition information within three business days and access that information in the future yields important conclusions. The FBI's use of a similar process to inquire into missing dispositions on FBI background checks for employment would benefit a large number of the estimated 600,000 workers potentially prejudiced each year because of faulty FBI records that fail to include beneficial information; correcting 65 percent of these records would benefit roughly 390,000 workers.<sup>135</sup> This number would likely increase if the FBI were given a somewhat longer time frame to search for disposition information. In addition, the FBI's difficulty in obtaining disposition information on some records underscores the challenges faced by individuals seeking to find obscure records to prove their eligibility for employment.

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The FBI is able to find disposition information within 3 days in 65% of all firearm background checks that are missing such information.

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Finally, the DDF is a valuable resource that could be further supplemented with information provided by the Transportation Security Administration, the Office of Personnel Management, and other agencies, as well as accessed by the FBI in the process of providing FBI rap sheets for employment and licensing purposes.

There are, of course, differences between background checks conducted for firearms purchases and those conducted for employment. Although nearly seven million background checks were conducted for firearms purchases in 2011, more than double that number were conducted for employment and licensing purposes. While requiring the FBI to clean up records used for employment and licensing purposes represents a significant increase, the FBI collects a fee for each FBI record released for employment purposes. A reasonable fee increase could offset the cost of extending the Brady process to employment and licensing checks.

In addition, not all convictions are disqualifying for gun purchasing purposes, although a large number are, including all felony convictions. As a result, the FBI does not inquire into all missing dispositions, only those that may prohibit a person from purchasing a firearm.<sup>136</sup> In the employment and licensing context, the list of potentially disqualifying offenses may be more expansive, and the FBI is not in a position to tailor each background check to each job. However, clear parameters could apply to limit the volume and scope of corrections necessary for records created for employment and licensing purposes. Most importantly, the FBI could limit its inquiries to open arrests that date back more than a year and serious offenses that are more likely to create a safety or security concern for most employers.

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# XI Recommendations to Improve the Integrity of the FBI Criminal Background Check Process

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The FBI's faulty database is a national problem that requires a federal solution. While states must work to provide more up-to-date information to the FBI, the FBI itself has a responsibility to ensure that the records it produces for employment and licensing are accurate. Millions of workers, employers, and public agencies responsible for conducting background checks are left to deal with the fallout from inaccurate and incomplete FBI records. The FBI is best positioned to correct this situation, with the help of Congress and the Executive Branch.

## 1. Enact Federal Legislation Requiring the FBI to Obtain Missing Disposition Information Prior to Sending Background Checks for Employment and Licensing Purposes

Just as the FBI tracks down incomplete and missing disposition information when conducting background checks pursuant to the Brady Act, so too should the bureau be required to find missing disposition information when conducting background checks for employment.

Congress should enact a bill modeled on H.R. 5300, introduced in the 111th Congress by Congressman Bobby Scott, the ranking minority member of the House Judiciary Committee, and several Republican co-sponsors. H.R. 5300, the Fairness and Accuracy in Employment Background Checks Act, would have expanded the process that now applies to Brady checks to FBI background checks for employment. As *The New York Times* editorialized in endorsing the bill, "No one should be denied a job because the government's information is wrong."<sup>137</sup>

The bill provided the FBI with 10 business days to find missing disposition information before releasing a criminal background check for employment or licensing purposes. It also codified FBI regulations in place since the 1970s that provide that non-serious juvenile and adult offenses should not be reported on FBI criminal background checks for employment.

In addition to tracking down the gaps in FBI rap sheets produced for employment purposes, the bill incorporated important consumer protections that

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"No one should be denied a job because the government's information is wrong."

-NY Times Editorial, "Check it Again", May 2010

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apply to private criminal background checks under the federal Fair Credit Reporting Act (“FCRA”).<sup>138</sup> For example, the bill ensured that individuals subject to employment and licensing background checks received a copy of the FBI report in order to verify and challenge the accuracy of the information. The new reforms were financed by authorizing the FBI to increase the fee now charged to entities that request FBI rap sheets for employment.

## **2. Require the FBI to Check the Brady Files for Missing Information and Accept Updated Records from Federal and State Agencies**

The FBI can also take several key steps on its own to increase accuracy, without new federal legislation.

First, it should work to reduce governmental inefficiency by creating processes to accept missing disposition information from multiple sources. Currently, other federal agencies expend energy and resources to find or collect missing disposition information. The FBI should accept disposition information from the Office of Personnel Management, the Transportation Security Administration, the State of California Department of Justice, and other agencies that find or collect missing disposition information.

At a minimum, the FBI should add other agencies’ information to the special disposition document file of updated records tracked down by the Brady firearms unit, if it is unable to directly supplement the other FBI databases. And, before the FBI releases a rap sheet with missing disposition information in response to an employment or licensing inquiry, the FBI should check the disposition document file to obtain missing dispositions, and report its findings in order to limit the resulting gaps in the records.

## **3. Ensure that All Federal and State Employment and Licensing Background Checks that Require FBI Records Provide an Automatic Right to a Copy of the Rap Sheet and Robust Appeals Process**

Even the most aggressive efforts to clean up the faulty FBI criminal records system will never be foolproof; back-up measures to ensure accuracy will always be necessary. Fortunately, there are helpful model policies that provide necessary worker protections at both the federal and state levels.

First, every person subject to an FBI criminal background check should automatically receive a copy of the rap sheet along with any negative suitability determination by a screening agency. This will permit workers to efficiently and effectively challenge the accuracy of the information if necessary. Federal consumer protection laws provide these protections to individuals subject to commercial background checks, and the protections should be extended to workers subject to FBI background checks. California is leading the way with a new state law that requires all state and local agencies that conduct state and federal background checks to automatically provide a copy of the rap sheet to the individual when the agency issues a negative determination.

In addition, all government agencies that access FBI records for employment screening purposes should have a robust appeals process. A robust appeals process includes a clear notice listing the specific disqualifying offenses identified by the screening agency, an adequate window of time (at least 60 days) during which the individual has an opportunity to produce corrective information before the agency’s determination is made final, and detailed instructions on what documentation is necessary to challenge the record. The TWIC program provides the best example of a strong appeals process that can benefit tens of thousands of workers and significantly reduce the discriminatory impact of faulty FBI records.



