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Sealing and Expungement of Criminal Records: Avoiding the Inevitable Social Stigma

Big government, the expanding use of computers, and the constant probing into our lives by countless organizations make us a highly scrutinized, watched, counted, recorded and questioned people.¹

I. INTRODUCTION

In the past several years there has been a growing concern over the kind of information that is collected and disseminated about an individual.² In an ever increasingly computerized society, one becomes curious about the information "Big Brother" has stored about us.³ Of this tremendous amount of information collected,

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1. Miller, *Our Right of Privacy Needs Protection from the Press*, 7 HUMAN RIGHTS 16, 18 (Spring 1978).
 2. One reason for the concern is that "the federal government today maintains 6,723 different record systems containing a total of 3.9 billion individual files, or eighteen files for every man, woman and child in the United States!" Caine, *Computers and the Right to Be Let Alone—A Civil Libertarian View*, 22 VILL. L. REV. 1181, 1183 (1977).
 3. One commentator has related the following incident:

Recently, a group of police officers were touring a police records department. After hearing an explanation of how data could be obtained from the computer by the mere entry of a person's name, one officer requested that his name be entered so he could see the system operate. Although it was suggested that such a demonstration would be pointless because the officer would have no record, the request was complied with. To everyone's surprise, particularly the officer who had made the request, the computer responded that the person had once been suspected of being a "peeping tom." Understandably upset, the officer immediately commenced an investigation to discover why this entry was on his record. He eventually learned the explanation. At one time a woman living in an apartment complex reported a peeping tom, and as a matter of course the names of all the male residents of the apartment complex were put on a list of "suspects." The officer, since he resided in the apartment complex at the time, was included in this list. He was never contacted, questioned or even aware of being a suspect. Nevertheless this information became part of his computer record.

Comment, *The Rights of the Innocent Arrestee: Sealing of Records Under California Penal Code Section 851.8*, 28 HASTINGS L.J. 1463, 1465 n.15 (1977).

there is probably none that poses such potential for abuse and misuse as well as a threat to an individual's privacy and reputation as does the collection of arrest and conviction records.⁴

It has been estimated that about forty percent of the male children living in the United States today will at some time be arrested for a non-traffic offense.⁵ Additionally, the Federal Bureau of Investigation (FBI) has amassed some 200 million sets of fingerprints.⁶ Thus, it is quite likely that an individual might have been involved in an activity which would have generated "a record at almost every level of the criminal justice system—from the police department, through the courts, to the FBI."⁷ Of course, generation of the record in and of itself does not pose a tremendous problem.⁸ But the presentation of the record and disclosure of its contents to others have caused much concern about the dangers of inaccurate or incomplete records, dissemination outside the criminal justice system, and reliance on such records as a basis for denying business or professional licensing, employment, or other opportunities for personal advancement.⁹ To afford protection to

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4. Throughout this comment the term "criminal record" will be used to refer to both arrest and conviction records. "Conviction record" will be used when the arrest resulted in a conviction and if the arrestee was exonerated the information will be referred to as an "arrest record."
 5. Comment, *Expungement and Sealing of Arrest and Conviction Records: The New Jersey Response*, 5 SETON HALL L. REV. 864, 868 (1974) (citing THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 247 (1967) [hereinafter cited as THE CHALLENGE OF CRIME]). See also note 40 *infra*.
 6. Comment, *supra* note 5, at 874 n.48.
 7. Comment, *The Press and Criminal Record Privacy*, 20 ST. LOUIS U.L.J. 509, 511 (1976) (footnote omitted).
 8. Comment, *supra* note 5, at 868 n.22.
 9. See, e.g., Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELINQUENCY 494, 495-98 (1967); Karabian, *Record of Arrest: The Indelible Stain*, 3 PAC. L.J. 20, 21-24 (1972); Schiavo, *Condemned by the Record*, 55 A.B.A.J. 540, 541-42 (1969); Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J. L. REF. 32, 38-42 (1972); Comment, *The Arrest Record and New York City Public Hiring: An Evaluation*, 9 COLUM. J. L. & SOC. PROB. 442, 445-48 (1973); Comment, *Arrest Records—Protecting the Innocent*, 48 TUL. L. REV. 629, 634-36 (1974); Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. C.R.-C.L. L. REV. 165, 168-71 (1970); Comment, *Guilt by Record*, 1 CAL. W. L. REV. 126, 126-29 (1965); Comment, *Maintenance and Dissemination of Criminal Records: A Legislative Proposal*, 19 U.C.L.A. L. REV. 654, 664-65 (1972); Comment, *Removing the Stigma of Arrest: The Courts, The Legislatures and Unconvicted Arrestees*, 47 WASH. L. REV. 659, 660-62 (1972); Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 853 (1971); Note, *A Constitutional Right to the Return of Fingerprints and Photographs on Acquittal*, 37 MO. L. REV. 709, 713-14 (1972); Note, *Discrimination on the Basis of Arrest Records*, 56 CORNELL L. REV. 470, 470-75 (1971); Note, *The Dissemination of Arrest Records in the Iowa TRACIS*

individuals with arrest or conviction records the principal development¹⁰ has been providing for expungement or sealing¹¹ of such records.

This comment will explore the problems which expungement and sealing are aimed at solving,¹² examine the judicial response to the problem, and describe different approaches certain state legislatures have adopted. The arguments for and against retention of criminal records will be discussed and the need for some type of legislative response in Nebraska will be suggested.

II. THE SERIOUSNESS OF THE PROBLEM

Suppose you are waiting in a park late at night for a friend to pick you up and the police erroneously charge you on a suspicion of being a prowler in the neighborhood.¹³ Or suppose you've taken a cab home and only have a twenty dollar bill with which to pay

Bill, 59 IOWA L. REV. 1162, 1163-66 (1974); 46 NOTRE DAME LAW. 825, 830 (1971). See generally Alexander & Walz, *Arrest Record Expungement in California: The Polishing of Sterling*, 9 U.S.F. L. REV. 299 (1974); Baum, *Wiping Out a Criminal or Juvenile Record*, 40 STATE BAR J. 816 (1965); Booth, *The Expungement Myth*, 38 L.A. BAR BULL. 161 (1963); Kogon & Dougherty, *Sealing and Expungement of Criminal Records—The Big Lie*, 61 J. CRIM. L. C. & P. S. 378 (1970); Comment, *Criminal Records of Arrest and Conviction: Expungement From the General Public Access*, 3 CAL. W. L. REV. 121 (1967) [hereinafter cited as *Expungement from the General Public*]; Note, *Constitutional Law—Maintenance and Dissemination of Records of Arrest Versus The Right to Privacy*, 17 WAYNE L. REV. 995 (1971); 8 LOY. L. A. L. REV. 238 (1975).

10. Relief was historically provided by the king as an act of grace and by executive pardon procedures. Comment, *supra* note 5, at 865. More recently, some jurisdictions have provided relief through automatic restoration statutes. *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1143 (1970) [hereinafter cited as *Collateral Consequences*].
11. Various jurisdictions define expungement and sealing differently and some use the terms interchangeably. In general, sealing does not purport to destroy the record, whereas expungement connotes physical destruction. When a record or proceeding is expunged it is as though the event giving rise to the record had never happened in the first place. Sealing statutes usually provide "that all government records relating to an offender's criminal record are closed to public inspection." *Collateral Consequences*, *supra* note 10, at 1149 n.627. See also BLACK'S LAW DICTIONARY 693 (4th ed. 1968) which defines "expunge" as "to destroy or obliterate; it implies not a legal act, but a physical annihilation."

The correct noun form for the act of expunging is "expunction." See WEBSTER'S NEW INT'L DICTIONARY 803 (2d ed. 1934). But the courts, legislators and commentators almost uniformly use the word expungement and this comment will also follow that form.

12. This comment will not deal with the expungement of juvenile records, but an excellent discussion of the area can be found in Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U. L.Q. 147.
13. *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

the driver. He has no change and puts you under citizen's arrest for refusing to pay his fare.¹⁴ In both situations the charges were dropped but a criminal record arose out of both incidents. Severe disabilities could result from disclosure of these arrest records even though the arrests did not result in convictions. The problem is that only lip service is given to the presumption that a person is innocent until proven guilty. Furthermore, when a conviction does occur and the individual has served time and paid a fine, then is it not true that the offender has "paid his debt to society"? In response, one commentator has observed that though payment is tendered, the individual "neither receives a receipt nor is free of his account."¹⁵ Apparently the prominent belief is that "an arrest is tantamount to guilt"¹⁶ and once found guilty the individual is stigmatized indefinitely, resulting in a "record prison"¹⁷ in which people are incarcerated by their criminal history records.¹⁸

A. The "Record Prison"

There are numerous ways a past criminal record may be used within the criminal justice system. The record may be used as an investigative tool by the police, to solve similar crimes or obtain further evidence.¹⁹ Reasonable or probable cause for making an arrest might arise when the *modus operandi* of a crime is similar to that described in a suspect's record.²⁰ Thus, a person with an arrest record is more likely to become a suspect in police investigations. One court has stated that "it is common knowledge that a man with an arrest record is much more apt to be subject to police scrutiny—the first to be questioned and the last eliminated as a suspect in an investigation."²¹

14. *Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962). See also *Alexander & Walz*, *supra* note 9.

15. Gough, *supra* note 12, at 148 (quoting Tappan, *Loss and Restoration of the Civil Rights of Offenders*, 1952 NAT'L PROBATION & PAROLE A. Y.B. 86, 87).

16. Comment, *supra* note 7, at 512. See also *Morrow v. District of Columbia*, 417 F.2d 728, 748 (D.C. Cir. 1969); Comment, *Discriminatory Hiring Practices Due to Arrest Records—Private Remedies*, 17 VILL. L. REV. 110, 112-13 (1971); Note, *The Dissemination of Arrest Records and the Iowa TRACIS Bill*, 59 IOWA L. REV. 1162, 1167 (1974); 41 U. MO. KAN. CITY L. REV. 106 (1972).

17. The concept is explained in greater detail in DeWeese, *Reforming Our "Record Prisons": A Proposal for the Federal Regulation of Crime Data Banks*, 6 RUT.-CAM. L. J. 26, 48 (1974).

18. Comment, *supra* note 7, at 513.

19. *Loder v. Municipal Court*, 17 Cal. 3d 859, 865, 553 P.2d 624, 628, 132 Cal. Rptr. 464, 468 (1976).

20. Comment, *supra* note 5, at 866. See also A. NEIER, DOSSIER ch. 10 (1975); DeWeese, *supra* note 17.

21. *Davidson v. Dill*, 180 Colo. 123, 127, 503 P.2d 157, 159 (1972).

