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The Expungement or Restriction of Arrest Records

An individual can be subject to arrest and have no connection with any criminal activities. It should be noted, of course, that under current procedures which have been in effect for a number of years, it is relatively easy for such an individual to have the record of such an arrest expunged. However, people are often denied employment on the basis of a mere arrest record, records that are provided by Criminal Justice Information Systems. This is fundamentally unfair and must be stopped.

It is important now more than ever that this Congress be concerned with the security and privacy data in Criminal Justice Information Systems. The problem we're dealing with goes beyond the setting of curbs or an invasion of privacy. The problem also involves the defining and limiting of the uses of Criminal Justice Information.

— *Testimony of Attorney General William B. Saxbe before House Judiciary Committee, Sub-Committee on Civil and Constitutional Rights (February 26, 1974)**

OVER THE PAST DECADE, concern has arisen regarding the adverse effects stemming from the misuse of arrest records. "Millions of people in America — probably tens of millions — have a record of conviction; even more have a record of arrest."¹ The FBI reported that in 1969 alone there were approximately seven and one-half million arrests in the United States for all criminal acts, excluding traffic offenses.² Crime can not be condoned, but once an arrested individual has been exonerated, the arrest record should be expunged and not allowed to remain a "record" to be used against him in the future.

The multiplying number of arrest records kept by the government³ and private agencies (such as the mass media), the tendency of these organizations to share information, and the speed and accuracy with which such information can be collected and disseminated through electronic means, presents a great threat to individual

* Appreciation is extended to Radio Station WGAR for allowing us access to the transcription of Attorney General Saxbe's remarks.

¹ A. RUBIN, *THE LAW OF CRIMINAL CORRECTIONS* 640 (1963).

² FBI, *UNIFORM CRIME REPORTS FOR THE UNITED STATES* 31 (1969).

³ For a discussion of the largest collector of these records — the F.B.I. Identification Division — see *Menard v. Mitchell*, 328 F.Supp. 718 (D.D.C. 1971).

privacy.⁴ Access to one's life history is available instantaneously. Private affairs are made public, and the adverse effects resulting therefrom could ruin many innocent persons — including exonerated arrestees. Collection of fingerprints, photographs, and other identification data of persons arrested by local, state, and federal law enforcement agencies, and dissemination of such information at the agency's discretion,⁵ often before the case reaches final disposition, is a nationwide practice.

The court in *Menard v. Mitchell* recognized the collateral disabilities attached to an arrest record when so disseminated when it noted:

Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct economic loss is involved, the injury to an individual's reputation may be substantial. Economic losses themselves may be both direct and serious. Opportunities for schooling, employment, or professional licenses may be restricted or nonexistent as a consequence of the mere fact of an arrest, even if followed by acquittal or complete exoneration of the charges involved. An arrest record may be used by the police in determining whether subsequently to arrest the individual concerned, or whether to exercise their discretion to bring formal charges against an individual already arrested. Arrest records have been used in deciding whether to allow a defendant to present his story without impeachment by prior convictions, and as a basis for denying release prior to trial or an appeal; or they may be considered by a judge in determining the sentence to be given a convicted offender.⁶

An arrestee seeking employment encounters almost insurmountable obstacles when confronted with his arrest record by a prospective employer. Often employers will not hire an individual with a "record" because their low-cost "blanket bond" contains a provision voiding protection if the employer hires individuals with an arrest record without prior consent of the surety.⁷ A survey in New York City showed that about seventy-five percent of the employment agencies

⁴ See *Davidson v. Dill*, 503 P.2d 157, 148-59 (Colo. 1972); A. MILLER, ASSAULT ON PRIVACY 34 (1971); Karst, *The Files: Legal Controls Over The Accuracy And Accessibility Of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 365-66 (1966).

⁵ E.g., FLA. STAT. §30.31(1) (1969).

⁶ 430 F.2d 486, 490-91 (D.C. Cir. 1970). See also *Davidson v. Dill*, 503 P.2d 157, 159 (Colo. 1972).

