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initial stages of trial.[44] However, because of over-emphasis on the threat of jurisdictional collusion, precedent has developed requiring an independent jurisdictional ground.[45] Therefore, the extension of ancillary jurisdiction to cover the original plaintiff's claim against the impleaded party is less certain but arguably necessary if effect is to be given the policy behind the federal rules and if the courts are going to perform their primary function of settling the entire dispute.

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Constitutional Law—Right of Police to Retain Arrest Records

The advent of the computer, proposals for a new National Data Bank,[1] development of means for rapid and efficient interchange of information, and highly publicized incidents of police and military surveillance have crystallized public concern over the information retention activities of government agencies. This developing wariness of records would seem to germinate from their accelerated capacity for harm. At present, masses of records may be conveniently stored in computers subject to almost instantaneous recall. The data retained by one organization may be expeditiously conveyed to another on request.[2] The total effect of these technological advances is an increased potentiality for evil as well as good. The accuracy and validity of records that are damaging in nature must, therefore, be laboriously scrutinized if the interests of individuals are not to be crushed by a newly mechanized bureaucracy.

A recent federal case, *Menard v. Mitchell*,[3] outlined many of the competing considerations involved in the right of the police to keep records of arrests. The plaintiff brought an action seeking to compel the Attorney General and the Director of the Federal Bureau of Investigation to ex-

[44] At least another potential problem area has been avoided where the main claim is dismissed leaving only the third-party defendant's claim which lacks an independent jurisdictional base, for "[j]urisdiction once acquired is not lost by changes in the situation leaving only ancillary matters for determination." 1A BARRON & HOLTZOFF § 424, at 658.

[45] See note 29 *supra*.

[1] For an analysis of the advisability of a National Data Bank see generally J. ROSENBERG, THE DEATH OF PRIVACY (1969) [hereinafter cited as ROSENBERG].

[2] *Id.* 64-68.

[3] 430 F.2d 486 (D.C. Cir. 1970).

punge records[4] of his arrest and detention for burglary in California.[5] The Court of Appeals for the District of Columbia in reversing a summary judgment for defendants stated that the record was not sufficiently complete to permit summary judgment and remanded for a trial on the merits.

Since the court refused to surmise the actual nature of the facts in the case, the opinion dealt extensively with the entire question of arrest records. Appropriate dispositions were indicated for various hypothetical fact situations. Basically four fact situations which may be arranged in an order of ascending analytical complexity, are possible. An arrest may be made: 1) without probable cause for purposes other than prosecution, 2) in good faith but without probable cause, 3) with probable cause but further investigation proves exonerating, or 4) with probable cause but the prosecutorial process is not invoked. The import of *Menard* lies in the guidelines established for resolving the issue of the police right to retain records in these various contexts.

Arrests made for purposes other than prosecution are essentially punitive in nature.[6] Such arrests are employed as a substitute for the full criminal process when the criminal process is considered inappropriate or unavailable. In particular, prostitutes and those who violate liquor and gambling laws are vulnerable to arrests made on little or no actual evidence for the purpose of harassing their operations.[7] The Supreme Court in *United States v. Price*,[8] stated that "[i]f the Fourteenth Amendment forbids denial of counsel, it clearly denounces denial of any trial at all.[9] The court in *Menard*, relying on *Price*, severely questioned retention of records of arrests made for the purpose of harassing an individual.[10] Such a practice would constitute a nonjudicial punishment in violation of due process. The arrest record constitutes one aspect of the total punitive effect of an arrest when made solely for the purpose of achieving that effect. There-

[4] The FBI retains these records pursuant to the statutory authorization in 28 U.S.C. § 534(a)(1) (Supp. IV 1965-69).

[5] The plaintiff was released under CAL. PENAL CODE § 849(b)(1) (West 1970).

[6] *But see* United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932), in which the court contended that compiling police records cannot be characterized as punishment.

[7] P. CHEVIGNY, POLICE POWER 219-35 (1969). Individuals may be arrested in order to maintain a proper level of respect for law enforcement officials. *Id.* at 89-98.

