Arrest Record Expungement in California: The Polishing of *Sterling*

*Richard P. Alexander**
*Kathleen Walz***

INTRODUCTION

A question of growing importance in today's world of expanding computerization is the extent to which an individual who has been arrested, but later exonerated,[1] should continue to be affected by the existence of arrest records. In the absence of governing statutes,[2] many courts adopt the position that they have the power to order expungement of arrest records or to provide other more limited forms of relief. In this respect the problem is viewed as one of balancing two conflicting considerations: 1) the necessity for law enforcement agencies to maintain adequate identification records so that they may efficiently perform their statutory duties, and 2) the potentially disastrous effect the existence of such records might have on the individual. While some courts take the position that the judiciary totally lacks the power to order expungement of arrest records,[3] others view retention of such records as involving an infringement of the fundamental right to privacy. As a consequence those courts require the state to justify its action by establishing a

---

* B.A., 1966, Ohio Wesleyan University; J.D., 1969, University of Chicago; Member, California Bar.

** B.S., 1970, Emory University; J.D., 1974, Hastings College of the Law; Member, California Bar. The authors gratefully acknowledge the research assistance of Mr. William Bernstein, member, Law Review staff.

1. "Exoneration" as used in this article refers to the release of an arrestee without formal charges being brought, to dismissal of charges, or to acquittal of the arrestee after a trial on the merits. The number of arrests ending in exoneration is not insignificant. In 1973 there were 1,021,617 arrests of adults in California and, on the basis of past statistics, approximately one-half of these arrests will be resolved by release, dismissal, or acquittal of the arrestee. Documentation by the California Bureau of Criminal Statistics.

2. Those states having expungement statutes as of 1966 are listed and discussed in Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 162-68, 174-78. In addition, Illinois has recently enacted such statutes. ILL. REV. STAT. ANN. ch. 38, § 206-5 (1970). It should be noted that most "expungement" statutes actually provide for the return or sealing of arrest records, rather than for their literal destruction. Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 853 n.17 (1971).

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

compelling state interest.[4] The leading California case of *Sterling v. Oakland*[5] avoided the question of when circumstances might warrant the expungement of arrest records by holding that the determination was more properly one for the legislature.

This article will investigate the present California position with respect to expunging arrest records of adults not convicted of the charges for which they were arrested. Current trends in other jurisdictions will be examined to discern any changes in the climate for judicial decision which might influence the California Supreme Court to overrule *Sterling*.

I

STERLING V. OAKLAND

The controlling case in California on the issue of expungement of arrest records is the court of appeal decision of *Sterling v. Oakland*.[6] *Sterling* involved a citizen's arrest made by a taxicab driver in a dispute with his passenger over payment of the fare. The misdemeanor charges were eventually dismissed, and Ms. Sterling was later vindicated in a civil action against the driver and the cab company for false imprisonment and malicious prosecution.[7] She then brought suit to enjoin the city and its police department from retaining her fingerprints and photographs.

The court of appeal held that the plaintiff had failed to state a cause of action, affirming the lower court's decision.[8] Although *Sterling* is regularly cited for the proposition that the exonerated arrestee cannot seek expungement of arrest records in the absence of any legislative mandate, a full reading of *Sterling* reveals that the court believed that this was not an area in which it was *desirable* for the court to exercise its power:

> We base our decision chiefly upon the omission of the Legislature of this state to prescribe any duty to return photographs or fingerprints, and upon certain statutory relief which does exist in this state; but we find some support for the judgment in the decisions of other states.[9]

Thus *Sterling* does not deny that California courts have the equita-

4. Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).
5. 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).
6. *Id.*
7. *Id.* at 3, 24 Cal. Rptr. at 697-98.
8. *Id.* at 4, 24 Cal. Rptr. at 698.
9. *Id.*

ble power to remedy manifest injustices caused by retention of arrest records.

In reaching its decision that there was no duty to return the photographs or fingerprints of an exonerated arrestee, the court relied on four major grounds: 1) the omission of the legislature to provide for the return or expungement of arrest records, 2) the sufficiency of existing statutes to protect an exonerated arrestee by insuring that the eventual disposition of the case is made part of the arrest records and limiting the access to such reports, 3) the supposition that the existence of an arrest record would not adversely affect the arrestee and 4) the belief that any invasion of the arrestee's right of privacy caused by maintaining such records was insignificant.

