# EXPUNGEMENT AND SEALING OF ARREST AND CONVICTION RECORDS: THE NEW JERSEY RESPONSE

## INTRODUCTION

The preservation of official records relating to arrest and conviction, and the dissemination of such information among law enforcement agencies and other governmental institutions through ever increasingly sophisticated channels of communication poses one of the more perplexing problems of public policy facing contemporary society. At balance are the broad self-protective interests of the state which must be weighed against the personal and private rights of the individual. Moreover, the frequent requirement or solicitation of such information in the private sector for employment, credit, and insurance purposes further adds to the dimension of the problem. While the offender, according to the popular adage, is said to have " 'paid his debt to society,' " one commentator has observed that though payment is tendered, the individual " 'neither receives a receipt nor is free of his account.' "[1] Instead, the individual becomes stigmatized as an "ex-offender," thus perpetuating identification with the past, while at the same time, greatly impeding opportunity for future social acceptability.[2]

The severe disabilities attendant to the disclosure of arrest records, moreover, are not limited only to those convicted of criminal acts. Persons whose arrests have resulted in dispositions other than conviction, through either the dismissal of charges, or acquittal, may also become the subject of societal disapproval and discrimination when records of such arrest become known outside the criminal justice system.[3] While the state's rationale for the preservation of arrest records in such circumstances is not nearly as persuasive, the potential for

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1 Gough, *The Expungement of Adjudication Records of Juvenile and Adult Offenders: A Problem of Status*, 1966 WASH. U.L.Q. 147, 148 (quoting from Tappan, *Loss and Restoration of the Civil Rights of Offenders*, in 1952 NATIONAL PROBATION AND PAROLE ASSOCIATION YEARBOOK 86, 87).

2 Gough, *supra* note 1, at 148. Becoming an "ex-convict" has been referred to by one noted expert as a stage in the "series of status degradation ceremonies" which characterize the entire criminal justice process. Goldstein, *Police Discretion Not To Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice* (app. I), 69 YALE L.J. 543, 590 (1960). *See* Parker v. Ellis, 362 U.S. 574, 593-94 & n.30 (1960) (Warren, C.J., dissenting).

3 *See* notes 13-18 *infra* and accompanying text.

injury to the innocent individual is often as real as it is to the former offender.[4]

Movement toward reform in this area must be contemplated within the broader context of the rehabilitative ideal which favors the reduction of civil disabilities occasioned by arrest and conviction. Historically, such relief was dispensed as an act of grace by the king, and later by the executive through various pardon procedures. More recently, relief has come in some jurisdictions through the enactment of automatic restoration statutes.[5] However, the principal development in the attempt to afford at least a modicum of protection to the individual faced with a record of arrest or conviction has been the provision, usually by statute, for expungement or sealing of such records. Expungement prescribes the physical removal and destruction of police arrest records, while sealing connotes the permanent securing of court records subject only to certain specifically authorized exceptions.[6]

This comment will explore the specific problems which expungement and sealing seek to rectify, while briefly examining the range of judicial pronouncements addressed to these remedies. It will then analyze the statutory approach chosen by New Jersey as well as the emerging case law in the state touching on the problem. Finally, it will offer a number of recommendations for the development of a more comprehensive statutory scheme.

## THE RATIONALE FOR RETENTION

There are a number of arguments that can be made for justifying the retention of criminal records. Most are directed toward the effectuation of law enforcement interests in the operation of the criminal

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[4] In the words of an eminent jurist, "[m]ere arrest may destroy reputation, or cause the loss of a job, or visit grave injury upon a family." Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 431 (1960).

[5] *Special Project—The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 1143 (1970) [hereinafter cited as *Special Project*].

[6] There are certain basic difficulties which arise from attempts to define expungement and sealing except in a very general sense. The principal reason for this problem is that the various jurisdictions define the terms without consistency. For example, expungement connotes physical destruction, but not all statutes provide for its occurrence. One author has defined an expungement statute as

> a legislative provision for the eradication of a record of conviction or adjudication upon fulfillment of prescribed conditions, usually the successful discharge of the offender from probation and the passage of a period of time without further offense.

Gough, *supra* note 1, at 149.

Sealing statutes usually provide "that all government records relating to an offender's criminal record are closed to public inspection." *Special Project*, *supra* note 5, at 1149 n.627.

justice system.[7] Arrest or conviction records are said to play a significant role at the police level in uncovering criminal activity or even in deciding whether there are grounds for making an arrest.

One author has stated that the threshold question in making discretionary judgments at this level is not whether such records may be used, but the extent to which they may be used.[8] It is suggested that reasonable or probable cause for making an arrest may arise where the *modus operandi* of a crime is sufficiently similar to that described in a suspect's record, even though there is insufficient additional evidence to connect the individual to the crime.[9] A number of elements would seem to be of critical importance in reaching such a decision, the first of which is the factor of time. It is more likely that a valid arrest would occur if the actual crime and the record of crime were separated by only a few weeks, as opposed to several years.[10] Secondly, arrest records would appear to be more reliable if they reflected a repeated pattern of criminal activity, a *modus operandi* similar to the conduct in question. Finally, perhaps the most important elements necessary to the validity of this practice are the inherent accuracy and completeness of such records. The decision to arrest an individual for the commission of a specific crime may also be related to the gravity of the offense. Thus, a suspect who has a past record indicating the commission of a serious offense is more likely to be arrested for the perpetration of a felony.[11]

Arrest records may also be useful at other levels of the criminal justice system. For example, they may be utilized in guiding prosecutorial discretion, in aiding judges in the setting of bond or bail, in the determination of sentencing, and in generally facilitating the work of correctional institutions.[12]

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7 Menard v. Mitchell, 328 F. Supp. 718, 727 (D.D.C. 1971). For a discussion of this theory, which one commentator has termed the "usefulness doctrine," see Comment, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 854-55 (1971).

8 W. LAFAVE, ARREST 287 (F. Remington ed. 1965) [hereinafter cited as W. LAFAVE]. Furthermore, 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.
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> 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.* (emphasis added).

9 *Id.* at 288.

10 *See* Gough, *supra* note 1, at 159.

11 W. LAFAVE, *supra* note 8, at 288.

12 Menard v. Mitchell, 328 F. Supp. 718, 727 (D.D.C. 1971).

## THE ARGUMENT AGAINST RETENTION

Many commentators have explored in depth the pervasive problems which inhere in the indiscriminate practice of retaining records of arrest or conviction.[13] Disclosure of such records may, for instance, have an overwhelming impact on both an individual's opportunities for further education,[14] or on one's ability to seek or hold gainful employment.[15] The dissemination of police records to licensing boards creates a state-sanctioned institutional mechanism that can prevent anyone from gaining or keeping employment in a trade or profession on the basis of vague, inadequate standards.[16] Measured against such standards,

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13 Extensive research has been done on cataloguing and analyzing these multi-faceted problems. *See generally* Gough, *supra* note 1; *Special Project, supra* note 5; Note, *Right of Police to Retain Arrest Records*, 49 N.C.L. REV. 509 (1971).

14 *See, e.g.*, State v. Campobasso, 125 N.J. Super. 103, 303 A.2d 674 (L. Div. 1973), where petitioner sought relief after being removed from a trade school until he could have a conviction for being under the influence of a controlled dangerous substance expunged. For a discussion of this case, see notes 138-40 *infra* and accompanying text.

15 One New York survey indicated, for example, that 75 percent of employment agencies refuse to refer anyone with an arrest record. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 75 (1967).

For a well documented discussion of the general employment problem related to records of arrest or conviction, see Hess & Le Poole, *Abuse of the Record of Arrest Not Leading to Conviction*, 13 CRIME & DELIN. 494 (1967); *Special Project, supra* note 5, at 1001-18.

For an interesting case in which plaintiff successfully sought to enjoin racial discrimination in employment based on arrest records not leading to conviction, see Gregory v. Litton Systems, Inc., 316 F. Supp. 401 (C.D. Cal. 1970), *modified on other grounds*, 472 F.2d 631 (9th Cir. 1972). Plaintiff based his contention on data showing that blacks were more prone to be arrested than whites and that Litton's practice of refusing employment on the basis of a number of arrests without conviction rendered its hiring policy discriminatory. 316 F. Supp. at 403.

16 For a catalogue of statutory restrictions placed on the licensing of ex-offenders, see J. HUNT, J. BOWERS & N. MILLER, LAWS, LICENSES AND THE OFFENDER'S RIGHT TO WORK (1973) (ABA Commission on Correctional Facilities and Services). Most statutes that are currently in force require that applicants be of "good moral character" or have not committed "crimes involving moral turpitude." *Id.* at 5-7. The application of these standards is often a discretionary function of professional licensing boards. *See, e.g.*, N.J. STAT. ANN. § 45:4-40 (1963), which provides in part:

> The State Board of Barber Examiners may either refuse to issue or renew or may suspend or revoke any certificate of registration for any one or combination of the following causes:
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> (1) Conviction of a felony shown by a certified copy of the record of the court of conviction;
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> . . . .
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> (6) Immoral or unprofessional conduct . . . .

The harshness of this type of licensing provision has been somewhat relieved in New Jersey by the Rehabilitated Convicted Offenders Act, N.J. STAT. ANN. § 2A:168A-1 *et seq.*

a record of arrest or conviction can easily prove fatal.[17] Additionally, the uncontrolled dissemination of such records to credit agencies can substantially affect the granting of credit.[18] Although Congress has partially responded to the problem of stale records in enacting the Fair Credit Reporting Act,[19] the legislation's limited coverage, would appear to frustrate its potential effectiveness.[20]

The sheer expansiveness of criminal statistics suggests a further reason for concern over the prospect of uncontrolled dissemination of police records outside the criminal justice system. One study has indicated, by what it termed a "conservative estimate," that about 40 percent of the male children living in the United States today will, at some time, be arrested for a non-traffic offense.[21] This high percentage indicates the extent of the power that police departments have over information capable of inflicting irreparable harm on much of the population.[22] Moreover, federal law provides for the exchange of all criminal records between federal and local authorities. Thus, such

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(1971). For a discussion of the operation of this Act, see NEW JERSEY PENAL CODE § 2C:51-1, Commentary (Final Report, 1971). However, a close inspection of the language of the statutes reveals that it still leaves broad discretionary power with the licensing authorities. N.J. STAT. ANN. § 2A:168A-2 (1971) provides that such a

> "licensing authority" . . . may grant an application . . . notwithstanding that the applicant has been convicted of a crime, other than a high misdemeanor, or adjudged a disorderly person, where it shall appear to the licensing authority that the applicant has achieved a degree of rehabilitation which indicates his engaging in the profession or business, for which he is an applicant for license or certificate or admission to a qualifying examination, would not be incompatible with the welfare of society or the aims and objectives of the licensing authority.

