Volume 83
Issue 3 *Dickinson Law Review - Volume 83, 1978-1979*

3-1-1979

# Expungement of Criminal Arrest Records in Pennsylvania

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# Expungement of Criminal Arrest Records: The State of the Law in Pennsylvania

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## I. Introduction

Common sense and experience tell us that a person who has been convicted of a crime suffers significant social handicaps, even after he has "paid his debt to society."[1] Persons convicted of crimes often experience substantial difficulties finding and retaining employment, obtaining professional licensing, credit and insurance, enlisting in military services and holding public office.[2] In recognition of the obvious disabilities created by a criminal record, the legislatures of over twenty states have enacted statutes that authorize the expungement of records of criminal convictions.[3]

Perhaps less obvious is the plight of those citizens who are the

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1. For an excellent discussion of the social handicaps that afflict the former offender, see Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status,* 1966 WASH. U.L.Q. 147 (1966).

2. *See generally Symposium - The Collateral Consequences of a Criminal Conviction,* 23 VAND. L. REV. 929 (1970). *See also* S. RUBIN, H. WEIHOFEN, G. EDWARDS, & S. ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 611, 617-29 (1963).

3. Comment, *Expungement in Ohio: Assimilation into Society for the Former Criminal,* 8 AKRON L. REV. 480 (1975). *See also* Comment, *Expungement of Criminal Convictions in Kansas: A Necessary Rehabilitative Tool,* 3 WASHBURN L.J. 93 (1974).

Professor Gough defines an expungement statute as follows:

> Legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions, usually the successful discharge of the offender from probation and the passage of a period of time without further offense. It is not simply a lifting of disabilities attendant upon conviction and a restoration of civil rights, though this is a significant part of its effect. It is rather a redefinition of status, a process of erasing the legal event of conviction or adjudication, and thereby restoring to the regenerate offender his *status quo ante.*

Gough, *supra* note 1, at 149.

For the purpose of this article, the term "expungement" should be taken to mean the eradication or destruction of the record of an individual's arrest, together with any additional records generated by reason of the arrest, such as criminal complaints, indictments, fingerprints, photographs and internal police memoranda or reports.

subjects of arrest records but who have never been convicted. Although society's discrimination against exonerated arrestees may be more subtle than that directed against convicts, the former is even more unfortunate since it undermines the fundamental doctrine of presumed innocence. Moreover, in the area of employment, an exonerated arrestee is often discriminated against to the same degree as a convict, since employers seldom distinguish between persons arrested and exonerated and persons arrested and convicted.[4] The socially disabling effects resulting from a mere arrest record are not lost on the judiciary. In *Menard v. Mitchell*[5] the court stated,

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

As if it were done to assure prejudice against the exonerated arrestee, virtually all arrest records, even those that ultimately result in dismissal, acquittal or some other disposition indicative of the prosecution's inability to prove its case, are routinely transmitted to centralized facilities that collect arrest records for subsequent dissemination. The largest such facility, the Federal Bureau of Investigation's Identification Division, possesses statutory authority to disseminate the arrest records it receives from various federal, state and local agencies to a wide range of public and private bodies throughout the country.[7] Judge J. Skelly Wright describes the FBI's

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4. S. RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 630-31 (1963). This effect has even been demonstrated empirically. One study revealed that only one-third of the prospective employers involved in the research were willing to hire a man as an unskilled laborer where his application revealed that he had been charged with assault and subsequently acquitted. Schwartz & Skolnick, *Two Studies of Legal Stigma,* 10 SOCIAL PROBLEMS 133, 134-38 (1962).

5. 430 F.2d 486 (D.C. Cir. 1970).

6. *Id.* at 490-91. For additional judicial discussion of the disabilities that flow from a record of arrest see Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973); Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972); Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969).