⁷ Gough, *The Expungement Of Adjudication Records Of Juvenile And Adult Offenders: A Problem Of Status*, 1966 WASH.U.L.Q. 147, 158 (1966) [hereinafter cited as GOUGH].

ask applicants if they have an arrest record, and normally do not refer those applicants that do — whether or not the arrest led to a conviction.⁸

Expungement or restrictions on the use of arrest records may provide relief from these adverse effects.⁹ To *expunge* means “to destroy or obliterate; it implies not a legal act, but a physical annihilation.”¹⁰ An expungement statute should, therefore, provide for the destruction of those arrest records of individuals who have been exonerated. Further, it should permit a negative reply upon inquiry, thereby removing all disabilities and restoring all rights, leaving the arrestee in the same position as if the event had never occurred. To *restrict* the record means that the records are not open to public inspection, *i.e.*, they must not be disseminated, except for the required use in the criminal justice system.

Generally, one seeking such expungement or a restriction on access to his record brings a civil action in equity against the police department retaining the records.¹¹ “The character of relief sought involves a civil right and . . . there is no basis for assumption of jurisdiction by the Criminal Court.”¹² Administrative remedies must be exhausted before an action for expungement can be maintained, however, and relief should be sought in the state courts before bringing action in federal courts.¹³

The scope of the following analysis will not include conviction records, records of civil cases, or military records of arrest and/or conviction under the Uniform Code of Military Justice though many topics to be discussed will also be relevant to such records. Further, since the juvenile court is not a criminal court,¹⁴ and because of the special status of juvenile records, they will not be considered herein, except to note that juveniles also need to be protected from the burdens

⁸ THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967) [hereinafter cited as REPORT].

⁹ For a discussion of expungement and sealing *see* Kogon & Loughery, *Sealing and Expungement Of Criminal Records — The Big Lie*, 61 J.CRIM.L.C. & P.S. 378, 379, 380 (1970).

¹⁰ BLACK'S LAW DICTIONARY 693 (Rev. 4th ed. 1968). Expungement was probably first introduced by the National Conference on Parole, PAROLE IN PRINCIPLE AND PRACTICE 137, 138 (1956).

¹¹ *See* Irani v. District of Columbia, 292 A.2d 804, 806 (D.C. App. 1972) (An action to expunge is not a criminal case, although the original charge was criminal in nature. The relief of expungement is civil in nature).

¹² *People v. Lewerenz*, 42 Ill.App.2d 410, 413, 192 N.E.2d 401, 402 (1963).

¹³ *Menard v. Mitchell*, 328 F.Supp. 718, 723-24 (D.D.C. 1971).

¹⁴ GOUGH, *supra* note 7, at 168. The author states: “It is truistic to say that the juvenile court is not a criminal court . . .”

of a record,¹⁵ and that statutes have provided this relief.¹⁶ This analysis will be concerned with existing statutory law, case law, and proposals relating to the expungement or restriction of adult, non-military, arrest records, *i.e.*, the records of an individual who was arrested but subsequently exonerated because he was not charged, the charges were dropped, the case was dismissed, or he was acquitted.

The "record" may be fingerprints, photographs, or any other criminal identification data held by either the agencies of the criminal justice system or others outside the system. If the arrestee was exonerated, the information is called an "arrest record" which is supposed to be confidential and closed to the public,¹⁷ but which indeed is far from confidential and is in practice almost *open* to the public.¹⁸ Furthermore, many of the arrest records are either inaccurate or incomplete as to final disposition¹⁹ — facts which tend to increase the probability of adverse effects to the arrestee.²⁰

In some jurisdictions, statutes provide for the restriction of general police investigative data from the public, if it is being used for law enforcement.²¹ But in the absence of such statutes, courts have held this information to be confidential to protect both the investigation itself and the persons giving information to aid the investigation.²² One court has held that police department records are privileged and not subject to subpoena *duces tecum*.²³ Since these statutes are designed to protect police investigations and not those under investigation they will grant the arrestee little, if any, relief.

¹⁵ For a discussion of juvenile records *see* GOUGH, *supra* note 7, at 168-78.

¹⁶ *E.g.*, OHIO REV. CODE ANN. §2151.358 (Page Supp. 1969) provides that "Any person who has been adjudicated a delinquent or unruly child, may apply to the court for an expungement of his record, or the court may initiate expungement proceedings." There is a two year waiting period and the court must find a satisfactory rehabilitation. If so found, the court may order the records sealed, the case deemed never to have occurred, index references deleted, and that a negative reply to inquiries is proper.

¹⁷ *See* OHIO REV. CODE ANN. §149.43 (Page 1969); *Kolb v. O'Connor*, 14 Ill.App.2d 81, 142 N.E.2d 818 (1957).