17 *See, e.g., In re* Fortenbach, 119 N.J. Super. 124, 290 A.2d 315 (Essex County Ct. 1972), where petitioner was discharged from his employment purely on the basis of an arrest record even though the charges had been dismissed. *Id.* at 125, 290 A.2d at 315-16. *See also* Raphalides v. New Jersey Dep't of Civil Serv., 80 N.J. Super. 407, 409-10, 194 A.2d 1, 2-3 (App. Div. 1963), where the civil service was able to dismiss an employee for a crime involving "moral turpitude" even though the offense was committed prior to the enactment of the statute mandating the forfeiture of office by anyone convicted of such a crime.

18 V. PACKARD, THE NAKED SOCIETY 54 (1964). For an analysis of the problems concerning the extension of credit to those with arrest records, see Note, *Arrest and Credit Records: Can the Right of Privacy Survive?*, 24 U. FLA. L. REV. 681 (1972).

19 15 U.S.C. § 1681 *et seq.* (1970).

20 *See, e.g., id.* § 1681b(E) which permits a consumer reporting agency to furnish a consumer report for credit, employment, insurance, or otherwise "legitimate business need[s]." *See also* Note, *supra* note 18, at 688.

21 THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE: THE CHALLENGE OF CRIME IN A FREE SOCIETY 247 (1967).

22 Steele, *A Suggested Legislative Device for Dealing with Abuses of Criminal Records*, 6 U. MICH. J.L. REFORM 32, 35 (1972). There is no harm in the mere fact that the police have the information. The danger arises only when those other than law enforcement personnel gain access to the records. *Id.*

records may ultimately come within the jurisdiction of the Federal Bureau of Investigation,[23] and become the subject of even further dissemination.

There are indications that comprehensive federal legislation, as well as more stringent Justice Department guidelines[24] designed to curb the collection and dissemination of such records are in the offing. Both Congress[25] and the Justice Department[26] have introduced bills to protect one's right of privacy from the unwarranted dissemination of records maintained in data banks, including such information as relates

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[23] 28 U.S.C. § 534(a) (1970) provides:

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.

[24] *See* Proposed Dep't of Justice Rules §§ 20.1-.2, 20.20-.33, 39 Fed. Reg. 5636 (1974). These rules are expressly intended "to afford greater protection of the privacy of individuals who may be included in the records" of the F.B.I., state, federally-funded agencies, and law enforcement agencies which exchange records with either the F.B.I. or federally-funded systems, while preserving the "legitimate law enforcement need for access" to criminal justice information. 39 Fed. Reg. at 5636. The rules correspond to the Justice Department bill introduced into the Senate. See note 26 *infra* for a discussion of the provisions of the bill.

[25] S. 2963, 93d Cong., 2d Sess. (1974) [hereinafter cited as S. 2963]. The Senate bill, introduced by Senator Ervin, outlines a comprehensive scheme for controlling the use of criminal justice information. The bill provides, subject to limited exceptions, that criminal justice information may be collected by and provided to criminal justice agencies only and it must be used for law enforcement purposes. *See id.* §§ 201(a)-(c). The Act further provides for either the purging or sealing of records in appropriate situations. *See id.* § 206(b). Purging, as defined in the Act, seems to be the functional equivalent of expungement in that it requires the complete removal of the pertinent record. *See id.* § 102(17).

Additional provisions of the Act deal with access requirements, both for agencies and individuals. *See id.* §§ 205, 207. Both civil remedies and criminal penalties are provided for, and enforcement is delegated to a Federal Information Systems Board which is created by the Act. *See id.* §§ 301, 308, 309.

The corresponding House bill is H.R. 12575, 93d Cong., 2d Sess. (1974).

[26] S. 2964, 93d Cong., 2d Sess. (1974) [hereinafter cited as S. 2964]. The Senate bill, introduced by Senator Hruska, is less comprehensive in scope than S. 2963. *See* note 25 *supra*. The Act deals with criminal information systems which are:

(1) operated by the Federal Government,

(2) operated by a State or local government and funded in whole or in part by the Federal Government,

(3) an interstate system, or

(4) operated by a State or local government and engaged in the exchange of criminal justice information . . . .

S. 2964 § 4(a). The Act outlines requirements concerning the access and use of criminal justice information and provides for the sealing of criminal record information under certain circumstances. *Id.* §§ 5, 9. However, unlike S. 2963, the Act does not provide for purging or expungement.

The corresponding House bill is H.R. 12574, 93d Cong., 2d Sess. (1974).

to arrest. However, future passage of this proposed legislation in its present form is far from assured and provision for the sealing of arrest records has already engendered controversy.[27]

## THE COMMON LAW APPROACH: A BRIEF ANALYSIS

The majority of jurisdictions in this country, including New Jersey, have cautiously approached the problem of fashioning judicial remedies when called upon to expunge or enjoin the dissemination of police records. Courts have generally been reluctant to grant expungement in any form in the absence of express statutory authority.[28] Their

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27 In testimony before the Senate Judiciary Subcommittee on Constitutional Rights, Clarence M. Kelley, Director of the F.B.I., declared his opposition to the sealing of some criminal justice information. Citing the usefulness of arrest records to law enforcement authorities in solving many cases, he stated that their use saves " 'valuable investigative time and energy.' " N.Y. Times, March 19, 1974, at 23, col. 5 (late New Jersey ed.).

28 Herschel v. Dyra, 365 F.2d 17, 20 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966) (no right to expungement of arrest records even though valid cause of action under section 1983 existed); United States v. Dooley, 364 F. Supp. 75, 76, 79 (E.D. Pa. 1973) (motion for expungement denied following acquittal of a criminal charge and dismissal of an additional indictment); United States v. Rosen, 343 F. Supp. 804, 808 (S.D.N.Y. 1972) (motion for expungement of arrest records denied following defendant's plea of guilty as corporate defendant and the subsequent dismissal of charges or acquittal as an individual defendant); Sterling v. City of Oakland, 208 Cal. App. 2d 1, 2-3, 6, 24 Cal. Rptr. 696, 697, 699 (Dist. Ct. App. 1962) (police department not required to return fingerprints, photographs, and arrest records upon dismissal of misdemeanor charges); District of Columbia v. Sophia, 306 A.2d 652, 653-54 (D.C. Ct. App. 1973) (exculpatory explanation, rather than expungement and sealing of arrest records, is proper remedy upon dismissal of charges where arrest was mistaken); Spock v. District of Columbia, 283 A.2d 14, 17 (D.C. Ct. App. 1971) (no right to expungement of records of arrest occurring during mass demonstration following acquittal or decision not to prosecute without an affirmative showing of nonculpability); Purdy v. Mulkey, 228 So. 2d 132, 136 (Fla. Dist. Ct. App. 1969) (no right to expungement and sealing where plea of guilty to misdemeanor); Village of Homewood v. Dauber, 85 Ill. App. 2d 127, 128, 229 N.E.2d 304, 305 (1967) (no right to return of fingerprints and photographs following conviction of traffic violation); People v. Lewerenz, 42 Ill. App. 2d 410, 411-13, 192 N.E.2d 401, 402 (1963) (lower court had no jurisdiction to order return of photographs, fingerprints and other records of identification following acquittal on narcotics charges); Kolb v. O'Connor, 14 Ill. App. 2d 81, 91, 142 N.E.2d 818, 824 (1957) (no right to return of fingerprints, photographs, and other identification records upon acquittal); State *ex rel.* Mavity v. Tyndall, 224 Ind. 364, 370-71, 66 N.E.2d 755, 757 (1946), *aff'd*, 225 Ind. 360, 74 N.E.2d 914 (1947), *appeal dismissed*, 333 U.S. 834 (1948) (no right to return of fingerprints, photographs and other identifying records upon acquittal); Roesch v. Ferber, 48 N.J. Super. 231, 250, 137 A.2d 61, 72 (App. Div. 1957) (no right to return of fingerprints and photographs following conviction of traffic violation); Fernicola v. Keenan, 136 N.J. Eq. 9, 10, 39 A.2d 851, 852 (Ch. 1944) (police have discretion to retain fingerprints, photographs and other identifying records upon failure of grand jury to indict); *In re* Molineux, 177 N.Y. 395, 398-99, 69 N.E. 727, 728 (1904) (no right to return of prison identification records following acquittal upon second trial for murder); Peabody v. Francke, 4 App. Div. 2d 962, 962, 168 N.Y.S.2d 201, 202 (1957), *cert. denied*,

approach has been premised upon considerations of public policy buttressed by the determination that law enforcement agencies possess a discretionary authority to retain such files.[29]

Many of the decisions that are reflective of this judicial hesitancy have focused on the power of the courts to effect an appropriate remedy. Analysis of some cases indicates the avoidance of substantive issues on the basis of jurisdictional defects.[30] Such defects, however, have not been generally regarded as an absolute bar to jurisdiction. Recently, a few federal courts have cured potential defects through the granting of judicial cognizance on the basis of "ancillary" jurisdiction,[31] or pursuant to general "federal question" jurisdiction where violations of constitutional rights have been alleged.[32]

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357 U.S. 941 (1958) (upon reversal of conviction and subsequent dismissal of proceedings no right to expungement of return filed in the record).

For an excellent discussion of the judicial analysis in these cases, see generally Comment, *supra* note 7.

29 *See, e.g.*, Rogers v. Slaughter, 469 F.2d 1084, 1085 (5th Cir. 1972); Walker v. Lamb, 254 A.2d 265, 266 (Del. Ch. 1969); Cissell v. Brostron, 395 S.W.2d 322, 326 (Mo. Ct. App. 1965). *See* cases cited note 30 *infra*. These decisions appear to be based on a presupposition that for investigative purposes, there is probative value to be derived from the fact that an arrest occurred even though the individual may not have been convicted. These records are said to be useful at all levels of the criminal justice system. *See* Menard v. Mitchell, 328 F. Supp. 718, 727 (D.D.C. 1971). *But see* United States v. Dooley, 364 F. Supp. 75, 78 (E.D. Pa. 1973) (dictum).