7. 28 U.S.C. § 534 (1976), which provides,

> Acquisition, preservation, and exchange of identification records; appointment of officials
>
> (a) The Attorney General Shall—

use of these arrest records in *Utz v. Cullinane*[8]:

> These data [arrest records and fingerprint cards] submitted to the FBI are allegedly added to the FBI's Computerized Criminal History File (part of the FBI's National Crime Information Center), from which a master "rap" sheet is prepared listing each person's name, his identifying data, the date of the arrest, and the offense or offenses for which he was arrested; the "rap" sheet is allegedly disseminated upon request to over 14,500 public and private agencies including the United States Civil Service Commission, the Armed Services, banks, and state and local governments, which allegedly utilize that information adversely for employment and promotion purposes . . . .[9]

The Pennsylvania General Assembly has granted similar authority to the state police to develop arrest record files. PA. STAT. ANN. tit. 19, § 1401[10] directs the Pennsylvania State Police to

> [p]rocure and file for record photographs, pictures, descriptions, fingerprints, and such other information as may be pertinent, of all persons who . . ., may hereafter be, convicted of crime within this Commonwealth . . . .

In addition PA. STAT. ANN. tit. 19, § 1403[11] provides,

> [I]t shall be the duty of the chiefs of bureaus of all cities within this Commonwealth to furnish daily, to the Pennsylvania State Police, copies of the fingerprints and, if possible, photographs, of all persons arrested within their jurisdiction charged with the commission of felony, or who they have reason to believe are fugitives from justice . . . .

Thus, it is possible, even probable, that the arrest record of a person arrested in the Commonwealth of Pennsylvania will be on file not only with the agency effecting the arrest, but with the State Police and FBI as well.

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

Section 534 is implemented, in part, by a regulation contained in 28 C.F.R. § 0.85(b)(1978), which provides that the Director of the FBI shall

> Conduct the acquisition, collection, exchange, classification, and preservation of identification records, including personal fingerprints voluntarily submitted, on a mutually beneficial basis, from law enforcement and other governmental agencies, railroad police, national banks, member banks of the Federal Reseive System, FDIC Reserve - Insured Banks, and banking institutions insured by the Federal Savings and Loan Insurance Corporation; provide expert testimony in Federal or local courts as to fingerprint examinations; and provide identification assistance in disasters and in missing-persons type cases, including those from insurance companies.

8. 520 F.2d 467 (D.C. Cir. 1975).

9. 520 F.2d at 471. *See also* Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974); Menard v. Mitchell, 328 F. Supp. 718 (D.C. 1971); Annot., 46 A.L.R.3d 900 (1972).

10. (Purdon 1964).

11. (Purdon 1964).

But if Congress and the Pennsylvania Legislature have been careful to insure that the record of each arrest is properly accumulated and preserved, they have been less than diligent in passing legislation to insure that arrest records are expunged from the centralized collection facilities when the person alleged to have committed the crime is exonerated. A review of the applicable Pennsylvania legislation reveals only limited authorization by the General Assembly for the expungement of criminal arrest records.[12]

The most comprehensive expungement provisions in Pennsylvania are found in the Controlled Substance, Drug, Device and Cosmetic Act.[13] Section 19 of the Act, as amended, provides for the expungement of the "official and unofficial arrest and other criminal records pertaining to that [arrested] individual when the charges are withdrawn or dismissed or the person is acquitted of the charges."[14] The expungement provisions of this section apply only to records of offenses under the Act itself.[15] Expungement of a sort is also authorized by PA. STAT. ANN. tit. 19, § 1405,[16] which provides in pertinent part as follows:

> The district attorneys of the several counties shall keep and arrange files of the fingerprints, taken under the provisions of this act, of persons convicted of crime and shall destroy the fingerprints of all persons acquitted.

With the exception of these two limited provisions, the Pennsylvania Legislature has failed to address the issue of expungement of arrest records of exonerated arrestees.