[8] 383 U.S. 787 (1966).

[9] *Id.* at 799.

[10] 430 F.2d at 494.

fore, memoralization of arrests in this first category is constitutionally defective for want of due process.

A strong constitutional argument may be made for precluding the retention of records of any arrest not resulting from probable cause and when probable cause never develops. A significant line of Supreme Court decisions has proscribed the use of "fruits" of an illegal seizure. In *Silverthorne Lumber Co. v. United States*[11] the government was prevented from using information gained by reviewing illegally seized documents. *Davis v. Mississippi*[12] prohibited the admission of fingerprints secured as a result of an unlawful detention. Finally, *Wong Sun v. United States*[13] established that verbal testimony ascertained to be the product of an unlawful arrest was inadmissible. In light of these cases the consideration narrows to a question of whether a record of an illegal—*i.e.*, without probable cause—arrest is the "fruit" of that arrest.

Since an arrest record has no independent significance and simply represents a transcription of the fact that an arrest occurred, a more direct product of an arrest is difficult to imagine. Significantly, an arrest record is employed primarily as an investigative aid—the precise use prohibited by the Court.[14] Admittedly, the record could be used only in investigation of subsequent criminal activity, but the prohibition established by *Silverthorne* was not confined to use in a particular case or point in time.[15] As a deterrent to illegal arrests, the police are restrained from any use of the products of such arrests. To permit the police to derive any benefit from an illegal arrest undermines the policy behind the exclusionary rule.[16]

When an arrest with probable cause terminates in exoneration, basic fairness would seem to preclude retention of a record. The court in *Menard* alluded to this question by reference to the fact that certainly no record could have been kept if an arrest had not occurred.[17] The import of this argument is that since the arrest resulted from a mistake, even though a reasonable one, it should not have occurred. Consequently, the police having initiated the mistaken arrest are under an obligation to restore the

[11] 251 U.S. 385 (1920).
[12] 394 U.S. 721 (1969).
[13] 371 U.S. 471 (1963).
[14] *See, e.g.*, Davis v. Mississippi, 394 U.S. 721 (1969).
[15] 251 U.S. at 392.
[16] *See* the rationale expressed concerning the exclusionary rule in Mapp v. Ohio, 367 U.S. 643, 659 (1961).
[17] 430 F.2d at 491.

individual as much as is possible to his position previous to the arrest.[18] The only legitimate police interest in this situation is based solely upon the need to maintain statistical data such as the number of arrests during a certain month. To facilitate this purpose, it is unnecesary for the record to disclose the identity of the individual. Administrative ease is not served by requiring two sets of records, one involving the identity, and the other not. Nevertheless, it would be inequitable to permit the police to take advantage of even an honest mistake to the detriment of an individual, administrative ease notwithstanding.

The most difficult problem concerns arrests resulting from probable cause in which the suspect is released but not exonerated. There are two facets to the resolution of this question. One concerns the dissemination of arrest records to potential employers. But even if dissemination to employers is not involved, a distinct problem remains as to whether the mere presence of the arrest records in the police files impinges vital rights.

Because police records, particularly those of the Federal Bureau of Investigation, are subject to substantial dissemination,[19] a person who has an arrest record may be handicapped in seeking employment.[20] This potentiality raises an equal protection question to which the court in *Menard* obliquely alluded.[21] In ascertaining whether the right to keep arrest records can withstand an attack based upon equal protection, the nature of the right infringed is significant. The question is whether the right is denominated as fundamental. In situations not involving fundamental rights, the government may make classifications so long as they are not arbitrary.[22] In such situations, those persons engaging in criminal activity are placed in this classification based upon having an arrest record. On the other hand, if fundamental rights are involved, the government must justify its classification with a "compelling" interest.[23] The Supreme

[18] For examples of liabilities that might result from an arrest record see Russell v. United States, 402 F.2d 185 (D.C. Cir. 1968) (refusal of personal recognizance); Rhodes v. United States, 275 F.2d 78, 82 (4th Cir. 1960) (government contended bail should be denied).