30 *See, e.g.*, People v. Lewerenz, 42 Ill. App. 2d 410, 411-13, 192 N.E.2d 401, 402 (1963); Maxwell v. O'Connor, 1 Ill. App. 2d 124, 126, 117 N.E.2d 326, 328 (1953).

31 *E.g.*, Morrow v. District of Columbia, 417 F.2d 728 (D.C. Cir. 1969). The court enunciated the general parameters of granting ancillary jurisdiction:

> [A]ncillary jurisdiction should attach where: (1) the ancillary matter arises from the same transaction which was the basis of the main proceeding, or arises during the course of the main matter, or is an integral part of the main matter; (2) the ancillary matter can be determined without a substantial new fact-finding proceeding; (3) determination of the ancillary matter through an ancillary order would not deprive a party of a substantial procedural or substantive right; and (4) the ancillary matter must be settled to protect the integrity of the main proceeding or to insure that the disposition in the main proceeding will not be frustrated.

*Id.* at 740.

32 *See, e.g.*, Sullivan v. Murphy, 478 F.2d 938, 960 (D.C. Cir. 1973). The jurisdictional issue was particularly unique in this case because jurisdiction was asserted pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970) as well as under general "federal question" jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 (1970). The court held that jurisdiction would not lie pursuant to section 1983 since the actions of local officials were not "under color of state or territorial law," the District of Columbia not being a state or a territory for the purposes of section 1983. 478 F.2d at 960 (citing District of Columbia v. Carter, 409 U.S. 418 (1973)). The court, however, found jurisdiction arising under the Constitution, since the claim met the requisite non-insubstantial federal claim and amount-in-controversy requirements of section 1331. 478 F.2d at 960. The court also noted that the $50,000 claim would also have given the court "local" equity jurisdiction in the absence of a federal question. *Id.* at 960 n.34.

Most courts which have denied relief have done so on the basis of statutory limitations or on a judicial reluctance to grant the form of relief sought. In *Cissell v. Brostron*,[33] for example, a Missouri court of appeals held that the trial court had abused its discretion when it directed police officers to remove respondent's arrest records from the active police files.[34] Cissell had been indicted for first degree murder. The charges were dismissed, however, when the prosecuting witness proved unreliable due to a history of mental illness.[35] After a few unsuccessful attempts to gain employment, Cissell sought and obtained an expungement order which permitted him to deny having been arrested when completing job application forms.[36] On appeal, the court held that the scope of injunctive relief was limited to restraining "actual or threatened acts" in situations in which real injury could be shown, and that this remedy was to be used only in response to the clearest of circumstances. The record, according to the court, demonstrated no such threat because there was no proof that respondent had been denied employment on the basis of the retention of his record.[37] Secondly, the court stated that in framing the order which permitted Cissell to deny the existence of an official record, the trial court had abused its discretion.[38] Furthermore, the court indicated there was no proof that the

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In cases involving "state action," jurisdiction of the federal courts to remedy breaches of civil rights through expungement has been granted without comment pursuant to section 1983. Hughes v. Rizzo, 282 F. Supp. 881 (E.D. Pa. 1968). *See also* Wilson v. Webster, 467 F.2d 1282 (9th Cir. 1972), where the federal court reversed that portion of the district court's decision dismissing a suit to cancel plaintiffs' police records where criminal charges against them had resulted in acquittal or had been dismissed notwithstanding the fact that the records involved were state records. *Id.* at 1283-84.

33 395 S.W.2d 322 (Mo. Ct. App. 1965).

34 *Id.* at 324-26.

35 *Id.* at 324.

36 *Id.* at 323-24. Apparently, Cissell had been extremely candid with prospective employers in filling out applications. In one instance, he supplemented the application with the detective magazine story that had been written about him in order to explain the details of his arrest. He never heard from them again. Following a few more unsuccessful applications, he sought the court order. *Id.* at 324.

37 *Id.* at 325.

38 *Id. See generally* Spock v. District of Columbia, 283 A.2d 14, 20 (D.C. Ct. App. 1971), where the court denied a request by two appellants for an order permitting them to answer in the negative in response to inquiries about arrests. The court stated such relief was certainly unavailable without statutory authority and, further, doubted the wisdom of any such future approach. The arrest, said the court, was an "historical fact," and consequently

> [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

police intended to improprietously disseminate the record. Summarily dismissing privacy arguments, the court finally noted that the murder was still unsolved; consequently, common sense justified the use of the record since any restriction would unduly hamper the police "while affording respondent no real relief."[39]

All courts, however, have not dealt so narrowly with attempts to curtail the potential misuse of records. There have been recent efforts to establish a test which courts could make use of in deciding whether to grant either complete, or some limited form of relief. Thus, a few courts have approached the question of retention on the basis of whether there was probable cause for the arrest or indictment. *Menard v. Mitchell*,[40] is the leading decision suggesting such a test. In this case, suit was brought to compel the Attorney General and the Director of the Federal Bureau of Investigation to remove plaintiff's fingerprints and an accompanying notation regarding his arrest by state authorities from the Bureau's files. Menard had been arrested on suspicion of burglary, but was later released and no prosecution was sought. He claimed that the arrest had been made without probable cause and sought the expungement of a copy of the record that the Bureau had received through police channels.[41] The Court of Appeals for the District of Columbia Circuit reversed the decision of the trial court which had granted summary judgment for the Government and remanded the case for a more complete development of the record. The appellate court stated that a proper determination of whether such "criminal" records could be maintained would depend largely upon a factual determination of whether there had been probable cause for the arrest.[42]

Judge Bazelon, writing for the court, implied that if upon remand, the arrest was found to have been made without probable cause, a serious question would be raised as to

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> criminal charge shall no longer be 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.

*Id.* at 21 (footnote omitted).

So long as potential employers are permitted to inquire into arrest records, orders limiting their dissemination or expungement are ineffectual if the applicant feels compelled to tell the truth. Consequently, some statutory expungment or sealing statutes contain provisions permitting those obtaining relief to deny the existence of a record. *See, e.g.*, N.J. STAT. ANN. § 2A:85-21 (Supp. 1974-75).

39 395 S.W.2d at 326.

40 430 F.2d 486 (D.C. Cir. 1970).

41 *Id.* at 487. The details of the arrest are more fully developed in the district court decision on remand. *See* 328 F. Supp. at 723.

42 430 F.2d at 492-95.

> whether the Constitution can tolerate any adverse use of information or tangible objects obtained as the result of an unconstitutional arrest of the individual concerned.[43]

The court also suggested that even where probable cause could be demonstrated, if further investigation by state authorities produced evidence exonerating plaintiff which later was brought to the attention of the F.B.I., the Bureau "may be under a duty at the very least to supplement its files to indicate that fact."[44] Conversely, it indicated that where probable cause was developed subsequent to an arrest, retention would usually be justified.[45] Noting Menard's contention that under existing procedures his record was subject to wide dissemination, the court of appeals stated that if the plaintiff could substantiate his claim, he might have a "right to limit its dissemination or to require its amplification."[46]

While upon remand, the district court refused to expunge Menard's records, it restricted their dissemination by the Bureau to the federal government and limited their use only for employment and law enforcement purposes.[47] The court's decision was based on the premise that federal courts are not in a position to either rule on arrests made by state agencies or interfere with a state's administration of its criminal justice system.[48] This was particularly so in view of the Bureau's con-

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43 *Id.* at 491 (footnote omitted).

44 *Id.* at 492 (footnote omitted).

45 *Id.* at 491 n.6.

46 *Id.* at 493.

47 328 F. Supp. 718, 728 (D.D.C. 1971). On appeal after the remand, the District of Columbia Circuit has recently held that where notification is received by the F.B.I. of a change in the description of the record from one of arrest to one of "detention only," the Bureau has a statutory responsibility to expunge the notation of the incident from its criminal identification files. The court rested its opinion on 28 U.S.C. § 534 (1970), stating however, that without notice of such a change, the F.B.I. bore no responsibility for expunging the records of innocent persons whose records were sent to it by local officials. The initial burden of inquiry into the validity of arrests is with the local officials, and therefore, vindication of constitutional rights through actions to expunge should ordinarily be directed at such local officials. Menard v. Saxbe, 42 U.S.L.W. 2571 (D.C. Cir., April 23, 1974).

48 328 F. Supp. at 723-24.

The F.B.I. Identification Division has amassed some 200 million sets of fingerprints under authority of 28 U.S.C. § 534 (1970), and pursuant to 28 C.F.R. § 0.85(b) (1972). The Bureau keeps the prints in separate criminal and applicant files. As a consequence of its far-ranging power, the F.B.I. has proceeded with caution. It oversees the procedures by which local authorities collect data and insists that those authorities fill out forms to show the purpose for which the fingerprints will be used. Upon the request of a local agency, the Bureau will return all records. In doing so, it will neither retain a copy nor inquire into the reason for the return. 328 F. Supp. at 721-22.

New Jersey participates in the National Uniform Crime Reporting Program whereby

sistent policy of honoring a state's request for the return of an individual's arrest records.[49]

The trial court, as directed, addressed itself to the issue of probable cause. Commenting extensively on the factual data that had been submitted, the court concluded that there had been sufficient probable cause to justify Menard's arrest.[50] While it thus refused to grant the relief prayed for, the court expressed reservations concerning the efficacy of such a test as a basis for granting expungement, noting that such a determination demonstrates nothing conclusive about an individual's conduct.[51]

Two recent cases heard in the District of Columbia's court of appeals have followed the *Menard* approach, but have taken a highly restrictive view of that decision.[52] In both cases the court concluded that neither expungement nor sealing were appropriate judicial remedies. Instead, the court held that the only relief which could properly be afforded would be to order clarification of all records with an accompanying notation reflecting all exculpatory material.[53] Such relief moreover, could only be granted upon an affirmative showing of nonculpability, and "not mere exoneration" by the petitioner.[54]

The approach taken by the District of Columbia's court of appeals has been disapproved of in a recent federal circuit court decision involving mass arrests during demonstrations. *Sullivan v. Murphy*[55] was a class action brought on behalf of persons who had been arrested on a variety of charges[56] during the week-long 1971 "May Day" anti-war

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specific crimes are reported in triplicate; one copy is retained locally, two are submitted to the State Police Uniform Crime Reporting Unit which forwards one copy to the F.B.I. ADVISORY COMMITTEE ON UNIFORM CRIME REPORTING, REPORT ON CRIME IN NEW JERSEY 3 (State of N.J. 1972).

49 328 F. Supp. at 723-24.

50 *Id.* at 723.