¹⁸ *See* *Menard v. Mitchell*, 328 F.Supp. 718 (D.D.C. 1971); *A. MILLER, ASSAULT ON PRIVACY* 34-35 (1971).

¹⁹ *A. MILLER, ASSAULT ON PRIVACY* 34 (1971). The author notes that 35% of the FBI "rap sheets" contain no followup information after the arrest data is submitted.

²⁰ *See* *Karst, The Files: Legal Controls Over The Accuracy And Accessibility Of Stored Personal Data*, 31 LAW AND CONTEMP. PROB. 342, 353-59 (1966) for an examination of the problems of inaccurate records.

²¹ *See* 5 U.S.C. §522(b) (7) (1967); CONN. GEN. STAT. ANN. §1-19 (Supp. 1971).

²² *See* *United States v. Mackey*, 36 F.R.D. 431 (D.D.C.), *aff'd* 351 F.2d 794 (D.C. Cir. 1965).

²³ *Kott v. Perini*, 283 F.Supp. 1 (N.D. Ohio 1968).

The Exonerated Arrestee's Records

Only six jurisdictions have laws in force granting the exonerated arrestee relief from the adverse effects of an arrest record.²⁴ However, they are limited in effect and equivocal in the sense that they usually do not apply to the local police agency, never apply to the FBI's Identification Division, and rarely provide effective enforcement provisions. Additionally, such statutes are generally riddled with statutory and case law exceptions.

In the absence of statutory provisions most courts, until recently, have refused to interfere, thus leaving to the police the decision of whether or not to retain arrest records, reasoning that law enforcement needs outweigh any harm to the individual.²⁵ "However this is not to say that, absent legislative action, judicial control may not be imposed to protect a citizen from what might develop upon its facts to be an unconstitutional invasion of his right of privacy."²⁶

Courts are now recognizing the need for restraints on police discretion in retaining and disseminating arrest records.²⁷ The District Court for Puerto Rico has held that when

. . . an accused is acquitted of a crime or when he is discharged without a conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity is invaded . . ."²⁸

²⁴ *Connecticut*: CONN. GEN. STAT. ANN. §54-90 (Supp. 1971). All records retained by the police and courts relating to an arrestee must be "immediately and automatically erased" upon his exoneration.

District of Columbia: The *Duncan Report*, adopted as uncodified law by the Commissioners of the District of Columbia in 1967, places restrictions upon the required maintenance of arrest records by the District police, and provides penalties for unauthorized and unnecessary dissemination. The report is reprinted in full in *Morrow v. District of Columbia*, 417 F.2d 728, 745-46 (D.C. Cir. 1969). See also note 32, *infra*.

Illinois: ILL. REV. STAT. ch. 38, §206-5 (1969). Records relating to the exonerated arrestee to be returned to him from the state department of public safety files, but not from the municipal police files. *People v. Lewerenz*, 42 Ill. App. 2d 410, 192 N.E.2d 401 (1963).

New York: N.Y. PENAL LAW §516 (McKinney 1967). Once exonerated, the arrestee's records shall be returned upon demand, unless the arrestee has a prior conviction for a felony or certain specified misdemeanors.

Ohio: OHIO REV. CODE ANN. §109.60 (Page Supp. 1972). Upon acquittal, the arrestee can request that the bureau of criminal identification and investigation return his fingerprints and other identification data.

Pennsylvania: PA. STAT. ANN. tit. 19, §1405 (c) (1964). The county district attorney must destroy the fingerprints of all persons acquitted.

²⁵ See, e.g., *Sterling v. Oakland*, 208 Cal. App.2d 1, 24 Cal. Rptr. 696 (1962); *Kolb v. O'Connor*, 14 Ill. App.2d 81, 142 N.E.2d 818 (1957); *Fernicola v. Keenan*, 136 N.J.Eq. 9, 39 A.2d 851 (1944); *In re Molineux*, 177 N.Y. 395, 69 N.E. 727 (1904). But see *Iitzkovich v. Whitaker*, 115 La. 479, 39 So. 499 (1905); *Owen v. Partridge*, 40 Misc. 415, 82 N.Y.S. 248 (Sup. Ct. 1903).

²⁶ *Davidson v. Dill*, 503 P.2d 157, 162 (Colo. 1972) (plaintiff, arrested for loitering and subsequently acquitted, requested relief in the nature of a mandamus ordering the records expunged or, in the alternative, returned to her).

