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Criminal Procedure—Retention of Arrest Record Data—The FBI Has No Statutory Authority to Maintain in Its Criminal Files Information Concerning an Encounter with the Police Which Did Not Constitute an Arrest—Menard v. Saxbe

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CRIMINAL PROCEDURE—RETENTION OF ARREST RECORD DATA—THE FBI HAS NO STATUTORY AUTHORITY TO MAINTAIN IN ITS CRIMINAL FILES INFORMATION CONCERNING AN ENCOUNTER WITH THE POLICE WHICH DID NOT CONSTITUTE AN ARREST—*Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

In *Menard v. Saxbe*, plaintiff instituted an action against the FBI and the Attorney General seeking expungement[1] of his arrest record or, in the alternative, an order limiting distribution of his record by the FBI.[2] The Court of Appeals for the District of Columbia was confronted with a novel situation: Should expungement be ordered in a case where the underlying arrest was not violative of the arrestee's constitutional rights, and, if so, should such action be maintainable against the FBI, whose only involvement was gathering and disseminating criminal records supplied by the arresting agency?

The court recognized that expungement of records engendered by police action clearly violative of constitutional protections has been ordered in the past.[3] Menard's situation was distinguishable from these cases since his arrest was supported by sufficient probable cause and

1. Expungement has been defined as

> not simply a lifting of disabilities attendant upon conviction and a restoration of civil rights . . . . It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication or arrest in the present case, and thereby restoring to the regenerate offender his *status quo ante*.

Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 149. In the federal judicial system this remedy is deemed "inherent and is not dependent on express statutory provision, and it exists to vindicate substantial rights provided by statute as well as by organic law." 498 F.2d at 1023. Another description of the remedy is that the "memory of the event is blotted out permanently, with no possibility of refreshment or revival under any circumstances." Kogan & Loughery, *Criminology: Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L.C. & P.S. 378, 379-81 (1970). *See also* Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Bilick v. Dudley, 356 F. Supp. 945 (S.D.N.Y. 1973); Gomez v. Wilson, 323 F. Supp. 87 (D.D.C. 1971); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C., 1969); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

2. 498 F.2d at 1019.

3. *Id.* at 1023, *citing* Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973) (mass arrests which patently offended the fourth amendment), and Gomez v. Wilson, 323 F. Supp. 87 (D.D.C. 1971) (repeated vagrancy observation forms filled out where police lacked suspicion).

was in no other way unconstitutional or unlawful.[4] But even assuming unconstitutional conduct by the police, the court was nevertheless disinclined to allow expungement actions against the FBI. Influenced by practical considerations, the court stated that expungement of arrest records should be pursued in

> actions brought against appropriate officials of the government whose officers had responsibility for making the arrest, initiating the arrest record, maintaining the arrest record, and determining the consequences, as in maintaining prosecutions.[5]

Judge Leventhal, noticing that Menard would still be subjected to the disabilities which accompany dissemination of criminal information by the FBI, even though his record could not truly be classified as "criminal," opined that the plaintiff should be accorded some relief.[6] Faced with the opportunity of passing on the constitutionality of retention and dissemination of criminal files which indicate an arrest where only a detention has occurred, Judge Leventhal seized the path of least resistance, statutory interpretation, and reached a limited holding: The FBI has an obligation to take into account reliable information and update its files, and once an encounter is deemed a detention, rather than an arrest, the obligation extends to the removal of the record from the *criminal* to the *informational* files.[7]

Since Judge Leventhal resolved the case upon statutory grounds, *Menard v. Saxbe* contains an exhaustive review of the statutory authority which supports the operations of the Identification Division of the FBI.[8] Criminal files "consist of those prints submitted in connection with an arrest or conviction."[9] Additional files are maintained which are denominated as "applicant files" and "general and/or neutral identification files."[10] Some astonishing statistics are revealed in the text of the decision:

> 1. Two hundred million fingerprint cards are currently on file with the FBI.[11]

4. Menard v. Mitchell, 328 F. Supp. 718, 723 (D.D.C. 1971).
5. 498 F.2d at 1024.
6. See text accompanying notes 14-19 *infra.*
7. 498 F.2d at 1028. See text accompanying notes 42-43 *infra.*
8. 498 F.2d at 1020-22. *See* 28 U.S.C. § 534 (1970) and 28 C.F.R. § 0.85(b) (1974).
9. 498 F.2d at 1021. See note 43 *infra.*
10. 498 F.2d at 1021 n.6.
11. *Id.* at 1021.