51 *Id.* at 724. The court further stated:

> Analysis demonstrates, however, that the question of probable cause has little to do with the merits of the underlying controversy. An arrest whether made with or without probable cause is to be sure a fact, but one that proves nothing so far as the actual conduct of the person arrested is concerned. An arrest without probable cause may still lead to conviction and one with probable cause may still result in acquittal. Under our system of criminal justice, only a conviction carries legal significance as to a person's involvement in criminal behavior.

*Id.*

52 District of Columbia v. Sophia, 306 A.2d 652 (D.C. Ct. App. 1973); Spock v. District of Columbia, 283 A.2d 14 (D.C. Ct. App. 1971).

53 District of Columbia v. Sophia, 306 A.2d 652, 654 (D.C. Ct. App. 1973); Spock v. District of Columbia, 283 A.2d 14, 19 (D.C. Ct. App. 1971).

54 Spock v. District of Columbia, 283 A.2d 14, 19 (D.C. Ct. App. 1971).

55 478 F.2d 938 (D.C. Cir.), *cert. denied*, 414 U.S. 880 (1973).

56 The arrests, totaling 14,517, were predominately for "disorderly conduct, violation

protests in Washington, D.C. The United States Court of Appeals for the District of Columbia Circuit delivered a lengthy opinion concerning the importance of the existence of probable cause at the time of an arrest as the basis for considering the appropriateness of granting expungement or sealing relief. The unique circumstances of these mass arrests and the consequent suspension and departure from established arrest and presentment procedures by the local authorities,[57] led the court to inquire into the relationship between such actions and plaintiffs' fourth amendment rights.

The court broached the question of relief by restating the well-established common law principle that it possessed the authority to order the expungement of all records where "necessary and appropriate in order to preserve basic legal rights."[58] Thus, with regard to the case

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of police lines, unlawful assembly, and unlawful entry onto public property." 478 F.2d at 942.

[57] The normal practice of the police, as pointed out by the court, is for the arresting officer to escort anyone arrested on probable cause to the precinct house where the recording and booking process is expedited. The arrestee may then secure his release by posting collateral bond at the precinct. *Id.* at 946.

During the disorders in the District of Columbia that immediately followed the assassination of Dr. Martin Luther King, Jr., this process became unworkable because escorting the arrestees tended to remove police from the streets when they were most needed. New procedures were adopted for use during periods of disorder. Pursuant to these procedures an officer would complete a "Field Arrest Form" recording all pertinent data including material elements of the charge and identification of the arrestee and the officer or officers involved. Further, a Polaroid photograph was required of the officer and the arrestee. Then the prisoner was turned over to other personnel for processing and booking, leaving the arresting officer free to remain at the scene of the disorder. *Id.*

Against this background the court went on to describe the events surrounding the May Day demonstrations. Prior to May 3, the field arrest procedures were followed by the police, but early that day the anticipated volume and intensity of protest activity convinced the police chief that mass arrests were necessary, and he issued an order suspending the field arrest procedures. Nearly 8,000 arrests were made during the day and the arrestees were simply loaded on vehicles and carted to detention centers. The court noted plaintiffs' contention that innocent persons were swept up by these procedures. *Id.* at 949-50. Many of these persons were processed through a makeshift booking center where volunteers from the Justice Department processed them. The volunteers were told to record the arrestees' names, addresses and physical descriptions. They were further instructed to enter disorderly conduct as the original charge and had been given a list of seven police officers and were to "pick one" to list under "name of arresting officer." The section describing the circumstances of the arrest was to remain blank. Then the prisoners were fingerprinted and photographed and those refusing were returned to detention. *Id.* at 951. Additionally, the normal procedures, whereby individuals arrested on disorderly persons offenses were permitted to post collateral bond at the precinct, were suspended. Instead they were held in police custody until bail could be fixed in a formal arraignment proceeding. *Id.* at 952.

The order suspending the field arrest procedures was rescinded the following morning, though the court noted that numerous arrests that day were of highly questionable character according to plaintiffs' evidence. *Id.* at 953.

[58] *Id.* at 968.

at bar, the court noted that the normal inference of justification attributable to arrest and detention were unwarranted to the extent that these arrests may not have been intended to expedite the criminal process.[59] Moreover, it indicated that photographs and fingerprints, normally intended to assist identification, had instead been used for the very different purpose of eliciting testimony during police "prep" sessions before trial.[60] The court construed this procedure to be constitutionally invalid under the fourth amendment since probable cause was often "established" after the arrest.[61]

Recognizing the large number of arrests that had been made during the week-long protests, the court found that it was impossible to ascertain their validity. Since this situation was directly attributable to the arrest and detention procedures adopted by the local authorities, the court held the arrests to be presumptively invalid, placing the burden of demonstrating their validity on the authorities.[62] The court concluded that in light of the unusual nature of the case, the equitable powers inherent in the federal judiciary permitted the granting of an order to remedy the abridgment of plaintiffs' constitutional rights.[63] Such order should be drawn as to 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.[64]

The circuit court did not specify the precise relief to be granted, leaving that decision for the trial court upon remand. However, as an alternative to outright expungement, the court stated that the placing of the documents under seal might prove adequate to protect both individual and governmental interests.[65]

In 1972, a federal district court in *United States v. Rosen*[66] sought to summarize existing judicial precedents and commentary in order to promulgate a general rule regarding expungement and dissemination. Corporate and individual defendants had been indicted on numerous counts of unlawfully purchasing and importing Asiatic human hair

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59 *Id.* at 969.
60 *Id.*
61 *Id.* at 970.
62 *Id.*
63 *Id.* at 971.
64 *Id.*
65 *Id.* at 973.
66 343 F. Supp. 804 (S.D.N.Y. 1972).

without the permission of the Secretary of the Treasury.[67] In one of the two indictments, all defendants were acquitted on all counts. In the other indictment, the charges against the individual defendants were dismissed after the corporate defendants pleaded guilty and were sentenced. Thus, all charges that had been brought against defendant Rosen had resulted in either acquittal or dismissal.[68] Yet, the court stated that even where an arrestee was acquitted, his records could

> be retained *unless*: (1) there is a statute that directs return of such arrest records; (2) the arrest was unlawful; or (3) the record of the arrest is the "fruit" of an illegal seizure.[69]

The court, however, stated that partial relief in the form of an injunction to restrain improper dissemination of the records might be appropriate in situations

> (1) where the person's arrest records are publicly displayed in a so-called "Rogues' Gallery;" (2) where the person's arrest records are disseminated to potential employers; (3) where there is a showing of harassment by law enforcement officials against the individuals; or (4) where there is a concrete showing that retention of arrest records has made the person more susceptible to suspicion and to injurious investigation when subsequent crimes, particularly of a similar character, are being inquired into . . . .[70]

Finding none of these conditions apposite to defendant's motion, the court balanced his "right of privacy in relation to the interests of society,"[71] and concluded that the right was not sufficiently interfered with to mandate the granting of injunctive relief.[72]

It is apparent that many of the courts that have granted relief in the form of complete expungement or sealing on common law grounds have done so in response to rather unusual circumstances such as clearly illegal or unconstitutional arrests,[73] or where innocence is unequivocally

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67 *Id.* at 805.

68 *Id.*

69 *Id.* at 808 (emphasis by the court). The court reached this conclusion through a balancing of equities which it deemed necessary to protect society's interests in effective law enforcement as well as the individual's right to privacy. *Id.*

70 *Id.* at 808-09 (footnote omitted).

71 *Id.* at 809.

72 *Id.* Emphasizing the fact that each case must be decided on its own merits, the court here found no improper use of the records and no injuries to defendants. Hence, it found that there was no violation of privacy since mere retention was not a per se violation. *Id.*

73 United States v. McLeod, 385 F.2d 734, 750 (5th Cir. 1967) (courts must do all that is possible to erase the effects of an unlawful prosecution); Hughes v. Rizzo, 282 F. Supp. 881, 885 (E.D. Pa. 1968) (mass arrests without legal justification should be expunged). *See* Sullivan v. Murphy, 478 F.2d 938, 968 (D.C. Cir. 1973), which states that expungement

established.[74] Courts have granted relief in cases where they have believed that "justice" so required,[75] and in a few others, relief has been granted on the basis of a recognition of the right to privacy.[76]

While the nascent recognition of a constitutional right to privacy may foreshadow the use of this theory as a sword in the area of expungement and sealing, it is clear that the earlier attempts to obtain relief under a privacy theory did not foretell the theory's more recent developments.[77] Most of the early cases seeking relief were advanced pursuant

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is one proper remedy which might be considered by the district court on remand in granting relief to persons whose constitutional rights had been abridged by arresting authorities during a mass demonstration.

Expungement has also been used to remove records of incidents at prisons where constitutional rights have been violated. *See* United States *ex rel.* Jones v. Rundle, 358 F. Supp. 939 (E.D. Pa. 1973), where a prisoner who had been denied due process in a disciplinary proceeding and had been confined in punitive segregation in violation of his right to be free from cruel and unusual punishment. He was granted relief in the form of expungement of the incident from his prison record pursuant to the court's equitable powers. *Id.* at 952. *Accord,* Belcher v. Ciccone, 336 F. Supp. 125, 132 (W.D. Mo. 1971); Mjolsness v. Ciccone, 311 F. Supp. 1014, 1018 (W.D. Mo. 1969).

[74] *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, 805 (D.C. Ct. App. 1972); State v. Pinkney, 33 Ohio Misc. 183, 184, 290 N.E.2d 923, 924 (Ct. C.P. 1972). *But see* District of Columbia v. Sophia, 306 A.2d 652, 654 (D.C. Ct. App. 1973); Spock v. District of Columbia, 283 A.2d 14, 19 (D.C. Ct. App. 1971).

[75] Kowall v. United States, 53 F.R.D. 211, 213 (W.D. Mich. 1971). Here petitioner had been convicted of failing to report for induction into the armed services and was sentenced to a term of imprisonment. He successfully obtained a reversal of this conviction, and the court ordered all records of his arrest expunged. The court found a logical limit in the law of remedies "to right wrongs cognizable by the common law within [its] jurisdiction." *Id.* at 213. Hence, it stated that

> [i]f it is found after careful analysis that the public interest in retaining records of a specific arrest is clearly outweighed by the dangers of unwarranted adverse consequences to the individual, then the records involved may properly be expunged.

*Id.* at 214.