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Building on the initiative of the U.S. Attorney General's Interagency Reentry Council, the federal government should take the lead in adopting these critical worker protections across all federal agencies. The federal government must set an example for the private and public sectors to protect qualified workers who, through no fault of their own, are penalized by the faulty FBI criminal records system.

#### **4. Hold the FBI Accountable for Enforcing the Current Law Regulating Criminal Background Checks for Employment and Licensing, and Require Regular Reporting and Monitoring of the Impact of the Current System**

The Obama Administration and Congress should hold the FBI accountable for strict compliance with its current regulations on criminal background checks for employment and close monitoring of the impact of the current system on workers, employers, and governmental agencies.

Specifically, the FBI should demand strict enforcement with the requirement that dispositions be reported within 120 days, that all records be complete, accurate, and current, and that the FBI refrain from reporting non-serious offenses on the rap sheets, regardless of whether such information is provided by the states.

In addition, the FBI should maintain and report detailed data to Congress and the public on its background checks for employment to evaluate their impact on people of color and ensure greater transparency and accountability. Specifically, the FBI should regularly report data indicating: (1) the number or percentage of incomplete and inaccurate FBI rap sheets issued for employment and licensing purposes; (2) the race and ethnicity of workers who have incomplete or inaccurate data released by the FBI for employment purposes; (3) the volume of the FBI background checks produced for employment purposes, including a breakdown of the specific federal or state agencies that request such information; (4) the

number of rap sheets released that include specified non-serious offenses, such as loitering and disorderly conduct; (5) the specific costs associated with tracking down missing disposition information under the Brady gun check program; and (6) the number of individual requests to correct the FBI records and the specific modifications and corrections adopted by the FBI. A slight increase in the fees assessed for background checks would cover the costs associated with this monitoring and report.

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## XII Conclusion

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America's workers need access to good jobs. When the federal government provides information that determines applicants' eligibility for such jobs, it has a responsibility to ensure that the information is accurate and up to date. By doing so, the government can avoid creating unnecessary barriers to employment and ensure that employers and agencies have the information they need to meet public safety concerns while preserving job opportunities for qualified workers. Inaccurate and incomplete records deny workers the ability to support themselves and their

families and do not provide the information needed for appropriate hiring and licensing decisions. The massive increase in the use of FBI records for employment and licensing decisions brings greater responsibility for the completeness and accuracy of those records. The FBI is failing to meet this responsibility, and America's workers—and those unable to work because of faulty records—are paying the price for that failure.

# Appendix A

## Multiple Arrests Reported on FBI Background Check with No Disposition Information

### Rap Sheet

Registration ID:	[REDACTED]	Applicant Name (L, F M):	[REDACTED]
SSN:	[REDACTED]	Agency Name:	[REDACTED]
TCN:	[REDACTED]	Type:	SRE
FBI Response Date:	[REDACTED]	FBI Response Content:	I

Rapsheet:

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

[REDACTED]  
[REDACTED]

THE FBI IDENTIFIED YOUR TEN-PRINT SUBMISSION WHICH CONTAINED  
THE FOLLOWING DESCRIPTORS:

NAME [REDACTED]  
DATE ARRESTED/FINGERPRINTED [REDACTED]

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR  
M B [REDACTED] 504 152 BROWN BLACK

STATE ID BIRTH PLACE  
PENNSYLVANIA

CITIZENSHIP  
UNITED STATES

OTHER BIRTH SOCIAL  
DATES SCARS-MARKS-TATTOOS SECURITY MISC NUMBERS

NONE NONE [REDACTED] NONE

ALIAS NAME(S)  
NONE

END OF COVER SHEET

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

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- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME FBI NO. DATE REQUESTED

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR  
M B [REDACTED] 504 135 BRO BLK

BIRTH PLACE  
PENNSYLVANIA

FINGERPRINT CLASS PATTERN CLASS CITIZENSHIP  
15 15 14 CO CO RS RS UC WU WU LS LS LS WU WU UNITED STATES  
15 15 13 PI CI WU

END OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

PART 2

- FBI IDENTIFICATION RECORD - FBI NO [REDACTED]

1978 arrest - individual found not guilty

1-ARRESTED OR RECEIVED 1978/09/21  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED]  
CHARGE 1-VIOLATION UNIFORM FIREARM ACT  
CHARGE 2-POSSESSION INSTRUMENT OF CRIME  
CHARGE 3-PROHIBITED OFFENSIVE WEAPON

1982 arrest - individual found guilty of criminal conspiracy; possessing instruments of crime; possessing instruments of crime weapon; aggravated assault; simple assault; burglary; attempt theft by unlawful taking or disposit; and robbery

2-ARRESTED OR RECEIVED 1982/05/28  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED]  
CHARGE 1-BURGLARY  
CHARGE 2-ROBBERY  
CHARGE 3-CRIMINAL TRESPASSING  
CHARGE 4-CRIMINAL ATTEMPT  
CHARGE 5-THEFT  
CHARGE 6-CRIMINAL CONSPIRACY  
CHARGE 7-VIOLATION PA UNIFORM FIREARM ACT  
CHARGE 8-POSS INSTRU CRIME-GUN  
CHARGE 9-PROH OFF WEAP  
CHARGE 10-AGGR ASSAULT  
CHARGE 11-SIMPLE ASLT

1993 arrest - charge dismissed

3-ARRESTED OR RECEIVED 1993/04/02 SID- [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]  
CHARGE 1-TERR THREATS

1994 arrest - individual found not guilty

4-ARRESTED OR RECEIVED 1994/11/19 SID- PA [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED- [REDACTED]  
CHARGE 1-SIM ASS  
CHARGE 2-REAP

2005 arrest - charges dismissed

5-ARRESTED OR RECEIVED 2005/05/23 SID- PA [REDACTED]  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPEP0000)  
AGENCY CASE [REDACTED] NAME USED- [REDACTED]

CHARGE 1-THEFT BY UNLWF TAKING OR DISPO  
CHARGE 2-THEFT BY DECEPTION  
CHARGE 3-RECEIVING STOLEN PROPERTY  
CHARGE 4-COPYING; RECORDING DEVICES  
CHARGE 5-TRADEMARK COUNTERFEITING

END OF PART 2 - PART 3 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

[REDACTED]  
PART 3

- FBI IDENTIFICATION RECORD - FBI NO- [REDACTED]

**6-ARRESTED OR RECEIVED 2009/04/22 SID- PA [REDACTED]**  
AGENCY-PD-RECORDS AND IDENT PHILADELPHIA (PAPER0000)  
AGENCY CASE [REDACTED] NAME USED [REDACTED]  
CHARGE 1-SIMPLE ASSAULT  
CHARGE 2-RECKLESSLY ENDANGERING  
CHARGE 3-TERRORISTIC THREATS

RECORD UPDATED 2011/09/28

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON  
FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL  
USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.

