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Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees

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REMOVING THE STIGMA OF ARREST: THE COURTS, THE LEGISLATURES AND UNCONVICTED ARRESTEES

Society punishes criminal conduct by incarceration and moral condemnation.[1] Prior to imposing sanctions for the commission of criminal acts, the accused must be proven guilty beyond a reasonable doubt in accordance with adequate procedural safeguards. Yet each year thousands of unconvicted arrestees are subjected to the same stigma which society imposes on those who are convicted because the records of all arrestees, whether convicted or not, are retained and disseminated by law enforcement agencies.

When an individual acquires an arrest record[2] the data is sent to the state police and to the Federal Bureau of Investigation.[3] The United States Attorney General is required by statute to exchange these records with "authorized officials of the Federal Government, the States, cities, and penal and other institutions."[4] Despite this fairly restrictive scope of permissible dissemination, many persons and institutions who are not authorized recipients gain access to arrest infor-

1. Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 402-06 (1958). Professor Hart, in the context of prescribing what legislatures should consider when specifying particular conduct as criminal, suggested that these were the two basic elements of criminal punishment. He asserted that a crime should be based on blameworthiness and hence justify the punishment of social condemnation that results.

2. The term "arrest record" as used throughout this comment means both records of identification, such as fingerprints, photographs, measurements and voice prints, and the official record of arrest which indicates the suspect's name, time and place of arrest and the specific charge.

3. These steps are provided for by statute in many states. *See, e.g.*, FLA. STAT. ANN. § 30.31 (Supp. 1972).

4. 28 U.S.C. § 534(a)(2) (1970). If the records are disseminated outside these authorized recipients, the exchange is subject to cancellation. *Id.* § 534(b). Although there are no decisions construing the term "cancellation," numerous interpretations are possible. It could mean that the exchange program between the Attorney General and the violating agency would be terminated. Two possible constructions would be more desirable. Upon cancellation the Attorney General could require the violating agency to return all records received and to retrieve those records disseminated outside authorized bounds. Cancellation could also be construed to authorize private suits in federal court by aggrieved persons to retrieve records illegally disseminated, or to recover damages for injuries sustained as a result of illegal dissemination.

The Attorney General has specified by regulation that member banks of the Federal Reserve System and those banking institutions insured by the Federal Savings and Loan Insurance Corporation are among those "other institutions" with which the FBI is required to exchange identification records. 28 C.F.R. § 0.85(b) (1965).

mation.[5] Complicating this pattern of unauthorized dissemination has been the development of integrated information systems for law enforcement agencies. The FBI's National Crime Information Center has been described as "the initial element of a broader crime information network that eventually will link all of the nation's law enforcement agencies into a single data system."[6]

Retention and dissemination of arrest records of unconvicted arrestees has a variety of adverse effects on them. These range from embarrassment when a past arrest is publicized to discrimination in employment, licensing and bonding. A survey of employment agencies in New York City indicated that seventy-five percent refused to refer an applicant who possessed an arrest record.[7] Schwartz and Skolnick

5. Courts have taken judicial notice of the accessibility of police files to private individuals. *See, e.g., In re* Smith, 310 N.Y.S.2d 617, 620 (Family Ct. 1970); Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971). In *Menard* Judge Gesell pointed out two principal reasons for unauthorized access. The first is the FBI's liberal exchange program. Any state, county, city official or agency that has anything to do with law enforcement is eligible to receive arrest information. *Id.* at 721. Second, there is a lack of supervision over what is done with the arrest records disseminated. "It is apparent that local agencies may on occasion pass on arrest information to private employers." *Id.* at 722. Commentators have criticized the ease with which private individuals can acquire arrest records. *See, e.g.,* Karst, *"The Files": Legal Controls Over The Accuracy And Accessibility Of Stored Personal Data,* 31 LAW & CONTEMP. PROB. 342, 365 (1966).

6. Miller, *Personal Privacy In The Computer Age: The Challenge Of A New Technology In An Information-Oriented Society,* 67 MICH. L. REV. 1089, 1192 (1969). Computerized information systems threaten to have a multiplier effect on the adverse consequences of an arrest record. Any person with access to the data could obtain a complete dossier on an individual and subject him to discrimination.

The utilization of computers and data banks in government record-keeping and the potential effects on individual citizens has been a subject of recent controversy. Miller states:

> [M]any people have voiced concern that the computer, with its insatiable appetite for information, its image of infallibility, and its inability to forget anything that has been stored in it, may become the heart of a surveillance system that will turn society into a transparent world in which our homes, our finances, and our associations will be bared to a wide range of observers.

Id. at 1092.

Proposals for a National Data Center, which would accumulate a wide range of government data, have been critized by commentators who fear the impact on man's privacy. Most commentators have favored a national system but one equipped with legal and technological safeguards to prevent abuse. *See* Comment, *Privacy And Efficient Government: Proposals For A National Data Center,* 82 HARV. L. REV. 400 (1968). Authors have suggested that input to such a system should be restricted to statistical information with arrest records and FBI reports excluded to protect personal privacy. *See Project, The Computerization Of Government Files: What Impact On The Individual?,* 15 U.C.L.A.L. REV. 1371, 1400 (1968). Another commentator has urged that raw investigative files, like FBI reports, should be kept confidential because of their inaccuracy, but that access to arrest information should be available to eliminate the information-peddling from within the police departments. Karst, *supra* note 5, at 367.

7. PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, REPORT: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967).

found that the individual acquitted of criminal charges experienced approximately the same degree of difficulty in obtaining a job as the person convicted of the same offense.[8] This discrimination is often the product of questioning in job interviews and on job application forms. Approximately fifty percent of the states have arrest-oriented job application forms, as do seventy-five percent of the local governments.[9] The Duncan Report[10] "detailed the enormous influence dissemination of [arrest] records . . . on a person's job opportunity."[11] Further discrimination occurs in those states which have laws or regulations which limit the issuance of business and occupational licenses. Discovery of an arrest record by a reviewing agency often results in the discretionary refusal to grant a license.[12] One study determined that former arrestees in the United States experienced a much greater degree of discrimination than did their counterparts in foreign countries.[13]

If an unconvicted arrestee is later charged with a different offense, his prior arrest record may significantly affect the disposition of the

8. Schwartz and Skolnick, *Two Studies of Legal Stigma,* 10 SOC. PROBS. 133,136 (1962). The collateral consequences of a criminal conviction, particularly in the area of employment, have been severe. For an extensive discussion of the collateral consequences of a criminal conviction see *Special Project—The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929 (1970); Comment, *Employment Of Former Criminals,* 55 CORNELL L. REV. 306 (1970).

9. Zeitz and Borkow, *Barrier to the Employment of Former Offenders: Local Government Job Applications,* January 4, 1971 (unpublished manuscript in Georgetown University Law Center, Institute of Criminal Law and Procedure), *cited in* Comment, *Discriminatory Hiring Practices—Private Remedies,* 17 VILL. L. REV. 110, 112-13 (1971).

10. This report may be found appended to the opinion of the court of appeals in Morrow v. District of Columbia, 417 F.2d 729, 745 (D.C. Cir. 1969). REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (1967).

11. *Id.* at 731. According to the Duncan Report, 3500 arrest records a week were being disseminated to employers who drew their own conclusions from the often difficult to decipher data. The *Morrow* court noted that the effect on minority groups was especially severe because of their initial difficulty in obtaining a job coupled with their higher incidence of arrest. *See, e.g.,* Gregory v. Litton Systems, Inc., 316 F. Supp. 401 M.D. Cal. 1970) which discussed the higher incidence of arrest among blacks. The court held that basing a hiring decision on the plaintiff's past arrest record was unlawful under Title VII of the Civil Rights Act of 1964.

12. *See* Comment, *Discrimination On The Basis of Arrest Records,* 56 CORNELL L. REV. 470, 474-5 (1971) and statutes cited therein.

13. *See* Hess and Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction,* 13 CRIME & DELINQ. 494 (1967). This particular article is especially interesting because the authors compare the effects of the arrest record in the United States and foreign countries. The authors conclude that "thirty-eight other countries do not countenance the general discrimination against persons with arrest records. . . .A 'record' in these thirty-eight countries lists only convictions . . . ." *Id.* at 500. The authors stated:

The civilized world generally acknowledges presumption of innocence as a human

charge. A record may influence the prosecutor's decision to prosecute, the amount at which bail is set, the election to negotiate a plea and the sentence to be imposed upon conviction.[14]

This comment will first present the arrest record debate. The traditional justifications for the present system will be compared with those underlying the new approach to the treatment of unconvicted arrestees. Second, two proposed tests will be examined to determine which can satisfy the needs of both sides of the debate. Finally, state statutes and a proposed federal act will be analyzed to determine whether current or proposed statutory law can provide a realistic solution to minimize or eliminate the stigma resulting from arrest record dissemination.

I. THE ARREST RECORD DEBATE

A. Justifications for the Traditional Record Keeping System

Traditionally, the records of unconvicted arrestees have been retained and disseminated indiscriminately. The primary argument advanced for maintaining the present record keeping system is that vital law enforcement purposes are being served. This argument was lucidly presented in *Voelker v. Tyndall*.[15] In *Voelker*, the plaintiff had been acquitted and, claiming his right to privacy was being violated by the retention of the records, demanded the return of his fingerprints. The Indiana court refused to aid the unconvicted arrestee and held that the purpose of retention is to promote the public safety and welfare, and that it was the duty of the police to retain the records to prevent crime and apprehend criminals.[16] Although the justifications

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right. Yet, the United States affords this right less protection than countries abroad; indeed, in the United States, protection of this human right is inferior at times to that in communist countries. . . . While the United States claims it respects the right to the presumption of innocence, it has not fully realized that the very essence of the presumption of innocence requires that it be applied in all cases where the person has not been adjudicated guilty.

Id. at 501-02.

14. *See* Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850,855 (1971) and the notes cited therein. *See also* Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1970).

15. 226 Ind. 43, 75 N.E.2d 548 (1947).

16. The court stated the reason for retaining the data: "The purpose is single, clear and quite salutary—to promote the public safety, by achieving greater success in preventing and detecting crimes and apprehending criminals." *Voelker*, 75 N.E.2d at 550-51.

offered in *Voelker* do not comprise an exhaustive list,[17] they are representative of those utilized to deny relief to unconvicted arrestees.[18]

Advocates of the present system cite several additional factors. Thirty to fifty percent of those arrested in major cities on felony and misdemeanor charges are not prosecuted.[19] It is argued that many go free because of legal technicalities developed by the Warren Court in the name of procedural due process.[20] Lack of evidence or the inability to find a crucial witness often prevents conviction of guilty arrestees.[21] Since the guilty often go free, treating unconvicted arrestees like convicted offenders for record keeping purposes serves a protective function. Another argument is that a constitutionally valid arrest results in a lawfully obtained public record. In addition, by providing proof of what transpired, the public record provides documentation for the arrestee who is later questioned or wishes to bring an action for false arrest.[22]

The traditional arguments have two analytical problems. First, there is no attempt to substantiate the claim that protective functions are being served by retention. Second, while it is recognized that the individual rights of unconvicted arrestees are being infringed, there is

17. Courts have been hesitant to disturb the broad discretion of law enforcement agencies and have justified retention on the grounds that the guilty often go free on technicalities. *Cf.* Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (1944). It has even been stated that a record of arrest is helpful to an arrestee because it demonstrates no conviction took place. Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).