An example of the problem is illustrated by *White v. State*,²² where a person with a record of one prior arrest was identified from a "mug shot" as a suspect in a check forgery case. The prosecutor subsequently decided not to prosecute because White was not in the state and only a small amount of money was involved. However, because of the arrest record White was denied employment as a police officer and was not successful at obtaining other jobs. White sued the state for libel and negligence but a judgment of nonsuit was entered.²³ The court reasoned that the state was protected from tort liability by a conditional privilege.²⁴ It seems clear, then, that those with a previous record stand an extremely good chance of being rearrested some time in their lives. Such a practice imposes a tremendous "undeserved handicap [especially] for an innocent arrestee."²⁵

The prior record can be used for a variety of other purposes at other stages of the criminal process as well. Prior records are often taken into account in deciding whether an offense should be charged, whether a felony or misdemeanor should be prosecuted and whether a plea bargain should be accepted.²⁶ Once a person

22. 17 Cal. App. 3d 621, 95 Cal. Rptr. 175 (1971).

23. *Id.* at 630, 95 Cal. Rptr. at 181.

24. The dissent argued that the individual's interests were not being sufficiently protected:

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 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. Appellate courts should think twice, before deciding that custodians of sensitive personal files may with impunity refuse to investigate claims of mistaken identity or other error which threaten the subject with undeserved loss. The office of judges is to strike that balance rather than pursue sentiments of indignation or sympathy. It is obvious, nevertheless, that an unwarranted record of conviction, even of arrest, may ruin an individual's reputation, his livelihood, even his life.

Id. at 631, 95 Cal. Rptr. at 181-82 (Friedman, J., dissenting in part, concurring in part) (footnotes omitted).

25. Comment, *supra* note 3, at 1467.

26. DeWeese, *supra* note 17, at 82.

has been charged, a prior record may be used to decide the question of pretrial release. Prior arrests and their dispositions will be considered by the court in determining whether the defendant should be released on recognizance or, if not, the amount of bail that should be fixed.²⁷ After trial and upon conviction, probation and parole authorities may use the arrest record in determining whether and upon what conditions to grant probation or when to release a defendant on parole.²⁸

Not only does a prior record act to "imprison" an individual in a "record prison" within the criminal justice system, but it has similar effects without. For example, licensing boards consider a prior record in deciding whether to revoke or deny a license.²⁹ Because of the widespread dissemination of these records,³⁰ applicants may have difficulty in obtaining insurance, credit³¹ or admission to certain schools.³²

B. "Above all else, employers are leery of any job applicant who has ever been arrested. Not necessarily convicted of a crime—just arrested."³³

Disclosure of criminal records may have an overwhelming impact on one's ability to seek and hold "gainful" employment.³⁴ A

27. *Loder v. Municipal Court*, 17 Cal. 3d at 867-68, 533 P.2d at 630, 132 Cal. Rptr. at 470 (1976).

28. *Id.*

29. Most statutes require that applicants be of "good moral character." Comment, *supra* note 5, at 867 n.16. For other licensing restrictions placed upon ex-offenders, see J. HUNT, J. BOWERS & N. MILLER, *LAW, LICENSES AND THE OFFENDER'S RIGHT TO WORK* (ABA Comm'n on Correctional Facilities and Services) (1973).

30. One study in the District of Columbia revealed that more than 3,500 criminal arrest records were disseminated weekly to private employers. See *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969) (citing COMMITTEE TO INVESTIGATE THE EFFECTS OF POLICE ARREST RECORDS ON EMPLOYMENT IN THE DISTRICT OF COLUMBIA, REPORT 9 (1967) [also referred to as the Duncan Report]). The Duncan Report also found that in other major cities there was a similar practice of giving influential employers access to police records.

31. V. PACKARD, *THE NAKED SOCIETY* 54 (1964); Note, *Arrest and Credit Records: Can the Right of Privacy Survive?*, 24 U. FLA. L. REV. 681 (1972). But see Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(5) (1976) which prohibits the reporting of arrest or conviction information seven years or older.

32. See, e.g., *State v. Campobasso*, 125 N.J. Super. 103, 308 A.2d 674 (1973) (petitioner removed from trade school until conviction, for being under the influence of a controlled substance, was expunged).

33. Hayden, *How Much Does the Boss Need to Know?*, 3 CIV. LIB. REV. 23, 30 (Aug./Sept. 1976).

34. The enormous influence dissemination of arrest records has on a person's job opportunities is documented in Hess & Le Poole, *supra* note 9; Karst, "The Files": *Legal Controls Over the Accuracy and Accessibility of Stored Personal Data*, 31 LAW & CONTEMP. PROB. 342, 367 (1966); *Collateral Conse-*

survey of New York City employment agencies indicated that about seventy-five percent ask applicants if they have an arrest record and generally do not refer those applicants who do, though the arrest may not have led to a conviction.³⁵ If two or more applicants apply for the same job, those with previous arrest records "clearly stand in a less favorable position than do other applicants."³⁶ Employers often state as their reason for not hiring an individual with a record is that their bond contract with the surety company is voided if they hire individuals with an arrest record without the surety company's prior consent.³⁷

To a limited extent, Title VII of the Civil Rights Act³⁸ may afford some relief. In *Gregory v. Litton Systems, Inc.*,³⁹ the plaintiff was denied employment because of a record of fourteen arrests, though not one of them led to a conviction. It was contended that because blacks are more prone to be arrested than whites,⁴⁰ Litton's practice of refusing employment on the basis of arrest records rendered its policy racially discriminatory.⁴¹ The court agreed and enjoined the company from such practice, noting that there was no evidence to support the contention that an employee with several arrests, but no convictions,⁴² is less likely to be honest or reliable

quences, *supra* note 10, at 1001-18. See also *Morrow v. District of Columbia*, 417 F.2d 728, 742 (D.C. Cir. 1969).

35. Comment, *Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees*, 47 WASH. L. REV. 659, 660 (1972) (citing *THE CHALLENGE OF CRIME*, *supra* note 5, at 75); See also note 30 *supra*.

36. *Davidson v. Dill*, 180 Colo. at 127, 503 P.2d at 159 and n.3.

37. Gough, *supra* note 12, at 158; Comment, *The Expungement or Restriction of Arrest Records*, 23 CLEV. ST. L. REV. 123, 124 (1974).

38. 42 U.S.C. § 2000e (1976).

39. 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972).

40. One commentator has concluded that:

[t]he probability of arrest for urban males is quite high. For urban black males the probability of arrest at least once during a lifetime has been estimated to be as high as 90%. For white urban males the figure is 60%, and for all males it is 47%. Fewer than 25% of those arrested per year are found guilty of the offense for which they were arrested, and only a little more than 25% are found guilty of any crime at all. As the statistics show, the punishment which flows from an arrest record works a disproportionate disadvantage against blacks in the ghettos in cities throughout the United States.

Caine, *supra* note 2, at 1189 (citing PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE ON SCIENCE AND TECHNOLOGY, at 216 (App. J) (1967)); CRIME IN THE UNITED STATES, U.S. DEPT OF JUSTICE UNIFORM CRIME REP. 103, table 17 (1969) (footnotes omitted).

41. 316 F. Supp. at 403.

42. For a discussion of the problem as it relates to conviction records, see *Green v. Missouri Pac. R.R.*, 523 F.2d 1290 (8th Cir. 1975); Note, *Employment Discrimination—Title VII—Unlawful to Use Conviction Records as an Absolute Bar to Employment*, 22 WAYNE L. REV. 1251 (1976).

than one without such a record.⁴³ Although the case gives some hope to black applicants bringing actions under Title VII, it would be difficult for a white applicant to gain similar relief.⁴⁴

C. Admission to the Bar

Professional licensing statutes often require that applicants be of "good moral character" or have not committed "crimes involving moral turpitude."⁴⁵ This requirement has been generally accepted as a permissible prerequisite for admission to the bar.⁴⁶ It has also been held that a criminal record may reflect upon an applicant's moral character.⁴⁷

In *Schwartz v. Board of Bar Examiners*⁴⁸ the Supreme Court reversed a decision to exclude an applicant from the practice of law for want of "good moral character."⁴⁹ The court asserted that a state may require high standards of qualification before it admits an applicant to the bar but the qualification must have a rational connection with the applicant's fitness or capacity to practice law.⁵⁰ Although the court did not hold that it was impermissible to consider prior arrests, it did explain what significance such a record should have: "The mere fact that a man has been arrested has very little, if any, probative value in showing that he engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."⁵¹

D. Mass Arrests

In some jurisdictions there have been mass arrests of unpopular groups, sometimes for the purpose of harassment.⁵² For exam-

43. 316 F. Supp. at 402.

44. *But see* Comment, *Arrest Records as a Racially Discriminatory Employment Criterion*, 6 HARV. CIV. LIB. L. REV. 165 (1970). The commentator argues that since Title VII also prohibits sex discrimination and because males are arrested more often than females, denying males employment because of numerous arrests would also be prohibited.

45. *See* note 29 & accompanying text *supra*.

46. *See* Annot., 88 A.L.R.3d 192 (1978).

47. *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957).

48. 353 U.S. 232 (1957).

49. The applicant had been a member of the Communist Party from 1932 to 1940; he had used aliases to avoid job discrimination. He was arrested while participating in a strike in 1934 but was later released, and was arrested in 1940 on a charge of violating the Federal Neutrality Act, but was again released. The finding of bad moral character was held to lack the rational support required by the due process clause because the evidence of character at the time of the applicant's application was highly favorable. *Id.* at 239.

50. *Id.*

51. *Id.* at 241 (footnote omitted).

52. *See, e.g., Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880

ple, in 1971 during the "May Day" antiwar demonstrations in Washington, D.C., a total of 14,517 arrests were made.⁵³ In *Sullivan v. Murphy*⁵⁴ a class action was brought on behalf of those arrested during the week-long disorder,⁵⁵ seeking relief for the abridgment of their fourth amendment rights. In deciding whether relief was appropriate, the court noted the importance of finding the existence of probable cause at the time of the arrests. Accordingly, it explained that because of disorders in the District of Columbia following the assassination of Dr. Martin Luther King, Jr., the normal arrest practice of the police became unworkable.⁵⁶ A new procedure had been adopted whereby the officer would complete a "Field Arrest Form" with relevant information, then turn the arrestee over to other personnel for booking and processing.⁵⁷ This left the arresting officers free to remain at the scene of the demonstration.

However, because of an anticipated increase in protest activity the police chief decided that mass arrests were necessary and suspended the field arrest procedures.⁵⁸ Many innocent persons were swept up in the process.⁵⁹ Because of the large number of arrests, and the departure from normal procedure, it was impossible to determine the validity of the arrests and detentions. Therefore, the circuit court stated that the arrests were not entitled to the normal inference of justification and held the arrests to be presumptively

(1973) (political demonstrators); *Wilson v. Webster*, 467 F.2d 1282 (9th Cir. 1972) (dictum); *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967) (civil rights workers); *Bilick v. Dudley*, 356 F. Supp. 945 (S.D.N.Y. 1973) (political meeting); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971) (hippies); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968) (same).

53. *Sullivan v. Murphy*, 478 F.2d 938, 942 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

54. 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

55. The arrests were primarily for "disorderly conduct, violation of police lines, unlawful assembly, and unlawful entry onto public property." *Id.* at 942.