## II. Judicial Expungement of Arrest Records in Pennsylvania

In the absence of comprehensive legislative authority for the expungement of arrest records, litigants have turned to the courts. The first case to mention a judicial remedy was *Commonwealth ex rel. Magaziner v. Magaziner.*[17] Petitioner David Magaziner had been arrested pursuant to an attachment issued in response to his divorced wife's contempt petition. On special certiorari to the supreme court,

12. The term "criminal arrest record" as used in this article does not include records of arrests or court proceedings involving a child as defined by The Juvenile Act, 1976, July 9, Pa. Laws 586, No. 142 § 2, 42 PA. CONS. STAT. ANN. § 6302 (Purdon 1978). Access to these records is strictly limited by §§ 6307 & 6308.

13. The Act of April 14, 1972, Pa. Laws 233, No. 64, §§ 1-44, *as amended;*, PA. STAT. ANN. tit. 35, §§ 780-101 to 780-144 (Purdon 1977).

14. Act of April 14, 1972 Pa. Laws 233 No. 64, PA. STAT. ANN. tit. 35, § 780-119(a)(Purdon 1977).

15. Section 19 authorizes expungement of records of arrest or prosecution of any criminal offense under the Controlled Substance, Drug, Device and Cosmetic Act with the exception of violations under § 13(a)(30), PA. STAT. ANN. tit. 35, § 780-113(a)(30)(Purdon 1977), which prohibits manufacture, delivery or possession with intent to manufacture or deliver a controlled substance. Moreover, expungement is available as a matter of right only once. PA. STAT. ANN. tit. 35, § 180-119(a)(Purdon 1977).

16. (Purdon 1964).

17. 434 Pa. 1, 253 A.2d 263 (1969).

petitioner successfully argued that the trial court improperly issued the attachment because he had not been afforded an opportunity to show cause why the attachment should not have issued. The supreme court determined, however, that the substantive issue raised by the petitioner was moot, for prior to the time the trial court was served with writ of special certiorari, the case was transferred to another judge who dismissed the petition. In disposing of petitioner's argument that the case was not moot because his unjust arrest resulted in a criminal record, Mr. Justice O'Brien noted, "However, a simple proceeding to remedy this [the petitioner's criminal record] exists in what is now the Criminal Division of the Common Pleas Court. Mr. Magaziner can there present his motion to expunge the arrest from his record."[18] Although mere dicta, this language was the first suggestion that the courts of this Commonwealth possess the requisite authority to expunge criminal arrest records.

The superior court faced this issue in the case of *Commonwealth v. Zimmerman.*[19] Charles Zimmerman had been convicted of failing to remit to the City of Philadelphia sales and use tax that he had collected. As a result of his conviction, he was placed on probation for a period of one year and ordered to make restitution. Later, Mr. Zimmerman filed a petition to expunge the record of his criminal conviction. The trial court granted his prayer for relief and directed that the record be expunged. The Commonwealth appealed, contending that the court was without authority to order destruction of Zimmerman's criminal record. In reversing the order of the common pleas court, the superior court agreed with the Commonwealth. Writing for court, Justice Cercone noted,

> This is not a case involving a defendant acquitted of a crime whose conduct since that acquittal furnishes no basis for keeping the arrest record alive. Unlike the circumstances in *Commonwealth ex rel. Magaziner v. Magaziner*, the petitioner in this case has been convicted of the crime and the only way that the record of conviction can be erased is by a Governor's exercise of his power to grant clemency under Article 4, Section 9, of the Pennsylvania Constitution.[20]

The superior court subsequently dealt with the issue of expungement, again in a tangential fashion, in the case of *Commonwealth v. Fredericks.*[21] Here appellant argued that a fingerprint comparison utilized by the Commonwealth in his burglary prosecution should have been suppressed since the fingerprint sample used for comparison was the product of a previous illegal arrest. In refusing to hold that the illegality of the prior arrest and the fingerprint

18. 434 Pa. at 9, 253 A.2d at 268.
19. 215 Pa. Super. 534, 258 A.2d 695 (1969).
20. 215 Pa. Super. at 536, 258 A.2d at 696 (citation omitted).
21. 235 Pa. Super. 78, 340 A.2d 498 (1975).

sample obtained as a result of it tainted the fingerprint comparison in the second case, the superior court stated,