2. Nineteen million of the fingerprint cards relate to criminal activity.[12]

3. During the fiscal year 1970 over 29,000 fingerprint cards were processed *daily* by the Identification Division of which 13,000 were arrest submissions and 16,000 were non-criminal submissions.[13]

It comes as no surprise that a system which began in 1924[14] is now, in the words of District Court Judge Gesell, "out of effective control."[15] Dissemination of these arrest records, which was the concern of Judge Gesell, culminated in the following criticism:

> Even more troublesome is the fact that the Division has little opportunity to supervise what is actually done with the arrest records it disseminates. It requires that a proper purpose be stated by the agency requesting information but what is in fact done with the information as a practical matter cannot be constantly checked. It is apparent that local agencies may on occasion pass on arrest information to private employers.[16]

It is the policy of the FBI to disseminate records to all "authorized agencies."[17] The potential for abuse becomes apparent with the realization that "authorized agencies" are defined to include "all agencies of the federal government, all state and local law enforcement agencies, and all state and local agencies authorized by statute or regulation to submit fingerprints to the FBI."[18] The potential for abuse is further

12. *Id.*

13. *Id.* at 1022.

14. The FBI has maintained fingerprint and arrest records since 1924. *Id.* at 1020.

15. 328 F. Supp. at 727.

16. *Id.* at 722.

17. 498 F.2d at 1021.

18. *Id.* at n.7. A concrete example of the potential for abuse can be found in California Penal Code section 11105(b) (CAL. PENAL CODE § 11105(b) (West Supp. 1974)) wherein the California Bureau of Criminal Identification and Investigation is authorized to disseminate records to many categories of individuals including "peace officers." The term "peace officers" is defined by Penal Code sections 830.1-.6 (CAL. PENAL CODE §§ 830.1-6 (West 1972 and Supp. 1974)) to include over forty separate categories of public employees. Such diverse occupations as hospital administrators, cemetery authorities, the Chief of all Services of Consumer Affairs, the members of the Wildlife Protection Branch of the Department of Fish and Game, the State Forester and his designees, employees of the Department of Motor Vehicles, the Deputy State Fire Marshall, the Inspectors of the Food and Drug Bureau, and Park Rangers are included.

Because section 11105(b) imposes no criminal or civil penalties for improper dissemination of records, there exists a substantial and unauthorized flow of information to public and private agencies. The functional aspects of this system have alerted commentators to the abuse inherent in such a system where the pay off for invading a computerized dossier is great:

Perhaps the greatest dangers lie in the *information buddy system* that promotes the

increased by the Bureau's practice of ignoring an individual's inquiry or request to review and correct his own file. Inaccuracies are expected to be resolved at the local level and then forwarded by the local entity to the FBI.[19]

Factually, the saga of Dale Menard, a 19-year-old college student, began in the early morning hours of August 10, 1965.[20] He was arrested on suspicion of burglary by two Los Angeles policemen who had responded to a call from a rest home, reporting a prowler. Patrolling the vicinity, they spotted Menard dozing on a park bench. As they approached him, a wallet belonging to someone else and containing $10 was found on the ground. Menard denied any knowledge of the wallet. He explained that following a visit to friends in the vicinity, he had walked to the Sunland Park at approximately 11:30 p.m. to wait for a friend who was to meet him. When his friend failed to arrive, Menard dozed intermittently on the park bench, once crossing the street to look for a clock through the window of a rest home. Despite his friend's subsequent arrival and corroboration of Menard's account, the officers arrested, booked, and fingerprinted him at the stationhouse. He was held for two days on suspicion of burglary and then released when the police were unable to find a crime with which to connect him. During the two days that Menard was detained, a criminal identification card on him was prepared, and pursuant to California Penal Code section 11115,[21] the Los Angeles police forwarded the following report to the FBI:

Date Arrested or received—8-10-65
Charge or offense—459 PC Burglary

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dissemination of personal information throughout the government and the private sector. . . . The result is a subterranean information exchange network that functions on a mutual back-scratching basis or can be invoked for a fee. This network's existence means that decisions are being made about us based on reports from unknown sources we can never confront that contain information whose accuracy we can never challenge.