18. It is interesting to note that these same justifications are utilized to justify compiling an arrest record immediately after an arrest. Two early cases, Downs v. Swann, 111 Md. 53, 73 A. 653 (1909), and Mabry v. Kettering, 89 Ark. 551, 117 S.W. 746 (1909), laid the foundation for later decisions permitting the collection of criminal identification data. In both decisions claims of potential harm were rejected and arrest records were found to facilitate the identification of criminals. The courts held that no violation of individual rights occurred because the inconvenience was an inevitable cost of citizenship.

19. L. HALL, Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 9 (1969). This figure is at best only a rough estimate. The authors note the absence of accurate statistical data on the disposition of criminal cases and the wide variance among jurisdictions. *Id.* at 1 n.b.

20. *Cf.*, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C. J., dissenting).

21. The role of prosecutorial discretion in this context cannot be overemphasized. The prosecutor's function is accusatorial. Before bringing charges he will have made a determination of guilt which he asks the community to agree with. Prosecutors like to maintain a high conviction rate and not have their determinations of guilt reversed. Therefore where the evidence against a defendant is weak, the prosecutor may often drop the charges rather than risk defeat. J. Skolnick, *Social Control In The Adversary System*, 11 J. CONF. RESOL. 52, 58 (1967).

22. Spock v. District of Columbia, 283 A.2d 14, 18 (D.C. App. 1971).

no attempt to reconcile that vital interest with the legitimate needs of law enforcement.

B. Emerging Theories for Change

Recent decisions have indicated the emergence of a new approach to the treatment of unconvicted arrestees. The law enforcement justifications for the traditional system have been questioned and theories of privacy and the presumption of innocence have been utilized to justify positive relief for unconvicted arrestees.

1. A Challenge to the Law Enforcement Rationale

Decisions that have ordered expungement of arrest records have been infrequent until recently and have often involved exceptional circumstances. In *Wheeler v. Goodman*,[23] an arrest pursuant to a vagrancy statute was held unconstitutional because the statute was being used to harass youths. The court ordered expungement of the unconvicted arrestees' records, reasoning that no criminal identification or investigation function could be served since the plaintiffs had not committed crimes.[24]

The *Wheeler* case evidences a fundamental shortcoming in the treatment of unconvicted arrestees, *i.e.*, the failure to distinguish among them. Thus, all unconvicted arrestees have been subjected to the retention and dissemination of their records irrespective of the particular circumstances of their arrest or release. Some arrestees are released upon a determination that no crime was committed. Some may have been the subject of an unconstitutional arrest. On the other hand, some arrestees are acquitted after having run the gamut of the criminal process. Others are released when a prosecutor dismisses the case for lack of evidence. Still others are released without any determination of guilt or innocence because the system cannot process every case. Rather than treating all unconvicted arrestees alike, it is urged that the particular circumstances of each arrest and release

23. 306 F. Supp. 58 (W.D.N.C. 1969). *Accord*, Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968); United States v. McLeod, 385 F.2d 734 (5th Cir. 1967) (mass arrests of blacks were found to be intended to interfere with their right to vote).

24. There were additional reasons for granting equitable relief in *Wheeler:* society would not be protected by the retention of the arrest records; future misuse was likely; and the extreme misbehavior of the police warranted rectification.

should be examined to determine whether relief is warranted. A recent federal decision, *Morrow v. District of Columbia*,[25] suggested this approach.

In *Morrow*, the plaintiff, who had been arrested for swearing at a police officer, got his case dismissed and then moved to have his arrest record expunged. The lower court refused to expunge, but issued an order prohibiting the dissemination of plaintiff's record to anyone, including law enforcement agencies. On appeal, the retention issue was not considered. Instead, the court questioned whether it should follow the Duncan Report's[26] recommendation that the dissemination of arrest records to employers be prohibited but the dissemination to law enforcement agencies allowed. Although the case was remanded to decide that issue, the circuit court authorized a flexible case by case approach:[27]

> The inquiry might better be . . . what valid *law enforcement purposes* are served by retaining and disseminating to law enforcement agencies the arrest record in a particular case? Thus the focus would include the reasons for dismissal or other disposition of the case (if dismissal on a technicality there might be better reason to keep the records intact than if dismissed for lack of evidence; further in the rare case of malicious prosecution there seems no valid reason for maintaining the record). Another focus of inquiry would be the nature of the crime; some types of crime may follow a pattern, in which case it would be more reasonable to retain a record of who has been repeatedly arrested in a certain area for such a crime.

The *Morrow* court prescribed two important steps in determining whether to limit the dissemination of the arrest record of an unconvicted arrestee. The first is to consider each unconvicted arrestee individually. The second, as was done in *Wheeler*, is to make a determination of what law enforcement purposes, if any, are being served. *Morrow*, though mentioning privacy as a basis for the approach it suggested, did not explain its reliance on that concept.

2. *The Right to Privacy*

Warren and Brandeis first asserted that privacy is a legally enfor-

25. 417 F.2d 728 (D.C. Cir. 1969).
26. *See* notes 10-11, *supra*.
27. *Morrow*, 417 F.2d at 742.

cible right in 1890.[28] They were concerned with the public exposure of an individual's personal affairs to the community as a byproduct of an advancing civilization.[29] The right to be left alone to enjoy life and to prevent matters thought private from being made public was considered the essence of privacy.[30] The basic attribute of the right to privacy has been described as "the individual's ability to control the flow of information concerning or describing him."[31]

Although privacy as a legal notion does not fit neatly into a coherent conceptual framework, specific invasions of the right to privacy can be identified and prevented. Prosser suggests that two types of invasions of privacy are: 1) to publicly disclose embarrassing facts about an individual or 2) to place him in a false light.[32] The United States Supreme Court early expressed its desire to secure protection for personal rights,[33] but it was not until *Griswold v. Connecticut*[34] that privacy was declared to be a fundamental personal right. The Court held that the Constitution protected the right of marital privacy. Justice Goldberg, in a concurring opinion, stated that privacy was a fundamental right which a state could not abridge simply by showing that a statute had a rational relationship to a state purpose—a compelling interest was required.[35]

Preventing the retention or dissemination of arrest records on a theory of privacy is consistent with current construction of that right.