> Finally, our decision does not leave those in appellant's situation without remedy. The clear weight of authority holds that one who has been falsely or illegally arrested is entitled to expungement of his record and removal of his fingerprints from criminal files. In light of the other considerations noted above, we find that appellant's failure to make use of the remedy of expungement constitutes a waiver of his objection to the use of the information on file in other, unrelated investigations.[22]

Not until *Commonwealth v. Malone*[23] did the courts squarely face the issue of an accused's right to expungement of his arrest record and the court's authority to grant such a request. Appellant Malone was arrested and charged with solicitation to commit involuntary deviate sexual intercourse. A week later the charge against appellant was dismissed at a preliminary hearing. Appellant then filed a petition with the common pleas court requesting that the arrest record be expunged and that the police be ordered to request a return of the arrest record from the Federal Bureau of Investigation. The Commonwealth opposed appellant's petition. It reviewed the statutory authority of the state police to procure and file criminal records,[24] together with the statutory duty imposed upon chiefs of police within the Commonwealth to furnish to the state police, on a daily basis, fingerprints and photographs of person arrested for felonies or whom they have reason to believe are fugitives.[25] The Commonwealth also emphasized that the same statute provided criminal penalties for "[n]eglect or refusal of any person mentioned in this Act to make the report required herein . . . ."[26] Finally, it noted that the statute requires the district attorneys of the several counties to destroy the fingerprint records of anyone acquitted of a crime.[27] The Commonwealth thus argued that these statutory provisions were a clear expression of legislative intent with respect to the collection, retention and destruction of criminal arrest records, and that in the absence of an express grant of authority from the legislature, the common pleas court lacked authority to order the police to expunge the arrest record. The trial court agreed with the Commonwealth and denied appellant's petition without a hearing.

On appeal to the superior court, appellant argued that his right to expungement of his arrest record was within the ambit of his constitutional right to privacy. Although rejecting his rationale, the su-

22. 235 Pa. Super. at 93, 340 A.2d at 505-06.
23. 244 Pa. Super. 62, 366 A.2d 584 (1976).
24. PA. STAT. ANN. tit 19, § 1401 (Purdon 1964). *See* text accompanying notes 10 & 11 *supra*.
25. PA. STAT. ANN. tit. 19, § 1403 (Purdon 1964).
26. *Id.* at § 1406.
27. *Id.* at § 1405. *See* text accompanying note 16, *supra*.

perior court held, in a four to three decision, that the trial court had the authority to remedy the denial of appellant's right to be free from unwarranted punishment by ordering expungement of the arrest record. The court further held that the accused was entitled to a hearing on the issue of his right to expungement, and that the court below would have the authority to order expungement under the appropriate circumstances.

Judge Hoffman delivered the opinion for the majority of the court, in which he reviewed the teaching of *Magaziner, Zimmerman* and *Fredericks*. He also considered the "harm ancillary to an arrest record," noting,

> Thus, it is not hyperbole to suggest that one who is falsely accused is subject to punishment despite his innocence. Punishment of the innocent is the clearest denial of life, liberty and property without due process of law. To remedy such a situation, an individual must be afforded a hearing to present his claim that he is entitled to an expungement—that is, because an innocent individual has a right to be free from unwarranted punishment, a court has the authority to remedy the denial of that right by ordering expungement of the arrest record.[28]

Judge Hoffman thus concluded that the courts have the inherent power, based upon due process principles, to order expungement of a criminal arrest record.[29] Having concluded that the trial court possessed the requisite authority to order an expungement, Judge Hoffman next turned his attention to a discussion of the circumstances under which that authority is properly exercised:

> The Commonwealth argues that society's interest in maintaining arrest records outweighs the limited intrusion on the individual's rights. We recognize the legitimate interest of society in retention of arrest records. However, recognition of that right in competition with the individual's rights is properly the beginning of the court's inquiry: 'What is . . . required is a more delicate balancing of law enforcement needs against the privacy and other interests of affected individuals, and a closer analysis of whether legitimate law enforcement needs may be served in a manner which does not unduly trench upon the individual's rights.' In some instances, retention of an arrest record is clearly invalid . . . in other instances, the court must balance the competing interest involved and resolve each case on its own facts. Given the substantial interest of an accused in his good name and in freedom from the disability flowing from an arrest record, we believe that the Commonwealth must come forward with compelling evidence to justify retention

28. 244 Pa. Super. at 69, 366 A.2d at 588.