2009 arrest -  
individual  
found not  
guilty



# Appendix B

## Non-Serious Offense Reported on FBI Background Check in Violation of Federal Regulation

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

ICN [REDACTED]

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- FBI IDENTIFICATION RECORD -

WHEN EXPLANATION OF A CHARGE OR DISPOSITION IS NEEDED, COMMUNICATE DIRECTLY WITH THE AGENCY THAT FURNISHED THE DATA TO THE FBI.

NAME [REDACTED] FBI NO. [REDACTED] DATE REQUESTED [REDACTED]

SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR  
W [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

BIRTH PLACE  
CALIFORNIA

PATTERN CLASS CITIZENSHIP  
3 AU RS RS RS LS UC RS LS LS UNITED STATES  
J WU WU WU WU WU LS WU

ID OF PART 1 - PART 2 TO FOLLOW

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
CRIMINAL JUSTICE INFORMATION SERVICES DIVISION  
CLARKSBURG, WV 26306

[REDACTED]

ICN [REDACTED]

- FBI IDENTIFICATION RECORD - FBI NO- [REDACTED]

-ARRESTED OR RECEIVED 2001/10/10 SID- CA [REDACTED]  
AGENCY-SHERIFF-CNTRL ID BUR OAKLAND (CA [REDACTED]  
AGENCY CASE-010 [REDACTED]  
CHARGE 1-001 COUNTS OF OBSTRUCT PUBLIC OFFICER

COURT-MUNICIPAL COURT BERKELEY [REDACTED]  
CHARGE-415 PC-FIGHT NOISE OFFENSIVE WORDS  
SENTENCE-  
CONVICTED-FINE

2001 arrest - Sophia Hoffmann  
convicted of fight noise  
offensive words infraction

FINE

RECORD UPDATED 2010/03/05

COPY

ALL ARREST ENTRIES CONTAINED IN THIS FBI RECORD ARE BASED ON  
FINGERPRINT COMPARISONS AND PERTAIN TO THE SAME INDIVIDUAL.

THE USE OF THIS RECORD IS REGULATED BY LAW. IT IS PROVIDED FOR OFFICIAL  
USE ONLY AND MAY BE USED ONLY FOR THE PURPOSE REQUESTED.



VERIFICATION OF RECORD

Name: [REDACTED]  
 Case Number: [REDACTED] Originating Court: [REDACTED]  
 Birthdate Information (spell the birth month, followed by the day, year): [REDACTED]  
 CORPUS Event Number (CEN): [REDACTED]  
 Date of Arrest: [REDACTED] Date of Conviction: [REDACTED]  
 Charges: **4) PC 415 INFRACTION**  
 Disposition: CONVICTED-PLEAD NO CONTEST. SENTENCE: \$100 FINE.

- Defendant successfully completed all terms and conditions of probation on the date of \_\_\_\_
- As of this date, no charges have been filed by the District Attorney. No court file exists.
- Defendant is still on probation, but has completed the following conditions of their probation: \_\_\_\_
- Your request for information regarding the above incident is acknowledged. However, pursuant to Section 68152 of the Government Code of California, all of our criminal records that were filed and concluded prior to the year 2009, have been destroyed.
- After a search of the Criminal Index for the period beginning in November, 1973 to \_\_\_\_ 20\_\_\_\_, no conviction was found for the above-named person at any Superior Court of California, County of Alameda location. (For searches prior to the above mentioned time period, please contact the originating court.)

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on May 6, 2010 at Oakland, California.

By [Signature], Deputy Clerk  
Type Name: Delfina Wade



# Appendix C

## TWIC Letter of Initial Disqualification Explains What Information on FBI Report is Potentially Disqualifying

U.S. Department of Homeland Security  
Arlington, VA 22202



Transportation  
Security  
Administration

April 27, 2009

**Re: Initial Determination of Your TWIC Application**

Dear [REDACTED]

The Transportation Security Administration (TSA) has received your application for a Transportation Worker Identification Credential (TWIC). Based on the information you provided in your application and the results of various portions of the eligibility assessment, TSA has determined that you **may not** be eligible for a TWIC. This letter is **not** a final decision. Instructions for preparing a response to this letter are included. **TSA must receive your response within 60 calendar days of the date of this letter, unless you request and TSA grants an extension of time to respond. If you do not provide a response to TSA within 60 calendar days from the date of this letter or request an extension, TSA's decision regarding your eligibility assessment will automatically become final and you will be disqualified from holding a TWIC.**

**RESULTS OF TSA'S INITIAL ELIGIBILITY ASSESSMENT:**

After conducting the assessment, TSA has made an initial decision that you **may not** be eligible for a TWIC. TSA has determined the following:

A review of your criminal history record shows that you were convicted of a potentially disqualifying criminal offense, as set forth in Title 49, Code of Federal Regulations (C.F.R.), 1572.103(a) and (b), Grand Theft of a Firearm, in [REDACTED] on or about [REDACTED] 2002. **In addition, your criminal history record shows that you were arrested, indicted, or otherwise have open dispositions for potentially disqualifying criminal offenses, False Checks, Records, or Certificates, Unauthorized Use of Access Account Information, Obtaining Credit with False Identification, and Assault with a Deadly Weapon, in [REDACTED], on or about [REDACTED] 2005.** If you believe that this information is not correct, you should provide TSA with all documentation or information that you believe TSA should consider in reviewing your application, such as written proof that you were found not guilty of these offenses, convicted of misdemeanor or non-disqualifying offenses, or the charges were dismissed. If you do not provide TSA with such information, it is unlikely that TSA will be able to approve your application.