28. Warren and Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890).

29. The authors stated: "The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual. . . ." *Id.* at 196.

30. The authors concluded: "It is the unwarranted invasion of individual privacy which is reprehended, and to be, so far as possible, prevented." *Id.* at 215.

31. Miller, *supra* note 6, at 1107.

32. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960). Two other types of invasions are intrusion into the plaintiff's solitude and appropriation of the plaintiff's name or likeness for one's advantage. In response to Prosser's analysis see Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U.L. REV. 962, 981 (1964).

33. An example of this is Boyd v. United States, 116 U.S. 616 (1886). The Court held that the essence of immunity from an unreasonable search was: "the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense . . . ." *Id.* at 630.

34. 381 U.S. 479 (1965).

35. *Id.* at 497. Goldberg applied this "compelling state interest" test to the Connecticut statute and found that discouraging extra-marital relations was a legitimate state concern, but more careful drafting was needed to prevent intrusion into the privacy of all married couples. This doctrine of narrowing the scope of the statute to prevent infringement of personal liberties has been used frequently by the Court. *See, e.g.*, Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969).

Uncontrolled dissemination provides private employers and others access to arrest records of unconvicted arrestees. These individuals lose the right to be left alone. They become the subjects of public and private scrutiny. The basic attribute of privacy, the ability to control the flow of information about oneself, is lost. Under either of Prosser's theories, dissemination of arrest information when the agency or individual is cognizant of the adverse effects on the unconvicted arrestee is an invasion of his privacy. For example, it is now universally recognized that placing an arrestee's picture in a rogues' gallery results in an invasion of his privacy. The leading case is *Itzkovitch v. Whitaker.*[36] The police were prevented from displaying an unconvicted arrestee's photograph along with those of convicted offenders in public view. The court enjoined such a display holding it to be an invasion of the plaintiff's private rights. The court stated that in such instances the right of privacy is absolute and that no public good can be derived from exhibiting the photograph of an honest man in a rogues' gallery.[37] Subsequent decisions have adopted the view pronounced in *Itzkovitch,* recognizing that the same dangers to the individual presented by the rogues' gallery are presented by the mere retention of his arrest records in the police files because of the accessibility of those files to the public.[38]

The privacy argument has also provided the basis for relief to unconvicted arrestees in conventional fact settings. In *United States v. Kalish,*[39] the unconvicted arrestee moved to expunge and destroy photographs and fingerprints taken when he refused induction into the army. He had been discharged without conviction. The court ordered the record destroyed holding that the arrestee's personal privacy was invaded and his dignity affronted as long as there was a "criminal record" retained. The court added that retention constituted an attack on the arrestee's character and reputation.[40]

36. 115 La. 479, 39 So. 499 (1905).
37. *Id.* at 500.
38. *See* Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228 (1906), where the court stated that posting the picture would be permanent proof of dishonesty; Schulman v. Whitaker, 117 La. 704, 42 So. 227 (1906); State *ex rel.* Reed v. Harris, 348 Mo. 426, 153 S.W.2d 834 (1941); State *ex rel.* Mativity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946), finding that placement in a rogues' gallery was serious violation of privacy; Downs v. Swann, 111 Md. 53, 73 A. 653 (1909), stating that police had no right to needlessly or wantonly injure any suspect by putting his photograph in a rogues' gallery.
39. 271 F. Supp. 968 (D.P.R. 1967).
40. Other decisions have adopted the *Kalish* approach and utilized the justifications offered there and in the exceptional circumstances decisions in ordering expungement.

The niche of the right to privacy in the constitutional framework has remained a mystery since the *Griswold* decision.[41] Nevertheless, privacy has been the principal theory relied upon by courts granting relief to unconvicted arrestees. Another theory for relief, firmly rooted in our legal tradition, is the presumption of innocence.

3. *The Presumption of Innocence*

The principle that a man is presumed innocent until proven guilty

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See, e.g., Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971). The issue in *Kowall* was whether a federal court, in granting relief under 28 U.S.C. § 2255 to a federal prisoner, could order the expungement of his arrest record. The court held that expungement could be ordered under section 2255 in appropriate circumstances. Before expungement could be ordered the court required a careful analysis of each arrestee's case. The critical determination was whether "the public interest in retaining the record of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences." *Id.* at 264.

In *In re* Smith, 310 N.Y.S.2d 617 (Family Ct. 1970), juveniles sought expungement of their records. The New York court ordered the expungement of the plaintiffs' surnames from the records but allowed retention of the records for statistical purposes. This novel remedy was formulated after a realistic appraisal of the attitudes concerning arrest records and the adverse effects of retention on unconvicted arrestees. The court noted that the prohibitions on accessibility were not rigidly enforced, and that employers and employment agencies openly discriminated against former arrestees reasoning that "where there is smoke, there must be fire." *Id.* at 620. Given the severity of the consequences to juvenile arrestees and the express mission of the New York Family Court to help and protect youths, the court concluded: "in the economic world that respondents must prepare to enter, there tends to be a presumption of guilt from an arrest record, rather than the presumption of innocence that in the world of legal theory prevails until conviction." *Id.* at 621.

The rationale behind this enlightened approach to juvenile record retention was grandly stated in *In re* Holmes, 379 Pa. 599, 109 A.2d 523 (1954) (dissenting opinion):

> The grim truth is that a Juvenile Court record is a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age . . . it will be a witness against him in the court of business and commerce, it will be a bar sinister to him in the court of society . . . it will be a sword of Damocles hanging over his head in public life, it will be a weapon to hold him at bay as he seeks respectable and honorable employment.