[19] *See* 28 U.S.C. § 534(a)(2) (Supp. IV 1965-69), for the authorized extent of dissemination. The ambiguity in the statutory phrase "other institutions" is clarified somewhat in 430 F.2d at 492 n.33.

[20] 430 F.2d at 490 n.17.

[21] [T]here is limit beyond which the government may not tread in devising classifications that lump the innocent with the guilty." *Id.* at 492.

[22] Railway Express Agency v. New York, 336 U.S. 106 (1949).

[23] Shapiro v. Thompson, 394 U.S. 618 (1969); See also Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969).

Court in *Levy v. Louisiana*[24] held that the right to adjudicate a wrongful death action involved the right of dependents to continued support and as such was "fundamental."[25] The analogy between the right of a family to receive continued support and the right to obtain gainful employment to provide similar support is clear. The inability to litigate a wrongful death would constitute a complete destruction of the the right involved in *Levy*. However, this aspect of *Levy* should not make the case distinguishable, even though the right to employment is only impaired by the dissemination of an arrest record. *Shapiro v. Thompson*[26] involved no more than an impairment of a right deemed fundamental—the right to travel—and not its complete destruction.

The court in *Menard* did not overtly come to grips with *Griswold v. Connecticut*[27] and its implications in the police record context. In *Griswold* the Supreme Court expanded the right to privacy beyond the bounds of the enumerated protections[28] and gave it an independent existence. The "constitutionalization" of the right to privacy in *Griswold* may have significant implications for the dissemination of police records. Underscoring this point is the fact that traditionally litigation concerning photographs and files maintained by the police was based upon the *equitable* right to privacy.[29] Many of these cases involved "rogue's gallerys"[30] which because of their accessibility to the public compromised this basic right.[31] While dispositions varied depending upon the significance given the right in the particular jurisdiction,[32] these state court decisions were pre-*Griswold*. The balancing of government and individual interests in

[24] 391 U.S. 68 (1968).

[25] *Id.* at 68-69.

[26] 394 U.S. 618 (1969).

[27] 384 U.S. 479 (1965).

[28] The enumerated rights to privacy are found in U.S. CONST. amends. I, II, IV, V. The right to association has been held to include the right to anonymity. NAACP v. Alabama, 357 U.S. 449 (1958).

[29] Cases cited note 32 *infra*.

[30] "Rogue's gallerys" are collections of photographs of persons who the police believe to have participated in criminal activity. These photographs are shown to members of the general public when they are attempting to identify the culprit of a crime.

[31] *See, e.g.*, Schulman v. Whitaker, 115 La. 628, 39 So. 737 (1905); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905).

[32] *Compare* State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), Molineux v. Collins, 177 N.Y. 395, 69 N.E. 727 (1904), and Owen v. Partridge, 40 Misc. 415, 82 N.Y.S. 248 (1903) *with* State *ex rel.* Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834 (1941), and McGovern v. Van Riper, 137 N.J. Eq. 24, 43 A.2d 514 (1945).

this area must now be reconsidered with cognizance being given to *Griswold.*

The government's interest in dissemination to employers is to protect employers from persons with criminal propensity. This interest is certainly less vital than the crime investigation interest which is not impaired by curtailment of dissemination. Further, given the unreliability of arrest records not resulting in conviction as an indicator of criminal propensity,[33] the government's interest could be characterized as weak indeed.

The court in *Menard* offered two suggestions for dealing with the problem of injury to employment opportunities. First, the records could be made more complete. It is doubtful, though, that even an arrest record stating "released because of insufficient evidence" would have a completely neutral effect upon an employer. The clear fact seems to be that arrest records of any type adversely affect job opportunities.[34] Even in *Menard* the court, while suggesting the need for more completeness, recognized the inherent difficulty in neutralizing arrest records.[35] The other alternative—curtailment of dissemination—provides the only effective means of preventing arrest records from infringing upon the rights of employment and privacy.