56. The normal practice was for the arresting officer to escort the person arrested on probable cause to the police station for booking and recording. However, during the disorder the practice was unworkable because the police were needed most on the street. *Id.* at 946.

57. *Id.*

58. The police chief's order came on May 3 and during that day 8,000 arrests were made. The arrestees were loaded on vehicles and sent to detention centers. Many were processed through a booking center composed of volunteers from the Justice Department who had been told to record the arrestee's name, address and physical description. They were to enter disorderly conduct as the charge and could choose from seven police officers to list under "name of arresting officer." *Id.* at 951. Photographs and fingerprints, normally taken to assist in identification, were taken to be used by police during "prep" sessions before trial. *Id.* at 969.

59. *Id.* at 949-50.

invalid.⁶⁰

Due to the unique circumstances of the case, the court concluded that the inherent equity powers of a federal court allowed it to grant relief to remedy the infringement of the plaintiffs' rights.⁶¹ Although the court left the decision of the precise relief to be granted to the trial court, it did note that the order of relief should limit:

maintenance and dissemination of the arrest records, and of all materials obtained from persons taken into custody during the May Day protest, in the absence of affirmative evidence produced by the Defendants to demonstrate the existence of probable cause either at the time of the arrest or subsequent thereto.⁶²

However, the court also indicated that placing the documents under seal might be an adequate alternative to outright expungement, because it would protect the individuals' interests as well as the government's.⁶³

Another incident of mass arrests resulted in *Hughes v. Rizzo*.⁶⁴ Certain young persons were apprehended during a series of arrests made to rid a park of hippies.⁶⁵ The arrests were found to be invalid and no charges were ever brought against the arrestees.⁶⁶ They subsequently brought suit seeking expungement of their records. The court held that they were entitled to relief and directed expungement of all arrest records and ordered the return or destruction of photographs taken in connection with the arrests.⁶⁷

Similarly, in *United States v. McLeod*,⁶⁸ a series of arrests and prosecutions of blacks had been made, apparently to keep them from registering to vote through intimidation. The court granted relief by directing that all fines be returned and court costs incurred be reimbursed and in addition ordered the expungement of all arrests and prosecution records.⁶⁹ It seems clear, therefore, as the mass arrest cases demonstrate that

[a]n arrest without conviction is as much an indication of unlawful activity by the police as by the person arrested; yet, nothing appears on the criminal record of the policeman for having committed an unlawful act. When the policeman applies for credit or for a job, there is no notation of law infraction.⁷⁰

60. *Id.* at 970.

61. *Id.* at 971.

62. *Id.*

63. *Id.* at 973.

64. 282 F. Supp. 881 (E.D. Pa. 1968).

65. *Cf. Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969) *vacated on other grounds*, 401 U.S. 987 (1971) (expungement ordered after finding that vagrancy statute under which arrests of young persons at a "hippie house" had been made was unconstitutional).

66. 282 F. Supp. at 885.

67. *Id.*

68. 385 F.2d 734 (5th Cir. 1967).

69. *Id.* at 750.

70. Caine, *supra* note 2, at 1189.

E. "Mistakes"

Equally reprehensible are a group of cases which can best be classified as "mistakes," that is, situations of mistaken identity or where the individual was arrested and subsequent events unequivocally established innocence.⁷¹ Perhaps the most celebrated case in this area is *Menard v. Saxbe*.⁷² A nineteen-year-old student was sitting in a park late at night while waiting for a friend. There had been a complaint of a prowler in the vicinity and so Menard was approached by the Los Angeles police and questioned. Although he explained his reason for being in the park and his friend later arrived confirming his story, he was arrested and held for two days without a complaint being filed. Subsequently the police released him when they found no basis upon which to charge him with a crime.⁷³ However, his fingerprints and information concerning the "arrest" were automatically forwarded to the FBI. Menard brought an action to compel removal of his fingerprints and record of arrest from FBI files.⁷⁴ The district court denied relief⁷⁵ but the court of appeals reversed,⁷⁶ noting that Menard had suffered more than mere personal distress. It recognized that "[a]lthough Menard cannot point with mathematical certainty to the exact consequences of his criminal file, we think it clear that he has alleged a 'cognizable legal injury.'"⁷⁷

The appellate court, however, did not order full expungement.

71. See, e.g., *Irani v. District of Columbia*, 272 A.2d 849 (D.C. Ct. App. 1971), *appeal from final order dismissed*, 292 A.2d 804 (D.C. Ct. App. 1972) (innocent bystander mistakenly arrested for parading without a permit); *State v. Pinkney*, 33 Ohio Misc. 183, 290 N.E.2d 923 (Ct. C. P. 1972) (18 year old defendant indicted for first degree murder released and charges dropped when other persons confessed to the crime).

72. 498 F.2d 1017 (D.C. Cir. 1974).

73. It has been suggested that "in all probability the crime for which he was apprehended had never taken place." *Caine*, *supra* note 2, at 1184 (citing *Menard v. Mitchell*, 430 F.2d 486, 492 n.27 (D.C. Cir. 1970)).

74. The incident was the subject of much litigation, including two reversals and remands by the circuit court. See *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970), *on remand*, 328 F. Supp. 718 (D.D.C. 1971), *rev'd sub nom.*, *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974).

75. 498 F.2d at 1019.

76. *Id.* at 1023.

77. *Id.* *Accord*, *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975), in which a high school student was allowed to seek expungement of her FBI file. She became the subject of an FBI investigation when she wrote a letter to an organization on which the FBI had put a mail cover. Although the case did not involve a criminal record the court noted that "[t]he threat that the file poses is analogous to the dangers inherent in the maintenance of arrest files." *Id.*

Instead it agreed with the contention that the decision to expunge must be made at the local level and thus suggested that an action should be brought against the local law enforcement agencies. The court did order Menard's fingerprints and file transferred from the FBI's criminal index to the identification index.⁷⁸ It held that when the Bureau is given notification of a change in the description of a record from, *e.g.*, one of arrest to one of "detention only," the Bureau has a statutory responsibility to "expunge" the notation from its criminal identification files.⁷⁹

Another case where subsequent events made it clear that the arrestee was erroneously charged is *United States v. Hudson*.⁸⁰ Plaintiff was arrested for murder but after evidence disclosed that the decedent had committed suicide, the charges against him were dismissed. He therefore sought expungement of his records and the court granted such relief.⁸¹ It was explained that entering a notation of no conviction would not be an adequate remedy since "[t]he existence of an arrest record, whether amplified or not, and whether or not followed by a conviction, will subject the arrestee to a host of disabilities"⁸² The court went on to rest its decision on constitutional grounds:

[F]ailure to expunge an innocent person's arrest record violates constitutional protections, including the rights to privacy and due process. The courts have a special obligation, within their area of jurisdiction, to call a halt to the indiscriminate accumulation of information that threatens privacy and liberty.⁸³

It thus, seems difficult to deny that criminal records (both arrest and conviction) are disseminated widely and relied upon to the disadvantage of many former arrestees. The severe disabilities attendant to the disclosure of these records are not limited to those

78. 498 F.2d at 1028.

79. *Id.* See also *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974) where the court held that the FBI has a duty to prevent the dissemination of inaccurate arrest and conviction records. The court based its opinion on 28 U.S.C. § 534 (1976) which provides:

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

80. 16 Crim. L. Rep. 2468 (D.C. Super. Ct. 1975).

81. *Id.* at 2470.

82. *Id.* at 2468.

83. *Id.* at 2469.

convicted of a criminal act. As the cases demonstrate, the potential for injury to the innocent individual is just as significant as it is to the "ex-offender."⁸⁴ The pervasiveness of the problem has led commentators to recommend sealing or expungement as necessary and desirable solutions.⁸⁵ However, the urgings have often fallen on deaf ears as the courts have demonstrated reluctance to utilize these remedies and the legislative response has been confused and varied.⁸⁶

III. SOLUTIONS TO THE PROBLEM: EXPUNGEMENT AND RECORD SEALING

A. The Judicial Response—A Cautious Approach

When requested to order the return or destruction of criminal records a majority of courts have been cautious in fashioning relief.⁸⁷ In the absence of express legislative authority, there has been reluctance to grant expungement or sealing in any form.⁸⁸ However, a number of courts, both state and federal, have in appropriate cases ordered expungement or sealing. Where relief is granted, several factors⁸⁹ stand out as important: (1) there were extraordinary circumstances such as an unconstitutional or illegal arrest;⁹⁰ (2) the facts convinced the court that "justice so required;"⁹¹ (3) innocence was unequivocally established;⁹² and (4)

84. One federal court has described the problem graphically:

Any citizen, even one with an absolutely clean lifetime record of not violating the law, through a series of circumstances could find himself charged with a violation of the law even though he may be entirely innocent of the charges. Our system of criminal justice will in due course bring out the truth and he will be cleared. But his record will not be cleared. And although he has been cleared under our laws, at any future time the cloud of the prosecution against him will remain to all who one way or another gain access to it: be it inquiries concerning employment, security clearance, political office or investigations concerning other criminal offenses.

United States v. Dooley, 364 F. Supp. 75, 78-79 (E.D. Pa. 1973).

85. See note 9 *supra*.

86. See notes 154-82 & accompanying text *infra*.

87. This judicial reluctance indicates that there is inadequate protection against the abuses of arrest record dissemination. In the case of conviction records there is almost no hope for judicial relief. See, e.g., Commonwealth v. Zimmerman, 215 Pa. Super. Ct. 534, 258 A.2d 695 (1969) (order expunging conviction record reversed, there being no statutory or common law basis for such relief).

88. Some courts avoid deciding the merits of a petition for expungement on the basis of jurisdictional defects. For an analysis of the issue, see Comment, *supra* note 5, at 871-72 nn. 30-32.

89. See generally *id.* at 878-79.

90. E.g., United States v. McLeod, 385 F.2d 734 (5th Cir. 1967); Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968).

91. Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971).

in some cases relief was granted on a right of privacy theory.⁹³

1. *The Federal Courts*

There is no specific federal statute providing for expungement of criminal records.⁹⁴ However, the inherent equity power of a federal court has been recognized in a number of cases as authorizing an order of expungement.⁹⁵ For example, the petitioner in *Kowall v. United States*⁹⁶ had been convicted for failure to report for induction into the armed services, but because his conviction was subsequently reversed the court ordered that all records of the arrest be expunged. In affirming the order of expungement the district court noted that "the logic of the natural law of remedies does not set arbitrary limits on a federal court's jurisdiction to right wrongs cognizable by the common law within the jurisdiction of the court."⁹⁷ Having established its authority to grant expungement relief, the court adopted a balancing test⁹⁸ for determining when such relief was warranted: "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 con-

92. *E.g.*, *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *United States v. Hudson*, 16 Crim. L. Rep. 2468 (D.C. Super. Ct. 1975); *State v. Pinkney*, 33 Ohio Misc. 183, 290 N.E.2d 923 (Ct. C.P. 1972).