Miller, *Computers, Data Banks, and Individual Privacy: An Overview*, 4 COLUM. HUMAN RIGHTS L. REV 1, 10 (1972).

19. 498 F.2d at 1022. At most, the FBI will refer the individual to the pertinent local agency.

20. *Id.* at 1019.

21. CAL. PENAL CODE § 11115 (West Supp. 1974) provides:

In any case in which a sheriff, police department or other law enforcement agency makes an arrest and transmits a report of the arrest to the Department of Justice or to the Federal Bureau of Investigation, it shall be the duty of such law enforcement agency to furnish a disposition report to such agencies whenever the arrested person is transferred to the custody of another agency or is released without having a complaint or accusation filed with a court.

> Disposition or Sentence—8-12-65—Released—Unable to connect with any felony or misdemeanor at this time.[22]

Familial concern over whether this encounter with the police resulted in a criminal record for young Menard engendered exhaustive correspondence with both the Los Angeles police and the FBI. Both replied that they were powerless to expunge the record from the FBI's files; however, the filing of the complaint in this action prompted the FBI, on January 16, 1968, to order a special agent to review the file.[23] Relying on California Penal Code section 849,[24] the FBI amended the record to read:

> Disposition of Sentence—8-12-65—Released—Unable to connect with any felony or misdemeanor—in accordance with 849b(1)—not deemed an arrest but *detention* only.[25]

Menard was unsatisfied with this change and proceeded to seek a judicial remedy to expunge his record of detention on the theory that the maintenance and use of his arrest record violated several of his constitutional rights: the right to privacy, due process, and freedom from unreasonable search and seizure.[26]

Originally, the district court granted summary judgment for the defendants;[27] however, the court of appeals reversed the summary judgment because of "the necessity for a clear and complete factual record as a basis for adjudication."[28] The court was concerned that the punishment which attaches to a criminal record would continue to be meted out even though Menard had been exonerated.[29]

On remand, Judge Gesell chose to focus on the legality of existing FBI practices which permit the dissemination of arrest record data.[30] Seeking to check the pervasive power of the national government, he narrowly interpreted 28 U.S.C. § 534—the statutory authority for the compilation of fingerprint files—and concluded that Congress "never

22. 498 F.2d at 1019-20 n.2.

23. *Id.* at 1020.

24. CAL. PENAL CODE § 849(c) (West Supp. 1974) states:

> Any record of arrest of a person released pursuant to paragraphs (1) and (3) of subdivision (b) shall include a record of release. Thereafter, such arrest shall not be deemed an arrest, but a *detention* only.

(Emphasis added).

25. 498 F.2d at 1020 n.2.

26. *Id.* at 1023.

27. Menard v. Mitchell, 430 F.2d 486, 488 (D.C. Cir. 1970).

28. *Id.* at 494.

29. *Id.*

30. 328 F. Supp. at 725.

intended to or in fact did authorize dissemination of arrest records to any state or local agency for purposes of employment or licensing checks,"[31] and this was true whether or not the record reflected a later conviction.[32] However, the court held that there was "a compelling necessity to furnish arrest data to other law enforcing agencies for strictly law enforcement purposes"[33] since such records play a "significant role in the prosecutor's exercise of discretion and greatly aid in setting bond, determining sentences and facilitating the work of penal and other institutions of corrections."[34] Due process safeguards are activated when the record is used within the criminal process. This internal check is completely absent when public and private employers receive the information and utilize it in conjunction with a job application.[35] Thus, while declining to order the expungement of Menard's record, Judge Gesell limited its distribution to law enforcement agencies for law enforcement purposes.[36]

With six years invested in his suit against the FBI, Dale Menard was not content with this decision and again appealed. In *Menard v. Saxbe*, he again asserted his right to have the files of the FBI purged of all information concerning his arrest and detention by the Los Angeles police on August 10, 1965.[37] The court of appeals, after a brief review of the prior proceedings, held that Menard was entitled to an order directing the removal of his record from the FBI *criminal files*.[38]

The court, incorporating into its opinion the statutory analysis of Judge Gesell,[39] concluded that the Identification Division of the FBI has the duty to maintain an appropriate separation between the criminal identification files and other data the department is authorized to maintain.[40] Since Menard was exonerated after his initial arrest and

