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NOTES

DISCRIMINATION ON THE BASIS OF ARREST RECORDS

In Anglo-American legal theory an accused is presumed innocent until he has been tried and convicted by a competent court.[1] Despite this time-honored canon, however, "presumed guilty" better reflects the reality confronting countless numbers of Americans who have been arrested but who have been subsequently discharged or acquitted.[2] The existence of an arrest record,[3] notwithstanding the absence of a conviction, works as a serious impediment and basis of discrimination in the search for employment, in securing professional, occupational, or other licenses, and in subsequent relations with the police and the courts.[4] Moreover, the existence of a "record" and the attendant problems it creates combine to further alienate the affected individual from the legal system.

I

ADVERSE EFFECTS OF AN ARREST RECORD

A. *Discrimination in Employment*

The problem posed by the existence of an arrest record is altogether too clear in the area of employment. Many, if not most, employers and

1 The Supreme Court noted in Deutch v. United States, 367 U.S. 456 (1961), that "the presumption of innocence" is "'[o]ne of the rightful boasts of Western civilization . . . assuring an accused all the safeguards of a fair procedure.'" *Id.* at 471, *quoting* Irvin v. Doud, 366 U.S. 717, 729 (1961) (Frankfurter, J., concurring). The principle was not novel in 1961; some 66 years earlier the Court had remarked: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." Coffin v. United States, 156 U.S. 432, 453 (1895).

2 The FBI reported 5,773,988 arrests in 1969. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS—1969, at 108 (1969) [hereinafter cited as FBI REPORT]. Eighty-two percent of the persons charged with major felonies were prosecuted; 73% of those prosecuted were convicted of some charge. *Id.* at 34. Thus, approximately 60% of the persons arrested for such felonies were convicted, and some 40% were either acquitted or discharged in some other manner.

3 The terms "arrest record" and "record" as used herein are intended to mean only those records indicating arrests that were not followed by convictions.

4 For a good discussion of the problems that confront the person who has been arrested but not convicted, see Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494, 494-99 (1967). Although their work is primarily a comparative study of American and European practices, the authors present an overview of the abuse of arrest records in the United States.

employment agencies inquire whether an applicant has been arrested regardless of whether a conviction resulted.[5] An affirmative answer to the question is often sufficient to deny the applicant further consideration.[6] Where there are two or more applicants for the same job, those with previous arrest records certainly stand in a less favorable position vis-à-vis the other applicants. A recent survey of employment agencies in the New York City area indicated that approximately seventy-five percent of the sampled agencies do not refer any applicant with a record of arrest, whether or not followed by discharge, acquittal, or conviction.[7] The authors of a 1962 study of unskilled job openings in hotels[8] concluded that "the individual accused but acquitted . . . has almost as much trouble finding even an unskilled job as one who was not only accused of the same offense, but also convicted."[9] These findings were supported by a California legislative investigating committee report:

> [H]undreds of persons are arrested and released in California every year without a complaint ever having been filed against them. Each of these persons acquires a permanent arrest record which presents a serious handicap to his prospects for employment.[10]

Without justifying the discrimination, the rationale behind employer hiring practices is perhaps understandable. Much of the discrimination against persons with arrest records is probably subliminal; between the applications of two men otherwise equal, the man without

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5 Representative of state and local government employment questionnaires is New York's "Application for Open-Competitive Examination," distributed by the New York Department of Civil Service. Question 16(A) asks: "Were you ever arrested for any violation of law?" The form then states: "Report all arrests regardless of disposition made thereon." N.Y. Dep't of Civil Service, Form XD-10 (July 1967).

Examples of employment applications are collected in AMERICAN MANAGEMENT ASS'N, BOOK OF EMPLOYMENT FORMS 167-274 (1967). Sixty-six percent of the private companies whose forms are included in the survey ask whether the applicant has been arrested.

6 *See* text accompanying notes 7-10 *infra*.

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

8 Schwartz & Skolnick, *Two Studies of Legal Stigma*, 10 SOCIAL PROB. 133 (1962).

9 *Id.* at 136. Only one-third of the hotels with employment vacancies would consider an applicant who possessed an arrest record despite the applicant's subsequent acquittal by a court of law, whereas slightly more than 11% of the jobs remained open to those arrested and convicted. *Id.* at 137. Although the study concerned itself with unskilled employment, it would probably be fair to assume that the difficulty of procuring employment would increase as the skill requirements, pay, and responsibilities of the position increase.

10 CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, 1959-61 REPORT 57 (1961).

an arrest record appears better suited for the job. This is especially true if the arrested applicant is a member of a minority group because the record can serve to justify a latent prejudice.[11] For many employers, however, the decision to discriminate is conscious, based on the belief that an arrest record might signal potential trouble in the future.[12] Equally important, it is less expensive and certainly less troublesome to hire a man without a record than to investigate the details of a past arrest, which many employers would want to do before hiring someone who had been arrested.[13]

Although discrimination against arrested but unconvicted persons in employment is itself a serious problem, its gravity is compounded in the context of the ghetto. A majority of male ghetto residents, perhaps ninety percent in some areas, have an arrest record of some sort.[14] Since an appreciable percentage of employers and employment agencies discriminate against applicants with arrest records, a large percentage of ghetto residents may be effectively eliminated from a substantial segment of the job market.[15] In this manner not only are men as

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11 The problem is particularly acute for minority group members since they compose the largest group of persons arrested per capita. Twenty-eight percent of the persons arrested in 1969 were Negroes (FBI REPORT 118), while Negroes compose only 11% of the total population. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1969, at 23 (1969). *See* F. GRAHAM, THE SELF-INFLICTED WOUND 86-101 (1970).

12 *See In re* Smith, 63 Misc. 2d 198, 201, 310 N.Y.S.2d 617, 620 (Family Ct. 1970).

13 The California Assembly Interim Committee on Criminal Procedure found that cost and convenience factors influenced not only employers in the private sector of the economy but also government employers. In one instance the Committee studied a question on a postal employment application form and found "that any applicant who answers this question in the affirmative is automatically disqualified because it is simpler and cheaper to hire an applicant without any record whatever than to investigate the circumstances of an arrest." CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, *supra* note 10, at 68.

