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FBI Rap Sheets—An Invasion of Constitutional Rights?

For several years the Federal Bureau of Investigation (FBI) has employed a system of centralized and computerized national crime records. The FBI transmits these criminal identification records, commonly called rap sheets, between local and regional law enforcement agencies and FBI headquarters in Washington, D.C. Recently, courts have begun to scrutinize the maintenance and accessibility of rap sheets with the initial impression that these records present serious constitutional questions. This article will focus attention on two areas: (1) the composition and use of FBI criminal identification records, and (2) the inherent constitutional questions involved in their maintenance and availability.

Composition of the FBI Criminal Identification Record

The FBI was first explicitly authorized to maintain a system of criminal records in 1930.[1] The Division of Identification and Information, which was established to handle these records, was specifically limited to the acquisition and preservation of "criminal identification and other crime records."[2] The statute states that:

> (a) The Attorney General shall—
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> (1) acquire, collect, classify, and preserve identification, criminal identification, crime, and other records; and
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> (2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities, and penal and other institutions.
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> (b) The exchange of records authorized by subsection (a)(2) of this section is subject to cancellation if dissemination is made outside the receiving departments or related agencies.
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> (c) The Attorney General may appoint officials to perform the functions authorized by this section.[3]

The Attorney General recently modified this statute by a regulation which, in his view, states that, dissemination is not limited to government officials of one kind or another, since the list of authorized recipients includes govern-

1. Act of June 11, 1930, ch. 455, 46 Stat. 544.
2. *Id.*
3. 28 U.S.C. § 534(a)(1) (Supp. V, 1970).

ment agencies in general, banks, insurance companies, and railroad police. The regulation reads:

> Subject to the general supervision and direction of the Attorney General, the Director of the Federal Bureau of Investigation shall: . . . (b) Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reserve System, FDIC-Reserve Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies.[4]

As will be later discussed there is some dispute as to the extent to which these records can be constitutionally disseminated. The FBI's criminal files include over 54 million arrest records.[5] This information is circulated to more than 14,500 private and public agencies,[6] including the United States Civil Service Commission, all branches of the Armed Services,[7] and the California State Bar Examiners.[8] One critic has stated that these criminal bookings are available to credit bureaus, and might even be available to the press.[9] The FBI rap sheet contains the following information: (1) the agency which contributed the fingerprints, (2) the name and arrest number of the person taken into custody, (3) the date of arrest, (4) the charge, and (5) the final disposition of the case. The sheet as illustrated in Appendix A is divided into five columns headed by one of the preceding categories of information. There is sufficient space on the sheet to indicate a number of arrests. Usually, the information is typed on the sheet in abbreviated fashion by the transmitting agency.

After a person is taken into custody and fingerprinted, the above information is filled in by the local or regional authorities and sent to FBI headquarters. These same authorities are also responsibile for informing the FBI of the final disposition of the case if that information does not appear on the original record. The problem which usually develops and which has created

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4. 28 C.F.R. § 0.85 (1970).

5. FEDERAL BUREAU OF INVESTIGATION, COOPERATION, THE BACKBONE OF EFFECTIVE LAW ENFORCEMENT 12 (1968).

6. *Id.*

7. Exec. Order No. 10,450, 3 C.F.R. 936 (Comp. 1949-53) (Letter 731-2).

8. *See* California Board of Bar Examiners Announcement of August 1970 Bar Exam and attached FBI Fingerprint Card sent to all applicants.

9. NEWSWEEK, July 27, 1970, at 33.

the recent controversy is the failure of the rap sheets to indicate the final disposition of the case.[10] Although the FBI has contended that the lack of complete information is due to the transmitting authorities failure to notify them of the final disposition, the FBI may be under some duty to supplement their files should they obtain information from other sources that exonerate the person arrested.[11] The courts recognize that while there must be some limit as to how complete the records must be kept, nevertheless files which tend to devise classifications that lump the innocent with the guilty will not be permitted.[12]

A further problem is presented since much of the information found on the rap sheet is written in somewhat cryptic language, *e.g.*, references to sections of the state statutes and abbreviations of the crimes. Although the FBI may have no difficulty in interpreting the references, it is questionable whether other agencies and individuals who gain access to these records are capable of understanding their meaning. The simplicity of the rap sheet is such that further amplification of the references contained in it is necessary to insure that no misinterpretation of the record occurs. The other alternative would be to further limit the dissemination of the record to internal uses by the FBI and othe law enforcement agencies.