31. *Id.* at 726.
32. *Id.* at 727.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 728. A statutory exception was left intact permitting dissemination to agencies of the federal government for purposes of employment. *See* Exec. Order No. 10,450, 3 C.F.R. § 936 (1949-53 Comp.); 5 U.S.C. § 7311 (1970).
37. 498 F.2d at 1022-23.
38. *Id.* at 1038.
39. *Id.* at 1020-21.
40. *Id.* at 1028-29. Judge Leventhal was initially confronted with the question of whether or not Menard had stated a justiciable claim: Is the retention of an arrest record a cognizable legal injury or is it merely to be suffered on the personal level? He concluded:

"The principle is well established that a court may order the expungement of rec-

since the encounter was deemed a "detention only,"[41] "the FBI has the responsibility to expunge the incident from its criminal identification files."[42] The court, clarifying the scope of its holding, stated:

> We are not in this case enjoining the FBI from maintaining Menard's fingerprints in its neutral non-criminal files, provided there is no reference of any kind to indicate that the prints originated in a source for criminal files.[43]

It remains to be seen whether the FBI or future arrestees will be satisfied with the latest disposition of this case. Should the issue be revived, and the constitutional issue confronted, the *Menard* court's not-so-subtle warning may be cited:

> Our conclusion should not be taken to reflect a judgment of the insubstantiality of Menard's [constitutional] claims. On the contrary, the gravity of those claims underscores the need for their adjudication between the appropriate parties. Conventional doctrines of venue may operate to localize the forum, but will not interfere with a call on cognizant Federal courts in the venue when administrative remedy is unavailing.[44]

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ords, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights."

Id. at 1023, *quoting* Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

41. See note 24 *supra.*

42. 498 F.2d at 1028.

43. *Id.* at 1030. The court emphasized the difference between "neutral noncriminal files" and "criminal files." Essentially, the former grouping can be broken down into two separate categories: "general identification files" (*id.* at 1021 n.6) and "applicant files" (*id.* at 1021).

The "general identification files" contain the prints obtained from tourists who have visited the FBI facilities. These prints are made available to private groups such as insurance companies who are involved with the claims of missing or deceased persons. The scope of the "applicant files" is much broader. As the name implies, these files are a repository for all prints obtained in conjunction with, but not limited to, federal employment applications and induction into the armed services.

By far the most voluminous files, the "criminal files," contain the prints submitted in conjunction with an arrest or conviction. See text accompanying notes 10-13 *supra.* While the aforedescribed system of print collection, filing, and preservation may be disconcerting to some because of its scope, it is an implementation of an express statutory power found at 28 U.S.C. § 534(a) (1970), which provides:

(a) The Attorney General shall—

(1) acquire, collect, classify, and preserve identification, criminal identification, crime and other records. . . .

44. 498 F.2d at 1026. In a revealing footnote, the court voiced concern that:

Although the record before us does not contain data concerning the computerization of the FBI's records, it does reveal that a computerization program is proceeding

Judge Leventhal, however, avoided confronting the constitutional issues by relying on the alternative judicial practice of statutory interpretation:

> We need not decide whether or to what extent the Constitution forbids the Government from contributing to the harm to the individual that may attend maintenance of a criminal file showing, as an arrest, what was only a chance encounter. We need not reach this question, for we place our decision on statutory grounds. There is a settled rule for statutory interpretation to avoid serious constitutional issues and this properly has some application to the case at bar.[45]

Whether or not one agrees that this is indeed the correct and most judicious manner to decide the case depends somewhat upon one's own conceptualization concerning the function of the judicial system within society. For the court may just as easily adopt the role of protectorate of the civil liberties of the populace against encroachment by the government.[46] In fact, it is this latter role which has been urged by those commentators and some lower courts who have become increasingly concerned about the serious effect that the retention of arrest record data has upon one's economic, social and political mobility in American society.[47]

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apace, increasing the Division's effectiveness, and enhancing its capacity for both good and harm.

Id. at 1026 n.29.

It might be noted that at this time "approximately 142 computerized information and communication systems are either being planned, being implemented or are currently operational in criminal justice agencies in . . . [California]." D. MARCHARD, CRIMINAL JUSTICE AND CIVIL LIBERTIES—THE STATE OF CALIFORNIA 6 (1973) [hereinafter cited as MARCHARD]. For a history of the development of this state-wide system, see Thornton, *White v. State of California and Penal Code Sections 11126-11127: A Pre-Computer Privacy Case and the Legislative "Answer,"* 47 L.A.B. BULL. 320, 327-28 (1972).