You are disqualified from holding a TWIC if you were convicted of a disqualifying offense, as set forth in 49 C.F.R. 1572.103(b) (see enclosure), within the last seven years; or you were released from jail, prison, or other correctional institution after being sentenced for this offense within the last five years. In addition, as set forth in 49 C.F.R. 1572.103(d), when records indicate an arrest for a disqualifying offense without indicating a disposition, a TWIC applicant must clear the open disposition or be disqualified. If you were convicted of the above open criminal dispositions, you are disqualified from holding a TWIC if you were convicted within the last seven years; or you were released from jail, prison, or other correctional institution after being sentenced for these offenses within the last five years. If you were convicted of a permanently disqualifying offense, you are disqualified from holding a TWIC regardless of when you were convicted or released from jail, prison, or other correctional institution.

You have **not yet** been disqualified from holding a TWIC. This letter is an Initial Eligibility Assessment which notifies you of the decision made by TSA. The enclosure provided with this letter explains all options available to you when responding to TSA. You have the option to file an appeal or waiver, request a copy of the materials TSA used as the basis for making its initial decision, or request an extension of time so that you may gather additional materials for your response. This letter is issued in accordance with 49 C.F.R. 1515.5.



**INSTRUCTIONS TO SEND INFORMATION TO TSA**

The TSA TWIC Request Cover Sheet **must be attached** to the front of all documentation and information being submitted to TSA. This cover sheet can be found at the end of the enclosed attachment and includes your full name, mailing address, daytime telephone number, and case number. Please change any information on the cover sheet that is incorrect and indicate the type of request you are submitting to TSA by selecting the appropriate request option(s).

**All correspondence must be mailed via U.S. Postal Service to the address below:**

**Transportation Security Administration  
TSA TWIC Processing Center  
P.O. Box 8118  
Fredericksburg, VA 22404-8118**

**Do not use any overnight mail service, other than the U.S. Postal Service** (because other mail service cannot deliver to a P.O. Box). Use of the enclosed cover sheet and mailing correspondence to the above address is the fastest means of communicating with TSA.

**You are not required to obtain an attorney. The enclosed attachment provides information on how to request releasable documents from TSA, submit an appeal or waiver request, and/or request an extension of time.**

For your information, the TWIC program is a vital security measure to help ensure that individuals who pose a threat do not gain unescorted access to secure areas of the nation's maritime transportation system. TWIC was established by Congress through the Maritime Transportation Security Act of 2002 (MTSA) and is implemented by regulations administered by TSA and the U.S. Coast Guard. Applicable MTSA regulations regarding assessments may be found at 49 C.F.R. Parts 1515 and 1572, which are available on TSA's website, [www.tsa.gov](http://www.tsa.gov). A TWIC will not be issued if TSA determines that an individual does not meet the standards described in 49 C.F.R. 1572.5.

Again, this letter is intended to notify you that TSA requires more information in order to complete your application. **TSA must receive your response within 60 calendar days of the date of this letter, unless you request and TSA grants an extension of time to respond. If you do not provide a response to TSA within 60 calendar days from the date of this letter or request an extension, TSA's decision regarding your eligibility will automatically become final and you will be disqualified from holding a TWIC.** Please review the enclosure which provides detailed instructions on how to submit information to TSA. If you have any questions, please correspond in writing to the address provided.

Sincerely,



Robert Freeman  
Director, Adjudication Center  
Office of Transportation Threat  
Assessment and Credentialing

Enclosure

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# Endnotes

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- 1 *Menard v. Mitchell*, 328 F. Supp. 718, 727 (D.C. Cir. 1971).
- 2 *Id.*
- 3 The FBI's identification records, commonly referred to as rap sheets, an abbreviation for "record of arrest and prosecution," are a record of information taken from fingerprint submissions retained by the FBI. The record includes "the date of arrest or the date the individual was received by the agency submitting the fingerprints, the arrest charge(s), and the arrest disposition(s) if known." (emphasis added). U.S. Dept. of Justice, Federal Bureau of Investigation, *Guide for Obtaining Your Identification Record*, available at <http://www.fbi.gov/about-us/cjis/nics/general-information/cgbrochure>.  
  
Throughout this report the terms "rap sheet", "background check", and "criminal history information" are used interchangeably.
- 4 Fingerprint-based FBI background checks for employment and licensing purposes use the Interstate Identification Index ("III") system to locate criminal history information. The III system is an index system of all persons arrested for felonies and serious misdemeanors under state or federal law. Fingerprints submitted for an employment background check are matched against the records maintained by the FBI and, if an entry of an arrest is located, the FBI will be "pointed" to the database that maintains the record. Most records are maintained by the FBI in the III database. However, 17 states—comprising less than 30 percent of the total U.S. population—have opted to become National Fingerprint File ("NFF") states (CO, FL, GA, HI, ID, KS, MD, MN, MO, MT, NC, NJ, OK, OR, TN, WV, WY). When an individual has a record in an NFF state, the state reports the initial arrest to the FBI but maintains record of all subsequent activity, including dispositions, in the state repository. 42 U.S.C. § 14611 et seq. See U.S. Dept. of Justice, Federal Bureau of Investigation, *The National Crime Prevention and Privacy Compact of 1998*, available at <http://www.fbi.gov/about-us/cjis/cc>. And see SEARCH, *Interstate Identification Index (III)*, available at <http://www.search.org/programs/policy/iii/>.
- 5 U.S. Dept. of Justice, Office of the Attorney General, *The Attorney General's Report on Criminal History Background Checks* (June 2006) at 3, available at [http://www.justice.gov/olp/ag\\_bgchecks\\_report.pdf](http://www.justice.gov/olp/ag_bgchecks_report.pdf) [hereinafter *Attorney General's Report*].

The 2006 report is the latest information that is publicly available regarding the percent of arrest records in the FBI database missing disposition information. Neither the FBI nor the Attorney General have provided an updated statistic for the percent of arrest records

maintained in the Interstate Identification Index that lack final disposition information since the 2006 Attorney General's report.