A. Legislative Omission

Although the court stated that its decision was based primarily upon the "omission" of the legislature to create a duty on the part of law enforcement agencies to expunge certain records, it was not actually relying on legislative silence. The previous year a bill had been considered by the California legislature which would have required the return of both local and state arrest records of all arrestees later exonerated, upon demand and payment of a small fee to defray administrative costs. The court looked upon failure to enact the bill as an indication that the legislature believed such a remedy was not "necessary or proper or expedient."[10]

B. Existing Statutes

The court also stressed the sufficiency of protections afforded by California Penal Code section 11116,[11] which requires that a disposition report be made in those cases in which a criminal complaint or accusation is filed, [12] and California Penal Code section

---

10. *Id.* at 6, 24 Cal. Rptr. at 699.

11. California Penal Code section 11116 as amended in 1972 is substantially the same as the earlier version discussed in *Sterling v. Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962), and in pertinent part provides:

> Whenever a criminal complaint or accusation is filed in any superior, municipal or justice court, the clerk, or, if there be no clerk, the judge of that court shall furnish a disposition report of such case to the sheriff, police department or other law enforcement agency primarily responsible for the investigation of the crime alleged in a form prescribed or approved by the Department of Justice.

12. California Penal Code section 11115 requires that a similar disposition report be made in cases in which the suspect is released without a criminal complaint or accusation having been filed and whenever the arrestee is transferred to the custody of another agency. In addition, this section provides in part:

11117,[13] which requires that such a report be included in the plaintiff's arrest file. Since both the dismissal of the charges against Ms. Sterling and the resolution of the private suit in her favor were matters of public record, thus constituting the disposition in her official arrest records, the court concluded that she could have no particular interest beyond a "personal desire" in return of the arrest records.[14]

While a disposition report is required to contain certain designations and explanations regarding the reasons for a dismissal, it is quite apparent from an examination of these designations that improper inferences of guilt may readily be drawn.[15] Thus, even though

---

If either of the following dispositions is made, the disposition report shall so state:

(a) "Arrested for intoxication and released," when the arrested party is released pursuant to paragraph (2) of subdivision (b) of Section 849.

(b) "Detention only," when the detained party is released pursuant to paragraph (1) of subdivision (b) of Section 849. In such cases the report shall state the specific reason for such release, indicating that there was no ground for making a criminal complaint because (1) further investigation exonerated the arrested party, (2) the complainant withdrew the complaint, (3) further investigation appeared necessary before prosecution could be initiated, (4) the ascertainable evidence was insufficient to proceed further, (5) the admissible or adducible evidence was insufficient to proceed further, or (6) other appropriate explanation for release.

13. California Penal Code section 11117 was also amended in 1972, but remains substantially unchanged. It requires the Department of Justice to place disposition reports required under California Penal Code sections 11115-16 in the "appropriate criminal records."

14. Sterling v. Oakland, 208 Cal. App. 1, 7, 24 Cal. Rptr. 696, 700 (1962).

15. California Penal Code section 11116 governs those cases in which a criminal complaint was filed and requires that a disposition report contain one or more of the following labels:

(a) "Dismissal in furtherance of justice, pursuant to Section 1385 of the Penal Code." In addition to this disposition label, the court shall set forth the particular reasons for the dismissal as stated in its order entered upon the minutes.

(b) "Case compromised; defendant discharged because restitution or other satisfaction was made to the injured person, pursuant to Sections 1377 and 1378 of the Penal Code."

(c) "Court found insufficient cause to believe defendant guilty of a public offense; defendant discharged without trial pursuant to Section 871 of the Penal Code."

(d) "Dismissal due to delay; action against defendant dismissed because the information was not filed or the action was not brought to trial within the time allowed by Section 1381, 1381.5, or 1382 of the Penal Code."

(e) "Accusation set aside pursuant to Section 995 of the Penal Code." In addition to this disposition label, the court shall set forth the particular reasons for the disposition.

(f) "Defective accusation; defendant discharged pursuant to Section 1008 of the Penal Code," when the action is dismissed pursuant to that section after

such reports are included in an arrest file, they fail to shield an exonerated arrestee from the inference that he is really just another criminal who "got off on a technicality."

California has also enacted certain statutory restrictions on the dissemination of information contained in arrest files.[16] Such limitations are designed to protect the arrestee from disclosures of information not necessitated by the proper performance of official duties,

---

demurrer is sustained, because no amendment of the accusatory pleading is permitted or amendment is not made or filed within the time allowed.