²⁷ See Annot., 46 A.L.R.3d 900 (1972).

²⁸ *United States v. Kalish*, 271 F.Supp. 968, 970 (D. P.R. 1967).

Recently, a court has even stated that, when there is no evidence of a person's misconduct, there is no benefit to society in permitting the police to retain the arrest records of an exonerated arrestee, except possibly for statistical purposes.²⁹

The *Duncan Report*,³⁰ later adopted by the Commissioners as uncodified law for the District of Columbia, recommended that where there was no conviction the dissemination of arrest records should be limited to "law enforcement agents," and only when those agents represent that records will be used solely for "law enforcement purposes."³¹ In *Morrow v. District of Columbia*,³² the Court of Appeals held that a trial court had ancillary jurisdiction to issue orders regarding the dissemination of arrest records. Considering the *Duncan Report*, the court explained that in the interest of preventing an invasion of privacy, restrictions could be put on the dissemination of arrest records in cases of exoneration.

A federal court has inherent power to order arrest records expunged where the facts of a case indicate that justice so requires, according to the court in *Kowall v. United States*,³³ which rejected the previous view that public interest in retaining an exonerated arrestee's records far outweighed, as a matter of law, any infringement upon one's right of privacy.³⁴ But the court did not clearly hold that it was an invasion of privacy to retain such records. Rather, it concluded that to do so was an impermissible impingement of one's inalienable rights to life, liberty, and the pursuit of happiness, and that such maintenance of the records might subject the individual to serious difficulties. Such factors, the court held, justify expunging the records.³⁵

Right of Privacy

In tort law there is a concept of wrongful invasion of the right of privacy. The gist of this cause of action is the interference with an individual's "right to be let alone." This right and cause of action was first recognized in a law review article by Warren and Brandeis, in which they defined the right of privacy as the individual's "right of

²⁹ *In re Smith*, 63 Misc.2d 198, 310 N.Y.S.2d 617 (1970).

³⁰ COMMITTEE TO INVESTIGATE THE EFFECTS OF POLICE ARREST RECORDS ON UNEMPLOYMENT IN THE DISTRICT OF COLUMBIA, REPORT 9 (1967).

³¹ *Id.* at 23.

³² 417 F.2d 728 (D.C. Cir. 1969) (arrestee's disorderly conduct charge dismissed). *But see* *Spock v. District of Columbia*, 283 A.2d 14, 19 (1971), wherein the court limited the arrestee's rights under the *Duncan Report* to situations in which the arrest was *mistaken*, not merely to those in which the arrestee was subsequently exonerated.

³³ 53 F.R.D. 211 (W.D. Mich. 1971) (sentence vacated under 28 U.S.C. §2255).

³⁴ See text accompanying note 25 *supra*.

³⁵ *Kowall v. United States*, 53 F.R.D. 211, 214 n. 2 (W.D. Mich. 1971).

determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others.”³⁶ Most states today recognize the right and cause of action by case law;³⁷ a few do so by statute.³⁸

Though the Constitution does not expressly provide for a right of privacy, courts have protected this right from some acts by the government, including illegal search and seizure.³⁹ The Supreme Court in *Griswold v. Connecticut*⁴⁰ held for the first time that there is a constitutional right to privacy, and that a Connecticut statute which made the use of contraceptives unlawful violated the right to marital privacy.

Relying on the *Griswold* decision, a Washington (state) appellate court in *Eddy v. Moore*⁴¹ held that the plaintiff, exonerated after dismissal of an assault charge, was entitled to have her fingerprints and photographs returned, because it was a violation of her constitutional right of privacy to allow the authorities to retain them, unless the government could show a compelling necessity for doing so. Although the state required restrictions on dissemination, it was held that the statute’s failure to provide for return of an exonerated arrestee’s records was a “constitutionally defective omission,”⁴² in the absence of a showing of a compelling reason for their retention. The court also observed that if the presumption of innocence means anything, it means that an exonerated arrestee should not have a permanent arrest record.⁴³

In *Carr v. Watkins*,⁴⁴ police personnel disclosed to plaintiff’s present employer, certain past non-criminal accusations related to plaintiff’s fitness to remain employed by a naval ordnance laboratory. Plaintiff had been vindicated from the charges six years prior to the disclosure complained of, and his cause of action for invasion of privacy was therefore sustained. The court held that such disclosure was a thoughtlessly grave intervention upon the confidentiality of plaintiff’s private affairs. Under this “unauthorized disclosure of private affairs” rationale, the arrestee should be able to prevent wrongful dissemination of his record to persons outside the criminal justice system.