14 CRIME COMM'N REPORT 75.

15 According to the President's Commission on Law Enforcement and Administration of Justice, 50%-90% of the New York City ghetto resident male population may be excluded from 75% of the area's employment agencies. *Id.* Schwartz and Skolnick indicate that job opportunities from employers themselves are not much better. Schwartz & Skolnick, *supra* note 8, at 136.

The REPORT OF THE COMMITTEE TO INVESTIGATE THE EFFECT OF POLICE ARREST RECORDS ON EMPLOYMENT OPPORTUNITIES IN THE DISTRICT OF COLUMBIA (1967) [hereinafter cited as DUNCAN REPORT] found that

> [t]he National Capital Area Civil Liberties Union has, on the basis of studies conducted in the Department of Labor, the D.C. Urban League and the United Planning Organization, calculated that between 60% and 90% of the male working population in some predominantly Negro areas of the District of Columbia is systematically excluded from between 25% and 50% of the jobs available to them in relation to their skills.

Id. at 7. Abuse of arrest records, with the attendant problem of employment discrimination, also thwarts current efforts to employ the ghetto resident. It does little good to

individuals discriminated against and impeded in their search for gainful employment, but the resultant problems of social unrest, frustration, and alienation are kindled.[16]

B. *Other Effects*

Employment is not the only area in which the person with an arrest record faces discrimination. The man with a record is often the focal point of continued police harassment—the first to be questioned and the last to be eliminated as a suspect in an investigation.[17] Although law enforcement officials are fully aware of the traditional presumption of innocence, the Federal Bureau of Investigation has referred to those whose records and fingerprints reside in its files—discharged, acquitted, and convicted alike—as "a criminal army of six million individuals who have been arrested and fingerprinted . . . ."[18]

In recent years it has become commonplace for courts to review "presentence reports" prepared by court, police, or probation authorities before pronouncing sentence. In many jurisdictions, the presentence report contains the offender's "rap sheet," which includes not only prior convictions but all previous arrests.[19] Again, the presumption of

expend money to train such individuals for employment when it is likely that many of them will be unable to secure employment after training because of a stigma largely inflicted by another agency of the government.

16 For an account of black alienation from a predominantly white legal establishment, see E. CLEAVER, SOUL ON ICE (1968).

17 For a discussion of "reputation" as probable cause for arrest, see 1969 WASH. U.L.Q. 339.

18 FBI LAW ENFORCEMENT BULLETIN 4 (Jan. 1946). *See also* Hess & Le Poole, *supra* note 4, at 496-97.

19 The Administrative Office of the United States Courts has recommended the inclusion of previous arrests not resulting in conviction in presentence reports. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE PRESENTENCE REPORT 11 (1965). A few states require a criminal record that includes arrests as part of the presentence report. *E.g.*, N.Y. CODE CRIM. PROC. § 942-a (McKinney 1958).

Most jurisdictions have upheld the courts' use of arrest records in determining the sentence to be imposed. *E.g.*, United States v. Cifarelli, 401 F.2d 512, 514 (2d Cir.), *cert. denied*, 393 U.S. 987 (1968) ("It was proper for the trial judge to consider evidence of other crimes for which appellant was neither tried nor convicted in determining sentence"); State v. Rose, 183 Neb. 809, 812, 164 N.W.2d 646, 649 (1969) ("It is true that many of the arrests did not lead to a conviction of crime, but they are no less proper to be considered in arriving at the sentence to be imposed"). *See also* United States v. Doyle, 348 F.2d 715, 721 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); Jones v. United States, 307 F.2d 190, 192 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 919 (1963); Taylor v. United States, 179 F.2d 640, 642-43 (9th Cir. 1950); People v. Mitchell, 63 Cal. 2d 805, 815-16, 409 P.2d 211, 218, 48 Cal. Rptr. 371, 378 (1966); Jones v. State, 221 Md. 141, 144-45, 156 A.2d 421, 422-23 (1959); State v. Caddell, 265 N.C. 563, 564, 144 S.E.2d 621, 622 (1965); State v. Willms, 117 N.W.2d 84, 87-88 (N.D. 1962); State v. Scott, 237 Ore. 390, 399-400, 390 P.2d 328, 332-33 (1964).

This use of arrest records in sentence determination is complicated by the fact that

innocence is eroded because the individual with an arrest record can expect to receive a heavier sentence than the man whose previous record is "clean."[20] Some courts have utilized records of a crime for which the defendant was acquitted in determining his sentence[21]—effectively presuming guilt despite acquittal.

Arrest records have a further discriminatory effect when they are considered in passing upon applications for professional, occupational, or other licenses. Numerous state and a few federal statutes require the submission of fingerprints when applying for specified licenses.[22] The fingerprints are then compared with "criminal records" to determine whether the applicant has an entry.[23] Although such statutes do not

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most courts do not allow the defendant or his counsel access to presentence reports or their contents. In such cases the defendant has no opportunity to rebut the contents of the report or tender explanations for previous arrests. *See* Note, *Employment of Social Investigation Reports in Criminal and Juvenile Proceedings*, 58 COLUM. L. REV. 702, 706 & n.31 (1958).

20 Former Judge Charles W. Fricke of the Superior Court of Los Angeles County has commented on the significance of a previous arrest record in pronouncing sentence: "[It] tends to show a disregard for the law or that [the defendant] entertained a belief that he was so clever that he could violate the law involved without the possibility of being caught and punished." C. FRICKE, SENTENCE AND PROBATION 33 (1960).

A record of previous arrest may well make the difference between being placed on probation, able to reside at home with wife and family and to retain employment, and being committed to penal confinement—despite the "presumed innocence" of previous wrongdoing.

21 *See, e.g.*, People v. Griffin, 60 Cal. 2d 182, 383 P.2d 432, 32 Cal. Rptr. 24 (1963) (the court, in opting to sentence the defendant to death rather than life imprisonment, looked to a previous rape charge against the defendant even though the defendant had been acquitted on that charge). *See also* Egelak v. State, 438 P.2d 712 (Alas. 1968); State v. Woodlief, 172 N.C. 885, 90 S.E. 137 (1916).