Even if arrest records are not disseminated, an argument can be made that the presence of a record in the police files infringes the right to privacy. A person with an arrest record is in a substantially different position vis-à-vis the police than other citizens. When a crime occurs, those persons with "records" are more likely to be investigated concerning that crime and if suspected, more likely to be arrested.[36] The increased efficiency and rapidity with which information may be disseminated among law enforcement entities and ultimately down to individual policemen enhances the possibility that an arrest record will result in investigation.[37] To the extent that an arrest record stimulates greater police involvement in the life of an individual, his privacy is diminished.

Despite an innate feeling that an arrest record somehow compromises

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[33] See text p. 517-18 *infra.*

[34] "Mere arrest may destroy reputation, or cause the loss of a job, or visit grave injury upon a family." Breitel, *Controls in Criminal Law Enforcement,* 27 U. CHI. L. REV. 427, 431 (1960).

[35] 430 F.2d at 492-93.

[36] *Id.* at 490-91. See also W. LAFAVE, ARREST 287-89 (1965), and E. WILLIAMS, MODERN LAW ENFORCEMENT AND POLITICAL SCIENCE 105-09 (1967), which contain extensive analyses of reliance by the police upon information about past criminal activity.

[37] ROSENBERG 64-68.

privacy, it is difficult analytically to pinpoint the exact legal right invaded. Since an arrest is a public act, a record of the event cannot by its existence alone be an infringement upon privacy. Further, if the record influences the police to make subsequent forays into a person's privacy, those acts may be judged on their own merits. For example, a search, even though it might not have been made in the absence of the suspect's record, may be evaluated on the basis of its reasonableness at the time it occurred.[38] A finding of reasonableness legitimatizes any invasion of privacy caused by the arrest record. In short, it may be argued that the increased police scrutiny resulting from an arrest record does not impugn privacy unless the scrutiny itself is illegal. The legality of that scrutiny may be independently ascertained.

This contention, though compelling, it not completely persuasive. The police certainly do not investigate, search, or arrest every time there is legal justification to do so.[39] An unreasonably retained arrest record may constitute a significant criterion by which discretionary choices are resolved. Therefore, even though the act is reasonable, the catalyst for the act may not be. Arguably, an individual should be entitled to have police discretion concerning even legitimate incursions into his private life rest upon rational factors. The systematic introduction into the decision-making process of an irrational factor, in the form of an unreasonably retained arrest record, would seem, therefore, to constitute an infringement of the right to privacy. Further, a person has no remedy if the police search or detain him on the basis of an arrest record, and then release him. The fact that the subsequent act of invasion of privacy resulting from the record could theoretically be judged on its own merits becomes unimportant since no opportunity would arise to determine its reasonableness. The only realistic means of precluding these attacks on privacy is to eliminate the inaccurate record from which they stem.

An emerging pattern of state and federal court decisions limiting police surveillance[40] may also be relevant to police retention of criminal records. The United States Supreme Court has for some time looked disconsolately upon laws that exert a chilling effect on first amendment

[38] *See* Chimel v. California, 395 U.S. 752 (1969); Terry v. Ohio, 392 U.S. 1 (1968); Aguilar v. Texas, 378 U.S. 108 (1964).

[39] *See* Goldstein, *Police Discretion not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 559-62 (1960).

[40] *See, e.g.*, Bee See Books Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968); Hicks v. Knight, 10 RACE REL. L. REP. 1504, 1505 (E.D. La. 1965) (prohibiting police from concealing identity).

rights.[41] A recent state court case[42] and an older federal case[43] extend to police surveillance the same type of rationale that is behind the "chilling effect" principle. These cases could portend important limitations upon police practices adversely affecting speech and association when the state interest is negligible or could be satisfied by a more circumscribed procedure.