(g) "Defendant became a witness for the people and was discharged pursuant to Section 1099 of the Penal Code."

(h) "Defendant discharged at trial because of insufficient evidence, in order to become a witness for his codefendant pursuant to Section 1100 of the Penal Code."

(i) "Proceedings suspended; defendant found presently insane and committed to state hospital pursuant to Sections 1367 to 1372 of the Penal Code." If defendant later becomes sane and is legally discharged pursuant to Section 1372, his disposition report shall so state.

(j) "Convicted of (state offense)." The disposition report shall state whether defendant was convicted on plea of guilty, on plea of nolo contendere, by jury verdict, or by court finding and shall specify the sentence imposed, including probation granted, suspension of sentence, imposition of sentence withheld, or fine imposed and if fine was paid.

(k) "Acquitted of (state offense)," when general "not guilty" verdict or finding is rendered.

(l) "Not guilty by reason of insanity," when verdict or finding is that defendant was insane at the time the offense was committed.

(m) "Acquitted; proof at trial did not match accusation," when defendant is acquitted by reason of variance between charge and proof pursuant to Section 1151.

(n) "Acquitted; previously in jeopardy," when defendant is acquitted on a plea of former conviction or acquittal or once in jeopardy pursuant to Section 1151.

(o) "Judgment arrested; defendant discharged," when the court finds defects in the accusatory pleading pursuant to Sections 1185 to 1187, and defendant is released pursuant to Section 1188.

(p) "Judgment arrested; defendant recommitted," when the court finds defects in the accusatory pleading pursuant to Sections 1185 to 1187, and defendant is recommitted to answer a new indictment of information pursuant to Section 1188.

(q) "Mistrial; defendant discharged." In addition to this disposition level, the court shall set forth the particular reasons for its declaration of a mistrial.

(r) "Mistrial; defendant recommitted." In addition to this disposition label, the court shall set forth the particular reasons for its declaration of a mistrial.

(s) Any other disposition by which the case was terminated. In addition to the disposition label, the court shall set forth the particular reasons for the disposition.

See note 12 *supra*, for the requirements for a disposition report in which no complaint was filed.

16. CAL. PENAL CODE § 11105 (West 1974).

and thus to some extent they afford such information the status of confidentiality.

The range of individuals and agencies which may properly obtain this "confidential" information is extremely broad,[17] and the ability of police agencies to monitor the use of such information is generally limited to an investigation of whether the stated purpose for requesting such information is a statutorily permissible one.[18] The result is that arrest records have often fallen into unauthorized hands despite the supposed statutory restrictions.

From an examination of the above statutes, it is easily discernable that if an arrestee is adequately insulated from any adverse consequences arising from arrest, it is not because of the existence of a disposition report or the statutory limitations on the dissemination of such information. Judge Freedman, dissenting in *White v. California*,[19] was also unimpressed with the sufficiency of these statutes to protect individual liberties:

> Our nation's current social developments harbor insidious evolutionary forces which propel us toward a collective, Orwellian society. One of the features of that society is the utter destruction of privacy, the individual's complete exposure to the all-seeing, all-powerful police state. Government agencies, civilian and military, federal, state and local, have acquired miles and

---

17. California Penal Code section 11105 provides in pertinent part:

> (a) The Attorney General shall furnish, upon application in accordance with the provisions of subdivision (b) of this section, copies of all summary criminal history information pertaining to the identification of any person. . . .
>
> (b) Such information shall be furnished to all peace officers, district attorneys, probation officers, and courts of the state, to United States officers or officers of other states, territories, or possessions of the United States, or peace officers of other countries duly authorized by the Attorney General to receive the same, and to any public defender or attorney representing such person in proceedings upon a petition for certificate of rehabilitation and pardon. . . , upon application in writing accompanied by a certificate signed by the peace officer, public defender, or attorney, stating that the information applied for is necessary for the due administration of the laws, and not for the purpose of assisting a private citizen in carrying on his personal interests or in maliciously or uselessly harassing, degrading or humiliating any person.
>
> (c) Such information shall not be furnished to any persons other than those listed in subdivision (b) of this section or as provided by law; *provided*, that such information may be furnished to any state agency, officer, or official when needed for the performance of such agency's, officer's, or official's functions (emphasis added).