[76] United States v. Kalish, 271 F. Supp. 968, 970 (D.P.R. 1967); Davidson v. Dill, — Colo. —, —, 503 P.2d 157, 161 (1972); State v. Pinkney, 33 Ohio Misc. 183, 184, 290 N.E.2d 923, 924 (Ct. C.P. 1972); Eddy v. Moore, 5 Wash. App. 334, 345, 487 P.2d 211, 217 (1971). The majority of courts, however, have refused to accept the argument that expungement of police records should be compelled under a privacy theory. *See* Comment, *supra* note 7, at 858-59.

[77] The great majority of the earlier decisions emphasize the necessity for subordinating any privacy rights of the individual to the greater need for public safety. Purdy v. Mulkey, 228 So. 2d 132, 137 (Fla. Dist. Ct. App. 1969); Kolb v. O'Connor, 14 Ill. App. 2d 81, —, 142 N.E.2d 818, 822 (1957); State *ex rel.* Mavity v. Tyndall, 225 Ind. 360, 366, 74 N.E.2d 914, 917 (1947), *appeal dismissed,* 333 U.S. 834 (1948); Roesch v. Ferber, 48 N.J. Super. 231, 241-50, 137 A.2d 61, 67-72 (App. Div. 1957).

Many of the earlier decisions dealt with situations involving police displays of individuals' photographs and records in "Rogues' Galleries." *See, e.g.,* Fernicola v. Keenan, 136 N.J. Eq. 9, 39 A.2d 851 (Ch. 1944), where complainant had been arrested on assault and battery charges but where no indictment was returned. His papers, however, were

to a right of privacy theory sounding in tort.[78] However, with the ascendency of *Griswold v. Connecticut*[79] and its progeny,[80] the right to privacy argument has been reinvigorated on a constitutional level. Thus, a few recent state decisions that have recognized a right to privacy as a fundamental interest in this context have held that where a defendant is acquitted the state must show a compelling need to retain the record.[81] The direction of the privacy argument in the expungement context, however, remains unclear,[82] and awaits the resolution of pending legislative initiatives.[83]

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kept in a rogues' gallery and he brought the action to compel their return. Despite the court's disapproval of the practice, it felt that protection of society was more important, and stated that the police had the discretion to deal with the matter. *Id.* at 9-10, 39 A.2d at 851-52. *See generally* Note, *The Right of Persons Who Have Been Discharged or Acquitted of Criminal Charges to Compel the Return of Fingerprints, Photographs, and Other Police Records*, 27 TEMPLE U.L.Q. 441, 451-52 (1954).

Other cases characterize the duty by the police to retain the records as offsetting privacy interests, Herschel v. Dyra, 365 F.2d 17, 20 (7th Cir.), *cert. denied*, 385 U.S. 973 (1966); McGovern v. Van Riper, 140 N.J. Eq. 341, 347, 54 A.2d 469, 472 (Ch. 1947); or, that privacy is invaded only where records are clearly misused, Sterling v. City of Oakland, 208 Cal. App. 2d 1, 7, 24 Cal. Rptr. 696, 700 (Dist. Ct. App. 1962), and conversely, that limitations of dissemination are sufficient to protect privacy, Spock v. District of Columbia, 283 A.2d 14, 19-20 (D.C. Ct. App. 1971).

78 *See* cases cited note 77 *supra*. While most cases denied relief, a few decisions granted or recognized the validity of injunctive relief to restrain the police from displaying an innocent person's records. These cases fit within the form of tort privacy invasion known as placing someone in a "false light in the public eye." *See* W. PROSSER, THE LAW OF TORTS, § 117, at 812-13 n.17 (4th ed. 1971). *See also* RESTATEMENT (SECOND) TORTS § 652A(d) (Tent. Draft No. 13, 1967).

79 381 U.S. 479 (1965) (marital privacy).

80 The cases are collected in Roe v. Wade, 410 U.S. 113, 152-53 (1973), where the Court briefly analyzes the various constitutional roots of the right as reflected in the opinions of the Justices.

81 Davidson v. Dill, — Colo. —, 503 P.2d 157, 161 (1972); Eddy v. Moore, 5 Wash. App. 334, 345, 487 P.2d 211, 217 (1971). *See* State v. Pinkney, 33 Ohio Misc. 183, 184, 290 N.E.2d 923, 924 (Ct. C.P. 1972).

82 With the exception of the first two decisions cited in note 81 *supra*, the post-*Griswold* expungement decisions are not analytical in their approach. Even the federal court decisions have avoided analyzing the issue in constitutional terms, and instead, appear to have adopted a simple balancing approach mentioning privacy in only very general terms. *See, e.g.*, United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967). Here defendant was charged in an information with failure to submit to induction into the service despite a pending show cause order and despite his willingness to surrender to the jurisdiction of the court in order to avoid any appearance of violating the law. In reaching a decision to expunge, the court adopted a simple balancing approach between the individual's right of privacy and the government's need for the information. No mention was made of the constitutional status of privacy or of *Griswold*. *Id.* at 969-70. *See also* United States v. Rosen, 343 F. Supp. 804 (S.D.N.Y. 1972) where the court, in refusing to grant defendant expungement relief, analyzed the balance between society's rights and the individual's right of privacy entirely in terms of the tort privacy cases. *Id.* at 807-09. The court did not mention the constitutional issue at all.

This brief analysis of judicial precedent does not reveal any clear pattern for common law expungement relief. Rather, the reluctance with which most courts have approached the subject amply demonstrates that these principles form a haphazard and often inadequate basis for protection against abuses in the use of police arrest records. With respect to abuse of conviction records, they offer no promise of relief at all.[84] The cases do, however, form a useful backdrop of comparative material for considering the relative merits and weaknesses of the emerging statutes.

## THE NEW JERSEY STATUTORY PREROGATIVES

### *Expungement and Pardon: The Overlapping Prerogatives*

Statutory relief usually takes the form of either pardon, restoration, expungement, or sealing.[85] In New Jersey, however, promulgation of expungement policy is not an exclusively legislative concern. Apart from the obvious necessity for consideration of the law enforcement needs of the executive, there are state constitutional difficulties which, although partially resolved, remain ambiguous. The problem lies in the extent to which executive pardoning authority may preempt the area of restorative relief granted under the state's statutory scheme. Pardon is an executive remedy,[86] generally granted to restore civil

It should be noted that while recognizing the fundamental nature of privacy interests in some contexts, the Supreme Court has not held privacy to be fundamental in the abstract. *See, e.g.*, the careful language of the Court in Roe v. Wade, 410 U.S. 113, 152 (1973). Here the Court noted the varying origins of the right in different contexts, holding that with respect to marital privacy, the right derived from the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Id.* at 152-53. The opinion further states that the Court's precedents on the right "acknowledge that some state regulations in areas protected by that right is appropriate." *Id.* at 154. This suggests that some balancing approach might be adopted in an expungement case. At the very least, there would appear to be a violation of the right to privacy where no legitimate state interest is at stake, as in a situation where officials attempt to retain records of one mistakenly arrested. *See* Comment, *supra* note 7, at 858-59 nn.48 & 49. *See generally* Note, *Davidson v. Dill: A Compelling State Interest in Retaining Arrest Records*, 35 U. PITT. L. REV. 205, 214-18 (1973). The author suggests that there may be a basis for the state to demonstrate a compelling state interest in effective crime detection. *Id.* at 216.

83 *See* note 25 *supra*.

84 *See, e.g.*, Commonwealth v. Zimmerman, 215 Pa. Super. 534, 258 A.2d 695 (1969), where the court, in reversing an order expunging appellee's conviction record, stated that there was no statutory or common law basis for such relief. *Id.* at 537, 258 A.2d at 696.

85 *See* notes 5 & 6 *supra* and accompanying text.

86 In New Jersey the pardon power is constitutionally committed to the Executive. *See* N.J. CONST. art. 5, § 2, ¶ 1, which provides:

> The Governor may grant pardons and reprieves in all cases other than impeachment and treason, and may suspend and remit fines and forfeitures. A com-

rights and privileges that an offender forfeits upon conviction.[87] However, the actual effects of pardon differ in various jurisdictions,[88] and New Jersey adheres to the view that pardon does not eradicate all disabilities arising from conviction.

Case law in New Jersey indicates that a pardon cannot restore the right to a retirement pension which has been lost as a consequence of a prior conviction. In *Hozer v. State Consolidated Police & Firemen's Pension Fund Commission*,[89] a police officer appealed an administrative order of the Commission which had denied his application for a retirement pension. The ground for the order was his failure to meet the statutory obligation of "honorable service."[90] Hozer, prior to his application for a pension, had been convicted of neglect of duty, fined, and given a suspended sentence.[91] Following an initial denial of a request for a pension by the Commission, he applied for and was granted a "full and free" pardon by the Governor. Relying upon the effects of the pardon, Hozer reapplied for the pension. The Commission, however, affirmed its prior decision.[92]

On appeal, the appellate division discussed the parameters of the executive pardon power, beginning with the premise that pardon had no retrospective application. The court reasoned that a pardon did not erase the acts leading to a conviction or restore an individual's moral character.[93] Rather, it found that a pardon was more in the nature of an act of forgiveness than one of forgetfulness, and that a right or privilege revoked as a result of the original crime or act might not be restored even though the individual had been fully pardoned.[94] The court concluded that the period of dishonorable service was not obliterated by the pardon and thus appellant was not entitled to his pension.[95]

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mission or other body may be established by law to aid and advise the Governor in the exercise of executive clemency.

The pardon power is modified in the New Jersey statutes under the heading of executive clemency. *See* N.J. STAT. ANN. § 2A:167-1 *et seq.* (1971). The exercise of executive clemency is considered solely within the executive province and a denial cannot be reviewed by any court. State v. Mangino, 17 N.J. Super. 587, 591, 86 A.2d 425, 427 (App. Div. 1952).

87 *Special Project, supra* note 5, at 1143.

88 *See id.* at 1143-47. In some states the judiciary further determines whether the individual should be restored to the status of "an innocent man without a criminal past." *Id.* at 1144.

89 95 N.J. Super. 196, 230 A.2d 508 (App. Div. 1967).

90 *Id.* at 198, 230 A.2d at 509-10. The statute in question was N.J. STAT. ANN. § 43:16-1 *et seq.* (1962).

91 95 N.J. Super. at 198, 230 A.2d at 509-10.

92 *Id.*, 230 A.2d at 510.

93 *Id.* at 201-02, 230 A.2d at 511-12.

94 *Id.*

95 *Id.* at 204, 230 A.2d at 513.