The importance of this "chilling effect" doctrine is readily apparent in cases of arrest resulting from activities within the realm of first amendment applicability. An individual espousing viewpoints or participating in associations that the police consider "suspect" might well carry on these activities with far greater circumspection if he knew the police were aware of what he was doing. An awareness by the police based upon an arrest record for trespass during a "sit in," as an example, does not seem dissimilar from an awareness based on surveillance or police presence. In each case, the individual is more visible to the police than other persons. The individual's reaction to this enhanced visibility can inhibit the vigorous exercise of first amendment rights. Consequently, retention of the records of "political" arrests undermines a most crucial constitutional prerogative.

A somewhat strained argument may be made that the reason for the arrest does not affect the application of the "chilling effect" principle. The apprehension caused by an arrest record results from a reaction to the

[41] *E.g.*, United States v. Robel, 389 U.S. 258 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[42] Anderson v. Sills, 106 N.J. Super. 545, 256 A.2d 298 (1969), *rev'd*, 56 N.J. 210, 265 A.2d 678 (1970). The trial court held unconstitutional as unduly inhibiting first amendment rights a police procedure directed at gathering information about lawful activity looking toward civil disturbances; the reversal was based, however, to a significant extent upon the scantiness of the trial record and a belief that the lower court's injunction suffered from overbreadth. 56 N.J. at 215, 231-32; 265 A.2d at 681, 687. In addition to the rather narrow grounds for reversal and remand, the trial court decision remains important because of the validity of its logic. The trial court's holding would, without reversal, have been quite limited in its precedent effect. Therefore, the significance of the case is dependent on the persuasiveness of its reasoning. The lower court's opinion has been commented upon favorably in Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196 (1970); Schlam, *Police Intimidation Through "Surveillance" May be Enjoined as an Unconstitutional Violation of Rights of Assembly and Free Expression*, 3 CLEARINGHOUSE REV. 130 (1969); Note, *Constitutional Law—Illegality of Police Program to Gather Information on Civil Disorders*, 48 N.C.L. REV. 648 (1970).

[43] Local 309, United Furniture Workers v. Gates, 75 F. Supp. 620 (N.D. Ind. 1948), prohibited police attendance at a union meeting on the basis that such presence would inhibit the union members' exercise of their first amendment freedoms.

potentiality for intensified police scrutiny. Consequently, the fact of greater police awareness rather than its source is critical. Further, the failure of an individual to exercise the full range of his first amendment rights in the past does not justify a practice inhibiting their exercise in the future. However, the cause and effect relationship between possessing an arrest record for burgulary and refraining from unrelated associational actvities is tenuous.

The fact that arrest records cannot be reconciled with certain individual rights does not give rise to an absolute prohibition of record retention.[44] The equal protection, privacy, and first amendment considerations only indicate that there is something on the other side of the scales against which the state interest must be balanced. The files maintained by the police are used as a tool in the investigation of crime. Certainly, the government's interest in criminal investigation is compelling. However, this does not mean that the interest in keeping records of every arrest, even those based on probable cause, is sufficient to overcome the individual's interests.[45] The value of an arrest record as an investigative aid is based upon two assumptions: 1) the individual arrested did, in fact, commit the crime of which he is accused, and 2) his commission of this crime indicates a propensity to commit subsequent crimes. To the degree that a particular arrest record does not vindicate these assumptions, its value in police investigation is reduced and the government's interest in it wanes. At some point the government's interest is no longer sufficient to justify its infringement upon individual rights.

In ascertaining the extent of the government's interest in a particular case, the reason for the termination of the criminal process is critical. The police or the prosecutor may decide not to attempt prosecution for any number of legitimate reasons. Many of these reasons provide insights into whether the assumptions warranting keeping arrest records are founded in a particular case. If the evidence is insufficient to take the case to trial,[46] a record of such arrest would, at best, be of little value and could prove misleading. A substantial number of cases are not prosecuted

[44] The court in the principal case refused plaintiff's motion for a summary judgment. 430 F.2d at 490.

[45] See United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967). "[W]hen an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records." *Id.* at 970.