18. Annot., 46 A.L.R.3d 900, 906 (1972) (entitled *Right of Exonerated Arrestee to Have Fingerprints, Photographs, or other Criminal Identification or Arrest Records Expunged or Restricted*).

19. 17 Cal. App. 3d 621, 95 Cal. Rptr. 175 (1971).

> acres of files, enclosing revelations of the personal affairs and conditions of millions of private individuals. Credit agencies and other business enterprises assemble similar collections. Information peddlers burrow into the crannies of these collections. Microfilm and electronic tape facilitate the storage of private facts on an enormous scale. Computers permit automated retrieval, assemblage and dissemination. These vast repositories of personal information may easily be assembled into millions of dossiers characteristic of a police state. Our age is one of shriveled privacy. Leaky statutes imperfectly guard a small portion of these monumental revelations.[20]

C. Adverse Consequences

The *Sterling* court brushed aside the contention that mere existence of an arrest record could be injurious by making it more likely that Ms. Sterling would be arrested some time in the future and that if she were ever convicted of a crime, such records would be considered in sentencing and might result in imposition of a harsher sentence. The court concluded that such an argument was specious on the facts presented. Plaintiff had been arrested for a "trivial" misdemeanor which had been resolved in her favor and the circumstances which had been the basis for the arrest had also been the basis for her recovery of damages.[21]

Today the burden of an arrest record cannot be so easily ignored. Courts are increasingly cognizant of the severe consequences which may result from mere existence of an arrest record. In 1970 the U.S. Court of Appeals for the District of Columbia Circuit 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.[22]

---

20. *Id.* at 631, 95 Cal. Rptr. at 181-82.
21. Sterling v. Oakland, 208 Cal. App. 2d 1, 7-8, 24 Cal. Rptr. 696, 700 (1962).
22. Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1970). *Accord*, Davidson v. Dill,

D. Invasion of Privacy

Sterling was also based at least in part on the court's belief that any invasion of the right of privacy was slight. The court argued that the taking of fingerprints had become so commonplace that it should no longer be considered an "indignity," and that in any event, only an expert could decipher fingerprints.[23] As for the photographs, which obviously could be easily associated with the plaintiff, the court believed that it was for the legislature to determine the permissible extent of their use, which would imply that the result might have been different if there had been special facts indicating misuse of the photographs.[24] The court even argued that retention of records was in plaintiff's interest since the records would enable her to prove that she was the person exonerated, a tenuous and unrealistic argument since there was no reason to believe that such an issue would ever arise.[25]

Sterling was decided in 1962, three years before the landmark United States Supreme Court decision of *Griswold v. Connecticut*.[26] In *Griswold* the Court struck down as violative of the due process clause of the fourteenth amendment a statute which prohibited the dissemination of birth control information. The Court held that the statute was an impermissible invasion of the constitutional right of privacy emanating from the "penumbras" of the first, third, fourth, fifth and ninth amendments. The Court further noted that the right of privacy was "older than the Bill of Rights" and as such was a fundamental right.[27] Later Supreme Court decisions have made it clear that in order to justify an infringement of the fundamental right of privacy, the equal protection clause of the fourteenth amendment requires that a compelling state interest be shown.[28]

Prior to emergence of the right of privacy as a fundamental right, the majority position was that any invasion of the right of privacy was justified by the interest of the state in providing effective law enforcement.[29] *Griswold* heralded a change in this attitude

---

___ Colo. ___, ___, 503 P.2d 157, 159-60 (1972).

23. Sterling v. Oakland, 208 Cal. App. 2d 1, 6-7, 24 Cal. Rptr. 696, 699-700 (1962).

24. *Id.* at 7, 24 Cal. Rptr. at 700.

25. *Id.*

26. 381 U.S. 479 (1965).

27. *Id.* at 486.

28. Roe v. Wade, 410 U.S. 113 (1973) (right of women to obtain abortion); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

29. Annot., 46 A.L.R.3d 900, 917 (1972) (entitled *Right of Exonerated Arrestee to Have*

toward invasion of privacy and resulted in a growing trend to apply ever more stringent standards in determining whether particular infringements should be upheld.