29. In reaching its conclusion that Pennsylvania courts possess the inherent power to order expungement of arrest records, the superior court was obviously influenced by a line of federal cases that first articulated the concept. Most notable of these is Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) wherein the court stated, "The principle is well established that a court may order the expungement of records, including arrest records, when that remedy is necessary and appropriate in order to preserve basic legal rights." 478 F.2d at 968. *See also* Utz v. Cullinane, 520 F.2d 467 (D.C. Cir. 1975).

of such information.[30]

Thus, the superior court held for the first time that when an accused files a petition for expungement of an arrest record he is entitled to a hearing. The burden of proof in such a proceeding is upon the Commonwealth to demonstrate a compelling need to retain the accused's record.[31]

Although *Malone* teaches that the Commonwealth has a heavy burden to come forward with evidence to justify retention, a recent decision seems to indicate that the court may have retreated somewhat from its previous position. In *Commonwealth v. Mueller*[32] the accused was charged with theft by unlawful taking. At a preliminary hearing held following the filing of a criminal complaint, the magistrate found a prima facie case of theft and ordered the accused held for court. The case was never brought to trial and it was ultimately dismissed pursuant to the so-called 180-day Rule.[33] Mueller sought and received an order of expungement, from which the Commonwealth appealed.

In reversing the lower court's order of expungement, Judge Cercone, speaking for the majority of the superior court, noted,

> Our allocation of the burden upon the Commonwealth was based on the failure of the Commonwealth to make out a prima facie case at Malone's preliminary hearing. Here, the Commonwealth met that burden, and the prosecution was terminated for reasons unrelated to guilt or innocence . . . .
>
> Accordingly, where the record shows that the Commonwealth made out a prima facie case of guilt on the part of an accused, he will then have the burden to affirmatively demonstrate non-culpa-

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30. 244 Pa. Super. at 69-70, 366 A.2d at 588-89 (citations and footnotes omitted).

31. Judges Van der Voort, Jacobs and Price sharply disagreed. Speaking for the dissenters, Judge Van der Voort stated,

> Clearly, the legislature has not ignored the subject of expungement of criminal records in cases of non-conviction. It is highly significant that our statutory law permits or even commands, expungement of records resulting from criminal charges in certain well-defined and explicitly limited circumstances, yet provides criminal penalties for destruction or removal of similar records in all other cases. The legislative intent could not be more clear.
>
> My colleagues on the majority feel that the appellant is entitled to a hearing before the lower court to enable him to present his argument in support of his right to expungement. The lower court held that it has no authority to order expungement, and I am compelled, by my interpretation of legislative intent to agree. Not only has the legislature dealt with the subject of expungement of criminal identification records in our Commonwealth, but it has fashioned very careful guidelines and declared clearly limited circumstances wherein expungement would be permitted. Moreover, no convincing reason has been advanced to indicate that such guidelines violate the constitutional right of any person.
>
> I am mindful that expungement requests have been granted by our trial courts on many occasions in the past. For the first time in the instant case, however, we are squarely faced with the question of whether a lower court commits error in denying an expungement request. No matter what personal thoughts may be upon the subject of expungement in general, I feel constrained to reach this result, on this question of first impression, by my interpretation of absolutely clear legislative intent.

244 Pa. Super. at 75-76, 366 A.2d at 591-92.

32. —Pa. Super. —, 392 A.2d 763 (1978).

33. PA. R. CRIM. P. 1100.

bility at a hearing, otherwise his petition to expunge will be denied. If, however, such a showing is made, the court must weigh the Commonwealth's interest in retaining appellee's arrest record against appellee's interest in being free from whatever disabilities the record may create.