[46] This lack of evidence is one basis for release under CAL. PENAL CODE § 849 (b)(1) (West 1970).

because the prosecuting witness withdraws his complaint.[47] Many of these cases involve marital spats and insignificant conflicts between individuals who attempt to invoke the criminal process to salve injured feelings.[48] It is very doubtful whether such minimal criminal activity indicates any propensity to commit subsequent crimes. The same may be said for cases in which the police department or prosecutor makes an independent decision that the case is too trivial to be tried. These examples serve to illustrate situations in which the state interest on balance is not very compelling.

On the other hand, a failure to prosecute resulting, for example, from the death or unavailability of a crucial witness would not preclude a probability of actual guilt sufficient to necessitate keeping the record of arrest.[49] The overburdening of our court system may force prosecutors into hard choices concerning which cases to take to trial. A release resulting from inability to provide a speedy trial would not go to the merits of the case. As can be seen, each case must rest upon its particular facts. A single rule of generalized applicability is impossible. However, at a minimum, the police should be prevented from accumulating records on persons whose criminal activity is either very doubtful or insignificant.

The determination that certain criteria must be met for the retention of arrest records to be permitted is not alone sufficient. If the decision as to whether the standard has been satisfied simply becomes another aspect of the police and prosecutorial discretion, any protection for the right of privacy would be illusory. It is enlightening to note the means used to protect another constitutionally founded personal right. The police are required by inferences from the specific language in the fourth amendment to establish before an independent magistrate the necessity of searching a man's home.[50] The reason for this requirement is the inability of the police to objectivity balance the competing interests.[51] In addition, since the intrusion is a product of police activity, the police are required to sustain the burden of justification and initiate the process for judicial determination. The same rationale could support a requirement that an independent magistrate decide when the police may retain arrest records. The ease with which records of even insignificant value may be main-

[47] Note, *Prosecutor's Discretion,* 103 U. PA. L. REV. 1057, 1068 (1955).
[48] *Id.* at 1069.
[49] *Id.* at 1068.
[50] U.S. CONST. amend. IV.
[51] In Aguilar v. Texas, 378 U.S. 108 (1964), the Supreme Court held the police affidavit supporting a search warrant insufficient to establish probable cause.

tained would mitigate in favor of the police considering virtually all arrest records essential. An opportunity for a collateral attack upon the police discretion would be beyond the means of most individuals and, consequently, would not constitute a viable remedy. A procedure similar to that used in issuing search warrants would serve the dual purpose of providing objectivity and alleviating the necessity of the individual taking the initiative in protecting fundamental rights. In addition, a high visibility decision-making process would facilitate judicial establishment of standardized guidelines by which the close cases could be resolved. Admittedly, this procedure is not demanded by the language of the constitution. Nevertheless, the courts have traditionally been willing to require particular procedures when it is apparent they are essential to insure constitutionally protected rights.[52]

Constantly expanding capacity to secure and maintain massive quantities of data on individuals has placed the right to privacy on the cutting edge of the law. *Menard* represents the beginning of more intense judicial involvement in this area. However, a definitive demarcation by appellate courts of the boundaries of police rights in the record retention context is critical.

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Constitutional Law—The North Carolina Public Assistance Lien Law and Current Constitutional Doctrine

"Beneficient provisions for the poor, the unfortunate and orphan [is] one of the first duties of a civilized and Christian state . . . ."[1] Such was the philosophy of "welfare" when the framers wrote the North Carolina Constitution of 1868. By mid-twentieth century, however, the "beneficence" associated with public assistance in North Carolina was sharply curtailed for some groups among the poor. The change came with the enactment of North Carolina's first "welfare lien" laws.[2] For the first time in the state's history, public assistance was conditioned on eventual repayment through statutory liens on real property.[3]

[52] An excellent example of a procedure established by the courts to secure a constitutionally based right is that outlined in Miranda v. Arizona, 384 U.S. 436 (1966).

[1] N.C. CONST. art. XI, § 7 (1868).

[2] N.C. GEN. STAT. §§ 108-29 to -37.1 (Supp. 1969).

[3] As recently as 1969, thirty-three other states had some type of repayment provisions under federal-state funded programs. While such provisions are not required