22 *E.g.*, 7 U.S.C. § 2044(a)(3) (1964) (certain types of farm labor contractors); CONN. GEN. STAT. REV. § 14-44 (Supp. 1969) (operators of public service vehicles); *id.* § 29-29 (1961) (applicants to carry weapons); DEL. CODE ANN. tit. 21, § 2763(a) (1953) (taxicab drivers); *id.* tit. 24, § 1313(b) (Supp. 1968) (employees of private detectives); FLA. STAT. ANN. § 447.04(2) (1966) (labor union business agents); *id.* § 561.17(1) (1962) (manufacturers, dealers, and distributors of alcoholic beverages); ILL. ANN. STAT. ch. 114, § 353 (Smith-Hurd Supp. 1970) (lessors of safe deposit boxes); MINN. STAT. ANN. § 326.333(3) (Supp. 1970) (private detectives); N.J. STAT. ANN. § 17:15A-3 (1970) (owners and employees of check-cashing firms); *id.* §§ 18A:39-17 to -19 (1968) (school bus drivers); N.Y. ALCO. BEV. CONTROL LAW §§ 103(6), 104(9) (McKinney Supp. 1970) (employees of alcoholic beverage manufacturers and wholesalers); N.Y. UNCONSOL. LAWS § 8010(1) (McKinney Supp. 1970) (employees of harness race tracks); PA. STAT. ANN. tit. 22, § 14 (Supp. 1970) (private detectives); *id.* § 23(c) (1955) (employees of private detectives); VT. STAT. ANN. tit. 31, § 605 (1970) (horse race employees).

23 *E.g.*, MINN. STAT. ANN. § 326.334(2) (Supp. 1970) provides:

> It shall be the duty of the bureau of criminal apprehension to compare such fingerprints with state criminal identification records, to conduct a sufficient investigation of the persons signing such application so as to determine their competence, character and fitness for such a license, and to report his [*sic*] findings to the commissioner.

specify an arrest record as grounds for the denial of a license, they often invest administrative officials or regulatory agencies with broad powers to determine such intangibles as "fitness" and "character."[24] While there is little case law on arrests alone as a criterion for the denial of licenses, the courts have generally held that such administrative determinations—even as to "character"—should not be overturned absent a clear showing of arbitrariness, capriciousness, or fraud.[25]

There are other problems besides inability to procure employment, police harassment, and unequal treatment before the courts.[26] One of the most significant of these is that the man with a record of arrests is likely to perceive less identity with the legal process than the man without arrests. When an arrest is followed by several forms of discrimination, further alienation is bound to result.

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24 *See, e.g.*, CONN. GEN. STAT. REV. § 14-44 (Supp. 1969); DEL. CODE ANN. tit. 24, § 1303(c) (Supp. 1968); FLA. STAT. ANN. § 561.15(1) (1962); N.J. STAT. ANN. § 17:15A-7 (1970).

Although not technically a licensing statute, New York's recent enactment of a statute requiring the fingerprinting of employees in the securities industry has provoked discrimination against persons with arrest records. That statute provides:

> All persons including partners, officers, directors and salesmen employed by a member or a member organization of a National Security Exchange . . . who are regularly employed within the state of New York shall, as a condition of employment, be fingerprinted. Every set of fingerprints taken pursuant to this subdivision shall be promptly submitted to the attorney general for appropriate processing.

N.Y. GEN. BUS. LAW § 359-e(12) (McKinney Supp. 1970). The statute was held constitutional as a valid exercise of the police power in Thom v. New York Stock Exchange, 306 F. Supp. 1002 (S.D.N.Y. 1969), *aff'd sub nom.* Miller v. New York Stock Exchange, 425 F.2d 1074 (2d Cir.), *cert. denied*, 398 U.S. 905 (1970).

The N.Y. Times, Feb. 5, 1970, at 1, col. 6, reported that the Attorney General's office had disclosed the records of securities industry employees to their firms. Assistant Attorney General Mencher stated that the individual "brokerage houses were 'using discretion and evaluating each case separately.'" *Id.* at 51, col. 6. Subsequent to the disclosure, many employees resigned or were discharged. The Wall St. J., Feb. 5, 1970, at 16, col. 2, noted that "[a]bout half the employees dismissed had been arrested but hadn't been convicted." The report went on to state that "Mr. Lefkowitz [New York's Attorney General] denied that exposure of arrest records would discriminate against minority-group workers who live in ghetto areas, where frequent police arrests are common." *Id.*

25 *See, e.g.*, McDonough v. Goodcell, 13 Cal. 2d 741, 91 P.2d 1035 (1939); State *ex rel.* Bluemound Amusement Park, Inc. v. Mayor of Milwaukee, 207 Wis. 199, 240 N.W. 847 (1932).

26 The person who has been arrested but not convicted may also be discriminated against by lending institutions and credit agencies. A problem related to employment is the inability of persons with arrest records to obtain surety bonds necessary for some types of employment. If rearrested, such individuals may have a much more difficult time in securing release on their own recognizance, or alternatively, in obtaining a bail bondsman. A person with an arrest record may also be more vulnerable to having his testimony impeached. There are other more remote problems such as the handicap a record imposes on the individual who elects to run for public office.

II

THE PROBLEM IN THE LEGISLATURES

A. *Past Efforts by the Legislatures*

Most state legislatures have not concerned themselves with the problems of the individual with an arrest record. Moreover, the measures that have been enacted have not been effective.

Efforts to alleviate the ills that attend the maintenance of arrest records have been of two types. First are statutes that restrict access to and preserve the confidentiality of arrest records.[27] Unfortunately, such laws have not been universally enacted, and where they are in force they are often rendered ineffective by inadequate enforcement.[28] Even

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27 WASH. REV. CODE ANN. § 72.50.140 (Supp. 1970) is an example of a confidentiality statute:

> In the event that (1) the person is not convicted of any of the charges for which he was arrested for the reason that such charges are not brought against him; or (2) such charges are brought and have been dismissed or the person has been acquitted; all such records of identification shall be confidential . . . except that such facts may be released on order of court where such facts are material to issues in any litigation.

The statute provides a civil remedy to persons whose records are illegally disclosed. *See also* CONN. GEN. STAT. REV. § 29-16 (1961); ILL. ANN. STAT. ch. 38, § 206-5 (Smith-Hurd Supp. 1970).

28 Supposedly confidential arrest records are readily available in many localities, despite contrary law or policy. The Committee To Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia

> contacted the Police Departments of seven cities and two neighboring counties with respect to their practices concerning release of arrest records for employment purposes. Although it was stated to be the local policy or legal requirement in New York City, Los Angeles, San Francisco, Chicago and Boston that arrest records not be released for private purposes, it appears that influential employers may often obtain such information notwithstanding the legal or policy prohibitions. In St. Louis and Baltimore police records are regularly released for employment purposes, as is also the case in Arlington County.