Court Attacks on the Constitutionality of the FBI Rap Sheet

In two recent cases, *Menard v. Mitchell*[13] and *United States v. Penney*,[14] two separate courts have launched attacks on the FBI rap sheet and its dissemination. Although both courts assert that the maintenance of the FBI rap sheets raises serious constitutional questions, neither explicitly stated the constitutional provisions violated. The language of these two opinions

10. *See* FEDERAL BUREAU OF INVESTIGATION, *Disposition Data Needed for Complete Arrest Record*, in LAW ENFORCEMENT BULLETIN, April 67, at 3.

11. *Cf.* Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 898 (1961). In a five to four decision the Supreme Court held that it was within the power of the commanding officer of a naval gun factory to deny a civilian cook employed in a private concession within the factory access to that factory. Such action was held not a denial of due process under the fifth amendment, although no other reasons were given for the exclusion except that the cook was considered a security risk. Justice Brennan noted in his dissent that in essence the majority would permit a commanding officer to allow arbitrary and discriminatory actions provided they are not admitted, since the actions could not be reviewed. *See also* Greene v. McElroy, 360 U.S. 474 (1959).

12. *See, e.g.*, Boorda v. Subversive Activities Control Board, 421 F.2d 1142 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1042 (1970). The court of appeals held that Section 14(a) of the Subversive Activities Control Act of 1950 was violative of the first amendment since it authorized public disclosure of a person's membership in a Communist-action organization without any finding of illegal activity by that individual.

13. 430 F.2d 486 (D.C. Cir. 1970).

14. Criminal No. 44939 (D.C. Gen. Sess., Nov. 20, 1970).

implies that the fourth, fifth, and ninth amendments are involved, insofar as due process and the right to privacy violations exist with regard to the maintenance and administration of the rap sheets.

In *Menard* the United States Court of Appeals for the District of Columbia Circuit stated that the retention and distribution of records of mere arrests by the FBI could infringe individual constitutional rights if not properly handled.[15] Menard instituted suit to compel the Attorney General and the Director of the FBI to remove (1) his fingerprints and (2) an accompanying notation regarding his detention by California police from the FBI's criminal identification files. The complaint alleged that while Menard was a student in California he was arrested for burglary, fingerprinted, detained for two days by the Los Angeles police, but never charged with any crime. He was then released from custody for lack of evidence. The FBI subsequently obtained copies of Menard's fingerprints and other information placed on a criminal investigation card. While the card did show that Menard had been detained on suspicion of burglary, it failed to indicate his subsequent release. The court in *Menard* reversed the district court's decision granting the government's motion for summary judgment and remanded the case for trial to discover the complex constitutional issues presented.[16]

In its opinion the court recognized the arduous task of the FBI in attempting to keep its information on releases and clearances of suspicion as meticulously as it keeps its arrest records.[17] The court evidenced a belief that the FBI may not be justified in maintaining fingerprint files and arrest records. The court stated:

> Realistically, the FBI cannot be expected to investigate the facts underlying every arrest or detention reported to it; the most it can do is examine the report on its face and, perhaps, investigate further if a complaint is received from the individual concerned. For most of those arrested—too poor, too ignorant, and often too disheartened to complain—the only adequate remedy may lie either in severely curtailing any use of records of arrest, or in eliminating altogether their maintenance in a file associated with the individual's name.[18]

A major portion of the opinion focused on the possible adverse effects which such records could have on the individual:

> Information denominated a record of arrest, if it becomes known, may subject an individual to serious difficulties. Even if no direct

15. 430 F.2d at 490-91.
16. *Id.* at 495.
17. *Id.* at 492.
18. *Id.* at 495 n.51.

> 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.[19]

The court implied, however, that many of these effects may be non-existent, if the dissemination is limited.[20]

In a more recent case, *United States v. Penney*,[21] Judge Alexander in the District of Columbia Court of General Sessions echoed the statements of the circuit court. Penney, who had no prior record of arrests or convictions, was arrested on charges of disorderly conduct and assaulting a policeman. The disorderly conduct charge was never processed, and the government dropped its case on the charge of assaulting a policeman three days later. Penney, concerned that his future attempts to find employment, especially with the government, might be impaired, requested that the record of this arrest be erased. Judge Alexander assented to this request and issued an order prohibiting the FBI from "distributing, communicating, transmitting or otherwise making available" any information on Penney's arrest, including fingerprints or mug shots.[22] The Government petitioned the federal district

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19. *Id.* at 490-91.

20. *Id.* at 492-93.