It must be borne in mind that the question before the court is not whether expungement is desirable in this case but whether it is constitutionally required; that is, whether it is necessary in order to prevent punishment of an innocent person.[34]

Thus, in light of the court's decision in *Mueller,* Pennsylvania courts are authorized, and in fact are constitutionally required, to grant expungement of criminal arrest records when criminal charges against an accused are dismissed because of the failure of the Commonwealth to establish a prima facie case against the accused. In addition, expungement is required when the accused has been acquitted, or when the case has been disposed of in some other manner that is premised upon, or indicative of, the innocence of the accused. In such cases, the court may refuse expungement only when the Commonwealth can come forward with compelling evidence to justify the retention of the records.[35]

When the prosecution is terminated favorably to the accused for reasons unrelated to his guilt or innocence, however, the accused then bears the burden of proving to the court that he was without criminal culpability. Failure by an accused to prove his lack of guilt will result in the denial of his petition for expungement.

Even after *Mueller* the law relating to expungement of criminal arrest records remains unsettled in Pennsylvania. The supreme court has granted *allocatur* in *Wert v. Jennings,*[36] a case that reiterates the teaching of *Malone.* But even if the ruling of the superior court is

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34. — Pa. Super. at —, 392 A.2d at 765. Judge Spaeth dissented from this obvious modification of the rule enunciated in *Malone* and its progeny, noting,

> [A]s I read *Malone,* the burden of proving a substantial interest in retaining the records should remain on the Commonwealth, the evidence that the Commonwealth had made out a *prima facie* case being relevant only to deciding whether the Commonwealth has met that burden.

*Id.* at —, 392 A.2d at 765 (citations omitted).

35. The court in *Mueller* did not indicate what kind of evidence the Commonwealth must present to justify retaining the records, but in light of the court's reasoning that expungment "is necessary in order to prevent punishment of an innocent person" *id.* at —, 392 A.2d at 765, it seems doubtful that any evidence would be sufficient to deny the arrestee his due process rights.

Recently, the superior court isssued a per curiam opinion in Commonwealth v. Rose, — Pa. Super. —, 397 A.2d 1243 (1979), in which it again reiterated that when the Commonwealth cannot present compelling evidence to justifiy retention of the arrest record, due process requires the record to be expunged. Here the Commonwealth failed to establish guilt, there were no procedural defects, and the defendant was acquitted. The court noted that the acquittal was "not a result of legal technicalities unrelated to questions of quilt or innocence" *id.* at 1244, and that the petitioner's interest in his reputation and from being free from the unfortunate consequences of having an arrest record outweighed the Commonwealth's interest in retaining the arrest record to deter shoplifters. *Id.*

36. 249 Pa. Super. 467, 378 A.2d 390 (1977), *allocatur granted,* No. 205 January Term, 1978.

affirmed, a great many unanswered questions will remain. For example, may a person who has received an expungement legally state that he has never been arrested? May an expunged arrest record be considered for the purpose of setting a person's bail if he is later arrested on another charge or be considered by the sentencing judge if he is later convicted on that charge? What sanctions may be imposed upon a person who reveals the existence of the expunged record? A legislative solution is clearly indicated as a way of avoiding the litigation that will be necessary to answer these questions.[37]

## III. Recommendations and Conclusion

Recently, three bills that provided for expungement were introduced to the General Assembly.[38] All three died in committee; nevertheless, none of these bills would have solved the problems encountered by the exonerated arrestee, since none of them would have acted to remove the disabilities associated with the record of arrest. The Legislature could best deal with the problem by enacting a modified version of section 19 of the Controlled Substance, Drug, Device and Cosmetic Act.[39] Section 19 mandates the prompt expungement of both official and unofficial arrest and other criminal records when the charges against an individual are withdrawn or dismissed or the person charged is acquitted of the charges. Section 19 requires the trial court, within five days after withdrawal, dismissal or acquittal, to

> order the appropriate keepers of criminal records (i) to expunge and destroy the official and unofficial arrest and other criminal

37. A number of states have statutes that mandate expungement or a restriction of access to criminal arrest records. For a general discussion of these statutes, see Annot., 46 A.L.R.3d 900 (1972).