DUNCAN REPORT 9. The District of Columbia Police Chief reported to the Committee that during a representative week in April 1967, there were some 1,048 requests for police arrest records from individuals. *Id.* at 20. Many of these requests, if not most, were made for employment reasons. There were also 1,482 similar requests made to the District of Columbia Police Department by the federal government, 588 similar requests from other government agencies of the District itself, and 554 requests from other agencies such as credit bureaus. *Id.*

Lax enforcement of prohibitions against the disclosure of arrest records in New York City recently led a Family Court judge to remark that "[i]t is so well known in New York City that private investigators can secure police arrest records (and this Court having seen records thus obtained), that this Court takes judicial notice of this circumstance." *In re* Smith, 63 Misc. 2d 198, 200 n.4, 310 N.Y.S.2d 617, 620 n.4 (Family Ct. 1970). The judge went on to say that "[w]ith respect to private employers, there is reason to doubt that the prohibition on access to police arrest records is rigidly enforced." *Id.* at 200, 310 N.Y.S.2d at 620.

where police authorities conscientiously protect such records, prospective employers and credit agencies are nevertheless able to procure the records by requiring applicants to sign "waiver statements," which authorize police disclosure of a record's existence and its release to the inquiring party.[29] Moreover, such statutes do not prevent interested persons from obtaining the same information from other sources such as "clipping agencies."[30] Furthermore, even the most rigidly enforced confidentiality statutes are often inadequate.[31]

The second type of legislation that has attempted to remedy the problem is the expungement statute.[32] There are serious objections to such statutes, however, raised both by the victims of arrest record abuse and by law enforcement officials.

An arrest record properly showing the disposition of the case can be of value to an individual when others have learned of his arrest from unofficial sources;[33] a person previously arrested should not be precluded

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29 States with confidentiality statutes often allow the release of arrest records when authorized by the subject of the records. *E.g.*, W. VA. CODE ANN. § 15-2-29(d) (Supp. 1970) provides:

> The criminal identification bureau may furnish, with the approval of the superintendent, fingerprints, photographs, records or other information to any private or public agency, person, firm, association, corporation or other organization, other than a law-enforcement or governmental agency . . . but all requests under the provisions of this subsection . . . must be accompanied by a written authorization signed and acknowledged by the person whose fingerprints, photographs, records or other information is to be released.

30 A "clipping agency" is a private business whose employees clip newspaper and periodical articles of interest to its clients.

31 In addition to procuring evidence of a prior arrest from other sources, the prospective employer may simply ask the applicant about an arrest record. Moreover, most confidentiality statutes permit access to arrest records by other governmental agencies.

32 Like confidentiality statutes, expungement laws have not been enacted in all states. The term "expunge" is somewhat ambignous due to the several meanings attached to the word. Technically the word means "to destroy or obliterate . . . a physical annihilation." BLACK'S LAW DICTIONARY 693 (4th rev. ed. 1968). *See also* Andrews v. Police Court, 123 P.2d 128, 129 (Cal. Dist. Ct. App. 1942), *aff'd*, 21 Cal. 2d 479, 133 P.2d 398 (1943). However, the term is often used to mean the "sealing" of records so that they cannot be opened without an order of the court. For a general discussion of expungement of criminal records, see Comment, *Criminal Records of Arrest and Conviction: Expungement from the General Public Access*, 3 CALIF. W.L. REV. 121 (1967).

> Connecticut's expungement statute is representative:
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> When any person, having no prior criminal record, whose fingerprints and pictures are so filed has been found not guilty of the offense charged, or has had such charge nolled, his fingerprints, pictures and description shall, upon his request, be returned to him not later than sixty days after the finding of not guilty or after such nolle.

CONN. GEN. STAT. REV. § 29-15 (1961). Other statutes provide that the state will destroy the records rather than return them. *See, e.g.*, IOWA CODE ANN. § 749.2 (Supp. 1970).

33 *See* notes 30-31 *supra*.

from tendering officially-documented evidence of his discharge or acquittal.[34] An explained arrest is still preferable to an unexplained one. Furthermore, in a great many cases expungement is probably not feasible. There are often so many records created as a result of one arrest that expungement of all of them is practically impossible.[35] Lastly, and perhaps most important, the expungement of state arrest records is often futile because most law enforcement agencies send duplicate copies of arrest records, fingerprints, and photographs to the Federal Bureau of Investigation in Washington.[36]

From the viewpoint of law enforcement, there are very real objections to expungement.[37] Statutes that require expungement of arrest records, in many cases, deprive the police of valuable investigative records of persons who for a variety of reasons may not have been convicted. Quite often, for example, victims of a crime will refuse to sign or pursue a complaint even after an arrest has been made.[38] Other offenders may be treated civilly through mental, narcotic, or alcoholic commitment, thus escaping criminal conviction.

B. *A Proposal*

Confidentiality statutes, properly drafted and enforced, could remedy much of the discrimination suffered by persons previously arrested

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34 If legislation were enacted that extended the coverage of "fair employment acts" to include persons with arrest records, this reason for the continuance of arrest record maintenance would no longer be valid. *See* notes 44-47 *infra*.

35 For a general description of the many records that exist after the reporting of a crime and a subsequent arrest, see CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, ERASURE OF ARREST RECORDS 27-36, IIIa-IIIh (1964).

36 Each day about 1,000 fingerprint clerks of the FBI process about 23,000 fingerprint records submitted by agencies throughout the nation. CRIME COMM'N REPORT 268.

37 The primary objection is that many persons arrested, but not convicted, are nevertheless "guilty." Some of the more prominent reasons tendered by law enforcement officials for this phenomenon are that: (*1*) the victim will refuse to sign a complaint; (*2*) witnesses disappear; (*3*) pertinent evidence is ruled inadmissible; (*4*) the defendant is already facing prosecution on another charge in which case the state may drop its case; (*5*) restitution is made; (*6*) the defendant is extradited, prompting the court to drop its charges, satisfied that the defendant will be convicted elsewhere; (*7*) the defendant is civilly committed; (*8*) his probation or parole is revoked and the charges are dropped; and (*9*) in the event the spouse is the victim, the spouse obtains a divorce rather than prosecute. CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, *supra* note 35, at 61-69, 86-101, 109.