93. *See United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967); *Davidson v. Dill*, 180 Colo. 123, 503 P.2d 157 (1972); *Eddy v. Moore*, 5 Wash. App. 334, 487 P.2d 211 (1971). As to the continuing validity of the privacy theory after *Paul v. Davis*, see notes 139-53 & accompanying text *infra*.

94. Federal law does provide for the cancellation of a record. *See* 28 U.S.C. § 534(b) (1976); note 79 *supra*. But the provision is seldom invoked and has been criticized as ineffective. Comment, *Criminal Law—FBI Retention of Criminal Identification Records—Tarlton v. Saxbe*, 29 *RUTGERS L. REV.* 151, 155-56 (1975).

95. *E.g.*, *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971).

96. 53 F.R.D. 211 (W.D. Mich. 1971).

97. *Id.* at 213.

98. "[T]he harm caused to an individual by the existence of any records must be weighed against the utility to the Government of their maintenance." *Paton v. La Prade*, 524 F.2d 862, 868 (3d Cir. 1975). *See also Chastain v. Kelley*, 510 F.2d 1232 (D.C. Cir. 1975) (personnel file); *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975); *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974); *Tarlton v. Saxbe*, 507 F.2d 1116 (D.C. Cir. 1974); *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973); *Menard v. Mitchell*, 430 F.2d 486 (D.C. Cir. 1970). Some of the factors the courts consider in the balance are: the accuracy and adverse nature of the information, the availability and scope of dissemination of the records, the legality of the methods by which the information was compiled, the existence of statutes authorizing the compilation and maintenance, and prohibiting the destruction, of the records [*sic*], and the values of the records to the Government.

Paton v. La Prade, 524 F.2d at 869 (footnote omitted).

sequences to the individual, then the records involved may properly be expunged.”⁹⁹ The government argued that the individual’s right of privacy was outweighed by the public’s interest in maintaining his criminal record. The court rejected the argument, pointing out the tremendous burden a record could have on an individual’s reputation and economic opportunities:

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.¹⁰⁰

Similarly, in *Sullivan v. Murphy*¹⁰¹ a case involving large scale arrests of anti-war demonstrators, the court stated that it possessed the authority to order the expungement of all records where “necessary and appropriate in order to preserve basic legal rights.”¹⁰² Having established its authority to order expungement, the court surprisingly left to the trial court the decision of what specific relief should be granted. However, it noted that maintenance and dissemination of the records should be limited since “the very presence of these records carries the strong implication that the underlying arrest and detention were somehow justified.”¹⁰³

Thus, under well-established common law principle,¹⁰⁴ it appears that a federal court has the inherent power to order expungement; but the power is not frequently exercised and whether expungement will be ordered depends on the circumstances of each case. There is “no definitive, all-purpose rule to govern requests of this nature, and to a considerable degree each case must stand on its own two feet.”¹⁰⁵

Sullivan, however, also illustrates a type of case which almost always gives rise to an order of expungement—the mass arrest. Although there are no hard-fast rules in this area it does appear that in cases of large scale arrests of blacks,¹⁰⁶ hippies¹⁰⁷ and anti-

99. 53 F.R.D. at 214.

100. *Id.* at 214-15 (footnotes omitted).

101. 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973). See notes 53-63 & accompanying text *supra*.

102. 478 F.2d at 968.

103. *Id.* at 969 (footnote omitted).

104. See text accompanying note 102 *supra*. See also note 147 *infra*.

105. *United States v. Linn*, 513 F.2d 925, 927 (10th Cir. 1975).

106. *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967). See notes 68-69 & accompanying text *supra*.

war protestors¹⁰⁸ requests for expungement have been uniformly granted. The rationale the courts have used has been varied. Some seem to suggest that the circumstances were so extraordinary that justice required an order of expungement.¹⁰⁹ Others reason that the arrests were presumptively illegal—due to the large number it was impossible to determine the validity of the arrests and because of departure from normal procedure probable cause was often established after the arrest. Therefore, expungement would be granted unless the validity of the arrest could be demonstrated by the government.¹¹⁰ In any event, if an individual is the victim of a mass arrest it would appear that his or her chances of receiving expungement relief are quite good. However, the courts seem to distinguish between arrests where members of a group are harassed and cases involving a single arrestee.¹¹¹

In *Menard v. Saxbe*,¹¹² for example, a student was erroneously detained on suspicion of burglary. He was later released with no charges filed against him but the incident had generated records which Menard sought to have expunged. Initially the trial court had granted summary judgment for the government but the court of appeals reversed and remanded, stating that whether the records could be maintained would depend upon a factual determination of whether there had been probable cause for the arrest.¹¹³ On remand, the district court found that there had been sufficient probable cause to justify the arrest and thus refused to expunge Menard's records.¹¹⁴ Further, it questioned the utility of using a probable cause test as a basis for granting expungement, stating that such a determination "has little to do with the merits of the underlying controversy."¹¹⁵ On appeal, however, the district court

107. *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971); *Hughes v. Rizzo*, 282 F. Supp. 881 (E.D. Pa. 1968).

See notes 64-66 & accompanying text *supra*.

108. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

See notes 53-63 & accompanying text *supra*.

109. *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971).

110. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

111. See Comment, *supra* note 3, at 1472. The basis for the distinction might be that it is easier to find that a group has been harassed than an individual. A large scale arrest of hippies, for example, is more "extraordinary" than the arrest of one hippie, even though in both situations the arrests might have been for purposes of harassment. Note also that in the mass arrest cases the invalidity of the arrests was presumed, see note 60 & accompanying text *supra*, but under the *Menard* test, see note 113 & accompanying text *infra*, the court must find that the arrest was made without probable cause before it can grant a request for expungement.

112. 498 F.2d 1017 (D.C. Cir. 1974). See notes 72-79 & accompanying text *supra*.

113. *Menard v. Mitchell*, 430 F.2d 486, 492-95 (D.C. Cir. 1970).

114. *Menard v. Mitchell*, 328 F. Supp. 718, 723 (D.D.C. 1971).

115. *Id.* at 724. Two District of Columbia Court of Appeals cases have followed the

was again reversed. Although not granting full expungement, the circuit court did order a transfer of Menard's records from the criminal to the neutral index and suggested Menard maintain an action against the local agencies.¹¹⁶ Thus, after nine years of litigation Dale Menard was still left with a record¹¹⁷ although it was no longer considered "criminal." The case aptly demonstrates the reluctance of the courts to grant expungement relief to a single arrestee when alternatives such as restricting dissemination or correcting inaccuracies are available.¹¹⁸

Two other federal courts have taken an even narrower position. In *United States v. Rosen*¹¹⁹ corporate and individual defendants had been charged with numerous counts of unlawful importation and receipt of Asiatic human hair wigs. All defendants were acquitted in one of two indictments and charges against the individual defendants in the other indictment were dismissed. The court denied defendant's motion for return of photographs, fingerprints and arrest records, reaching this conclusion through "balancing equities."¹²⁰ It was explained that a "dismissal does not necessarily go to a consideration of the merits"¹²¹ and in cases of acquittal the records could be retained unless the arrest was illegal or a statute directed the return of the record.¹²²

A similarly restrictive view was taken in *United States v. Linn*,¹²³ in which an attorney was acquitted of charges of mail fraud and conspiracy. He sought expungement, alleging damage to his professional reputation and an invasion of his right to privacy. The court refused to order expungement and stated that relief "should be reserved for the unusual or extreme case. . . . [A]n acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record."¹²⁴

Thus, from the federal courts there emerges two basic tests for

Menard probable cause test but refused to order expungement or sealing of the records. See *District of Columbia v. Sophia*, 306 A.2d 652, 654 (D.C. Ct. App. 1973) and *Spock v. District of Columbia*, 283 A.2d 14, 19 (D. C. Ct. App. 1971) (proper remedy would be to order correction of the records and then only if petitioner could show non-culpability and "not mere exoneration").

116. *Menard v. Saxbe*, 498 F.2d 1017, 1028 (D.C. Cir. 1974).

117. See *Caine*, *supra* note 2, at 1184-85 and n.18.

118. See also note 115 *supra*.

119. 343 F. Supp. 804 (S.D.N.Y. 1972).

120. The court found that society's interest in effective law enforcement outweighed the individual's right to privacy, especially since there had been no allegation of harassment, improper use of the records, or economic injury. *Id.* at 808 (footnote omitted).

121. *Id.* at 806.

122. *Id.* at 808.

123. 513 F.2d 925 (10th Cir. 1975).

124. *Id.* at 927-28.

determining when expungement is appropriate: the probable cause test and the balancing of equities test. The application of these tests varies greatly. Some courts give great weight to the individual's interest in privacy, whereas others take a narrower view that there must be extraordinary circumstances, *i.e.*, an invasion of privacy plus some other threatened injury.¹²⁵ Similar diversity in application of these tests has also appeared in several state courts.

2. State Courts

Of the state courts addressing the criminal record problem, only a few have relied upon a right of privacy theory to grant expungement relief. In *Davidson v. Dill*¹²⁶ the plaintiff, who had been charged with loitering but was subsequently acquitted, requested either the return or destruction of her records. The Colorado Supreme Court balanced the individual's right to privacy against society's interest in retaining records of acquitted defendants, recognizing the potential personal and economic harm which result from the dissemination of arrest records. In reversing the dismissal of plaintiff's claim, the court made clear that plaintiff's action did state a claim upon which relief could be granted: "The complaint presents an extremely important issue . . . involving a constitutional right of the highest magnitude—an individual's right to privacy vis-a-vis the propriety of the police retaining that person's arrest records in police files after he had been acquitted of criminal conduct."¹²⁷

Similar reasoning was utilized by the Washington Court of Appeals in *Eddy v. Moore*¹²⁸ where the rights involved were recognized as fundamental.¹²⁹ Petitioner requested the return of photographs and fingerprints after charges of assault had been dismissed. The court agreed that disadvantages flow from criminal records: one problem being an increase in police scrutiny.¹³⁰ It

125. Comment, *supra* note 3, at 1476.

126. 180 Colo. 123, 503 P.2d 157 (1972). See also Note, *Davidson v. Dill: A Compelling State Interest in Retaining Arrest Records*, 35 U. PITT. L. REV. 205 (1973).

127. 180 Colo. at 132, 503 P.2d at 162.

128. 5 Wash. App. 334, 487 P.2d 211 (1971).

129. See also *State v. Pinkney*, 33 Ohio Misc. 183, 184, 290 N.E.2d 923, 924 (Ct. C.P. 1972) ("there exists in the individual a fundamental right of privacy").

130. The court stated:

An individual who has been arrested and then acquitted has an undeniable greater visibility to the police than other persons. His fingerprints, and more particularly his photograph, are available to be shown to other citizens as a potential suspect to be chosen in prearrest lineups, an identification procedure frequently used by law enforcement agencies. Increased police scrutiny resulting from an arrest record and its potential invasion of the individual's private life, if it occurs, should rest upon rational factors.