21. Criminal No. 44939 (D.C. Gen. Sess., Nov. 20, 1970). Although Judge Alexander's action prohibiting the dissemination of Penney's arrest record was essentially a civil action, the court in Morrow v. District of Columbia, 147 F.2d 728 (D.C. Cir. 1969) sanctioned an ancillary civil action in a criminal case:

> . . . in a situation such as the one before us, ancillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter . . . (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

Id. at 740. The Morrow court specifically upheld the expungement of an arrest record on the theory of ancillary jurisdiction in a criminal case.

22. Criminal No. 44939 (D.C. Gen. Sess., Nov. 20, 1970).

court for removal of the case from the Court of General Sessions.[23] This petition was granted by Judge Gesell, and again Penney sought to gain a "complete prohibition on future dissemination of the records, proof that they have been destroyed and list of anyone who received them in the meantime."[24] Although Judge Gesell accepted the Government's jurisdictional argument, the thrust of the decision was simply to afford the FBI an opportunity to expunge Penney's arrest record.

Despite the fact that the *Menard* and *Penney* decisions resulted in the expungement of their respective arrest records,[25] there is no indication of a change in the FBI's basic policy with regard to the dissemination and use of the rap sheets. Each person subjected to the rap sheet procedure must therefore either accept the procedures as they exist or institute a costly suit to rescue his record. In an attempt to rectify this situation in the District of Columbia, *Utz v. Wilson,*[26] a class action, was instituted in the federal district court

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23. The petition for removal filed by the Director of the FBI alleged a right to remove under 28 U.S.C. § 1442(a)(1) (1964), which provides that:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
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> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

Penney properly alleged that the District of Columbia Court of General Sessions was not in fact a state court, but a federal court and that removal was improper. Penney further alleged that jurisdiction was proper in the District of Columbia Court of General Sessions since the action was an ancillary proceeding to a criminal action as sanctioned in Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969). Petition to Remand at 6, Civil No. 3472 (D.C. Cir., Nov. 30, 1970). *See* note 22 *supra.*

24. Washington Post, Nov. 20, 1970, § A, at 16, col. 5.

25. In many instances the courts have indicated that the use of arrest records should be limited to law enforcement situations. In *In Re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Family Ct. 1970), expungement was ordered because there was reason to doubt that the prohibition on access to police records from private employers was being rigidly enforced. In United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967) the court held: "The preservation of these records is an unwarranted attack upon his character and reputation and violates his right to privacy." *Id.* at 970. In State *ex rel.* Mavity v. Tyndall, 66 N.E.2d 755 (Ind. 1946) expungement was granted where the police allowed public disclosure of arrest photographs in a rogues gallery fashion. In Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968), expungement war ordered after the court found no probable cause for arrests of hippies. In Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), the court stated that expungement was justified since "extreme circumstances" exist "where records do not serve to protect society, or their future misuse is likely." *Id.* at 65. In United States v. Kelly, 55 F.2d 67 (2d Cir. 1932), the court denied expungement because there was careful provision to prevent the misuse of records and there was no charge of any improper use in the present case. *Id.* at 70. In McGovern v. Van Riper, 140 N.J. Eq. 341, 54 A.2d 469 (1947), the court took notice of arrest records kept under "lock and key and not subject to public view." *Id.* at 471.

26. Utz v. Wilson, Civil No. 4571 (D.D.C. Jan. 1, 1971).

seeking injuctive relief relying on the Duncan ordinance[27] and constitutional violations.[28] The class consists of all persons arrested and fingerprinted by the District of Columbia Police Department since October 31, 1967, the date the Duncan ordinance was adopted. The class is divided into four subclasses pursuant to Rule 23(c)(4):[29] (1) persons exonerated of the charges against them, (2) persons who are defendants in criminal cases but

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27. Washington, D.C., Duncan Ordinance, Nov. 2, 1967. The Duncan Ordinance is based on the REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (1967). It provides:

> 1. That no record, copy, extract, compilation or statement concerning any record relating to any juvenile offender or relating to any juvenile with respect to whom the Metropolitan Police Department retains any record writing, shall be released to any person for any purpose except as may be provided under D.C. Code, Section 11-1586; provided, that the release of such information to members of the Metropolitan Police Department, and the dissemination of such information by the Metropolitan Police Department, to the police departments of other jurisdictions wherein juveniles apprehended in the District of Columbia reside, shall be authorized, provided further, that the release of such information to individuals to whom the information may relate or to the parents or guardians or duly authorized attorneys of such individuals, shall be authorized in those cases in which applicants therefor present documents of apparent authenticity indicating need for such information for reasons other than employment. The term "employment", in the context of this paragraph, shall not include military service.
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> 2. That unexpurgated adult arrest records, as provided under D.C. Code, Section 4-134a, shall be released to law enforcement agents upon request, without cost and without the authorization of the persons to whom such records relate and without any other prerequisite, provided that such law enforcement agents represent that such records are to be used for law enforcement purposes. The term "law enforcement agent" is limited in this context to persons having cognizance of criminal investigations or of criminal proceedings directly involving the individuals to whom the requested records relate. The term includes judges, prosecutors, defense attorneys (with respect to the records of their client defendants), police officers, Federal agents having the power of arrest, clerks of courts, penal and probation officers and the like. It does not include private detectives and investigators; personnel investigators, directors and officers; private security agents or others who do not ordinarily participate in the process involving the detection, apprehension, trial or punishment of criminal offenders.
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> 3. That, subject to the foregoing, adult arrest records, as provided under D.C. Code, Section 4-134a, shall be released in a form which reveals only entries relating to offenses which have resulted in convictions or forfeitures of collateral.
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> 4. That, subject to the foregoing, adult arrest records, as provided under D.C. Code, Section 4-134a, shall be released in a form which reveals only entries relating to offenses committed not more than 10 years prior to the date upon which such records are requested; except that, where an offender has been imprisoned during all or part of the preceding 10-year period, the record shall include entries relating to such earlier conviction.

28. Complaint for Plaintiffs at 1, Utz v. Wilson, Civil No. 4571 (D.D.C., filed Jan. 1, 1971).

29. FED. R. CIV. P. 23(c)(4) states:

> (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided

awaiting trial, (3) juveniles charged in the District of Columbia Juvenile Court, and (4) persons who have been adjudged guilty of an offense.

Utz's petition represents an attempt to prevent police records from being transmitted to the FBI unless specifically requested or to employers, rather than attempting to directly prevent dissemination by the FBI of rap sheet information to non-law enforcement activities.

Although constitutional grounds are relied upon, it is doubtful that the court will go further than the Duncan ordinance to give the requested relief, since that ordinance specifically prohibits the District of Columbia Police Department from transmitting arrest records to another law enforcement agency, unless that agency has specifically requested the record and represents that it is investigating the person named in the arrest record.[30]

Although the Duncan ordinance prohibits the police department from giving the records in question to non-law enforcement agencies, some of these agencies are authorized recipients of the same FBI rap sheets. By such circumvention, the spirit of the Duncan ordinance has been violated. In addition, the FBI apparently receives District of Columbia Police records in bulk rather than on requests for specific individual's records as required by the Duncan ordinance. As the court in *Menard* stated:

> A government agency may not escape responsibility for improper use of material disseminated by it simply because the improper use is not mandatory and is in fact made by a third party.[31]

Unfortunately, neither court fully discussed the possible constitutional issues involved, despite the fact that they explicitly recognized their presence. However, it is evident from the concern that both courts showed for the possible ill effects on an individual's employment, education and other endeavors, that the constitutional questions which deserve discussion are due process and the right to privacy as embodied by the fourth, fifth, and ninth amendments. The remainder of this article will address itself to the above issues, followed by a critique of the present record-keeping system.

Denial of Property Without Due Process of Law

Both the fifth and fourteenth amendments state that no person shall be deprived of life, liberty, or property without due process of law.[32] This guar-

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into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

30. *See* note 27, *supra.*

31. 430 F.2d 486, 492 n.34 (D.C. Cir. 1970). *See also* National Student Ass'n v. Hershey, 412 F.2d 1103 (D.C. Cir. 1969).

32. U.S. CONST. amends. V, XIV.

anty has been described as the very essence of ordered justice,[33] and that in its absence the right of private property could not exist in the sense known to our laws.[34] The primary purpose of the due process clause is to insure fair and orderly administration of law.[35] It was not designed to interfere with the power of federal or state governments to protect the lives, liberty, and property of its citizens or with the exercise of that power in the administration of the legal process.[36]

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33. Brock v. North Carolina, 344 U.S. 424, 428 (1953). In a state criminal prosecution on motion of the prosecutor, a mistrial was declared when two witnesses on whom the state based its case refused to testify under the self incrimination section of the fifth amendment. In a second trial for the same offense, the same defendant was convicted. It was held that the due process clause of the fourteenth amendment was not violated, since it was in the interest of justice that the first trial was terminated. The Court based its decision in part on a test announced in Palko v. Connecticut, 302 U.S. 319 (1937).

> Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our policy will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"? . . . The answer must surely be "no."

Id. at 328. The Palko approach to basic constitutional law has, however, been rejected. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969). *See generally* Farrar, *Double Jeopardy and Due Process*, 23 U. MIAMI L. REV. 531 (1969).

34. Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913). A provision in the judicial order of General Henry during the United States military occupation of Puerto Rico which retroactively reduced the period for prescriptive title to real estate previously set by law was held to be a deprivation of property without due process of law.

35. International Shoe Co. v. Washington, 326 U.S. 310 (1945). The business activities of an out of state corporation within a state provided sufficient contacts or ties to make it reasonable, just, and in harmony with the due process requirements of the fourteenth amendment to make the corporation amenable to suits within the state:

> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

Id. at 319. *See, e.g.*, Frankfurter, *Memorandum on "incorporation" of the Bill of Rights into the due process clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965).

36. *In Re* Converse, 137 U.S. 624, 632 (1891). It was held that the State of Michigan had the power to protect the property rights of its citizens by imposing criminal penalties for violations of those rights. A conviction on an embezzlement charge was upheld as within the state's jurisdiction and as a proper administration of criminal justice consistent with the fourteenth amendment. The Court in Howard v. Kentucky, 200 U.S. 164 (1906), attempted to illuminate the mandates of the fourteenth amendment:

> The provision of the Fourteenth Amendment that no State shall deprive any person of life, liberty or property without due process of law, having brought within the Federal jurisdiction and power the protection against state action, the judicial power of the Nation necessarily extends thereto; and it is not requisite for jurisdiction that the right or thing claimed come from the law of the United States; though it comes from the state law, it is protected from unlawful state action. It must not be so construed, however, as to interfere with the State in its enactment and local administration of the criminal law, nor

The fact that a person may not be hired or admitted to school because of the adverse criminal record which the FBI maintains constitutes a denial of liberty and property. While it might be contended that these records are only circulated to governmental agencies, the recent regulation published by the Attorney General contradicts such an inference.[37] Even if the records are restricted to only federal government agencies, this might cause a person to be denied a job should he apply to one of these agencies. The reluctance of employers—both governmental and private—to hire persons with criminal records enhances the argument that if the FBI maintains criminal identification files, they must be accurate and clearly reflect the final disposition of the case prior to release to other agencies.

The importance of indicating the final disposition on the rap sheet is illustrated by a recent incident in New York. In 1969 New York passed a statute requiring all employees of securities firms fingerprinted and providing that the fingerprints should be sent to the state's Attorney General "for appropriate processing."[38] Several hundred employees, who submitted themselves for fingerprinting, were found to have criminal records. Shortly thereafter they were dismissed from their employment.[39] The resultant injustice was that over half of those fired had no conviction records, rather only arrest records.[40] The New York State Identification and Intelligence System is authorized to receive information from the FBI under the federal statute providing for dissemination of such records,[41] but for some unknown reason the information was made available to the employer by that agency.

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to confine it to any special mode of proceeding, so long as said law, as enforced by the State, affords equal protection to all persons within its jurisdiction, similarly situated, and is not violative of the fundamental and inalienable rights that are essential to the protection of life, liberty and property. *Id.* at 165-66.

37. 28 C.F.R. § 0.85(b) (1970).

38. N.Y. GEN. BUS. LAW § 359-e(12) (McKinney Supp. 1970):

> All persons including partners, officers, directors and salesmen employed by a member or a member organization of a National Security Exchange, registered with the federal securities exchange commission and any employee of a clearing corporation affiliated with any such registered National Security Exchange employed on or after September first, nineteen hundred sixty-nine, who are regularly employed within the State of New York shall, as a condition of employment, be fingerprinted. Every set of fingerprints taken pursuant to this subdivision shall be promptly submitted to the attorney general for appropriate processing. The department of law shall collect from a member or member organization of a national security exchange or a clearing corporation affiliated with any such registered national security exchange submitting fingerprints to the attorney general for processing a fee of five dollars for each set of fingerprints submitted.

39. N.Y. Times, Feb. 5, 1970, at 1, col. 2; Wall Street J., Feb. 5, 1970, at 17, col. 3.

40. *Id.*

41. *See* 28 U.S.C. § 534(a)(2) (Supp. V, 1970).