38 This may often be the case with regard to sex offenses. The injured party (or his or her parents) might be reluctant to prosecute further, fearing the notoriety and publicity that might result. In the case of a small child, the stress and import that may come to be associated with the unfortunate event in the child's mind can prompt parents to abandon a prosecution.

but not convicted. Such statutes should be drawn so that access is strictly limited to bona fide law enforcement agencies, such as local, county, and state police, whose primary function is the general investigation of crime and enforcement of laws; this would eliminate many quasi-law enforcement agencies that perform limited police functions under regulatory statutes.[39] Assuming that courts and licensing agencies have a legitimate interest in viewing records, provision should be made to furnish those institutions with records that reflect only arrests resulting in convictions.[40] Furthermore, provision should be made to furnish individual records only in exceptional circumstances, perhaps only on court order.[41] Such a statute would remedy both the employer's direct access to the records and also his access through the prospective employee. It would also prevent improper consideration by the courts and licensing agencies.

A problem remains, however, in that prospective employers and credit agencies may continue to ask the applicant himself whether or not he has been arrested. Although the applicant may lie, no man should be forced to resort to dishonesty in order to establish his inno-

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39 "Peace officer" is defined by the California Penal Code to include over 40 separate categories of public employees. CAL. PENAL CODE §§ 830.1-.6 (West 1970); *see* 1 CALIF. W.L. REV. 126, 131 n.15 (1965). CAL. PENAL CODE § 11105 (West 1970) requires the California Criminal Identification Division to furnish arrest record information to all "peace officers."

There is a problem in determining which law enforcement agencies should have access to arrest records. With the increase in regulatory statutes and the agencies that enforce them, access to arrest records should be limited to those agencies that one would normally define as "police," such as local and state police and county sheriffs.

Federal law allows the dissemination of arrest records by the FBI to authorized officials of the federal government, the states, cities, and other institutions. 28 U.S.C. § 534(a)(2) (Supp. V, 1970). The Attorney General has interpreted "other institutions" to include government agencies in general, most banks, insurance companies, and railroad police. 28 C.F.R. § 0.85(b) (1970). *See also* Menard v. Mitchell, 430 F.2d 486, 492 n.33 (D.C. Cir. 1970).

40 A similar recommendation has been proposed by the Committee To Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia. DUNCAN REPORT 24.

41 The District of Columbia Committee has recommended that no arrest records be made available at all except to law enforcement agencies. The Committee would only allow the release of records that revealed arrests followed by convictions. *Id.* at 25.

Courts, while they should be restricted from using arrest records in determining a defendant's sentence, must retain the power to order the release of arrest records when circumstances warrant. With the possible exception of national security, no governmental agency should be able to maintain files on individuals without some mechanism whereby the subjects of the files can determine their contents.

cence of previous wrongdoing. Employers[42] and credit agencies should be permitted to inquire only as to arrests followed by conviction.[43]

There is still the problem that employers may learn of previous arrests from other sources.[44] This too could be legislatively remedied by enacting laws prohibiting employers from considering previous arrests in the employment selection process. "Fair employment acts"[45] could be extended to provide protection to those with arrest records in the same manner they presently cover race, religion, and sex.[46] The extension of fair employment acts to include persons with arrest records is not without difficulties. The evidentiary problem of proving that a prior arrest was considered by an employer is serious, but it is not insurmountable.[47] In addition, an important aspect of fair employment legislation is its educative value. Such legislation would compel violating employers to recognize the illegality of their acts and would remind employers and the general public of the presumption of innocence. Moreover, the extension of fair employment acts into this area would

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42 This recommendation applies to the government as an employer as well as to private employers. In most cases reform of government application forms can be accomplished by administrative directive. Although the Civil Service Commission has ceased to inquire as to previous arrests on its application forms (*e.g.*, U.S. Civil Service Comm'n, Standard Form 171 (July 1968)), many states and municipalities continue to inquire as to arrests (*e.g.*, N.Y. Dep't of Civil Service, Form XD-10 (July 1967)).

43 This was proposed by the California Assembly Interim Committee on Criminal Procedure in 1961. CALIFORNIA ASSEMBLY INTERIM COMM. ON CRIMINAL PROCEDURE, *supra* note 10. A similar proposal was introduced as a bill in the New York State Legislature in 1965. It passed the Assembly, but failed to pass the Senate. Hess & Le Poole, *supra* note 4, at 499.

A New York Family Court judge recently noted that "[c]omplete protection . . . from unfair discrimination due to untenable arrests and dismissed charges can only be afforded by a statutory prohibition on employers' inquiries . . . ." *In re* Smith, 63 Misc. 2d 198, 205, 310 N.Y.S.2d 617, 625 (Family Ct. 1970).

44 Notes 30-31 and accompanying text *supra*.

45 *See, e.g.*, 42 U.S.C. § 2000e-2 (1964); CAL. LABOR CODE § 1420 (West Supp. 1970); N.Y. EXEC. LAW § 296(a) (McKinney Supp. 1970); PA. STAT. ANN. tit. 43, § 955 (Supp. 1970).

46 This approach has been advocated as a solution to a related problem. *See* Note, *Employment of Former Criminals*, 55 CORNELL L. REV. 306, 317-19 (1970).

47 Courts have noted the inherent difficulties in policing subjective mental processes. Fair employment acts are one such area where " 'subtleties of conduct . . . play no small part.' " Holland v. Edwards, 307 N.Y. 38, 45, 119 N.E.2d 581, 584 (1954), *quoting* NLRB v. Express Publishing Co., 312 U.S. 426, 437 (1941). *See also* Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965), noting that "[e]nforcement of equal opportunity in employment would be difficult under any statute."

While often difficult, the burden of proving discrimination under a fair employment act is not impossible. Plaintiffs often point to the history of the employer's refusal to hire persons similarly situated. Sometimes there is demonstrable evidence of a hiring policy in violation of the law, such as testimony of personnel officers or employers who, while willing to discriminate, are unwilling to perjure themselves.

probably achieve some compliance through the moral suasion attributable to its status as law.

There is little likelihood at present that the needed legislation will be forthcoming. Indeed, the present scarcity of legislation restricting the abuse of arrest records indicates an absence of legislative concern for the problem.[48] Thus, many victims of arrest record abuse must look to the courts for relief.