5 Wash. App. at 344, 487 P.2d at 216.

was observed that once an arrestee has been acquitted of criminal charges there remains no rational basis for the record to be retained, especially in light of the fundamental principle that an accused is presumed innocent until proven guilty.¹³¹ The court held that the fingerprints and photographs should be ordered returned and stated:

We believe the right of an individual, absent a compelling showing of necessity by the government, to the return of his fingerprints and photographs, upon an acquittal, is a fundamental right implicit in the concept of ordered liberty and that it is as well within the penumbras of the specific guarantees of the Bill of Rights¹³²

However, a majority of courts have rejected the argument that record expungement should be compelled under a privacy theory.¹³³ For example, in *Loder v. Municipal Court*,¹³⁴ Loder attacked a police officer who was beating his wife and was arrested for battery, obstructing a police officer and disturbing the peace. The complaint against Loder was dismissed and the officer was temporarily suspended from duty for the incident. Loder sought an order compelling the return or erasure of his arrest records. The court reiterated an earlier position¹³⁵ that judicial intervention was unwarranted and held that the trial court properly denied the relief requested.¹³⁶ It was noted that no statutory authority existed which would require erasure or return of arrest records. Further the court recognized the multiple uses of such records throughout the criminal justice system as constituting a substan-

131. For a discussion of the relationship between the presumption of innocence and expungement, see Comment, *supra* note 35, at 668-70.

132. 5 Wash. App. at 345, 487 P.2d at 214 (citing *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)).

133. See, e.g., *United States v. Linn*, 513 F.2d 925 (10th Cir. 1975); *Herschel v. Dyra*, 365 F.2d 17 (7th Cir. 1966); *United States v. Seasholtz*, 376 F. Supp. 1288 (N.D. Okla. 1974); *United States v. Dooley*, 364 F. Supp. 75 (E.D. Pa. 1973); *United States v. Rosen*, 343 F. Supp. 804 (S.D.N.Y. 1972); *Beasley v. Glenn*, 110 Ariz. 438, 520 P.2d 310 (1974); *Walker v. Lamb*, 254 A.2d 265, (Del. Ch.), *aff'd per curiam*, 259 A.2d 663 (Del. 1969); *Spock v. District of Columbia*, 283 A.2d 14 (D.C. Ct. App. 1971); *Purdy v. Mulkey*, 228 So. 2d 132 (Fla. Dist. Ct. App. 1969); *People v. Lewerenz*, 42 Ill. App. 2d 410, 192 N.E.2d 401 (1963); *In re Raynor*, 123 N.J. Super. 526, 303 A.2d 896 (1973); *In re Foster*, 72 Misc. 2d 1029, 340 N.Y.S.2d 758 (County Ct. 1973); *Statman v. Kelley*, 47 Misc. 2d 294, 262 N.Y.S.2d 799 (Sup. Ct.), *aff'd. per curiam*, 24 A.D.2d 936, 264 N.Y.S.2d 1008 (1965); *State v. Bellar*, 16 N.C. App. 339, 192 S.E.2d 86 (1972). See also Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 858-59 (1971).

134. 17 Cal. 3d 859, 553 P.2d 624, 132 Cal. Rptr. 464 (1976).

135. *Sterling v. City of Oakland*, 208 Cal. App. 2d 1, 24 Cal. Rptr. 696 (1962). See also note 14 *supra*.

136. 17 Cal. 3d at 876, 553 P.2d at 636, 132 Cal. Rptr. at 476.

tial governmental interest.¹³⁷ When balanced against the individual right of privacy the court found the government's interest to be weightier.¹³⁸

Additionally, the court cited *Paul v. Davis*¹³⁹ for the proposition that, "[t]here is apparently no right of privacy in arrest records under the federal Constitution."¹⁴⁰ In that case Davis brought an action under section 1983 of the Civil Rights Act¹⁴¹ alleging deprivation of his constitutional rights. He had been arrested for shoplifting and his name and "mug shot" had appeared on a flyer of "active shoplifters" which was distributed to approximately 800 merchants. Shortly after circulation of the flyer the shoplifting charge was dismissed. Davis alleged that distribution of the flyer caused injury to his reputation and therefore deprived him of liberty and property without due process. He also alleged an invasion of his right to privacy. On appeal, the Supreme Court agreed with the district court's dismissal for the reason that the alleged facts did not establish deprivation of a constitutional right. The Court held that any harm to Davis' reputation did not deprive him of any "liberty" or "property" interest protected by the due process clause.¹⁴² As to Davis' privacy claim the Court declined to enlarge its prior "substantive privacy decisions"¹⁴³ and thus concluded that there had been no invasion of a constitutionally recognized right.¹⁴⁴

Paul v. Davis further complicates the question of what weight the individual's right to privacy should be given in the balancing of equities test. If the holding of the case is construed broadly then it seems clear it could be relied upon to deny requests for expungement. However, one commentator has suggested that "*Paul v. Davis* does not require a departure from cases permitting expungement."¹⁴⁵ The contention is that there are significant dif-

137. *Id.* at 864-68, 553 P.2d at 628-30, 132 Cal. Rptr. at 468-70.

138. *Id.* at 868-69, 553 P.2d at 630-31, 132 Cal. Rptr. at 470-71.

139. 424 U.S. 693 (1976).

140. 17 Cal. 3d at 877 n.24, 553 P.2d at 637 n.24, 132 Cal. Rptr. at 477 n.24.

141. 42 U.S.C. § 1983 (1976).

142. 424 U.S. at 712.

143. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (guarantee of personal privacy limited to matters relating to marriage, procreation, contraception and family relationships).

144. 424 U.S. at 712-13.

145. Comment, *supra* note 3, at 1477 (emphasis in original). *Cf.* *Paul v. Davis*, 424 U.S. 693, 735 (1976) (Brennan, J., dissenting) (Court's holding might end the notion of privacy as a basis for arrest record expungement):

A host of state and federal courts, relying on both privacy notions and the presumption of innocence, have begun to develop a line of cases holding that there are substantive limits on the power of the Government to disseminate unresolved arrest records outside the law enforcement system I fear that after today's decision,

ferences between *Paul v. Davis* and the expungement cases which can serve as a basis for distinction. One difference is in the "nature of the relief sought"¹⁴⁶—Davis sought both damages and injunctive relief, a remedy which could have been pursued through a claim for defamation under state law.¹⁴⁷ A second difference and "a more critical distinction . . . is the nature of the individual interest in privacy asserted by Davis."¹⁴⁸ Davis was seeking protection from invasion of his privacy during a time when charges against him had not yet been dismissed.¹⁴⁹ Even those cases granting expungement under a privacy theory gave no recognition to the right

these nascent doctrines will never have the opportunity for full growth and analysis. Since the Court of Appeals did not address respondent's privacy claims, and since there has not been substantial briefing or oral argument on that point, the Court's pronouncements are certainly unnecessary. Of course, States that are most sensitive than is this Court to the privacy and other interests of individuals erroneously caught up in the criminal justice system are certainly free to adopt or adhere to higher standards under state law.

Id. at n.18.

146. Comment, *supra* note 3, at 1477.

147. 424 U.S. at 697. Not only might there be a claim for defamation but also the tort of invasion of privacy might be available. See generally Comment, *supra* note 5, at 879-80 & nn.77-82.

There is a recurring tendency by the Court to avoid expanding section 1983 liability. See, e.g., Note, *Section 1983: Liability for Negligence*, 58 NEB. L. REV. 271 (1979). Thus, the underlying message of *Paul v. Davis* would seem to be that claims like those of Mr. Davis should be pursued under state tort law and not in the federal courts. Whether this means an end to equitable expungement relief is not clear. See note 145 *supra*.

148. Comment, *supra* note 3, at 1477.

149. See *United States v. Kalish*, 271 F. Supp. 968 (D.P.R. 1967), in which the court distinguished between the privacy rights of an individual before and after exoneration and concluded that after an individual is exonerated, his or her right to privacy is not outweighed by a legitimate governmental interest:

There can be no denying of the efficacy of fingerprint information, photographs, and other means of identification in the apprehension of criminals and fugitives. Law enforcement agencies must utilize all scientific data in society's never-ending battle against lawlessness and crime. 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 is invaded as long as the Justice Department retains "criminal" identification records, "criminal" arrest, fingerprints and a rogue's gallery photograph. . . .

. . . . The preservation of these records constitutes an unwarranted attack upon his character and reputation and . . . violates his dignity as a human being.

Id. at 970 (emphasis added).

of privacy "*prior* to final dismissal of charges underlying an arrest, and dissemination of arrest information in this pre-exoneration period would not be precluded."¹⁵⁰

Thus, it does not appear that the right of privacy or interest in reputation rise to a constitutionally-protected level so as to be deemed fundamental rights as some of the earlier cases suggest.¹⁵¹ Yet the rationale of those cases need not be abandoned. In balancing the equities between an individual's interest in privacy and the government's interest in retention, courts can still be sympathetic to the hardships and disabilities attendant to a criminal record. A distinction could be made between the privacy rights of an individual before and after exoneration¹⁵² and *Paul v. Davis* can be limited to its particular facts. Although perhaps not entitled to the weight of fundamental rights, the individual's interest in reputation and privacy can clearly outweigh any governmental interest in retention of the records.¹⁵³

B. The Legislative Response

Although the courts have equitable power to order expungement, in a number of cases the view has been expressed that the legislature was the proper body to make such a remedy available.¹⁵⁴ Thus, the criminal record problem has seen the attention of Congress¹⁵⁵ as well as state legislative bodies.

150. Comment, *supra* note 3, at 1477 (emphasis in original).

151. See notes 126-32 & accompanying text *supra*.

152. "However, it is obvious that to recognize the privacy interest of all exonerated defendants as being constitutionally protected would have dramatic ramifications and pose serious problems in the context of existing law enforcement practices and record dissemination procedures." Comment *supra* note 3, at 1493.

153. If fundamental rights are not involved, the government would not be required to show a compelling state interest. But the courts could still use a balancing approach or a rational basis test, finding in favor of the individual when no legitimate state interest was at stake. See Comment, *supra* note 133, at 858-59 nn.48-49; text accompanying note 131 *supra*.

154. See, e.g., *United States v. Dooley*, 364 F. Supp. 75 (E.D. Pa. 1973). But see *People v. Chapman*, 62 Cal. App. 3d 251, 132 Cal. Rptr. 831 (1976) (implying that legislative provision for destruction of arrest records might be unconstitutional as a violation of the separation of powers doctrine).

155. See, e.g., H.R. 61/S. 1428 and H.R. 62/S. 1427, S. 2008 94th Cong., 1st Sess. (1975); H.R. 12574, H.R. 12575/S. 2963 and S. 4252 93rd Cong., 2d Sess. (1974); H.R. 10789, H.R. 10892 and S. 2964 91st Cong., 1st Sess. (1969).