38. H.B. 1317, 1977 session (June 14) would have amended The Act of April 27, 1927, Pa. Laws 414, No. 270, *as amended*, PA. STAT. ANN. tit. 19 §§ 1401-1438, (Purdon 1964), to provide that "fingerprints, photographs and other arrest records shall be expunged from police and other files one year following the date of arrest of any person if that person had no conviction prior to nor subsequent to the date of arrest," with penalties of thirty days imprisonment or a fine of up to $100, or both, for failure to comply with the provisions of the bill.

S.B.1629, 1978 session (Sept.18), would have amended the Act of November 25, 1970, Pa. Laws 707, No. 230, 42 PA. CONS. STAT. by adding § 4307, providing, in the case of a person granted a pardon, for expungement of "all material relating to the Act to which the pardon applies."

Finally, S.B. 1443, 1978 Session § 3 (April 18), which would have been known as the Criminal Records Expunging Act, provided for expungement in the following instances:

> (1) In any case where a police agency has elected to drop charges.
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> (2) If no disposition has been received in the central repository within 18 months after the date of arrest . . . .
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> (3) By court order requiring such that nonconviction information be expunged.
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> (4) To remove and destroy records when an individual has reached 100 years of age and has been free of arrest or prosecution for a period of 15 years following final release from confinement or supervision.
>
> (5) When an individual has been dead for a period of seven years and had no contact with the criminal justice system for 15 years.

39. Act of April 14, 1972, Pa. Laws 233, No. 64, as amended, PA. STAT. ANN. tit. 35, § 780-119 (Purdon 1977).

> records of that individual, to request in so far as they are able the return of such records as they have made available to Federal and other State agencies, and to destroy such records on receipt thereof; and (ii) to file with the court within thirty days an affidavit that such records have been expunged and destroyed, together with the court's expunction order and to retain no copies thereof. Upon receipt of such affidavit, the court shall seal the same together with the original and all copies of its expunction order and shall not permit any person or agency to examine such sealed documents.[40]

Section 19 also provides that no expunged record of arrest or prosecution may "be regarded as an arrest or prosecution for the purpose of any statute or regulation or license or questionnaire or any civil or criminal proceeding or any other public or private purpose."[41] Thus, an exonerated arrestee legitimately can state on a job application that he has never been arrested. Furthermore, the arrest cannot be considered at sentencing if the exonerated arrestee was subsequently convicted. The confidentiality of the sealed records is guaranteed by subsection (b), which makes it a summary offense for anyone other than the person arrested or prosecuted to divulge any information concerning the case. Upon conviction, the violator becomes subject to a fine of up to $500 or thirty days imprisonment, or both.

One provision of section 19 would require modification to conform to the due process standards articulated by the superior court. Subsection (a) provides, *inter alia,* that "such expungement shall be available as a matter of right to any person only once."[42] All of the cases seem to indicate that due process requires expungement of criminal arrest records when the prosecution is terminated for reasons indicative of the innocence of the accused. With the deletion of the one time only provision, and the incorporation of a provision permitting the court to authorize retention of the records when the Commonwealth can offer compelling reasons for doing so, an act based upon section 19 would be a model expungement statute.

Such a statute would end the dichotomy that now exists between the treatment accorded drug offenders and that accorded those charged with other classes of offenses. Prompt expungement will insure the exonerated arrestee the right to pursue employment, education or professional licensing without fear of unwarranted discrimination. The current state of affairs often presents a very difficult choice: should an exonerated arrestee honestly acknowledge the possession of an arrest record, knowing the possible adverse consequences of such an admission, or should he attempt to conceal its existence, recognizing that the discovery of a falsehood might have

40. *Id.*
41. *Id.*
42. *Id.*

devastating effects? A statute modeled after section 19 would alleviate the necessity of an exonerated arrestee being forced to make that choice, and would insure that no citizen would be forced to endure punishment for alleged criminal conduct without due process of law.