III

THE PROBLEM IN THE COURTS

A. *Past Efforts by the Courts*

The courts have not been much more responsive to the problem than have the legislatures. Most of the case law on the subject of arrest records reflects efforts by individuals to secure the return of their records and related items such as fingerprints and photographs.[49] With a few notable exceptions,[50] such attempts have been unsuccessful.[51]

The courts have not been completely insensitive to the pleas of litigants, but they have reasoned that although a person may suffer some humiliation or embarrassment, the harm to the individual is outweighed by the needs of effective law enforcement.[52] Alternatively,

48 Less than 20% of the states have laws prohibiting divulgence of arrest records to unauthorized persons. Unlike other areas where social legislation is needed, there has been little momentum to cure the abuses of arrest records. The absence of any effective lobby is no doubt one reason for this lack of public concern. Yet this is certainly understandable in view of the social stigma and other forms of discrimination that attach to a person with an arrest record. One in that position is less likely to call attention to his status and risk further ill effects.

49 An example is Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962), where the plaintiff sought to enjoin police officials from retaining her photographs, fingerprints, and records of arrest after the dismissal of a charge filed against her for failing to pay a taxi fare. Plaintiff had tendered a $20 bill to a cab driver. The driver refused to accept the bill and subsequently made a citizen's arrest for failure to pay a taxi fare in violation of an Oakland city ordinance. The court refused to grant plaintiff relief.

50 *See* notes 54-56 and accompanying text *infra*.

51 *See, e.g.*, Herschel v. Dyra, 365 F.2d 17 (7th Cir. 1966); United States v. Kelly, 55 F.2d 67 (2d Cir. 1932); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); Walker v. Lamb, 254 A.2d 265 (Del. Ch.), *aff'd*, 259 A.2d 663 (Del. Super. Ct. 1969); People v. Lewernz, 42 Ill. App. 2d 410, 192 N.E.2d 401 (1963); State *ex rel.* Mavity v. Tyndall, 225 Ind. 360, 74 N.E.2d 914 (1947); Miller v. Gillespie, 196 Mich. 423, 163 N.W. 22 (1917).

52 *See, e.g.*, Kolb v. O'Connor, 14 Ill. App. 2d 81, 87-88, 142 N.E.2d 818, 821 (1957), where the court noted with approval that a man is "innocent until proven guilty," but held that "[t]here is no question that the conflicting rights of an individual must in many cases be subordinated to the rights of the public as a whole."

In Fernicola v. Keenan, 136 N.J. Eq. 9, 10, 39 A.2d 851 (Ch. 1944), the court recog-

some courts have assumed that little harm can result from arrest records since their use is restricted and confidential.[53]

Recently, however, there have been a few decisions requiring expungement or return of arrest records. In *United States v. McLeod*,[54] having found that Negroes had been arrested and prosecuted for purposes of harassment and interference with their right to vote, the court ordered expungement of all of the unlawful arrests and convictions.[55] Similar conduct by police in harassing and making mass arrests of "hippies" has resulted in court-ordered return or destruction of all police department records, fingerprints, and photographs.[56]

Not all recent decisions, however, have compelled the return of arrest records.[57] It can be argued that the few cases requiring the return of records involved grave abuses of police power or instances where the

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nized petitioner's embarrassment, but held that the "humiliation to which he must submit [is] for the benefit of society."

53 *See* note 70 *infra*.

54 385 F.2d 734 (5th Cir. 1967).

55 The court ruled that

> [i]n order to grant full relief in this case, we must see that as far as possible the persons who were arrested and prosecuted . . . are placed in the position in which they would have stood had the county not acted unlawfully. . . . Of course no court order can completely eradicate the effect of the country's [*sic*] actions. . . . The Court can and must, however, do all within its power to eradicate the effect of the unlawful prosecutions in this case. We therefore hold that the district court should enter an order requiring the appropriate officials . . . to expunge from the record all arrests and convictions resulting from the prosecutions which form the basis for these suits.

Id. at 749-50.

56 In Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968), the court found that the Philadelphia police had made mass arrests of "hippies," interrogated them as to their "sexual orientation" and "political affiliation," photographed them, and after detaining them for about an hour, released them. No charges were ever filed, and all who were arrested were released. The court failed to find any probable cause for the arrests and ordered the return of the records. *Id.* at 885.

In a similar case, Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), the court found at least 15 instances of harassment of "hippie" plaintiffs by police authorities. One of the incidents culminated in the arrest, photographing, and fingerprinting of 18 persons without probable cause. The court ordered the expungement of all records relating to the incidents. *Id.* at 66.

57 *See, e.g.*, Walker v. Lamb, 254 A.2d 265 (Del. Ch.), *aff'd*, 259 A.2d 663 (Del. Super. Ct. 1969). In denying the plaintiff relief, the Delaware court echoed earlier case law and held that the retention of arrest records was in the public interest

> in that such records tend to promote the safety and welfare of the community as a whole, it being reasoned that any humiliation to an individual so finger-printed and photographed, though ultimately found not guilty of the offense charged, is outweighed by the benefit gained by the public's possession of information concerning persons who may again be charged with some activity which requires the making of records.

254 A.2d at 266.

maintenance of such records would make their future misuse likely. Absent exceptional circumstances, therefore, expungement may not be available.

B. *Possibilities for Judicial Protection*

In view of legislative inaction, individuals are likely to petition the courts in efforts to obtain relief from discrimination. Several approaches are open to the courts. They can defer to the legislatures and do nothing.[58] They can go further and order expungement only on a finding of "extreme circumstances," such as grave abuses by police.[59] Such a response to the problem affords little protection, however, and what protection is afforded is available to few people.[60] Another possibility is to order expungement only if the arrest were made without probable cause.[61]

A more promising approach is suggested by a recent case, *Gregory v. Litton Systems, Inc.*,[62] in which the court found employment discrimination in violation of Title VII of the Civil Rights Act of 1964[63] against a black applicant who had an arrest record. Conceding that the defendant's policy of disqualifying applicants with arrest records was objectively applied without regard to race, the court nevertheless found discrimination.[64] In arriving at its conclusion the court noted the presence of "overwhelming and utterly convincing" evidence that "Negroes

58 "We deem the subject matter to reside principally within the legislative domain." Sterling v. City of Oakland, 208 Cal. App. 2d 1, 6, 24 Cal. Rptr. 696, 699 (1962).