45. 498 F.2d at 1029.

46. Such an approach was adopted in Griswold v. Connecticut, 381 U.S. 479 (1965), where the Court, in invalidating a Connecticut statute regulating the use of contraceptives, noted that:

> Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

Id. at 485, *citing* NAACP v. Alabama, 377 U.S. 288, 307 (1964).

47. It has been succinctly noted that:

> Widespread use of the arrest record . . . can inflict definite and demonstrable harms on the arrested individual. Inside the criminal justice system, he may be subjected to unfair treatment by the police, prosecutors, and courts; outside the system, he may suffer damage to his reputation and to his economic and psychological well-being. It is questionable whether any such consequences should be permitted to occur to a person who has not been judged guilty but who is presumed innocent.

Judicial preference for statutory over constitutional interpretation in this case engendered a disquieting note. Shortly after Judge Gesell's ruling prohibiting the dissemination of Menard's FBI record to prospective employers,[48] congressional forces mobilized to vitiate the ruling. Senator Alan Bible (D. Nevada), through a series of legislative machinations, debilitated the *Menard v. Mitchell* decision by authorizing "the FBI to disseminate arrest records for non-law enforcement purposes through June 30, 1973."[49] Certainly, if Judge Gesell's opinion could arouse such legislative resistance, the impact of *Menard v. Saxbe* will even be more resounding. So long as the courts side-step the constitutional issues which saturate the problem of record retention and, instead, narrowly interpret statutory authorizations, such legislative machinations can be expected.

Given the possibility that the statutory basis upon which the *Menard* decision stands will be eroded by congressional enactment, courts must be prepared to resolve the constitutional arguments. Where the arrest record was prepared as the result of an unconstitutional arrest or where the arrest record has been improperly used, courts have not been reluctant to order expungement.[50] However, where there is no government misconduct, the courts have been faced with a more complex issue. Those courts addressing themselves to the problem have generally extended the right to privacy recognized in *Griswold v. Connecticut*[51] to government data retention. While "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . are included in the guarantee of personal privacy,"[52] these

Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 853 (1971). *See* Karabian, *Record of Arrests: The Indelible Stain*, 3 P.L.J. 20 (1972); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470 (1971). Judicial concern has found expression in Davidson v. Dill, 503 P.2d 157 (Colo. 1972) and Eddy v. Moore, 487 P.2d 211 (Wash. Ct. App. 1971).

48. 328 F. Supp. at 726. See text accompanying note 31 *supra.*

49. *See* MARCHARD, *supra* note 44, at 192-93. *See also* 498 F.2d at 1019 n.1.

50. *See* Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967).

51. 381 U.S. 479 (1965).

52. Roe v. Wade, 410 U.S. 113 (1973). Constitutionally protected personal privacy is most often found in situations involving or touching upon the marital relationship. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (abortion); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraception); Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); Meyer v. Nebraska, 262 U.S. 390 (1923) (child rearing).

Recent literature on the concept of a right to privacy has been explosive. The devel-

courts have correctly concluded that the right to be free from unwarranted compilations of personal data by government agencies is deserving of constitutional recognition.[53]

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opment of the concept can best be seen by a review of the literature beginning with the nascent article by Professors Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890), and tracing its treatment in Larremore, *The Law of Privacy*, 12 COLUM. L. REV. 693 (1912); Ragland, *The Right of Privacy*, 17 KY. L.J. 85 (1929); Moreland, *The Right of Privacy Today*, 19 KY. L.J. 101 (1931); Green, *The Right of Privacy*, 27 ILL. L. REV. 237 (1932); Nizer, *The Right of Privacy*, 39 MICH. L. REV. 526 (1941); Feinberg, *Recent Developments in the Law of Privacy*, 48 COLUM. L. REV. 713 (1948).