One may reasonably conclude that the federal statute, which calls for cancellation of an agency's privilege to receive such information upon unauthorized dissemination, is either not mandatory or not enforced. Certainly, it is arguable that those employees fired based on their arrest records were denied property without due process of law. Concededly, the state has an obligation to protect the lives, liberty, and property of its citizens. However, it seems unreasonable that the states' interests require an employee's dismissal on the basis of a mere arrest record, especially since the employee was eventually exonerated. It cannot be said that a legally innocent man, *i.e.*, one not convicted, is a danger to another citizen or the community.

An effect of due process is to prevent the governmental taking of one person's property and transferring it to another, contrary to settled concepts and usages of procedure, without notice and opportunity for a hearing.[42] A statutory attempt to accomplish such a change of ownership would be considered a violation of due process which could not be defended as a proper exercise of police power.[43] By allowing the rap sheet to be disseminated to the various agencies described by the new regulation,[44] the statute places the guaranty in a perilous position. The power to deny a person his rightful employment is indeed a dangerous weapon, and the situation should be closely analyzed before used. As illustrated in this section many employees have lost their jobs, simply because of adverse criminal arrest records. As stated in *Morrow v. District of Columbia*:[45]

> The main evil produced by dissemination of arrest records thus seems to be the adverse effect on job opportunity. To this extent, it appears that the Duncan Report rules would be a good rule of thumb as to the appropriate scope of a court order prohibiting dissemination of arrest records. However, other evils, such as unjustified invasion of privacy, particularly where innocent persons are arrested, may result from such dissemination in particular

42. Ochoa v. Hernandez y Morales, 230 U.S. 139, 161 (1913).

43. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (employment of the police power of a state to violate a citizen's right to marital privacy deemed unconstitutional); Daugherty v. Thomas, 174 Mich. 371, 376-77, 140 N.W. 615, 620-21 (1913) (a Michigan statute providing that the owner of a motor vehicle is liable for any injury caused by negligent operation thereof by any person unless the vehicle is stolen was held to be unconstitutional as depriving the owner of his property without due process of law. Since the statute renders an owner liable for damages caused by a mere stranger or a willful trespasser, it is not a proper exercise of the state's police power). *See also* Burdick v. People, 149 Ill. 600, 601, 36 N.E. 948, 949-51 (1894) (a state statute allowing only certified brokers to sell railroad and steamship tickets was upheld as a reasonable and proper exercise of a state's police power since the purpose of the statute was to prevent frauds upon travelers).

44. 28 C.F.R. § 0.85(b) (1970).

45. 417 F.2d 728 (D.C. Cir. 1969).

> cases, indicating the possible need for a flexible rather than a fixed rule.[46]

The problem is heightened when a person is the victim of a mass arrest, is never prosecuted, and loses a job because of an arrest record which does not reflect the subsequent exoneration. A statute permitting such results is constitutionally suspect.

Privacy and the FBI Rap Sheet

In 1890 Samuel Warren and Louis Brandeis published an article strongly advocating a right to privacy which should be protected by the courts.[47] By carefully tracing prior case law allowing recovery under the principles of defamation, property rights, and breach of confidence and contract, the two authors argued that in reality it was privacy that the courts were protecting.[48] By their article, they attempted to convince the courts that a doctrine of privacy would be the most appropriate way to resolve cases of disclosure of private information. Gradually, the courts began to follow the suggestion of the article, and in some instances cited it as precedent.[49] Today, the protection of privacy has been divided into four basic areas: (1) protection against the intrusion into the private affairs of an individual; (2) protection against public disclosure of embarrassing private facts concerning an individual; (3) protection against publicity which places an individual in a false light; and (4) protection against the appropriation of an individual's name or likeness for money.[50] The first two areas are the most relevant to the privacy problem with regard to the maintenance of FBI rap sheets.

In early cases the protection against intrusion was directed only toward physical intrusion or physical searches of an individual's person. As a result the protection was only an extention of the tort principles of trespass. Eventually, the protection was held to encompass various types of sensory intrusion, such as peering at individuals through windows, eavesdropping and wiretapping.[51] In *Zimmerman v. Wilson*,[52] the intrusion doctrine was extended to the area of personal records. *Zimmerman* held that an unauthorized prying into the plaintiff's bank records constituted a wrongful inva-

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46. *Id.* at 742.
47. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).
48. *Id.* at 195-200.
49. *See, e.g.*, Katz v. United States, 389 U.S. 347, 350 n.6 (1967); Griswold v. Connecticut, 381 U.S. 479, 510 n.1 (1965).
50. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).
51. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); Smayda v. United States, 352 F.2d 251 (9th Cir. 1965), *cert. denied*, 382 U.S. 981 (1966).
52. 81 F.2d 847 (3d Cir. 1936), *modified*, 105 F.2d 583 (3d Cir. 1939).