Id. at 529. Both courts and commentators have recognized the grim consequences of a juvenile arrest record and sought to preserve confidentiality and prevent a stigma from attaching. *See, e.g.*, T.N.G. v. Superior Court, 4 Cal. 3rd 767, 484 P.2d 981, 94 Cal. Rptr. 813 (1971) (court enabled the juvenile to deny he had been retained, arrested, or subjected to juvenile court proceedings); Comment, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775 (1966) (the author indicates that the major purpose of juvenile court legislation is to have hearings and court records kept confidential); *In re* Gault, 387 U.S. 1 (1967), where the Supreme Court recognized the stigma of an arrest record to both a juvenile and an adult, *id.* at 23-24. It is submitted that this enlightened approach is equally applicable to many adult arrestees. Not only are the disabilities comparable, but the stigma can afflict the unconvicted adult arrestee for the remainder of his life.

41. For a discussion of the many implications of *Griswold* see *Symposium—Comments on The Griswold Case*, 64 MICH. L. REV. 197 (1965).

is a fundamental one in the administration of our criminal law.[42] Although its exact origin is uncertain, both ancient Greek and Roman law maintained this concept.[43] The underlying basis for the presumption of innocence is that man is basically good, and is innocent of any crime until the contrary is proven by legal evidence.[44] The role of the presumption in the case of the unconvicted arrestee is a confusing one. Although the principal source of confusion has been whether the presumption of innocence is evidentiary in nature or merely allocates the burden of proof in a criminal trial,[45] the critical question regarding the unconvicted arrestee is whether or not his innocence is still presumed after the disposition of his case.

The United States Supreme Court has frequently referred to the presumption of innocence and indicated that it is the concept that American jurisprudence prefers.[46] The Court has never stated directly that the presumption of innocence must continue to be operative after an unconvicted arrestee is released. However, in *United States v. Fleischman*[47] the Court held that the presumption of innocence continues to operate until overcome by proof of guilt. In *Schware v. Board of Bar Examiners*[48] the Court held that the mere fact of arrest

42. Coffin v. United States, 156 U.S. 432, 453 (1895).
43. *Id.* at 454.
44. Slovenko, *Establishing The Guilt Of The Accused,* 31 TUL. L. REV. 173 (1956).
45. Commentators agree that the presumption of innocence is not a true legal presumption but rather an assumption. In Ashford and Risinger, *Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview,* 79 YALE L.J. 165 (1969), the authors defined a legal presumption: "Most are agreed that a presumption is a legal mechanism which, unless sufficient evidence is introduced to render the presumption inoperative, deems one fact to be true when the truth of another fact has been established." Innocence is assumed because the policy of the law prefers it. *See* Note, *The Presumption Of Innocence In Criminal Cases,* 3 WASH. & LEE L. REV. 82, 84 (1941).

At that point any agreement stops and three principal views emerge regarding the effect of the presumption of innocence at a criminal trial. A number of courts follow the view espoused in Coffin v. United States, 156 U.S. 932 (1895), and treat the presumption of innocence as evidentiary in nature. The major authorities in Evidence, Thayer and Wigmore, suggested that no presumption and, a fortiori, no assumption, could be legal evidence. Once an opponent offers evidence to the contrary, the presumption or assumption disappears. *See* Falknor, *Notes On Presumptions,* 15 WASH. L. REV. 71, 72 n.5 (1940). Thayer and Wigmore concluded that a predisposition to innocence merely allocates the burden of proof. A third position agrees with the conclusion that the presumption of innocence allocates the burden of proof and yet serves the additional purpose of cautioning jurors not to draw conclusions from the fact of an arrest. *See* Orfield, *Burden of Proof and Presumptions in Federal Criminal Cases,* 31 KANSAS C. L. REV. 30, 57 (1963).
46. *See* Note, *The Presumption Of Innocence In Criminal Cases,* 3 WASH. & LEE L. REV. 82, 84 (1941).
47. 339 U.S. 349 (1950).
48. 353 U.S. 232 (1957).

had little probative value in showing misconduct and that any probative force of an arrest was dissipated upon the arrestee's release. Not only is the presumption of innocence preferred, but guilt is not inferred when an arrest does not lead to conviction.

The presumption of innocence has only been used twice as a basis for relief to unconvicted arrestees.[49] In those instances the judges failed to discuss either its historical or precedential background. Given the Supreme Court's preference for the presumption of innocence, however, further development of and reliance upon that concept can be expected in the arrest record area.

Courts which have granted relief to unconvicted arrestees have adopted a more enlightened approach to the problem. Not only are the facts of each arrestee's arrest and release examined, but the justifications underlying the law enforcement arguments are challenged. Most important, however, is the recognition that the individual rights of the unconvicted arrestees warranted protection. A test that can be applied uniformly to unconvicted arrestees and insure the service of vital law enforcement purposes while minimizing the deleterious consequences of the present system would be desirable. Two possible tests have recently been proposed. The following section will examine those proposed tests to determine which can satisfy the needs of both sides of the arrest record debate.

C. Proposed Tests to Resolve the Arrest Record Debate

Tests to be applied to unconvicted arrestees seeking relief were formulated in *Spock v. District of Columbia*[50] and *Eddy v. Moore*.[51] *Spock* involved seventy-five appeals which were consolidated to test the power of the District of Columbia courts to order the expungement of arrest records. The court required that the arrestee make an "affirmative demonstration negating culpability." Once that test was met the court would not order expungement, but would order that all copies of the arrest record be changed to reflect that fact. The court reasoned that this would be sufficient to eliminate the harmful classification of arrest records by effectively distinguishing those arrestees

49. *In re* Smith, 310 N.Y.S.2d 617 (Family Ct. 1970); Eddy v. Moore, 5 Wn. App. 334, 487 P.2d 211 (1971).
50. 283 A.2d 14 (D.C. App. 1971).
51. 5 Wn. App. 334, 487 P.2d 211 (1971).

who had not been convicted and hence prevent the adverse consequences of retention.