Although much of the present literature is devoted to analyzing the right of privacy in fourth amendment search and seizure cases, many commentators have considered the general notion of a right to privacy in the contemporary context. See A. WESTIN, PRIVACY AND FREEDOM (1967); Beaney, *The Right to Privacy and American Law*, 31 LAW & CONTEMP. PROB. 253 (1966); Beaney, *The Constitutional Right to Privacy in the Supreme Court*, 1962 SUP. CT. REV. 212 (1962); Fried, *Privacy*, 77 YALE L.J. 475 (1968); Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 RECORD OF N.Y.C.B.A. 546 (1971); Miller, *Privacy in the Modern Corporate State*, 25 ADMIN. L. REV. 231 (1973); *Symposium: Comments on the Griswold Case*, 64 MICH. L. REV. 197 (1965); *Symposium: Privacy and the Law*, 1971 U. ILL. L.F. 137 (1971).

Griswold has generated a great deal of commentary, both in terms of the "penumbra" theory of privacy, as well as in connection with a right of privacy arising under the ninth amendment. *See* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanding Law of Privacy?*, 64 MICH. L. REV. 197 (1965); Ringold, *The History of the Enactment of the Ninth Amendment and Its Recent Development*, 8 TULSA L.J. 1 (1972).

Much of the recent literature is devoted to applying privacy principles to the use of computers and data banks, where information control is associated with a means of providing protection for the right to privacy. *See* A. MILLER, THE ASSAULT ON PRIVACY: COMPUTERS, DATA BANKS AND DOSSIERS (1971); Christies, *The Right to Privacy and the Freedom to Know: A Comment on Professor Miller's The Assault on Privacy*, 119 U. PA. L. REV. 970 (1971); Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837 (1971); Karst, *"The Files": Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342 (1966); Meldman, *Centralized Information Systems and the Legal Right to Privacy*, 52 MARQ. L. REV. 335 (1969); Michael, *Speculations on the Relation of the Computer to Individual Freedom and the Right to Privacy*, 33 GEO. WASH. L. REV. 270 (1964); Miller, *Computers, Data Banks and Individual Privacy: An Overview*, 4 COLUM. HUMAN RIGHTS L. REV. 1 (1972); *Symposium—Computers, Data Banks and Individual Privacy*, 53 MINN. L. REV. 211 (1968). For proposed legislation in the area, see Note, *Privacy and Efficient Government: Proposals for a National Data Center*, 82 HARV. L. REV. 400 (1968).

The right to privacy has also been asserted in terms of freedom of association (*see, e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958); Comment, *Discrimination in Private Social Clubs: Freedom of Association and Right to Privacy*, 1970 DUKE L.J. 1181), political expression (*see, e.g.*, Talley v. California, 362 U.S. 60 (1960) (invalidating ordinance which prohibited dissemination of anonymous political leaflets)), and the right to keep obscene material in one's home (*see, e.g.*, Stanley v. Georgia, 394 U.S. 557 (1969)).

53. See text accompanying notes 54-62 *infra*.

In *Eddy v. Moore*,[54] the Court of Appeals of Washington balanced the government interest in retaining the data against the right of the individual to be free from unnecessary governmental interference. After charges of assault were dismissed against her at trial, Mrs. Eddy attempted to secure a writ of mandate to compel the return of her photographs and fingerprints on file with the Seattle Department of Police. The trial court denied the writ, ruling that she had no legal right to retrieve the information obtained incident to her arrest. In reversing, the court stated:

> We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights, "formed by emanations from those guarantees that help give them life and substance."[55]

The court in *Eddy* required a showing of compelling interest on the part of the state in order to maintain its practice of retaining arrest records such as photographs and fingerprints. In defense, the state relied on an *implied* statutory authority that such records are useful and warrant retention. The court determined, however, that a record, such as an acquittal, negated their usefulness, since the acquittal indicated that the accused did not in fact commit the crime and that she was unlikely to engage in criminal activity in the future.[56]

A substantial danger exists when an individual's right of privacy is ignored with the state basing its policy of retention and dissemination of arrest records upon the "usefulness doctrine." The problem becomes further compounded by the fact that the state must determine which agencies should receive the information and this must be based upon a determination that the agency has a legitimate need to such

54. 487 P.2d 211 (Wash. Ct. App. 1971).

55. *Id.* at 217.

56. *Id.* at 212. In Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971), the court set forth the following test:

> If it is found after careful analysis that the public interest in retaining records of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences to the individual, then the records involved may properly be expunged.