In addition to post-*Sterling* decisions recognizing the fundamental nature of the right of privacy, an amendment to the California constitution was adopted in 1972 which expressly assures Californians the right of privacy.[30] This express affirmance, together with Supreme Court decisions elevating the importance of the right of privacy, justify a reappraisal of the *Sterling* decision. *Sterling* dealt with the right of privacy issue in an offhand and ambiguous manner as if it were of minor importance. At best, the court applied a balancing test to weigh the particular interests involved on the basis of the facts before the court. Arguably, the proper test which should be applied today is the much more stringent compelling interest test.[31] In any event, it may be helpful to review the approaches of other courts in the post-*Griswold* era as an aid in anticipating the result of any forthcoming California reappraisal.

II

DECISIONS FOLLOWING *GRISWOLD*

There is a split of authority on the issue of whether an exonerated arrestee has the right to have his arrest records expunged or returned to him upon request in the absence of a statute granting

---

Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted).

30. The California constitution, article I, section 1 provides:

> All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and privacy.

The booklet on the proposed amendments to the California constitution which accompanied voter packets in 1972 stated:

> The proliferation of government snooping and data collecting is threatening to destroy our traditional freedoms. Government agencies seem to be competing to compile the most extensive sets of dossiers of American citizens. Computerization of records makes it possible to create "cradle-to-grave" profiles on every American.
>
> *At present there are no effective restraints on the information activities of government and business. This amendment creates a legal and enforceable right of privacy for every Californian* (emphasis in original).

Secretary of State, VOTER'S PAMPHLET, 26-27 (1972).

The accompanying argument emphasized that the right of privacy could be "abridged only when there is a compelling public need." *Id.*

31. *See* Eddy v. Moore, 5 Wash. App. 334, 487 P.2d 211 (1971).

such a right. The majority view maintains that there is no such right.[32]

There is wide diversity among the jurisdictions in their approach to the issue of expungement. Some courts take the position that they are without power to provide such a remedy.[33] Other courts adopt the position that even though they have the power, it should not be exercised in the absence of legislative action.[34]

The better reasoned view, however, is that courts do have the general equitable power to order the expungement of arrest records, or other more limited forms of relief, in the appropriate case. The Colorado supreme court so held in *Davidson v. Dill*, [35] reversing the lower court's dismissal of a complaint requesting expungement or the return of arrest records for failure to state a claim upon which relief could be granted. The court stated that "courts should be wary of dismissing a case where the pleadings show that an alleged violation of a constitutional right is at issue, since fundamental rights and important public policy questions are necessarily involved."[36]

Federal courts have also generally adopted this position.[37] In *Kowall v. United States*[38] the district court held that it had the inherent power to order records in "the possession and control of federal agencies" to be expunged and therefore denied a motion for

---

32. Annot., 46 A.L.R. 3d 900, 904 (1972) (entitled *Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted*).

33. *See, e.g., Spock v. District of Columbia*, 283 A. 2d 14 (D.C. Ct. App. 1971) which held that the District of Columbia courts were without the power to order expungement, but remanded for the lower court to determine whether some lesser form of relief should be awarded. *But see Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970), distinguished in *Spock* as dealing with the expungement of F.B.I. records, rather than the local police records authorized to be compiled by local statute. *Compare Morrow v. District of Columbia*, 417 F.2d 728 (D.C. Cir 1969), which held that the lower court had *ancillary* jurisdiction to issue an order regarding arrest records in a criminal case which had been heard before it. On remand in *In re Alexander*, 259 A.2d 592 (D.C. Ct. App. 1969), the lower court held that the local statutes limiting dissemination of arrest records provided sufficient protection of the arrestee's rights and that "no further order is required . . . except in rare cases presenting such unusual facts as to justify the trial court in ordering a particular arrest record completely expunged." *Id.* at 593.

34. *See, e.g.*, Sterling v. Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962).

35. ___ Colo. ___, 503 P.2d 157 (1972).

36. *Id.* at ___, 503 P.2d at 162.