In *Eddy,* the plaintiff was arrested, fingerprinted and photographed. After charges were dismissed at trial, the plaintiff sought the return of his records on a theory of privacy. The defendant police chief offered the traditional justifications for retention, namely, statutory authority to retain information[52] and the absence of a statute compelling the return of the records. The court, after stating that the presumption of innocence was basic to our legal system and determining that the state had been granted too much discretion "to determine what records are needed to effectuate the law enforcement function,"[53] focused on the right of privacy:[54]

> [The question is] . . . the legality of the existence of a record of an acquitted person's fingerprints and photographs in police files. The determination of that question, in turn, hinges directly on whether there is a constitutional right of privacy in an acquitted person's fingerprints and photographs.

The court held that no rational basis for retention remained because there was a "direct correlation between the loss of individual privacy and the retention of arrest records."[55] An arrestee who had been acquitted was determined to have a greater visibility to law enforcement because of his record.[56] The court pronounced the "compelling necessity" test. The court held that the right to privacy in the accused's fingerprints and photographs should be balanced against the state's need to retain the records and that "absent a compelling showing of necessity by the government" return "is a fundamental right implicit in the concept of ordered liberty . . . well within the penumbras of the specific guarantees of the Bill of Rights . . . ."[57] It was further held that the Washington statutes governing the retention of fingerprints and photographs were too limited: "failure to provide for return of the [records] upon acquittal, absent a compelling showing justifying their retention, is a constitutionally defective omission."[58]

52. WASH. REV. CODE § 72.50.140 (Supp. 1971).
53. *Eddy,* 5 Wn. App. at 339, 487 P.2d at 214.
54. *Id.* at 342, 487 P.2d at 215-16. The court apparently equated a dismissal at trial with an acquittal.
55. *Id.* at 342, 487 P.2d at 216.
56. *Id.* at 344, 487 P.2d at 216.
57. *Id.* at 345, 487 P.2d at 217.
58. *Id.* at 346, 487 P.2d at 218.

A federal district court in *Menard v. Mitchell*[59] applied a compelling necessity test similar to that enunciated in *Eddy*. In *Menard* on remand,[60] the federal district court faced the issue of whether to order expungement of the arrest record or to limit dissemination to law enforcement agencies. The court refused to order expungement, stating that there was a "compelling necessity to furnish arrest data to other law enforcement agencies for strictly law enforcement purposes."[61] The court held, however, that the FBI could not disseminate arrest records outside the federal government "for employment, licensing or related purposes whether or not the record reflects a later conviction."[62]

Menard fills a significant gap left by the *Eddy* test. *Eddy* said nothing about restricting the use of arrest records once a compelling necessity is demonstrated. By strictly limiting dissemination of retained records, *Menard* insures they will be used only for purposes that justified their retention. *Eddy* and *Menard* can be combined to provide a test which can satisfy both vital law enforcement purposes and the individual rights of unconvicted arrestees. This can be demonstrated by a comparison of the two tests in the context of privacy and the presumption of innocence.

The *Spock* test, and the law enforcement arguments that underlie it, do not implement the policy behind the presumption of innocence but conflict directly with it. The arguments for retaining the present

59. 328 F. Supp. 718 (D.D.C. 1971).

60. The District of Columbia Circuit Court in Menard v. Mitchell, 430 F.2d 486 (D.C. Cir. 1970), had remanded the case to determine whether probable cause existed at the time of arrest. The plaintiff had sued for removal of both his fingerprints and notation from the FBI's criminal identification files. Menard claimed that the information would become available to potential employers and law enforcement agencies and be used against him. 430 F.2d at 488. The circuit court stated unequivocally that if the plaintiff's arrest had lacked probable cause, there was no "constitutional justification for its memorialization in the FBI's crime files." 430 F.2d at 492. The federal district court on remand found that probable cause for Menard's arrest had existed. See the analysis of the probable cause issue in Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 855 (1971). As for lawful arrests, where the FBI learns of later disposition without conviction, the court stated that there may be a duty to supplement the FBI files. 430 F.2d at 492.

Several casenotes have been written on the circuit court's opinion in *Menard*. *See* 49 N.C.L. REV. 509 (1971); 20 AMER. L. REV. 189 (1970); 17 WAYNE L. REV.995 (1971).

61. *Menard*, 328 F. Supp. at 727. The law enforcement purposes purported to be served by arrest records are: ". . .uncovering criminal conduct, they play a significant role in the prosecutor's exercise of discretion, they greatly aid in setting bond, determining sentences an [*sic*] facilitating the work of penal and other institutions of correction." *Id.* at 727.

62. *Menard*, 328 F. Supp. at 727. The court did hold that the Federal Government could use the records for limited employment purposes in the aid of national security.

record keeping system are based on the assumption that the unconvicted arrestee was in fact guilty and would have been proven to be so had not a lack of evidence, prosecutorial discretion or a legal technicality prevented it. The unconvicted arrestee is considered an unconvicted criminal from whom society must be protected. The *Spock* test reinforces this presumption of guilt by requiring the unconvicted arrestee affirmatively to negate his culpability.

The *Eddy-Menard* test, on the other hand, by requiring the government to justify its retention of arrest records, reinforces the policy behind the presumption of innocence. Accordingly, the presumption attaches to the accused and continues after his release. Thus, under the *Eddy-Menard* test, the government retains the burden of proof and is required to overcome the presumption of innocence to retain a record as it must to obtain a conviction.