Prior comment on the scope and extent of the executive pardoning power had appeared in a 1925 advisory opinion presented to the Governor by Chancellor Walker in *In re New Jersey Court of Pardons*.[96] The Chancellor declared that because pardon was constitutionally an exclusive power of the executive, the legislature could not exercise any of the prerogatives of that power, including restoration of the rights of either suffrage or citizenship. He further expressed the view that the executive had exclusive control over remittance of forfeitures resulting from conviction, thus impliedly prohibiting legislative action in this area.[97] The Chancellor's opinion rested upon a rather tortured reading of a provision in the 1844 Constitution which provided that:

> No . . . person convicted of a crime which now excludes him from being a witness, unless pardoned *or restored by law* to the right of suffrage shall enjoy the right of an elector.[98]

The Chancellor expressed the view that the phrase "restored by law" could not mean statutory law when read in the light of other constitutional provisions. Rather, he interpreted the phrase to apply only to lawful action taken by the Court of Pardons, an arm of the executive branch.[99]

With respect to suffrage, New Jersey's present constitution, adopted in 1947, provides:

> The Legislature may pass laws to deprive persons of the right of suffrage who shall be convicted of such crimes as it may designate. Any person so deprived, when pardoned *or otherwise restored by law* to the right of suffrage, shall again enjoy that right.[100]

Since the text of this provision remained substantially unchanged from its earlier version, it was inevitable that a question concerning the parameters of the emerging statutory remedy of conviction expungement would arise to rekindle controversy over the interpretation of the provision.

The first official expression came in a 1953 Attorney General's opinion which outlined the executive's interpretation of the state's

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96 97 N.J. Eq. 555, 129 A. 624 (Ch. 1926).

97 *Id.* at 570, 129 A. at 630.

98 *Id.* at 557, 129 A. at 625 (quoting from N.J. CONST. art. II, ¶ 1 (1844)) (emphasis added). In discussing the forfeiture of the right of suffrage, the Chancellor stated that the language of the 1844 Constitution could only be rationally construed to include that right "as well as any other forfeiture flowing from a conviction of crime." 97 N.J. Eq. at 568, 129 A. at 629-30.

99 97 N.J. Eq. at 564, 129 A. at 628.

100 N.J. CONST. art. 2, ¶ 7 (emphasis added).

statutory provision for conviction expungement.[101] In reiterating the position that expungement was not the equivalent of a pardon,[102] the opinion specifically looked to the state constitution's phrase "or otherwise restored by law,"[103] and concluded that it was not meant to preclude legislative action, but rather "contemplates that civil disabilities lost by conviction may be restored by legislative enactment."[104] The Attorney General's opinion thus indicates that the restoration of civil rights and disabilities lost or incurred as a result of conviction is, at the very least, a concurrent responsibility of the executive and the legislature.

A subsequent opinion by the Attorney General,[105] however, resurrected the Chancellor's restrictive interpretation of the constitution's mandate. This latter opinion in addressing itself to the effect of expungement on the restoration of voting rights, concluded that "restoration of franchise can only be obtained by executive action."[106] This position has since been abrogated by at least one federal court on constitutional grounds,[107] and has consequently resulted in a split of opinion regarding the restrictive effect the clause may have on the scope of expungement statutes.

In 1968 the legislature enacted the Rehabilitated Convicted Offenders Act[108] which has partially resolved the dilemma of executive-legislative prerogative. The avowed purpose of the Act was to

> assist rehabilitated convicted offenders to obtain gainful employment by the elimination of impediments and restrictions upon their obtaining employment based solely upon the existence of a criminal record.[109]

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101 1953 Op. N.J. Att'y Gen. No. 44 at 208.

102 *Id.* The specific question reviewed in the opinion was whether a record of conviction that was the subject of an expungement order could be subsequently produced to prove the fact of conviction. The Attorney General concluded that it could not. *Id.* at 209.

103 N.J. CONST. art. 2, ¶ 7.

104 1953 Op. N.J. Att'y Gen. No. 44 at 209.

105 1958 Op. N.J. Att'y Gen. P-36 at 123.

106 *Id.* at 125.

107 *See* Stephens v. Yeomans, 327 F. Supp. 1182 (D.N.J. 1970), where the court found no rational basis for the state's voting classifications and stated that

> a state voter classification disenfranchising resident citizens must pass equal protection muster under the equal protection clause of the fourteenth amendment.

*Id.* at 1185. The court noted recent Supreme Court decisions on the subject of voter disqualifications which it said "evidenced a tendency in franchise disqualification cases toward a stricter than usual scrutiny of the States' chosen classifications." *Id.* at 1186.

One commentator has termed this decision's approach as "the proper test" for cases involving franchise disqualification. Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 748 (1973).

108 N.J. STAT. ANN. § 2A:168A-1 *et seq.* (1971).

109 *Id.* § 2A:168A-1.

The statute acts to remove impediments and restrictions to employment by vesting authority in licensing bodies to grant applications for admission to qualifying examinations notwithstanding an applicant's prior criminal conviction. This right is conditioned on the applicant having demonstrated a degree of rehabilitation which would indicate that engagement in the licensed profession or business "would not be incompatible with the welfare of society or the aims and objectives of the licensing authority."[110]

The final section of the Act declares that either a pardon, an expungement pursuant to the criminal expungement statute,[111] or a certificate of parole[112] attesting the applicant's rehabilitation, would be sufficient evidence to meet the "compatib[ility] with the welfare of society" criteria.[113] This provision is significant in that it eliminates disabilities incurred through conviction, and to a degree, equates the legal effects of a pardon and expungement. Clearly the legislative intent of the statute runs contrary to the Chancellor's expansive view of the executive pardoning power.

The scope of relief made available by the Act is limited, since by definition it incorporates a standard of rehabilitation that is based upon the narrow remedy made available by the criminal conviction expungement statute.[114] Notwithstanding this difficulty, the Rehabilitated Convicted Offenders Act has laid a foundation for further legislation in the area of restorative relief. Since the judiciary in New Jersey, however, has offered little clarification of the legislative prerogative in the area of restorative relief, the extent to which such relief may be legislatively mandated remains ambiguous.[115]

*The Conviction Expungement Statutes*

Pursuant to New Jersey's statutory scheme, expungement of conviction records may be granted, under certain circumstances, to those

110 *Id.* § 2A:168A-2.

111 *Id.*

112 *Id.* § 2A:168A-3. The certificate of parole may be granted by either a federal or state parole board, or the chief probation officer of a United States district court or a county court. *Id.*

113 *Id.*

114 For a discussion of the criminal conviction expungement statute (*Id.* § 2A:164-28) see notes 116-42 *infra* and accompanying text.

115 *See, e.g., In re* Application of Raynor, 123 N.J. Super. 526, 303 A.2d 896 (App. Div. 1973). The court discussed the concurrent responsibilities of the executive and the legislature in developing expungement policy in respect to law enforcement needs. *Id.* at 528-29, 303 A.2d at 897. As the opinion dealt with a request for expungement of applicant's arrest record (her conviction record had been expunged), the court did not consider the potential conflicts that might arise between the governmental branches in the exercise of these responsibilities with respect to the executive pardoning power.

convicted of disorderly persons offenses,[116] criminal offenses,[117] and first-time drug offenses.[118] In addition, under the state's recently revised

116 N.J. STAT. ANN. § 2A:169-11 (1971) provides in pertinent part:

In all cases wherein a person has been adjudged a disorderly person whereon sentence was suspended or a fine imposed and no subsequent criminal or disorderly person conviction has been entered against such person, it shall be lawful after the lapse of 5 years from the date of such conviction for the person so adjudged a disorderly person to present a duly verified petition to the County Court of the county in which the conviction was entered, setting forth all the facts in the matter and praying for the relief provided for in this act.

Upon reading and filing such petition the court may by order fix a time, not less than 10 or more than 30 days thereafter, for the hearing of the matter, a copy of which order shall be served in the usual manner, within 5 days from its date, upon the county prosecutor and upon the chief of police or other executive head of the police department of the municipality wherein the offense was committed and, if the conviction was entered in a municipal court, upon the magistrate of that court. At the time so appointed the court shall hear the matter and if no material objection is made and no reason appears to the contrary, an order may be granted directing the clerk of the court wherein such conviction was entered to expunge from the records all evidence of said conviction and that the person against whom such conviction was sentenced shall be forthwith thereafter relieved from such disabilities as may have existed by reason thereof.

117 *Id.* § 2A:164-28 provides in pertinent part:

In all cases wherein a criminal conviction has been entered against any person whereon sentence was suspended, or a fine imposed of not more than $1,000, and no subsequent conviction has been entered against such person, it shall be lawful after the lapse of 10 years from the date of such conviction for the person so convicted to present a duly verified petition to the court wherein such conviction was entered, setting forth all the facts in the matter and praying for the relief provided for in this section.

Upon reading and filing such petition such court may by order fix a time, not less than 10 nor more than 30 days thereafter, for the hearing of the matter, a copy of which order shall be served in the usual manner upon the prosecutor of the county wherein such court is located, and upon the chief of police or other executive head of the police department of the municipality wherein said offense was committed, within 5 days from the date of such order, and at the time so appointed the court shall hear the matter and if no material objection is made and no reason appears to the contrary, an order may be granted directing the clerk of such court to expunge from the records all evidence of said conviction and that the person against whom such conviction was entered shall be forthwith thereafter relieved from such disabilities as may have heretofore existed by reason thereof, excepting convictions involving the following crimes: treason, misprision of treason, anarchy, all capital cases, kidnapping, perjury, carrying concealed weapons or weapons of any deadly nature or type, rape, seduction, aiding, assisting or concealing persons accused of high misdemeanors, or aiding the escape of inmates of prisons, embracery, arson, robbery or burglary.

118 *Id.* § 24:21-28 (Supp. 1974-75) provides in pertinent part:

After a period of not less than 6 months, which shall begin to run immediately upon the expiration of a term of probation imposed upon any person under this act, such person, who at the time of the offense was 21 years of age or younger, may apply to the court for an order to expunge from all official records, except from those records maintained under the Controlled Dangerous Substances Registry . . . all recordations of his arrest, trial and conviction pursuant to this section. If the court determines, after a hearing and after reference to the Controlled Dangerous Substances Registry, that such person during the period of such probation and during the period of time prior to his application to the court under this section has not been guilty of any serious or repeated violation of the conditions of such probation, it shall enter such order. The effect

delinquency statutes, a juvenile adjudged delinquent, or in need of supervision, may upon motion, have the court's order and findings vacated, and all proceedings in the case sealed.[119]

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of such order shall be to restore such person, in the contemplation of the law, to the status he occupied prior to such arrest and trial. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest or trial in response to any inquiry made of him for any purpose.