37. Annot., 46 A.L.R. 3d 900, 909 (1972) (entitled *Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted*).

38. 53 F.R.D. 211 (W.D. Mich. 1971).

relief from the trial judge's expungement order. The court did not view the statutes regarding collection of such records as affecting its power, at least in the absence of express statutory language, and thus rejected the government's assertion that as a matter of law any invasion of an arrestee's right of privacy was outweighed by the state's interest in maintaining comprehensive arrest records:

> In each case, the court must weigh the reasons advanced for and against expunging arrest records. If it is found after careful analysis that the public interest in retaining records of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences to the individual, then the records involved may be properly expunged.[39]

Those courts adopting the position that they do have the power to order expungement of arrest records have generally approached the issue on a case-by-case basis, balancing the conflicting interests of law enforcement agencies to maintain such records in order to insure efficient performance of their duties against the individual's fundamental right of privacy.[40]

The fact that the mere existence of arrest records may have disastrous consequences for an innocent arrestee is well recognized today.[41] Against this consideration must be balanced the argument that efficient law enforcement requires the maintenance of complete arrest records. This argument rests upon the supposition that if a person was arrested in the past, there is some reason to believe that that arrest was justified, (that is, that the arrestee was engaged in criminal activity, even if he was actually never convicted) and that this provides some basis for the inference that he will be involved in criminal conduct in the future. Ignoring the question of whether such an inference is permissible in a system of criminal justice which is based on the presumption of innocence, this reasoning contains several obvious fallacies. If someone was arrested solely by mistake, there is no basis whatsoever for any inference of possible

---

39. *Id.* at 214.

40. Before the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), the courts reaching this issue almost uniformly resolved the balancing process in favor of the interests of law enforcement.

41. *See, e.g., Davidson v. Dill*, ___ Colo. ___, ___, 503 P.2d 157, 159-60 (1972) in which the Supreme Court of Colorado stated that the "seriousness of the arrest record problem . . . is now too well documented to be doubted." *See also* Karabian, *Record of Arrest: The Indelible Stain*, 3 PACIFIC L. J. 20 (1972); A. MILLER, ASSAULT ON PRIVACY 67 (1971); Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEXAS L. REV. 837 (1971); and Comment, *Discriminatory Hiring Practices Due to Arrest Records - Private Remedies*, 17 VILL. L. REV. 110 (1971).

future criminality.[42] Furthermore, there would be no basis for such an inference if in fact no arrest had been made, although criminal records of a supposed arrest did exist.[43]

The courts have also recognized that there is no permissible basis for an inference of future criminal misconduct in those cases involving arrests which violated some constitutional guarantee, such as an illegal mass arrest or an arrest which was part of an illegal plan of police harrassment.[44]

An arrest not based on probable cause also presents difficulties, raising serious constitutional issues with respect to the fourth amendment's prohibition against unreasonable searches and seizures.[45] In order to safeguard these rights, the Supreme Court has adopted an exclusionary rule prohibiting the introduction in state or federal court of evidence obtained in violation of the fourth amendment.[46] The rationale of adopting such exclusionary evidentiary rules to prevent infringement of fourth amendment rights has not been extended to non-evidentiary situations, such as compilation of arrest records, even though such actions might involve use of the "fruits of the poisonous tree."[47] At least one court has expressed serious concern about this problem:

> There is, to say the least, serious question whether the Constitution can tolerate any adverse use of information or tangible

42. Henry v. Looney, 65 Misc. 2d 759, 317 N.Y.S. 2d 848 (Sup. Ct. 1971); Irani v. District of Columbia, 272 A.2d 849 (D.C. Ct. App. 1971). One court, after denying the existence of any expungement remedy, took the position that in order to obtain some lesser form of relief based on a mistaken arrest, it was necessary for plaintiff to make an affirmative showing of nonculpability. Spock v. District of Columbia, 283 A.2d 14, 19 (D.C. Ct. App. 1971). However, this decision was based in large part on the court's determination that the existing statutes afforded adequate protection. *See In re* Alexander, 259 A.2d 592, 593 (D.C. Ct. App. 1969).

43. In *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974), the Court of Appeals for the District of Columbia held that an asserted arrest was merely a detention under California Penal Code section 849b(1) and that although the F.B.I. was authorized by federal statute to collect and maintain arrest records pursuant to 28 U.S.C. section 534, this statute did not authorize the F.B.I. to maintain criminal records of mere encounters. The court noted that it was not prohibiting the collection of neutral identification records, but merely retention of such records in criminal files.

44. *See, e.g.*, Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir. 1973) (injunction against dissemination of mass arrest records ordered pending determination of the merits of plaintiff's suit for expungement); U.S. v. McLeod, 385 F.2d 734 (5th Cir. 1967) (suit by Attorney General under 42 U.S.C. section 1971(b) based on state action designed to disrupt voter registration drive); Wheeler v. Goodman, 306 F. Supp. 58 (W.D. N.C. 1969) (vagrancy statute under which arrest was held unconstitutionally overbroad); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968) (police harassment of "hippies").