³⁶ Warren & Brandeis, *The Right To Privacy*, 4 HARV.L.REV. 193, 198 (1890).

³⁷ E.g., *Rugg v. McCarty*, 173 Colo. 170, 476 P.2d 753 (1970); *Apodaca v. Miller*, 79 N.M. 160, 441 P.2d 200 (1968).

³⁸ E.g., COLO. REV. STAT. §40-4-33 (Supp. 1967).

³⁹ See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴⁰ 381 U.S. 479 (1965).

⁴¹ 5 Wash. App. 334, 487 P.2d 211 (1971).

⁴² *Id.* at 336, 487 P.2d at 214.

⁴³ *Id.*

⁴⁴ 177 A.2d 841 (Md. Ct. App. 1962).

Cases that grant relief on an invasion of privacy rationale appear to use a balancing of interests test; *i.e.*, which has the greater need of protection — society or the individual? The government's interest in retaining the records for law enforcement is balanced against the individual's interest in expungement, to secure his privacy and to enable him to lead a life free from the collateral effects of a record. There is no doubt that society must be protected from the criminal element, but the exonerated arrestee has not been adjudicated a criminal. Further, records retained for the purpose of protecting society hinder the exonerated arrestee in seeking employment and may thus drive him to crime, thereby defeating the original purpose of protecting society.

Balancing these interests, the result in the 1972 Ohio case of *State v. Pinkney*⁴⁵ demonstrates why a court, in the absence of legislative mandate, *must* take the initiative to order records expunged. In *Pinkney*, an eighteen-year-old defendant was indicted for first degree murder and later discharged when the jury became deadlocked. While awaiting retrial, other persons confessed to the crime, defendant was released, and the charges against him were dropped. Defendant's counsel then filed a motion to expunge the records, and the court granted relief. The court directed the Cleveland Police Department and the county sheriff to destroy all related records (originals and copies) in their possession or under their control; the court clerk to seal the records of the case; and defendant's counsel to request the Ohio State Bureau of Criminal Identification and Investigation and the federal agencies (particularly the FBI) to expunge and destroy all records and return any photographs. The court instructed the police, sheriff, clerk, and defense counsel to confirm to the court in writing, within ten days, that the records had been destroyed. The court further ordered all court index references deleted, the case deemed to never have occurred, and the court and the defendant obliged to reply that "no record exists" to future inquiries in the matter. The court explained:

It is the opinion of this court that there exists in the individual a fundamental right of privacy, the right to be left alone. The potential economic and personal harm that result if his arrest becomes known to employers, credit agencies, or even neighbors, may be catastrophic.⁴⁶

Other Grounds for Relief

The arrest that is not founded on probable cause presents an even stronger argument for the restriction of expungement of an ar-

⁴⁵ 33 Ohio Misc. 183, 290 N.E.2d 923 (Cuy. Cnty. 1972).

⁴⁶ *Id.* at 184, 290 N.E.2d at 924.

restee's record. Judge Bazelon in *Menard v. Mitchell*⁴⁷ suggested that if an arrest is made without probable cause, the Constitution may not tolerate "any adverse use" of the arrest record and therefore it should not be retained.⁴⁸ The court stated:

Even if the arrest was made lawfully and with the best intentions, if the person arrested has been exonerated it is difficult to see why he should be subject to continuing punishment by adverse use of his "criminal" records⁴⁹

Where the arrest was illegal from the onset, courts have generally held that the arrestee is entitled to restriction or expungement of his arrest records.⁵⁰ Such is the case when the police arrest "hippies"⁵¹ or Negroes⁵² for purposes of harrassment, or when an arrest is made on the basis of a mistaken identity.⁵³ Thus it was held in *Irani v. District of Columbia*⁵⁴ that a graduate student who was mistakenly arrested for parading without a permit during a mass arrest at a civil disturbance, at which he was unavoidably present but not a participant, was entitled to relief. The court remanded and left the appropriate form of relief to the trial court's discretion. On remand, the trial court ordered the records expunged by having the local police retrieve all disseminated copies and to have them placed under seal and neither to be opened nor their existence or contents to be disclosed.⁵⁵ In *Wheeler v. Goodman*,⁵⁶ a three-judge court held a vagrancy statute under which arrests were made, unconstitutional. The court granted an order of expungement of the arrest records and said the exonerated arrestees would be allowed to deny that the arrest ever took place when asked orally or on a written document, such as an employment application.