59 "The general rule is that an equity court should not order expunction unless extreme circumstances exist . . . ." Wheeler v. Goodman, 306 F. Supp. 58, 65 (W.D.N.C. 1969). The court held that "extreme circumstances" exist "where the records do not serve to protect society, or their future misuse is likely." *Id.* at 65. The standards enunciated by the court are somewhat anomalous since the maintenance of arrest records per se affords society some protection while, at the same time, absent sufficient safeguards, the records are susceptible to misuse.

60 Perhaps the man most seriously affected is one with an arrest record who is in search of employment—all too often within a ghetto context. Few men in such circumstances are coguizant of the possibility—and it is only a possibility contingent on proving "extreme circumstances"—that they could have their records expunged. Fewer would appreciate the significance, and fewer still would be financially able to proceed with the necessary litigation. Moreover, expungement is not a complete solution; discrimination could still continue. *See* notes 30-31 and accompanying text *supra*.

61 Characteristic of all the recent cases ordering expungement is that the arrest in question was made without probable cause. *See* notes 54-56 and accompanying text *supra*.

62 316 F. Supp. 401 (C.D. Cal. 1970).

63 42 U.S.C. § 2000e-2 (1964).

64 The court might well have gone on to say that an arrest record is often an imposed "badge of blackness"—part and parcel of being black. The court did note, however, that 45% of this nation's "suspicion arrests" and 27% of its total arrests are made on blacks though blacks compose only 11% of the total population. 316 F. Supp. at 403.

are arrested . . . more frequently than whites."[65] Therefore, a policy that in effect discriminated against blacks denied them equal employment opportunity and was unlawful even though it appeared on its face to be neutral and applied fairly to white and black alike.[66]

The decision in *Gregory*, if adopted by other courts, solves the problem of discrimination itself in one of its most pernicious forms. The problem of arrest record abuse remains, however, for the person who is not a member of a minority group and who is arrested with probable cause but subsequently acquitted or discharged. An approach to obtaining judicial relief in such cases can be outlined.

In determining the constitutionality of a state law or practice, the courts must look not only to its purpose but also to its ultimate impact.[67] It is demonstrable that many arrest records are less than confidential, and that when there is unwarranted disclosure serious discrimination often attaches to the victims of arrest record abuse.[68] Unfortunately, most of the courts that have upheld the maintenance of arrest records either have refused to consider ultimate impact,[69] or have seen no possibility for arrest record abuse.[70]

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65 *Id.*

66 This approach has both advantages and disadvantages. Its most obvious defect is that it focuses on only one aspect of the problem—employment—and on only one segment of the population with arrest records—minority groups. This disadvantage is not as great as it might seem, however, because employment is one of the more serious aspects of the arrest record problem, and minority group members comprise a very significant percentage of persons with arrest records. Notes 11 & 64 *supra*. Its advantage over the other alternatives is that it effectively forbids discrimination per se on the basis of a previous arrest record, while expungement would only destroy some of the records accompanying an arrest without doing much more. This approach is also equipped with penalties sufficient to discourage employers from using arrest records as criteria in their hiring practices. In *Gregory*, the court awarded compensatory damages to plaintiff in the amount of the difference between what he had earned since Litton refused to hire him on the basis of his arrest record and what he would have earned with Litton. The court also enjoined Litton from inquiring as to the arrest records of blacks and from otherwise considering arrest records in their hiring practices with regard to blacks. 316 F. Supp. at 404. Moreover, the result in *Gregory*, if adopted, would have a significant educative effect in alerting employers and the general public to the irrelevancy of arrest records and in calling attention to the erosion of the traditional presumption of innocence.

67 Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

68 Section I *supra*.

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

70 In United States v. Kelly, 55 F.2d 67, 70 (2d Cir. 1932)—which has been widely cited by courts in refusing to order expungement—the court stated that an arrest record was not a "badge of crime." The court went on to recite the then current practice by government attorneys and marshalls of destroying records of defendants who were discharged or acquitted. That "[t]here is therefore as careful provision as may be made to prevent the misuse of the records and [that] there is no charge of any threatened improper use in the present case" was important in the court's decision to deny expungement. *Id.*

Illinois courts, in refusing to grant expungement, have stated that arrest records are

In a few recent cases, however, the courts have noticed the consequences of improper public disclosure of arrest records. As Chief Judge Bazelon of the District of Columbia Circuit recently noted:

> 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.[71]

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confidential. People v. Lewerenz, 42 Ill. App. 2d 410, 413, 192 N.E.2d 401, 402 (1963). "The court takes judicial notice that the records of identification retained by the police department of the City of Chicago are not open to the general public." Kolb v. O'Connor, 14 Ill. App. 2d 81, 88, 142 N.E.2d 818, 822 (1957). That court went on to say that the arrest records were used only for identification purposes in police investigations. Both of the Illinois decisions have been persuasive in many courts that have denied expungement.

A New Jersey court in McGovern v. Van Riper, 140 N.J. Eq. 341, 344, 54 A.2d 469, 471 (Ch. 1947), took notice that arrest records were "kept under lock and key and [were] not subject to public view . . . ."

It is interesting to note that where there has been a recognized danger of disclosure unwarranted by the needs of effective law enforcement, as in the display of arrested persons' photographs in a "rogue's gallery" (a display of photographs in a police station of individuals who have been arrested), courts have ordered expungement. State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 66 N.E.2d 755 (1946); Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1905). These cases have often been cited by petitioners in efforts to secure the return of their arrest records. The courts have distingnished the cases, saying that the display of photographs involved public disclosure while fingerprints and arrest records presented no such danger. *See, e.g.*, Sterling v. City of Oakland, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962); Kolb v. O'Connor, 14 Ill. App. 2d 81, 142 N.E.2d 818 (1957); Poyer v. Boustad, 3 Ill. App. 2d 562, 122 N.E.2d 838 (1954).

71 Menard v. Mitchell, 430 F.2d 486, 490-91 (D.C. Cir. 1970). In this case, the court reversed a grant of summary judgment for defendants where plaintiff, who had beeu arrested without probable cause, sued the Attorney General and FBI Director for the return of his fingerprints. The court remanded the case for trial. Although the case involved the return of records reflecting an arrest made without probable cause, the court noted that the same consequential discrimination faced the man arrested with probable cause. *Id.* at 492.