45. U.S. CONST. amend. IV.

46. Mapp v. Ohio, 367 U.S. 643 (1961).

47. *See* Davis v. Mississippi, 394 U.S. 721, 727 (1969).

> objects obtained as the result of an unconstitutional arrest of the individual concerned. . . . [I]f appellant can show that his arrest was not based on probable cause it is difficult to find constitutional justification for its memorialization in the FBI's criminal files.[48]

Even if retention of records of an arrest made without probable cause does not offend the fourth amendment, drawing any inference of criminality from such an arrest would nevertheless seem tenuous. If at the time of arrest there was no probable cause to believe the arrestee had committed a crime, there is clearly no reasonable basis for this inference of criminality, since if it is justified at all, it must be justified as of the time the arrest records were made.

In cases in which there is a valid arrest not due to a mistake and in which there is a later exoneration of the arrestee, courts have been willing to afford some relief against retention of arrest records where they have been misused. Such misuse has been found to exist when photographs of arrestees are displayed in a "rogue's gallery" fashion.[49] *United States v. Kalish*[50] furnishes another example of misuse of arrest records. Just prior to the time for his induction into the army, defendant was arrested for a previous refusal to report for induction. Defendant's refusal was based on the advice of counsel in order to test the propriety of the local board's determination of his draft status. A habeas corpus petition had been filed and the Selective Service had been ordered to show cause why such petition should not issue. At the hearing to show cause, even though Kalish stated the reasons for his prior refusal and stated his then willingness to be inducted, the United States attorney insisted that he be arrested. Previously, the U. S. attorney had also agreed that Kalish should be permitted to reopen the selective service proceedings before being inducted.[51]

The charges against him were subsequently dropped. However, the facts indicated threatened use of the arrest process to frustrate a federal constitutional right.[52] Under such circumstances, the court

---

48. Menard v. Mitchell, 430 F.2d 486, 491-92 (D.C. Cir. 1970). For the decision on remand, see 328 F. Supp. 718 (D. D.C. 1971), *on appeal*, Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).

49. Annot., 46 A.L.R. 3d 900, 931 (1972) (entitled *Right of Exonerated Arrestee to Have Fingerprints, Photographs, or Other Criminal Identification or Arrest Records Expunged or Restricted*).

50. 271 F. Supp. 968 (D.P.R. 1967).

51. *Id.* at 969.

52. *Id.* at 970.

held that retention by the FBI and other federal agencies of criminal arrest records constituted an unwarranted attack upon his character and violated his right of privacy.[53] The court ordered the attorney general to destroy all arrest records.

In the above situations a balancing test was employed to determine the relative strength of any inference drawn from an arrest which would support the state's contention of the need to retain particular records. In *Eddy v. Moore*[54] the Supreme Court of Washington held that retention of arrest records where all charges had been dismissed invaded the arrestee's fundamental right of privacy, thus invoking the compelling state interest test:

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

III

REMEDIES

Although this society prides itself on the philosophy that a person is presumed innocent until proven guilty, as a practical matter that policy is more honored in the breach than in the observance. In our mass media society, an initial allegation of criminality is regularly voiced to the world as news and as such is indelibly noted by the public, regardless of the outcome of the charges. This reaction is due in part to the high number of criminal cases resulting in termination in favor of the government.

Regardless of the empirical results, neither the presumption of innocence nor the innocent arrestee should suffer, whether dismissal comes by way of grace, in the interest of justice, by judicial dis-

---

53. *Id.*

54. 5 Wash. App. 334, 487 P.2d 211 (1971).

55. *Id.* at 345, 487 P.2d at 217 and Annot., 46 A.L.R. 3d 889, 898. The Washington court held that state statutes providing for the confidentiality of such arrest records were insufficient to protect the exonerated arrestee's right of privacy. These statutes were repealed in 1970, but were similar to present California statutes. For example, the Revised Code of Washington section 72.50.140 provided that upon dismissal or acquittal all such records would be considered confidential and limited by sections 72.50.100 and 72.50.080 to the official use of law enforcement agencies and other authorized persons, except upon court order or the notarized request of the arrestee. In effect California Penal Code section 11105 also attempts to make arrest records confidential, although it does not distinguish between arrests ending in acquittal or conviction.

missal on the merits or by acquittal. Respect for the presumption of innocence until guilt is established beyond a reasonable doubt requires that termination of criminal proceedings in favor of the arrestee be coupled with a favorable inference compatible with that presumption. Accordingly, arrest records should at that time be automatically expunged by rule of law.