⁴⁷ 430 F.2d 486 (D.C. Cir. 1970). *Menard* was held two days without a charge or a hearing, and was subsequently released when the police found no basis upon which to charge him with committing a crime.

⁴⁸ *Id.* at 481-92.

⁴⁹ *Id.* at 495.

⁵⁰ *But see* *Sterling v. Oakland*, 208 Cal. App.2d 1, 24 Cal. Rptr. 696 (1962) (Expungement of plaintiff's records denied, even though she had succeeded in a civil action for false arrest by a citizen).

⁵¹ *Hughes v. Rizzo*, 282 F.Supp. 881 (D.C. Pa. 1968) (records ordered expunged after the individuals were apprehended during an illegal mass arrest and never charged).

⁵² *United States v. McLeod*, 385 F.2d 734 (D.C. Ala. 1967) The records ordered expunged after arrests were shown to have been made with the intent to interfere with the right to register and vote, in violation of the Civil Rights Act of 1957. *Id.* at 749.

⁵³ *United States v. Jones*, Crim. No. 36388-69 (D.C. Ct. Gen. Sess., April 1970) as reported in 38 U. CHI. L. REV. 850, 857 n. 37 (1971) (records ordered returned).

⁵⁴ 272 A.2d 849 (1971).

⁵⁵ *Irani v. District of Columbia*, 292 A.2d 804 (D.C. App. 1972) (reported the facts and trial court's decision at 805-07).

⁵⁶ 306 F.Supp. 58 (D.C. N.C. 1969). In *Wheeler*, young persons were harassed by police on fifteen separate instances at a "hippie house," eventually arrested for vagrancy, and subsequently discharged by *nolle prosequi*.

The equal protection clause of the fourteenth amendment may some day be held by the courts to pertain to arrest records. Although the court in *Menard v. Mitchell*,⁵⁷ did not reach this conclusion, it may have hinted at it when it said that the government can not classify the innocent with the guilty.⁵⁸ This apparently means that the government can maintain records of the exonerated arrestee, but must title and file them separately from those of arrestees who have been convicted. The equal protection clause does not mean that everyone must be treated alike, but rather that everyone in the same situation must be treated alike.⁵⁹ The exonerated arrestee is in the same situation as a *non*-arrestee, if "innocent until proven guilty" means anything. Therefore, the existence of an arrest record should not change his situation or classification to something between innocent and guilty.

To a limited extent, the Civil Rights Act of 1964 may grant the exonerated arrestee relief from a record.⁶⁰ In *Gregory v. Litton Systems, Inc.*⁶¹ the plaintiff, being denied employment by the defendant because of a record of fourteen arrests, but no convictions, requested an order to constrain the defendant from discriminating against him because of his arrest records. In granting relief, the court held that this practice results in racial discrimination under Title VII of the Civil Rights Act of 1964, as blacks are more frequently arrested than whites. The court found that there is no evidence to support the defendant's contention that an employee with several arrests, but no convictions, is likely to be less honest or reliable than one without such a record.⁶²

Another remedy that may give the exonerated arrestee an equal chance in seeking employment is to limit inquiries. The U.S. Government employment application form (Form 75) asks for information on arrests that lead to a conviction whereas in the past it asked for information concerning all arrests.⁶³ Such should be the language on all employment application forms.

⁵⁷ 430 F.2d 486, 492 (D.D.C. 1970).

⁵⁸ *Id.* at 492.

⁵⁹ See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁶⁰ *But see In re Foster*, 72 Misc.2d 1029, 340 N.Y.S.2d 758 (Erie County Ct. 1973). Though the court ordered the return or destruction of fingerprints and photographs of an arrestee whose loitering charge was dismissed, it found that Section-"e" of the state's Civil Rights Law neither authorizes nor requires that other records be expunged.

⁶¹ 316 F. Supp. 401 (C.D. Cal. 1970).