See also Criminal Justice Data Banks—1974, *Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974), *Data Banks, Computers and the Bill of Rights, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 92d Cong., 1st Sess. (1971).

1. Federal Remedies

There is no specific federal statute providing for expungement of criminal records. However, there is a somewhat limited provision for record cancellation, which is seldom used and has been criticized as inadequate.¹⁵⁶ The major concern at the federal level has been with preventing disclosure of FBI records which contain inaccurate or incomplete information. Under federal regulations,¹⁵⁷ there are no limits on the dissemination of conviction data¹⁵⁸ and nonconviction data¹⁵⁹ cannot be disseminated, with certain exceptions.¹⁶⁰ Each state is free to make provisions in its own best interests.¹⁶¹ Although these regulations give the individual a limited amount of protection, they are inadequate in many respects:¹⁶² (1) they do not affect dissemination of the record to law enforcement agencies or agencies of the federal government; (2) they only reach records in the files of the FBI and do not di-

156. 28 U.S.C. § 534(b) (1976). See note 94 *supra*.

157. The regulations were issued by the Law Enforcement Assistance Administration (LEAA) pursuant to a statutory amendment to its enabling legislation. The amendment, which was enacted into law as section 524(b) of the Crime Control Act of 1973, states:

All criminal history information collected, stored, or disseminated through support under this title shall contain, to the maximum extent feasible, disposition as well as arrest data where arrest data is included therein. The collection, storage, and dissemination of such information shall take place under procedures reasonably designed to insure that all such information is kept current therein; the Administration shall assure that the security and privacy of all information is adequately provided for and that information shall only be used for law enforcement and criminal justice and other lawful purposes. In addition, an individual who believes that criminal history information concerning him contained in an automated system is inaccurate, incomplete, or maintained in violation of this title, shall, upon satisfactory verification of his identity, be entitled to review such information and to obtain a copy of it for the purpose of challenge or correction.

Crime Control Act of 1973, Pub.L. No. 93-83, 87 Stat. 197 (amending 42 U.S.C. §§ 3701-3795 (1970)).

158. *But see* the Privacy Act of 1974, 5 U.S.C. § 552a (1976).

159. "Nonconviction data" means arrest information without disposition if an interval of one year has elapsed from the date of arrest and no active prosecution of the charge is pending; or information disclosing that the police have elected not to refer a matter to a prosecutor, or that a prosecutor has elected not to commence criminal proceedings, or that proceedings have been indefinitely postponed, as well as all acquittals and all dismissals.

28 C.F.R. § 20.3(k) (1977).

160. 41 Fed. Reg. 11,714 (1976) (revising 28 C.F.R. § 20.21(b)).

161. 28 C.F.R. § 20.21(c)(3) (1977).

162. "These provisions do not at the present time provide the national framework necessary to limit dissemination of records." Madden & Lessin, *Privacy: A Case for Accurate and Complete Criminal History Records*, 22 VILL. L. REV. 1191, 1197 (1977).

rectly affect records made at the local level; and (3) they do not provide for the return or destruction of the records. Therefore, whether relief at the local level is available through state expungement or sealing laws becomes extremely important.

2. Remedies Provided by State Law

In response to the growing concern over the misuse and abuse of arrest records several state legislatures have enacted protective legislation usually in the form of prohibiting access to criminal justice information or requiring destruction of arrest records once the arrestee has been exonerated.¹⁶³ Although the laws are in accord as to purpose, a variety of approaches has been taken: some give relief automatically, some provide for expungement, others allow for sealing of records, and still others leave the decision to the discretion of the courts.

For example, in Missouri a person's arrest record must be sealed to all persons except the arrestee if he or she is not charged within thirty days of arrest.¹⁶⁴ The statute also provides that if the person is not convicted within one year after the records are sealed, all records of the arrest must be expunged.¹⁶⁵ In the event of a disposition other than conviction (nolle prosses, dismissals, acquittals) the records pertaining to the case are to be sealed to all persons except the arrestee.¹⁶⁶

Another state which provides for automatic relief is Connecticut, whose law mandates that all court, police and prosecutorial records be erased immediately once an arrestee has been acquitted or discharged.¹⁶⁷ The records are sealed in locked files or destroyed upon request. Notice of erasure is sent to any agency known to have received the arrest information.¹⁶⁸

In other states the exonerated arrestee must petition for relief. For instance, in Maryland a person seeking expungement must give notice to the law enforcement agency involved who then in-

163. For a survey of state laws, see Comment, *Criminal Procedure: Expunging the Arrest Record When There Is No Conviction*, 28 OKLA. L. REV. 377, 386-87 (1975); Comment, *Expungement in California: Legislative Neglect and Judicial Abuse of the Statutory Mitigation of Felony Convictions*, 12 U.S.F. L. REV. 155, 172-78 (1977).

164. MO. REV. STAT. ANN. § 610.100 (Supp. 1973).

165. *Id.*

166. *Id.* § 610.105.

167. CONN. GEN. STAT. ANN. § 54-142a (West Cum. Supp. 1979).

168. The statute has been criticized as leaving "untouched and in place all of the other information about the individual which has accumulated in the course of a criminal proceeding." Weinstein, *Confidentiality of Criminal Records Privacy v. the Public Interest*, 22 VILL. L. REV. 1205, 1210 (1977).

vestigates the request.¹⁶⁹ If the individual is denied relief he or she may petition for a judicial hearing. Similarly, Nevada law allows record sealing upon petition of the arrestee filed thirty days after dismissal or acquittal.¹⁷⁰ There is a hearing on the issue following which the court may order the records sealed.

A different approach is taken in Arizona where a person "wrongfully arrested" can seek a court order restricting dissemination of police and court records.¹⁷¹ The arrestee must petition the court for relief and after a hearing on the petition the court must decide whether "justice will be served" by entry of a notation that the person was arrested in error.¹⁷² If the court orders such entry, no copies of the record may be released without a court order.

California presents yet another approach by having a "scattered patchwork" of expungement statutes. One provision relieves the disabilities attendant to certain felony convictions.¹⁷³ Another provides relief to persons convicted of a misdemeanor and not granted probation,¹⁷⁴ whereas a second procedure is a sealing statute for minors.¹⁷⁵ Four provisions are aimed at relieving the effects of conviction on narcotics users and juveniles,¹⁷⁶ and there is a provision for expungement of records of arrest or conviction for possession or use of small amounts of marijuana.¹⁷⁷ Record sealing is provided upon acquittal and a finding by the judge that the defendant was "factually innocent."¹⁷⁸

Under certain circumstances and passage of a substantial period of time New Jersey law also provides for expungement of conviction records.¹⁷⁹ An innocent arrestee is afforded either the remedy of expungement or sealing, but objection to a motion for relief automatically precludes expungement.¹⁸⁰

Yet there are other states, such as Nebraska, which afford no real relief for the innocent arrestee and few states provide relief for an ex-offender. In light of judicial reluctance to grant expunge-

169. MD. ANN. CODE art. 27, § 736 (1976).

170. NEV. REV. STAT. § 179.255 (1973).

171. ARIZ. REV. STAT. ANN. § 13-4051 (Supp. 1978).

172. *See* *Beasley v. Glenn*, 110 Ariz. 438, 520 P.2d 310 (1974), in which the court held that the statute did not provide for expungement but only a notation restricting dissemination.

173. CAL. PENAL CODE § 1203.4 (West Supp. 1979).

174. CAL. PENAL CODE § 1203.4a (West Supp. 1979).

175. CAL. PENAL CODE § 1203.45 (West Supp. 1979).

176. CAL. WELF. & INST. CODE §§ 3200, 781, 1179, 1772 (West Supp. 1979).

177. CAL. HEALTH & SAFETY CODE § 11361.5 (West Supp. 1979).

178. CAL. PENAL CODE § 851.8 (West Supp. 1979).

179. N.J. STAT. ANN. §§ 2A:169-11, 2A:164-28 (West 1971) (repealed 1978, effective Sept. 1, 1979).

180. N.J. STAT. ANN. §§ 2A:85-17, 2A:85-18 (West Supp. 1979-1980) (repealed 1978, effective Sept. 1, 1979).

ment unless there are "extraordinary circumstances," the absence of protective legislation contributes to the burden on the victim of a criminal record. As Aryeh Neier, Executive Director of the American Civil Liberties Union has stated:

[A]rrest and conviction records often create social lepers who must exist as best they can on the fringes of society. The dissemination of records places a series of obstacles in the path of persons who wish to enter society's mainstream and end the half-life of the world of crime. Is it any wonder, then, that recidivism rates should be so high? How can we seriously hope to reduce crime if we disseminate records which have the unintended effect of making it impossible for people to stop being criminals?¹⁸¹

Thus, it is essential to take a closer look at what remedies most adequately solve the problem. Given the overwhelming evidence of the use and reliance upon criminal records¹⁸² it must be agreed that a problem exists. The apparent disagreement among commentators, the courts and legislative bodies has been over whether the problem is so serious that it warrants legislative relief and if so whether sealing and expungement are effective remedies.

IV. ARE EXPUNGEMENT AND RECORD SEALING SATISFACTORY SOLUTIONS?

A. Shortcomings of Sealing and Expungement Statutes

It has been suggested that provisions for sealing or expunging criminal records are a failure,¹⁸³ that they are inadequate at removing the disabilities that accompany criminal records¹⁸⁴ and that they are of questionable constitutional validity.¹⁸⁵ These and a number of other arguments have been made to justify the retention of criminal records and denying expungement relief.

1. *A System Which Purports to Destroy Records Does not Work*

Some commentators have argued that "expungement in the sense of an erasure or destruction [is] impractical as well as inadvisable."¹⁸⁶ They argue that once a record is created it is simply not possible to expunge or seal it. This is the case primarily because statutes or court orders requiring expungement, generally

181. *Hearings on S. 2008 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 235 (1975) (statement of Aryeh Neier, Executive Director of the American Civil Liberties Union).

182. See § II of text *supra*.

183. Kogon & Loughery, *supra* note 9.

184. *Id.* at 384.

185. Comment, *supra* note 3, at 1469-70.

186. *Expungement from the General Public*, *supra* note 9.

do not reach all copies of the record which might have been disseminated to various public agencies and private individuals.¹⁸⁷ The problem seems to be that

in the absence of any penal sanctions against disclosure, the accessibility of such records is generally a matter of whom one knows in the department in which they are kept. Disclosure is further pyramided by the many places to which such records are distributed and thus additional sources from which they may be procured.¹⁸⁸

Specifically, it is argued that state expungement or sealing statutes cannot affect FBI records and do not affect local police records. In addition, legislation typically leaves room for employers to inquire about an applicant's possible expunged or sealed record.¹⁸⁹ Finally, "the written order for records to be sealed or destroyed is itself not concealed; this, of course, creates a 'track' to be followed."¹⁹⁰ Because so many traces of a record may be left behind, the contention is that expungement and sealing simply do not work.¹⁹¹

Another argument which is frequently made is that history should not be rewritten¹⁹² and that attempts to do so may lead to "institutionalizing a lie."¹⁹³ One court has stated that an arrest is a "historical fact" and therefore

[n]o system of law can, with integrity, lend or appear to lend its aid to an unreal denial of the events, particularly as such denials may affect the lawful judgment of other persons who may in the future deal with them. It is one thing to say that the system of law will legally ignore an acknowledged fact and perhaps, pursuant to specific legislation, indulge in a fiction that what was once a conviction or a criminal charge shall no longer be

187. Kogon & Loughery, *supra* note 9, at 384. "That which is sealed may readily become unsealed. . . ." *Id.*

188. *Expungement from the General Public*, *supra* note 9.