Critics argue that such expungement amounts to rewriting history. They maintain that only when no probable cause for arrest can be found in the record should expungement follow.

Present practice requires retention of arrest records, and an order of expungement is the most radical remedy available to a court. Judicial reluctance to take this step is no doubt premised on a belief in the value of arrest records. Dealing with that reality, sealing of such records under a plan whereby records would only be admitted in a criminal proceeding involving the arrestee as a principal would serve to protect the innocent person from the stigma of arrest and yet at the same time would also serve some of the desires of prosecutors.

Retaining arrest records obviously enhances the intelligence capability of law enforcers. The major concern of the individual is the potentially devastating effect a resurrected arrest record can have on his or her life. One solution adopted by the courts is to "neutralize" arrest records. By removal of all notations and other indications of the person behind the record, the individual is relieved of the arrest record stigma. In *Menard v. Saxbe*[56] the U.S. Court of Appeals for the District of Columbia Circuit adopted this approach and ordered expungement of criminal arrest records while retaining fingerprints which were kept in a civilian, noncriminal file and which did not indicate their true source.

Another remedy available to a court is restriction of the dissemination of arrest records. Generally availability of this remedy has not been held to be limited by statute, except to the extent that the court views such statutes as being sufficient to protect the interests of the exonerated arrestee.[57] As noted above this protection is relatively meaningless since basically there are too many potential disseminators to control.

---

56. 498 F.2d 1017 (D.C. Cir 1974).

57. *See, e.g., In re Alexander*, 259 A. 2d 592 (D.C. Ct. App. 1969) which held that in the absence of unusual facts, the statutory limitations on the distribution of arrest reports in those cases in which there was no conviction or forfeiture of collateral to law enforcement agents were sufficient. *See also* Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 860, 864-67 (1971).

Another suggested remedy is a modified form of expungement premised upon a modified belief in the presumption of innocence. Individuals with a single record of arrest would have their records expunged after the passage of several years without a subsequent arrest. Under this plan minor offenses would be expunged more quickly than serious charges. The defect in this approach is that regardless of the validity of the arrest the innocent individual still bears the burden of a record for some time.

Aside from the substance of the relief, unless law enforcement officials are under a mandatory duty to expunge upon the dismissal of charges, any relief that is fashioned may well be meaningless to those citizens who are unable to cope effectively with government bureaucracy. Limiting the right of expungement to those who can hire lawyers to pursue expungement places an unjustifiable burden on the innocent and procedurally denies relief to many people. Requiring mandatory expungement would not only solve this problem but in the long run would also generate respect for our legal system by reinforcing the validity of the premise that all are innocent until proven guilty.

CONCLUSION

When a balancing test is used to weigh the conflicting interests of law enforcement agencies in retaining arrest files and the individual's right of privacy, circumstances such as the misuse of records, an arrest which itself violates a constitutional guarantee, or a mistaken arrest have generally resulted in the balance being struck in favor of the individual. In the absence of such special circumstances, courts have been hesitant to interfere with the executive discretion to compile such records. However, in recent years courts have been more willing to question the propriety of retaining arrest records of exonerated arrestees.

This growing trend is primarily a function of two variables: the increasing recognition by the courts of the severe consequences that may flow from mere existence of an arrest record, and emergence of the right of privacy as a fundamental right protected by the due process clauses of the fifth and fourteenth amendments and the equal protection clause of the fourteenth amendment. Both of these factors are in turn directly related to the increasing use of computerization to pool agency information, a development which has caused a "growing concern for the individual's loss of privacy as a natural

by-product of our modern technology."[58] If "privacy" is not to become a meaningless word for an innocent arrestee, the courts must be willing to scrutinize the need of agencies to maintain such arrest records. *Sterling v. Oakland* should be recognized as obsolete and should be overruled, especially in light of the mandate of California's most recent constitutional amendments.

58. Davidson v. Dill, ___ Colo. ___, 503 P.2d 157, 158 (1972). *See also* A. MILLER, ASSAULT ON PRIVACY 67 (1971).