⁶² *Id.* at 402. Because Title VII also prohibits sexual discrimination, then according to one commentator, since males are arrested more often than females, denying them employment because of numerous arrests would also be prohibited. Comment, *Arrest Records As A Racially Discriminating Employment Criterion*, 6 HARV.CIV.LIB.L.REV. 165 (1971). The commentator also found, that to deny white females jobs due to several arrests, may be a denial of equal protection.

⁶³ REPORT, *supra* note 8, at 75.

A Proposal

Existing statutory law is not much help in protecting the exonerated arrestee. However, the aforementioned case law has established a precedent allowing the arrestee to bring an action to either restrict his record from dissemination to the general public⁶⁴ or to have it expunged. The necessity for such an action is because of the unfortunate misinterpretation of the legal meaning and significance of the arrest record. The meaning that should be ascribed to the arrest record is discussed by the Supreme Court in *Schwartz v. Board of Bar Examiners*:

The mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense.⁶⁵

The legal remedy must satisfy both society and the individual by a balancing of interests.⁶⁶ Expungement would be the most effective remedy, as it would destroy all recorded traces of the event.⁶⁷ Restriction alone is inadequate. Leaks from the criminal justice system would open the record to the public without notice to the individual who may learn of the disclosure only after the harm has occurred. Moreover, relief in the form of an action for unauthorized disclosure is costly and time consuming.

The balancing of interests test demands expungement, when the inadequacy of the restrictions remedy is considered along with the right of privacy, the concept of innocent until proven guilty, the great social and economic burdens of an arrest record, and the limited value, if any, of such records to the police and business world. Once the record has been expunged, the exonerated arrestee will be able to continue life as if the event had never occurred, with the equal status and opportunity of all nonarrestees.

Because of first amendment guarantees, statutes should allow for records to be retained, both within and without the criminal justice system, until the arrestee is either exonerated or convicted. Exceptions could be made if the police felt that this policy would expose individuals assisting the investigation, or when the court felt it would deny the arrestee a fair trial.

⁶⁴ See generally Comment, *Retention And Dissemination of Arrest Records: Judicial Response*, 38 U.CHI.L.REV. 850 (1971) for a discussion of the various remedies pertaining to the disclosure or dissemination of arrest records.

⁶⁵ 353 U.S. 232, 241 (1957) (reversed defendant's exclusion from practice of law because of three arrests without adjudication).

⁶⁶ See discussion of 'Balancing of Interests' following text at note 44 *supra*.

⁶⁷ The author suggests the *Pinkney* case, 33 Ohio Misc. 183, 290 N.E.2d 923 (Cuy. Cnty. 1972) as the basis for an effective statute; see text accompany notes 64 and 65 *supra*.

Furthermore, if an arrestee is exonerated, statutes should provide:

- 1) That all records held by any person or agency within the criminal justice system be immediately and automatically expunged; and that it will be unlawful for any person or agency outside the criminal justice system to disclose or disseminate the same.
- 2) That the event will be deemed to have never occurred, and the individual may, and all others must, reply accordingly.
- 3) That it will be a misdemeanor for anyone to disclose, disseminate, or in any other manner make known, the record of the event.
- 4) That the individual will be notified of this provision at the close of the proceedings at trial.

The statutes should also provide that after a record is restricted or expunged the information may be used for statistical purposes, articles, papers, crime prevention, or any and all other deserving goals, as long as it in *no way* discloses or makes known the identity of the individual who is the subject of the record.⁶⁸

Conclusion

The need for legislation protecting an exonerated arrestee from the misuse of his arrest record is great. The foregoing is not meant to be a proposal⁶⁹ for such legislation, but rather a recommendation of the necessary elements to be included in order to fully guarantee the preservation of the arrestee's right to privacy. By protecting the arrestee's right to privacy we are in reality protecting the arrestee from all of the adverse effects to which he is now subjected through the dissemination of his arrest record.

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⁶⁸ A New York trial court has held that the exonerated arrestee is entitled to physical expungement and obliteration of his surname from all arrest records. *Henry v. Looney*, 65 Misc.2d 759, 317 N.Y.S.2d 848 (Sup. Ct. 1971). This *may* be a means of protecting the individual's privacy and at the same time allowing the police and others with an appropriate goal to retain such records.

⁶⁹ See Comment, *Maintenance And Dissemination of Criminal Records: A Legislative Proposal*, 19 U.C.L.A. L.REV. 654, 677-88 (1972) for proposed "model" legislation.

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