Id. at 212. The *Kowall* court held that the public interest in maintaining the arrest record would violate Kowall's inalienable human rights to "life, liberty, and the pursuit of happiness" (*id.* at 214 n.2), as well as wrongfully imposing potential economic losses in the areas of schooling, employment, or professional licenses "as a consequence of the mere fact of an arrest even if followed by acquittal or complete exoneration of the charges involved." *Id.* at 215.

access. Often the grounds for granting access are without foundation, and decisions may be made without a thorough examination of the agency's function.

An analogous factual situation to *Eddy* produced a similar judicial reaction in *Davidson v. Dill.*[57] Plaintiff, Dorothy Davidson, had been acquitted by a county court jury. In her complaint, she demanded the return of her arrest records and argued that the retention of these records was a violation of her right of privacy. The defendants resisted with the familiar argument that, in the absence of specific statutory authority, no individual has the right to compel the expungement or return of properly obtained arrest data. The trial court dismissed the complaint for failure to state a cause of action. The Colorado Supreme Court reversed and remanded the case for trial on the issue of whether plaintiff could state a cause of action based on the right of privacy.[58] The *Davidson* court determined that

> a court should expunge an arrest record or order its return when the harm to the individual's right of privacy or dangers of unwarranted adverse consequences outweigh the public interest in retaining the records in police files.[59]

The *Davidson* court noted that older cases required that the plaintiff demonstrate actual, not potential, dissemination of his arrest records.[60] The modern trend to eliminate this requirement is linked with the advent of computer technology and the development of the concept of privacy as a right,[61] as well as with the realization of the indisputable

57. 203 P.2d 157 (Colo. 1972).

58. *Id.* at 158.

59. *Id.* at 161.

60. *Id.* at 160-61.

61. A common law right of privacy has been recognized in at least thirty-six states. Brisco v. Reader's Digest Ass'n, 4 Cal. 3d 529, 534, 483 P.2d 34, 37, 93 Cal. Rptr. 866, 869 (1971). In California its development can be traced to Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931). As defined initially, the right of privacy is the individual's "right of determining to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, *The Right of Privacy*, 4 HARV. L. REV. 193, 198 (1890). Dean Prosser has since classified the right of privacy into four forms: appropriation, intrusion, public disclosure of private facts, and the casting of the individual in a false light in the public's eye. W. PROSSER, THE LAW OF TORTS 804-14 (4th ed. 1971).

Having a direct bearing on the Menard situation are cases where past criminal conduct is revived through disclosure long after the act was committed and the wrongdoer rehabilitated. *See, e.g.*, Briscoe v. Reader's Digest Ass'n, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971); Melvin v. Reid, 112 Cal. App. 285, 297 P. 91 (1931); Note, *Rehabilitation, Privacy and Freedom of the Press—Striking A New Balance: Briscoe v. Reader's Digest Association*, 5 LOY. L.A.L. REV. 544 (1972). The "false light" form of invasion of privacy may also be available as a remedy. *See* Com-

impact an arrest record has on a person's chances for securing employment, particularly within the professions. As Judge Leventhal recognized in *Menard*, "[t]here is an undoubted 'social stigma' involved in an arrest record."[62] While they are a more serious handicap in the competitive arena of the job market, an arrest record is equally deleterious when used within the criminal justice system.[63]

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ment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 858-59 (1971). It should be noted that the plaintiff seeking to pursue a common law invasion of privacy action may be blocked by such concepts as governmental tort immunity or legislative abrogation of the common law right by the statutory authority to retain and disclose the records.

62. 498 F.2d at 1024. The deleterious effect of an arrest record is substantial. In 1967, a survey of employment agencies operating in the New York area disclosed that "approximately seventy-five percent of the sampled agencies do not refer any applicant with a record of arrest, whether or not followed by discharge, acquittal, or conviction." Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470, 471 (1971). For the theoretical twenty-five percent who would be referred, their position in relation to other applicants would be less than favorable:

> Employers, like the general public, tend to conclude from a charge and an arrest that "where there is smoke, there must be fire," and they may automatically disqualify applicants with arrest records when there are sufficient untarnished applicants.

In re Smith, 310 N.Y.S.2d 617, 620 (Family Ct. 1970).

Those who may have already secured employment by denying that they were ever arrested will often find they are still subject to exposure. In an investigation conducted by New York security firms, over fifty employees were found to have "criminal records" and were therefore dismissed. Half of these people had no record of conviction but had merely been arrested. *Check of Fingerprints Spurs 29 Dismissals in Securities Business*, Wall Street J., Feb. 5, 1970, at 16, col. 2.