In 2011, in response to a Congressional Inquiry by Senator Franken, the FBI reported that it "does not collect information regarding the number of criminal history record checks that contain incomplete state criminal history record information." The FBI further stated that it does not collect information responsive to Senator Franken's requests for information regarding incomplete FBI records for noncriminal justice purposes and employment and licensing purposes. U.S. Dept. of Justice, Office of Legislative Affairs, *Responses of the Federal Bureau of Investigation to Questions for the Record Arising from the March 30, 2011 Hearing Before the Senate Committee on the Judiciary Regarding FBI Oversight* (Dec. 6, 2011) at 8-9 [hereinafter *Questions for the Record*].

In June 2013, NELP submitted a Freedom of Information Act (FOIA) Request formally requesting the percent of arrest records missing disposition information in the III. In response, the FBI stated that the FOIA "does not require agencies to answer inquiries, create records, conduct research, or draw conclusions." Because the FBI does not maintain this statistic they were unable to provide it to NELP in response to the FOIA request. David M. Hardy, Section Chief, Record/Information Dissemination Section, Records Management Division, Federal Bureau of Investigation (July 1, 2013), letter to Madeline Neighly. Letter on file with NELP.

See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems, 2010*, available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/237253.pdf> (providing data on state criminal history repositories and percent of arrests in database that have final dispositions recorded) [hereinafter *State Survey*].

- 6 The FBI has provided data on the number of criminal background checks produced for noncriminal justice purposes from mid-Fiscal Year 2001 through Fiscal Year 2012. The chart produced by the FBI includes the number of rap sheets produced for state "miscellaneous applicant" and "user fee" submissions as well as "federal user fee" and "federal no charge" submissions. Because the "federal user fee" submissions number includes requests for non-employment purposes such as immigration, we have not included those numbers in our calculations. As such, the number of criminal background checks provided for employment and licensing purposes highlighted in this report—16.9 million for Fiscal Year 2012—likely underrepresents the total number produced for employment and licensing.



- Email correspondence. Stephen G. Fischer, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Re: FOIA Request" (June 5, 2013), email with attachment to Madeline Neighly. Email on file with NELP. Email correspondence. Stephen G. Fisher, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, "Re: FOIA Request" (June 6, 2013), email to Madeline Neighly. Email on file with NELP. [together, hereinafter Fischer emails].
- 7 For brevity, we will use the term "background checks for employment" throughout this report to denote background checks used for both employment and licensing purposes.
- 8 Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).  
The Executive Order does allow the Office of Personnel Management, in its discretion, to authorize lesser investigations for per-diem, intermittent, temporary, or seasonal employees, or aliens employed outside of the United States.
- 9 At least as early as 1950, if not before, persons convicted of a "criminal offense involving dishonesty or a breach of trust" were barred from employment at a federally insured bank. The law prohibiting employment did not, however, authorize access to the FBI records. Pub. L. No. 81-979, 64 Stat. 873 (Sept. 21, 1950).
- 10 See *Menard v. Mitchell*, 328 F. Supp. 718 (D.C. Cir. 1971).
- 11 Pub. L. No. 92-185 (15 Dec. 1971), available at <http://www.gpo.gov/fdsys/pkg/STATUTE-85/pdf/STATUTE-85-Pg642.pdf>.
- 12 *Id.*  
Public Law 92-185 was enacted in 1971. The following year, Public Law 92-544 was enacted, superseding Public Law 92-185, and is still in effect. See Pub. L. No. 92-544, 86 Stat. 1115 (Oct. 25, 1972).
- 13 Certain FBI-approved private companies, called "channelers," are permitted to assist with the expediting of criminal history information. Importantly, channelers are prohibited from processing requests for FBI rap sheets for use in employment and licensing decisions within the United States. U.S. Dept. of Justice, Federal Bureau of Investigation, *Criminal History Summary Checks: FBI-Approved Channelers*, available at <http://www.fbi.gov/about-us/cjis/criminal-history-summary-checks/fbi-approved-channelers>.  
In addition, federal regulation permits criminal justice agencies and agencies performing criminal justice dispatching functions, data processing, and information services to contract with private companies for access and dissemination of FBI records. 28 C.F.R. § 20.33(a)(7).
- 14 42 U.S.C. § 5119a.
- 15 28 U.S.C. § 534 (2002) Note (nursing and home health care industry).
- 16 In 1986, the Atomic Energy Act of 1954 was amended to require fingerprint background checks for all individuals permitted unescorted access to atomic energy facilities. 42 U.S.C. § 2169.
- 17 42 U.S.C. § 14611 et seq.
- 18 U.S. Dept. of Justice, Federal Bureau of Investigation, *Compact States and Territories as of April 10, 2013*, available at [http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/122010\\_updated\\_map.pdf](http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/122010_updated_map.pdf).
- 19 U.S. Dept. of Justice, Federal Bureau of Investigation, *Interstate Identification Index (III), National Fingerprint File (NFF)* (June 2, 2013), available at <http://www.fbi.gov/about-us/cjis/cc/quick-links-to-maps/IIImaps>.
- 20 Homeland Security Presidential Directive 12 ("HSPD-12") requires the development and implementation of a mandatory, government-wide standard form of identification for Federal employees and contractors. U.S. Dept. of Homeland Security, *Homeland Security President Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors* (Aug. 27, 2004), available at <https://www.dhs.gov/homeland-security-presidential-directive-12>.  
HSPD-12 urges agencies to receive National Agency Checks with Written Inquires ("NACI") prior to issuing the new credential, but permits issuance based on the FBI National Criminal History Check if the NACI is not received within five days. Credentials are required for all employees and contractors with more than intermittent access to federally controlled facilities, including federally owned buildings or leased spaces, grounds, and approaches, when any portion is covered by the Directive, federally controlled commercial spaces (even those shared with non-government tenants), government-owned contractor-operated facilities, and facilities under a management and operating contract. U.S. Executive Office of the President, *Memorandum for the Heads of All Departments and Agencies M-05-24* (Aug. 5, 2005), available at <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-24.pdf>.
- 21 Press Release, Congressman Doyle, "Congressman Doyle Calls for Review of Homeland Screening Process," (Aug. 3, 2006).
- 22 Testimony of Maurice Emsellem, *Hearing Before the U.S. House of Representatives, Judiciary Committee, Subcommittee on Crime, Terrorism & Homeland Security* (Apr. 26, 2007) at 5, available at [http://nelp.3cdn.net/09844c01251e45bbf4\\_6gm6ii9ld.pdf](http://nelp.3cdn.net/09844c01251e45bbf4_6gm6ii9ld.pdf).  
See Paula Reed Ward, *Homeland Security Clears Cafeteria Workers After a Puzzling 2-Week Hiatus: Two Women Allowed Back on the Job Tuesday*, Pittsburgh Post-Gazette (July 18, 2006), available at <http://www.post-gazette.com/stories/local/uncategorized/homeland-security-clears-cafeteria-workers-after-puzzling-2-week-hiatus-442480/>.
- 23 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct

- Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001).
- 24 46 U.S.C. § 70101 et seq.
- 25 28 U.S.C. § 534 Note (private security officer employment authorization act).
- 26 42 U.S.C. § 5119a(a)(1).
- 27 42 U.S.C. § 5119a Note (pilot program for national criminal history background checks and feasibility study).
- 28 42 U.S.C. § 16962.
- 29 12 U.S.C. § 1829. 15 U.S.C. § 78q.
- 30 The list of federal statutes authorizing fingerprint checks for noncriminal justice purposes, current to 2006, was published as Appendix 1 of *The Attorney General's Report on Criminal History Background Checks*. Attorney General's Report, *supra* note 5, at 137.
- 31 12 U.S.C. § 5104.
- 32 According to a 2010 U.S. Department of Justice survey, states require noncriminal justice fingerprint-based background checks for the following positions: nurses/elder caregivers (41 jurisdictions); daycare providers (44 jurisdictions); caregivers—residential facilities (40 jurisdictions); school teachers (50 jurisdictions); nonteaching school employees, including volunteers (43 jurisdictions); volunteers working with children (31 jurisdictions); prospective foster care parents (48 jurisdictions); prospective adoptive parents (49 jurisdictions); relative caregivers (22 jurisdictions); and hazardous materials licensees (22 jurisdictions). *State Survey*, *supra* note 5, at 10.
- 33 Email correspondence. Response from Stephen G. Fischer, Jr., Chief, Multimedia Productions, Federal Bureau of Investigation, Criminal Justice Information Services Division, to Linda Paul, WBEZ Radio (Aug. 2, 2012). Email on file with NELP.
- In addition, the National Child Protection Act/Volunteers for Children Act further allows state agencies to access FBI background checks without requiring a specific state statute. 42 U.S.C. § 5119a.
- 34 Fischer emails, *supra* note 6.
- 35 *Id.*
- 36 U.S. Dept. of Homeland Security, *TWIC Dashboard* (May 2013).
- 37 *Attorney General's Report*, *supra* note 5, at 3.
- 38 A 2006 Bureau of Justice Statistics study of the nation's 75 largest counties, comprising 37 percent of the U.S. population, found that 32 percent of all felony arrests do not lead to conviction. Thomas Cohen and Tracy Kyckelhan, U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006* (2010) at 1, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluco6.pdf>.
- 39 Of the defendants charged with a felony offense and later convicted, 72 percent were convicted of the original felony while the remaining 28 percent were convicted of other felonies or misdemeanors. *Id.* at 10-11.
- 40 Nationwide, law enforcement personnel made an estimated 12,408,899 arrests in 2011. Importantly, because a person may be arrested multiple times during a year, the Uniform Crime Reporting arrest figures do not reflect the number of individuals who have been arrested but rather the number of times that persons are arrested, as reported by law enforcement agencies. U.S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Report, *Crime in the United States 2011*, at table 29, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-29>.
- 41 *See supra* note 5.
- 42 Fischer emails, *supra* note 6.
- 43 *See* Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment* (2011), available at [http://www.nelp.org/page/-/SCLP/2011/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf).
- 44 Last names have been abbreviated to preserve anonymity.
- 45 28 C.F.R. § 20.37.
- 46 *Id.*
- 47 *Menard v. Saxbe*, 498 F.2d 1017, 1026 (D.C. Cir. 1974).
- 48 *Id.*
- In 1976, this same court noted that almost 70 percent of the FBI's criminal records contained at least one arrest without a final disposition. *Tartlon v. Saxbe*. 407 F. Supp. 1083, 1084 (D.C. Cir. 1976).
- 49 28 C.F.R. § 20.21(a)(1).
- 50 *State Survey*, *supra* note 5, at Table 1.
- 51 *Id.*
- 52 *See* Attorney General's Report, *supra* note 5, at 9 (calling for a new commitment to improving the completeness of records held by the FBI and state record repositories, including an assessment of the funds necessary for such improvements).
- 53 Since 1995, more than \$562 million in direct awards and technical assistance has been granted to states and localities to assist with improving the quality, timeliness, and immediate accessibility of criminal history records, including disposition information, under the National Criminal History Improvement Program ("NCHIP"). U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *NCHIP Funding for 1995-2012*, available at <http://www.bjs.gov/index.cfm?ty=tp&tid=471#Funding>.

Recognizing the lack of updates and state criminal disposition records available through the National Instant Criminal Background Check System (“NICS”) and the tragedy that can unfold when ineligible firearms purchasers are not accurately screened, Congress passed the NICS Improvement Amendments Act of 2007. The law authorized additional grants to state and Native American tribal governments that could be used for “supply[ing] accurate and timely information to the Attorney General concerning final dispositions of criminal records to databases accessed by NICS.” 18 U.S.C. § 922 Note (NICS Improvement Amendments Act of 2007).

Recently, the Bureau of Justice Assistance awarded an 18-month grant worth \$3.5 million to the National Center for State Courts to fund the creation of a customizable toolkit for states to use to improve the reporting of criminal dispositions and arrest warrants from the courts to the state criminal history repositories. See *Warrant & Disposition Toolkit*, available at <http://www.wdmtoolkit.org/>.