119 *Id.* § 2A:4-67. This latter act encompasses a broad spectrum of relief available to juveniles to insure the maintenance of strict confidentiality of all "social, medical, psychological, legal and other records" of all agencies involved in a juvenile proceeding. The court may upon motion order nondisclosure of such records where two years have elapsed from final custodial discharge or final proceeding where custody is not involved and there have been no subsequent proceedings, pending or adjudicated, against the individual. *Id.* § 2A:4-67a(1) & (2).

Furthermore, immediate sealing relief is available to any juvenile against whom an adjudication has been entered and who wishes to enter any of the Armed Services. The sealing order may be entered for all records of all involved agencies. *Id.* § 2A:4-67b. Additional provisions require notice to pertinent law enforcement authorities. *Id.* § 2A:4-67c(1)-(3). Entry of the sealing order is broad enough to encompass index references as well as the actual records of the proceedings. All officials are required to, and the individual may, respond negatively to inquiries concerning the existence of such a record. The records may, however, be "maintained for purposes of prior offender status" and the section does not apply to reports required pursuant to the Controlled Dangerous Substances Registry Act of 1970. All agencies and officials must be sent copies of the order. *Id.* § 2A:4-67d.

Thereafter, inspection of the sealed files and records may be obtained only upon motion, or where the court in its discretion and on an individual basis grants a special order permitting

> inspection by or release of information in the records to any clinic, hospital, or agency which has the person under care or treatment or to individuals or agencies engaged in fact-finding or research.

*Id.* Notably there is no standard of "good cause" or "probable cause" governing the motion for inspection. *Compare id. with id.* § 2A:85-18b (governing motions for inspection of sealed arrest records, which provides that the court may grant the motion "upon motion for good cause shown").

Finally the statute provides that any subsequent "adjudication of delinquency or in need of supervision or conviction of a crime" operates to nullify the order sealing the juvenile's records. *Id.* § 2A:4-67e.

This juvenile sealing statute should be understood within the context of the new revision of the juvenile statutes. *See id.* § 2A:4-42 *et seq.*

There are particular problems which inure to the handling of juvenile records that require additional safeguards. *See, e.g., id.* § 2A:4-65 which provides penalties for disclosure of any juvenile records. Though many of these problems overlap those involved with adult offenders, statutes from other jurisdictions evince a heightened sensitivity to youthful offenders and tend to be more protective in their scope. Discussion of these provisions, though beyond the scope of this Comment, could provide very useful analysis of an important problem. *See* ALASKA STAT. § 47.10.060(e) (1971); ARIZ. REV. STAT. ANN. § 8-247 (Supp. 1973); CAL. PENAL CODE § 851.7 (West Supp. 1974); *id.* § 1203.45; COLO. REV. STAT. ANN. § 22-1-11 (Supp. 1969); CONN. GEN. STAT. ANN. § 54-76*o* (Supp. 1973); FLA. STAT. ANN. § 39.03(6)(a) (1974); IDAHO CODE § 16-1816A (Supp. 1973); IND. CODE § 31-5-7-16 (1973); KAN. STAT. ANN. § 38-815(h) (1973); MD. ANN. CODE art. 26, § 70-21 (1973);

The general approach taken by these provisions is to grant expungement of the conviction record following the passage of a substantial period of time during which the ex-offender has not been convicted of the commission of a new crime.[120] These statutes impliedly codify a balancing between the rights of the individual on the one hand and the law enforcement benefits to be derived from the retention of conviction records within the criminal justice system on the other. In measuring the balance of competing interests against the passage of time, the statutes recognize that an old record loses its probative value as indicia of a pattern demonstrative of criminal behavior.

Both the disorderly persons and criminal conviction expungement statutes are conditioned upon the suspension of sentence or the imposition of a fine.[121] In the case of the criminal expungement statute the fine imposed cannot have exceeded $1,000.[122] A number of offenses for which expungement may not be granted are specifically enumerated in the criminal offense statute, severely limiting the scope of its reach.[123] In both statutes, the decision to expunge is at the discretion of the court. Other purely procedural matters are virtually identical.[124]

As already mentioned, both the disorderly persons and criminal conviction expungement statutes preclude relief upon any subsequent convictions. While the disorderly persons statute specifies that either a "criminal or disorderly person conviction"[125] will bar relief, the criminal conviction statute conditions expungement solely upon "no subsequent conviction."[126] Although the language in the latter statute might thus appear not to permit the expungement of a criminal conviction despite a subsequent disorderly persons offense, case law has held otherwise. In *State v. Blinsinger*,[127] the court concluded that reference in the criminal conviction statute to "a 'subsequent conviction' must

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MO. ANN. STAT. § 211.321 (Supp. 1974); NEV. REV. STAT. § 62.275 (1973); N.J. STAT. ANN. § 2A:4-65 to -67 (Supp. 1974-75); N.C. GEN. STAT. § 15-223 (Supp. 1973); N.D. CENT. CODE § 27-20-54 (1974); UTAH CODE ANN. § 55-10-117 (Supp. 1973); VT. STAT. ANN. tit. 33, § 665 (Supp. 1973); VA. CODE ANN. § 16.1-193 (1960); WASH. REV. CODE ANN. § 13.04.250 (Supp. 1972).

120 Pursuant to the disorderly persons expungement statute, the individual must wait five years before seeking relief. N.J. STAT. ANN. § 2A:169-11 (1971). The prescribed waiting period is ten years under the criminal expungement statute. *Id.* § 2A:164-28. For the text of these statutes, see notes 116-17 *supra*.

121 *Compare* N.J. STAT. ANN. § 2A:169-11 (1971) *with id.* § 2A:164-28.

122 *Id.* § 2A:164-28.

123 *Id. See* note 117 *supra*.

124 *Compare* N.J. STAT. ANN. § 2A:169-11 (1971) *with id.* § 2A:164-28.

125 *Id.* § 2A:169-11.

126 *Id.* § 2A:164-28.

127 114 N.J. Super. 318, 276 A.2d 182 (App. Div. 1971).

be construed in *pari materia* with the phrase 'criminal conviction' contained in the paragraph," and hence only a *criminal* conviction could bar the remedy.[128]

In both the disorderly persons and criminal conviction statutes, provision is made for the expungement of only the most recent conviction,[129] a point further reiterated by judicial interpretation. In *State v. Chelson*[130] the court concluded that the plain meaning of this provision as written into the criminal conviction statute compelled such a conclusion.[131] In *State v. D'Angerio*,[132] the defendant attempted to have a 1939 conviction for motor vehicle theft expunged. He had previously been successful in having a 1953 larceny conviction expunged in a separate proceeding. The court refused to expunge the record of the earlier conviction.[133] Multiple offenders, it reasoned, were not to be rewarded with expungement of all convictions through the operation of the statute, "by starting with the last and working backwards."[134]

New Jersey's statutory scheme, as noted earlier, provides an expungement remedy for the benefit of first-time youthful offenders of the state's drug laws.[135] This provision, however, differs substantially in terms from both the disorderly persons and criminal conviction statutes. The first-time drug offender, who is 21 years of age or younger at the time of the commission of the offense may apply to the court for a removal order six months or more following the termination of the probation period.[136] The order to expunge includes all records of arrest, trial, and conviction related to the drug offense except for records maintained under the Controlled Dangerous Substances Registry.[137] While under the terms of the provision expungement appears to be predicated upon the completion of a period of probation, case law has held otherwise. In *State v. Campobasso*,[138] the petitioner sought to have a record of a drug conviction expunged from the record. His sentence had been suspended and he had been ordered to "leave town."

128 *Id.* at 320, 276 A.2d at 183.

129 *Compare* N.J. STAT. ANN. § 2A:164-28 (1971) *with id.* § 2A:169-11.

130 104 N.J. Super. 508, 250 A.2d 445 (Bergen County Ct. 1969). Petitioner, who had been unable to gain employment as a taxi driver, sought to have the first of two convictions for petty larceny expunged. Both convictions were in excess of ten years old. *Id.* at 509, 250 A.2d at 445-46.

131 *Id.* at 510, 250 A.2d at 446.

132 124 N.J. Super. 240, 305 A.2d 827 (L. Div. 1973).

133 *Id.* at 242-43, 305 A.2d at 828.

134 *Id.* at 243, 305 A.2d at 828.

135 N.J. STAT. ANN. § 24:21-28 (Supp. 1974-75). For text of statute see note 118 *supra.*

136 N.J. STAT. ANN. § 24:21-28 (Supp. 1974-75).

137 *Id.*

138 125 N.J. Super. 103, 308 A.2d 674 (L. Div. 1973).

No subsequent convictions followed, and two years later he entered an out-of-state trade school. However, when the school discovered the record of his conviction, he was asked to leave until the records of arrest and conviction were expunged. Campobasso met all of the statutory requirements for expungement except that no term of probation had been imposed on him at the time of his conviction.[139] The court, in ordering all records expunged concluded that the legislative intent in providing for relief following completion of a term of probation was not an exclusive procedure or a mandatory requirement.[140]

The first-time drug offenders statute, unlike the disorderly persons and criminal conviction statutes, expressly provides for the expungement of arrest records. This mandate is in keeping with the Act's avowed purpose which is to completely restore the individual "in the contemplation of the law, to the status he occupied prior to . . . arrest and trial."[141] To facilitate this purpose, all legal sanctions are suspended, following expungement, for failure to acknowledge the fact of one's prior arrest or trial for a drug offense.[142]

*The Arrest Expungement and Sealing Statute*

New Jersey's recently enacted arrest expungement and sealing act[143] affords relief previously not obtainable under the disorderly persons and criminal conviction expungement statutes. The Act's remedies are available to individuals who, after being arrested for either a disorderly persons or criminal offense, have had the proceedings dismissed or discharged without being convicted, or upon acquittal of charges. At any time thereafter, the individual upon presentation of a verified complaint to the proper court with jurisdiction over the proceedings, may request such relief as is provided for by the Act.[144] The Act, however recognizes no presumption in favor of an arrestee's right to a remedy, and vests in the court sole discretion in granting relief.[145]

The Act affords the innocent arrestee the remedy of either expungement or sealing.[146] When an expungement order is granted by the court, all records are removed from the files and placed in the control

139 *Id.* at 105-06, 308 A.2d at 675.
140 *Id.* at 106, 308 A.2d at 675.
141 N.J. STAT. ANN. § 24:21-28 (Supp. 1974-75).
142 *Id.*
143 *Id.* § 2A:85-15 *et seq.* The Act became effective on June 28, 1973.
144 *Id.* § 2A:85-15.
145 *Id.* § 2A:85-17a.
146 *Id.* §§ 2A:85-17, -18.

of a designated person who is to insure that information contained therein shall not be released to anyone "for any reason."[147] In response to inquiries for information or records that have been expunged law enforcement officers and departments are to indicate that there is "no record."[148]

The court may issue an order to expunge all records including evidence of related detention if there is no objection from law enforcement agencies and if no contrary reason appears otherwise.[149] If, however, objection is made by a law enforcement agency, the court is then required to make a determination whether there are "grounds for denial."[150] At this juncture, regardless of the court's determination, expungement relief is precluded by the Act, and sealing becomes the sole available remedy. Sealing will be granted upon a determination by the court that there are no grounds for denial.[151]

The Act provides the court with a statutory definition constituting "grounds for denial" of relief.[152] The first balances the utility of the arrest record and subsequent proceedings to law enforcement authorities as well as to "*anyone* who might obtain such information" against the desirability of freeing the individual from any attendant disabilities associated with the arrest.[153] A second ground for denial of expungement relief exists when the dismissal of charges resulted from a plea bargaining agreement.[154] The third ground for denial precludes the granting of expungement

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147 *Id.* § 2A:85-17b.