Fearful of such ostracism, and unwilling to lie on an application form, many individuals are virtually immobilized—economically, socially, and politically:

> The person branded with a criminal record has a well-founded reluctance about taking an active part in community or public affairs for fear that his record will come to light and become a public issue.

Schiavo, *Condemned by the Record*, 55 A.B.A.J. 540, 542 (1969).

63. Arrest records have been considered by judges in determining the sentence to be given a convicted offender. *See* United States v. Cifarelli, 401 F.2d 512 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968). *Davidson* pointed out that

> it is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect in an investigation.

503 P.2d at 159.

Additionally, as was delineated in Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970):

> Arrest records have been used in deciding whether to allow a defendant to present history 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.

Id. at 491.

Prosecutors use past arrests in determining whether or not to plea bargain. Once a person is incarcerated, parole boards consider records of arrest in deciding whether or not to grant parole. Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 855 (1971).

A court more disposed to confront the constitutional issues may superimpose the constitutional arguments from "arrest" cases such as *Eddy* and *Davidson* over a *Menard* "detention" situation and conclude that the individual's constitutional right of privacy has been violated. Applying the *Eddy* balancing test[64] to the *Menard* facts, the scales are likely to be tipped in favor of the arrestee: if an acquittal does not indicate that the arrestee is likely to engage in criminal conduct in the future, thereby dispelling any compelling government interest in retention of the records, then even less interest is served by retaining records of an arrestee as to whose purported crime even more doubt existed, as evidenced by the decision not to prosecute.

As to the proper defendant in such actions, the *Menard* court emphatically concluded that the proper suit is against the local law enforcement agency supplying the data to the FBI.[65] Fingerprint arrest records can be removed by the FBI from the files of the Identification Division when the contributing agency so requests.[66] Insofar as direct suits against the FBI, the court was practical and self-protective:

> We are also reluctant, in the absence of a need greater than that established by this record, to concentrate in the Department of Justice the burden of overall litigation over maintenance of arrest records. Of the 19 million criminal prints on file with the Identification Division, it is impossible to predict how many would be the subject of dispute. We are concerned with the possible effects of a concentration of burden not only on the FBI and the Department of Justice, but also on this court and the District Court for the District of Columbia.[67]

However, Menard's suit was proper in that "[h]aving been informed that Menard's encounter with the Los Angeles police authorities was purely fortuitous, the FBI had no authority to retain this record in its

64. See text accompanying notes 54-56 *supra*.

65. 498 F.2d at 1025. The court stated:

> We think sound principles of justice and judicial administration dictate that in general actions to vindicate constitutional rights, by expungement of arrest records maintained notwithstanding release of the person and absence of probable cause for arrest, be maintained against the local law enforcement agencies involved. The primary duty of executive inquiry into the facts of distant arrests is a burden assigned more appropriately to the local agency whose officials made the arrest than to the FBI. Further, an official finding that an arrest is tainted by illegality stigmatizes the local enforcement agency to some extent—apart from the possibility of damage actions—and should be avoided where an alternate course is available. If the local law enforcement agency is a party to the action, it will have opportunity, in instances where it considers the claim improper, to present effectively its version of events and support its denial of relief.

Id. (footnote omitted).

66. *Id.* at 1022.

67. *Id.* at 1025-26.

criminal files along with the mass of arrest records . . . ."[68] Despite the FBI's contention that their function is merely derivative, the court found that a necessary corollary to the maintenance of criminal identification records is the duty "to discharge this function reliably and responsibly and without unnecessary harm to individuals whose rights have been invaded."[69]

In conclusion, *Menard* is a significant decision because its reasoning, albeit applied to statutory interpretation, can be equally applied tomorrow in a constitutional context. Underlying the present court's holding is the fear that encounters between the police and citizens, which fall short of an arrest, may permanently become part of the criminal record system.[70] The Orwellian implications of such a system, compounded by the advent of computer technology, have sufficiently alerted the judicial system. *Menard v. Saxbe* can be viewed as another attempt to put controls on a bureaucracy which admittedly is "out of effective control."[71]

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68. *Id.* at 1027 (emphasis added).
69. *Id.* at 1026, 1028.
70. *Id.* at 1029.
71. 328 F. Supp. at 727.