sion of his privacy.[53] This case received subsequent disapproval by Judge Learned Hand in *McMann v. SEC*.[54] Although *Zimmerman* was not expressly over-ruled in *McMann* it consistently has been held to be restricted to its facts. Because of the technological advances in eavesdropping and surveillance, the concern for protection of privacy has increased. Since the Constitution does not expressly provide a right to privacy, the legislature and courts have interpreted it in a way that affords protection from an invasion of privacy by government agents. Unrestrained searches and seizures,[55] surreptitious eavesdropping,[56] and wiretapping,[57] compelled submissions to lie detector tests,[58] and truth drugs[59] are all examples of violations of an individual's interest in the integrity of his person. It is argued that since the above methods of obtaining information are without personal consent, they constitute violations of his right to privacy even though the information obtained is not such that he particularly cares whether it is kept secret. In recent years the interests of privacy have received increased constitutional protection against even the most common invasions.[60]

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53. *Id.* at 849.
54. 87 F.2d 377, 379 (2d Cir. 1937).
55. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961).
56. *See, e.g.*, Berger v. New York, 388 U.S. 41 (1967).
57. *See, e.g.*, Spinelli v. United States, 393 U.S. 410 (1969).
58. *See, e.g.*, Mallory v. United States, 345 U.S. 449 (1957).
59. *See, e.g.*, Townsend v. Sain, 372 U.S. 293 (1963).
60. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) where a conviction overturned since some of the evidence was obtained in violation of the petitioner's fourth amendment rights of privacy and freedom from unwarranted searches and seizures. FBI agents obtained the illegal evidence by a non-penetrating electronic listening and recording device attached to the outside of a public telephone booth. The right to privacy in a public telephone booth was held to include the right to exclude the "uninvited ear," since one entering such a place expects to be seen but not to be heard by outsiders. In Camara v. Municipal Court, 387 U.S. 523 (1967) the court reversed a conviction based on a San Francisco statute providing criminal punishment for refusing to permit warrantless administrative searches. The Court held that the public purpose of the inspection ordinance did not outweigh the rights guaranteed by the fourth amendment. In Griswold v. Connecticut, 381 U.S. 479 (1965) a Connecticut statute making it a crime for any person to use any drug or device to prevent conception was held to contravene the fourteenth amendment and the constitutional right to privacy. The right to marital privacy was held to be within the penumbra of specific guarantees of the Bill of Rights. In Giancana v. Johnson, Civil No. 63 C 1145 (N.D. Ill. July 22, 1963), the plaintiff was under twenty-four hour surveillance by the FBI. FBI agents observed him at his home and followed him as he went about his private affairs including going to places of public accommodation such as restaurants, stores and golf courses. Judge Austin of the district court granted a preliminary injunction limiting the methods of surveillance used by the FBI agents based on plaintiff's right to privacy under the fourth and fifth amendments.

Four days after the temporary injunction was issued by Judge Austin, the Seventh Circuit stayed the order. Giancana v. Hoover, 322 F.2d 789 (7th Cir. 1963). The court did so because "[a] failure of jurisdiction appears on the face of the amended complaint." Moreover there was no allegation that plaintiff was damaged in an amount exceeding $10,000 as required by 28 U.S.C. § 1331 (1964). "Defendants . . . are a

The question remains whether the maintenance of the rap sheet infringes on the right to privacy. To fully appreciate the concept of a right to privacy, one should consider the opinions in *Griswold v. Connecticut.*[61] Justice Douglas, speaking for the majority, stated:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[62]

The fact that *Griswold* applied the right to privacy to a new zone, *i.e.*, the marital relationship, supports the argument that there are other zones of privacy which need protection. In discussing the reason for the inclusion of the ninth amendment in the Constitution, Justice Goldberg stated in his concuring opinion:

> It was proffered to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.[63]

The draftsmen could not have anticipated the existence of a criminal record system, as developed by the FBI, and could not, therefore, foresee the possi-

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part of the executive department of the United States and they are not subject to supervision or direction by the courts as to how they shall perform the duties imposed by law upon them. . . . [Otherwise there] would be an unwarranted interference and intrusion upon the discretion vested in this case, for instances, in the director of the Federal Bureau of Investigation." *Id.* at 790.