148 *Id.*

149 *Id.* § 2A:85-17a.

150 *Id.* § 2A:85-18a.

151 *Id.*

152 *Id.* § 2A:85-20.

153 *Id.* § 2A:85-20a (emphasis added). This balancing test is different from provisions under the other state statutes. The Connecticut statute, for instance, operates automatically once the initial criteria are met. CONN. GEN. STAT. ANN. § 54-90 (Supp. 1973). And while the Nevada statute provides for judicial discretion in granting the relief, no criteria or tests are established. NEV. REV. STAT. § 179.255(3) (1973). It is likely, however, that courts in adjudicating petitions under this statute will adopt a balancing approach, perhaps along right to privacy lines.

For a federal case adopting a very similar balancing approach, see Kowall v. United States, 53 F.R.D. 211 (W.D. Mich. 1971), where the court stated:

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

*Id.* at 214.

154 N.J. STAT. ANN. § 2A:85-20b (Supp. 1974-75).

> when acquittal, discharge or dismissal occurred after exclusion of highly probative evidence upon invocation of an exclusionary rule not directed to the truth of the evidence excluded.[155]

This provision is likely to provoke a constitutional challenge since it arguably impinges on the arrestee's right to enjoy the prophylactic effects of fourth amendment safeguards and of consequence, would be violative of equal protection guarantees if the state's interests were less than "compelling." The effect of this clause may be to create a class of individuals who are absolutely precluded from the remedy notwithstanding the fact that they have never been adjudicated guilty of crime.[156] This situation is of course antithetical to the presumption of innocence, which is a seminal precept of our criminal law. The Supreme Court has recognized that the presumption is operative until overcome by a finding of guilt.[157] If upon motion for relief, the court thus concludes that there are grounds for denial, no relief will be afforded the petitioner.[158]

While records held under an order of expungement may not be released for any reason,[159] the inspection or release of records under seal are not afforded such absolute protection. Sealed records and information are maintained in the law enforcement agency with original possession, and are therein subject to internal use and review.[160] In addition, sealed records may be inspected or released "to anyone" upon order of the court for "good cause shown" specifying the individuals to whom they are to be shown.[161] The manner in which this clause is judicially construed will be of great significance in ultimately measuring the Act's overall effectiveness. If motions made under this provision are freely granted to individuals outside the law enforcement area, and more particularly to employers, credit agencies and others in the private sector, the beneficial purposes of the Act could be effectively thwarted.

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155 *Id.*

156 *Cf.* Spevack v. Klein, 385 U.S. 511 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).

157 *E.g.*, United States v. Fleischman, 339 U.S. 349, 363 (1950); United States v. Goldman, 277 U.S. 229, 235-36 (1928); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911). *See also* Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), where the Court stated that "[t]he mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct." *Id.* at 241 (footnote omitted). For a discussion of the presumption of innocence as relates to expungement, see Comment, *Removing the Stigma of Arrest: The Courts, the Legislatures and Unconvicted Arrestees*, 47 WASH. L. REV. 659, 668-70 (1972).

158 N.J. STAT. ANN. § 2A:85-21 (Supp. 1974-75).

159 *Id.* § 2A:85-17b.

160 *Id.* § 2A:85-18b.

161 *Id.*

Courts may also evince a desire, where motion is made under this provision, to inquire into the source of the applicant's knowledge of the existence of a record, since the Act prohibits any law enforcement agency in possession of the same to acknowledge its existence.

One of the more evident difficulties with the provisions of the Act, is that the mere objection to an arrestee's motion for relief entered by a law enforcement agency automatically precludes expungement.[162] This raises the possibility that law enforcement interests might perfunctorily object to expungement relief as a matter of course in order to preserve their access to this information, even where their claim for need was in fact frivolous. Depending on the tactics adopted by local police officials, such practice could result in lack of uniformity in application of the remedy, thereby thwarting the Act's salutory objectives.

Another potential deficiency is the absence of sanctions to prevent abuse or neglect of duty by either the keeper of the expunged records or the local authorities in the case of the sealing provisions. Comparable provisions have appeared in a few juvenile sealing statutes[163] and in a few statutes providing for the return of fingerprints and ancillary investigatory material.[164] This kind of provision could be quite instrumental in further assuring the effectiveness of the Act, complementing what may soon become federal law in the area.[165]

The Act's provision regarding the procedure to be followed in expunging a record also appears to be less than adequate in affording complete protection. It simply mandates that upon an order granting expungement relief, the clerk of the court, and all parties upon whom notice of the petition for relief were served, are required to remove all pertinent records that have been specified in the order.[166] An amendment to this provision, or its judicial construction permitting the court to order these officials to request the return of any records

162 *Id.* § 2A:85-18a.

163 *See, e.g.*, KAN. STAT. ANN. § 38-815(h) (1973), which provides that a juvenile court may order the expungement of any record made in connection with a public offense committed by a child less than 18 years old, and those refusing to expunge such order are subject to a contempt citation. Other juvenile statutes treat all juvenile records as privileged and provide fines or other punishments for publication or disclosure. *See* N.J. STAT. ANN. § 2A:4-65 (Supp. 1974-75).

164 *See, e.g.*, HAWAII REV. STAT. § 28-54 (1968), which provides for a fine of not more than $100 and not more than one year imprisonment or both; R.I. GEN. LAWS ANN. § 12-1-12 (Reenactment 1969), which provides for a fine not to exceed $100.

165 Pending bi-partisan bills from Congress and the Justice Department contain both administrative sanctions and civil and criminal penalties for improper maintenance and dissemination of criminal justice information. *See* notes 25 & 26 *supra*.

166 N.J. STAT. ANN. § 2A:85-17a (Supp. 1974-75).

clearly forwarded to federal or other out-of-state agencies would seem appropriate in further effectuating the Act's design.[167]

## CONCLUSION

The approach of the conviction expungement statutes has been to establish statutory periods during which the individual may demonstrate a behavioral change. With the increase of the amount of time that elapses, certain inferences concerning the person's likely future behavior based on past activity become increasingly unwarranted. The end of the statutory period marks the point at which an individual receives official recognition of his rehabilitation.

While all of this may seem rather obvious, it reveals an inherent weakness of conviction expungement statutes. In order for the statute to be effective—*i.e.*, in aiding the individual to rehabilitate himself—it would seem that all major obstacles should be removed from his path. A primary difficulty which is frequently encountered by one convicted of a crime is the procurement and retention of employment. One reason for this is the ready access by employers to records of conviction. Consideration should therefore be given to provisions which would immediately seal such records to those other than law enforcement officials for law enforcement purposes.

Arrest expungement and sealing statutes present an entirely different problem. Since an arrest is not a final adjudication, the state may not officially sanction the same types of inferences about an individual's future behavior as it may in cases of conviction. This is due to the fact that one is presumed innocent until there is an adjudication of guilt. There is an implicit recognition of this in the arrest statute since it contains no provision for a statutory waiting period.

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167 In Menard v. Mitchell, 328 F. Supp. 718 (D.D.C. 1971), Judge Gesell noted that a local agency forwarding fingerprint arrest data to the F.B.I. could subsequently request its return and the Bureau would do this automatically and without question. Thus, control of the data rests completely with local police authorities. *Id.* at 722.

Only a few states, however, have statutes which provide for the retrieval of records. *See, e.g.*, NEV. REV. STAT. § 179.245(3) (1973) which provides that pursuant to the expungement of a record of conviction, the court may order

> all such criminal identification records of the petitioner returned to the file of the court where the proceeding was commenced from, but not limited to, the Federal Bureau of Investigation, the California identification and investigation bureau, sheriffs' offices and all other law enforcement agencies reasonably known by either the petitioner or the court to have possession of such records.

*See also* MICH. COMP. LAWS ANN. § 28.243 (1967) which requires appropriate officials to notify the director of the F.B.I. of the final disposition of an arrest where the accused was fingerprinted and copies were forwarded to the Bureau. For a brief discussion concerning the need for such a provision, see Gough, *supra* note 1, at 163-64.

The statutory provisions which preclude from the remedy those persons who have either been acquitted because evidence has been precluded under an exclusionary rule, or have had charges dropped as a result of plea bargaining present additional questions. As stated previously, these exceptions may raise constitutional problems. Consideration should thus be given to the removal of such exceptions since they neither conform to a presumption of innocence standard nor effectuate the purpose of the New Jersey arrest expungement statute. The legitimate needs of law enforcement agencies can be adequately protected at the sealing level.

The expungement remedy should be used in cases involving unconstitutional arrests and those concerning mistaken identity since these arrests cannot form the basis for any legitimate law enforcement need to retain the records. In such cases, expungement of all records should be available notwithstanding initial objection by law enforcement agencies.

With the adoption of these and other reforms, New Jersey would more effectively provide a second chance to those whose lives have been touched by the criminal justice system. Viewed in this context, expungement and sealing can prove to be effective tools in both rehabilitating the ex-offender and breaking the recidivism cycle that has come to characterize the penal system.

*Isabel Brawer Stark*