The court in United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967), recognized the impact of an arrest record when it asked: "Should a citizen be haunted by fingerprints labelled 'criminal' . . . when he has no charges pending against him?" *Id.* at 970. *See also* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); *In re* Smith, 63 Misc. 2d 198, 310 N.Y.S.2d 617 (Family Ct. 1970).

In United States v. Penny, Civil No. 34-7270 (D.D.C., filed Nov. 25, 1970), FBI Director J. Edgar Hoover is currently seeking to enjoin a District of Columbia judge from ordering the expungement of arrest records. The case is reported in N.Y. Times, Nov. 26, 1970, at 1, col. 1.

Statutes that authorize the maintenance of arrest records[72] have a reasonable relation to the effectuation of a valid state objective—effective law enforcement.[73] But if these statutes fail to protect the confidentiality of records that indicate the arrested person was subsequently discharged or acquitted, they arguably have a deleterious effect on such a person's right to privacy.[74]

The right to privacy is, of course, a fundamental personal liberty.[75] The abridgement of such a fundamental right is permissible only on a showing by the state of a compelling interest in maintaining its arrest records *without protecting the privacy of arrested persons.*[76] Presumably, no such interest can be shown.

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72 *E.g.*, CAL. PENAL CODE § 11112 (West 1970); FLA. STAT. ANN. § 30.31 (Supp. 1970); MASS. ANN. LAWS ch. 147, § 4A (1965); *id.* ch. 263, § 1A (1968); N.J. STAT. ANN. § 53:1-15 (1955); OKLA. STAT. ANN. tit. 74, § 158 (1965); PA. STAT. ANN. tit. 19, § 1403 (1964).

The California statute is representative. It provides:

> The first agency to receive a person for booking after his arrest shall furnish the bureau [the state agency that maintains arrest records] daily copies of fingerprints . . . and descriptions of: (a) all persons who have been arrested for the commission of any [defined] offense . . . .

The statute goes on to enumerate specific offenses, ranging from "seduction under promise to marry" to "all persons who in the best judgment of any such officer are wanted for serious crimes . . . ."

73 *See generally* CALIFORNIA ASSEMBLY COMM. ON CRIMINAL PROCEDURE, ERASURE OF ARREST RECORDS (1964).

74 One court has characterized the maintenance of arrest records after discharge or acquittal without more as an infringement on the right to privacy. In United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967), the court stated:

> There can be no denying of the efficacy of fingerprint information, photographs, and other means of identification in the apprehension of criminals and fugitives. . . . When arrested, an accused does not have a constitutional right of privacy that outweighs the necessity of protecting society and the accumulation of this data, no matter how mistaken the arrest may have been.
>
> However, when an accused is acquitted of the crime or when he is discharged without conviction, no public good is accomplished by the retention of criminal identification records. On the other hand, a great imposition is placed upon the citizen. His privacy and personal dignity are invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph.
>
> . . . .
>
> . . . What the Government fails to consider is the affront on the personal dignity of the individual . . . .

The court concluded that "[t]he preservation of these records constitutes an unwarranted attack upon his character and reputation and violates his . . . dignity as a human being." *Id.* at 970 (dicta).

75 Griswold v. Connecticut, 381 U.S. 479 (1965).

76 In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regnlatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

Id. at 497 (Goldberg, J., concurring), *quoting* Bates v. Little Rock, 361 U.S. 516, 524 (1960)

In determining the constitutionality of a state law or practice, the courts have also looked to see if the same state objective could be accomplished by less burdensome means.[77] In essence, the police have two means by which they can maintain arrest records. They can employ tight security to preserve the confidentiality of the records, with inspection permitted only under careful safeguards, and copies furnished to bona fide police agencies upon request for good, specific reasons.[78] Or, they can be less vigilant in preserving the confidentiality of these records.[79] Where a constitutional liberty is infringed, the Constitution compels them to utilize the less drastic means.[80]

One recent case has stated in dicta that the mere maintenance of arrest records by police after acquittal or discharge is an infringement on the right to privacy.[81] A more reasonable approach, one recoguizing the needs of effective law enforcement[82] and requiring the use of less drastic means, is to find a violation of the right to privacy only when there is a danger that the confidentiality of records will not be properly safeguarded. This could be done in two ways. First, the courts might find the state statute authorizing the maintenance of arrest records unconstitutional as an invasion of the right of privacy unless the statute sufficiently ensured the confidentiality of arrest records. Coguizant of the ultimate impact of arrest record abuse, a court might find that the state should have achieved its objective by less drastic means—enactment of a statute authorizing arrest record maintenance with adequate safeguards for confidentiality. Second, the courts might construe the statute to require appropriate action by its administrators to protect rights of privacy.[83] By utilizing either approach, the courts would as-

77 "In a series of decisions [the Supreme Court] has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* United States v. Robel, 389 U.S. 258, 268 & n.20 (1967); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

This constitutional principle is commonly referred to as the "less drastic means" test, or the "doctrine of the reasonable alternative." *See generally* Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative,* 9 UTAH L. REV. 254 (1964). *See also* Note, *Less Drastic Means and the First Amendment,* 78 YALE L.J. 464 (1969).

78 *See* text accompanying notes 39-48 *supra. See generally* S. HOFSTADER & G. HOROWITZ, THE RIGHT OF PRIVACY 183-89 (1964).

79 *See* note 28 *supra.*

80 *See* note 77 and accompanying text *supra.*

81 "The preservation of these records constitutes an unwarranted attack upon his character and reputation and violates his right of privacy . . . ." United States v. Kalish, 271 F. Supp. 968, 970 (D.P.R. 1967).

82 *See* notes 37-38 and accompanying text *supra.*

83 A case-by-case determination as to the abuse of arrest records is, of course, a third

sure persons with arrest records of meaningful protection for an increasingly threatened constitutional right.

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approach available to the courts. While recognizing the principle that arrest records must be accorded adequate protection to escape infringement on the constitutional right of privacy, this approach is more cumbersome and less effective than the other two approaches suggested. Every person whose records were improperly maintained would have to litigate to secure redress. Moreover, few persons would be aware of their right to litigate or financially able to pursue it. Thus, a case-by-case determination leaves the less litigious—especially the poor and the ghetto residents who bear the brunt of arrest record abuse—with little practical remedy.