The injunctive order of the District Court was reversed in a subsequent hearing on the ground that the lower court lacked jurisdiction because of the requirement of an allegation of $10,000 damages. Giancana v. Johnson, 335 F.2d 366 (7th Cir. 1964). In his dissent, Judge Swygert stated:

> It is incongruous to hold that a formal allegation of the amount in controversy is necessary when personal liberties of the magnitude alleged in the complaint and found by the district court are involved. To require a dollar value to be specifically averred in these circumstances is to exalt form over substance. . . . [T]he district court could infer, contrary to what the majority indicates, that the amount in controversy exceeded $10,000.

Id. at 371.

61. 381 U.S. 479 (1965).

62. *Id.* at 484.

63. *Id.* at 488-89.

ble violations of an individual's rights. The clear intention of the ninth amendment is to act as a "catch-all" provision in order to protect unenumerated rights which might be subject to government infringement.

Whether the FBI rap sheet falls within a protected zone of privacy depends on whether it is a public or private document, and the importance of maintaining and disseminating these records in the public interest. Generally, governmental records whose accessibility are not legislatively restricted are considered public, and not protected from disclosure. Such records as birth certificates, military service records, court testimony, police measurements and fingerprints which are maintained for administrative reasons fall within this category. However, government records that are considered confidential or which have access restrictions, are usually classified as private. The FBI rap sheet and tax and census records fall within this category and are protected from public disclosure. As we previously discussed, there is some question as to the extent of protection against public disclosure afforded the rap sheet. The restrictions are apparently insufficient, since there is evidence that employers have gained access to these documents.[64]

Admittedly, there are situations where the public interest requires that the individual's right to keep personal information private must be supplanted. The reasonable exercise of the police power, which includes fingerprinting and other record-taking, is one of these situations.[65] The courts and legislatures have had to wrestle with the problem of balancing the value of privacy against other social values. Every attempt is made to maximize both values. *Menard* and *Penney* provide excellent examples of courts attempting to salvage a valuable system for maintaining criminal records, while protecting the individual against the adverse use of his record.

Conclusion

Clearly, the FBI rap sheet serves a valuable function in criminal investigation. It provides a centralized source of information on those arrested for crime and a record of their fingerprints. The main problems with these records arise from their incompleteness and dissemination. The records are incomplete to the extent they do not always contain a final disposition. As previously described, every year a large number of persons guilty of no criminal activity are arrested and charged with crimes. Some have unjustly acquired arrest records "without even the excuse of an honest and unavoidable mistake by the police."[66] Mass arrests during demonstrations and

64. *See, e.g.*, text accompanying note 37 *supra*.
65. *See generally* Annot., 14 A.L.R.2d 750 (1950).
66. Menard v. Mitchell, 430 F.2d 486, 493 (D.C. Cir. 1970).

dragnet arrests further illustrate situations where innocent bystanders are subject to arrest. The court in *Menard* described how in the District of Columbia thousands of persons had been once arrested for investigation and then released, but that their records often remained on file.[67] Unless the FBI receives notfication of a final disposition, the record will continue to reflect only the arrest.[68] The absence of a final disposition is a persuasive reason to protest the wide dissemination of rap sheets, especially if it is made available to prospective employers or schools.

It is suggested that the FBI severely curtail the availability of rap sheets to private parties and governmental agencies other than those directly involved in law enforcement. The incompleteness of the records necessitates such a restriction. The tendency by non-law enforcement agencies to misconstrue the contents of the rap sheet and to place emphasis on mere arrests instead of convictions supports such a restriction. If the FBI renovates its present system to provide for the updating of its records and permits only those records which are complete, *i.e.*, for every arrest the record shows a disposition to be disseminated to other agencies, then it is arguable that the individual's rights are sufficiently protected. Even after such renovation, the FBI should be extremely cautious when circulating these records to other governmental agencies, and it should be certain to scrutinize each individual request for the rap sheets. The implementation of such a controlled system is necessary to maintain the balance between the individual's privacy and due process of interests with the FBI's interest in continuing a centralized system of criminal identification records.

Dayton Michael Cramer
Michael O. Sturm

67. *Id.*
68. *Id.*

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D.C. 20537

The following FBI record, NUMBER , is furnished FOR OFFICIAL USE ONLY. Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. WHERE FINAL DISPOSITION IS NOT SHOWN OR FURTHER EXPLANATION OF CHARGE IS DESIRED, COMMUNICATE WITH AGENCY CONTRIBUTING THOSE FINGERPRINTS.

Contributor of Fingerprints	Name and Number	Received Arrested or	Charge	Disposition

Notations indicated by * are NOT based on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.

John Edgar Hoover
Director