189. For example, an applicant might be asked whether he or she had ever had a criminal record sealed, Kogon & Loughery, *supra* note 9, at 384, or whether he or she had ever appeared as a moving party in any court, Gough, *supra* note 12, at 164-65 n.80.

190. Kogon & Loughery, *supra* note 9, at 384.

191. *Id.* at 383-84. "[K]nowledge of an expunged record is available if the prints have been forwarded to the FBI. . . . [T]he person develops a false sense of security and anonymity regarding the record that certainly does not maintain in practice." *Id.* at 387.

192. The expungement, either by statute or judicial decision, creates new problems. It requires, in effect, that history be rewritten, that events be turned into nonevents, and it attempts to achieve this anomalous result by eliminating a part of the information which has accumulated in the course of a criminal proceeding.

Weinstein, *supra* note 168, at 1210.

193. In encouraging him to lie, the society communicates to him that his former offender status is too degrading to acknowledge, and that it is best forgotten or repressed, as if it had never existed at all. Such self-delusion and hypocrisy is the very model of mental ill health—the reverse of everything correctional philosophy stands for.

Kogon & Loughery, *supra* note 9, at 385.

deemed such; but it is quite another to assist in rewriting history at the expense of truth, particularly where, as outlined above, the full truth if effectively recorded can preserve the integrity of the individual as well as the rule of law.¹⁹⁴

It has also been suggested that expungement and sealing procedures are not available to all. The remedies are criticized as being "functional only for a very small number of offenders who have resources and can negotiate the system."¹⁹⁵ Because granting relief is generally within the discretion of the court it may be that even if ex-offenders had knowledge of the remedy they would not apply for it anyway.

2. *Law Enforcement Would Be Hampered If Records Were Not Retained*

A good deal of opposition to the sealing or expungement of criminal justice information has come from law enforcement authorities. They cite the usefulness¹⁹⁶ of arrest records in solving cases and in saving "valuable investigative time and energy."¹⁹⁷ The retention of arrest records has also been justified by the potential such records have for helping police prevent crimes.

One commentator suggests that identification information such as fingerprints and photographs can be helpful to police "if the individual is ever under investigation again."¹⁹⁸ The police are aided by establishing positive identification or protecting a person who is innocent. The information can also indicate a pattern of conduct which could form the basis for a future arrest. Although it is acknowledged that injury to innocent persons may result, "this risk is outweighed in most cases by society's interest in the performance of these activities to protect the general public."¹⁹⁹

3. *Sealing and Expungement Laws Unconstitutionally Infringe Upon Freedom of the Press*

It has been suggested that the sealing of criminal records could be framed as a clash between two constitutional rights—the right to privacy and freedom of the press—and that in the balance the

194. *Spock v. District of Columbia*, 283 A.2d 14, 21 (D.C. Ct. App. 1971) (footnote omitted).

195. *Kogon & Loughery*, *supra* note 9, at 386.

196. One commentator has termed this the "usefulness doctrine." *See* note 198 *infra*.

197. *Criminal Justice Data Banks—1974, Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. 199 (1974) (statement of Clarence M. Kelley, Director FBI declaring his opposition to sealing).

198. Comment, *supra* note 133, at 855. *See also* § II-A of text *supra*.

199. *Id.*

right of privacy must yield.²⁰⁰ Relying on *Paul v. Davis*,²⁰¹ *Cox Broadcasting Corp. v. Cohn*,²⁰² and *Sheppard v. Maxwell*,²⁰³ one commentator contends that a state cannot make criminal history records private or deny the press access to them.²⁰⁴

The right to gather news about judicial operations has only been given limited constitutional protection, and thus "[t]he right of access to classified, criminal justice records is as unclear as the right to make them secret in the first place."²⁰⁵ But "[w]hat transpires in the courtroom . . . is public property" and to make private the records of what transpired would prevent the press from reporting on the administration of justice.²⁰⁶ Since the press has a responsibility of scrutinizing the judicial process, "it would seem that there is a corollary right of access to gather news about that system."²⁰⁷

Although the Supreme Court did not give constitutional recognition to the privacy right asserted in *Paul v. Davis*,²⁰⁸ it has generally avoided the question whether a state could make criminal records private. It is maintained, however, that the Court's position concerning state action which infringes first amendment rights supports the argument that record sealing is unconstitutional.²⁰⁹ When state action infringes upon first amendment rights the state must show a compelling state interest in regulating the subject, and that the objective could not be achieved by other means. The argument is that the goal of sealing laws could be achieved "without manipulating original source documents and records traditionally open to public inspection . . ."²¹⁰ The commentator suggests remedies which might be less drastic: "Statu-

200. Comment, *supra* note 7, at 522-26.

201. 424 U.S. 693 (1976).

202. 420 U.S. 469 (1975).

203. 384 U.S. 333 (1966).

204. Comment, *supra* note 7, at 526-27. With regard to this argument one commentator has noted:

The strongest advocates of open access are the news media. While their interest is, in part, selfish—access to information, especially "inside" information, makes for good copy—they forcefully argue that elimination or concealment of information is an open invitation to inadequate performance or illegal behavior. The press, however, acknowledges few formal limits on its own access to publicly held information. Self-restraint and enlightened self-interest are considered to be sufficient constraints on journalistic abuse of information.

Weinstein, *supra* note 168, at 1212-13.

205. Comment, *supra* note 6, at 522.

206. *Id.* at 527.

207. *Id.* at 521.

208. See notes 143-44 & accompanying text *supra*.

209. Comment, *supra* note 7, at 527-28 & nn. 119-20.

210. *Id.* at 528.

tory requirements that records be accurate and complete, that employers and others be forbidden to ask for or consider the individual's non-conviction arrest record, and that the records themselves be open to correction by the individual"²¹¹

Thus, opponents of expungement say it creates new problems. It requires that history be rewritten, it eliminates part of information the accused may need as evidence of innocence, and it makes difficult the responsibility of uncovering a potential pattern of corruption in our system of justice. The argument is that a system of concealment does not work,²¹² and even if it did there exist alternative remedies which provide more adequate solutions to the problem.

B. The Affirmative Side of Expungement and Sealing

Although sealing and expungement laws are not free from conceptual and practical difficulties, they do confer benefits upon the victim of a criminal record. The "collateral consequences"²¹³ flowing from a conviction as well as an arrest record mandate that a remedy be provided. Leading organizations,²¹⁴ commentators²¹⁵

211. *Id.* at 529 (footnotes omitted).

212. It has been suggested that

it is also not entirely clear that most people want [sealing or expungement] to work. The thrust of the solutions is the sacrifice of some purported public benefit to gain some purported private benefit. If the private beneficiaries are actual or alleged criminals, and the public beneficiaries are everyone else, then the perceived public benefit is quite likely to prevail. The general public sees little or no connection between collection and computerization of information about "criminals" and its own "privacy" and related interests. The immediate problem of controlling criminal behavior precludes serious consideration of remote and uncertain consequences. If the computer can be used to "fight crime," then the public is behind it.

Weinstein, *supra* note 168, at 1211-12.

213. See generally *Collateral Consequences*, *supra* note 10.

214. See, e.g., the American Civil Liberties Union position discussed in Caine, *supra* note 2, at 1188. Cf. MODEL PENAL CODE § 306.6 (1962) (providing limited relief for the removal of disabilities or disqualifications).

Rather than recommending expungement, the National Conference on Uniform State Laws recommends that refusal to hire because of a conviction record is an unfair employment practice except in situations which are narrowly defined and directly related to the offense; for example, where the occupation would provide an opportunity to commit a similar crime. UNIFORM LAW COMMISSIONERS' MODEL SENTENCING AND CORRECTIONS ACT, NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEP'T OF JUSTICE §§ 4-1001 to -1005 (1978). See Perlman & Potuto, *The Uniform Law Commissioners' Model Sentencing and Corrections Act: An Overview*, 58 NEB. L. REV. 925 (1979).

215. See generally note 9 *supra*.

and several states²¹⁶ have recognized that the most effective remedy is to provide for sealing or expungement of the record.

1. *The System Can Work*

It is by no means well-accepted nor does it necessarily follow that expungement and sealing do not work simply because some evidence of the record is not sealed or destroyed. One state requires that notice be given any agency to which the arrest information is known to have been disseminated.²¹⁷ In the absence of statutes in their jurisdictions, some courts have fashioned relief by having the local police retrieve all disseminated copies of the record and placed under seal, not to be opened nor their existence or contents disclosed.²¹⁸ Even if some information is "leaked" out, statutes may prohibit inquiries into past arrests,²¹⁹ or allow the individual to deny the existence of the record with no threat of being found guilty of giving a false statement.²²⁰ Thus, although it might be desirable to have complete destruction of the record, the fact that this is not possible in all cases does not negate the potential relief which can be afforded.

A system which "sanctions deceit" may make some legislators uncomfortable. A study of employer attitudes revealed that it troubled them also:

Several expressed distrust of an expungement procedure, and indicated that they would not look favorably on someone who had invoked it. As one man put it: "We probably wouldn't fire the guy outright [*i.e.*, in the event of subsequent discovery of the offense], but I think we'd be rather hurt that he didn't feel he could come and tell us about it."²²¹

But what is more bothersome is what happens to the exonerated arrestee when he or she is totally candid with potential employers. In *Cissell v. Brostron*,²²² for example, charges against Cissell for murder were dismissed. He made several attempts to secure employment and in one instance even supplemented the application

216. See § III-B-2 *supra*.

217. CONN. GEN. STAT. ANN. § 54-142a (West Supp. 1979). See notes 167-68 and accompanying text *supra*.

218. See, e.g., *Irani v. District of Columbia*, 272 A.2d 849 (D.C. Ct. App. 1971), *appeal from final order dismissed*, 292 A.2d 804 (D.C. Ct. App. 1972).

219. Similarly, inquiries into "old" convictions could be limited, *i.e.*, whether there had been any convictions within the last seven years. The government formerly asked for information concerning all arrests but now asks only for arrests that led to a conviction. *THE CHALLENGE OF CRIME*, *supra* note 4, at 75, *cited in* Comment, *supra* note 37, at 132 n.63.