The *Spock* test places the burden directly on the unconvicted arrestee to protect his fundamental right of privacy. In contrast, the *Eddy-Menard* test requires the government to prove its need for records of unconvicted arrestees before retention is allowed. The latter approach is preferable because it will serve law enforcement purposes where they constitute a compelling necessity. Where such purposes do not exist, *Eddy-Menard,* unlike *Spock,* insures the unconvicted arrestee's right to privacy. *Eddy-Menard* will balance the state's need to retain the records against the individual's right to have them expunged. By requiring the government to prove that its interest is greater, *Eddy-Menard* will insure that the privacy of unconvicted arrestees is not violated before their due process rights have been afforded. *Eddy-Menard* will reduce the prejudicial effects which result from the present system of retention and dissemination by limiting retention to those cases where it can be justified by legitimate governmental interests.

D. Applying the Proper Standard

The *Eddy-Menard* test is clearly preferable. It reverses the presumption of guilt which the *Spock* test perpetuates. It insures that the unconvicted arrestee's fundamental right of privacy will not be violated without due process by requiring the government to show a compelling necessity to retain his records. The *Eddy-Menard* test automatically affords individualized treatment for each unconvicted arrestee because

retention will be based on the particular circumstances of his arrest and release.

The *Eddy-Menard* standard must be strictly applied to insure its effectiveness. If the government fails to meet its "compelling necessity" burden, expungement must be ordered. If the government sustains its burden and justifies retention, dissemination must be strictly limited. The same compelling government necessity that justifies retention should also limit dissemination of the records retained. The arrest records of unconvicted arrestees should not be disseminated beyond those recipients whose function it is to fulfill the law enforcement purposes which initially justified retention.

Assuming the *Eddy-Menard* test is applicable, either total expungement of an arrest record or strict limitation of its dissemination is required. The critical issue is how to insure the effectiveness of the prescribed remedy. A comprehensive federal scheme is needed because the scope of the problem extends beyond state boundaries. A system must be structured which strictly limits the dissemination of arrest information at the outset and then enables retrieval and destruction of all copies of the record if expungement is ordered. The system must also insure that dissemination is limited to authorized recipients in cases where retention is justified. This system would prevent unauthorized interests from obtaining the arrest records prior to conviction.

The proposed scheme must provide realistic sanctions. Some information leaks are inevitable. However, an active enforcement program by the record gathering agencies should minimize unauthorized dissemination. Strong sanctions would discourage violations and obviate the necessity of private suits to enforce the sanctions by individuals who are unaware of their rights or cannot afford to enforce them.

The following section will explore legislative efforts to provide effective remedies in the area of arrest record discrimination.

II. LEGISLATIVE RESPONSE: THE QUEST FOR AN EFFECTIVE REMEDY

A. State Statutes

Sanctions, good draftsmanship and an understanding of the types of problems an unconvicted arrestee faces are the essential elements of an effective expungement system. Several states have taken steps to

alleviate the unwarranted penalties imposed on unconvicted arrestees. These well-intentioned efforts have undoubtedly afforded relief to a number of unconvicted arrestees, yet such relief is seldom complete because once a record is disseminated across state lines or to a federal agency, retrieval is usually precluded.

Maine, Oregon and Washington have enacted confidentiality statutes which purport to strictly limit the accessibility of identification records. Maine simply declares the records confidential[63] while Oregon provides that fingerprints, photographs, records and reports are confidential and not accessible to public inspection.[64] The Washington statutes[65] specifically address the problem of the unconvicted arrestee. The Washington scheme distinguishes between records of identification (fingerprints, etc.) and the record of arrest. The records of identification are declared to be confidential and damages, including injury to reputation, are provided for against any person who wilfully violates the confidentiality statute. Any agency maintaining arrest records must note the disposition of the charges against the arrestee and send the same information to all agencies to which the records were disseminated. Despite the progressive posture of these statutes, the Washington Court of Appeals in *Eddy v. Moore*[66] found their scope too limited. There was no provision for the return of fingerprints and photographs, a constitutionally defective omission. Only Washington has a statutory remedy for violation of its confidentiality statute. There is no language in any of these statutes to encourage an unconvicted arrestee to bring an action. Nor is there any provision for internal enforcement. All three states allow law enforcement agencies to retain the arrest records without demonstrating necessity. This perpetuates the invasion of privacy and the resulting discrimination against unconvicted arrestees.

Connecticut and Illinois have enacted statutes which attempt to provide more complete relief to the unconvicted arrestee. The Connecticut statute[67] permits the erasure of an arrest record under certain circumstances and provides that the party securing erasure is considered not arrested *ab initio*. The Illinois statute[68] provides that all

63. ME. REV. STAT. ANN. tit. 25, § 1631 (1959).
64. ORE. REV. STAT. § 181.540 (1963).
65. WASH. REV. CODE §§ 72.50. 120-.170 (Supp. 1971).
66. *See* note 51, *supra*.
67. CONN. GEN. STAT. ANN. § 54-90 (Supp. 1971).
68. ILL. ANN. STAT. Ch. 38, § 206-5 (Smith-Hurd 1970).

photographs, fingerprints or other records of identification shall be returned to the arrestee upon his acquittal or release. It further provides that an unconvicted arrestee can petition the local court to have his arrest record expunged from the official records of the arresting authority. There are several shortcomings in these statutes that impair the effectiveness of the remedy. The Connecticut statute has been criticized as follows:[69]

> [T]here is no certainty that the erasure does eliminate all evidence of arrest. . . . An order of erasure will eliminate the court records and may eliminate the records in the local police station, but unless a person specifically requests it, the fingerprints and arrest records with the state police and the FBI will not be removed. Thus the damages of a false arrest may occur years later and sometimes without the plaintiffs being aware of it.