54 The FBI has an interagency task force dedicated to identifying problem areas in states’ disposition reporting and methods to improve the systems, as well as a CJIS Advisory Policy Board Disposition Task Force. See Daniel D. Roberts, Assistant Director, Criminal Justice Information Services Division, F.B.I., *Letter to the Editor: Reliability of F.B.I. Data*, New York Times (June 7, 2012), available at <http://www.nytimes.com/2010/06/08/opinion/108fbi.html>. See also Powerpoint Presentation by Travis L. Olson, Disposition Initiative Manager, FBI CJIS Division, “CJIS Advisory Policy Board: Disposition Task Force” (2011 Winter), available at <http://www.search.org/files/pdf/OLSON.pdf>.

55 *Attorney General’s Report*, *supra* note 5, at 105.

56 *Id.* at 100.

57 *Johnson v. Locke*, Case No. 10-cv-3105 (filed Aug. 5, 2010, S.D.N.Y.) First Amended Complaint at 23-25.

58 See Daniel J. Derksen and Ellen-Marie Whelan, *Closing the Health Care Workforce Gap: Reforming Federal Health Care Workforce Policies to Meet the Needs of the 21st Century* (Dec. 2009), available at [http://www.americanprogress.org/issues/2010/01/pdf/health\\_care\\_workforce.pdf](http://www.americanprogress.org/issues/2010/01/pdf/health_care_workforce.pdf); Anthony P. Carnevale, et al., *Healthcare* (June 2012), available at <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Healthcare.FullReport.090712.pdf>; Annalyn Kurtz, *Truckers Face Big Labor Shortages*, CNN Money (June 13, 2013), available at <http://money.cnn.com/2013/06/13/news/economy/trucker-shortage/index.html>.

59 *TWIC Dashboard*, *supra* note 36.

60 Email correspondence. Cristin Finkel, Transportation Security Administration, Office of Security Policy & Industry Engagement, Maritime & Surface Credentialing, “Re: HME Dashboard” (June 11, 2013), email to Madeline Neighly. Email on file with NELP.

61 U.S. Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., No. 915.002 (Apr. 25, 2012) at 10, available at [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) [hereinafter *EEOC Guidance*].

62 42 U.S.C. § 2000e et seq.

63 See *EEOC Guidance*, *supra* note 61.

64 These three factors were first enumerated by the Eighth Circuit in a 1975 decision. *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977). In its 2012 updated guidance on the use of arrest and conviction records in employment decisions, the EEOC reaffirmed the use of the *Green* factors and further explained possible factors to consider during the individualized assessment. See *EEOC Guidance*, *supra* note 61, at 10-20.

65 *EEOC Guidance*, *supra* note 61, at 13.

66 U.S. Dept. of Justice, Federal Bureau of Investigation, Uniform Crime Report, *Crime in the United States 2011*, at table 43A, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/crime-in-the-u.s.-2011/tables/table-43> [hereinafter Uniform Crime Report].

67 U.S. Census Bureau, *The Black Population: 2010* (Sept. 2011) at 3, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

68 U.S. Census Bureau, *The White Population: 2010* (Sept. 2011) at 3, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-05.pdf>.

69 Uniform Crime Report, *supra* note 66.

70 *Id.*

71 28 C.F.R. § 20.32(a).

72 28 C.F.R. § 20.32(b).

73 In September 2006, the FBI released notice of its proposal to amend part 20 of its regulations. The proposed amendment would authorize the reporting of all juvenile and adult non-serious offenses on FBI criminal background checks conducted for employment and licensing purposes. 71 Fed. Reg. 52302 (Sept. 5, 2006).

74 Congresswoman Maxine Waters and Congressman Bobby Scott, Chairman of the Subcommittee on Crime, Terrorism, and Homeland Security, submitted a letter requesting a delay of the issuance of the proposed regulation in order to allow for Congressional oversight. Letter to Alberto Gonzalez, Attorney General, U.S. Dept. of Justice, from Maxine Waters and Robert “Bobby” Scott, Members of Congress (Mar. 23, 2007), letter on file with NELP.

In addition, joint comments in opposition were submitted by a dozen union and labor rights and civil rights organizations. American Civil Liberties Union, et al., Joint Comments on Proposed Regulation Expanding FBI Rap Sheets to Include “Non-Serious” Offenses for