220. See, e.g., MO. REV. STAT. ANN. § 610.110 (Supp. 1973). See also Comment, *supra* note 5, at 873 n.38; Comment, *supra* note 37, at 125.

221. Gough, *supra* note 12, at 154 n.39.

222. 395 S.W.2d 322 (Mo. Ct. App. 1965).

with a detective magazine story written about him which explained the details of his arrest. He received no response from that employer. Following several more unsuccessful applications, he sought and obtained an expungement order.²²³ On appeal the order was reversed, the court holding that injunctive relief was available only in situations where actual injury could be shown and was limited to restraining actual or threatened acts.²²⁴ The "system," therefore, already sanctions deceit and perhaps even encourages it.

Finally, the system is readily available to all ex-arrestees in those states which provide for automatic sealing.²²⁵ Even in those states where a petition is required the individual can be assured of having as equal an access to the remedy as does any other individual.

2. *Effective Law Enforcement Would Not Be Affected*

It has been suggested that arrest or conviction records play a vital role in effective law enforcement.²²⁶ Where the *modus operandi* of a crime is sufficiently similar to that in a suspect's record there might be probable cause for an arrest.²²⁷ Several factors are important here: (1) a valid arrest is more likely if the actual crime and the record of crime are not separated by too long a period of time;²²⁸ (2) the reliance upon criminal records is justified if they reflect a *modus operandi* similar to the activity in question; and (3) the validity of the practice depends on the accuracy and completeness of the records.²²⁹

In the case of an exonerated arrestee there would appear to be no rational basis for retaining the record.²³⁰ Indeed one court has stated that there is no legitimate government interest in retaining records of arrests not resulting in conviction: "*Unresolved* arrest records generally may well have significance for law enforcement purposes. . . . But charges resulting in acquittal clearly have no

223. *Id.* at 323-24.

224. *Id.* at 325-26.

225. See notes 164-68 & accompanying text *supra*.

226. See notes 196-99 & accompanying text *supra*.

227. W. LAFAYE, ARREST 288 (F. Remington ed. 1965). The author states: "The difficult question is whether arrest can ever be proper when the primary basis for suspicion is the prior record of the suspect. A person's past record does not in itself constitute reasonable grounds to believe that a felony has been committed and that the person has committed it." *Id.* at 287. See also note 20 *supra*.

228. See Gough, *supra* note 12, at 159.

229. See generally Comment, *supra* note 5, at 866.

230. Eddy v. Moore, 5 Wash. App. 334, 344, 487 P.2d 211, 216 (1971); see text accompanying note 131 *supra*; Comment, *supra* note 133, at 858-59 nn.48-49 (no legitimate state interest in retention of records of one mistakenly arrested).

legitimate significance. Likewise, other charges which the government fails or refuses to press or which it withdraws are entitled to no greater legitimacy."²³¹ Additionally, it has been estimated that of the criminal histories received by state and local agencies, about thirty-five percent do not contain dispositions.²³² Indeed if the records are not accurate and complete how can they be effective to law enforcement agencies, when the only information they provide is the mere fact of arrest? One suggestion is that "[e]ven if the record is only one of arrest and not conviction, criminal justice agencies as well as others tend to treat the two types of records as equivalent."²³³

The factor of time would seem to favor the ex-offender. The greater the period of time between his or her offense and a recent, unsolved crime, the less valid would be an arrest based on the record.²³⁴ In other words, once a period of several years has passed, for example, five to seven, and the ex-offender has maintained a "clean" record²³⁵ there is little likelihood of reasonable cause for making an arrest based on a *modus operandi* of a crime "sufficiently similar to that described in a suspect's record"²³⁶

231. *United States v. Dooley*, 364 F. Supp. 75, 77 (E.D. Pa. 1973) (emphasis added).

232. See A. MILLER, *THE ASSAULT ON PRIVACY* 34 (1971) (35% of FBI "rap sheets" contain no followup information); Madden & Lessin, *supra* note 162, at 1198 (citing *The American Criminal History Record Present Status and Future Requirements*, Technical Report No. 14, SEARCH Group, Inc., Sacramento, Cal. (1976)) ("In 1975 approximately sixty-eight million requests were made for criminal histories by state and local level criminal justice agencies. Of the criminal histories received 31% had missing data and 10%, it was estimated, had erroneous information."); Comment, *supra* note 7, at 512 n.16 (citing *Criminal Justice Data Banks—1974: Hearings on S. 2542, S. 2810, S. 2963, and S. 2964 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. Vol. I. at 37-38 (1974)) ("In several states, as many as 70% of the records do not contain dispositions.").

233. Weinstein, *supra* note 168, at 1207.

234. See note 228 & accompanying text *supra*.

235. In New Jersey, "the statutes recognize that an old record loses its probative value as indicia of a pattern demonstrative of criminal behavior." Comment, *supra* note 5, at 888. Under the disorderly persons expungement statute the individual must wait five years before seeking relief, N.J. STAT. ANN. § 2A:169-11 (West 1971) (repealed, 1978, effective Sept. 1, 1979), and under the criminal expungement statute the waiting period is ten years, *id.* § 2A:164-28 (repealed 1978, effective Sept. 1, 1979).

Cf. Fair Credit Reporting Act, 15 U.S.C. § 1681c(a)(5) (1976) (prohibiting reporting of arrest or conviction information older than seven years); CAL. PENAL CODE § 1203.4a (West Supp. 1979) (to obtain relief, person convicted of a misdemeanor must lead an honest and upright life, must not be charged with the commission of any other crime, and must not have served a criminal sentence for a one year period running from the date of conviction); OHIO REV. CODE ANN. § 2953.32 (Page Supp. 1978) (first offender felons may petition for expungement of the conviction record three years after final discharge).

236. Comment, *supra* note 5, at 866.

All of these considerations have led one commentator to state:

Nor is there any proof that the pervasive recording and dissemination of arrest records has any effect in fighting crime. In various hearings on legislation on arrest records neither the FBI nor any other law enforcement agency has presented a case that arrest records are essential in combating crime. It is more likely that the wide dissemination of arrest records has helped to create criminals, not the opposite.²³⁷

3. *Sealing and Expungement Do Not Infringe On Any Constitutionally-Protected Rights*

There do not appear to be any reported cases which have decided the constitutionality of sealing or expungement laws.²³⁸ It has been urged that a sealing law results in "a collision between criminal record privacy and the people's right to know."²³⁹ But it can be argued that sealing and expungement laws do not have the effect of abridging first amendment protections primarily because the press does not have an *absolute* right to gather news.²⁴⁰

The press has no greater access to information than does the public.²⁴¹ If a state denies access to certain criminal records by sealing or expunging, the law applies to everyone, members of the press and public alike. *Cox Broadcasting Corp. v. Cohn*,²⁴² held only that the state could not impose sanctions on the press for publishing information obtainable from public records.²⁴³ It specifically left open the question whether a state could make such records private:

If there are privacy interests to be protected in judicial proceedings, the States must respond by means which avoid public documentation or other exposure of private information. Their political institutions must weigh the interests in privacy with the interests of the public to know and of the press to publish.²⁴⁴

237. Caine, *supra* note 2, at 1189-90.

238. *But see* Gannett Pac. Corp. v. State, Civil No. 42343 (Hawaii 1st Cir. Ct., June 20, 1974), *cited in* Comment, *supra* note 7, at 517 n.39 (preliminary injunction issued against enforcement of Hawaii law that sealed all information concerning an arrest from the moment of the arrest).

239. Comment, *supra* note 7, at 517.

240. Branzburg v. Hayes, 408 U.S. 665 (1972).

241. Houchins v. KQED, Inc., 438 U.S. 1 (1978); Pell v. Procunier, 417 U.S. 817 (1974); Saxbe v. Washington Post, 417 U.S. 843 (1974); Branzburg v. Hayes, 408 U.S. 665 (1972).

242. 420 U.S. 469 (1975).

243. *Id.* at 496. "Cox makes clear the difference between trying to prevent the press from gathering the information in the first place, and trying to prevent the publication of something that has been learned—especially from a public record." M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 384 n.8 (1977).

244. 420 U.S. at 496. "We mean to imply nothing about any constitutional questions which might arise from a state policy not allowing access by the public

The state cannot tell the press what to publish or what not to publish.²⁴⁵ Thus, the fact of the arrest can be reported by the news media.²⁴⁶ But once the charges have been dismissed and the individual exonerated, the records may be closed or destroyed and therefore access to them denied. The press' right to publish is simply not directly affected by such a practice.

Since there is no infringement of the freedom of the press the state is not required to show a compelling state interest but rather a rational basis between the regulation and the legitimate objective it seeks to achieve. Still, critics of expungement and sealing laws assert there are less drastic alternatives which would provide more adequate relief.²⁴⁷ Those that have been suggested are: (1) requiring complete and accurate records;²⁴⁸ (2) prohibiting inquiry about non-conviction arrest records;²⁴⁹ (3) making the records more available to insure accuracy²⁵⁰ and (4) changing social attitudes through education and supporting legislation.²⁵¹ However, it is not at all clear that these alternatives are satisfactory. Granted, part of the problem is the dissemination of inaccurate and incomplete records. Nevertheless, even assuming this problem could be cured by requiring accuracy, expungement or sealing laws would still be needed. An accurate arrest record creates the same problem as an inaccurate one; there is a tendency to equate an arrest with a conviction. Accuracy does not cure the "undoubted 'social stigma' involved in an arrest record."²⁵²

VI. CONCLUSION

The problems inherent in the vast dissemination of criminal records cannot be ignored. The overwhelming impact these records have on prospects of employment and schooling as well as the use to which they are put by law enforcement agencies demonstrates the need for some sort of protection of the individual against abuse and misuse. Because the equitable expungement

and press to various kinds of official records, such as records of juvenile-court proceedings." *Id.* at n.26.

245. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting).

246. The right to publish such information would be protected by the first amendment and the Freedom of Information Act, 5 U.S.C. § 552 (1976). *See also Tennessee Newspaper, Inc. v. Levi*, 403 F. Supp. 1318 (M.D. Tenn. 1975).

247. *See, e.g., Comment, supra* note 7, at 529.

248. *Id.*

249. *Id.*

250. *Kogon & Loughery, supra* note 9, at 388.

251. *Id.*

252. *Menard v. Saxbe*, 498 F.2d 1017, 1024 (D.C. Cir. 1974).

relief by the courts has been scarce, it is to state legislatures that individuals look for relief.

The legislative response has been haphazard in those states where expungement or sealing laws have been enacted. Other states, such as Nebraska, have consistently refused to enact protective legislation of any kind. It is suggested that, at a minimum, relief for a person "wrongfully arrested" or "factually innocent" is imperative. Additionally, due to the presumption of innocence there is no legitimate reason for retaining records of other exonerated arrestees. As to conviction records, lines can be drawn, for example, on the basis of the seriousness of the crime. In any event, legislation is needed to avoid the "social stigma" in criminal records—some type of provision for relief is long overdue.

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