The Illinois statute provides for the return of all identification records but includes no method for retrieving the records that have been disseminated to other law enforcement agencies or private individuals. The statute also distinguishes between records of indentification (fingerprints, etc.) and the record of arrest as does the Washington statute. Both records should be regarded as equally dangerous to the unconvicted arrestee and both should be returned or expunged to insure effective relief. It should be no more difficult for the unconvicted arrestee to eliminate the identification records than the record of arrest. Finally, the expungement provided for the arrest record is too limited because it applies only to the arresting authority and does not include the agencies to which the records may have been disseminated.

States have attempted to limit potential discrimination based on an arrest record by requiring confidentiality or authorizing the return or expungement of the potentially damaging records. Yet these isolated efforts cannot provide the comprehensive relief needed; federal law is the answer.

B. A Proposed Federal Statute

The Offender Rehabilitation Act[70] is presently being considered by

69. Satter and Kalom, *False Arrest: Compensation And Deterrence*, 43 CONN. B.J. 598, 612-13 (1969).

70. 117 CONG. REC. S16,622 (daily ed. Oct. 20, 1971). S2732, 92d Cong., 2d Sess. (1971).

the United States Senate. The Act is designed to prevent the use of past criminal records to discriminate in employment, licensing and bonding against past offenders and arrestees that were not convicted. The theory is that once the offender has paid his debt to society he should return to the economic community as a full partner. Nullification of his criminal record would be an incentive to the former offender to live lawfully and thereby avoid recidivism. The same theory is applicable to unconvicted arrestees because the adverse effects on the arrestee's employment opportunities are similar when his arrest record is disseminated. In addition, treating an unconvicted arrestee like a criminal can encourage his participation in criminal activity—a self-fulfilling prophecy.[71]

The Act provides that any person who was found not guilty of an offense for which he was indicted, or who was released after arrest, can apply to a federal district court to nullify all records relating to his arrest, indictment or trial.[72] The effect of nullification for the individual who is not convicted is to prohibit the "use, distribution, or dissemination" of any nullified record in connection with employment, bonding or licensing.[73] An important section enables the unconvicted arrestee to deny that any arrest, indictment, hearing, or trial ever occurred if inquiry is made for any purpose involving employment, bonding or licensing.[74] Section 7(d) allows the applicant for nullification to list all persons, offices, agencies and other entities which he believes to have a copy of his record. Each person, office, agency or entity receives a copy of the order of nullification if within the jurisdiction of the court of application.[75] Section 8 provides that any officer or employee of the United States or any state who releases or disseminates arrest data or information concerning an indictment, trial or hearing, shall be guilty of a misdemeanor and subject to fine and imprisonment if the record has been nullified.[76] A final provision of importance codifies the full faith and credit provision of the Constitu-

71. Gough, *The Expungement Of Adjudication Records Of Juvenile And Adult Offenders: A Problem Of Status,* 1966 WASH. U.L.Q. 147, 162 (1966).
72. 117 CONG. REC. at S16,623 (daily ed. Oct. 20, 1971). These provisions are embodied in sections 5(a) and (b) of the proposed act.
73. *Id.* at S16,623. This protection is included in section 7(a) (1) of the proposed act.
74. *Id.* at S16,623; section 7(b).
75. *Id.* at S16, 623-24.
76. *Id.* at S16,624.

tion and permits the record holder to have an order of expungement or the like extended to each of the several states and the United States.[77]

If enacted, the Offender Rehabilitation Act would alleviate much of the discrimination suffered by unconvicted arrestees. Unfortunately there are several serious shortcomings which could prevent effective relief in a number of situations. The theory of nullification as an effective remedy is inadequate. Nullification presumes that if a particular record is declared nullified by a federal court, the person or entity that possesses the record will disregard an arrestee's past history and stop discriminating. This presumption will not be true in numerous situations and discrimination will continue. Allowing retention without placing strict limits on dissemination of retained records ignores the fact that state statutes which have been in effect for years have failed to control access to confidential records. Nullification would permit the illegimate subsystem of information-peddling to continue.

Although the draftsmen recognized the extent of dissemination of records to private interests, no effective mechanism was proposed to give notice of nullification to the private concerns which possess copies of the arrest record. Merely sending a copy of the order of nullification is inadequate. In addition, requiring the former arrestee to provide a list of all the possible recipients of his record is an unreasonable burden. Tracing the numerous copies disseminated would be extremely difficult, and tracing the copies of the copies would be impossible! A final criticism is directed at the penalty section which has no provision for relief against a private individual who may disseminate damaging information. Prevention of private discrimination is essential. However, leaving the development of private remedies to state legislatures is an unsatisfactory solution.

The proposed Offender Rehabilitation Act does not satisfy the requirements for an effective expungement system; it merely throws a cloak of nullification over the system that penalizes the unconvicted arrestee. The underlying system itself must be attacked. The most efficient method of eliminating the discrimination is to remove its source, the arrest records themselves. If a compelling necessity justifies retention of these records, the dissemination must be strictly limited. Even if all the violations of the proposed Act could be prosecuted, which is

77. *Id.* at S16,624; section 11.

highly unlikely, many former arrestees already would have been denied jobs they were seeking and would face possibly months of delay before obtaining relief. A comprehensive retrieval system that is based on limited dissemination of the arrest record prior to final disposition of the arrestee's case is needed. Then all copies of the record of arrest, including copies of fingerprints and other identification data, could be retrieved and destroyed if expungement is ordered.

CONCLUSION

Reform in the arrest record system is critically needed. On the judicial level, the *Eddy-Menard* standard should be applied. If the government cannot demonstrate a compelling necessity to retain an arrest record, it will be expunged. If the government justifies retention, dissemination will be limited strictly to law enforcement agencies. This procedure will satisfy valid law enforcement purposes without offending personal privacy or reversing the presumption of innocence. On the legislative level, a comprehensive federal plan is needed to insure that arrest records which are held beyond local jurisdiction can be retrieved or that strict limits on dissemination will be complied with. This solution will eliminate much of the present discrimination against unconvicted arrestees.

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