- Employment and Licensing Purposes (Nov. 6, 2006), letter on file with NELP.
- 75 *Questions for the Record, supra* note 5, at 9.
- 76 See Maurice Emsellem et al., *A Scorecard on the Post-9/11 Port Worker Background Checks: Model Worker Protections Provide a Lifeline for People of Color, While Major TSA Delays Leave Thousands Jobless During the Recession* (July 2009), available at <http://www.nelp.org/page/-/SCLP/PortWorkerBackgroundChecks.pdf>.
- 77 *Id.* at 4.
- 78 *Id.*
- 79 As of May 19, 2013, initial disqualification letters have been sent to 120,224 TWIC applicants by TSA, but only 68,864 appeals and waivers have been requested. *TWIC Dashboard, supra* note 36.
- 80 Emsellem, *supra* note 76, at 4.
- 81 Name has been changed to protect the identity of the worker.
- 82 28 C.F.R. § 50.12(b).
- 83 5 U.S.C. § 552a(d).
- 84 Fischer emails, *supra* note 6.
- 85 *Questions for the Record, supra* note 5, at 8.
- 86 *Id.* at 10.
- 87 *Id.*
- 88 *Id.*
- 89 Ms. Vanderpool was successfully represented by the ACLU of Michigan in her claim against the Michigan Department of Licensing and Regulatory Affairs and the Michigan Department of Community Health. In addition, the ACLU of Michigan assisted Ms. Vanderpool in correcting her FBI record so that she would be able to again find work in her chosen field.
- 90 46 U.S.C. § 70105(c)(1).
- 91 49 C.F.R. § 1515.7.
- 92 49 C.F.R. § 1515.5.
- 93 49 C.F.R. § 1515.5(b)(1).
- 94 46 U.S.C. § 70105(c)(1)(C).
- 95 Client's last name has been abbreviated to preserve anonymity.
- 96 *TWIC Dashboard, supra* note 36.
- 97 *Id.*
- 98 TSA has sent 120,224 initial disqualification letters since the October 2007 inception of the TWIC program. *Id.*
- 99 *Questions for the Record, supra* note 5, at 17.
- 100 5 C.F.R. § 731.
- 101 Agencies may perform background checks for non-competitive service positions and competitive service positions for which an agency has assumed investigative responsibility by law or by agreement. Exec. Order No. 10450, 18 Fed. Reg. 2489 (Apr. 27, 1953).
- 102 OPM Federal Investigative Services, *Requesting OPM Personnel Investigations* (April 2012) at 3, available at <http://www.opm.gov/investigations/requesting-investigation-copies/requesting-opm-personnel-investigations.pdf>.
- 103 On September 14, 2009, NELP submitted a Freedom of Information Act ("FOIA") request to OPM seeking information regarding criminal background check investigations undertaken by the federal government. NELP requested any information documenting the number of criminal background checks requested by each federal agency pursuant to 5 C.F.R. § 731 to which OPM replied that the agency "does not maintain records responsive to this request." OPM did provide information regarding criminal background check investigations performed by the agency between January 1, 2009 and October 31, 2009. Of the 1,135,816 investigations performed, 145,730 or approximately 13 percent produced a result on the FBI Identification Record. Correspondence. Timothy A. Forberger, Chief, FOI/PA Office, Office of Personnel Management (Mar. 4, 2012) to Maurice Emsellem. Letter on file with NELP.
- 104 Email correspondence. Robert Shriver, Deputy General Counsel for Policy, Office of Personnel Management, "Re: FBI Records" (May 21, 2012), email to Madeline Neighly. Email on file with NELP.
- 105 *Id.*
- 106 Federal, state, and local courts and agencies that perform the administration of criminal justice must make available criminal history record information regarding individuals under investigation by OPM for the purpose of determining eligibility for access to classified information, assignment or retention in sensitive national security duties, acceptance or retention in the armed forces, or appointment, retention, or assignment to a position of public trust or a critical or sensitive position while either employed by the Government or performing a Government contract. 5 U.S.C. § 9101. Executive Order 10450 requires a fingerprint-based FBI records check of all civilian officers and employees in any department or agency of the Government.
- 107 Shriver, *supra* note 104.
- 108 OPM is authorized to send the disposition information it uncovers to the FBI to correct or update arrest records under a Privacy Act routine use. See 5 U.S.C. § 552a(b)(3). National Crime Prevention and Privacy Compact Council, *Compact Council Meeting* (Nov. 14-15, 2012) at Topic #22, available at <http://www.fbi.gov/about-us/cjis/cc/library/compact-council-meeting-november-14-15-2012-minutes>.
- 109 Shriver, *supra* note 104.



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- 110 *Questions for the Record*, *supra* note 5, at 17.
- 111 Email correspondence. Julie Basco, Chief, Bureau of Criminal Information and Analysis, Cal. Dept. of Justice, “Re: Data Question” Attachment (June 6, 2013), email to Madeline Neighly. Email on file with NELP.
- 112 From July 2011 through April 2012, the California Department of Justice processed more than one million FBI background checks for employment and licensing purposes, with the following occupational categories subject to the most screening: 157,151 for school employees and bus drivers; 145,364 for Department of Social Services; 61,221 for security-related positions; 59,913 for healthcare-related positions; 59,606 for law enforcement-related positions; and 51,765 for youth-related positions. *Id.*
- 113 Cal. Penal Code § 11105(t).
- 114 Cal. Penal Code § 11105(k)-(m).
- 115 Email correspondence. Julie Basco, Chief, Bureau of Criminal Information and Analysis, Cal. Dept. of Justice, “Re: Questions about CA and FBI rap sheets” (Mar. 19, 2012), email to Madeline Neighly. Email on file with NELP.
- 116 *Id.*
- 117 *Id.*
- 118 *Attorney General’s Report*, *supra* note 5, at 105.
- 119 See U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Background Checks for Firearms Transfers, 2009* (Oct. 2010), available at <http://www.bjs.gov/content/pub/html/bcft/2009/bcft09st.pdf>.
- 120 18 U.S.C. § 922(d).
- 121 See Ronald J. Frandsen, *Enforcement of the Brady Act, 2008: Federal and state investigations and prosecutions of firearm applicants denied by a NICS check in 2008* (June 2010), available at <https://www.ncjrs.gov/pdffiles/bjs/231052.pdf>.
- 122 18 U.S.C. § 922(t)(1)(B)(ii); 28 C.F.R. § 25.6(c)(iv)(B).
- 123 National Instant Criminal Background Check System Act, 1993, Pub. L. No. 103-159, 107 Stat. 1541 (Nov. 30, 1993).
- 124 U.S. Dept. of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, *National Instant Criminal Background Check System (NICS) Operations*, (2011) at 8, available at [http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011/at\\_download/file](http://www.fbi.gov/about-us/cjis/nics/reports/2011-operations-report/operations-report-2011/at_download/file) [hereinafter *NICS Operations*].
- 125 *Id.* at 13.
- 126 *Questions for the Record*, *supra* note 5, at 13.
- 127 *Id.*
- 128 *Id.* at 14.
- 129 *NICS Operations*, *supra* note 124, at 8.
- 130 U.S. Dept. of Justice, Federal Bureau of Investigation, *Today’s FBI: Facts and Figures 2010-2011*.
- 131 *Attorney General’s Report*, *supra* note 5, at 108.
- 132 *NICS Operations*, *supra* note 124, at 19.
- 133 *Questions for the Record*, *supra* note 5, at 15.
- 134 *Id.*
- 135 As described in section IX, *supra*, we estimate that more than 600,000 workers a year are potentially prejudiced in their job search as a result of the lack of accurate and complete information reported by the FBI. If the FBI were able to obtain missing disposition information in 65 percent of those cases—as they are able to do during the Brady gun check investigation—390,000 of those 600,000 workers may be spared the negative impact of an incomplete or inaccurate record.
- 136 18 U.S.C. § 922(g).
- 137 Editorial, *Check it Again*, *New York Times* (May 26, 2010), available at <http://www.nytimes.com/2010/05/27/opinion/27thu3.html>.
- 138 15 U.S.C. § 1618 et seq.
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